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TIMES-MIRROR PRINTING AND BINDING HOUSE
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EJECTMENT.

By George P. Cook.

CROSS-REFERENCES:

Eminent Domain;

Forcible Entry and Detainer;

Landlord and Tenant;

Quieting Title;

Vendor and Purchaser.

I. MATTERS ESSENTIAL TO RECOVERY BY PLAINTIFF.

1. Title and Right of Possession. — A. Burden and Cogency of Proof. — a. *General Rule.* — The general rule is that the plaintiff in an action of ejectment must, in order to entitle him to recovery, show title in himself, and that he cannot recover by defeating the title of his adversary;[1] and he must show title existing at the commencement of the action and continuing up to the date of the trial.

1. *England.* — Roe *v.* Harvey, 4 Burr. 2484; ; Doe *v.* Barber, 2 T. R. 749; Martin *v.* Strachan, 5 T. R. 107; Goodtitle *v.* Baldwin, 11 East 488.

United States. — Henderson *v.* Wanamaker, 79 Fed. 736; Turner *v.* Aldridge, 2 McAll. 229, 24 Fed. Cas. No. 14,249; King *v.* Mullins, 171 U. S. 404.

Alabama. — Hawes *v.* Rucker, 94 Ala. 160, 10 So. 85; Feagin *v.* Jones, 94 Ala. 597, 10 So. 537; Stephens *v.* Moore, 116 Ala. 397, 22 So. 542; Wilson *v.* Glenn, 68 Ala. 383.

Arkansas. — Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Leonard *v.* Coleman (Ark.), 15 S. W. 14; Daniel *v.* Lefevre, 19 Ark. 201.

California. — Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208.

Florida. — Seymour *v.* Creswell, 18 Fla. 29.

Georgia. — Harrington *v.* Gabby, 52 Ga. 537; Willis *v.* Meadors, 64 Ga. 721; Anderson *v.* Robinson, 75 Ga. 375.

Illinois. — Cobb *v.* Lavalle, 89 Ill. 331, 31 Am. Rep. 91; Fischer *v.* Eslaman, 68 Ill. 78.

Indiana. — Deputy *v.* Mooney, 97 Ind. 463; Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698; Silver Creek Cement Corp. *v.* Cement Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721; Stehman *v.* Crull, 26 Ind. 436; Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930.

Iowa. — Huntington *v.* Jewett, 25 Iowa 249, 95 Am. Dec. 788; Glenn *v.* Jeffrey, 75 Iowa 20, 39 N. W. 160.

Kansas — Hurd *v.* Com'rs of Harvey Co., 40 Kan. 92, 19 Pac. 325.

Kentucky — Colston *v.* McVay, 1 A. K. Marsh. 251.

Louisiana. — Millard *v.* Richard, 13 La. Ann. 572; Millaudon *v.* Ranney, 18 La. Ann. 196.

Maine. — Chaplin *v.* Barker, 53 Me. 275.

Massachusetts. — Frazee *v.* Nelson, 179 Mass. 456, 67 N. E. 40, 88 Am. St. Rep. 391.

Maryland. — Hall *v.* Gittings, 2 Har. & J. 112; Johnson *v.* Turner, (Md.), 22 Atl. 1,103.

Michigan. — Crooks *v.* Whiteford, 47 Mich. 283, 11 N. W. 159.

Minnesota. — Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229.

Mississippi. — Huntington *v.* Pritchard, 11 Smed. & M. 327; Reynolds *v.* Ingersoll, 11 Smed. & M. 249, 49 Am. Dec. 57.

Missouri. — West *v.* Bretelle, 115 Mo. 653, 22 S. W. 705; Parker *v.* Cassingham, 130 Mo. 348, 32 S. W. 487.

Nebraska. — Comstock *v.* Kerwin, 57 Neb. 1, 77 N. W. 387.

New Jersey. — Meyers *v.* Conover, 65 N. J. L. 187, 46 Atl. 709.

New York. — Henry *v.* Reichert, 22 Hun 394.

North Carolina. — Keathley *v.* Branch, 88 N. C. 379; Thomas *v.* Hunsucker, 108 N. C. 720, 13 S. E. 221; Clarke *v.* Diggs, 28 N. C. 159, 44 Am. Dec. 73; Duncan *v.* Duncan, 25 N. C. 317.

Ohio. — Smith *v.* Hunt, 13 Ohio 260, 42 Am. Dec. 201.

Oklahoma. — Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

Oregon. — Farley *v.* Parker, 4 Or. 269.

Pennsylvania. — Mobley *v.* Bruner, 59 Pa. St. 481, 98 Am. Dec. 360; Bear Val. Coal Co. *v.* Dewart, 95 Pa. St. 72.

Rhode Island. — Smith *v.* Haskins, 22 R. I. 6, 45 Atl. 741.

South Carolina. — Watts *v.* Witt, 39 S. C. 356, 17 S. E. 822.

South Dakota. — Evenson *v.* Webster, 5 S. D. 266, 58 N. W. 669.

Tennessee. — Walker *v.* Fox, 85 Tenn. 154, 2 S. W. 98.

Texas. — Soape *v.* Doss, 18 Tex. Civ. App. 649, 45 S. W. 387.

Its determination or destruction before the trial will operate as a bar to his recovery.[2] And of course it necessarily follows from this rule that the burden is on the plaintiff to make out his case by affirmative proof.[3]

Virginia. — Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3; Rensens *v.* Lawson, 91 Va. 226, 21 S. E. 347; McKinney *v.* Daniel, 90 Va. 702, 19 S. E. 880; Tapscott *v.* Cobbs, 11 Gratt. 172.

West Virginia. — Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922.

Wisconsin. — Wentworth *v.* Abbetts, 78 Wis. 63, 46 N. W. 1,044; Slauson *v.* Goodrich Transp. Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825; Gardiner *v.* Tisdale, 2 Wis. 253, 60 Am. Dec. 407.

Rule Stated. — "A defendant in possession may either fold his arms, and await the establishment of plaintiff's title, or he may show a superior title in some third person, and until the plaintiff shows a title superior to all the world the defendant is entitled to retain possession. When, therefore, it appears that some of the links in plaintiff's title are defective or void for fraud or other cause, the plaintiff fails to establish superior title, and the action fails on that account." Watts *v.* Witt, 39 S. C. 356, 17 S. E. 822.

If the Declaration in Ejectment Contains Several Demises, although the proof shows but one of them to be good, the verdict will be upheld. Gunn *v.* Wades, 65 Ga. 537.

2. *United States.* — Johnston *v.* Jones, 1 Blackf. 209.

Alabama. — Scranton *v.* Ballard, 64 Ala. 402; Pollard *v.* Hanrick, 74 Ala. 334; Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13.

Arkansas. — Daniel *v.* Lefevre, 19 Ark. 201.

California. — Owen *v.* Fowler, 24 Cal. 193.

Florida. — Spratt *v.* Price, 18 Fla. 289.

Illinois. — Pitkin *v.* Yaw, 13 Ill. 251.

Kentucky. — Marshall *v.* Dupey, 4 J. J. Marsh. 388.

Maryland. — Roseberry *v.* Seney, 3 Har. & J. 228.

Michigan. — Bay County *v.* Bradley, 39 Mich. 163.

Missouri. — Finley *v.* Babb, 144 Mo. 403, 46 S. W. 605.

Nevada. — Mallett *v.* Mining Co., 1 Nev. 188, 90 Am. Dec. 484.

Oklahoma. — Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

Vermont. — Dodge *v.* Page, 49 Vt. 137; Cheney *v.* Cheney, 26 Vt. 606.

Virginia. — Suttle *v.* R. F. & P. R. Co., 76 Va. 284.

Rule Does Not Apply to Defendant. The general rule is that the plaintiff must prove a title subsisting at the commencement of the action, but this rule does not apply to the defendant. He may defeat the plaintiff's recovery by proving a paramount outstanding title acquired after the commencement of the action. Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.

3. *Alabama.* — Bynum *v.* Gold, 106 Ala. 427, 17 So. 667.

Colorado. — Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736; Richner *v.* Brisbane, 19 Colo. 385, 35 Pac. 740.

Illinois. — Roland *v.* Fischer, 30 Ill. 224; Eddy *v.* Gage, 147 Ill. 162, 35 N. E. 347.

Indiana. — Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698; Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 390.

Kansas. — Beckman *v.* Richardson, 28 Kan. 648.

Kentucky. — Howard *v.* Locke, 15 Ky. L. Rep. 154, 22 S. W. 332; Owensboro F. R. & G. R. Co. *v.* Barker, 15 Ky. Rep. 175, 22 S. W. 444; Martin *v.* Kelley, 17 Ky. L. Rep. 200, 30 S. W. 612; Lewis *v.* Miles, 19 Ky. L. Rep. 1,676, 44 S. W. 120.

Louisiana. — Chavanne *v.* Frizola, 25 La. Ann. 76.

Michigan. — Donahue *v.* Klassner, 22 Mich. 252; Reidinger *v.* Cleveland Iron Min. Co., 39 Mich. 30.

North Carolina. — Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142; Huneycutt *v.* Brooks, 116 N. C. 788, 21 S. E. 558.

Oregon. — Farley *v.* Parker, 4 Or. 269.

Qualification of Rule. — The rule that the plaintiff in an action of ejectment must recover on the strength of his own title is not of universal application, but is necessarily limited and qualified by the case in which it arises.[4] Thus, the rule has no application in actions of ejectment to recover possession of mining claims located on public lands.[5]

Pennsylvania. — Bowman *v.* Fry, 1 Yeates 21.

South Carolina. — Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686.

Virginia. — Rensens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

4. Turner *v.* Aldridge, 2 McAll. 229, 24 Fed. Cas. No 14,249; Bristow *v.* Pegge, 1 T. R. 758; Gray *v.* Dixon, 74 Cal. 508, 16 Pac. 305.

Statement of the Doctrine. — "It is no doubt true, as a general rule, that the right of a plaintiff in ejectment to recover rests on the strength of his own title, and is not established by the exhibition of defects in the title of the defendant, and that the defendant may maintain his defense by simply showing that the title is not in the plaintiff, but in some one else. And the rule is usually thus broadly stated by the authorities, without qualification. There are, however, exceptions to the rule as thus announced, as well established as the rule itself. As when the defendant has entered under the title of the plaintiff he cannot set up a title in a third person in contradiction to that under which he entered. Other instances might be cited in which it is equally as well settled that the defendant would be estopped from showing defects in the title of the plaintiff. In such cases, the plaintiff may, and often does recover, not by the exhibition of a title good in itself, but by showing that the relations between himself and the defendant are such that the latter cannot question it. The relation between the parties stands in the place of title; and though the title of the plaintiff is tainted with vices or defects that would prove fatal to his recovery in a controversy with any other defendant in peaceable possession, it is yet all sufficient in a litigation with one who entered into the possession under it, or otherwise stands so related to it that the law will not allow him to plead its defects in his defense." Tapscott *v.* Cobbs, 11 Gratt. (Va.) 172.

The exception to this general rule is thus stated by the supreme court of West Virginia: "When the defendant in an action of ejectment sustains such relation to the plaintiff as estops him from denying the title of the latter, the general rule that the plaintiff must recover on the strength of his own title, and make out a chain of title from the state, is inapplicable." Summerfield *v.* White (W. Va.), 46 S. E. 154.

5. Richardson *v.* McNulty, 24 Cal. 339; Coryell *v.* Cain, 16 Cal. 567; Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

"The doctrine that the plaintiff must recover upon the strength of his own title is applied to cases where the strict legal title, in contradistinction from a mere possession, is involved. In such a case the defendant may defeat the legal title, relied upon by the plaintiff, by showing the true legal title to be outstanding. Ejectments for mining claims where neither party has, strictly speaking, any legal title, but both, in strict law, are intruders upon what belongs to another, are mere contests for possession, and their solution is only embarrassed by an attempt to adhere to language only adapted to cases where the strict legal title to land is involved. Such ejectments might be more properly called actions to determine the right to mine in a certain locality. Practically, the real question involved in all such cases is, which, as against the other, has the better right to mine the land in question. Generally, the solution of this question depends in a great measure upon the rules and regulations of the mining district in which the ground is located, established by the miners themselves, and not unfrequently its just solution is pre-

Ejectment as Possessory Action. — Some courts seem to hold that, since ejectment is merely a possessory action, the plaintiff need not prove title, but merely his right to possession.[6]

b. *Several Plaintiffs.* — The general rule is that in an action of ejectment by several co-plaintiffs, evidence on the part of the plaintiffs must show a title and right of possession in all of them.[7] This rule, however, does not apply where the defendants have put in

vented, rather than aided, by an adherence on the part of the counsel and courts to a phraseology hardly applicable, when the character of the right involved is considered." Richardson *v.* McNulty, 24 Cal. 339.

In ejectment to recover possession of mining claims, water privileges and the like, located upon the public lands, the court proceeds upon the presumption of a grant from the government to the first appropriator. This presumption, which would have no place for consideration as against the assertion of the rights of the superior proprietor, is held absolute in all these controversies. Coryell *v.* Cain, 16 Cal. 567.

When the title to the lands in controversy is vested in the state, and the only dispute in the case, as between plaintiff and defendant, is as to the right of possession, the plaintiff need not prove title, but may maintain his case upon proof of prior, peaceable possession, under claim of right, as against all but the true owner. Smith *v.* Hicks, 139 Cal. 217, 73 Pac. 144.

6. **In Michigan,** ejectment is a possessory action, and does not necessarily involve the title. The party having right to present possession is always entitled to recover, and it is quite unnecessary for him to show more, unless some question of damages or the value of improvements made by the defendant shall require it. Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 190.

In California, it has been held that in order to entitle a plaintiff in ejectment to recover, he must show a right to the possession in himself, and a possession in the defendant, at the time the action is brought, and if he fails to establish either proposition he cannot recover. Owen *v.* Fowler, 24 Cal. 193.

It is only necessary to establish his right of possession and the occupation of the defendant at that time. The date at which the plaintiff's right accrued, or the defendant's occupation commenced, is material only with reference to the claim for mesne profits. Stark *v.* Barrett, 15 Cal. 362. See also Yount *v.* Howell, 14 Cal. 465; Payne *v.* Treadwell, 16 Cal. 221. But see Marshall *v.* Shafter, 32 Cal. 177, where it is held that the right to possession *is* title, and that the plaintiff, in proving his right to possession, necessarily proves his title.

7. *United States.* — Chirac *v.* Reinicker, 11 Wheat. 280.

California. — Tormey *v.* Pierce, 42 Cal. 335.

Georgia. — Towns *v.* Mathews, 91 Ga. 546, 17 S. E. 955; McGlamory *v.* McCormick, 99 Ga. 148, 24 S. E. 941; Bohanan *v.* Bonn, 32 Ga. 390; Etowah Mfg. Co. *v.* Alford, 78 Ga. 345; Echols *v.* Sparks, 79 Ga. 417; DeVaughn *v.* McElroy, 82 Ga. 687, 10 S. E. 211; Lowe *v.* Suggs, 87 Ga. 577, 13 S. E. 565.

Illinois. — Murphy *v.* Orr, 32 Ill. 489. But see Walton *v.* Follansbee, 131 Ill. 147, 23 N. E. 332.

Kentucky. — Skyles *v.* King, 2 A. K. Marsh. 385; Tucker *v.* Vance, 2 A. K. Marsh. 458; Taylor *v.* Taylor, 3 A. K. Marsh. 18; Lynn *v.* Clark, 3 A. K. Marsh. 378; Chiles *v.* Bridges, 5 Litt. 420.

Michigan. — Lynch *v.* Kirby, 36 Mich. 238; DeMill *v.* Moffat, 49 Mich. 125, 13 N. W. 387.

New York. — Gillett *v.* Stanley, 1 Hill 121; Marston *v.* Butler, 3 Wend. 149.

North Carolina. — Banner *v.* Carr, 33 N. C. 45; Bronson *v.* Paynter, 20 N. C. 393.

Vermont. — Cheney *v.* Cheney, 26 Vt. 606.

evidence an equitable defense.[8] Nor where a demise in ejectment is laid from two or more lessors, and it appears that the latter are tenants in common with one who did not join in the demise.[9]

Statutory Provisions. — In some of the states the common law rule that all the plaintiffs in an action of ejectment must recover, or none of them, has been expressly abrogated by statute.[10]

c. *Connection With Government Title.* — It was held that the plaintiff must connect himself with the government title, unless both parties to the action claim title from a common source,[11] but not where the defendants by their deed recognize and admit his title.[12]

d. *Action by People.* — Since the people are the source of title they are presumed to be the owners of all lands not granted by them, and in an action of ejectment brought in the name of the people it is sufficient in the first instance to entitle them to recover to show that the property in question is vacant, unenclosed and unoccupied.[13]

e. *Immediate Right to Possession.* — It is not sufficient for a plaintiff in an action of ejectment to show a mere naked title in fee, without also establishing his right to immediate possession.[14]

8. Milner *v.* Vandivere, 86 Ga. 540, 12 S. E. 879.

Where an Equitable Defense Had Been Filed, it was error to charge the jury that if for any reason any of the plaintiffs could not recover, none of them could recover. Under the practice in this state, where an equitable defense is set up and prevails against the right of any of the plaintiffs to recover, the common law rule as to actions of ejectment, that all the plaintiffs shall recover or none, does not apply, but the same rule and measure of justice is to be applied as in proceedings in equity. Milner *v.* Vandivere, 86 Ga. 540, 12 S. E. 879.

9. In such case the plaintiff may yet be entitled to recover according to the interest of his lessors, though, if one of the parties suing had no title, the plaintiff could not recover at all. Bronson *v.* Paynter, 20 N. C. 393.

10. **Statutory Provisions.** — Walton *v.* Follansbee, 131 Ill. 147, 23 N. E. 332; Primm *v.* Walker, 38 Mo. 94; Miller *v.* Bledsoe, 61 Mo. 96; Miller *v.* English, 61 Mo. 444; Miller *v.* Early, 64 Mo. 478; Roberts *v.* Pharis, 8 Yerg. (Tenn.) 447.

11. Slauson *v.* Goodrich Transp. Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825; Cockey *v.* Smith, 3 Har. & J. (Md.) 20; Swainson *v.* Scott (Tenn.), 76 S. W. 909; Rank *v.* Higginbotham (W. Va.), 46 S. E. 128; Davis *v.* City of Clinton (Ky.), 79 S. W. 259.

Where neither the pleadings nor the proof offered show a common grantor, and there is nothing in the evidence indicating from what source defendant claims title, nor showing that he was or ever had been in possession, it is necessary for the plaintiff to connect himself with the government title or with some grantor who was the common source of title. Slauson *v.* Goodrich Transp. Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825.

Where the evidence introduced by either party shows that the defendant claims under two or more titles, any one of which does not spring from the same source as plaintiff's title, it throws the burden upon the plaintiffs to connect themselves with the state, or otherwise to show a superior title to that of defendant, from whatever source derived. Story *v.* Birdwell (Tex. Civ. App.), 45 S. W. 847.

12. Summerfield *v.* White (W. Va.), 46 S. E. 154.

13. **Action by People.** — People *v.* Livingston, 8 Barb. (N. Y.) 253.

14. **Immediate Right to Possession.** — *United States.* — City of Cincinnati *v.* White, 6 Pet. 431.

f. *Equitable Interest or Estate.* —(1.) **In General.** — It is also the settled rule in ejectment that the plaintiff must in all cases prove a legal title in himself at the date of the commencement of the action, and that proof of an equitable interest or estate is not sufficient.[15]

In some jurisdictions, although the plaintiff cannot recover upon proof of a mere equitable interest where he has averred a legal title and right of possession, yet an equitable interest entitling him to possession is held sufficient if properly averred.[16]

(2.) Statutory Provisions. — In some jurisdictions, by virtue of statutory provisions the plaintiff, in an action of ejectment, is entitled to recover upon proof of an equitable title, coupled with the right of possession.[17]

Arkansas. — Fears *v.* Merrill, 9 Ark. 559, 50 Am. Dec. 226.

Florida. — Florida So. R. Co. *v.* Burt, 36 Fla. 497, 18 So. 581.

Missouri. — *Compare* Hulsey *v.* Wood, 55 Mo. 252.

Under an Allegation of Seisin it is sufficient for the plaintiff to make out a *prima facie* case, to establish any interest in the premises which gives him a right of possession. Hardy *v.* Johnson, 1 Wall. 371; Gillespie *v.* Jones, 47 Cal. 259.

15. Equitable Interest or Estate.

England. — Blake *v.* Luxton, 6 T. R. 289; DaCosta *v.* Wharton, 8 T. R. 2; Reade *v.* Reade, 8 T. R. 118; Shewen *v.* Wroot, 5 East 132; Doe *v.* Staple, 2 T. R. 684.

United States. — Johnston *v.* Jones, 1 Black. 209; Fenn *v.* Holme, 21 How. 481; Carter *v.* Ruddy, 166 U. S. 493; Johnson *v.* Christian, 128 U. S. 374; Cleveland *v.* Bigelow, 98 Fed. 242.

Alabama. — Simmons *v.* Richardson, 107 Ala. 697, 18 So. 245; Tennessee Coal, Iron & R. Co. *v.* Tutwiler, 108 Ala. 483, 18 So. 668; Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711; Yow *v.* Flinn, 34 Ala. 409; Harrison *v.* Alexander, 135 Ala. 307, 33 So. 543.

Florida. — Berlack *v.* Halle, 22 Fla. 236.

Illinois. — Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Walton *v.* Follansbee, 131 Ill. 147, 23 N. E. 332.

Indiana. — Stehman *v.* Crull, 26 Ind. 436; Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676; Groves *v.* Marks, 32 Ind. 319; Brown *v.* Freed, 43 Ind. 253. But see second succeeding note.

Kentucky. — Gilpin *v.* Davis, 2 Bibb 416, 5 Am. Dec. 622.

Maryland. — Paisley *v.* Holzshu, 83 Md. 325, 34 Atl. 832.

Michigan. — Ryder *v.* Flanders, 30 Mich. 336.

Mississippi. — Wolfe *v.* Dowell, 13 Smed. & M. 103, 51 Am. Dec. 147.

Missouri. — Crawford *v.* Whitmore, 120 Mo. 144, 25 S. W. 365; Laurissini *v.* Corquette, 25 Mo. 177, 57 Am. Dec. 200; Nalle *v.* Parks, 173 Mo. 616, 73 S. W. 596.

Nebraska. — Morton *v.* Green, 2 Neb. 441; Dale *v.* Hunneman, 12 Neb. 221, 10 N. W. 711; Malloy *v.* Malloy, 35 Neb. 224, 52 N. W. 1,097; Lantry *v.* Wolff, 49 Neb. 374, 68 N. W. 494; Headley *v.* Coffman, 38 Neb. 68, 56 N. W. 701.

New York. — Jackson *v.* Sisson, 2 John. Cas. 321; Jackson *v.* Harrington, 9 Cow. 86. But see second succeeding note.

Oklahoma. — Adams *v.* Couch, 1 Okla. 17, 26 Pac. 1,009.

South Carolina. — Bank of Charleston Nat. Banking Ass'n *v.* Dowling, 45 S. C. 677, 23 S. E. 982.

Virginia. — Suttle *v.* R. F. P. R. Co., 76 Va. 284; Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895; Ruffners *v.* Lewis, 7 Leigh 720, 30 Am. Dec. 513.

16. Stout *v.* McPheeters, 84 Ind. 585; Johnson *v.* Pontious, 118 Ind. 270, 20 N. E. 792; Nichol *v.* Thomas, 53 Ind. 42; Seaton *v.* Son, 32 Cal. 481; Merrill *v.* Dearing, 47 Minn. 137, 49 N. W. 693; Tarpey *v.* Deseret Salt Co., 5 Utah 205, 14 Pac. 338.

17. Statutory Provisions.

g. *Common Grantor.* — **(1.) In General.** — Where both parties claim to derive title from a common grantor, the plaintiff makes out a *prima facie* case by showing such common derivation of title without proving the title of such common grantor.[18] Nor is it necessary

United States. — Melenthin *v.* Keith, 17 Fed. 583.

Georgia. — Glover *v.* Stamps, 73 Ga. 209, 54 Am. Rep. 870.

Indiana. — Burt *v.* Bowles, 69 Ind. 1.

Kansas. — Stout *v.* Hyatt, 13 Kan. 232; Pope *v.* Nichols, 61 Kan. 230, 59 Pac. 257.

Kentucky. — Stanley *v.* Jones, 16 Ky. L. Rep. 328, 27 S. W. 992.

Minnesota. — Merrill *v.* Dearing, 47 Minn. 137, 49 N. W. 693.

New York. — Murphy *v.* Loomis, 26 Hun 659; Phillips *v.* Gorham, 17 N. Y. 270.

Wisconsin. — Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837.

Washington. — State *v.* Johanson, 26 Wash. 668, 67 Pac. 401.

18. Common Grantor in General.

District of Columbia. — Reid *v.* Anderson, 13 App. D. C. 30.

Georgia. — Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44; Bussey *v.* Jackson, 104 Ga. 151, 30 S. E. 646.

Illinois. — Dean *v.* Garton, 177 Ill. 624, 52 N. E. 880; Brown *v.* Schintz, 203 Ill. 136, 67 N. E. 767.

Maryland. — Jay *v.* Michael, 82 Md. 1, 33 Atl. 322.

Missouri. — Sell *v.* McAnaw, 138 Mo. 267, 39 S. W. 779; Worley *v.* Hicks, 161 Mo. 340, 61 S. W. 818; Stevenson *v.* Black, 168 Mo. 549, 68 S. W. 909.

Nebraska. — McCarthy *v.* Birmingham (Neb.), 89 N. W. 1,003.

North Carolina. — Collins *v.* Swanson, 121 N. C. 67, 28 S. E. 65.

South Carolina. — Cave *v.* Anderson, 50 S. C. 293, 27 S. E. 693.

South Dakota. — Horswill *v.* Farnham (S. D.), 92 N. W. 1,082.

In ejectment, where both parties claim under a common ancestor, whose estate had been partitioned among his heirs, the plaintiff cannot recover unless he shows that the property in controversy was transferred to the party under whom he claims, or that a title has been acquired by disseisin. In such a case a mere possessory title which would be good against a stranger is not sufficient. Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95.

Common Grantor.

Alabama. — Pollard *v.* Cocke, 19 Ala. 188; Gantt *v.* Cowan, 27 Ala. 582; Bishop *v.* Truett, 85 Ala. 376, 5 So. 154; Florence Bldg. Ass'n *v.* Schall, 107 Ala. 531, 18 So. 108.

Illinois. — Smith *v.* Laatsch, 114 Ill. 271, 2 N. E. 59.

Missouri. — Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383; Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285; Matney *v.* Graham, 59 Mo. 190; Smith *v.* Lindsey, 89 Mo. 76, 1 S. W. 88.

Pennsylvania. — Turner *v.* Reynolds, 23 Pa. St. 199; Riddle *v.* Murphy, 7 Serg. & R. 230.

Tennessee. — Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876.

Texas. — Glover *v.* Thomas, 75 Tex. 506, 12 S. W. 684.

Vermont. — Bernard *v.* Whipple, 29 Vt. 401, 70 Am. Dec. 422.

West Virginia. — Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922; Carrell *v.* Mitchell, 37 W. Va. 130, 16 S. E. 453.

Wisconsin. — Claflin *v.* Robinhorst, 40 Wis. 482.

Where the plaintiff, under a statute, files an affidavit to the effect that he claims through a common source of title with the defendant, and the defendant files a counter-affidavit denying the common source of title, this imposes upon the plaintiff the burden of proving both chains of title back to the common source. Bradley *v.* Lightcap, 201 Ill. 511, 66 N. E. 546.

An affidavit made out by one of the defendants to the effect that a third party claims title to the land sued for under the same party under whom the plaintiff claims, is not competent on behalf of the plaintiff to show that both parties claim from the same grantor and thus estop the defendant from denying this grantor's

in such case for either of them to deraign it from the state.[19]

But this rule does not apply where the defendant connects himself with an outstanding title, which is superior to that of the common grantor.[20]

(2.) Estoppel to Deny Title of Common Grantor. — And where both parties claim title from a common grantor there is authority to the effect that this fact will not estop either from denying the common grantor's title.[21] But the great weight of authority is to the effect that both parties in such a case are estopped from denying that he had title.[22]

h. *Plaintiff Claiming Under Judicial Sale.* — Where the plaintiff in an action of ejectment claims as a purchaser under a judicial sale, the same degree of proof is not required of him as in ordinary cases of purchasers from individuals;[23] and the production of the execution with the sale under it and the deed made in pursuance

title. Ryan *v.* McGehee, 83 N. C. 500.

19. Howard *v.* Massengale, 13 Lea (Tenn.) 577.

20. When Rule Does Not Apply. The rule that where both parties claim from the same source of title the plaintiff makes out a *prima facie* case by merely proving this common derivation of title, does not apply where the defendant relies upon two separate and distinct titles and the plaintiff proves title superior to only one of them. Starr *v.* Kennedy, 5 Tex. Civ. App. 502, 27 S. W. 26.

21. Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550; Starr *v.* Kennedy, 5 Tex. Civ. App. 502, 27 S. W. 26.

Where both plaintiff and defendant in ejectment claim under quit-claim deeds from the same grantor, the defendant, in order to defeat the plaintiff's title, may show that the common grantor had no title and that nothing passed by either of the deeds which he executed. Henry *v.* Reichert, 22 Hun (N. Y.) 394; to the same effect Collins *v.* Bartlett, 44 Cal. 371.

Where both parties claim from a common source the plaintiff makes out a *prima facie* case by proving such common derivation of title, but this does not prevent the defendant, if not otherwise estopped, from setting up a title paramount to the common source, under a deed or incumbrance created by the common grantor prior to the conveyance to the plaintiff. Reid *v.* Anderson, 13 D. C. App. 30.

22. Where both parties claim title under the same person, they are both estopped from denying that such person had title.

United States. — Robertson *v.* Pickrell, 109 U. S. 608.

Alabama. — Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297.

California. — Ellis *v.* Jeans, 7 Cal. 409.

District of Columbia. — Morris *v.* Wheat, 11 App. D. C. 201.

Georgia. — Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44.

Kentucky. — McClain *v.* Gregg, 2 A. K. Marsh. 454.

Louisiana. — Bedford *v.* Urquhart, 8 La. 234, 28 Am. Dec. 137.

North Carolina. — Love *v.* Gates, 20 N. C. 363; Ives *v.* Sawyer, 20 N. C. 51; Gilliam *v.* Bird, 30 N. C. 280, 49 Am. Dec. 379; Murphy *v.* Barnett 6 N. C. 251; Johnson *v.* Watts, 46 N. C. 228; Ryan *v.* Martin, 91 N. C. 464.

Ohio. — Doe *v.* Dugan, 8 Ohio 87, 31 Am. Dec. 432.

Tennessee. — Royston *v.* Wear, 3 Head 8.

Virginia. — Chesterman *v.* Bolling (Va.), 46 S. E. 470.

Vermont. — Barnard *v.* Whipple, 29 Vt. 401, 70 Am. Dec. 422.

Wisconsin. — Schwallback *v.* Chicago etc. R. Co., 69 Wis. 292, 2 Am. St. Rep. 740, 34 N. W. 128.

23. Whatley *v.* Newsom, 10 Ga.

thereto, and proof of title in the defendant in execution, or possession in him, subsequent to the rendition of judgment, make a *prima facie* case, which will throw the burden of proof on the defendant in ejectment.[24]

Execution Debtor Not in Possession. — Where the execution debtor under whom the plaintiff in ejectment claims was not in possession of the premises, the plaintiff must prove that the execution debtor had some right, title or interest in the premises sold.[25] So, also, where the action is against a stranger to the judgment the plaintiff must show that the judgment debtor had the title or possession of the land at the date of the judgment or of the sale.[26]

74; to the same effect see Bowman *v.* Fry, 1 Yeates 21; Huntington *v.* Pritchard, 11 Smed. & M. (Miss.) 327; Sweeney *v.* Sweeney (Ga.), 46 S. E. 76.

"The law is, that in an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution, the defendant cannot controvert the title. The plaintiff is only required to produce the judgment, execution and the sheriff's deed. The tenant, who goes into possession subsequent to the sale, is placed in no better situation. He is estopped from denying the title of his landlord, and, consequently, the title acquired under the judgment. But if the tenant went into possession before the lien accrued, then the plaintiff, to eject him, must show the tenancy has expired. It is only when the action is brought against a stranger that the plaintiff is bound to prove that the judgment debtor had actual possession of the premises, or title thereto, at the rendition of the judgment of the date of the lien." Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702.

When the plaintiff is the purchaser at a sheriff's sale, and the action is brought against the defendant in the judgment, he must show that the defendant had an estate or interest in the lands, which was subject to levy and sale. There is no requirement that he should show any written evidence of title, since he is not presumed to have access to the title papers of the defendant. In the absence of any evidence of an outstanding legal title, he may recover upon the same evidence which would authorize the defendant to recover if he were suing a trespasser or any one entering upon him, who refused to surrender possession. Mickle *v.* Montgomery, 111 Ala. 415, 20 So. 441.

Where the plaintiff in ejectment claims under an administrator's sale of a homestead, the burden is upon him to show that the debt for the payment of which the sale was made was antecedent to the homestead. In such case the record of the probate court is the only proper evidence of the fact. Daudt *v.* Harmon, 16 Mo. App. 203.

24. Whatley *v.* Newsom, 10 Ga. 74; Hartley *v.* Farrell, 9 Fla. 374.

25. Jackson *v.* Town, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402.

"Whenever real estate is sold under an execution, against a party not in possession, and the purchaser brings an action of ejectment against the person found in possession, it can not be questioned that the plaintiff is bound to prove on the trial that the defendant in the execution had some right, title or interest in the premises sold." Jackson *v.* Town, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405.

26. Robinson *v.* Thornton, 102 Cal. 675, 34 Pac. 120; Jackson *v.* Town, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702.

When the plaintiff claims under a judicial sale as against a defendant who is a stranger to the judgment, he must prove, as a part of his case, that there was a valid judgment; the mere recital in the execution is not sufficient evidence of this fact. Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

Execution Debtor and Defendant in Ejectment Same Person. — In an action of ejectment by a purchaser at a judicial sale against the defendant in execution, the defendant need only show the judgment execution sale and the sheriff's deed to make out a *prima facie* case.[27]

B. Mode of Proof. — a. *General Rule.* — The plaintiff in an action of ejectment, as has been previously shown, has the burden of proving his title to the premises in controversy, and he must of course do so by competent evidence. Necessarily, however, the treatment of the competency of the evidence to prove title is not affected by the fact that the action in which title is in issue is one of ejectment, and accordingly, although some general rules are hereinafter stated, the reader is referred for a full treatment of the mode of proving title to another article.[28]

Thus it is held that the legal title cannot be proved by parol evidence.[29] But it may be shown by parol that both parties to the action claim from the same grantor.[30]

Possession is Prima Facie Evidence of Title, whether it be actual possession, or constructive possession through an agent or servant.[31] If it appears that the party in possession is merely the tenant of another, this rebuts the presumption of title arising from possession.[32]

b. *Documentary Evidence* — **(1.) Deeds.** — A deed, although void in fact, may still be admitted to show color of title in the party claiming under it.[33] The record in a former suit in which the title or right to possession of the same property was involved is some-

27. Duncan *v.* Duncan, 25 N. C. 317; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702.

28. See article "Title."

29. Title Cannot Be Proved by Parol. — Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531; Keith *v.* Catchings, 64 Ga. 773; Reynolds *v.* Clowdus (Ind. Ter.), 76 S. W. 277.

30. Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383.

Where it does not appear upon the face of the pleadings that the parties both claim title from the same grantor, this fact may be proved by parol evidence at the trial. Smythe *v.* Tolbert, 22 S. C. 133.

31. Rand *v.* Dodge, 17 N. H. 343.

32. Straw *v.* Jones, 9 N. H. 400.

33. *United States.* — Pillow *v.* Roberts, 13 How. 472.

Alabama. — Woods *v.* Montevallo Coal & Transp. Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 593; Gist *v.* Beaumont, 104 Ala. 347, 16 So. 20.

Georgia. — Gunn *v.* Wades, 65 Ga. 537; Bivins *v.* Vinzant, 15 Ga. 521; Kile *v.* Fleming, 78 Ga. 1; Cook *v.* Winter, 68 Ga. 259; Simmons *v.* Lane, 25 Ga. 178; White *v.* Scofield, 84 Ga. 56, 10 S. E. 591.

Illinois. — Stumpf *v.* Osterhage, 111 Ill. 82; Fagan *v.* Rosier, 68 Ill. 84.

Kentucky. — McLawrin *v.* Salmons, 11 B. Mon. 96, 52 Am. Dec. 563; Scott *v.* Lairamore, 17 Ky. L. Rep. 613, 32 S. W. 172; Logan *v.* Steel, 2 Marsh. J. J. 101.

Michigan. — King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Where the plaintiff puts in evidence certain deeds which are valid upon their face, it is error to exclude them from the jury even though there is some evidence of title in the defendant from a common source, and prior in date to the deeds offered by the plaintiff. Harpham *v.* Little, 59 Ill. 509.

A Tax Deed which is insufficient as evidence of legal title may still be

times admitted in evidence.[34] Where the plaintiff and defendant derive their respective titles from a vendor and vendee in a contract of sale, the written contract is admissible in evidence.[35] In Maryland, when defense is taken on warrant, no title paper is admissible in evidence unless located on the plats in the case.[36] Where there is

admitted to show color of title upon which to base a claim of adverse possession. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Mining Co. *v.* Warren, 91 Ala. 533, 9 So. 384.

34. Where the defendant, in support of the plea of the statute of limitations, gives evidence showing a prior, exclusive, adverse possession of the land by the party under whom he claims, the plaintiff may introduce in evidence the record of an action of ejectment formerly brought by him against another party, claiming under the same landlord as the defendant, in which judgment was rendered in favor of this plaintiff; and may further show that in that action the party under whom the defendant claims had verbally disclaimed any interest in the land. Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176.

The plaintiff may introduce in evidence, as proof of his title, a judgment in a former action of partition for the same property between the same parties; such judgment is conclusive as to the title held or claimed by the parties to that action at the time of its commencement. Hancock *v.* Lopez, 53 Cal. 362.

35. Where the plaintiff claims under the vendor in a contract of sale for the property in dispute, and the defendant claims under the vendee, the plaintiff may introduce the contract of sale in evidence to show that the rights of the vendee were forfeited before he transferred his interest to the defendant. Palmer *v.* McCafferty, 15 Cal. 334; Hanby *v.* Tucker, 23 Ga. 132, 68 Am. Dec. 514.

In a summary proceeding to recover possession of real property which the plaintiff claimed by virtue of a deed from the defendant, *held* that the plaintiff's deed was admissible in evidence to show his right of possession. Gale *v.* Eckhart, 107 Mich. 465, 65 N. W. 274.

36. Blessing *v.* House, 3 Gill & J. (Md.) 290; Clary *v.* Kimmell, 18 Md. 246; Langley *v.* Jones, 26 Md. 462; Carroll *v.* Norwood, 1 Har. & J. (Md.) 100.

Where the whole tract of land in controversy is properly located on the plats, a deed conveying the whole is admissible in evidence, though not itself located; but if the deed conveys less than the entire tract it is inadmissible without being located notwithstanding the location of the entire tract. Beall *v.* Bayard, 5 Har. & J. (Md.) 127.

A deed of the defendant, which is referred to in the deed under which the plaintiff claims, may be given in evidence by the plaintiff without locating it on the plats. Catrop *v.* Dougherty, 2 Har. & McH. (Md.) 383.

Where the whole tract of land in dispute has been located on the plats, two deeds, one of a portion and the other of the residue of a tract, are admissible in evidence without being located. Hall *v.* Gough, 1 Har. & J. (Md.) 119.

Where a deed is located on the plats in the case, and is not counter-located by the opposite party, the party producing it may read it in evidence to show how it is located; but if it subsequently appears to be invalid, it is to be ruled out as evidence. Hammond *v.* Norris, 2 Har. & J. (Md.) 130.

Where the whole tract of land in controversy has been united in one person and properly located, a deed for a part only, though not particularly located on the plats, may be read in evidence. Hall *v.* Gittings, 2 Har. & J. (Md.) 380.

A return made by a jury, in pursuance of an act providing for the ascertainment of a boundary of land, is inadmissible in ejectment when the tract of land has not been located on the plat to correspond with the return of the jury. Ruff *v.* Webster, 4 Har. & McH. (Md.) 499.

a rule of court requiring plaintiff to file an abstract of title, such abstract is admissible in evidence,[37] and where the plaintiff dies pending suit, and his administrator being substituted in his place, serves a notice upon defendants claiming damages for mesne[38] profits, such notice is admissible, unless the defects are so patent that a person of common understanding would be held to take notice of them,[39] but a deed coming from a grantor who was either an intruder or had never been in possession at all, is admissible.[40]

Deed Executed Subsequent to Action. — As a general rule, a deed which was not executed until after the commencement of the action is inadmissible as evidence of title.[41]

(2.) Patents. — A patent from the federal government carries the

37. Under a rule of court requiring the plaintiff, in an action of ejectment, to file an abstract of the title on which he relies, such abstract is properly admissible in evidence. Hart *v.* McGrew (Pa.), 11 Atl. 617.

38. Where the plaintiff dies after the commencement of the action, and his administrator, being substituted in his place, serves a notice upon defendants, claiming damages or mesne profits, such notice is admissible in evidence. Hart *v.* McGrew (Pa.), 11 Atl. 617.

39. Allen *v.* Kellam, 69 Ala. 442.

40. A deed from one of the parties under whom the defendant claims, is inadmissible in evidence, when it appears that the grantor in the deed had never been in possession of the property, of if he ever had been in possession, was an intruder. Cockey *v.* Smith, 3 Har. & J. (Md.) 20.

41. **Deed Executed After Commencement of Action.**

United States. — Robinson *v.* Campbell, 3 Wheat. 212; Johnson *v.* Jones, 1 Black. 212.

Alabama. — Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711; Bullock *v.* Wilson, 5 Port. 338; Johnson *v.* McGehee, 1 Ala. 186.

Arkansas. — Dickinson *v.* Thornton, 65 Ark. 610, 47 S. W. 857.

California. — Moss *v.* Shear, 30 Cal. 468; Northern R. Co. *v.* Jordan, 87 Cal. 23, 25 Pac. 273.

Florida. — Spratt *v.* Price, 18 Fla. 289.

Illinois. — Pitkin *v.* Yaw, 13 Ill. 251.

Michigan. — Jenney *v.* Potts, 41 Mich. 52, 1 N. W. 898; Hurd *v.* Raymond, 50 Mich. 369, 15 N. W. 514; Jennings *v.* Dockham, 99 Mich. 253, 58 N. W. 66.

Pennsylvania. — Hoover *v.* Gonzalus, 11 Serg. & R. 314.

Where defendant claims as the assignee of a mortgagee, an assignment of the mortgage which is not made out to him until after suit is commenced and after he has pleaded to the issue is inadmissible as evidence of his title. Dimon *v.* Dimon, 10 N. J. L. 156; Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

A sheriff's deed executed after the commencement of suit, but which relates back to a sale previous to the suit, is inadmissible in evidence under the general issue. Jackson *v.* Ramsay, 3 Cow. (N. Y.) 75, 15 Am. Dec. 242.

A deed, executed by the plaintiff since the commencement of the action, and conveying his title to the property in dispute to a third party, would be admissible in evidence; but where it appears that the deed is not an absolute conveyance, but merely a declaration of trust, it is inadmissible. Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

Instruments of title executed after the commencement of suit and before trial, are admissible on behalf of the defendant when they tend to prove an outstanding title which would defeat plaintiff's recovery; but since the plaintiff must show title at the commencement of suit, instruments executed subsequent to that date are generally inadmissible on his behalf. Galbraith *v.* Elder, 8 Watts (Pa.) 81.

fee, and is the best evidence of title known in a court of law;[42] and it is conclusive evidence as against the government and all persons claiming under it by title subsequent, of the existence and validity of the grant, and the confirmation of the claim thereunder as set forth in its recitals.[43] But a patent which is void on its face is inadmissible as evidence of title in ejectment.[44]

Regularity of Prior Proceedings. — Where title is proved in a patent it is not necessary to prove the regularity of all the proceedings previous to the issuance of the patent; this will be presumed until the contrary is shown.[45]

(3.) Land Receipts and Certificates. — An entry made in the United States Land Office is not sufficient evidence of title upon which to bring an action of ejectment in the federal courts.[46]

A Receiver's Certificate from the United States Land Office, the

42. Hooper *v.* Scheimer, 23 How. (N. Y.) 235.

43. *United States.* — U. S. *v.* Stone, 2 Wall. 525; Foster *v.* Mora, 98 U. S. 425.

California. — Stark *v.* Barrett, 15 Cal. 362; Boggs *v.* Merced Min. Co., 14 Cal. 279; Yount *v.* Howell, 14 Cal. 465; Leese *v.* Clark, 18 Cal. 535; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Moore *v.* Wilkinson, 13 Cal. 478; Waterman *v.* Smith, 13 Cal. 373.

Pennsylvania. — Stewart *v.* Butler, 2 Serg. & R. 381.

In Pennsylvania, a patent from the commonwealth is only *prima facie* evidence of title in the patentee. Gingrich *v.* Foltz, 19 Pa. St. 38, 57 Am. Dec. 631.

44. Patent Void on Its Face. Alexander *v.* Greenup, 1 Munf. 134, 4 Am. Dec. 541; Paterson *v.* Winn, 11 Wheat. (U. S.) 380.

45. Regularity of Prior Proceedings. — *United States.* — Brown *v.* Galloway, Pet. C. C. 291, 4 Fed. Cas. No. 2,006; Huidekoper *v.* Barrus, 1 Wash. C. C. 109, 12 Fed. Cas. No. 6,848; Polk *v.* Wendal, 9 Cranch 87; Stringer *v.* Young, 3 Pet. 320; Patterson *v.* Winn, 11 Wheat. 380; Minter *v.* Crommelin, 18 How. 87.

Alabama. — Tennessee Coal, Iron & R. Co. *v.* Tutwiler, 108 Ala. 483, 18 So. 668.

California. — Collins *v.* Bartlett, 44 Cal. 371.

Florida. — Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Kentucky. — Rays *v.* Woods, 2 B. Mon. 217.

Mississippi. — Hit-tuk-ho-mi *v.* Watts, 7 Smed. & M. 363; Surget *v.* Little, 24 Miss. 118.

Missouri. — Barry *v.* Gamble, 8 Mo. 68; Perry *v.* O'Hanlon, 11 Mo. 585; Hill *v.* Miller, 36 Mo. 182.

New York. — People *v.* Livingston, 8 Barb. 253; Jackson *v.* Marsh, 6 Cow. 281.

Tennessee. — Dodson *v.* Cocke, 1 Overt. 314, 3 Am. Dec. 757.

Where the plaintiff acquired his right to the possession of the land in dispute, by virtue of a grant from the state made in pursuance of a grant from the United States, *held* that the patent from the governor and secretary of state was *prima facie* evidence that the plaintiff had fully complied with all the preliminary steps requisite to obtain the grant. Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837.

A Patent from the United States may be admitted as evidence of title without proving its execution. Steeple *v.* Downing, 60 Ind. 478; Yount *v.* Howell, 14 Cal. 465.

46. Hooper *v.* Scheimer, 23 How. (U. S.) 235; Scheirburn *v.* De Cordova, 24 How. (U. S.) 423; Fenn *v.* Holme, 21 How. (U. S.) 481; Langdon *v.* Sherwood, 124 U. S. 74; Carter *v.* Ruddy, 166 U. S. 493; Sweatt *v.* Burton, 42 Fed. 285.

entry upon which has been subsequently cancelled, is not sufficient evidence of title upon which to maintain ejectment.[47]

A distinction has been noted between certificates issued after final proof and receipts issued from the local land office showing mere filings upon public lands. The latter have been held to be no evidence of title, and not sufficient to support an action of ejectment.[48]

Statutory Provisions. — But in many of the states receipts and certificates issued from the federal land office are sufficient to support an action of ejectment by virtue of express statutory provision.[49]

2. Prior Actual Possession. — A. Burden of Proof. — a. *General Rule.* — Where the plaintiff in an action of ejectment traces his title to the government it is not incumbent upon him to show prior actual

47. Morton *v.* Green, 2 Neb. 441; Headley *v.* Coffman, 38 Neb. 68, 56 N. W. 701; Bates *v.* Herron, 35 Ala. 117.

48. Hemphill *v.* Davies, 38 Cal. 577.

Rule Stated. — "In many of the states and territories it has been provided by statute that certificates issued by registers of the land office, and receivers' receipts issued after final proof, shall be held to be *prima facie* evidence sufficient to support ejectment. Such certificates evidence an equitable title in the holders, and show that, having fully complied with the requirements of the law, the holders are entitled to patents from the government. But, inasmuch as the legal title to public land remains in the government, even after final proof, until patent issues, and as delays often occur whereby the legal title may not for years be vested in the holder of such an equitable title, in order to protect the latter in his possession, the legislatures in many states have extended the action of ejectment to embrace such titles. There is a clear distinction to be observed between certificates issued after final proof and receipts issued by receivers or registers of the local land office, showing mere filings upon mere public lands under the various land acts. The former, as we have said, evidence the equitable title, while the latter are not evidence of any title." Balsz *v.* Liebenow (Ariz.), 36 Pac. 209.

49. Land Certificates Sufficient by Statute. — *Alabama.* — Bullock *v.* Wilson, 2 Port. 436; *s. c.* 5 Port. 338; Case *v.* Edgeworth, 87 Ala. 203, 5 So. 783; Cruise *v.* Riddle, 21 Ala. 791; Bates *v.* Herron, 35 Ala. 117; Birdwell *v.* Bowlinger, 5 Port. 86; Goodlet *v.* Smithson, 5 Port. 245; Rosser *v.* Bradford, 9 Port. 354; Falkner *v.* Jones, 12 Ala. 165; *s. c.* 15 Ala. 9.; Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579.

Arkansas. — Rector *v.* Gaines, 19 Ark. 70; Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1,088.

California. — Coulan *v.* Quinley, 51 Cal. 412.

Missouri. — Cerre *v.* Hook, 6 Mo. 474.

Washington. — Pierce *v.* Frace, 2 Wash. 81, 26 Pac. 192, 807; Orchard *v.* Alexander, 2 Wash. 108, 26 Pac. 196.

In Pennsylvania a warrant and survey, without patent, are sufficient evidence of title upon which to maintain ejectment against all persons but the commonwealth.

United States. — Herron *v.* Dater, 120 U. S. 464; Sims *v.* Irvine, 3 Dall. 425; Evans *v.* Patterson, 4 Wall. 224; Willink *v.* Miles, Pet. C. C. 429, 30 Fed. Cas. No. 17,768.

Pennsylvania. — Maclay *v.* Work, 5 Binn. 154; Campbell *v.* Galbreath, 1 Watts 70; Gingrich *v.* Foltz, 19 Pa. St. 38, 57 Am. Dec. 631.

In Illinois it has been provided by statute that the certificate of the register of the land office of the entry and purchase of land within his district shall be sufficient evidence of title upon which to maintain ejectment. Rogers *v.* Brent, 10 Ill. 573, 50 Am. Dec. 422; Bruner *v.* Manlove, 2 Ill. 156.

possession by any one under whom he claims.[50] But in all cases where he does not so trace his title to the government, he must show a prior actual possession, either in himself or in some person under whom he claims, except where both parties claim under one grantor.[51] But in some cases possession in some of the prior grantors will be presumed.[52] It is generally held that proof of their possession is sufficient evidence of title to make out a *prima facie* case.[53]

50. Tracing Title to Government. Steeple *v.* Downing, 60 Ind. 478; New York Cent. & H. R. Co. *v.* Brennan, 42 N. Y. Supp. 529, 12 App. Div. 103.

Rule Stated. — "All title rests on possession, either actual or presumed. No possession is presumed in favor of any person but the sovereign. The state is presumed to be the owner and in possession of all *bona vacantia,* of all lands to which no other person has title, and the possession of the state is held always to accompany its title. If then the plaintiff derives his title from the state or sovereign, it is not necessary to show any actual possession until some adverse individual title is shown." Graves *v.* Amoskeag Mfg. Company, 44 N. H. 462.

51. Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462; Gist *v.* Beaumont, 104 Ala. 347, 16 So. 20; Florence Bldg. Ass'n *v.* Schall, 107 Ala. 531, 18 So. 108; Jackson Lumb. Co. *v.* McCreary, 137 Ala. 278, 34 So. 850; Omaha Real Estate Trust Co. *v.* Kragscow, 47 Neb. 592, 66 N. W. 658; Troth *v.* Smith, 68 N. J. L. 36, 52 Atl. 243.

52. Where the plaintiff proves a chain of title to himself, from a source acknowledged to be genuine and valid, it is not necessary to show possession in each of the intermediate grantors. Such possession is presumed, and the burden is cast upon the defendant to establish an adverse possession. Arents *v.* Long Island R. R. Co., 89 Hun 126, 34 N. Y. Supp. 1,085.

In a writ of right it did not appear that the demandants, or the person under whom they claimed, ever had the actual occupancy of the demanded premises. The person under whom they claimed had taken as devisee under a will. *Held,* that since the premises under dispute were vacant and unoccupied, the devisee under the will took, by operation of law, and without entry, such a seisin as would enable him to maintain a writ of right; and since the demandants were the heirs of the devisee, the law would presume them to have the actual possession of the premises. Ward *v.* Fuller, 15 Pick. (Mass.) 185.

53. *Alabama.* — Payne *v.* Crawford, 102 Ala. 387, 14 So. 854.

Arkansas. — Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256.

California. — Nagle *v.* Macy, 9 Cal. 426; McMinn *v.* Mayes, 4 Cal. 210; Baum *v.* Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561; Zilmer *v.* Gerichten, 111 Cal. 73, 43 Pac. 408.

Colorado. — Milsap *v.* Stone, 2 Colo. 137.

Georgia. — Peters *v.* West, 70 Ga. 343; Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786.

Illinois. — Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803; Coombs *v.* Hertig, 162 Ill. 171. 44 N. E. 392; Stowell *v.* Spencer, 190 Ill. 453, 60 N. E. 800.

Texas. — House *v.* Reavis, 89 Tex. 626, 35 S. W. 1,063.

The rule is thus stated by the supreme court of Arkansas: "No principal of the law of ejectment is better settled than that where the plaintiff proves his ancestor died in possession of real estate, under color of title, and claiming to be the owner, he has proceeded far enough to make out at least a *prima facie* case; and that the defendant in such a case, if he would overcome the *prima facie* showing thus made by the plaintiff, must show, either in himself or some third person, a better title or right of possession than the plaintiff himself has." Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256.

Where plaintiff claims title by virtue of a former possession, such possession must be clearly and unequivocally proved.[54] And in the absence of a paper title, the plaintiff must show a possession prior to that of defendant.[55]

b. *As Against Intruders.* — As against an intruder or trespasser, or any one not showing a better right, possession is sufficient evidence of title to entitle the plaintiff to recover.[56] And this rule applies even

A plaintiff in ejectment claiming title in fee makes out a *prima facie* case when he shows title by possession. Day *v.* Alverson, 9 Wend. (N. Y.) 223; Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597; Straw *v.* Jones, 9 N. H. 400.

Where the plaintiff in ejectment proves a prior possession of the premises for a period long enough to bar an action for recovery, he establishes a title by prescription, which throws the burden upon the defendant to show his right to retain the possession. Goodwin *v.* Scheerer, 106 Cal. 690, 40 Pac. 18.

Where the plaintiff bases his claim upon a prior possession, he must show that the possession of his predecessors in interest comprehends the claims of the defendant, or a part thereof. Helms *v.* Howard, 2 Har. & McH. (Md.) 57.

Where the plaintiff sets up a prior possession in those under whom he claims, and no deed or other written evidence of title is shown, the plaintiff must show that the party under whom he claims had actual possession of the whole property; and if the evidence shows a prior possession of part of the premises but does not distinguish this part from the balance, the verdict should be for the defendants. Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572.

Where the plaintiff in an action to recover a mining claim or other like rights located upon the public lands, relies upon a prior possession in himself or those through whom he claims, such possession must be shown to have been actual. By actual possession is meant a subjection to the will and dominion of the claimant and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by such use as is appropriate to the particular locality and quality of the property. Coryell *v.* Cain, 16 Cal. 567.

Where the action of ejectment is against a mere tenant, who is estopped from disputing the plaintiff's title, a bare peaceable possession, under claim of title, though for a less period than would bar a real action, is sufficient evidence of title to make out a *prima facie* case. Clarke *v.* Clarke, 51 Ala. 498.

Rule Does Not Prevail in Tennessee. — "Whatever may be the right of a plaintiff in other jurisdictions to recover in ejectment upon proof of mere possession at the time of the defendant's entry, in Tennessee the rule is well settled that the plaintiff cannot recover in ejectment unless he shows a perfect legal title, either by deraignment from the state, or by evidence of actual occupation under deeds purporting to convey the title for the full term of seven years." Stockley *v.* Cissna, 119 Fed. (U. S.) 812. See also Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81, where the above rule is laid down even as against a mere trespasser. To the same effect Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706.

54. Jackson *v.* Myers, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504; Bishop *v.* Truett, 85 Ala. 376, 5 So. 154.

55. McVey *v.* Carr, 159 Mo. 648, 60 S. W. 1,034; Price *v.* Hallett, 138 Mo. 561, 38 S. W. 451.

56. *England.* — Bateman *v.* Allen, Cro. Eliz. 437; Doe *v.* Dyball, 3 Car. & P. 610; Allen *v.* Rivington, 2 Sound. 111. (*Compare* Nagle *v.* Shea, Ir. Rep. 8 C. L. 224.)

United States. — Turner *v.* Aldridge, 2 McAll. 229, 24 Fed. Cas. No. 14,249.

Alabama. — Dothard *v.* Denson, 72 Ala. 541; Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711; Wilson *v.* Glenn, 68 Ala. 383; Ware *v.* Dewberry, 84 Ala. 568, 4 So. 404; Clarke *v.* Clarke, 51 Ala. 498; Jern-

igan *v.* Flowers, 94 Ala. 508, 10 So. 437; Gist *v.* Beaumont, 104 Ala. 347, 16 So. 20.

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

California. — Hutchinson *v.* Perley, 4 Cal. 33, 60 Am. Dec. 578; Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597; Bequette *v.* Caulfield, 4 Cal. 278, 60 Am. Dec. 615; Foot *v.* Murphy, 72 Cal. 104; Goodwin *v.* Scheerer, 106 Cal. 690, 40 Pac. 18.

Florida. — Goodwin *v.* Markwell, 37 Fla. 464, 19 So. 885; Ashmead *v.* Wilson, 22 Fla. 255; L'Engle *v.* Reed, 27 Fla. 345, 9 So. 213; Seymour *v.* Cresswell, 18 Fla. 29.

Georgia. — Glover *v.* Stamps, 73 Ga. 209, 54 Am. Rep. 870.

Kansas. — Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157.

Kentucky. — McLawrin *v.* Salmons, 11 B. Mon. 96, 52 Am. Dec. 563.

Massachusetts. — Sparhawk *v.* Bullard, 1 Metc. 95.

Michigan. — Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390; Van-Auken *v.* Monroe, 38 Mich. 725.

Mississippi. — McClanahan *v.* Barrow, 27 Miss. 664; Kerr *v.* Farish, 52 Miss. 101.

Nevada. — Mallett *v.* Mining Co., 1 Nev. 188, 90 Am. Dec. 484.

New Hampshire. — Wells *v.* Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

New Jersey. — Cain *v.* McCann, 3 N. J. L. 438, 4 Am. Dec. 384.

New York. — Murphy *v.* Loomis, 26 Hun 659; Jackson *v.* Hazen, 2 Johns. 22; Smith *v.* Lorillard, 10 Johns. 338.

Oregon. — Oregon & Nav. R. Co. *v.* Hertzberg, 26 Or. 216, 37 Pac. 1,019.

Pennsylvania. — Shumway *v.* Phillips, 22 Pa. St. 151; Mobley *v.* Bruner, 59 Pa. St. 481, 98 Am. Dec. 360; Turner *v.* Reynolds, 23 Pa. St. 199.

Vermont. — Warner *v.* Page, 4 Vt. 291, 24 Am. Dec. 607.

Prior Possession Sufficient Against Intruder. — *United States.* — Bradshaw *v.* Ashley, 180 U. S. 59.

Alabama. — Bowling *v.* Mobile & M. R. Co., 128 Ala. 550, 29 So. 584; Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824.

Arkansas. — John Henry Shoe Co. *v.* Williamson, 64 Ark. 100, 40 S. W. 703.

California. — Stephens *v.* Hambleton (Cal.), 47 Pac. 51.

District of Columbia. — Bradshaw *v.* Ashley, 14 App. D. C. 485.

Georgia. — Sparks *v.* Conrad, 99 Ga. 643, 27 S. E. 764; Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786; Watkins *v.* Nugen, 118 Ga. 372, 45 S. E. 260.

Illinois. — Coombs *v.* Hertig, 162 Ill. 171, 44 N. E. 392; Casey *v.* Kimmel, 181 Ill. 154, 54 N. E. 905.

Mississippi. — Trager *v.* Shepherd (Miss.), 18 So. 122; Wilkinson *v.* Strickland (Miss.), 35 So. 177.

Nebraska. — Robinson *v.* Gantt (Neb.), 95 N. W. 506.

South Dakota. — Coleman *v.* Stalmacke, 15 S. D. 242, 88 N. W. 107.

Utah. — Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300.

Virginia. — Rhule *v.* Seaboard Air Line R. Co. (Va.), 46 S. E. 331.

"As to an intruder, or trespasser, or as to one who does not show a better right, possession of lands, like the possession of personal property, is *prima facie* evidence of title, and will support ejectment. But, though this presumption attaches to the possession — that it is an occupancy by right — the presumption disappears in the presence of the title. When the title is shown not to attend the possession, but that it resides in another, the law, not favoring wrong, will not presume that the possession was taken, or is held and claimed, in hostility to the title. The burden of proving the possession adverse — that it was taken and held under a claim of title hostile to the title of the true owner — rests upon the party asserting it." Dothard *v.* Denson, 72 Ala. 541.

Where the plaintiff deraigns title from a prior grantor in peaceable possession, it is sufficient for a recovery against a mere intruder; and his recovery will not be defeated by the fact that he attempts to deraign a complete chain of title from the state and fails to do so. Coombs *v.* Hertig, 162 Ill. 171, 44 N. E. 392. See also Fisk *v.* Hopping, 169 Ill. 105, 48 N. E. 323.

A prior possession of the plaintiff,

where the title may be shown to exist in another.[57]

It has been held, however, that even where the defendant is a mere trespasser and wrongdoer, ejectment cannot be maintained upon proof of a mere possession once had, where there is no presumption of a conveyance of a legal title, but it affirmatively appears to be in a third person.[58]

B. Mode of Proof. — The plaintiff may prove, as tending to show his prior possession, any acts of ownership by himself or his grantors which usually accompany possession.[59]

3. Possession of Property by Defendant. — A. Burden of Proof. a. *General Rule.* — In an action of ejectment the plaintiff must, in order to recover, show that the defendant was at the commencement of the action in the actual possession or occupation of the property in dispute;[60] and proof of a constructive possession is not

to be effective as against a mere squatter or intruder in actual possession, must be an actual unabandoned possession. The payment of taxes, surveying and mapping the lands, and executing a mortgage covering them, do not constitute such possession. Seymour *v.* Creswell, 18 Fla. 29; Smith *v.* Lorillard, 10 Johns. (N. Y.) 338.

57. Bequette *v.* Caulfield, 4 Cal. 278, 60 Am. Dec. 615.

58. Duncan *v.* Duncan, 25 N. C. 317.

59. Acts of Ownership. — The plaintiff may prove, as a fact tending to show his prior possession of the property in dispute, that it was rented out for several years for his use while he was a minor. Jay *v.* Stein, 49 Ala. 514.

It is competent to put in evidence, as tending to show the plaintiff's prior possession of the property in dispute, a survey of the property, the driving of stakes around it, a sign posted upon it, the payment of taxes and the offer of the property for sale by the plaintiff and his agents. Gist *v.* Beaumont, 104 Ala. 347, 16 So. 20.

The payment of taxes and the execution of deeds of partition are not evidence of possession, although it may show color of title. Jackson *v.* Myers, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504.

Where the principal question in issue is one of prior possession, the records in former actions of ejectment between the grantors of both plaintiff and defendant are admissible in evidence on the question of possession. McCourtney *v.* Fortune, 57 Cal. 617.

Where the plaintiff claims as the vendor under a contract of sale, he may put in evidence the written contract as tending to show his prior possession; this amounts to a written admission on the part of the defendant of the prior possession of the plaintiff. Frisbie *v.* Price, 27 Cal. 253.

60. *England.* — James *v.* Stanton, 2 Barn. & Ald. 371; Goodright *v.* Rich, 7 T. R. 327; Taylor *v.* Mann, 1 Wils. 220; Fenn *v.* Wood, 1 Bos. & Pul. 573.

Alabama. — Morris *v.* Beebe, 54 Ala. 300.

Arizona. — Board of Regents *v.* Charlebois (Ariz.), 36 Pac. 32.

Arkansas. — Daniel *v.* Lefevre, 19 Ark. 201.

California. — Garner *v.* Marshall, 9 Cal. 268; Owen *v.* Fowler, 24 Cal. 193; Mahoney *v.* Middleton, 41 Cal. 41; Barry *v.* Sonoma Co., 43 Cal. 217; Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176.

Georgia. — Doe *v.* Roe, 30 Ga. 553.

Idaho. — McMasters *v.* Torsen, 5 Idaho 536, 51 Pac. 100.

Illinois. — St. Louis, etc. R. Co. *v.* Hamilton, 158 Ill. 366, 41 N. E. 777.

Kentucky. — McDowell *v.* King, 4 Dana 67; Pope *v.* Pendergrast, 1 A. K. Marsh. 122; Eastin *v.* Rucker, 1 J. J. Marsh. 232; Smith *v.* Shackleford, 9 Dana 452.

Mississippi. — Newman *v.* Foster,

sufficient.[61]

Actual Residence Not Necessary.— But it is not necessary to show that the defendant actually resides on the premises in person; proof of a possession through mere servants or employees acting under his authority or control is sufficient.[62]

3 How. 383, 34 Am. Dec. 98; Wallis *v.* Smith, 2 Smed. & M. 220.

New Hampshire. — Tappan *v.* Tappan, 36 N. H. 98.

New York. — Martin *v.* Rector, 101 N. Y. 77, 4 N. E. 183; VanHorn *v.* Everson, 13 Barb. 526.

North Carolina. — Albertson *v.* Reding, 6 N. C. 283; Flanniken *v.* Lee, 23 N. C. 293; Atwell *v.* McLure, 49 N. C. 371; Ward *v.* Parks, 72 N. C. 452.

Pennsylvania. — Cooper *v.* Smith, 9 Serg. & R. 26, 11 Am. Dec. 658; Lowenstein *v.* Ecker, 155 Pa. St. 304, 26 Atl. 448; McIntire *v.* Wing, 113 Pa. St. 67, 4 Atl. 197.

Vermont. — Evarts *v.* Dunton, Brayt. 70; Stevens *v.* Griffith, 3 Vt. 448; Skinner *v.* McDaniel, 4 Vt. 418; Arbuckle *v.* Walker, 63 Vt. 34, 22 Atl. 458; Lynch *v.* Rutland, 66 Vt. 570, 29 N. W. 1,015.

West Virginia. — Southgate *v.* Walker, 2 W. Va. 427. But see Beckwith *v.* Thompson, 18 W. Va. 103.

Possession may be proved of a whole tract of land, but no evidence is admissible of possession of a particular part unless such part is located on the plats in the case. Hawkins *v.* Middleton, 2 Har. & McH. (Md.) 119.

It is sufficient proof of defendant's possession that he is the actual occupant of the premises. Thomas *v.* Orrell, 27 N. C. 569, 44 Am. Dec. 58.

The Return of the Sheriff is *prima facie* evidence of the possession of such defendant as are marked served by him in his writ. Cooper *v.* Smith, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658; Lowenstein *v.* Ecker, 155 Pa. St. 304, 26 Atl. 448; Harding *v.* Strong, 42 Ill. 148, 89 Am. Dec. 415.

Where defendant in ejectment, to prive his *right* of possession, introduced two leases to himself from persons claiming under plaintiff's grantor, this affords a sufficiently strong presumption in favor of his *possession* to support a judgment against him. Pickett *v.* Doe, 5 Smed. & M. (Miss.) 470, 43 Am. Dec. 523.

Possession in the defendant is sufficiently proved where the property in dispute lies along a division line between plaintiff's and defendant's property and the question as to the true location of the division line has been left to arbitrators, when it is shown that the defendant, before the award, had claimed the land and fenced it in as his own, and after the award, continued to claim it and refused to surrender it. In such case, the defendant, to avoid liability, must prove notice to the plaintiff before action, that he renounced his claim or that his tenant was in possession independently of him. Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534.

If the defendant claims to be in possession of the property in controversy, and enters himself a defendant with a view of maintaining such claim, this is sufficient to maintain the plaintiff's action without further proof of the defendant's possession. Mordecai *v.* Oliver, 10 N. C. 479.

When the plaintiff's own testimony shows that he was in possession of the property in dispute when the action was brought, it is the duty of the court to charge the jury that there is no evidence tending to prove a wrongful possession on the part of the defendant and to direct a verdict for the defendant on this issue. Brown *v.* King, 107 N. C. 313, 12 S. E. 137.

61. Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186; Arbuckle *v.* Walker, 63 Vt. 34, 22 Atl. 458.

62. Polack *v.* Mansfield, 44 Cal. 36, 13 Am. Rep. 151; Crane *v.* Ghirardelli, 45 Cal. 235; Moore *v.* Moore (Cal.), 34 Pac. 90; Den *v.* Snowhill, 13 N. J. L. 23, 22 Am. Dec. 496; Smith *v.* Walker, 10 Smed. & M. 584 (Miss.); Hurd *v.* Tuttle, 2 Chip. (Vt.) 43.

Ouster. — The plaintiff must not only prove the defendant in possession, but he must prove an ouster and that the possession of the defendant is wrongfully and unlawfully maintained.[63]

Possession at Commencement of Action. — There are authorities to the effect that it is not necessary for the plaintiff to prove that the defendant was in possession at the commencement of the action;[64] and the nature of the defendant's possession may be such as to relieve the plaintiff from the necessity of proving an ouster.[65]

Where the Action is Against Several Defendants possession must be proved in all of them in order to recover against all;[66] and where several defendants appear and plead jointly and enter into the consent rule jointly, a joint possession must be proved in all of them.[67]

63. Lotz *v.* Briggs, 50 Ind. 346; Ricard *v.* Williams, 7 Wheat. (U. S.) 59.

The plaintiff must prove the defendant wrongfully in possession, and where the evidence shows that he is rightfully in possession under a lease and option to purchase, the action must fail. Tyson *v.* Neill (Idaho), 70 Pac. 790.

"To maintain the action of ejectment it is essential that the plaintiff allege and prove three things: First, the right of possession in the plaintiff; second, possession in the plaintiff; third, ouster of plaintiff by the defendant." McMasters *v.* Torsen, 5 Idaho 536, 51 Pac. 100.

"In an action of ejectment the plaintiff must show that the defendant unlawfully, and without right, keeps the plaintiff out of possession, before the plaintiff can recover in the action." Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

The plaintiff has a right to show the nature of the ouster and the time of the ouster; and one of the means of showing this is to put in evidence the titles under which the defendant claims. Steinfeld *v.* Ross (Ariz.) 53 Pac. 495.

An ouster may be admitted by the pleadings; and a plea of the general issue, coupled with a notice of a former suit in ejectment, which is alleged to be a bar to the plaintiff's recovery in the present action, and also evidence of the defendant to the effect that he has been in possession for several years claiming title, is sufficient proof of an ouster. Carpenter *v.* Carpenter, 119 Mich. 167, 77 N. W. 703.

64. Beckwith *v.* Thompson, 18 W. Va. 103; Harvey *v.* Tyler, 2 Wall. (U. S.) 328; Taylor *v.* Crane, 15 How. Pr. (N. Y.) 358.

65. In some cases the character of the defendant's possession may be such as to relieve the plaintiff from the proof of an actual ouster. The rule is thus stated in Clason *v.* Rankin, 1 Duer (N. Y.) 337: "The character of the defendant's possession must be determined by the nature of the claim under which he originally entered, and as, in its inception, this was clearly hostile to the rights of the plaintiff, and the possession of the defendant under it in fact exclusive, we think there is sufficient in the case to show such an ouster by the defendant as destroyed the tenancy in common, and entitled the plaintiff, by bringing this suit, to treat him as a trespasser. As the possession of the defendant was in its origin hostile, the presumption of law is that it remains so."

The defendant may, by his own acts, be estopped from denying that he was in possession of the property at the commencement of the action. Atwell *v.* McClure, 49 N. C. 371.

66. In an action of ejectment against several defendants the plaintiff must prove possession in all the defendants in order to recover against all. Evarts *v.* Dunton, Brayt. (Vt.) 70.

United States. — Lanning *v.* Case, 4 Wash. C. C. 169, 14 Fed. Cas. No. 8,072.

67. In an action of ejectment against several defendants, where

b. *General Issue.* — In ejectment the general issue alone admits the defendant to be in possession of the property in controversy.[68]

c. *Defendant's Answer Denying Plaintiff's Title.* — Where the evidence shows that the defendant was in possession of the demanded premises at the commencement of the action, the answer of the defendant denying the plaintiff's title and right of possession affords sufficient evidence of an ouster.[69]

Wild Land. — But when the property in controversy consists of vacant land, such as a wild and uncultivated forest, the denial in the defendant's answer that he is wrongfully and unlawfully in possession is not evidence that he is exercising such control over the land as to make him liable to an action of ejectment.[70]

d. *Question of Fact for Jury.* — Whether or not the defendant was the occupant of the premises at the commencement of the action is a question to be determined by the jury.[71]

B. Mode of Proof. — The plaintiff may give in evidence any acts of the defendant which amount to an acknowledgment of possession.[72]

4. Ouster of Co-Tenant. — A. Burden of Proof. — a. *General Rule.* — Where the plaintiff and defendant in the action of ejectment are co-tenants the plaintiff must show actual ouster; he must show that he has been entirely excluded from the possession of the premises.[73]

they all appear and plead jointly, and enter into the consent rule jointly, the plaintiff must prove a joint possession in all of them; and if it appears that any of them hold in severalty, those so holding will be entitled to judgment against the plaintiff. Jackson *v.* Hazen, 2 Johns. (N. Y.) 430.

68. *Alabama.* — King *v.* Kent, 29 Ala. 542.

Illinois. — Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377.

Maine. — Chaplin *v.* Barker, 53 Me. 275; Perkins *v.* Raitt, 43 Me. 280.

Mississippi. — Bernard *v.* Elder, 50 Miss. 336.

New Hampshire. — Tappan *v.* Tappan, 36 N. H. 98; Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462.

Pennsylvania. — Ulsh *v.* Strode, 13 Pa. St. 433.

See *contra* Stevens *v.* Griffith, 3 Vt. 448.

69. Moore *v.* Moore (Cal.) 34 Pac. 90; Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1,009; Clason *v.* Rankin, 1 Duer (N. Y.) 337.

Arents *v.* Long Island R. R. Co., 89 Hun 26, 34 N. Y. Supp. 1,085; Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377.

70. Duncan *v.* Hall, 117 N. C. 443, 23 S. E. 362.

71. Martin *v.* Rector, 101 N. Y. 77, 4 N. E. 183; Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437.

72. In an action against a county to recover land, where the defense was that the property had been dedicated to public use, the plaintiff may show, as tending to prove the defendant's possession, that they had hired a person to look after the fences and keep them in repair, and that such person was so engaged at the commencement of the action. Barry *v.* Sonoma Co., 43 Cal. 217.

It is competent for the plaintiff to put in evidence to prove the defendant's possession, an instrument in which the defendant undertakes to pay rent for the property in dispute. Farmer *v.* Pickens, 83 N. C. 549.

73. *United States.* — Goldsmith *v.* Smith, 21 Fed. 611.

Alabama. — Jones *v.* Perkins, 1

b. *Statutory Provisions.* — In some jurisdictions it is expressly provided by statute that in an action of ejectment by co-tenants a denial of the plaintiff's right on the part of the defendant or any act that will amount to such denial affords sufficient evidence of an ouster.[74]

c. *Positive Force Unnecessary.* — As between co-tenants it is not necessary in an action of ejectment for the plaintiff to show that the ouster was accompanied by positive force; it may be established by acts and declarations by or brought home to the knowledge of the co-tenant.[75]

Stew. 512; Foster *v.* Foster, 2 Stew. 356.

Maryland. — Van Bibber *v.* Frazier, 17 Md. 436; Hammond *v.* Morrison, 33 Md. 95.

New York. — Taylor *v.* Crane, 15 How. Pr. 358; Trustees etc. *v.* Johnson, 66 Barb. 119; Edwards *v.* Bishop, 4 N. Y. 61.

North Carolina. — Halford *v.* Tetherow, 47 N. C. 393.

In an action of ejectment between co-tenants where it appears that the defendant has received a deed of the whole lot, and has taken possession, claiming the whole in his own right, this is sufficient evidence of an ouster; and the plaintiff need not prove a demand of possession. Johnson *v.* Tilden, 5 Vt. 426.

In an action of ejectment between tenants in common, the assertion of the defendant of his ownership of the whole premises, and his offer to sell them, coupled with his declaration that the plaintiffs would be compelled to sign the deed through which he derived his title, amount to a sufficient denial of the plaintiff's right as a co-tenant to relieve him of further proof of the ouster. Valentine *v.* Northrop, 12 Wend. (N. Y.) 494.

Widow Not a Tenant in Common. The rule that in ejectment between co-tenants the plaintiff is bound to prove an actual ouster does not apply to a widow suing in ejectment to recover her dower right. She has a mere right of action and is not a tenant in common, and consequently is not bound to prove an actual ouster or any other act amounting to a denial of her right. Yates *v.* Paddock, 10 Wend. (N. Y.) 529.

74. Bethell *v.* McCool, 46 Ind. 303; Nelson *v.* Davis, 35 Ind. 474; Falconer *v.* Roberts, 88 Mo. 574; Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1,009.

75. VanBibber *v.* Frazier, 17 Md. 436; Hammond *v.* Morrison, 33 Md. 95; Hellings *v.* Bird, 11 East 49; Fisher *v.* Prosser, 1 Cowp. 217; Corbin *v.* Cannon, 31 Miss. 570; Carpenter *v.* Thayer, 15 Vt. 552; Dodge *v.* Page, 49 Vt. 137.

The old rule as to the proof of an actual ouster between co-tenants was more rigid than the modern rule. It was once supposed that the rule could only be satisfied by the strongest evidence; something little short of an actual turning out by force. The modern rule is thus stated by the supreme court of Vermont: "An actual ouster is still to be made out; but it may, and should be, found upon satisfactory evidence of an adverse possession. The hostile character of the possession may be evinced in various ways. It will not be inferred from exclusive possession, merely, unless it has been of very long continuance, and attended . . . . with circumstances excluding all probability of assent or understanding on the part of the other owners. But with this exception . . . the evidence is the same as in other cases of adverse possession." Carpenter *v.* Thayer, 15 Vt. 552.

"The actual ouster need not be proved to have been accompanied by positive force, but must be established by acts or declarations, brought home to the knowledge of the co-defendant. The mere fact that one tenant in common has been in exclusive possession of property for more than twenty years, and that he has in that time received all of

d. *Question of Fact.* — The ouster of a co-tenant may be inferred from circumstances, and is a question of fact for the jury to determine.[76]

5. Demand for Possession by Plaintiff as Vendor. — A. Burden of Proof. — a. *General Rule.* — Where the defendant in an action of ejectment went into possession of the premises with the permission or acquiescence of the plaintiff,[77] or under a contract of sale from the plaintiff, the latter must prove as a part of his case a demand for possession, and a refusal by the defendant or some other act on the part of the defendant which will make him a wrongdoer.[78]

The Reason for this rule is that until such demand the possession of the vendee is lawful, unless he has by his own wrongful act placed himself in the attitude of a wrongdoer, as for example, by denying the title of him who has the fee, claiming under adverse title and the like.[79]

b. *Defendant in Default in Payment.* — But many authorities hold that upon a default in payment the defendant in possession is not entitled to a notice to quit, and may be proceeded against in ejectment

the profits, will not constitute an actual ouster or adverse possession." Van Bibber *v.* Frazier, 17 Md. 436.

The rule as stated by many authorities is that one joint tenant or tenant in common may maintain ejectment against his companion on proof of actual ouster or of facts from which ouster may be inferred. Obert *v.* Bordine, 20 N. J. L. 394.

76. Harmon *v.* James, 7 Smed. & M. (Miss.) 111, 45 Am. Dec. 296; Corbin *v.* Cannon, 31 Miss. 570; Hargrove *v.* Powell, 19 N. C. 97; Bolton *v.* Hamilton, 2 Watts & S. 294, 37 Am. Dec. 509.

77. Clawson *v.* Moore, 5 Blackf. (Ind.) 300.

78. *England.* — Hiatt *v.* Miller, 5 Car. & P. 595; Right *v.* Beard, 13 East 210.

Arkansas. — Fears *v.* Merrill, 9 Ark. 559, 50 Am. Dec. 226. But see Smith *v.* Robinson, 13 Ark. 533.

California. — Frisbie *v.* Price, 27 Cal. 253.

Indiana. — Doe *v.* Brown, 7 Blackf. 142, 41 Am. Dec. 217; Taylor *v.* McCrackin, 2 Blackf. 260; Clawson *v.* Moore, 5 Blackf. 300; Stackhouse *v.* Reynolds, 5 Blackf. 570.

Kentucky. — Harle *v.* McCoy, 7 J. J. Marsh. 318, 23 Am. Dec. 407; Peters *v.* Allison, 1 B. Mon. 232, 36 Am. Dec. 574. But see Morton *v.* Dickson, 90 Ky. 572, 14 S. W. 905.

Michigan. — Michigan Land & Iron Co. *v.* Thoney, 89 Mich. 226, 50 N. W. 845.

North Carolina. — Love *v.* Edmonston, 23 N. C. 152.

In ejectment for a certain piece of land, the facts were that the plaintiff showed a covenant from himself to the defendant for the sale of the premises on a credit, for which he took the defendant's notes, payable before the action was brought, and the defendant had gone into possession of the premises under this covenant. Neither party produced the notes, or gave any evidence on the subject of their payment. It was admitted that if the notes were paid the defendant was entitled to recover; and if they were not, then the plaintiff was entitled to recover. *Held*, that the burden of proof was on the plaintiff to show that the defendant was in default and not upon the defendant to show that the notes had been paid. Roland *v.* Fischer, 30 Ill. 224.

In Kentucky a vendor in real property cannot maintain ejectment against his vendee in possession under a contract of sale. Consequently, as the action cannot be maintained in any event, it is immaterial whether there was or was not a notice to quit or demand of possession. Morton *v.* Dickson, 90 Ky. 572, 14 S. W. 905.

79. In support of this, see cases cited in the previous note.

without a showing upon the part of the plaintiff of a previous notice and demand of possession.[80]

6. Identity or Location of Property. — A. Burden of Proof. — a. *General Rule.* — The plaintiff in an action of ejectment must, in order to entitle him to recover, identify the property in controversy by competent evidence.[81]

The General Issue has been held to admit the location and boundaries of the property as set forth in the plaintiff's pleading in ejectment, and relieves him from further proof in this respect.[82]

b. *Exception in Grant.* — Where the plaintiff claims under an instrument of conveyance containing an exception, the burden of proof is upon him to show that the premises in controversy are not embraced within the exception; and this rule applies with equal force where the defendant claims under such an instrument.[83]

80. *United States.* — Burnett *v.* Caldwell, 9 Wall. 290.

Alabama. — Seabury *v.* Stewart, 22 Ala. 207, 58 Am. Dec. 254.

Arkansas. — Smith *v.* Robinson, 13 Ark. 533.

California. — Coates *v.* Cleaves, 92 Cal. 427, 28 Pac. 580; Connolly *v.* Hingley, 82 Cal. 642, 23 Pac. 273.

Mississippi. — McClanahan *v.* Barrow, 27 Miss. 664.

Missouri. — Glascock *v.* Robards, 14 Mo. 350, 55 Am. Dec. 108.

New York. — Whiteside *v.* Jackson, 1 Wend. 418; Jackson *v.* Moncrief, 5 Wend. 26.

81. *Georgia.* — Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572.

Illinois. — Bissett *v.* Bowman, 54 Ill. 254; Bradish *v.* Yocum, 130 Ill. 386, 23 N. E. 114.

Kentucky. — Taylor *v.* Taylor, 3 A. K. Marsh. 18.

Louisiana. — Murray *v.* Boissier, 10 Mart. O. S. 293.

Maryland. — Langley *v.* Jones, 26 Md. 462; Mitchell *v.* Mitchell, 8 Gill 98.

Missouri. — Papin *v.* Allen, 33 Mo. 260.

New York. — Jarvis *v.* Lynch, 157 N. Y. 445, 52 N. E. 657.

Texas. — Garrison *v.* Coffey (Tex.), 5 S. W. 638.

Virginia. — Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

West Virginia. — Bryan *v.* Willard, 21 W. Va. 65; Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531.

82. Dockery *v.* Maynard, 1 Har. & McH. (Md.) 209; Gongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649; Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

83. *Kentucky.* — Hall *v.* Martin, 89 Ky. 9, 11 Ky. L. Rep. 241, 11 S. W. 953; Guthrie *v.* Lewis, 1 T. B. Mon. 142.

North Carolina. — See *contra* McCormick *v.* Monroe, 46 N. C. 13; Batts *v.* Batts, 128 N. C. 21, 38 S. E. 132.

Virginia. — Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601.

West Virginia. — Bryan *v.* Willard, 21 W. Va. 65; Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531.

Where the deed under which the plaintiff claimed title contained an exception of such tracts of land "part of the said estate hereby warranted not to exceed in the aggregate 15,000 acres, which the parties of the first part have heretofore sold and conveyed," *held* that the burden was on the plaintiff to show that the land in dispute did not come within his exception. Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586; *s. c.* 7 N. M. 133, 34 Pac. 191.

Rule Stated. — It would seem, therefore, both upon principle and upon authority, that where the exterior boundaries of a survey upon which a grant or deed is founded include lands which have been excepted from the operation of the grant, or lands which have been aliened since the grant was issued, and which have been excepted from the operation of the deed, and the

B. Mode of Proof. — a. *Parol Evidence.* — **(1.) In General.** Parol evidence is always admissible to determine the true location and boundaries of the property in dispute in an action of ejectment.[84]

(2.) Variance Between Description in Deed and in Pleadings.— Where the description of the property contained in a deed introduced in evidence in an action of ejectment does not correspond with the description in the pleadings, parol evidence may be introduced to further identify the property and explain away the discrepancy.[85]

plaintiff's title papers disclose such exception or such alienation, it is not sufficient for such plaintiff, in an action of ejectment, to connect himself with the commonwealth, and show the exterior boundaries of his grant, but he must also prove that the lands in controversy are not within the excepted or aliened lands, in order to make out a case which will entitle him to recover in an action of ejectment. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

See *contra* Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832; New York, N. H. & H. R. Co. *v.* Hogan (R. I.), 56 Atl. 179.

Where the Defendant Shows No Title at All, the burden is upon him to show that the property in dispute is embraced within the exception contained in the plaintiff's grant. Bowman *v.* Bowman, 3 Head (Tenn.) 47.

Where One Claims Under a Reservation in a grant, the *onus* is upon him to show that the land claimed is embraced within the terms of the reservation. Gudger *v.* Hensley, 82 N. C. 481.

Where the plaintiff in ejectment claims under a deed conveying the balance of a certain tract of land the burden is upon the plaintiff to show what the balance was which was conveyed, and that it included the land in contest. Taylor *v.* Taylor, 3 A. K. Marsh. (Ky.) 18.

84. *California.* — Northern R. Co. *v.* Jordan, 87 Cal. 23, 25 Pac. 273; People *v.* Klumpke, 41 Cal. 263.

Georgia. — Peters *v.* West, 70 Ga. 343.

Illinois. — Smith *v.* Stevens, 82 Ill. 554.

Kentucky. — Mercer *v.* Hauts, 4 Bibb 399.

Louisiana. — Purl *v.* Miles, 9 La. Ann. 270.

Maryland. — Wilson *v.* Inloes, 6 Gill 121.

Michigan. — Twogood *v.* Hoyt, 42 Mich. 609, 4 N. W. 445; Sanscrainte *v.* Torongo, 87 Mich. 69, 49 N. W. 497.

Minnesota. — Ames *v.* Lowry, 30 Minn. 283, 15 N. W. 247.

Mississippi. — Surget *v.* Little, 24 Miss. 118; Newman *v.* Foster, 3 How. 383, 34 Am. Dec. 98.

Tennessee. — Augusta Mfg. Co. *v.* Vertrees, 4 Lea 75.

Vermont. — Parks *v.* Moore, 13 Vt. 183, 37 Am. Dec. 589.

Virginia. — Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347. See also "Boundaries;" "Ambiguity."

It is error to instruct the jury that if a deed under which one of the parties claims did not show on its face that it included the land sued for, he could not claim any benefit under it; since the deed was aided and explained by parol evidence. Payne *v.* Crawford, 102 Ala. 387, 14 So. 854.

85. Ashmead *v.* Wilson, 22 Fla. 255; Florida Sav. Bank *v.* Smith, 21 Fla. 258; Payne *v.* Crawford, 102 Ala. 387, 14 So. 854. *Compare* Newman *v.* Lawless, 6 Mo. 279. See also article "Ambiguity."

The proof of the identity of the property at the trial must correspond to the description given in the complaint; and where the evidence shows an entirely different piece of property from that described in the complaint, it is a fatal variance which will preclude a recovery by the plaintiff. Morris *v.* Giddens, 101 Ala. 571, 14 So. 406; Wilson *v.* Hoffman, 54 Mich. 246, 20 N. W. 37.

Under a statute providing that, where both of the parties claim from the same source of title, no warrant of resurvey shall issue except in cases where the parties claim differ-

b. *Grants of Adjacent Lands.* — It has been held that for the purpose of establishing the location of the property in dispute it is competent to introduce in evidence grants of adjacent land between strangers.[86]

II. MATTERS OF DEFENSE.

1. Burden of Proof. — A. In General. — Possession Under Color of Title. — Actual possession under color of title is sufficient to protect the defendant in ejectment until a superior right is shown by the plaintiff;[87] but where the defendant offers no evidence to justify his possession, it may be fairly inferred that he is a mere intruder.[88]

B. New Matter. — Where the defendant sets up affirmative matter in his answer which is not admitted by the plaintiff, the burden is on him to establish his defense by affirmative proof.[89]

Prior Outstanding Title. — In order to defeat the plaintiff's claim by an outstanding title, it is incumbent upon the defendant to show

ent parcels from the same grantor, and it appears that there is a dispute about the location, it was held error to issue a warrant for a resurvey, and admit locations in evidence where both of the parties derive title from a common source and there is no dispute as to the location of any division line between the parcel claimed by the plaintiff and that claimed by the defendant. Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18.

The old rules governing the action of ejectment in the state of Maryland, with regard to locating and identifying the property in dispute, have been somewhat simplified and modified by statute. Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18.

86. Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95.

Where the property in dispute is located on the boundary line between two counties, and the principal question in issue is as to the true location, the official maps of the county in which the plaintiff claimed the land to be situated are properly admissible in evidence. Conover *v.* Russ, 29 Fla. 338, 10 So. 585.

87. Fisher *v.* Philadelphia, 75 Pa. St. 392; Carleton *v.* Townsend, 28 Cal. 219; Doe *v.* Reade, 8 East 353.

88. Crommelin *v.* Minter, 9 Ala. 594; Saltmarsh *v.* Crommelin, 24 Ala. 347.

89. Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698; Moore *v.* Small, 19 Pa. St. 461; Bonham *v.* Bishop, 23 S. C. 96.

The burden of proof, on the whole case, is always upon the plaintiff, but where the defendant, by his evidence, and by his whole defense, recognizes the title to have been originally in the plaintiff, and claims the land only by virtue of a parol gift or sale, followed by his adverse occupancy for the period of limitation, the *onus* is upon the defendant to establish this affirmative defense. Davis *v.* Davis, 68 Miss. 478, 10 So. 70.

Where the plaintiffs, on the trial, show a clear documentary title to the premises in dispute, and the defense rests solely on the claim of adverse possession, the burden is upon the defendants to establish the fact of adverse possession beyond a reasonable doubt. Rowland *v.* Updike, 28 N. J. L. 101.

Where the plaintiff makes out a *prima facie* case, the defendant, relying upon a title by prescription and adverse possession, has the burden of establishing this defense by affirmative proof. Bussy *v.* Jackson, 104 Ga. 151, 30 S. E. 646.

Where the plaintiff in ejectment shows possession in himself under a deed to the premises, or a deed to himself from his grantor who was in possession, the burden is cast on

that such title is a present subsisting and legal one upon which the owner could recover if asserting it by an action.[90]

Where the contest is over possessory rights to property located on

the defendant to show that he is not a mere trespasser, and that he has not acquired possession by mere entry without any lawful right whatever. Hadley *v.* Bean, 53 Ga. 685.

90. Defenses Consisting of New Matter. — Where the plaintiffs in ejectment claim under a devise from the common grantor, and the defendants claim the premises under a parol gift from him to their father, this defense is equitable in its nature; and the burden of proof is upon the defendants. Moore *v.* Small, 19 Pa. St. 461.

Where the plaintiff claims an undivided interest in the land, by original title, and the defendant claimed an undivided interest in the same premises, by virtue of a tax sale, the burden is upon the defendant to show that the interest purchased by him is the same as, or includes the interest of, the plaintiff. Butler *v.* Porter, 13 Mich. 292.

In an action of ejectment brought by a landlord against his tenant, where the defense is a demand for a surrender of possession, and an eviction by one holding a paramount title, the burden is upon the defendant to prove both the paramount title and a demand for possession made before the action was brought. Camarillo *v.* Fenlon, 49 Cal. 202.

Where a defendant in ejectment claims that one of the deeds, through which the plaintiff derives title, is void, the burden is upon the defendant to show such facts as rendered the deed void. Grigsby *v.* Akin, 128 Ind. 591, 28 N. E. 180.

Where the plaintiff in ejectment claims as the assignee of a leasehold interest, and the defendant claims under a mortgage foreclosure sale, the burden is upon the defendant to establish affirmatively that the rights of the plaintiff and his assignor were barred by the foreclosure decree. Enos *v.* Cook, 65 Cal. 175, 3 Pac. 632.

Where the plaintiff in ejectment claims as a lessee of the defendant, and the defendant relies on an alleged surrender of the lease, the burden of proof is upon the defendant to prove this surrender, and that burden is not shifted merely because the evidence as to the surrender went in with the plaintiff's proofs. Hague *v.* Ahrens, 53 Fed. 58, 3 C. C. A. 426.

Where the defense relied on in the ejectment is that the defendant is a tenant in common with the plaintiff, thus seeking to make the plaintiff prove an actual ouster, the defendant must connect himself with the title under which the plaintiff claims. Gillett *v.* Stanley, 1 Hill (N. Y.) 121.

Where the plaintiff claims under a sheriff's deed issued upon an execution against a certain railway company and the defense is that the title passed out of the railway company before the execution of the sheriff's deed, the burden of proof is upon the defendant to show that the title did, as to the particular land sued for, pass out of the said corporation previous to the execution of the deed. Wunderlich *v.* Spradling, 121 Mo. 364, 25 S. W. 1,063.

United States. — Foster *v.* Joice, 3 Wash. C. C. 498, 9 Fed. Cas. No. 4,974.

Arkansas. — Sharp *v.* Johnson, 22 Ark. 79.

Georgia. — Salter *v.* Williams, 10 Ga. 186.

Indiana. — East *v.* Peden, 108 Ind. 92, 8 N. E. 722.

Maryland. — Hall *v.* Gittings, 2 Har. & J. 112.

Michigan. — Bennett *v.* Horr, 47 Mich. 221, 10 N. W. 347; Buell *v.* Irwin, 24 Mich. 145.

Mississippi. — Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

Missouri. — McDonald *v.* Schneider, 27 Mo. 405; Glasgow *v.* Baker, 14 Mo. App. 201.

New York. — Jackson *v.* Hudson, 3 Johns. 375.

Pennsylvania. — Foust *v.* Ross, 1 Watts & S. 501; Sheik *v.* McElroy, 20 Pa. St. 25; Wray *v.* Miller, 20 Pa. St. 111; Riland *v.* Eckert, 23 Pa. St. 215; McBarron *v.* Gilbert, 42 Pa. St. 268.

the public domain, the action cannot be defeated by showing the outstanding title to be in the government.[91]

2. Substance and Mode of Proof. — A. In General. — In the absence of any statute to the contrary, it is the settled rule that a defendant in ejectment cannot set up or show an equitable title in opposition to the legal estate.[92] But in many of the states, and particularly in those states which have adopted codes, the defendant

Tennessee. — Peck *v.* Carmichael, 9 Yerg. 325; Humble *v.* Spears, 8 Baxt. 156; Howard *v.* Massengale, 13 Lea 577.

Virginia. — Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

West Virginia. — Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499.

When the defendant defends his possession upon the ground that the government, state or national, has placed him in possession, in order to defeat the plaintiff's recovery he must show that the right of the government is paramount to the right of the plaintiff. Scranton *v.* Wheeler, 113 Mich. 565, 71 N. W. 1,091, 67 Am. St. Rep. 484.

91. In actions to recover the possession of mining claims, water privileges and the like, the defendant cannot defeat the plaintiff's recovery by proving the paramount outstanding title to be in the government. Coryell *v.* Cain, 16 Cal. 567; Gray *v.* Dixon, 74 Cal. 508, 16 Pac. 305.

In an action of ejectment to recover a mining claim, it is error to exclude evidence showing that the discoveries made by both parties were located on lands previously patented by the United States; such evidence should be admitted and the jury instructed that if they found this to be true in regard to both claims, neither party to the action could recover. Moyle *v.* Bullene, 7 Colo. App. 308, 44 Pac. 69.

92. *United States.* — Greer *v.* Mezes, 24 How. 268; Robinson *v.* Campbell, 3 Wheat. 212; Johnston *v.* Jones, 1 Black. 209; Foster *v.* Mora, 98 U. S. 425; Young *v.* Board of Com'rs, 51 Fed. 585; Ryan *v.* Staples, 76 Fed. 721.

Alabama. — Mitchell *v.* Robertson, 15 Ala. 412; Lomb *v.* Pioneer Sav. & Loan Co., 106 Ala. 591, 17 So. 670; Nickles *v.* Haskins, 15 Ala. 619, 50 Am. Dec. 154; McPherson *v.* Walters, 16 Ala. 714, 50 Am. Dec. 200; Woods *v.* Montevallo Coal & Transp. Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393.

District of Columbia. — Rathbone *v.* Hamilton, 4 App. Cas. 475.

Florida. — Petty *v.* Mays, 19 Fla. 652.

Illinois. — Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531; Johnson *v.* Watson, 87 Ill. 535; Finlon *v.* Clark, 118 Ill. 32, 7 N. E. 475; McGinnis *v.* Fernandes, 126 Ill. 228, 19 N. E. 44; Chiniquy *v.* Catholic Bishop, 41 Ill. 148.

Indiana. — Smith *v.* Allen, 1 Blackf. 22.

Michigan. — Buell *v.* Irwin, 24 Mich. 145; Conrad *v.* Long, 33 Mich. 78; Gates *v.* Sutherland, 76 Mich. 231, 42 N. W. 1,112; Michigan Land & Iron Co. *v.* Thoney, 89 Mich. 226, 50 N. W. 845; Shaw *v.* Hill, 83 Mich. 322, 47 N. W. 247, 21 Am. St. Rep. 607; McKay *v.* Williams, 67 Mich. 547, 35 N. W. 159, 11 Am. St. Rep. 597.

Mississippi. — Morgan *v.* Blewitt, 72 Miss. 903, 17 So. 601; Graham *v.* Warren, 81 Miss. 330, 33 So. 71.

New York. — Jackson *v.* Pierce, 2 Johns. 221; Jackson *v.* Deyo, 3 Johns. 422; Jackson *v.* VanSlyck, 8 Johns. 486; Sinclair *v.* Jackson, 8 Cow. 543; Jackson *v.* Parkhurst, 4 Wend. 369; More *v.* Spellman, 5 Denio 225; Crary *v.* Goodman, 9 Barb. 657, 64 Am. Dec. 506. But see next succeeding note.

North Carolina. — Farmer *v.* Pickens, 83 N. C. 549.

Ohio. — Smith *v.* Hunt, 13 Ohio 260, 42 Am. Dec. 201.

Pennsylvania. — Leshey *v.* Gardner, 2 Watts & S. 314, 38 Am. Dec. 764.

may give in evidence any defense he may have, whether legal or equitable in its nature.[93]

Some of the authorities allow equitable defenses under certain restrictions. Thus it has been held that the evidence must show such a defense as would enable the defendant to enjoin a judgment at law should one be recovered against him,[94] or such as would entitle him to specific performance;[95] and it has been held that the rule

Where the plaintiff claims by virtue of a sheriff's sale under a decree of foreclosure, evidence is incompetent and inadmissible on behalf of the defendant, showing that he did not owe the judgment creditor as much as the decree was rendered for. Splahn *v.* Gillespie, 48 Ind. 397.

93. *United States.* — Quinby *v.* Coulan, 104 U. S. 420; Bohall *v.* Dilla, 114 U. S. 47.

California. — Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624; Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49; Meeker *v.* Dalton, 75 Cal. 154, 16 Pac. 764; Hyde *v.* Mangan, 88 Cal. 319, 26 Pac. 180; Helm *v.* Wilson, 76 Cal. 476; Morrison *v.* Wilson, 13 Cal. 494, 73 Am. Dec. 593.

Colorado. — Davis *v.* Holbrook, 25 Colo. 493, 55 Pac. 730.

Dakota. — Suessenbach *v.* National Bank, 5 Dak. 447, 41 N. W. 662.

Florida. — Walls *v.* Endel, 20 Fla. 86; Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Georgia. — Milner *v.* Vandivere, 86 Ga. 540, 12 S. E. 879; Allison *v.* Elder, 45 Ga. 17.

Indiana. — Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676.

Iowa. — Shawhan *v.* Long, 26 Iowa 488, 96 Am. Dec. 164.

Kansas. — Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957.

Kentucky. — Morton *v.* Dickson, 90 Ky. 572, 14 S. W. 905.

Missouri. — McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1,028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; Chouteau *v.* Gibson, 76 Mo. 38; Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660; City of St. Louis *v.* Lumber Co., 98 Mo. 613, 12 S. W. 248; Comings *v.* Leroy, 114 Mo. 454, 21 S. W. 804; Swope *v.* Weller, 119 Mo. 556, 25 S. W. 204.

Nebraska. — Dale *v.* Hunneman, 12 Neb. 221, 10 N. W. 711.

Nevada. — South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89.

New York. — Thurman *v.* Anderson, 30 Barb. 621; Crary *v.* Goodman, 9 Barb. 657, 64 Am. Dec. 506; Carpenter *v.* Otley, 2 Lans. 451; Hoppough *v.* Struble, 60 N. Y. 439.

Oklahoma. — Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

Oregon. — Spaur *v.* McBee, 19 Or. 76.

South Dakota. — Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

Texas. — Neill *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746.

Wisconsin. — Prentiss *v.* Brewer, 17 Wis. 635, 86 Am. Dec. 730; Buzzell *v.* Gallagher, 28 Wis. 678; Gould *v.* Sullivan, 84 Wis. 659, 54 N. W. 1,013, 36 Am. St. Rep. 955, 20 L. R. A. 487.

Either party in ejectment may show that a deed, relied upon by the other in support of his title, is void for want of capacity in one of the parties thereto, even though such deed may have been specially set up in the pleadings, and no formal reply or notice of attack upon it has been given before the trial. Fitzgerald *v.* Shelton, 95 N. C. 519.

Where the defendant in ejectment sets up an equitable defense, he cannot prevent the plaintiff's recovery by merely proving that he has a lien against the property. Schierloh *v.* Schierloh, 72 Hun 150, 25 N. Y. Supp. 676.

94. It is held in some jurisdictions that though equitable defenses may be admitted in actions of ejectment, the evidence must show such a defense as would authorize the defendant to enjoin the judgment at law, should one be recovered against him. Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172; Spratt *v.* Price, 18 Fla. 289; Horne *v.* Carter, 20 Fla. 45.

95. Where the defense to the ac-

precluding equitable defenses does not prevail where the plaintiff shows no title.[96] In Pennsylvania it is held that the defense must be supported by evidence sufficiently clear to satisfy a chancellor.[97] In Virginia certain equitable defenses are allowed when evidenced by writing, but parol evidence to establish them is inadmissible.[98] But even where an equitable defense is proper to be shown, it is available only when it is specially pleaded.[99]

Disclaimer. — Where the defendant disclaims as to any part of the premises in controversy, any evidence as to the title to such part is irrelevant and properly excluded.[1]

B. Prior Outstanding Title. — a. *General Rule.* — The general rule is that the defendant in an action of ejectment, when he does not claim under the plaintiff, may, in order to defeat a recovery by the plaintiff, give evidence of a prior outstanding title to the premises in controversy;[2] although he does not connect himself

tion is that the defendant is entitled to possession under a parol contract for a conveyance from the plaintiff's grantor, of which the plaintiff had notice, this defense must be established by evidence sufficiently clear to entitle the party to specific performance. Davis *v.* Holbrook, 25 Colo. 493, 55 Pac. 730.

96. The rule that the defendant is precluded from setting up an equitable defense in an action of ejectment, does not prevail where the plaintiff has shown no title in himself and the equitable right or interest of the defendant is independent of the title claimed by the plaintiff, and has no connection with it. Shaw *v.* Hill, 83 Mich. 322, 47 N. W. 247, 21 Am. St. Rep. 607.

97. In Pennsylvania, where an equitable defense is set up to an action of ejectment, the action is turned into a proceeding in equity; and the defendant must prove his equitable defense by evidence so clear and conscionable as to satisfy a chancellor; and if the chancellor is of the opinion that the evidence is not sufficient to sustain a verdict in favor of the equitable defense, it is his duty to say so to the jury, and withdraw the evidence from their consideration. Wylie *v.* Mansley, 132 Pa. St. 65, 18 Atl. 1,092.

98. In Virginia, by virtue of statutory regulations, certain equitable defenses are admissible in an action of ejectment, but they must be evidenced by writing, and parol evidence to establish them is inadmissible. Suttle *v.* R. F. & P. R. Co., 76 Va. 284; Davis *v.* Teays, 3 Gratt. (Va.) 270; Jennings *v* Gravely, 92 Va. 377, 23 S. E. 763.

99. *California.* — Cadiz *v.* Majors, 33 Cal. 288; Kenyon *v.* Quinn, 41 Cal. 325; Swain *v.* Duane, 48 Cal. 358; Manly *v.* Howlett, 55 Cal. 94.

Missouri. — Kennedy *v.* Daniels, 20 Mo. 104; LeBeau *v.* Armitage, 47 Mo. 138.

Montana. — Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298; Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

Nebraska. — Colvin *v.* Land Ass'n, 23 Neb. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

Nevada. — Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801.

North Carolina. — Hinton *v.* Pritchard, 102 N. C. 94, 8 S. E. 887; Talbert *v.* Becton, 111 N. C. 543, 16 S. E. 322; Wilson *v.* Wilson, 117 N. C. 351, 23 S. E. 272; McLaurin *v.* Cronly, 90 N. C. 50; Rollins *v.* Henry, 78 N. C. 342.

Ohio. — Stewart *v.* Hoag, 12 Ohio St. 623; Powers *v.* Armstrong, 36 Ohio St. 357.

Wyoming. — Anderson *v.* Rasmussen, 5 Wyo. 44, 36 Pac. 820.

1. Waugh *v.* Andrews, 24 N. C. 75.

2. *England.* — Jones *v.* Jones, 7 T. R. 47.

Arkansas. — Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256.

Illinois. — Cobb *v.* Lavalle, 89 Ill. 331, 31 Am. Rep. 91.

with it,[3] unless he is a mere intruder, or unless both parties deraign title from a common source.[4]

Kentucky. — Colston *v.* McVay, 1 A. K. Marsh. 251.

Maryland. — Hall *v.* Gittings, 2 Har. & J. 112.

North Carolina. — Love *v.* Gates, 20 N. C. 363; Keathley *v.* Branch, 88 N. C. 379; Thomas *v.* Hunsucker, 108 N. C. 720, 13 S. E. 221; Doe *v.* Fields, 52 N. C. 37, 75 Am. Dec. 450.

Pennsylvania. — Bear Val. Coal Co. *v.* Dewart, 95 Pa. St. 72.

Tennessee. — Walker *v.* Fox, 85 Tenn. 154, 2 S. W. 98.

Virginia. — McKinney *v.* Daniel, 90 Va. 702, 19 S. E. 880.

Where defendant is in possession claiming under color of title, he can defeat the plaintiff's recovery by showing an outstanding title in a stranger. Snedecor *v.* Freeman, 71 Ala. 140; Saltmarsh *v.* Crommelin, 24 Ala. 347; Bird *v.* Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Gregory *v.* Haynes, 13 Cal. 592; Hogans *v.* Carruth, 18 Fla. 587.

The defendant may rely upon an outstanding title in the commonwealth, and if it appears that the title to the property has been forfeited to the commonwealth for non-payment of taxes or other cause, and there is no evidence that it has been redeemed by the owner or resold or regranted by the commonwealth, there is no presumption that such title has been extinguished in favor of a claimant who shows long possession. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

A defendant in possession may defeat a recovery by a plaintiff in ejectment, who relies upon his title, by proof of an outstanding title in a third person, and such outstanding title must be subsisting and valid as against the plaintiff at the time of the trial, but need not be so against the defendant. Henderson *v.* Wanamaker, 79 Fed. 736.

Where the defendant proves an outstanding title in a third party, the plaintiff may rebut this evidence by showing that it is not a valid subsisting title such as would defeat his recovery. Dickinson *v.* Collins, 1 Swan (Tenn.) 516; Sharp *v.* Johnson, 22 Ark. 79.

It has been held that where the demandant in a writ of entry shows an actual seisin in himself of the demanded premises, such seisin cannot be disproved on the part of the tenant by showing title in a third person under whom he does not claim. Enfield *v.* Permit, 8 N. H. 512; Bailey *v.* Merch, 3 N. H. 274.

3. Bloom *v.* Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299 (*cited* in Tinkham *v.* Erie R. Co., 53 Barb. (N. Y.) 393; Gillett *v.* Stanley, 1 Hill (N. Y.) 121; Gardiner *v.* Tisdale, 2 Wis. 253, 60 Am. Dec. 407; West *v.* East Coast Cedar Co., 113 Fed. 737; King *v.* Mullins, 171 U. S. 404; Reves *v.* Low, 8 App. D. C. 105; Jenkins *v.* Southern R. Co., 109 Ga. 35, 34 S. E. 355; Rowson *v.* Barbe, 51 La. Ann. 247, 25 So. 139.

The defendant may prove, even by presumptive evidence, an outstanding title which will defeat the plaintiff's recovery, even though he does not connect himself with such title. Townsend *v.* Downer, 32 Vt. 183.

4. Stephenson *v.* Reeves, 92 Ala. 582, 8 So. 695; Matkin *v.* Marx, 96 Ala. 501, 11 So. 633; Jones *v.* Perkins, 1 Stew. (Ala.) 512; Hardin *v.* Forsythe, 99 Ill. 312; King *v.* Barns, 13 Pick. 24.

Statement of the Doctrine. — "It is admitted, as a general rule, that it is competent for a defendant in ejectment to protect himself in his possession by showing an outstanding title in another, upon the principle that the plaintiff in ejectment must recover upon the strength of his own title. The rule is as ancient as the action itself, and has its origin in the just presumption that the party in possession is either the true owner or holds under the true owner, until the contrary is made to appear.

"But the exception is almost as ancient as the rule, that when the plaintiff in ejectment shows that both parties derive their title from the same common source, it is not competent for the defendant, after such acknowledgment of the title of the common source, to protect himself in possession by proving an outstanding

General Denial. — And it is held also that the defendant may prove an outstanding title under a general denial without pleading it.[5] But where the defendant is a mere intruder, he cannot protect himself by showing an outstanding title in a stranger.[6] It has been intimated, however, that such a defense might be allowed if established

title in a third person, with which he shows no connection. For in such case, the law will presume, from such acknowledgment on his part, that such title is vested in the common source, and inures to the benefit and support of the plaintiff's title." Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

Where the defendant in ejectment sets up an outstanding title as a bar to the plaintiff's recovery, the owner of the outstanding title must be so identified as to enable the adverse party to dispute his title by proof of an abandonment or of incapacity to hold it. Glasgow *v.* Baker, 14 Mo. App. 201.

"Although the law permits a defendant in ejectment to set up an outstanding title in a third person with which he has no connection, yet it is a defense *stricti juris,* and new trials will not be granted to enable a defendant to avail himself thereof, unless the court below have either refused to permit it to be made, or have grossly erred in acting on it." Peck *v.* Carmichael, 9 Yerg. (Tenn.) 325.

Rule in Kansas. — In Kansas the defense of an outstanding title is not allowed. The plaintiff may recover if he has any right to the property which is paramount to the rights possessed by the defendant, although the legal title to the property may be outstanding in some third person; and although such third person may have a better right to the property than either the plaintiff or the defendant. Thomas *v.* Rauer, 62 Kan. 568, 64 Pac. 80.

5. *Alabama.* — Matkin *v.* Marx, 96 Ala. 501, 11 So. 633.

California. — Dyson *v.* Bradshaw, 23 Cal. 528.

New York. — Raynor *v.* Timerson, 46 Barb. 518.

North Carolina. — Fitzgerald *v.* Shelton, 95 N. C. 519.

Tennessee. — Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67; Bleidorn *v.* Pilot Mountain Coal & Min. Co., 89 Tenn. 166, 204, 15 S. W. 737.

But after the defendant in possession has already put in his defense, he is precluded from showing that there are also others in possession who have the actual title. Thomas *v.* Orrell, 27 N. C. 569, 44 Am. Dec. 58; McClennan *v.* McCleod, 75 N. C. 64.

6. *Alabama.* — Wilson *v.* Glenn, 68 Ala. 383; Crommelin *v.* Minter, 9 Ala. 594.

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

California. — Carleton *v.* Townsend, 28 Cal. 219; Bird *v.* Libros, 9 Cal. 1, 70 Am. Dec. 617; Foot *v.* Murphy, 72 Cal. 104, 13 Pac. 163; McCreery *v.* Sawyer, 52 Cal. 257.

Connecticut. — Phelps *v.* Yeomans, 2 Day 227.

District of Columbia. — Bradshaw *v.* Ashley, 14 App. D. C. 485.

Georgia. — Sparks *v.* Conrad, 99 Ga. 643, 27 S. E. 764.

Illinois. — Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837; Casey *v.* Kimmel, 181 Ill. 154, 54 N. E. 905.

Iowa. — Williams *v.* Swetland, 10 Iowa 51.

Michigan. — Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390.

New York. — Jackson *v.* Harder, 4 Johns. 203; Jackson *v.* Bush, 10 Johns. 223.

Virginia. — Tapscott *v.* Cobbs, 11 Gratt. 172.

"If a defendant enters into possession under the plaintiff, or by his permission, or is an intruder upon the possession of the plaintiff, having no claim or color of title, he is estopped from setting up, in an action of ejectment, an outstanding title. In all other cases he may destroy the plaintiff's right to recover by showing an outstanding title with which he in no way connects himself; his possession being good against all others, except the true

by evidence beyond controversy,[7] and it has been held that the rule has no application where such outstanding title is derived from the plaintiff;[8] and although a mere intruder is precluded from showing an outstanding title, he may show that the plaintiff's title has expired, or was purchased subsequent to the commencement of the action.[9]

b. *Defendant in Default as Vendee.* — Where the defendant is the vendee in possession under a contract of sale after default in payment, he can not avail himself of an outstanding title disclosed by the plaintiff in his evidence.[10] Nor in such a case can the defendant show an outstanding title.[11]

c. *Both Parties Claiming Under Common Grantor.* — Where both the plaintiff and defendant in ejectment claim under the same grantor, the defendant can not show an outstanding title in a third person.[12] But although claiming from a common source, the defendant may prove a paramount outstanding title if he connects himself with it.[13]

owner." Guilmartin *v.* Wood, 76 Ala. 204.

7. Where the plaintiff has made out a *prima facie* case, and the defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder by setting up a title in third persons with whom he has no privity, it is incumbent upon him to establish the existence of such outstanding title beyond controversy, and it is not sufficient for him to show that there may possibly be such a title. Greenleaf *v.* Birth, 6 Pet. (U. S.) 302.

Where the plaintiff shows title to the property in dispute by an open and notorious adverse possession, and that the defendant acquired possession of the property wrongfully and without permission of the plaintiff, the defendant cannot defeat the plaintiff's recovery by showing an outstanding title in a stranger with which he has in no way connected himself. Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837.

8. The rule that a defendant, who is a mere trespasser, is precluded from showing an outstanding title in a third person, is properly applied to a case where such outstanding title is superior or better than that of the plaintiff, or adverse thereto, but it has no application to a case where such outstanding title is derived from the plaintiff. Dyson *v.* Bradshaw, 23 Cal. 528. *Compare* Gardiner *v.* Tisdale, 2 Wis. 253, 60 Am. Dec. 407.

9. Although a mere intruder is precluded from showing an outstanding title, he may prove that the plaintiff's title has expired, or that he has purchased it subsequent to the commencement of the action. Hardin *v.* Forsythe, 99 Ill. 312.

10. Seabury *v.* Stewart, 22 Ala. 207, 58 Am. Dec. 254.

11. *Alabama.* — Seabury *v.* Stewart, 22 Ala. 207, 58 Am. Dec. 254; Larkin *v.* Bank, 9 Port. 434, 33 Am. Dec. 324.

Kentucky. — Million *v.* Riley, 1 Dana 359, 25 Am. Dec. 149; Logan *v.* Steele, 23 Ky. 101.

New York. — Jackson *v.* Stewart, 6 Johns. 34; Jackson *v.* Ayers, 14 Johns. 224; Jackson *v.* Walker, 7 Cow. 637.

Pennsylvania. — Jackson *v.* McGinness, 14 Pa. St. 331.

Vermont. — Greeno *v.* Munson, 9 Vt. 37, 31 Am. Dec. 605.

12. Matkin *v.* Marx, 96 Ala. 501, 11 So. 633; Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646. *Compare* Wolfe *v.* Dowell, 13 Smed. & M. 103, 51 Am. Dec. 147; Jackson *v.* DeWalts, 7 Johns. 157; Jackson *v.* Hinman, 10 Johns. 292; Easterwood *v.* Dunn, 19 Tex. Civ. App. 320, 47 S. W. 285.

13. Sell *v.* McAnaw, 138 Mo. 267,

d. *Outstanding Equitable Interest.* — The defendant in an action of ejectment cannot, in order to defeat plaintiff's recovery, give evidence of a mere outstanding equitable interest in a third person.[14]

Mortgage. — The defendant in an action of ejectment cannot give in evidence, as an outstanding title, a mortgage with which he is in no way connected.[15]

C. ABANDONMENT. — Where the plaintiff in an action is able to show only a prior possession the defendant may, in order to

39 S. W. 779; Neher *v.* Armigo, 9 N. M. 325, 54 Pac. 236.

The rule that where both parties claim from a common source the defendant is estopped from setting up an outstanding title, will not prevent the defendant from putting in evidence the legal title of a third party and connecting himself with it, in order to show that he, the defendant, has the best title from the common source. New England Mtg. Co. *v.* Clayton, 119 Ala. 361, 24 So. 362.

The supreme court of Georgia laid down the following rule: "As long as the defendant claims exclusively under the common grantor, he cannot show an outstanding title in a third person, for he is estopped to deny the title of him under whom he claims. Of course, where he finds the title of the common grantor defective he may buy up the better title. And the defendant may set up another and better title than that of the common source, in any case where he claims also under that better title and shows his connection with it. By the great weight of authority, however, he cannot set up another and better title than that of the common grantor, under whom he and the plaintiff claim, unless he connects himself with that better title." Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44.

The Rule in Texas. — "Where both parties claim title to the land in controversy under a common source, it is well settled, both by statute and decisions, that the plaintiff need only exhibit superior title therefrom to entitle him to judgment. This is a rule both useful and convenient, when applied in a proper case, and is not to be lightly disregarded. It does not, however, possess the dignity of an estoppel, and preclude the parties from asserting any other title. On the contrary, either of the parties has the right to assert as many different, and even conflicting, titles as he may be able to produce." Starr *v.* Kennedy, 5 Tex. Civ. App. 502, 27 S. W. 26.

14. *England.* — Doe *v.* Staple, 2 T. R. 684.

Illinois. — Wales *v.* Bogue, 31 Ill. 464; Fischer *v.* Eslaman, 68 Ill. 78; Fleming *v.* Carter, 70 Ill. 286.

Kentucky. — Gilpin *v.* Davis, 2 Bibb 416, 5 Am. Dec. 622.

Michigan. — Whiting *v.* Butler, 29 Mich. 122; Ryder *v.* Flanders, 30 Mich. 336; Conrad *v.* Long, 33 Mich. 78.

Missouri. — Moreau *v.* Detchemendy, 41 Mo. 432.

In ejectment brought by a beneficiary under a plain trust, or by those claiming under him, where, by the terms of the trust, the legal estate should have been conveyed to the beneficiary before the commencement of the action, the execution of the trust will be presumed and the plaintiff's recovery will not be defeated by failing to disprove any outstanding interest in the trustee. England *v.* Slade, 4 T. R. 682.

15. *Alabama.* — Allen *v.* Kellam, 69 Ala. 442.

Connecticut. — Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379; Savage *v.* Dooley, 28 Conn. 411, 73 Am. Dec. 680.

Illinois. — Hall *v.* Lance, 25 Ill. 250; Oldham *v.* Pfleger, 84 Ill. 102; Emory *v.* Keighan, 88 Ill. 482; Barrett *v.* Hinckley, 124 Ill. 32, 7 N. E. 863, 7 Am. St. Rep. 331.

Kentucky. — Bartlett *v.* Borden, 13 Bush 45.

Missouri. — Woods *v.* Hildebrand, 46 Mo. 284, 2 Am. Rep. 513; Hardwick *v.* Jones, 65 Mo. 54.

New Jersey. — Den *v.* Diman, 10 N. J. L. 156.

defeat recovery by the plaintiff, show that the latter voluntarily abandoned his possession with no intention of returning.[16]

Burden of Proof. — Where the defendants in ejectment prove an outstanding title in a third party, the burden is upon the plaintiff to show an abandonment of this title; abandonment of title will not be presumed.[17]

D. Impeachment of Plaintiff's Title. — As a general rule where the defendant in an action of ejectment has acquired his possession and the title he asserts derivatively from the plaintiff, he is precluded from giving any evidence the effect of which would be to impeach the plaintiff's title.[18]

Vendor and Vendee. — In an action of ejectment by the vendor in a contract of sale against the vendee in possession, the vendee is estopped to deny the plaintiff's title.[19]

New York. — Jackson *v.* Pratt, 10 Johns. 381.

16. Bequette *v.* Caulfield, 4 Cal. 278, 60 Am. Dec. 615; Bird *v.* Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Mallett *v.* Min. Co., 1 Nev. 188, 90 Am. Dec. 484; Jackson *v.* Walker, 7 Cow. (N. Y.) 637.

In an action of ejectment to recover possession of a mining claim where the defense set up was abandonment, the fact that the plaintiff, long prior to the commencement of the present action, brought another suit to recover possession of the same ground against other parties who were then in possession and claiming it adversely to him, and had prosecuted it successfully to final judgment, was strong evidence if not conclusive upon the question of abandonment. Richardson *v.* McNulty, 24 Cal. 339.

Rule Stated. — "When the strict legal title is not involved, and the plaintiff relies upon a right to recover founded upon a naked possession, the defendant may defeat a recovery by proving the premises were abandoned by the plaintiff before the alleged entry of the defendant, and were therefore at the time of the entry *publici juris*, and he may do this under a simple denial of the plaintiff's right to the possession." Willson *v.* Cleaveland, 30 Cal. 192.

17. Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67; Buttery *v.* Brown (Tenn.), 52 S. W. 713. See also Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 81.

18. Tennessee R. Co. *v.* East Alabama R. Co., 75 Ala. 516; Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

19. *United States.* — Burnett *v.* Caldwell, 9 Wall. 290; Heermans *v.* Schmaltz, 7 Fed. 566.

Alabama. — Ware *v.* Dewberry, 84 Ala. 568; Seabury *v.* Stewart, 22 Ala. 207, 58 Am. Dec. 254; Tennessee, etc., Ry. Co. *v.* East Alabama R. Co., 75 Ala. 516.

California. — Coates *v.* Cleaves, 92 Cal. 427, 28 Pac. 580.

Florida. — Goodwin *v.* Markwell, 37 Fla. 464, 19 So. 885.

Georgia. — Hill *v.* Winn, 60 Ga. 337.

Illinois. — McKibben *v.* Newell, 41 Ill. 461.

New Jersey. — Tindall *v.* Conover, 21 N. J. L. 651.

New York. — Whiteside *v.* Jackson, 1 Wend. 418; Jackson *v.* Spear, 7 Wend. 400; Spencer *v.* Tobey, 22 Barb. 260.

North Carolina. — Love *v.* Edmonston, 23 N. C. 152; Farmer *v.* Pickens, 83 N. C. 549.

Pennsylvania. — Jackson *v.* McGinness, 14 Pa. St. 331.

South Dakota. — Coleman *v.* Stalnacke, 15 S. D. 242, 88 N. W. 107.

Tennessee. — Meadows *v.* Hopkins, Meigs 181, 33 Am. Dec. 140.

Texas. — Baumgarten *v.* Smith, 37 Tex. 439.

Vermont. — Greeno *v.* Munson, 9 Vt. 37, 31 Am. Dec. 605.

Landlord and Tenant. — So where the defendant in ejectment is the plaintiff's tenant, he is precluded from introducing evidence the effect of which would be to dispute the plaintiff's title, so long as he remains in possession as tenant.[20] But the tenant in such an action may show that the title under which he entered has expired, or has been extinguished.[21]

E. Possession of Third Person. — Where plaintiff claims title

Wisconsin. — Miller *v.* Larson, 17 Wis. 624; Cutler *v.* Babcock, 79 Wis. 484, 48 N. W. 494.

Compare Macklot *v.* Dubreuil, 9 Mo. 473, 43 Am. Dec. 550.

The rule that the vendee, under a contract of sale, is estopped from denying the title of his vendor, applies also to anyone coming in under the vendee, either with his consent or as an intruder. Jackson *v.* Walker, 7 Cow. (N. Y.) 637.

The rule that the vendee is estopped from denying the title of his vendor does not apply to a party already in possession of lands, recognizing the title of a claimant and agreeing to purchase such title. He may subsequently deny such title, set up title in himself, and show that his acknowledgment was produced by imposition or fraud. Jackson *v.* Spear, 7 Wend. (N. Y.) 400.

The rule that the vendee in possession under a contract of sale is estopped from denying the title of his vendor when sued in ejectment by the latter, does not apply where the land is claimed by a purchaser at an execution sale against the vendor; in such case, the vendee may show that the title of his vendor was merely equitable and not subject to sale on execution. Million *v.* Riley, 1 Dana (Ky.) 359, 25 Am. Dec. 149.

20. *Alabama.* — Bishop *v.* Lalouette, 67 Ala. 197.

Georgia. — Williams *v.* Cash, 27 Ga. 507, 73 Am. Dec. 739.

Michigan. — Nims *v.* Sherman, 43 Mich. 45, 4 N. W. 434.

New York. — Jackson *v.* Whitford, 2 Caines 215; Jackson *v.* Vosburgh, 7 Johns. 186; Brant *v.* Livermore, 10 Johns. 358.

Vermont. — Lord *v.* Bigelow, 8 Vt. 445.

Where it appears that the defendant in ejectment has entered by permission of one who is a tenant in common with the plaintiff, he will be precluded from setting up an adverse title. Jackson *v.* Creal, 13 Johns. (N. Y.) 116. See article "Landlord and Tenant."

21. *England.* — England *v.* Slade, 4 T. R. 682.

Alabama. — Clarke *v.* Clarke, 51 Ala. 498.

Colorado. — Milsap *v.* Stone, 2 Colo. 137.

Illinois. — Hardin *v.* Forsythe, 99 Ill. 312.

Indiana. — Pence *v.* Williams, 14 Ind. App. 86, 42 N. E. 494.

Kentucky. — Logan *v.* Steele, 23 Ky. 101.

Michigan. — Jenkinson *v.* Winans, 109 Mich. 524, 67 N. W. 549.

Vermont. — Orleans Grammar School *v.* Parker, 25 Vt. 696.

See also article "Landlord and Tenant."

Devacht *v.* Newsam, 3 Ohio 57; Hardin *v.* Forsythe, 99 Ill. 312; Clarke *v.* Clarke, 51 Ala. 498.

The estoppel which prevents a tenant from disputing the title of his landlord in the action of ejectment only continues while the tenant continues in the possession of the property in dispute. After he surrenders possession, he, or those claiming under him, may set up an independent claim to the property in dispute. Bertram *v.* Cook, 44 Mich. 396, 6 N. W. 868.

In ejectment between landlord and tenant the tenant cannot deny the landlord's possessory right, nor can those claiming under him; but if the plaintiff claims the premises in fee, the tenant may deny that he has any greater right than that of possession. Jochen *v.* Tibbells, 50 Mich. 33, 14 N. W. 690.

See article "Landlord and Tenant."

by a prior possession, the defendant cannot prove an older possession in a third person through whom he does not claim.[22]

III. FRAUDULENT CONVEYANCES.

1. In General. — As a general rule, the title of either party in an action of ejectment may be impeached by evidence that it was obtained through fraud.[23] But in those jurisdictions which still adhere to the rule excluding all defenses in ejectment which are not legal, evidence that a title was obtained through fraud is inadmissible.[24]

2. Question for Jury. — Where the title of either party in ejectment is attempted to be impeached for fraud, the question of fraud is one of fact for the jury.[25]

Patents. — Evidence is admissible in an action of ejectment to show that a patent from the government is absolutely void, but not to show that it was irregularly issued.[26]

22. Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692.

23. *United States.* — Torrey *v.* Beardsley, 4 Wash. 242, Fed. Cas. No. 14,104.

Georgia. — Williams *v.* Rawlins, 10 Ga. 491.

Illinois. — Rogers *v.* Brent, 10 Ill. 573, 50 Am. Dec. 422.

Kansas. — Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157; Rauer *v.* Thomas, 60 Kan. 71, 55 Pac. 285.

Minnesota. — State *v.* Bachelder, 5 Minn. 223.

Nebraska. — Franklin *v.* Kelley, 2 Neb. 79.

New York. — Wilcox *v.* American Telephone Co., 176 N. Y. 115, 68 N. E. 153.

North Carolina. — Helms *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893.

Virginia. — White *v.* Jones, 4 Call 253, 2 Am. Dec. 564.

Where neither the defendant nor those through whom they claim were parties to any of the conveyances through which the plaintiff claims, they cannot attack any link in the plaintiff's title on the ground that it was fraudulently obtained. Steeple *v.* Downing, 60 Ind. 478.

24. *Maryland.* — Williams *v.* Peters, 72 Md. 584, 20 Atl. 175.

Michigan. — Harrett *v.* Kinney, 44 Mich. 457, 7 N. W. 63; Paldi *v.* Paldi, 95 Mich. 410, 54 N. W. 903; Gale *v.* Eckhart, 107 Mich. 465, 65 N. W. 274.

New York. — People *v.* Livingston, 8 Barb. (N. Y.) 253.

Tennessee. — Smith *v.* Winton, 1 Overt. 230, 3 Am. Dec. 755; Dodson *v.* Cocke, 1 Overt. 314, 3 Am. Dec. 757.

Evidence of fraud is inadmissible to attack any of the muniments of title, unless previous notice thereof has been given to the opposite party. Kieth *v.* Catchings, 64 Ga. 773.

Under a statute, allowing equitable defenses in actions at law, it was held that evidence was inadmissible on the part of the defendant showing that the title under which plaintiff claimed was derived through a voluntary conveyance to defraud creditors. Williams *v.* Peters, 72 Md. 584, 20 Atl. 175.

25. Lee *v.* Flannagan, 29 N. C. 471; Hardy *v.* Skinner, 31 N. C. 191; Hardy *v.* Simpson, 35 N. C. 132; Black *v.* Caldwell, 49 N. C. 150.

26. *United States.* — Polk *v.* Wendal, 9 Cranch 87; Stringer *v.* Young, 3 Pet. 320; Boardman *v.* Reed, 6 Pet. 328; Patterson *v.* Winn, 11 Wheat. 380; French *v.* Fyan, 93 U. S. 169; Moore *v.* Robbins, 96 U. S. 530; Minter *v.* Crommelin, 18 How. 87; Sherman *v.* Buick, 93 U. S. 209.

Alabama. — Bates *v.* Herron, 35 Ala. 117; Masters *v.* Eastis, 3 Port.

IV. MESNE PROFITS. — JUDGMENT IN EJECTMENT.

In an action to recover mesne profits, the judgment in ejectment is conclusive evidence of only two facts, viz., the right of possession in the plaintiff and the occupation of the defendant at the institution of the ejectment action. Whatever beyond these facts may be necessary for a recovery must be shown by competent evidence outside the record in the ejectment.[27]

368; Saltmarsh *v.* Crommelin, 24 Ala. 347; Stephens *v.* Westwood, 25 Ala. 716.

Arkansas. — Sweeptzer *v.* Gaines, 19 Ark. 96.

California. — Yount *v.* Howell, 14 Cal. 465.

Florida. — Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Iowa. — Arnold *v.* Grimes, 2 Greene 77.

Minnesota. — State *v.* Bachelder, 5 Minn. 223.

Missouri. — Barry *v.* Gamble, 8 Mo. 88; Perry *v.* O'Hanlon, 11 Mo. 585.

New York. — Jackson *v.* Lawton, 10 Johns. 23, 6 Am. Dec. 311; Jackson *v.* Hart, 12 Johns. 77, 7 Am. Dec. 280; People *v.* Livingston, 8 Barb. 253; Jackson *v.* Marsh, 6 Com. 281.

North Carolina. — Strother *v.* Cathey, 1 Murph. 162, 3 Am. Dec. 683.

Tennessee. — Overton *v.* Campbell, 5 Hayw. 165, 9 Am. Dec. 780.

Virginia. — Witherington *v.* McDonald, 1 Hen. & Munf. 306, 3 Am. Dec. 603; Norvell *v.* Camm, 6 Munf. 233, 8 Am. Dec. 742; French *v.* Loyal Co., 5 Leigh 627.

27. *California.* — Yount *v.* Howell, 14 Cal. 465.

Kentucky. — Marshall *v.* Depuy, 4 J. J. Marsh. 388.

New Jersey. — Den *v.* Snowhill, 13 N. J. L. 23, 22 Am. Dec. 496.

New York. — Dewey *v.* Osborn, 4 Cow. 329.

North Carolina. — Poston *v.* Jones, 19 N. C. 294.

Virginia. — Whittington *v.* Chritian, 2 Rand. 353.

In an action for mesne profits against a third person who was not a party to the action of ejectment, but who is claimed to have been the real owner and to have received the profits, the record in ejectment is not evidence of the plaintiff's title, but is admissible to show his possession. Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280.

When the mesne profits are claimed in an independent suit, the record of recovery in ejectment is, as to the title, only evidence of the right of possession of the plaintiff at the commencement of the action in which the recovery was had. Yount *v.* Howell, 14 Cal. 465.

When mesne profits are recovered in the action of ejectment, the proof must be limited to such as accrued subsequent to the ouster alleged, or, in other words, subsequent to the occupation of the defendant. Yount *v.* Howell, 14 Cal. 465; Payne *v.* Treadwell, 16 Cal. 221.

ELECTIONS.

By E. M. Stannard.

I. STATUTORY ELECTIONS.

1. The Evidence in General. — In the absence of statutory provisions regulating the same, the evidence and proof in election cases are, in general, governed by the same rules as are applicable to ordinary cases,[1] with perhaps the exception that more latitude is allowed in the admission of evidence and the same strictness with regard to technicalities is not observed.[2]

2. Effect of Statutory Provisions. — In many of the states where the true result of an election is in issue, the scope of the investigation, the rules of evidence and mode of making proof, especially in contested election cases, are, to a greater or less extent, regulated or prescribed by statute,[3] and where the same exist they must, as

1. *Colorado.* — Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666.

Illinois. — Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; McKinnon *v.* People, 110 Ill. 305; Clark *v.* Robinson, 88 Ill. 498; Hodge *v.* Linn, 100 Ill. 397.

Kentucky. — Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

Massachusetts. — *In re* Strong, 20 Pick. 484.

North Carolina. — People *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547.

New Mexico. — Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York. — People *v.* Seaman, 5 Denio 409.

Texas. — Davis *v.* State, 75 Tex. 420, 12 S. W. 957; McKinney *v.* O'Connor, 26 Tex. 5.

Wisconsin. — Carpenter *v.* Ely, 4 Wis. 420; State *v.* Elwood, 12 Wis. 551.

The same deduction will be drawn therefrom. Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75.

2. The most satisfactory evidence must always be adduced. People *v.* Robertson, 27 Mich. 116. In *quo warranto* the evidence should be confined strictly to the issue. State *v.* Roberts, 153 Mo. 112, 54 S. W. 520.

3. *Alabama.* — Griffin *v.* Wall, 32 Ala. 149, Vol. 1, Code 1896, C. 40, Art. 17; Wade *v.* Oates, 112 Ala. 325, 20 So. 495; Reid *v.* Moulton, 51 Ala. 255.

Arizona. — Rev. Stat. 1901, Title 20, C. 3.

Arkansas. — Rev. Stat., C. 57.

California. — Land *v.* Clark, 132 Cal. 673, 64 Pac. 1,071; Pomeroy's Code, C. 5, Title 2.

Colorado. — Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325; Lewis *v.* Boynton, 25 Colo. 486, 55 Pac. 732; Gen. Stat. 1883, C. 34.

Connecticut. — Rev. Stat. 1902, Title 8, C. 104.

Florida. — Rev. Stat. 1892, Title 4, C. 1.

Georgia. — Vol. 2, Code 1895, Title 6; Drake *v.* Drewry, 112 Ga. 308, 37 S. E. 432; Giun *v.* Linn, 83 Ga. 180, 9 S. E. 784.

Idaho. — Rev. Stat. 1887, C. 12.

Illinois. — Rodman *v.* Wurzburg, 183 Ill. 395, 55 N. E. 688; Kreider *v.* McFerson, 189 Ill. 605, 60 N. E. 49; Hurd's Rev. Stat. 1893, C. 46.

Indiana. — State *v.* Shay, 101 Ind. 36; Burns' Ann. Stat., C. 60.

Kansas. — Gen. Stat. 1901, C. 36, Art. 6.

Kentucky. — Stats. 1894, C. 41, Art. 8.

Louisiana. — Wolf's Rev. Laws 1896, Title "CONTESTED ELECTIONS."

Maine. — Bacon *v.* Commissioners, 26 Me. 491; Rev. Stat. 1883, C. 4.

Maryland. — Vol. 1, Pub. Laws, Art. 33.

Massachusetts. — Rev. Laws, 1902, Title 2, C. 11.

Michigan. — Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923; People *v.* Robertson, 27 Mich. 116; Compiled Laws 1897, Title 8.

Minnesota. — Newton *v.* Newell, 26

a rule, be strictly followed.[4]

3. Judicial Notice of the Result. — In some cases the courts will take judicial notice of the result of an election.[5]

4. The Best Evidence of the Result. — The best evidence of the result of an election is proof of the correct number of legal votes cast thereat for and against the respective candidates, or the questions or propositions submitted for decision.[6]

5. The Returns and Canvass as Evidence of the Result. — A. In General. — Official election returns are *quasi* records,[7] and competent evidence of the facts which they purport to show.[8] The returns

Minn. 529, 6 N. W. 346; Taylor *v.* Taylor, 10 Minn. 107.

Missouri. — Rev. Stat. 1899, C. 102.

Nebraska. — State *v.* Foxworthy, 29 Neb. 341, 45 N. W. 632; Consolidated Stats. 1891, C. 15.

New Jersey. — Vol. 2, Gen. Stat. 1895, Title "Elections."

New Mexico. — Compiled Laws 1897, p. 75; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York. — People *v.* Cook, 14 Barb. 259; Vol. 1, Rev. Stat., C. 6.

Ohio. — Powers *v.* Reed, 19 Ohio St. 189; 1 Bates' Ann. Stat., Title 14, C. 5.

Oregon. — 2 Hill's Ann. Laws, 1892, Title 4, C. 14; Wood *v.* Fitzgerald, 3 Or. 568.

South Dakota. — Rev. Code 1903, Sub. "Political Code," C. 19.

Tennessee. — Code 1896, C. 3, Art. 5; Bouldin *v.* Lockhart, 3 Baxt. 262.

Texas. — McKinney *v.* O'Connor, 26 Tex. 5; Rev. Stat. 1895, Title 36, C. 7.

Utah. — Rev. Stat. 1898, Title 18, C. 9.

Vermont. — Stats. 1894, Title 3, C. 12.

Washington. — 1 Hill's Stat. and Codes, Title 8, C. 6.

West Virginia. — Code C. 6.

Wisconsin. — Bashford *v.* Barstow, 4 Wis. 567.

4. Griffin *v.* Wall, 32 Ala. 149; State *v.* Commissioners, 22 Fla. 29; Marchant *v.* Langworthy, 6 Hill 646. An irregular certificate, People *v.* Robertson, 27 Mich. 116, or one certifying to a fact not warranted by the statute is not evidence. Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870; People *v.* Cook, 14 Barb. (N. Y.) 259. But in a case where the statute made a certificate of the record evidence, the original was held admissible. Crouse *v.* State, 57 Md. 327. Where the statute required that the clerk should canvass the votes cast upon the question of the relocation of the county seat, and to certify the result of the canvass without regard to the other votes cast at the same election, his certificate that a majority of the voters had voted for a certain place as county seat, or that the county seat had been changed, was not evidence. People *v.* Warfield, 20 Ill. 159.

5. Where a constitutional amendment has been adopted by a vote of the people, who, in general, participated in the election and acquiesced in the result, judicial notice will be taken that such amendment has thus become a part of the constitution. State *v.* Mimick, 15 Iowa 123. See also Prohibitory Amendment Cases, 24 Kan. 700; or that a vote against high license prevailed. Thomas *v.* Com., 90 Va. 92, 17 S. E. 788.

6. Piatt *v.* People, 29 Ill. 54; Roper *v.* Scurlock, 29 Tex. Civ. App. 464, 69 S. W. 456; Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764; Stewart *v.* Rose, 24 Ky. L. Rep. 1,759, 72 S. W. 271; Williams *v.* Shoudy, 12 Wash. 362, 41 Pac. 169; *In re* Strong, 20 Pick. (Mass.) 484; Word *v.* Sykes, 61 Miss. 649; Echols *v.* State, 56 Ala. 131; State *v.* Owens, 63 Tex. 261; State *v.* Judge, 13 Ala. 805.

7. Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505.

8. Hughes *v.* Holman, 23 Or. 481, 35 Pac. 298; Reynolds *v.* State, 61 Ind. 392; Windes *v.* Nelson, 159 Mo.

or canvass are *prima facie* evidence of the result of the proceedings.[9] In some cases they are held to be the best,[10] and in others sufficient evidence of the result,[11] but not always conclusive,[12] unless made so

51, 60 S. W. 129; Kerr *v.* Trego, 47 Pa. St. 292; Williams *v.* State, 69 Tex. 368, 6 S. W. 845. They are competent evidence so far as they are put to legitimate use, but if they go beyond and state other facts, the same are surplusage. *Ex parte* Heath, 3 Hill (N. Y.) 42; People *v.* Warfield, 20 Ill. 159; People *v.* Supervisors, 12 Barb. (N. Y.) 217; State *v.* Governor, 25 N. J. L. 331. Sometimes held to be the best, People *v.* McKane, 62 N. Y. St. 6, 30 N. Y. Supp. 95, or *prima facie* evidence of the facts therein stated. State *v.* Avery, 14 Wis. 122.

9. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Patton *v.* Coates, 41 Ark. 111; People *v.* Board, 14 Cal. 479; People *v.* Garner, 47 Ill. 246; Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711; Russell *v.* State, 11 Kan. 308; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060; *In re* Strong, 20 Pick. (Mass.) 484; Taylor *v.* Taylor, 10 Minn. 107; Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 582; People *v.* Minck, 21 N. Y. 539; *Ex parte* Heath, 3 Hill (N. Y.) 42; Phelps *v.* Schroeder, 26 Ohio St. 549; Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; State *v.* Owens, 63 Tex. 261; Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250; Bashford *v.* Barstow, 4 Wis. 567; State *v.* Meilike, 81 Wis. 574, 51 N. W. 875. That the returns or canvass are *prima facie* evidence arises from three presumptions, to wit: First — That sworn officers of the law will act honestly. Second—That they will perform their duties with care, and Third—That the votes received by them will be legal votes and none others. Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129. The proclamation of the judges required by statute is *prima facie* evidence of the result, and where no such proclamation is made the returns cannot be substituted therefor, especially where they have not been properly preserved according to law. Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3.

10. People *v.* Robertson, 27 Mich. 116; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596; Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814. When there is nothing but discredited ballots to contradict the returns, the latter will be held to be the best evidence of the result. Spidle *v.* McCracken, 45 Kan. 356, 25 Pac. 897; Owens *v.* State, 64 Tex. 500; Jeter *v.* Headley, 186 Ill. 34, 57 N. E. 784.

11. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

12. *Arkansas.* — Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680.

Illinois. — Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Indiana. — Reynolds *v.* State, 61 Ind. 392.

Kansas. — Dorey *v.* Lynn, 31 Kan. 758, 3 Pac. 557.

Louisiana. — Lanier *v.* Gallatas, 13 La. Ann. 175.

Maine. — Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156.

Michigan. — People *v.* McNeal, 63 Mich. 294, 29 N. W. 728.

Minnesota. — Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. 95.

Mississippi. — Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472.

New Hampshire. — Attorney-General *v.* Megin, 63 N. H. 378.

New Mexico. — Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York. — People *v.* Bell, 119 N. Y. 175, 23 N. E. 533.

North Carolina. — Rigsbee *v.* Durham, 99 N. C. 341, 6 S. E. 64.

Oregon. — Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

Pennsylvania. — Kerr *v.* Trego, 47 Pa. St. 292.

South Dakota. — Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

Tennessee. — McCraw *v.* Harralson, 4 Coldw. 34.

Texas. — Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

Wisconsin. — Bashford *v.* Barstow, 4 Wis. 567; State *v.* Avery, 14 Wis. 122. The integrity of the ballots es-

by statute.[13]

B. Defective or Irregular Returns. — Amended or supplementary returns,[14] or those not in proper form,[15] or illegally made,[16] or statements accompanying the returns, have no weight as evidence.[17] But the fact that defects, irregularities or informalities appear upon the face of the returns will not exclude them as evidence of the result, and the same may be supplied, explained and corrected by extrinsic evidence.[18]

tablished, a recount thereof will prevail over the presumption of correctness of the returns or canvass. Kindel *v.* Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234; McMahon *v.* Crockett, 12 S. D. 11, 80 N. W. 136; State *v.* Circuit Judge, 9 Ala. 338; or the count of the judges of election. Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3. And even where the ballots have not been duly preserved the returns are not conclusive. Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193; Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615. The returns are, to the board of canvassers, conclusive evidence. Hudmon *v.* Slaughter, 70 Ala. 546; Mayo *v.* Freeland, 10 Mo. 629; Moore *v.* Kessler, 59 Ind. 152; O'Ferrall *v.* Colby, 2 Minn. 180; State *v.* Head, 25 Ill. 325; Dishon *v.* Smith, 10 Iowa 212; Taylor *v.* Taylor, 10 Minn. 107; State *v.* Board, 16 Fla. 17; State *v.* Wilson, 24 Neb. 139, 38 N. W. 31; Maynard *v.* Board, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332; People *v.* Canvassers, 126 N. Y. 392, 27 N. E. 792. In the case of State *v.* Judge, 13 Ala. 805, a voter wrote the name "Pence" upon his ballot, and he was permitted to testify that he did not intend to vote for one Spence who was a candidate, and the vote was not counted. The evidence of the returns is conclusive in a collateral proceeding, in which the title to the office is not questioned. Hadley *v.* Albany, 33 N. Y. 603, 88 Am. Dec. 412.

Where the ballots have not been surrounded with all the securities contemplated by law it is for the court or jury to determine, under all the circumstances, whether they constitute more reliable evidence than the returns. *In re* Zacharias, 3 Pennsylvania Co. C. Rep. 656; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141. In cases in which the vote is *viva voce* the voter may testify how he voted, but if the proof is doubtful the record of the vote stands. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

13. Bacon *v.* Commissioners, 26 Me. 491; Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596; People *v.* Robertson, 27 Mich. 116; Hudson *v.* Solomon, 19 Kan. 177.

14. People *v.* Stevens, 5 Hill (N. Y.) 616; Bashford *v.* Barstow, 4 Wis. 567; People *v.* Supervisors, 12 Barb. (N. Y.) 217.

15. People *v.* Warfield, 20 Ill. 159.

16. People *v.* Robertson, 27 Mich. 116; Ewing *v.* Filley, 43 Pa. St. 384; Truehart *v.* Addicks, 2 Tex. 217.

17. State *v.* Governor, 25 N. J. L. 331.

18. Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106; Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505; Broaddus *v.* Mason, 95 Ky. 421, S. W. 1,060; Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 249; Chicago *v.* People, 80 Ill. 496; Meyers *v.* Moffet, 1 Brewst. (Pa.) 230; People *v.* Livingston, 79 N. Y. 279; Kingery *v.* Berry, 94 Ill. 515; State *v.* Judge, 13 Ala. 805; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Allen, 6 Wend. (N. Y.) 486; People *v.* Vail, 20 Wend. (N. Y.) 12. If the correctness of the return be corroborated by other evidence the mere failure to sign will not exclude it. Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75. If signed by a majority of the board it is sufficient, State *v.* Board, 17 Fla. 29, or by the clerk, Collins *v.* Masden (Ky.), 74 S. W. 720, so long as the statute is substantially complied with. Powers *v.* Reed, 19 Ohio St.

6. The Ballots as Evidence of the Result. — A. Admissibility. a. *In General.* — It seems to be the universal rule that the evidence furnished by a recount of the ballots cast at an election is admissible to prove the true number of votes cast, unless some statutory provision excludes them or prevents their being so used.[19]

189. Rich *v.* State Canvassers, 100 Mich. 453, 59 N. W. 181. Where a public document, prepared by a sworn officer, is produced by the officer to whose custody the law entrusts it, the party offering it in evidence need not explain an erasure or alteration visible upon its face and appearing to have been made at the same time and by the same hand as the obliterated letters and figures. The return of an election not otherwise impeached than by such an alteration is *prima facie* evidence of the number of votes cast. People *v.* Minck, 21 N. Y. 539.

Mistakes in the spelling of the names of candidates in the returns may be corrected. People *v.* Canvassers, 129 N. Y. 469, 29 N. E. 361.

19. *Alabama.* — Raid *v.* Moulton, 51 Ala. 255.

Arkansas.—Powell *v.* Holman, 50 Ark. 85, 4 S. W. 505.

California. — Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673.

Connecticut. — Mallett *v.* Plumb, 60 Conn. 352, 22 Atl. 772.

Illinois. — Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

Indiana. — Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Iowa. — DeLong *v.* Brown, 113 Iowa 370, 85 N. W. 624.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Michigan. — Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923.

Minnesota. — O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

Mississippi. — Newsom *v.* Cocke, 44 Miss. 352. 7 Am. Rep. 686.

Missouri. — State *v.* Draper, 50 Mo. 353.

Nebraska. — Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 582.

Nevada. — Schneider *v.* Bray, 22 Nev. 272, 39 Pac. 326.

New York. — People *v.* Livingston, 79 N. Y. 279.

North Carolina. — Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749.

Oregon. — Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

South Dakota. — McMahon *v.* Crockett, 12 S. D. 11, 80 N. W. 136.

Texas. — Owens *v.* State, 64 Tex. 500.

West Virginia. — Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250.

Wyoming. — Fishback *v.* Bramel, 6 Wyo. 293, 44 Pac. 840.

Where no steps have been taken for a recount of the ballots, and the time has elapsed within which they should have been destroyed according to law, such ballots have no legal existence and are not admissible as evidence of the result. State *v.* Bate, 70 Wis. 409, 36 N. W. 17. But where the statute provides for security and custody of the ballots, for all proper purposes, they are admissible, although not produced and proved within the time provided by statute for taking proof in the case. Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Failure to properly preserve the ballots does not render them inadmissible as evidence. Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193; Mallett *v.* Plumb, 60 Conn. 352, 22 Atl. 772, but they have been held inadmissible without evidence tending to prove that they were in the same condition as when canvassed, Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814; or properly preserved, DeLong *v.* Brown, 113 Iowa 370, 85 N. W. 624. Where misconduct on the part of the election officers appears, an inspection and comparison of the ballots with the poll lists should be allowed in connection with the oral evidence in reference thereto. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258; Hunnicut *v.* State, 75 Tex. 233, 12 S. W. 106.

b. *As Common Law Evidence.* — The evidence furnished by the ballots is admissible as common law evidence of the result.[20]

B. Weight and Sufficiency. — In cases in which the integrity and genuineness of the ballots are fully and satisfactorily established, the evidence furnished by a recount thereof is the primary and best evidence of the true number of votes cast at the election, and sufficient to overcome and control any other evidence of the result.[21] But where it appears that the ballots have been improperly kept, or otherwise doubt is cast upon their genuineness, such evidence is unreliable, weak and dangerous, and should be given weight only for what it is really worth.[22]

Where the mode of preservation is prescribed by statute, any omission to observe all the formalities and requirements may weaken, though not necessarily destroy, the force of the evidence furnished by a recount of the ballots.[23]

20. People *v.* Livingston, 79 N. Y. 279; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

21. *Alabama.*—State *v.* Judge, 13 Ala. 805.

California. — Gibson *v.* Board, 80 Cal. 359, 22 Pac. 225.

Connecticut. — Conaty *v.* Gardner, 78 Conn. 48, 52 Atl. 416.

Illinois. — Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615.

Indiana. — Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Iowa. — Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292.

Kansas. — Searle *v.* Clark, 34 Kan. 49, 7 Pac. 630.

Kentucky. — Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060.

Michigan. — People *v.* Robertson, 27 Mich. 116.

Missouri. — Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

Nebraska. — Martin *v.* Miles, 40 Neb. 135, 58 N. W. 732.

Oregon. — Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298.

Texas. — Jennett *v.* Owens, 63 Tex. 261.

But the rule has no application where the ballots have been tampered with. Owens *v.* State, 64 Tex. 500; Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814. And so also where it appears that there has been an opportunity for tampering; Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250; or that they have not been kept by the legal custodian. Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018. Where the poll books, tally sheets and certificates of the result of the canvass, supported by the parol testimony of the election officers, are opposed to the evidence furnished by the ballots, properly identified, the evidence of the latter is the best and will control. Kingery *v.* Berry, 94 Ill. 515.

22. The evidence of the ballots will be given weight according to the extent to which they are shown to be genuine. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; People *v.* Livingston, 79 N. Y. 279; and depending upon the care with which they have been preserved and upon their not having been changed. Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470.

The fact that the ballots were kept in a private house of the proper custodian, after being strung and sealed as required by statute, and when found apparently intact, will not discredit them as the best evidence. Apple *v.* Barcroft, 158 Ill. 649, 41 N. E. 1,116.

23. Statutes specifying care with which ballots are to be preserved are merely directory and strict compliance with their terms is not essential; People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491; O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416; Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596; a substantial compliance with

C. Proof of the Necessity for a Recount. — a. *Mode of Proof.* — Evidence tending to prove that errors were made in the original count, canvass or returns, or that fraud, malcontent or other irregularities entered into the conduct of the election proceedings, or generally that injustice might be done unless recourse were had to the evidence which a recount of the ballots would furnish, is properly admitted to prove the necessity for such recount.[24]

b. *Weight and Sufficiency.* — The sufficiency of the evidence to justify the ordering of a recount of the ballots is a matter that lies in the discretion of the court,[25] but the general rule seems to be that the evidence should be such as at least to discredit the *prima facie* correctness of the returns.[26]

D. Proof Preliminary to the Introduction of the Evidence of a Recount. — While in most instances the evidence furnished by a lawful[27] recount of the ballots is admissible, before it will be considered the best evidence of the result and overcome and control the *prima facie* correctness of the returns or canvass, it must affirmatively appear, with a reasonable degree of certainty, that the bal-

the provisions is sufficient; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; the weight to be given to the evidence is a question for the court or jury. People *v.* Livingston, 79 N. Y. 279.

24. Kindel *v.* Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234; Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814; Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298; Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258; Kneass Case, 2 Pars. Eq. Cas. (Pa.) 599.

25. Hope *v.* Flentge, 140 Mo. 390, 41 S. W. 1,002; O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416; Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 80; Word *v.* Sykes, 61 Miss. 649.

Where mistake, fraud and malconduct on the part of the election officers are alleged, the recount will be ordered as a matter of course upon the request of the complainant. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258. But where the court required some proof of the irregularities before ordering the recount, it was held that its discretion was commendably exercised. Kindel *v.* Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.

Second Recount.— It is improper to order a second recount on affidavits alleging on information and belief that the ballots have been tampered with, without specifying some substantive fact by which such charges may be proved. Sone *v.* Williams, 130 Mo. 530, 32 S. W. 1,016.

Third Recount. — After there had been two recounts of the ballots and a certificate thereof made by the county clerk, an application for another recount was properly refused. Hope *v.* Flentge, 140 Mo. 390, 41 S. W. 1,002.

The fact that the ballots of a certain precinct cannot be recounted will not prevent a recount of those cast at other precincts. Brown *v.* Crosson, 115 Iowa 256, 88 N. W. 366.

26. Alleged mistakes in the returns should be pointed out, Kneass Case, 2 Pars. Eq. Cas. (Pa.) 599, and the necessity for the recount must *prima facie* appear, Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349, as by showing errors, fraud, malconduct or corruption on the part of the election officers, or that it is highly probable that injustice will be done without the recount. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258; Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298; Kline *v.* Myers, 1 Bart Con. Elec. Cas. 741.

27. Recount must be lawfully

lots recounted are the genuine, identical and unaltered ballots cast;[28] otherwise the evidence may be rejected.[29]

E. Proof of Genuineness. — a. *Mode of Proof.* — The integrity or genuineness of the ballots as a whole from any election precinct or district is usually established by proof of the manner in which they have been preserved,[30] but after a *prima facie* showing of proper keeping has been made and the ballots recounted, the evidence so furnished may still be impeached or sustained by proof of other facts

made. People *v.* Robertson, 27 Mich. 116.

28. *Alabama.*—State *v.* Judge, 13 Ala. 805.

Arkansas.—Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505.

California. — Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738; Coffey *v.* Edmonds, 58 Cal. 521.

Colorado.—Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Illinois.—Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

Indiana. — Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Kansas.—Searle *v.* Clark, 34 Kan. 49, 7 Pac. 630.

Kentucky.—Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060.

Michigan. — Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923.

Nebraska. — Martin *v.* Miles, 40 Neb. 135, 58 N. W. 732.

Nevada. — Schneider *v.* Bray, 22 Nev. 272, 39 Pac. 326.

New York. — People *v.* Livingston, 79 N. Y. 279.

North Carolina. — Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749.

Oregon. — Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298.

Texas. — Jennett *v.* Owens, 63 Tex. 261.

Wyoming. — Fishback *v.* Bramel, 6 Wyo. 293, 44 Pac. 840.

The ballots being silent witnesses which can neither err nor lie, they are the best evidence of the manner in which the electors voted, when their integrity is satisfactorily established. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129; which must be beyond a reasonable doubt, Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801, but not necessarily beyond a possible doubt, or beyond the mere possibility of having been tampered with, O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416; Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250; Hudson *v.* Solomon, 19 Kan. 177. A showing that the ballots came through the proper channels provided by law for their keeping makes them *prima facie* evidence of the result. Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292. Identity is a question of fact for the court or jury. Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

29. Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298; Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

30. *Arkansas.* — Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505.

California. — Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738.

Colorado. — Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Connecticut. — Conaty *v.* Gardner, 78 Conn. 48, 52 Atl. 416.

Illinois. — Kreider *v.* McFerson, 189 Ill. 605, 60 N. E. 49; Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

Iowa. — Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Kentucky. — Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Michigan. — People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

Minnesota. — O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

Nebraska. — Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 582.

and circumstances relative to the ballots.[31] Upon the issue of the genuineness of the ballots it is proper to hear parol evidence as to their keeping,[32] and to show the conduct of the persons having them in charge, and whether or not they have been handled by unauthorized persons, or so circumstanced as to afford such persons an opportunity for altering or tampering with them.[33] It is also proper to take into consideration the condition and appearance of the ballots themselves, and the boxes and wrappers containing them, the seals thereon, and when, how and by whom sealed, and in general the

North Carolina. — Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749.

North Dakota. — Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018.

New York. — People *v.* Livingston, 79 N. Y. 279.

Oregon. — Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298.

South Dakota. — McMahon *v.* Crockett, 12 S. D. 11, 80 N. W. 136.

Where the evidence shows that the ballots have not been properly kept they are not the best evidence. Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250; their value as evidence depending upon the care with which they have been preserved and upon their not having been tampered with. Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470.

31. *Alabama.* — Griffin *v.* Wall, 32 Ala. 149.

California. — Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673.

Colorado. — Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Connecticut. — Conaty *v.* Gardner, 78 Conn. 48, 52 Atl. 416.

Indiana. — Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Kentucky. — Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Mississippi. — Pradat *v.* Ramsey, 47 Miss. 24.

Missouri. — Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

Nebraska. — Martin *v.* Miles, 40 Neb. 135, 58 N. W. 732.

Oregon. — Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298.

The *prima facie* proof of the integrity of the ballots may be met with proof that they are not in the same condition. Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292; and the fact that the court ordered a recount does not exclude such proof. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 S. E. 232, 8 Am. St. Rep. 349.

32. *California.* — Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738.

Illinois. — Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3.

Indiana. — Wheat *v.* Ragsdale, 27 Ind. 191.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Mississippi. — Word *v.* Sykes, 61 Miss. 649.

Nebraska. — Albert *v.* Twohig, 35 Neb. 563, 53 Mo. 582.

Nevada. — Schneider *v.* Bray, 22 Nev. 272, 39 Pac. 326.

New York. — People *v.* Livingston, 79 N. Y. 279.

North Dakota. — Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018.

Texas. — Owens *v.* State, 64 Tex. 500.

33. *California.* — Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738.

Connecticut. — Conaty *v.* Gardner, 78 Conn. 48, 52 Atl. 416.

Illinois. — Beall *v.* Albert, 159 Ill. 127, 42 N. E. 166.

Iowa. — Reed *v.* Jugenheimer, 118 Iowa 610, 92 N. W. 859.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Michigan. — Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923.

Nebraska. — Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 582.

Nevada. — Schnieder *v.* Bray, 22 Nev. 272, 39 Pac. 326.

New Jersey. — Convery *v.* Conger, 53 N. J. L. 658, 24 Atl. 1,002.

New York. — People *v.* Livingston, 79 N. Y. 279.

Oregon. — Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298.

Texas. — Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

degree of care exercised in keeping them inviolate,[34] and so it is proper to hear any evidence, direct or indirect, which has a tendency to show the facts and circumstances surrounding the ballots from the time they were cast until recounted, that might indicate that they had been tampered with, or to show the competency or incompetency of the evidence furnished by the recount as the best evidence of the number of votes cast.[35]

As circumstances bearing upon the integrity of the ballots, it is proper to show that papers put into the ballot boxes with the ballots were not found when the boxes were opened for the recount, or that discrepancies were found between the recount and the vote as shown by other records or memoranda;[36] or that particular tickets found upon the recount are not the same as when cast.[37] The fact

West Virginia. — Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250.

It is the duty of the court to hear all the evidence touching the mode or manner in which the ballots have been preserved. Word *v.* Sykes, 61 Miss. 649.

34. *California.* — People *v.* Burden, 45 Cal. 241.

Colorado. — Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Illinois. — Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Kentucky. — Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Mississippi. — Word *v.* Sykes, 61 Miss. 649.

Missouri. — Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

New York. — People *v.* Livingston, 79 N. Y. 279.

Oregon. — Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298.

Rhode Island. — State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1,018.

Texas. — Owens *v.* State, 64 Tex. 500.

West Virginia. — Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250.

An inspection of the ballots themselves will often furnish evidence of their having been tampered with. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

35. Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923; Pradat *v.* Ramsey, 47 Miss. 24; Hughes *v.* Holman, 23 Or. 481, 32 Pac. 298. The evidence should show the keeping of the ballots, how enveloped and in whose custody from the time the count began through all migrations until produced for the recount. Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801, and any evidence that the election proceedings were conducted irregularly or fraudulently. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Livingston, 79 N. Y. 279; or carelessly, tends to discredit the ballots. Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193.

36. Griffin *v.* Wall, 32 Ala. 149; Convery *v.* Conger, 53 N. J. L. 658, 24 Atl. 1,002; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 342; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992; Owens *v.* State, 64 Tex. 500; Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 582. Election officers may testify to the correctness of the canvass. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814; and it may be shown that votes were received aside from what appears from the ballots. State *v.* Judge, 13 Ala. 805. Anything tending to show that the ballots have not been changed is admissible, and a tabulated statement made by the judge at a former trial is admissible for that purpose. Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738.

37. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Pradat *v.* Ramsey, 47 Miss. 24. Evidence of how a person voted is admissible to show that the ballots have been tampered with. Henderson *v.* Albright, 12 Tex. Civ.

that interested parties might have had an opportunity to molest the ballots may properly be taken into consideration.[38]

b. *Weight and Sufficiency.* — (1.) In General. — The best evidence of the genuineness of the ballots is proof that they have been properly preserved, and whether or not they have been so preserved depends upon all the surrounding circumstances.[39] If the manner of their preservation up to the time of the recount appears to have been such that they are free from suspicious circumstances and surroundings, intact, inviolate, and in the same condition as when cast, their genuineness sufficiently appears.[40]

But where the evidence tends to show that the ballots have been improperly preserved, or that, in fact, they have been tampered with, the value of the evidence furnished by a recount is destroyed;[41] and the same is true where it appears that they might have been tampered with, unless there is evidence to show that they are in the same condition as when cast.[42] As a general rule, however, the probability of their having been tampered with, or that they are otherwise

App. 368, 34 S. W. 992; Owens *v.* State, 64 Tex. 500; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

38. Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; Word *v.* Sykes, 61 Miss. 649. It is proper to show that ballots have been changed and that all changes were in the interest of the person who was their custodian. Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

39. Kreider *v.* McFerson, 189 Ill. 605, 60 N. E. 49; Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

40. Mere irregularities on the part of the election officers in conducting the proceedings which are so explained by the board and other witnesses as to show no injurious results and that none of them had any fraudulent design, and that the irregularities in no way affected the result, will not discredit the ballots. Hayes *v.* Kirkwood, 136 Cal. 396, 69 Pac. 30.

Where the evidence showed that after the count the ballots were placed loose in the box with certain other tickets, without being separated or tied in packages; that several double ballots were put in the box loose without any distinguishing marks; that the ballot box was closed, locked and securely sealed and deposited in the town clerk's office; that the box had been for a time in the city clerk's office, after which it was returned to the town clerk's office, it was held that the genuineness of the ballots properly appeared. Conaty *v.* Gardner, 78 Conn. 48, 52 Atl. 416.

41. Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470; State *v.* Horan, 85 Wis. 94, 55 N. W. 157, 39 Am. St. Rep. 826; Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250. That the seals to the envelope containing the ballots had been cracked and broken and fixed by an unauthorized person will not discredit the ballots where it affirmatively appears that the envelope was not opened or the ballots tampered with. Hayes *v.* Kirkwood, 136 Cal. 396, 69 Pac. 30. But where it appears that all the changes in the ballots were made in the interest of one person it is strong proof of tampering. Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129. Where it appears that the ballots have been properly preserved and there is oral evidence that they have been altered, it is a question of fact and not of law whether the ballots or the oral evidence shall prevail, especially if such oral evidence is not conclusive. Ferguson *v.* Henry, 95 Iowa 439, 64 N. W. 292.

42. Kingery *v.* Berry, 94 Ill. 515; Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814; Howser *v.* Pepper, 8 N. D.

unworthy of credit, must appear. To cast a doubt upon their integrity is not sufficient.[43]

Proof of gross negligence on the part of the election officers in the performance of their duties will impeach the integrity of the ballots,[44] especially if supplemented by evidence tending to show that the ballots have been tampered with.[45]

(2.) Compliance With Statutory Provisions. — Where the manner in which the ballots should be preserved is prescribed by statute, proof that they have been kept by the designated officers is *prima facie*

484, 79 N. W. 1,018. But proof that the lid of the box had been split, Davis *v.* State, 75 Tex. 420, 12 S. W. 957, or that the ballots had been counted in a prior contest, is not sufficient to show probability of tampering. Owens *v.* State, 64 Tex. 500; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

43. *Alabama.* — State *v.* Judge, 13 Ala. 805.

California. — People *v.* Holden, 28 Cal. 123.

Colorado. — Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Illinois. — Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Beall *v.* Albert, 159 Ill. 127, 42 N. E. 166.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Michigan. — Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923.

Missouri. — Sone *v.* Williams, 130 Mo. 530, 32 S. W. 1,016.

Nevada. — Schneider *v.* Bray, 22 Nev. 272, 39 Pac. 326.

New York. — People *v.* Livingston, 79 N. Y. 279.

North Dakota. — Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018.

Oregon. — Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801.

Texas. — Davis *v.* State, 75 Tex. 420, 12 S. W. 957; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

They need not have been preserved beyond all possible doubt; all that is required is a reasonable certainty that they have not been tampered with. O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

Where the evidence showed that the ballot boxes from the time of the canvass had been in the custody of the proper officer, and so far as he or his employes knew, their contents had not been tampered with, but the boxes were kept in a vault easy of access by day, and others besides the officers might have entered at any time, and the election officers testified that the canvass was correct and the ballots themselves on the recount indicated that they had been tampered with, it was held that the evidence was sufficient to discredit the ballots. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Where the ballots were brought to court by the proper officer and the seals were found broken and strings loose, they were held genuine in the absence of evidence of having been actually tampered with. Coffey *v.* Edmonds, 58 Cal. 521; Thayer *v.* Greenhaut, 1 Brewst. (Pa.) 189; Com. *v.* Snowden, 1 Brewst. (Pa.) 218.

44. People *v.* Livingston, 79 N. Y. 279; Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250. Where the ballots were taken from the voting place across the line into another county, though in the possession of an election officer, it was held sufficient to discredit them. Knowles *v.* Yates, 31 Cal. 83.

45. State *v.* Judge, 13 Ala. 805; People *v.* Livingston, 79 N. Y. 279. In People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312, the ballot box was standing convenient of access and unlocked for some time while other votes were being counted, and there were several persons in the room besides the election officers. The ballots were then placed upon the table and during the sorting of them the light was suddenly extinguished and there was a short interval of dark-

proof of their integrity.[46] And where the evidence further shows that care as to their keeping has been exercised, and their whereabouts and condition satisfactorily appear, the mere fact that there were irregularities or informalities in the observance of the statutory provisions will not discredit the evidence of a recount as the best evidence, so long as it clearly appears that the ballots have been kept in substantial compliance with such provisions, or in such a manner as to place their identity beyond a reasonable doubt.[47]

ness. There was a discrepancy between the return and the recount and it was held that the ballots were not reliable.

46. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292; Hudson *v.* Solomon, 19 Kan. 177; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129. The fact that the proper custodian of the ballots is a party to the proceedings will not discredit the ballots. Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; Coffey *v.* Edmonds, 58 Cal. 521; Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738. Under a statute providing that the county clerk should keep the ballots, and where in a contest for that office it appeared that the ballots were delivered to the contestant who was the present incumbent of the office, and that a number of the packages were unsealed, and were deliberately placed and kept in an unlocked telephone room in the clerk's office, to which unauthorized persons had unrestricted access, held, such ballots were discredited. Farrell *v.* Larsen (Utah), 73 Pac. 227.

47. *Alabama.* — State *v.* Judge, 13 Ala. 805.

California. — Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673.

Colorado. — Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Illinois. — Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3.

Iowa. — Davenport *v.* Olerich, 104 Iowa 194, 73 N. W. 603.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Kentucky. — Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Michigan. — Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923.

Minnesota. — O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

Missouri. — Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

Nebraska. — Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 582; Martin *v.* Miles, 41 Neb. 135, 58 N. W. 732.

Nevada. — Schneider *v.* Bray, 22 Nev. 272, 39 Pac. 326.

North Dakota. — Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018.

Oregon. — Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 80.

Texas. — Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992; Owens *v.* State, 64 Tex. 500.

West Virginia. — Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250.

The preservation of the ballots inviolate being the ultimate object of the statute, if that is in fact accomplished, the omission to observe all the formalities to secure that object is not fatal. People *v.* Livingston, 79 N. Y. 279. Where it appears from the evidence beyond a reasonable doubt that the ballots were placed in a sealed envelope and the same put in the ballot box and sealed and delivered to the city clerk in whose custody they remained until recounted, it was held that their integrity was sufficiently established, although the board of canvassers did, in the city clerk's presence, illegally open the envelope and count the ballots. Dorey *v.* Lynn, 31 Kan. 758, 3 Pac. 557. But where the ballots were placed in an unlocked desk of the clerk, who left the state without placing them in charge of any one, and they had remained there for some time without care, and the envelope containing them had the flap partially torn off, and there was evidence that some of the ballots had been altered, they were held improperly kept. Beall *v.* Albert, 159 Ill.

F. Proof of the Result of a Recount. — Where commissioners are appointed by the court to make a recount of the ballots, their parol testimony is competent to prove the result of the same,[48] but any statement or certificate of the result of a recount which was not legally made, is incompetent.[49]

G. Extrinsic Evidence to Explain or Impeach Particular Ballots. — a. *In General.* — In the absence of some showing of fraud, accident or mistake, a ballot which clearly and unequivocally expresses the intention of the voter cannot be contradicted or explained by extrinsic evidence, even though he intended to vote differently.[50] But in many instances in which the ballot fails to clearly express the intention of the voter,[51] or where it is void

127, 42 N. E. 166. The certificate of such commissioners as to the result of such recount is also admissible in evidence. State *v.* Shay, 101 Ind. 36.

48. Searle *v.* Clarke, 34 Kan. 49, 7 Pac. 630; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

49. People *v.* Robertson, 27 Mich. 116.

50. *California.* — Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761.

Connecticut. — Coughlin *v.* McElroy, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301.

Illinois. — Talkington *v.* Turner, 71 Ill. 234; Beardstown *v.* Virginia, 76 Ill. 34; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; McKinnon *v.* People, 110 Ill. 305.

Kansas. — Gilleland *v.* Schuyler, 9 Kan. 569.

Massachusetts. — *In re* Strong, 20 Pick. 484.

Michigan. — People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491; People *v.* Tisdale, 1 Doug. 59; Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923.

New York. — People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Seaman, 5 Denio 409; People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191.

Ohio. — State *v.* Foster, 38 Ohio St. 694.

Texas. — Rathgen *v.* French, 22 Tex. Civ. App. 439, 55 S. W. 578.

Wisconsin. — State *v.* Steinborn, 92 Wis. 605, 66 N. W. 798.

The general rules of evidence for the purpose of supporting or explaining written instruments, apply to ballots. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Davis *v.* State, 75 Tex. 420, 12 S. W. 957. But where the ballot was prepared for a voter by an election officer in an unlawful manner, the voter was allowed to contradict his ballot. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680.

51. *California.*—People *v.* Holden, 28 Cal. 124.

Colorado. — Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666.

Connecticut. — State *v.* Gates, 43 Conn. 533.

Illinois. — Clark *v.* Robinson, 88 Ill. 498.

Iowa. — Wimer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250.

Kentucky. — Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

Massachusetts. — *In re* Strong, 20 Pick. 484.

Minnesota. — Newton *v.* Newell, 26 Minn. 529, 6 N. W. 346.

Mississippi. — Word *v.* Sykes, 61 Miss. 649.

Missouri. — Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

Nebraska. — State *v.* Foxworthy, 29 Neb. 341, 45 N. W. 632.

Oregon. — Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801.

Texas. — Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Wisconsin. — State *v.* Elwood, 12

because of some inherent defect,[52] or *prima facie* illegal because of some irregularity, extrinsic evidence may be resorted to in order to sustain or impeach the ballot as evidence of a vote.[53]

b. *Defective Ballots.* — A ballot may be shown to be illegal and incompetent as evidence of a vote because of some marking,[54] writing[55] or printing thereon;[56] or because printed upon improper paper;[57] or improperly folded;[58] or because the voter was illegally or

Wis. 551; Burnett *v.* Pierpont, 24 Wis. 608.

52. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Major *v.* Barker, 99 Ky. 305, 35 S. W. 543; State *v.* Olin, 23 Wis. 309.

53. Inglis *v.* Shepherd, 67 Cal. 469, 8 Pac. 5; Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; State *v.* Roberts, 153 Mo. 112, 54 S. W. 520; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

54. *California.* — Farnham *v.* Boland, 134 Cal. 151, 66 Pac. 200, 366; People *v.* Campbell, 138 Cal. 11, 70 Pac. 918.

Illinois. — Pierce *v.* People, 197 Ill. 432, 64 N. E. 372.

Indiana. — Stanley *v.* Manly, 35 Ind. 275; Tombaugh *v.* Grogg, 15 Ind. 355, 59 N. E. 1,060.

Kentucky. — Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75.

Michigan. — Attorney General *v.* Glaser, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828.

Minnesota. — Quin *v.* Markoe, 37 Minn. 439, 35 N. W. 213.

Missouri. — State *v.* Roberts, 153 Mo. 112, 54 S. W. 520.

New York. — People *v.* Cook, 14 Barb. 259.

Pennsylvania. — *In re* White (Com. Pl.), 4 Pa. Dist. Rep. 363.

South Dakota. — Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

Texas. — Davis *v.* State, 75 Tex. 420, 12 S. W. 957; King *v.* State, 30 Tex. Civ. App. 320, 70 S. W. 1,019.

West Virginia. — Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

55. Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761; Kerr *v.* Trego, 47 Pa. St 292; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180. In Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, all the ballots cast at a certain precinct had upon them certain writings, which would, under the statute, invalidate them unless the same were put upon the ballot by way of legally assisting the voter to prepare his ballot. The evidence showed that all the writing was done by one and the same person, and further that there had been but one voter lawfully assisted. There was no evidence as to who did the writing, or whether it was on the ballots when put into the voter's hands. *Held*, that only the ballot of the person lawfully assisted should be counted.

56. Kirk *v.* Rhoads, 46 Cal. 398; Inglis *v.* Shepherd, 67 Cal. 469, 8 Pac. 5; Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325; Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743; Stanley *v.* Manly, 35 Ind. 275; Millholland *v.* Bryant, 39 Ind. 363; Jones *v.* State, 153 Ind. 440, 55 N. E. 229; Kerr *v.* Trego, 47 Pa. St. 292; People *v.* Cook, 14 Barb. (N. Y.) 259; Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

57. Kirk *v.* Rhoads, 46 Cal. 398; Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325; State *v.* Roberts, 153 Mo. 112, 54 S. W. 520; Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

58. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1; Clark *v.* Robinson, 88 Ill. 498; Dale *v.* Irwin, 78 Ill. 170; State *v.* Roberts, 153 Mo. 112, 54 S. W. 520. A ballot may be so folded as to distinguish it and render it illegal under a statute forbidding distinguishing marks. People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; King *v.* State, 30 Tex. Civ. App. 320, 70 S. W. 1,019.

improperly assisted in the preparation of his ballot;[59] or the ballot otherwise not in conformity with the statute;[60] but the cause of its illegality must come strictly within the prohibition of the law,[61]

59. Under a statute requiring a voter to declare his disability upon oath, before his ballot can be marked for him, a ballot marked without such declaration is illegal. Major *v.* Barker, 99 Ky. 305, 35 S. W. 543. The parol testimony of election officers and electors showing the manner in which incompetent voters were assisted in the preparation of their ballots is admissible. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

60. Where the statute requires that ballots shall be numbered and more ballots are found in the box than shown by the poll lists to have been cast, some of which are unnumbered, the latter are illegal. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. And where the statute forbids the acceptance of a ballot "shown to another," if any voter shows his ballot to another after it is marked, such ballot is illegal and inadmissible. Major *v.* Barker, 99 Ky. 305, 35 S. W. 543.

Arkansas. — Lovewell *v.* Bowen, 69 Ark. 501, 64 S. W. 272.

California. — Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Farnham *v.* Boland, 134 Cal. 151, 66 Pac. 200, 366.

Colorado. — Heiskell *v.* Landrum, 23 Colo. 65, 46 Pac. 120.

Connecticut. — Merrill *v.* Reed, 75 Conn. 12, 52 Atl. 409.

Illinois. — Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470; Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

Indiana. — Jones *v.* State, 153 Ind. 440, 55 N. E. 229; Borders *v.* Williams, 155 Ind. 36, 57 N. E. 527; Sego *v.* Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468.

Iowa. — Whittam *v.* Zahorik, 91 Iowa 23, 59 N. W. 18.

Kentucky. — Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75.

Maryland. — Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Massachusetts. — O'Connell *v.* Mathews, 177 Mass. 518, 59 N. E. 195.

Missouri. — Rollins *v.* McKinney, 157 Mo. 656, 57 S. W. 1,027; Hehl *v.* Guion, 155 Mo. 76, 55 S. W. 1,024.

New York. — People *v.* Board, 156 N. Y. 36, 50 N. E. 425; People *v.* Shaw, 133 N. Y. 493, 31 N. E. 512.

Oregon. — Wood *v.* Fitzgerald, 3 Or. 568.

Rhode Island. — *In re* Vote Marks, 17 R. I. 812, 21 Atl. 962.

Washington. — State *v.* Fawcett, 17 Wash. 188, 49 Pac. 346.

West Virginia. — Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

Wisconsin. — State *v.* Egan, 115 Wis. 417, 91 N. W. 984.

61. *California.* — Inglis *v.* Shepherd, 67 Cal. 469, 8 Pac. 5; Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761.

Colorado. — Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325.

Illinois. — Bloome *v.* Hograeff, 193 Ill. 195, 61 N. E. 1,071.

Ohio. — State *v.* Schafer, 18 Ohio Cir. Ct. R. 525.

Pennsylvania. — Kerr *v.* Trego, 47 Pa. St. 292.

Nebraska. — State *v.* Foxworthy, 29 Neb. 341, 45 N. W. 632. Laws regulating the admission of ballots as evidence of the votes are liberally construed in favor of the legality of the ballots. Talcott *v.* Philbrick, 59 Conn. 472, 20 Atl. 436, 10 L. R. A. 150; State *v.* Bossa, 69 Conn. 335, 37 Atl. 977; Duvall *v.* Miller, 94 Md. 697, 51 Atl. 270; DeGaw *v.* Fitzsimmons, 124 Mich. 511, 83 N. W. 282; Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. 213; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 427, 51 Am. St. Rep. 585; State *v.* Cook, 41 Mo. 593; Mauck *v.* Brown, 59 Neb. 382, 81 N. W. 313; *In re* Holmes, 30 Misc. 127, 61 N. Y. Supp. 775; People *v.* Ferguson, 8 Cow. (N. Y.) 102; State *v.* Phillips, 63 Tex. 390, 51 Am. Rep. 646; State *v.* Elwood, 12 Wis. 551. Statutes prescribing the form of ballots and kind of paper on which they are to be printed and prohibiting

especially if not the fault or within the control of the voter.[62] As a general rule the objection to the admissibility of the ballot as evidence may be removed by showing that the cause of the apparent illegality resulted from fraud or accident, or the mistake of any person other than the voter himself,[63] and in some cases even where

marks, figures or devices thereon, by which one can be distinguished from another, are designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation or bribery, and are generally held to be mandatory, and always so when such statutes provide that a ballot varying from such requirements shall not be counted. Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690; but after a ballot is voted, received and counted, it should not be declared void merely because printed on paper of a different quality, color or dimension from that prescribed by the statute. Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743.

62. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Kirk *v.* Rhoads, 46 Cal. 398; Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743; Coughlin *v.* McElroy, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75; People *v.* Bates, 11 Mich. 362, 83 Am. Dec. 745; West *v.* Ross, 53 Mo. 350; State *v.* Roberts, 153 Mo. 112, 54 S. W. 520; Stearns *v.* Taylor, (Com. Pl.) 1 Ohio (N. P.) 23. But see Ledbetter *v.* Hall, 62 Mo. 422. Where, because of their ambiguity, ballots were not placed in the ballot box and were treated as rejected ballots on the count, the fact that they were not deposited in the box will not reject them if the voter's intention can be ascertained. Bloome *v.* Hograeff, 193 Ill. 195, 61 N. E. 1,071.

63. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Inglis *v.* Shepherd, 67 Cal. 469, 8 Pac. 5; Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1; Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250; People *v.* Bates, 11 Mich. 362, 83 Am. Dec. 745; Coulehan *v.* White, 95 Md. 703, 53 Atl. 786; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 117, 51 Am. St. Rep. 58; Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018; Stearns *v.* Taylor, 1 Ohio (N. P.) 23; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Fraud. — A distinguishing mark put upon a ballot by an election officer without the connivance or consent of the voter will not invalidate it. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164. Improper marks, apparently fraudulent, will not invalidate the ballot. Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75; Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761. If a ballot be accidentally printed in an illegal manner, People *v.* Cook, 14 Barb. (N. Y.) 259; Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325, or a numbered ballot accidentally folded with one unnumbered; Dale *v.* Irwin, 78 Ill. 170; or with a blank one, Clark *v.* Robinson, 88 Ill. 498; or accidentally so folded as to illegally distinguish it, the ballot will be valid. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769.

Improper marks upon the face of a ballot, which appear or are shown to have been made accidentally, and not for the purpose of indicating the voter, for the existence of which a reasonable explanation, consistent with honesty and good faith, is made, will not render the ballot void. Coughlin *v.* McElroy, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301.

Where the statute excluded unnumbered ballots, to show that by the mistake of the election officers his ballot was not numbered, the voter may identify the ballot cast by him and the same may be admitted in evidence. Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; but the evidence, to change the record,

the fault was his own.[64]

c. *Fraudulent Ballots.* — If an elector, by reason of fraud having been practiced upon him, casts a ballot clearly indicating a choice, but which does not truly express his will, parol evidence is admissible to prove the fraud, and the true intention of the voter, and the ballot will then be competent evidence thereof.[65]

d. *Forged Ballots.* — It is competent, upon a recount of the ballots, to prove that any particular one has been forged, and such ballot corrected and admitted as evidence of the vote as cast.[66]

The parol testimony of the voter, or others, or circumstantial evidence, is competent to prove the forgery, and also the contents of the original ballot, but the testimony of the voter, unless corroborated by other evidence, is not alone sufficient proof of those facts.[67]

e. *Mutilated Ballots.* — The mere fact that upon a recount of the ballots some are found mutilated will not alone cause their rejection, but the competency of such ballots as evidence of the votes indicated thereby depends upon the motive which prompted the mutilation, or how, when and by whom it was done.[68] Evidence is admissible to

should be conclusive; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407.

Numbered lists of voters, *In re* White, 4 Pa. Dist. Rep. 363; or poll books, are proper evidence to identify the ballot claimed to have been cast by a voter. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

64. Where a voter cast two ballots instead of one, it was held that the mistake might be shown and one counted. Beardstown *v.* Virginia, 81 Ill. 541. But see Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; People *v.* Seaman, 5 Denio (N. Y.) 409.

Where the name of the candidate was accidentally erased by the voter, it was held proper to so show, and that it was not intentional, and to count the ballot, but otherwise if it was the deliberate act of the voter. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. But where it appears that two candidates for the same office have been voted for, the ballot cannot be explained and is inadmissible. Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

65. In Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680, where it appeared that the voter could not read and was incompetent to prepare his own ballot, he was assisted therein by one judge instead of two, as required by statute, and the ballot was so prepared contrary to the wishes of the voter. *Held*, that it was competent for such elector and the election officers to testify to such facts, and that the voter could state his real intention and have the ballot so counted.

66. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Owens *v.* State, 64 Tex. 500; State *v.* Olin, 23 Wis. 309; Dunn *v.* Thompson (Tex. Civ. App.), 30 S. W. 728. A forged ballot is one changed after being cast, or one substituted for the one cast, and the general rule that it is competent to prove any writing to be a forgery applies to such ballots. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

67. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Owens *v.* State, 64 Tex. 500; Dunn *v.* Thompson (Tex. Civ. App.), 30 S. W. 728; State *v.* Olin, 23 Wis. 309.

68. People *v.* Holden, 28 Cal. 123; Bates *v.* Crumbaugh, 21 Ky. L. Rep. 1,205, 71 S. W. 75; Stearns *v.* Taylor, 1 Ohio (N. P.) 23. A ballot with the name of an office cut or torn off is invalid. State *v.* Walsh, 62

show such matters, or that the ballot was intact when voted.[69] Proof that a ballot was not mutilated by the voter with the intent to render it void, or that it was intact when voted, makes it admissible in evidence.[70]

f. *Irregular or Ambiguous Ballots.* — A ballot is the primary and best evidence of the intention of the voter,[71] and generally admissible in evidence as such, although not nicely or accurately written;[72] or when the name of the candidate is abbreviated or incorrectly spelled or written,[73] or the office[74] or proposition voted for not accurately designated;[75] or the ballot otherwise not technically perfect,[76] so long

Conn. 260, 25 Atl. 1. But if it consists of two pieces of paper, one piece containing only the titles of certain offices and names of candidates therefor, and the other the title and names of other offices and candidates therefor, folded one piece within the other and offered as a single vote, and it is so received and deposited, when the whole is done fairly by a person qualified to vote, it should be admitted as evidence of the vote. Wildman *v.* Anderson, 17 Kan. 344.

69. People *v.* Holden, 28 Cal. 123; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585.

70. People *v.* Holden, 28 Cal. 123; Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585; Stearns *v.* Taylor, 1 Ohio (N. P.) 23. In the latter case the voter put an X mark in the proper place and drew a line through the other ticket, evidently to emphasize his intention. The ballot was admitted.

71. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Beardstown *v.* Virginia, 76 Ill. 34; Hodge *v.* Linn, 100 Ill. 397; Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923; People *v.* Tisdale, 1 Doug. (Mich.) 59; People *v.* Ferguson, 8 Cow. 102; Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

72. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191.

73. Talkington *v.* Turner, 71 Ill. 234; Clark *v.* Robinson, 88 Ill. 498; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Cook, 14 Barb. (N. Y.) 352; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242. But see Kip *v.* Weeks (N. J.), 44 Atl. 856. Leaving out a syllable or any material portion of the name, People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; or expressing the Christian name of the candidate by the initials only, would be fatal, People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491; but where the designation is by a common and universally sanctioned abbreviation, the ballot is admissible. People *v.* Tisdale, 1 Doug. (Mich.) 59.

74. Where the provisions of the statute as to the form of the ballot were directory merely, ballots for "trustees of public schools" instead of "trustees of common schools" were held admissible, there being no trustee to be voted for except those for common schools. People *v.* McManus, 34 Barb. (N. Y.) 620.

75. On annexation of territory under a directory provision of the statute which prescribed the form of ballot to be "for detaching R.—" or "against detaching R.—," ballots reading "R.—attached," "R.—detached," "for division" or "against division," were held admissible. Hawes *v.* Miller, 56 Iowa 395, 9 N. W. 307; State *v.* Elwood, 12 Wis. 551. But see State *v.* Schafer, 18 Ohio Cir. Ct. R. 525; San Luis Obispo *v.* Fitzgerald, 126 Cal. 279, 58 Pac. 699.

76. *Colorado.* — Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666.

Illinois. — Hodge *v.* Linn, 100 Ill

as the voter's intention is manifested,[77] unless the irregularity is a substantial departure from the law under which the election is held.[78]

When otherwise competent, an ambiguous ballot is generally admissible as evidence of a vote if, from a proper construction of its language,[79] aided by evidence *aliunde*, the intention of the voter can be ascertained with reasonable certainty.[80] The weight of authority seems to favor the admission of such evidence that effect may be given to the voter's intention,[81] and when admitted, it is, in

397; Bloome *v.* Hograeff, 193 Ill. 195, 61 N. E. 1,071; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Massachusetts. — *In re* Strong, 20 Pick. 484.

Missouri. — Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

New York. — People *v.* Cook, 14 Barb. 259; People *v.* Pease, 27 N. Y. 45, 84 Am. St. Rep. 242.

Oregon. — Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 80.

Ohio. — Stearns *v.* Taylor, 1 Ohio (N. P.) 23.

Texas. — Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Wisconsin. — Carpenter *v.* Ely, 4 Wis. 420.

But see State *v.* Roberts, 153 Mo. 112, 54 S. W. 520. The omission of the word "for" before the name of the candidate is immaterial. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141. Under a statute prohibiting writing upon the ballot, correcting the spelling of the candidate's name with ink will not invalidate it. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1. Under a statute forbidding the substitution of a candidate's name in any other manner than by the use of lead pencil or common writing ink, an indelible pencil was used, and evidence introduced tending to prove that such pencils were not in fact lead pencils, or commonly known as such, held, that ballots so corrected were admissible, as were those upon which red ink was used. Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761.

77. State *v.* Bossa, 69 Conn. 335, 37 Atl. 977; Beardstown *v.* Virginia, 76 Ill. 34; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Hawes *v.* Miller, 56 Iowa 395, 9 N. W. 307; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Kip *v.* Weeks (N. J.), 44 Atl. 856; People *v.* Ferguson, 8 Cow. (N. Y.) 102; State *v.* Elwood, 12 Wis. 551.

78. Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666; State *v.* Schafer, 18 Ohio Cir. Ct. R. 525. Where the law under which the election was held provided that each voter should indicate his wish by writing or causing to be written or printed upon his ballot the word "yes" or "no" opposite the proposition voted upon, the printing by the authorities of the word "yes" in one column of the ballots used was held to invalidate the ballots. San Luis Obispo *v.* Fitzgerald, 126 Cal. 279, 58 Pac. 699.

79. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; State *v.* Gates, 43 Conn. 533; Hodge *v.* Linn, 100 Ill. 402; Clark *v.* Robinson, 88 Ill. 498; Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250; People *v.* Ferguson, 8 Cow. (N. Y.) 102; Stearns *v.* Taylor, 1 Ohio (N. P.) 23; Davis *v.* State, 75 Tex. 429, 12 S. W. 957; Carpenter *v.* Ely, 4 Wis. 420.

80. Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666; Beardstown *v.* Virginia, 76 Ill. 34; McKinnon *v.* People, 110 Ill. 305; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Kip *v.* Weeks (N. J.), 44 Atl. 856; People *v.* Seaman, 5 Denio (N. Y.) 409; People *v.* Cook, 14 Barb. (N. Y.) 259; Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801; State *v.* Elwood, 12 Wis. 551.

81. *California.* — Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L.

general, governed by the same rules as apply to evidence aiding the interpretation of other written instruments.[82]

And it thus becomes proper to take into consideration and show by extrinsic evidence all the facts and circumstances connected with or surrounding the candidates,[83] the electors,[84] and the election itself, showing or tending to show the intention of the voter, or otherwise aid in the construction of the ballot cast by him.[85] In cases in which

R. A. 761; Inglis *v.* Shepherd, 67 Cal. 469, 8 Pac. 5.

Colorado. — Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666.

Connecticut. — State *v.* Bossa, 69 Conn. 335, 37 Atl. 977; State *v.* Walsh, 62 Conn. 260, 25 Atl. 1; State *v.* Gates, 43 Conn. 533.

Illinois. — McKinnon *v.* People, 110 Ill. 305; Clark *v.* Robinson, 88 Ill. 498; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Hodge *v.* Linn, 100 Ill. 397; Beardstown *v.* Virginia, 76 Ill. 34; Talkington *v.* Turner, 71 Ill. 234.

Iowa. —Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250; Hawes *v.* Miller, 56 Iowa 395, 9 N. W. 307.

Massachusetts. — *In re* Strong, 20 Pick. 484.

Missouri. — Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

New York. — People *v.* Ferguson, 8 Cow. 102; People *v.* Cook, 14 Barb. 259; People *v.* Seaman, 5 Denio 409; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* McManus, 34 Barb. 620; People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191.

Nebraska. — State *v.* Griffey, 5 Neb. 161; State *v.* Foxworthy, 29 Neb. 341, 45 N. W. 632.

Ohio. — Stearns *v.* Taylor, 1 Ohio (N. P.) 23.

Oregon. — Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 80.

Pennsylvania. — *In re* White, 4 Pa. Dist. Rep. (Com. Pl.) 363.

Texas — Davis *v.* State, 75 Tex. 420, 11 S. W. 957.

Wisconsin. — Carpenter *v.* Ely, 4 Wis. 420; State *v.* Elwood, 12 Wis. 551; State *v.* Goldthwaite, 16 Wis. 146.

82. *Colorado.* — Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666.

Illinois. — Clark *v.* Robinson, 88 Ill. 498; McKinnon *v.* People, 110 Ill. 305.

Massachusetts. — *In re* Strong, 20 Pick. 484.

New York. — People *v.* Seaman, 5 Denio 409.

Nebraska. — State *v.* Griffey, 5 Neb. 161.

Texas. — Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Wisconsin. — State *v.* Elwood, 12 Wis. 551; Carpenter *v.* Ely, 4 Wis. 420.

83. *Illinois.* — Hodge *v.* Linn, 100 Ill. 397; McKinnon *v.* People, 110 Ill. 305; Talkington *v.* Turner, 71 Ill. 234.

Iowa. — Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250.

Massachusetts. — *In re* Strong, 20 Pick. 484.

Missouri. — Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

New York. — People *v.* Cook, 14 Barb. 259; People *v.* Furguson, 8 Cow. 102; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

Wisconsin. — State *v.* Elwood, 12 Wis. 55; Carpenter *v.* Ely, 4 Wis. 420.

84. Clark *v.* Robinson, 88 Ill. 498; Talkington *v.* Turner, 71 Ill. 234; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* Seaman, 5 Denio (N. Y.) 409; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

85. Hawes *v.* Miller, 56 Iowa 395, 9 N. W. 307; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; People *v.* Love, 63 Barb. (N. Y.) 535; People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191; People *v.* McManus, 34 Barb. (N. Y.) 620.

Construction of Ballots.— In General. — The language of a ballot will be construed liberally in favor of the voter so as to give effect to his in-

tention and render it admissible as evidence of a vote. *In re* Strong, 20 Pick. (Mass.) 484; but generally by the same rules as apply to other written instruments. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Davis *v.* State, 75 Tex. 420, 12 S. W. 957; Burnett *v.* Pierpont, 24 Wis. 608; Hodge *v.* Linn, 100 Ill. 397; Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666; and where partly in writing and partly printed, the written part will control. Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801; People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191.

No Office Designated. — A ballot without any office designated is void. State *v.* Griffey, 5 Neb. 161.

Duplicate Designation of Office or Candidate. — Where the ballot contains more names for any office than the number of persons required to fill the same, Newton *v.* Newell, 26 Minn. 529, 6 N. W. 346; Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; State *v.* Foxworthy, 29 Neb. 341, 45 N. W. 632; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; State *v.* Tierney, 23 Wis. 430; but where the name of the office appears two or more times and the name of the candidate but once, the ballot is properly counted for such candidate. People *v.* Holden, 28 Cal. 123. Upon the ballot was printed the name of the candidate for county treasurer, and no name was written immediately above or below the designation "for county treasurer," but the name of one of the candidates for county treasurer was written below the designation "for county superintendent of schools" and below the name of the candidate for that office. *Held*, clearly no vote for county treasurer and two votes for county superintendent of schools, and that no other evidence of the voter's intention was admissible. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Designation of Candidate by the Initials of the Christian Name, or by the Surname Only. — Where but one person of a given name is a candidate, a ballot containing the initials of his Christian name or his surname only should be counted for him. People *v.* Stevens, 5 Hill (N. Y.) 616; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Seaman, 5 Denio (N. Y.) 409; People *v.* Cook, 14 Barb. (N. Y.) 259; Talkington *v.* Turner, 71 Ill. 234; People *v.* Ferguson, 8 Cow. (N. Y.) 102; Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250.

Contra. — Kip *v.* Weeks (N. J.), 44 Atl. 856; People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491; People *v.* Tisdale, 1 Doug. (Mich.) 59.

Mistakes in Initials or Spelling of Surname. — Where the names are *idem sonans*, mistakes in spelling or initials will not invalidate the ballot. State *v.* Foster, 38 Ohio St. 604; People *v.* Stevens, 5 Hill (N. Y.) 616; Clark *v.* Robinson, 88 Ill. 498; as "Huba," "Hubba," "Huber" or "Hub" for Hubbard; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; or "Behrm" for Behrensmeyer, Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Contra. — State *v.* Steinborn, 92 Wis. 605, 66 N. W. 798.

Erasures. — In General. — In the absence of evidence to aid in its construction, a ballot whereon the name of one candidate is erased and the name of the opposing candidate written above the words designating the office, the ballot will be construed as a vote for the candidate whose name was so written, but where the name of the office is completely erased and the name of one candidate written beneath the erased name of the office, the ballot is not evidence of a vote for such candidate. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Name of Candidate Erased. Where the name of a candidate is erased, and the ballot so indistinct and illegible as to fail to show any intention to vote for the opposing candidate, the ballot is not admissible, but where a ballot shows a name erased the intention to substitute the writing for the printed is apparent. Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801. And so held even though the printing was not erased. People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191. But see

the name upon the ballot is not the proper name by which the candidate should have been designated, but is strikingly similar thereto, it is competent to hear parol testimony tending to prove that such candidate was commonly known by or sometimes used the name as it appeared upon the ballot;[86] or that his name was commonly misspelled or mispronounced;[87] or that there was no other person to whom the name upon the ballot would apply;[88] or any other facts or circumstances tending to throw light upon the intention of the

Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615.

Where the name of one candidate is distinctly erased and the initial of the other but faintly touched with the pencil, the ballot will be counted for the latter candidate. Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Pasting Slips. — Where slips are pasted upon a ballot, unless so pasted as to show conclusively the intent of the voter, or so pasted as to leave on the ballot two distinct names for the same office, the ballot is inadmissible; still where an attempt is made to cover one name with another for the same office, so that the under name is but partially obliterated, the slip will be counted, although the under name be not entirely covered. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141. Placing a paster over a name which is under the title of an office indicates an intention to substitute for that office the name upon the slip. People *v.* Love, 63 Barb. (N. Y.) 535.

Where a slip had been pasted over a candidate's name, but had been unintentionally detached by an election officer during the canvass, the ballot was properly counted for the candidate named on the slip. People *v.* McNeal, 63 Mich. 294, 29 N. W. 728.

86. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Beardstown *v.* Virginia, 76 Ill. 48; McKinnon *v.* People, 110 Ill. 305; Gilleland *v.* Schuyler, 9 Kan. 569; Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 70, 2 Am. St. Rep. 250; Word *v.* Sykes, 61 Miss. 649; People *v.* Cook, 14 Barb. (N. Y.) 259; People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Seaman, 5 Denio (N. Y.) 409. Where Moses M. Smith was a candidate, to show that ballots casts for "M. M. Smith" were intended for him, evidence was admitted proving that he was an old resident and business man, and had held public office; that it was his practice in business, both private and official, to sign his name M. M. Smith, and to so advertise; that such name was on his sign over his store, and that he received letters so addressed. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

87. Where the name was incorrectly spelled by the voter, evidence was admitted to prove that others commonly misspelled and mispronounced it, and it was held that any evidence going to prove that the voter had intended or attempted to express the name as he understood it was admissible. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

88. McKinnon *v.* People, 110 Ill. 305; Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312. Where the initials of the candidate's Christian name only appeared upon the ballot, it was held proper to admit evidence tending to prove that there was no other person to whom the initials would apply, or that the ballot was intended for such candidate. People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Carpenter *v.* Ely, 4 Wis. 420; People *v.* Seaman, 5 Denio (N. Y.) 409. But see People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; People *v.* Tisdale, 1 Doug. (Mich.) 59.

Where the candidate was well known to the electors and had held public office before, it was presumed that the voters intended to vote for him, and that such presumption

voter.[89] For such purposes the voter's testimony is admissible, but only in corroboration of his ballot.[90] He may state what he intended by his ballot,[91] or how he reads it, or how he understands the names of the candidates,[92] but he cannot testify as to his mental purpose in voting;[93] neither are his declarations as to his intention admissible.[94]

But in cases in which the name upon the ballot and that of the candidate differ in sound to such an extent that one could not reasonably be taken or intended for the other, evidence as to the intention of the voter is inadmissible.[95] The voter's testimony as to his intention is better evidence than opinions gathered from the ballots, but neither is entitled to much weight.[96] The intent of the voter, when apparent or ascertained, controls, and the ballot is admissible as evidence of votes for such candidates as appear to have been intended, regardless of the fact that the choice of the voter as to other candidates upon the ballot is not indicated, or so defectively expressed as not to be ascertainable.[97]

would not be rebutted by proof that there was another person of the same name, who was aged and obscure, had never been a candidate or held public office. People *v.* Cook, 14 Barb. (N. Y.) 259.

89. Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250; *In re* Strong, 20 Pick. (Mass.) 484; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Ferguson, 8 Cow. (N. Y.) 102; Carpenter *v.* Ely, 4 Wis. 420.

It is proper to show the nationality of many of the voters as a circumstance that might indicate or explain incorrect spelling of the name. Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

It seems that opinions gathered from the ballots themselves are competent evidence, as where the voter has used the letters of a foreign language to express the name of the candidate, it was held competent to prove by him, or by some one else versed in that language, what word or words they make. And if the characters are so complex in their formation or so imperfectly formed as to make it difficult to read them, it is competent to prove by any one understanding them, what they are. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

90. People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191; Beardstown *v.* Virginia, 76 Ill. 34; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Gilliland *v.* Schuyler, 9 Kan. 569.

91. McKinnon *v.* People, 110 Ill. 305; People *v.* Ferguson, 8 Cow. (N. Y.) 102.

92. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

93. People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191.

94. Word *v.* Sykes, 61 Miss. 649.

95. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Gilliland *v.* Schuyler, 9 Kan. 569; Beardstown *v.* Virginia, 76 Ill. 48. Ballot cast for "Kuirs" cannot be counted for Kreitz, nor can one for "Dehbsumeyer" be counted for Behrensmeyer. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

96. People *v.* Furguson, 8 Cow. (N. Y.) 102; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

97. *Illinois.* — Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Iowa. — Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250.

Massachusetts. — *In re* Strong, 20 Pick. 484.

Missouri. — Atkeson *v.* Lay, 115 Mo. 538, 22 S. W. 481; Lankford *v.*

7. The Poll Lists and Tally Sheets as Evidence of the Result. — The poll lists, tally sheets and other records of the election proceedings, kept by the election officers, are, when properly identified, competent evidence of the result so far as they tend to prove the same.[98] The poll books have been held to be *prima facie*,[99] and even the best evidence of the result,[1] but the weight to be given them as evidence usually depends upon circumstances.[2] Such records may be corrected, sustained or impeached by extrinsic evidence.[3] Mere informalities in the poll book will not exclude it as evidence,[4] but proof that the poll lists and tally sheets are fraudulent or fictitious,[5] or that the election officers were careless in the performance of their duties discredits them.[6]

8. Extrinsic Evidence of the Result. — A. In General. — In cases in which, from any cause, the returns, ballots and other records of the election proceedings are incompetent or unavailable as

Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585.

New York. — People *v.* Cook, 14 Barb. 259.

North Carolina. — Deloatch *v.* Rogers, 86 N. C. 357.

Oregon. — Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801.

West Virginia. — Dunlevy *v.* County Court, 47 W. Va. 513, 35 S. E. 956.

Wisconsin. — Carpenter *v.* Ely, 4 Wis. 420; State *v.* Elwood, 12 Wis. 551.

98. Griffin *v.* Wall, 32 Ala. 149; Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270; Patton *v.* Coates, 41 Ark. 111; People *v.* Holden, 28 Cal. 123; Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; Kingery *v.* Berry, 94 Ill. 515; Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3; State *v.* Sillon, 24 Kan. 13; Russell *v.* State, 11 Kan. 308; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Young *v.* Hendersonville, 129 N. C. 422, 40 S. E. 89; Powers *v.* Reed, 19 Ohio St. 182; Phelps *v.* Schroder, 26 Ohio St. 549; Howard *v.* Shields, 16 Ohio St. 184; State *v.* Donnewirth, 21 Ohio St. 216; Owens *v.* State, 64 Tex. 500. But depositions of persons who have examined them, as to the contents of poll lists and tally sheets, are not admissible when the originals can be produced. Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

It seems that such records are incompetent unless required by the statute to be kept. Echols *v.* State, 56 Ala. 131.

99. Patton *v.* Coates, 41 Ark. 111; Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270; Young *v.* Hendersonville, 129 N. C. 422, 40 S. E. 89; Russell *v.* State, 11 Kan. 308; Howard *v.* Shields, 16 Ohio St. 184; State *v.* Donnewirth, 21 Ohio St. 216; Phelps *v.* Schroder, 26 Ohio St. 549.

1. Board of Trustees *v.* Board of Com'rs, 61 Kan. 796, 60 Pac. 1,057.

2. Griffin *v.* Wall, 32 Ala. 149; Trustees *v.* Board, 61 Kan. 796, 60 Pac. 1,057; Powers *v.* Reed, 19 Ohio St. 182.

3. Griffin *v.* Wall, 32 Ala. 140; Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270; People *v.* Holden, 28 Cal. 123; Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3; Kingery *v.* Berry, 94 Ill. 515; Russell *v.* State, 11 Kan. 308; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; State *v.* Sillon, 24 Kan. 13; Powers *v.* Reed, 19 Ohio St. 182; Phelps *v.* Schroder, 26 Ohio St. 549.

4. Griffin *v.* Wall, 32 Ala. 149; Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270; State *v.* Sillon, 24 Kan. 13; Powers *v.* Reed, 19 Ohio St. 182.

5. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Phelps *v.* Schroder, 26 Ohio St. 549.

6. Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3.

evidence of the true result at any precinct or district, evidence *aliunde* is admissible to prove the same.[7]

B. Proof of the Contents of Lost or Destroyed Records. Where it appears that any of the records of the election proceedings showing or tending to show the result are lost or destroyed, secondary evidence of their contents may be received.[8]

9. Purging the Poll. — A. In General. — In cases in which the returns, ballots and other records of the proceedings from any precinct or district are so discredited as to render them incompetent as evidence of the result, such poll should, if possible, be purged by proving the competency or incompetency of any of the votes cast thereat, rejecting those found to be illegal and incompetent, and admitting the balance of the poll as evidence *pro tanto* of the result.[9]

7. *Alabama.* — State *v.* Judge, 13 Ala. 805.

Arkansas. — Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723.

California. — Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183.

Colorado. — Londner *v.* People, 15 Colo. 557, 26 Pac. 135.

Illinois. — Town *v.* Lloyd, 97 Ill. 179.

Kentucky. — Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060.

Louisiana. — Fletcher *v.* Jeter, 32 La. Ann. 401.

Michigan. — Harbaugh *v.* People, 33 Mich. 241.

Montana. — Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

New Mexico. — Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

North Carolina. — People *v.* Teague, 106 N. C. 576, 19 Am. St. Rep. 547.

Ohio. — Stearns *v.* Taylor (Com. Pl.), 1 Ohio 23.

Pennsylvania. — *In re* Duffy, 4 Brewst. 531.

Wisconsin. — State *v.* Meilike, 81 Wis. 574, 51 N. W. 875.

Whenever by any means the *prima facie* presumption of the correctness of the returns is overthrown, the true vote may be proved, and it is never thrown out if, by any process, it can be discovered. Word *v.* Sykes, 61 Miss. 649; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; Melvin's Case, 68 Pa. St. 333; Batturs *v.* Megary, 1 Brewst. (Pa.) 162.

Under a statute which required the officers of election upon the completion of the count of the votes of the precincts to publicly announce the result of the election, the testimony of bystanders who heard such proclamation made as to what such result was, is better evidence than the discredited returns. Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3.

Where the evidence tends to discredit both the returns and the ballots, the result is to be determined by a consideration of both and all attending circumstances. Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012.

8. Patton *v.* Coates, 41 Ark. 130; Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270; Town *v.* Lloyd, 97 Ill. 179; Beardstown *v.* Virginia, 76 Ill. 34; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060; Stearns *v.* Taylor, 1 Ohio (N. P.) 23.

But proof of the loss or destruction of the official returns must first be made. Fletcher *v.* Jeter, 32 La. Ann. 401; Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42.

Under a statute requiring that the result of an election be publicly proclaimed to the people present, after proof that the poll books, tally sheets and ballots have been destroyed, it was held that spectators who were present at the count and heard the result announced, and inspected the papers prepared by the officers recording the result, were competent witnesses to prove the number of votes given to each person. Warren *v.* McDonald, 32 La. Ann. 987.

9. Lovewell *v.* Bowen, 69 Ark.

Where the ballots have been recounted it is proper to prove that votes were received which are not shown by the ballots, and if their legality be also established, they are competent evidence of the result;[10] but only such votes as were actually cast are admissible,[11] and it must also appear for whom the votes were cast before the true vote can be determined.[12]

B. Proof That Certain Persons Voted. — In cases in which in order to purge the poll it becomes necessary to show that certain persons voted, the poll books are competent,[13] and in the absence of

501, 64 S. W. 272; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Board Supervisors *v.* Davis, 63 Ill. 405; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; Lanier *v.* Gallatas, 13 La. Ann. 175; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Covode *v.* Foster, 4 Brewst. (Pa.) 414; Ferguson *v.* Allen, 7 Utah 263, 26 Pac. 570; Reid *v.* Julian, 2 Bart. Elec. Cas. 32.

In Tennessee, under act of 1873, it was held that the county court had no power to receive proof to reject certain votes and purge the polls. Bouldin *v.* Lockhart, 3 Baxt. (Tenn.) 262.

10. Where the ballots and returns are discredited, votes not shown by them may be established otherwise. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; State *v.* Judge, 13 Ala. 805.

11. Webster *v.* Byrnes, 34 Cal. 273; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; State *v.* Giles, 2 Pin. (Wis.) 166, 52 Am. Dec. 149; State *v.* Pierpont, 29 Wis. 608; State *v.* Avery, 14 Wis. 122; Ferguson *v.* Allen, 7 Utah 263, 26 Pac. 570; Young *v.* Deming, 9 Utah 204, 33 Pac. 818.

Parol evidence of the voter that he saw the officer of election deposit his ballot in the box is admissible. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704. It cannot be shown who those whose votes were rejected would have voted for. State *v.* Judge, 13 Ala. 805; People *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547; Hart *v.* Harney, 19 How. Pr. (N. Y.) 252. It seems the lawfulness of a vote connot be determined until it has been received. People *v.* Bell, 119 N. Y. 175, 23 N. E. 533.

12. Lovewell *v.* Bowen, 69 Ark. 501, 64 S. W. 272; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; *Ex parte* Murphy, 7 Cow. (N. Y.) 153; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Trustees *v.* Gibbs, 2 Cush. (Mass.) 39; People *v.* Tuthill, 31 N. Y. 550; Deloatch *v.* Rogers, 86 N. C. 257; Judkins *v.* Hill, 50 N. H. 140; Lanier *v.* Gallatas, 13 La. Ann. 175; Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

Question is who received the highest number of legal votes. Dobyns *v.* Weadon, 50 Ind. 298; Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42; People *v.* Thornton, 25 Hun (N. Y.) 456; Echols *v.* State, 56 Ala. 131; Hudson *v.* Solomon, 19 Kan. 177.

Where it appears that illegal votes were cast, but not for whom, they should be deducted from the vote of each candidate in the proportion which that vote bears to the whole vote pulled. Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; Attorney General *v.* May, 99 Mich. 538, 58 N. W. 483. But this should not be done, if by the exercise of due diligence it can be shown for whom the votes were cast. Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076. An illegal vote cannot be taken from the majority candidate unless it appears that it was cast for him. McDaniel's Case, 3 Pa. Law Jnl. 310; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

13. State *v.* Pressman, 103 Iowa 449, 72 N. W. 660; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547. Even though

any showing of fraud, when properly authenticated, are generally held to be the best evidence of the fact.[14] Such fact may, however, be proved by other evidence,[15] and the voter may, but cannot be compelled to, testify whether or not he voted,[16] and when fraud is shown he may contradict the poll book.[17]

C. Proof of How Certain Persons Voted. — It seems to be a general rule that one who voted legally need not testify for whom he voted, but if he chooses to do so the evidence is competent,[18] and so long as the legality of the vote is unquestioned, or in controversy, no evidence can be heard as to how it was cast, unless the voter himself has voluntarily at the time of voting made the contents of

not properly authenticated and preserved. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

14. State *v.* Pressman, 103 Iowa 449, 72 N. W. 660; State *v.* Deniston, 46 Kan. 359, 26 Pac. 742; Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547. Where only the number of the ballot was recorded in the poll book, but no name written in connection therewith, parol evidence is inadmissible to show who voted the ballot. Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585; but where fraud is shown the poll book may be contradicted by parol. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

15. Until the absence of the poll book is accounted for, parol evidence of the fact of voting is not admissible. Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547; State *v.* Deniston, 46 Kan. 359, 26 Pac. 742.

Where the name of Vance was on the poll book, but no such man lived in the precinct and one by the name of Zentz was not on the list but was a legal voter in the precinct, it was held that parol evidence could not be heard to show that Zentz voted for Vance, and that the vote of Zentz was illegal. Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585.

16. State *v.* Olin, 23 Wis. 309.

17. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

18. *Alabama.* — McDonald *v.* Wood, 118 Ala. 589, 24 So. 86.

Arkansas. — Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42.

Kentucky. — Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

Michigan. — People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; People *v.* Sackett, 14 Mich. 320.

Montana. — Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

New York. — People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

North Carolina. — People *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547.

North Dakota. — Perry *v.* Hackney, 11 N. D. 148, 90 N. W. 483.

Oregon. — State *v.* Kraft, 18 Or. 550, 23 Pac. 663.

Pennsylvania. — Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; *In re* Con. Elec. 1 Phila. 159; O'Day's Contest, 6 Kulp 474.

But see Major *v.* Barker, 99 Ky. 305, 35 S. W. 543.

Where a witness testified that he could not read and that his ticket was not read to him, but it was said that a certain candidate's name was on the ticket, and it appeared that there were two kinds of tickets peddled, his testimony was admitted. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

The interest of the voter in the suit is not such as to disqualify him from swearing as a witness for whom he voted. *In re* Con. Elec. 1 Phila. 159; Reed *v.* Kneass, Brightly Con. Elec. Cas. 366.

Neither party need contend for the right of the witness who does not demand protection, and if compelled to testify against his will the testimony is competent unless he objects. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

his ballot public.[19] But when it is made to appear that the vote is illegal,[20] such immunity ceases, and the contents of the ballot may be proved without the consent of the voter, and he ought to be compelled to testify himself,[21] but should he decline to do so, it may be proved by other evidence for whom he voted.[22] The ballot itself, if it can be found and identified, is the best evidence of how a person voted, except under the allegation that fraudulent ballots have been substituted, in which case the voter may testify.[23] As tending to show how he voted, a voter's general reputation as to his politics, his political associations, affiliations and his conduct going to, returning from and while at the polls, or any other circumstances

19. Black *v.* Plate, 130 Ala. 514, 30 So. 434; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; State *v.* Kraft, 18 Or. 550, 23 Pac. 663; O'Day's Contest, 6 Kulp 474.

Proof of the external appearance of the voter's ballot, or knowledge of its contents obtained without his consent, or his statements concerning his vote, are inadmissible. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141. But see Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Where the election officers assist, under color of the statute, in the preparation of a ballot, they cannot testify how the ballot was marked, although the law as to giving assistance to incompetents was not complied with. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164.

It has been held that a legal voter who voted after the closing hour need not disclose for whom he voted. *In re* Locust Ward, 3 Clark 11.

20. It lies within the discretion of the court to determine how much testimony tending to show the illegality of the vote is sufficient foundation for compelling the voter to testify for whom he voted. People *v.* Teague, 106 N. C. 576, 11 S. E. 330. That his name does not appear upon the list of taxables is insufficient. Thompson *v.* Ewing, 1 Brewst. 67.

21. Black *v.* Pate, 130 Ala. 514; Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; People *v.* Holden, 48 Cal. 123; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076; Stewart *v.* Rose, 24 Ky. L. Rep. 1,759, 72 S. W. 271; Harbaugh *v.* People, 33 Mich. 241; State *v.* Kraft, 18 Or. 550, 23 Pac. 663; *In re* McDaniel's Case, Brightly Con. Elec. Cas. 238.

It is proper to ask him for whom he intended to vote. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; or for whom he voted, but not what ticket he voted. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

22. *In re* McDaniel's Case, Brightly Con. Elec. 238; Harbaugh *v.* People, 33 Mich. 241; Piatt *v.* People, 29 Ill. 54; Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; Vallandigham *v.* Campbell, 1 Bart. 233; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

Where the vote is *viva voce*, the voter or others may testify. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

The election officers who marked his ballot may testify. Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076.

Testimony of a ticket peddler for a certain candidate and no other candidate that he gave a ticket to such person and "voted him" is admissible as tending to show for whom he voted. People *v.* Teague, 106 N. C. 576. But what a distributor of tickets said at the polls about the tickets he was handing out does not tend to prove how the person to whom he gave one voted. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

23. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86; Wheat *v.* Ragsdale, 27 Ind. 191.

indicating his choice, may properly be shown.[24] The evidence of the voter as to how he voted, and circumstantial evidence generally, are entitled to no great weight.[25]

10. Proof of Illegal Votes. — A. In General. — As none but legal votes are competent evidence of the result, any proper evidence tending to impeach or establish the legality of the vote may be received;[26] and so it is competent to hear evidence tending to or showing the qualification or disqualification of persons shown to have voted,[27] the time of casting the vote,[28] the manner in which it

24. Vallandigham *v.* Campbell, 1 Bart. 233; Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; Dealno *v.* Morgan, 2 Bart. 168. It may be shown what ticket he asked for. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; or that the ticket he voted had an identifying mark upon it, People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; but it is incompetent to describe the ticket he voted by its type or size, Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; or external appearance.

Where a person of unsound mind was permitted to vote, and the day succeeding the election he was found by a jury to be of unsound mind, evidence as to his previous party affiliations was sufficient to show how he voted. Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

25. People *v.* Sackett, 14 Mich. 320.

The evidence of the voter as to how he voted is only admitted because it is the best obtainable. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711, and such witnesses may be impeached. Stewart *v.* Rose, 24 Ky. L. Rep. 1,759, 72 S. W. 271.

Evidence that the political associations of the voter were with men belonging to the political party to which a specified candidate belonged is insufficient, alone and of itself, to show that they voted for such candidate. Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 857.

26. People *v.* Holden, 28 Cal. 123; Beardstown *v.* Virginia, 81 Ill. 541; Dale *v.* Irwin, 78 Ill. 170; Harbaugh *v.* People, 33 Mich. 241; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; People *v.* Love, 63 Barb. (N. Y.) 535; People *v.* Vail, 20 Wend. (N. Y.) 12; People *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; McKinney *v.* O'Connor, 26 Tex. 5; Ferguson *v.* Allen, 7 Utah 263, 26 Pac. 570; Reid *v.* Julian, 2 Bart. 832.

27. State *v.* Judge, 13 Ala. 805; People *v.* Holden, 28 Cal. 123; Dale *v.* Irwin, 78 Ill. 170; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Harbaugh *v.* People, 33 Mich. 241; Pradat *v.* Ramsey, 47 Miss. 24; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; People *v.* Cook, 14 Barb. (N. Y.) 259; People *v.* Teague, 106 N. C. 576, 11 S. E. 330; McKinney *v.* O'Connor, 26 Tex. 5.

The qualifications of voters are prescribed by the statutes and vary in different states. Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Kellog *v.* Hickman, 12 Colo. 256, 21 Pac. 325. The usual qualifications are, residence for a certain period, citizenship, age, sex, sometimes payment of taxes, and usually conviction of a crime or mental incapacity, disqualifies. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Blair *v.* Ridgley, 41 Mo. 161, 97 Am. Dec. 248; Van Valkenberg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136; Spragins *v.* Houghton, 3 Ill. 377; Anderson *v.* Baker, 23 Md. 531; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

28. Piatt *v.* People, 29 Ill. 54; Graham *v.* Graham, 24 Ky. L. Rep. 548, 68 S. W. 1,093; Zeiler *v.* Chapman, 54 Mo. 502.

was cast and received,[29] where,[30] by whom[31] and for whom cast,[32] or any other facts or circumstances tending to indicate the legality of the vote.[33]

To prove the legality of the vote, it must appear that the person casting the same was possessed of all the necessary qualifications, and also that he was registered, where registration is a prerequisite to voting;[34] but to prove a vote illegal because of the disqualification of the person casting it, the evidence must be conclusive.[35]

As a rule such evidence as is generally competent to show the necessary facts is admissible upon the issue of the legality of a vote.[36] In some cases the election officers,[37] and the voter himself, may testify,[38] subject to the rule that the best evidence of which the

29. Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076; Patton *v.* Watkins, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43; Clark *v.* Robinson, 88 Ill. 498. Proof of the fact that the votes were cast by the aid of machinery does not show them to be illegal. *In re* House Bill No. 1,291 (Mass.), 60 N. E. 129; *In re* Voting Machines, 19 R. I. 729, 36 Atl. 716. Opinions as to whether or not certain ballots were cast by machinery are incompetent. Convery *v.* Conger, 53 N. J. L. 658, 24 Atl. 1,002.

30. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Harbaugh *v.* People, 33 Mich. 241.

31. Clark *v.* Robinson, 88 Ill. 498; Cowan *v.* Browse, 93 Ky. 156, 19 S. W. 407; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

32. Lovewell *v.* Bowen, 69 Ark. 501, 64 S. W. 272; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Board of Supervisors *v.* Davis, 63 Ill. 405; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Lanier *v.* Gallatas, 13 La. Ann. 175; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

33. Black *v.* Pate, 130 Ala. 514, 30 So. 434; Beardstown *v.* Virginia, 81 Ill. 541; Lankford *v.* Gebhart, 130 Mo. 621, 51 Am. St. Rep. 585; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; Weaver *v.* Given, 1 Brewst. (Pa.) 140.

34. People *v.* Holden, 28 Cal. 123; Preston *v.* Culbertson, 58 Cal. 198; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; Weaver *v.* Given, 1 Brewst. (Pa.) 40; *In re* Duffy, 4 Brewst. (Pa.) 531.

35. Wheat *v.* Ragsdale, 27 Ind. 191; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

Proof of errors and irregularities in registration, Dale *v.* Irwin, 78 Ill. 170; Drake *v.* Drewry, 112 Ga. 308, 37 S. E. 432; Davis *v.* O'Berry, 93 Md. 708, 50 Atl. 273; Pradat *v.* Ramsey, 47 Miss. 24; People *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547; or that the voter had agreed to "pair off" with another does not show an illegal vote. Piatt *v.* People, 29 Ill. 54.

36. Dale *v.* Irwin, 78 Ill. 170; Supervisors *v.* People, 65 Ill. 360; Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Pradat *v.* Ramsey, 47 Miss. 24; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

37. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680.

38. Clark *v.* Robinson, 88 Ill. 498; Dale *v.* Irwin, 78 Ill. 170; Beardstown *v.* Virginia, 81 Ill. 541; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; Fish *v.* Chester, 8 Gray (Mass.) 506; Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749; State *v.* Kraft, 18 Or. 550, 23 Pac. 663.

case is susceptible must be produced.[39]

Public records showing or tending to show facts which indicate the legality or illegality of the vote are the best evidence of such facts.[40]

Proof that the voter was registered is but *prima facie* proof of the legality of the vote,[41] but proof that a person was regarded by the public authorities as a legal voter in no way tends to indicate that fact.[42]

The legality of each vote must affirmatively appear,[43] and proof of the fact that illegal votes were cast at the precinct does not invalidate the legal ones when the number of such can be ascertained.[44]

B. Irregularities in Casting or Receiving the Votes. — As a general rule, in the absence of some showing of fraud or fraudulent intent, proof of mere irregularities or omissions to observe all the formalities prescribed by law as to the manner of casting or receiving the vote does not show it to be illegal,[45] but the rule will

39. Clark *v.* Robinson, 88 Ill. 498; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407. If written evidence exists it must be produced if possible, or its absence satisfactorily accounted for, and if lost or destroyed secondary evidence may be received. People *v.* Pease, 13 E. D. Smith (N. Y.) 45, 84 Am. Dec. 242; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; Beardstown *v.* Virginia, 76 Ill. 34.

40. Beardstown *v.* Virginia, 76 Ill. 34; Clark *v.* Robinson, 88 Ill. 498; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

All documents in general relating to the election are competent. *In re* Duffy, 4 Brewst. (Pa.) 531; Black *v.* Pate, 130 Ala. 514, 30 So. 434. Documentary evidence may be explained by parol. Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; Beardstown *v.* Virginia, 76 Ill. 34. Where the records of proceedings in court are introduced the regularity of the proceedings may be inquired into, and if found void for want of jurisdiction they are incompetent evidence. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

41. Com. *v.* Alger, Thach. Crim. Cas. 412; *In re* Duffy, 4 Brewst. (Pa.) 531; Norment *v.* Charlotte, 85 N. C. 387; Southerland *v.* Goldsboro, 96 N. C. 49, 1 S. E. 760; McKinney *v.* O'Connor, 26 Tex. 5; Fish *v.* Chester, 8 Gray (Mass.) 506; Dale *v.* Irwin, 78 Ill. 170; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546.

42. Fish *v.* Chester, 8 Gray (Mass.) 506.

Proof that one was drafted and sent a substitute to the army does not tend to prove qualification to vote. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

43. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Covode *v.* Foster, 4 Brewst. (Pa.) 414. In a school election it is not necessary to establish by explicit testimony the qualifications of those voting. Carr *v.* Stafford, 62 Kan. 868, 63 Pac. 737.

44. State *v.* Commissioners, 22 Fla. 29.

45. *Alabama.* — State *v.* Circuit Judge, 9 Ala. 338.

Illinois. — Clark *v.* Robinson, 88 Ill. 498; Piatt *v.* People, 29 Ill. 54.

Indiana. — State *v.* Shay, 101 Ind. 36.

Kansas. — Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

Kentucky. — Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Michigan. — People *v.* Bates, 11 Mich. 362, 83 Am. Dec. 745.

not apply if the statute declares such irregularity to be fatal to the vote,[46] or where it amounts to a substantial departure from the statutory provisions,[47] or might have prevented the casting of other votes.[48] And so in some cases where it appeared that the ballots were not numbered,[49] or were improperly prepared for incompetents,[50] or that votes were received before or after the proper hour, the votes have been held illegal,[51] while in other cases the holding has

Mississippi. — Pradat *v.* Ramsey, 47 Miss. 24.

Missouri. — Sanders *v.* Backs, 142 Mo. 255, 43 S. W. 653; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585.

New York. — People *v.* Cook, 14 Barb. 259.

Pennsylvania. — Thompson *v.* Ewing, 1 Brewst. 67; Weaver *v.* Given, 1 Brewst. 140.

Failure to erect booths, Patton *v.* Watkins, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43, or stamp ballots, Moyer *v.* Van De Vanter, 12 Wash. 377, 41 Pac. 60, 90 Am. St. Rep. 900, 29 L. R. A. 670; or number them, Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; or their deposit in the wrong box, People *v.* Bates, 11 Mich. 362, 83 Am. Dec. 745; or the reception of votes before the election officers are sworn, Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; or after premature close of the polls if within the regular hours, Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585, or calling upon a certain person from the crowd to vote in order to save time, Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076; or irregularities in preparing ballots for illiterate voters, will not affect the validity of the vote. Patton *v.* Watkins, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 143.

46. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; West *v.* Ross, 53 Mo. 350; Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 553.

Where the statute forbids the acceptance of a ballot "shown to another," if the voter shows his ballot to another after it is marked, such vote is illegal. Major *v.* Barker, 99 Ky. 305, 35 S. W. 543.

47. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Tebbe *v.* Smith, 108 Cal. 101, 4 Pac. 454, 29 L. R. A. 673; Clark *v.* Robinson, 88 Ill. 498; Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,078; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Attorney General *v.* Folsom, 69 N. H. 556, 45 Atl. 410. Opening the ballot box and taking out a ballot to enable the voter to change it makes the vote illegal. Roach *v.* Malotte, 23 Tex. Civ. App. 400, 56 S. W. 701.

Where the use of certain voting machines has been adopted, the statute regarding change of style of machine used must be strictly adhered to. *In re* Voting Machine (R. I.), 50 Atl. 265.

48. Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076.

49. West *v.* Ross, 53 Mo. 350. Where it appears that there are more ballots in the box than names on the poll list, some of which are unnumbered as required by statute, such excess unnumbered ballots are illegal. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

50. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Major *v.* Barker, 99 Ky. 305, 35 S. W. 543. Proof that illiterate voters were permitted to vote openly, with the aid of the election officers, and without any oath as to their disabilities, shows such votes to be illegal. Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076; Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867.

51. Attorney General *v.* Folsom, 69 N. H. 556, 45 Atl. 410; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Mayers *v.* Moffet, 1 Brewst. (Pa.) 230; Piatt *v.* People, 29 Ill. 54. In the case of People *v.* Cook, 14 Barb. (N. Y.) 259, the polls were required to close at sunset. At that time there were several voters in the booth who had entered before sunset, who were allowed to vote, but none others. Whether or not such votes

been otherwise.[52] Proof of irregularities in challenging doubtful voters,[53] or in making proof of their qualifications,[54] or in handing in the vote will not as a rule invalidate the vote.[55]

The parol testimony of the electors, the election officers or others is competent to show irregularities or omissions in the preparation or casting or reception of the ballots.[56]

C. More Than One Vote Cast by the Same Person. — As a rule, proof that a person voted more than once shows all of such votes to be illegal,[57] but where it appears that a voter casts two ballots instead of one by mistake, one of them is legal.[58]

D. Votes Cast in the Wrong Precinct. — As a rule, proof that a vote was cast in a precinct other than that in which the

were illegal does not seem to have been clearly decided, but the holding was that the merits of the election had not been affected. But in Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312, one of the judges of election cast his ballot after the time for the closing of the polls, and such vote was held illegal.

52. Patton *v.* Watkins, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43.

53. Weaver *v.* Given, 1 Brewst. (Pa.) 140; Batturs *v.* Megary, 1 Brewst. (Pa.) 162; Dale *v.* Irwin, 78 Ill. 170.

54. Board of Supervisors *v.* People, 65 Ill. 360. Proof that a challenged voter was sworn upon a book other than one containing gospels will not invalidate the vote. People *v.* Cook, 14 Barb. (N. Y.) 259.

55. It was alleged that certain votes were illegal because the persons casting them voted by proxy. The evidence showed that the voters were sick and came to the polls in a carriage; that they were driven up to the window of the voting place and reached out their ballots to one of the judges of election, who extended his hand through the window to receive the vote; that their hands lacking about two feet of meeting, some person took the votes from the voters' hands and passed them to the judge; that the ballots were in sight of the judges from the time they left the voters' hands until deposited in the ballot box. *Held,* that the votes were legal. Clark *v.* Robinson, 88 Ill. 498.

56. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Piatt *v.* People, 29 Ill. 54; Clark *v.* Robinson, 88 Ill. 498; People *v.* Cook, 14 Barb. (N. Y.) 259; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. E. 1,127, 51 Am. St. Rep. 585; West *v.* Ross, 53 Mo. 350; Batturs *v.* Megary, 1 Brewst. (Pa.) 162.

It is proper to show conversations between the election officers and the voter at the time of making proof of right to vote; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; and the details of making such proof; Board of Supervisors *v.* People, 65 Ill. 360; or manner of assisting incompetent voters in the preparation of their ballots; Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

57. People *v.* Holden, 28 Cal. 123; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Clark *v.* Robinson, 88 Ill. 498; Dale *v.* Irwin, 78 Ill. 170.

58. People *v.* Holden, 28 Cal. 123; Beardstown *v.* Virginia, 81 Ill. 541. Where by mistake the first vote was cast in the wrong precinct and was withdrawn, and afterwards cast in the proper precinct, the second vote was held illegal. Harbaugh *v.* People, 33 Mich. 241. In the case of Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704, by mistake of the election officers the vote of a person was accepted and deposited in the ballot box, after which it was discovered that the person casting the same was not a voter at that precinct. The vote was not counted. The voter afterwards voted in his proper precinct, and it was held that both votes were illegal.

voter resides,[59] or that he was registered and was a legal voter in another precinct from that in which he voted, shows an illegal vote.[60] But some cases hold that where it appears that a vote is so cast through honest mistake,[61] or necessity, the vote will be legal.[62]

And so evidence as to precinct boundaries is admissible for the purpose of establishing the legality or illegality of a vote.[63] For such purpose the official records fixing the precinct boundaries are admissible,[64] but in the absence of such records parol evidence of circumstances tending to raise a presumption of established boundaries is admissible.[65]

E. Qualifications of Voters. — a. *Registration.* — It is competent to show that persons not registered voted, and where registration is required, such a vote is illegal,[66] unless proof of the right

59. People *v.* Holden, 28 Cal. 123; Preston *v.* Culbertson, 58 Cal. 198; Dale *v.* Irwin, 78 Ill. 170; Clark *v.* Robinson, 88 Ill. 498; People *v.* Teague, 106 N. C. 576, 11 S. E. 330; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

60. People *v.* Teague, 106 N. C. 576, 11 S. E. 330; Dale *v.* Irwin, 78 Ill. 170.

61. Preston *v.* Culbertson, 58 Cal. 198. Where a legally qualified voter is honestly mistaken as to the precinct in which he ought to vote, and *bona fide* registers and votes in the wrong precinct, and no other, unless the mistake be discovered before the vote is cast, the vote is legal. People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

62. Davis *v.* State, 75 Tex. 420, 12 S. W. 957. In the case of Peard *v.* State, 34 Neb. 372, 51 N. W. 828, the territory was subdivided for election purposes in such a manner that voters could not vote for certain officers to be elected at the legal polling places provided, and voted for such officers at the only polling places provided, which were outside of the precinct in which the voters resided, and there was no showing of fraud, or that the irregularity affected the merits of the case, the votes were held to be legal.

63. People *v.* Holden, 28 Cal. 123; Preston *v.* Culbertson, 58 Cal. 198; Clark *v.* Robinson, 88 Ill. 498; People *v.* Teague, 106 N. C. 576, 11 S. E. 330; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

64. Clark *v.* Robinson, 88 Ill. 498; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407.

65. Testimony may properly be heard showing that certain persons had voted in the precinct before, had paid taxes there, worked roads there pursuant to warning from the road overseer of the precinct, and that they believed they had a right to vote there. Clark *v.* Robinson, 88 Ill. 498. Proof of long acquiescence in relation to precinct boundaries is *prima facie* proof of their establishment, and the validity of the law providing for the original creation cannot be questioned in *quo warranto.* People *v.* Maynard, 15 Mich. 463.

66. Clark *v.* Robinson, 88 Ill. 498; People *v.* Kopplekom, 16 Mich. 342; Southerland *v.* Goldsboro, 96 N. C. 49, 1 S. E. 760; People *v.* Teague, 106 N. C. 576, 11 S. E. 330; *In re* Duffy, 4 Brewst. (Pa.) 531; Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; State *v.* Stumpf, 21 Wis. 586. Even though the name was omitted from the registration books by mistake. Patterson *v.* Hanley, 136 Cal. 265, 68 Pac. 821.

The terms qualified and registered voters are not coextensive. Norment *v.* Charlotte, 85 N. C. 387.

Where prior to an election the registration officers failed to register the voters as required by law, the votes cast were illegal. Zeiler *v.* Chapman, 54 Mo. 502.

to vote is made.[67] Registration lists are the best evidence that a person is or is not registered,[68] and where such lists are lost, extrinsic evidence of their contents may be received.[69] Proof of errors, irregularities or fraud in registration will not disqualify the voter,[70] but the errors may be shown and corrected,[71] or the registry impeached for fraud.[72]

b. *Residence.* — As a general rule, proof that a person who voted had not been a *bona fide* resident of the election precinct or district at which the vote was cast during the statutory length of time, shows an illegal vote.[73] Proof of a temporary change of residence is not

67. Dale *v.* Irwin, 78 Ill. 170. Where a person was not of legal age on registration day, but attained his majority before the day of election, and proved the facts and voted, the vote was legal. People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

68. State *v.* Griffey, 5 Neb. 161. Where the board of registry orders names to be stricken from the list, a certified copy of the proceedings, or the original record thereof, is the best evidence, and a certified list of the names so ordered stricken is no evidence to show who are registered. Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

69. Where the original registry list is lost, the register may testify whether or not a certain person was registered. State *v.* Griffey, 5 Neb. 161.

70. Drake *v.* Drewry, 112 Ga. 308, 37 S. E. 432; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546; People *v.* Teague, 106 N. C. 576, 11 S. E. 330. The elector cannot be disfranchised by a mistake of an election officer. Davis *v.* O'Berry, 93 Md. 708, 50 Atl. 273. But see Patterson *v.* Hanley, 136 Cal. 265, 68 Pac. 821.

Where it appeared that a person voted without having a certificate of registration, Pradat *v.* Ramsey, 47 Miss. 24; Dale *v.* Irwin, 78 Ill. 170; or an irregular one, Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508; or one obtained by fraud, it was held that the votes were legal. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407. Irregularities in registration and utter absence of registration are different things. Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508.

71. *Georgia.* — Drake *v.* Drewry, 112 Ga. 308, 37 N. E. 432.

Illinois. — Dale *v.* Irwin, 78 Ill. 170.

Maryland. — Davis *v.* O'Berry, 93 Md. 708, 50 Atl. 273.

Massachusetts. — Com. *v.* Alger, Thach. Crim. Cas. 412.

Mississippi. — Pradat *v.* Ramsey, 47 Miss. 24.

North Carolina. — People *v.* Teague, 106 N. C. 576, 11 S. E. 330; Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749; Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873.

But see Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1,127, 51 Am. St. Rep. 585.

72. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508; McKinney *v.* O'Connor, 26 Tex. 5.

73. *Alabama.* — Black *v.* Pate, 130 Ala. 514, 30 So. 434; Griffin *v.* Wall, 32 Ala. 149.

California. — People *v.* Holden, 28 Cal. 123.

Illinois. — Beardstown *v.* Virginia, 81 Ill. 541; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Dale *v.* Irwin, 78 Ill. 170.

Kansas. — Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

Kentucky. — Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Missouri. — Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1,127, 51 Am. St. Rep. 585.

North Carolina. — People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

Pennsylvania. — Weaver *v.* Given, 1 Brewst. 140; Nann *v.* Cassidy, 1 Brewst. 11.

sufficient to disqualify a voter on the ground of non-residence in the absence of evidence as to his purpose or intention.[74]

The intent of a person as to residence may be disclosed by proof of his acts and surrounding circumstances,[75] and he himself may testify as to his intention,[76] but his testimony is not conclusive.[77] Proof of such acts of a person as indicate an intention to acquire or abandon his residence is the best evidence of his intention.[78]

Evidence of reputation as to residence, or rumors or common report, does not tend to prove or disprove residence, and is inadmissible.[79] Evidence tending to show the probability or improbability that certain persons were or were not residents is competent—as that certain parties could not be residents without the knowledge of the witness,[80] or that search had been made for them and that they could not be found in the precinct,[81] or that there was a great demand for common laborers in the community,[82] which may be

New York. — People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; McKinney *v.* O'Connor, 26 Tex. 5; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

74. Griffin *v.* Wall, 32 Ala. 149; Dale *v.* Irwin, 78 Ill. 170; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1,127, 51 Am. St. Rep. 585; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; Davis *v.* State, 75 Tex. 420, 12 S. W. 957. Paupers in almshouse do not lose residence in the precinct from which they came. Clark *v.* Robinson, 88 Ill. 498; Freeport *v.* Board of Supervisors, 41 Ill. 495. Neither presence nor absence in the service of the United States indicates or negatives residence. People *v.* Holden, 28 Cal. 123.

75. State *v.* Judge, 13 Ala. 805; Griffin *v.* Wall, 32 Ala. 149; People *v.* Holden, 28 Cal. 123; French *v.* Lighty, 9 Ind. 475; State *v.* Minnick, 15 Iowa 123; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1,127, 51 Am. St. Rep. 585; People *v.* Pease, 13 E. D. Smith (N. Y.) 45, 84 Am. Dec. 242.

Proof that the next day after a person voted he bought a ticket for a point outside the precinct in which he voted may be made as a circumstance to disprove residence. People *v.* Teague, 106 N. C. 576, 11 S. E. 330. Proof of acts which disclose an evident intention to make a change of residence is strong proof of such intention. Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615. Where it is sought to show the intention of a student at a college, the evidence of his acts to show the intention as to residence must be acts independent of his status as a student. *In re* Barry, 61 N. Y. Supp. 124.

76. Dale *v.* Irwin, 78 Ill. 170; Wilkins *v.* Marshall, 80 Ill. 74; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; Fish *v.* Chester, 8 Gray (Mass.) 506.

77. Beardstown *v.* Virginia, 81 Ill. 541; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; Weaver *v.* Given, 1 Brewst. (Pa.) 140. A person's intention as disclosed by his acts is the best evidence. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

78. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

79. Griffin *v.* Wall, 32 Ala. 149; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

80. State *v.* Deniston, 46 Kan. 359, 26 Pac. 742; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; McKinney *v.* O'Connor, 26 Tex. 5; State *v.* Olin, 23 Wis. 309.

81. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11. The searcher cannot testify as to what was said to him at a particular house. Weaver *v.* Given, 1 Brewst. (Pa.) 140.

82. People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

rebutted by proof that there had been a large increase in population,[83] but as a rule such evidence is entitled to little weight as proof of residence.[84]

c. *Citizenship.* — Proof that one who voted was not a citizen shows an illegal vote.[85] Naturalization records are the best evidence of citizenship, and cannot be impeached by parol evidence except in cases of fraud,[86] but such evidence is competent to show mistakes in them, and to identify the real party therein named;[87] or to show that they were fraudulently issued or procured.[88] The nonexistence of such records may also be shown by parol, and when it appears that they have been destroyed secondary evidence of their contents is admissible.[89]

Evidence that persons bearing foreign names were born outside of the United States is *prima facie* proof that they are aliens, and where it appears that a person was foreign-born, in order to show his qualification to vote it must further appear that he is of American parentage or has been naturalized.[90]

The certificate of intention to become a citizen is competent proof of the fact that the person to whom it was issued has declared his intention to become naturalized,[91] but the fact when proved has little

83. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442. Certificates of final entries from the land office are competent to show an increase in population. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

84. Black *v.* Pate, 130 Ala. 514, 30 So. 434; Weaver *v.* Given, 1 Brewst. (Pa.) 140.

And to less force in a new country containing a shifting and unsettled population, than in older and more settled communities. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935. In order to establish the fact that those who voted were non-residents, the testimony of one or more witnesses having actual knowledge of the facts must be adduced. When the proof tends to show that the witness does not know all the legal voters in the precinct, it is insufficient. Todd *v.* Cass Co., 30 Neb. 823, 47 N. W. 196. But in the absence of evidence to the contrary, proof by old residents that no such persons as those whose names appear on the poll lists were known to have resided in the precinct is sufficient to support a finding that such names were fictitious or belong to persons not legal voters. State *v.* Olin, 23 Wis. 309.

85. Dale *v.* Irwin, 78 Ill. 170. A citizen is not necessarily an elector, but an elector must be a citizen. Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923.

86. People *v.* McGowan, 77 Ill. 644, 20 Am. Rep. 254.

87. Beardstown *v.* Virginia, 76 Ill. 34; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

88. So held where the naturalization was the act of the clerk alone, and not the judgment of the court. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

89. State *v.* Olin, 23 Wis. 309. A certificate of the clerk of the court that there is no record of certain persons having been naturalized, is incompetent to disprove naturalization. Any person who has examined the record may testify that a matter is not of record. Beardstown *v.* Virginia, 81 Ill. 541.

90. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

91. Berry *v.* Hull, 6 N. M. 643.

weight in determining the right to vote,[92] and does not sufficiently prove citizenship;[93] but proof that a person applied for naturalization papers before election sufficiently shows that at the time of such application he was not a citizen.[94]

The testimony of a person as to the facts of his father's naturalization is competent.[95]

d. *Age.* — To show an illegal vote it may be proved that the person casting the same was a minor,[96] and the testimony of the voter himself is competent,[97] as are family records,[98] and age may also be shown by circumstances.[99]

e. *Mental Incapacity.* — Proof that a vote was cast by one *non compos mentis* shows an illegal vote,[1] and the proof may be made without proving a finding in lunacy.[2]

f. *Payment of Taxes.* — Where payment of taxes is required as a prerequisite to voting, proof of non-payment will show an invalid vote,[3] and the same is true where it appears that payment thereof was made by another, unless ratified or authorized by the voter.[4] The testimony of the tax collector, or his records, is competent to show payment or non-payment of taxes,[5] but parol testimony of the payment thereof will outweigh the merely negative evidence of the books which show no such payment.[6]

g. *Bribery.* — Proof that a person who has voted had been bribed shows an illegal vote.[7] Proof of the giving or promising to give to

92. Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

93. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

94. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

95. Beardstown *v.* Virginia, 81 Ill. 541.

96. Clark *v.* Robinson, 88 Ill. 498; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

97. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711.

98. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

99. Black *v.* Pate, 130 Ala. 514, 30 So. 434. A certificate of a priest who baptized the person. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; or a school census, is incompetent as evidence. Edwards *v.* Logan, 24 Ky L. Rep. 1,099, 70 S. W. 852. The appearance of the person as to his age may be testified to. Black *v.* Pate, 130 Ala. 514, 30 So. 434.

1. Clark *v.* Robinson, 88 Ill. 498; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852; People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

2. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

3. *In re* White, 4 Pa. Dist. 363; State *v.* Griffey, 5 Neb. 161; Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

4. *In re* White, 4 Pa. Dist. 363.

5. State *v.* Griffey, 5 Neb. 161.

6. *In re* Election 12th Ward, 18 Phila. (Pa.) 458.

7. Carroll *v.* Green, 148 Ind. 362, 47 N. E. 223; Carrothers *v.* Russell, 53 Iowa 346, 5 N. W. 499, 36 Am. Rep. 222; State *v.* Deniston, 46 Kan. 359, 26 Pac. 742; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; People *v.* Thornton, 25 Hun (N. Y.) 456; State *v.* Dustin, 5 Or. 375, 20 Am. Rep. 746; State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485; State *v.* Olin, 23 Wis. 309; State *v.* Conness, 106

the voter or to another, if accepted, shows bribery,[8] but where proof is made of a public offer of bribery, it must further appear that the voter acted under its influence, or would in some way be benefited by the performance of the offer.[9]

Where, at an election for the location of a county seat, it was shown that an illegal agreement was made whereby one of the contesting cities was to withdraw from the contest in favor of another city, it was held that such agreement would not invalidate the votes cast, in the absence of proof of any benefit to the voters.[10]

The testimony of the person to whom the bribe was offered or given is competent to show the bribery;[11] or it may be disclosed by proof of circumstances.[12]

h. *Conviction of a Crime.* — Conviction of a crime as a disqualification to vote may be shown to prove the invalidity of a vote,[13] and the record of the person's indictment is competent evidence,[14] but

Wis. 425, 82 N. W. 288; St. Ives, 2 Elec. Cas. (Doug.) 403.

8. Evidence of misrepresentations by a candidate to voters, as to the legal effect of ballots, whereby they were influenced to vote for him, does not tend to show bribery. Applegate *v.* Egan, 74 Mo. 258.

To constitute bribery the payment need not be to the voter himself. State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485; State *v.* Dustin, 5 Or. 375, 20 Am. Rep. 746.

Where it appeared that a company organized in the interests of one of the competing cities for county seat, issued up to the day of election and not thereafter, certificates of sale of lots to voters, without consideration, to be paid for after election, and there was evidence that payment had not been demanded, it was held under the statute to be bribery, although the voters testified that they were not influenced. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936. The offer of a public building for the use of the county in case the county seat be changed does not constitute bribery. Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255.

9. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; State *v.* Dustin, 5 Or. 375, 20 Am. Rep. 746; People *v.* Thornton, 25 Hun (N. Y.) 456; State *v.* Olin, 23 Wis. 309; Carrothers *v.* Russell, 53 Iowa 346, 5 N. W. 499, 36 Am. Rep. 222. A vote given for a candidate for a public office in consideration of his promise, in case he shall be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county, or any other corporation, is void. State *v.* Purdy, 36 Wis. 213.

10. Parol evidence that a person voted in a certain way, and the day before election received as a gift a deed for a lot, shows an inducement for the vote, and the vote is illegal. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

11. State *v.* Deniston, 46 Kan. 359, 26 Pac. 742; Stewart *v.* Rose, 24 Ky. L. Rep. 1,759, 72 S. W. 271; Carroll *v.* Green, 148 Ind. 362, 47 N. E. 223.

12. State *v.* Conness, 106 Wis. 425, 82 N. W. 288; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

13. *In re* White, 4 Pa. Dist. 363; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 301; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

Election officers have no right to reject a vote on the ground that the elector is a deserter from the military service of the United States, in the absence of a regular conviction of such offense. Commissioners *v.* Reade, 2 Ashm. (Pa.) 261.

14. People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

upon proof of the granting of a pardon by the proper officer, the right of franchise is restored.[15]

i. *Proof of Right to Vote.* — As a rule the manner of proving the right to vote is prescribed by statute,[16] and must be strictly followed,[17] but when the proof is so made the right to vote sufficiently appears.[18]

11. Setting Aside the Election or Return. — A. Admissibility of Evidence. — a. *In General.* — Upon the issue of the regularity or legality of the election proceedings it is proper to take into consideration the validity of the law under which the same are held;[19] the regularity of the submission of the question to the voters,[20] and the eligibility of the candidates to hold the offices for which they were voted.[21] Evidence may also be heard as to the regularity or legality of the calling or ordering of the election;[22] the designation of polling places, precincts or voting districts,[23] and the time and place of

15. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; Jones *v.* Board, 56 Miss. 766, 31 Am. Rep. 385; *Ex parte* Garland, 4 Wall. (U. S.) 333; Carlisle *v.* United States, 16 Wall. 147; Wood *v.* Fitzgerald, 3 Or. 568.

16. Spragins *v.* Houghton, 3 Ill. 377; State *v.* Griffey, 5 Neb. 161; People *v.* Bell, 119 N. Y. 175, 23 N. E. 533; French *v.* Lighty, 9 Ind. 475. Where a vote is refused on the ground of disqualification, the voter should make proof of his qualifications then, otherwise the vote is illegal. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Gibbons *v.* Sheppard, Brightly Con. Elec. Cas. 558; *In re* White, 4 Pa. Dist. 363.

17. Board of Supervisors *v.* People, 65 Ill. 360; Fairchance Borough Elec. Con., 8 Pa. Dist. 595.

18. Where a challenged voter takes the oath prescribed by law, the vote must be received. Spragins *v.* Houghton, 3 Ill. 377; Fairchance Borough Elec. Con., 8 Pa. Dist. 595; French *v.* Lighty, 9 Ind. 475; People *v.* Bell, 119 N. Y. 175, 23 N. E. 533; unless the oath be proven to be false. Spragins *v.* Houghton, 3 Ill. 377.

19. Board of Supervisors *v.* Keady, 34 Ill. 293; Gaston *v.* Lamkin, 115 Mo. 20, 21 S. W. 1,100.

20. State *v.* Commissioners, 22 Fla. 29; Elliott *v.* Burke, 24 Ky. L. Rep. 292, 68 S. W. 445.

21. Searcy *v.* Grow, 15 Cal. 117; Saunders *v.* Haynes, 13 Cal. 145; State *v.* Swearingen, 12 Ga. 23; State *v.* Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; Gardner *v.* Burke, 61 Neb. 534, 85 N. W. 541; *In re* Abbott, 4 Brewst. (Pa.) 468.

22. *California.* — Knowles *v.* Yates, 31 Cal. 83.

Colorado. — Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743.

Florida. — State *v.* Commissioners, 22 Fla. 29.

Georgia. — Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Illinois. — Chicago *v.* People, 80 Ill. 496.

Indiana. — State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403.

Iowa. — Dishon *v.* Smith, 10 Iowa 212.

Michigan. — People *v.* McNeal, 63 Mich. 294, 29 N. W. 728.

New York. — Merchant *v.* Langworthy, 6 Hill 646.

Oregon. — Wood *v.* Fitzgerald, 3 Or. 568.

Texas. — McKinney *v.* O'Connor, 26 Tex. 5.

Where the statute required that notices of the election be posted at every voting place in the county within a prescribed period preceding the election, it was held that the failure to post the notices invalidated the election. Haddox *v.* County, 79 Va. 677; but failure to publish the notice in the newspaper will not. Atkeson *v.* Lay, 115 Mo. 538, 22 S. W. 481.

23. People *v.* City Los Angeles,

holding the election.[24]

It is proper to receive evidence as to the appointment and qualification of those having charge of the proceedings,[25] and their authority so to act.[26] As evidence of such authority, it may be shown that the authority was not questioned,[27] or that the person so acting was reputed to have such authority.[28] Errors, irregularities, omissions and defects, or misconduct of the election officers in the conduct of the proceedings,[29] or in making up the record of such

133 Cal. 338, 65 Pac. 749; Clark *v.* Robinson, 88 Ill. 498; Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615; Wildman *v.* Anderson, 17 Kan. 344; Gilleland *v.* Schuyler, 9 Kan. 569; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407; Pradat *v.* Ramsey, 47 Miss. 24; Steele *v.* Calhoun, 61 Miss. 556; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; Peard *v.* State, 34 Neb. 372, 51 N. W. 828; *Ex parte* Heath, 3 Hill (N. Y.) 42; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; McKinney *v.* O'Connor, 26 Tex. 5.

Evidence of long acquiescence in relation to precinct boundaries, People *v.* Maynard, 15 Mich. 463, or their establishment by presumption, is proper. Clark *v.* Robinson, 88 Ill. 498.

24. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Knowles *v.* Yates, 31 Cal. 83; People *v.* Seale, 52 Cal. 71; People *v.* Brewer, 20 Ill. 474; Gilleland *v.* Schuyler, 9 Kan. 569; Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 51 Am. Rep. 88; McCraw *v.* Harrison, 4 Coldw. (Tenn.) 34; McKinney *v.* O'Connor, 26 Tex. 5.

The court take judicial notice of the day upon which the general election for the current year is held. State *v.* Minnick, 15 Iowa 123.

25. Clifton *v.* Cook, 7 Ala. 114; Satterlee *v.* San Francisco, 23 Cal. 314; Sprague *v.* Norway, 31 Cal. 173; Hardin *v.* Colquitt, 63 Ga. 588; Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424; Piatt *v.* People, 29 Ill. 54; Gilleland *v.* Schuyler, 9 Kan. 569; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Hankey *v.* Bowman, 82 Minn. 328, 84 N. W. 1,002; Pradat *v.* Ramsey, 47 Miss. 24; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; McCraw *v.* Harrison, 4 Coldw. (Tenn.) 34; State *v.* Stumpf, 21 Wis. 586.

26. Whipley *v.* McKune, 12 Cal. 352; Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424; Gilleland *v.* Schuyler, 9 Kan. 569; Norman *v.* Boaz, 85 Ky. 557, 4 S. W. 316; Taylor *v.* Taylor, 10 Minn. 107; Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. 95; Pradat *v.* Ramsey, 47 Miss. 24; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Cook, 14 Barb. (N. Y.) 259; McCraw *v.* Harrison, 4 Coldw. (Tenn.) 34; McKinney *v.* O'Connor, 26 Tex. 5.

27. Whipley *v.* McKune, 12 Cal. 352; Taylor *v.* Taylor, 10 Minn. 107; Pradat *v.* Ramsey, 47 Miss. 24; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Cook, 14 Barb. (N. Y.) 259.

Proof that a person acted as an election officer is *prima facie* proof of his authority so to act. Gilleland *v.* Schuyler, 9 Kan. 569.

28. Gilleland *v.* Schuyler, 9 Kan. 569; Pradat *v.* Ramsey, 47 Miss. 24; People *v.* Cook, 14 Barb. (N. Y.) 259.

29. *Alabama.* — State *v.* Circuit Judge, 9 Ala. 338; Echols *v.* State, 56 Ala. 131.

California. — Whipley *v.* McKune, 12 Cal. 352.

Colorado. — Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325.

Florida. — State *v.* Commissioners, 22 Fla. 29.

Georgia. — Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424.

Illinois. — Blankinship *v.* Israel, 123 Ill. 514, 24 N. E. 615.

Iowa. — Dishon *v.* Smith, 10 Iowa 212.

Michigan. — Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 51 Am. Rep. 88.

proceedings,[30] or in the count or canvass may be shown.[31]

It is also proper to show the conduct of those in and about the polls;[32] what persons voted,[33] and for whom;[34] and that illegal

Minnesota.— O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

Missouri. — Atkeson *v.* Lay, 115 Mo. 538, 22 S. W. 481.

Nevada. — State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546.

North Carolina. — *Ex parte* Daughtry, 28 N. C. 155.

New York. — People *v.* Livingston, 79 N. Y. 279.

Pennsylvania. — Melvin's Case, 68 Pa. St. 333.

Tennessee. — McCraw *v.* Harrison, 4 Coldw. (Tenn.) 34.

Texas. — Truehart *v.* Addicks, 2 Tex. 217.

Virginia. — Haddox *v.* County, 79 Va. 677.

Evidence which tends to prove misconduct on the part of the election officers, or that they were careless in the performance of their duties, may be admitted as tending to show the probability that errors might have occurred and thus cast discredit upon the returns. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193; but evidence of mere irregularities, not affecting the result, when offered alone to set aside the return, may be rejected without error. Russell *v.* State, 11 Kan. 308; Morris *v.* Vanlaningham, 11 Kan. 269; Jones *v.* Caldwell, 21 Kan. 186; Prohibitory Amendment Cases, 24 Kan. 700; Pradat *v.* Ramsey, 47 Miss. 24; Ewing *v.* Filley, 43 Pa. St. 384; Loomis *v.* Jackson, 6 W. Va. 613.

What is a mere irregularity must be determined from the provisions of the statute. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

30. Patton *v.* Coates, 41 Ark. 111; Blankinship *v.* Israel, 132 Ill. 514. 24 N. E. 615; Taylor *v.* Taylor, 10 Minn. 107; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Batturs *v.* Megary, 1 Brewst. (Pa.) 162; Weaver *v.* Given, 1 Brewst. (Pa.) 140; Truehart *v.* Addicks, 2 Tex. 217; State *v.* Elwood, 12 Wis. 551.

31. Clifton *v.* Cook, 7 Ala. 114; State *v.* Judge, 13 Ala. 805; Sprague *v.* Norway, 31 Cal. 174; Bourland *v.* Hildreth, 26 Cal. 161; State *v.* Board, 17 Fla. 29; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012; Kingery *v.* Berry, 94 Ill. 515; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060; People *v.* Sackett, 14 Mich. 320; Taylor *v.* Taylor, 10 Minn. 107; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Judkins *v.* Hill, 50 N. H. 140; *Ex parte* Heath, 3 Hill (N. Y.) 42; Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749; Meyers *v.* Moffet, 1 Brewst. (Pa.) 230; McCraw *v.* Harrison, 4 Coldw. (Tenn.) 34; Truehart *v.* Addicks, 2 Tex. 217; State *v.* Meilike, 81 Wis. 574, 51 N. W. 875.

Inquiry as to errors in the return or canvass is not confined to intentional frauds, but the return or canvass may be set aside for errors, whether of the election officers or otherwise, and effect given to the real will of the electors. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; State *v.* Elwood, 12 Wis. 551; Bashford *v.* Barstow, 4 Wis. 567; Carpenter *v.* Ely, 4 Wis. 420.

32. *Arkansas.* — Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680.

California. — Whipley *v.* McKune, 12 Cal. 352.

Illinois. — Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Michigan. — People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Harbaugh *v.* People, 33 Mich. 241.

Montana. — Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

Minnesota.— O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

New York. — People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Cook, 14 Barb. 259.

33. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Pease, 13 E. D. Smith (N. Y.) 45, 84 Am. Dec. 212; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

34. *Alabama.* — McDonald *v.*

votes were received or legal ones rejected;[35] or that the casting of votes was obstructed or prevented,[36] and generally all the details, facts and circumstances surrounding the proceedings and the manner in which they were conducted, showing or tending to show whether or not there had been a free, full and fair expression of the popular will.[37]

The election records,[38] as well as any other written evidence, are

Wood, 118 Ala. 589, 24 So. 86; Black *v.* Pate, 130 Ala. 514, 30 So. 434.

Arkansas. — Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42.

California. — People *v.* Holden, 28 Cal. 123.

Illinois. — Piatt *v.* People, 29 Ill. 54.

Indiana. — Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Kentucky. — Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

New York. — People *v.* Pease, 13 E. D. Smith (N. Y.) 45, 84 Am. Dec. 242.

Oregon. — State *v.* Kraft, 18 Or. 550, 23 Pac. 663.

35. Whipley *v.* McKune, 12 Cal. 352; Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224; Clark *v.* Robinson, 88 Ill. 498; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; People *v.* Louisville, S. R. Co., 93 Ky. 223, 19 S. W. 595; Trustees *v.* Gibbs, 2 Cush. (Mass.) 39; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422; People *v.* Cook, 14 Barb. (N. Y.) 259; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

36. Patton *v.* Coates, 41 Ark. 111; Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Augustin *v.* Eggleston, 12 La. Ann. 366; Combs *v.* Eversole, 24 Ky. L. Rep. 1,063, 70 S. W. 638; Pradat *v.* Ramsey, 47 Miss. 24; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54.

Where legal voters are denied the privilege of voting it is proper to show for whom they would have voted. Trustees *v.* Gibbs, 2 Cush. (Mass.) 39.

37. State *v.* Adams, 2 Stew. (Ala.) 231; State *v.* Judge, 13 Ala. 805; Preston *v.* Culbertson, 58 Cal. 198; Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193; Dishon *v.* Smith, 10 Iowa 212; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060; Young *v.* Com., 14 Bush (Ky.) 161; Andrews *v.* Saucier, 13 La. Ann. 301; Andrews *v.* Judge, 74 Mich. 278, 41 N. W. 923; Harbaugh *v.* People, 33 Mich. 241; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Livingston, 79 N. Y. 279; People *v.* Cook, 14 Barb. (N. Y.) 259; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; McKinney *v.* O'Connor, 26 Tex. 5; Ellison *v.* Barnes, 23 Utah 183, 63 Pac. 899.

Where misconduct on the part of the election officers appears, an inspection and comparison of the ballots with the poll lists should be allowed in connection with the oral evidence in reference thereto. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258; Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

38. State *v.* Board, 17 Fla. 29; People *v.* Garner, 47 Ill. 246; Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Cook, 14 Barb. (N. Y.) 259; People *v.* Van Slyck, 4 Cow. (N. Y.) 297. Registration records tending to prove the number of voters in the precinct are admissible when the number thus shown differs from the vote as returned. Young *v.* Hendersonville, 129 N. C. 422, 40 S. E. 89, and are *prima facie* evidence of the number of qualified voters in the precinct. Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Norment *v.* Charlotte, 85 N. C. 387.

Mere informalities in the records will not discredit them as evidence. Howard *v.* Shields, 16 Ohio St. 184; Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270.

admissible when tending to show the necessary facts,[39] and the parol testimony of the election officers,[40] voters and others is generally admissible;[41] the competency of such evidence not being affected as a rule by the fact that it goes to contradict the records of the proceedings,[42] which may be set aside or impeached by parol.[43]

39. Piatt *v.* People, 29 Ill. 54; Clark *v.* Robinson, 88 Ill. 498. The returns may be sustained by the evidence furnished by the poll books, tally sheets or certificate of the result. Kingery *v.* Berry, 94 Ill. 515. Orders of court, showing precinct boundaries, changes therein, etc., are admissible. Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141. In People *v.* Cook, 14 Barb. (N. Y.) 259, the statute required that a record be made of the proceedings whereby officers of election were appointed, and that a certificate of the custodian of such record be evidence of their appointment. A certificate was offered in evidence, which stated that certain persons were appointed as such officers and none others. It was held that the negative part of the certificate was not evidence, and that therefore the whole should be excluded, but that without such negative statement the certificate would have been the best evidence of appointment. See also State *v.* Board, 17 Fla. 29.

40. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Piatt *v.* People, 29 Ill. 54; Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255; Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1,018; Attorney General *v.* Ely, 4 Wis. 420. Parol evidence of the entries of election officers, made in the discharge of their duties in making up the records of election, is admissible. State *v.* Shay, 101 Ind. 36, where such evidence tends to sustain the canvass, but not to controvert the return. Word *v.* Sykes, 61 Miss. 649. In Thompson *v.* Ewing, 1 Brewst. (Pa.) 67, it was held competent to show that an election officer stated the morning after election that there was a difference between the ballots and the return.

41. State *v.* Judge, 13 Ala. 805; Supervisors *v.* People, 65 Ill. 360; Kingery *v.* Berry, 94 Ill. 515; Gilleland *v.* Schuyler, 9 Kan. 569; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1,060; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; People *v.* Cook, 14 Barb. (N. Y.) 259; People *v.* Allen, 6 Wend. (N. Y.) 486; Wood *v.* Fitzgerald, 3 Or. 568; Haddox *v.* County, 79 Va. 677; Chalmers *v.* Funk, 76 Va. 717. But see Young *v.* Com., 14 Bush (Ky.) 161.

In a case in which the returns showed one vote more for one party than for the other, to rebut the *prima facie* case thus made, the court admitted the testimony of witnesses as to how they cast their votes, and that such votes were illegal, it was held, such testimony was competent. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711.

42. State *v.* Adams, 2 Stew. (Ala.) 231; Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Cook, 14 Barb. (N. Y.) 259; Wood *v.* Fitzgerald, 3 Or. 568; McCraw *v.* Harrison, 4 Coldw. (Tenn.) 34.

43. *Alabama.* — State *v.* Judge, 13 Ala. 805.

Arkansas. — Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270.

Colorado. — Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Illinois. — Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012.

Kansas. — Russell *v.* State, 11 Kan. 308; State *v.* Marston, 6 Kan. 524.

Nebraska. — Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 582.

North Carolina. — Young *v.* Hendersonville, 129 N. C. 422, 40 S. E. 89.

North Dakota. — Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018.

Ohio. — Howard *v.* Shields, 10

b. *Proof of Fraud.* — As a rule fraud or fraudulent intent in election cases may be proved by such evidence as is admissible at common law,[44] and parol testimony is generally admissible.[45] Upon the issue of fraud it is competent to show that certain persons did or did not vote;[46] the time when or the circumstances under which the vote was cast,[47] and for whom cast,[48] and the reception of illegal and rejection of legal votes.[49] Testimony proving or tending to prove

Ohio St. 184; Phelps *v.* Schroder, 26 Ohio St. 549.

Oregon. — Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

Pennsylvania. — *In re* Zacharias, 3 Pa. Co. Rep. 656.

Rhode Island. — State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1,018.

Texas. — McKinney *v.* O'Connor, 26 Tex. 5; Jennett *v.* Owens, 63 Tex. 261.

A recount of the ballots, properly identified, will overcome the evidence of the returns, even when supported by the evidence of the poll books, tally sheets, certificate of the result and the testimony of the election officers. Kingery *v.* Berry, 94 Ill. 515.

44. People *v.* Holden, 28 Cal. 123; Board of Supervisors *v.* Davis, 63 Ill. 405; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Wheat *v.* Ragsdale, 27 Ind. 191; Gilleland *v.* Schuyler, 9 Kan. 569; People *v.* Sackett, 14 Mich. 320; Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472; Word *v.* Sykes, 61 Miss. 649; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Stearns *v.* Taylor, 1 Ohio (N. P.) 23; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

45. Patton *v.* Coates, 41 Ark. 111; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Gilleland *v.* Schuyler, 9 Kan. 569; Jones *v.* Caldwell, 21 Kan. 186; Word *v.* Sykes, 61 Miss. 649; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; State *v.* Olin, 23 Wis. 309.

46. Patton *v.* Coates, 41 Ark. 111; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Zeiler *v.* Chapman, 54 Mo. 502; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; State *v.* Conness, 106 Wis. 425, 82 N. W. 288. The fact that such evidence contradicts the records of the election will not exclude it. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Word *v.* Sykes, 61 Miss. 649.

47. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Russell *v.* State, 11 Kan. 308; Zeiler *v.* Chapman, 54 Mo. 502; State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51; State *v.* Conness, 106 Wis. 425, 82 N. W. 288.

The poll lists showed that the voters cast their votes in alphabetical order of their names. Voters were permitted to testify that one A— voted between the hours of one and two, while one H— voted at eight a.m. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

48. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; State *v.* Conness, 106 Wis. 425, 82 N. W. 288. The voter may testify as to how he voted. Board of Supervisors *v.* Davis, 63 Ill. 405; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312. If his ballot cannot be found or identified. Wheat *v.* Ragsdale, 27 Ind. 191. But see Major *v.* Barker, 99 Ky. 305, 35 S. W. 543.

49. *California.* — Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183.

Illinois. — Board of Supervisors *v.* Davis, 63 Ill. 405.

Kansas. — Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; State *v.* Hamilton Co. Com'rs, 35 Kan. 640, 11 Pac. 902.

Mississippi. — Word *v.* Sykes, 61 Miss. 649; Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472.

Pennsylvania. — Mann *v.* Cassidy, 1 Brewst. 11; Weaver *v.* Given, 1 Brewst. 140.

Texas. — McKinney *v.* O'Connor, 26 Tex. 5.

Wisconsin. — State *v.* Olin, 23 Wis. 309.

facts and circumstances which would indicate fraud or fraudulent motives or intentions;[50] or opportunities to commit fraud,[51] or its actual perpetration, is competent.[52] It is also competent to show that the election officers were not qualified or competent, either physically or mentally, to act as such; or that there might be an inducement for them to, or that they did, act fraudulently;[53] or that

50. *Arkansas.* — Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680.

Indiana. — Wheat *v.* Ragsdale, 27 Ind. 191.

Kansas. — Gilleland *v.* Schuyler, 9 Kan. 569.

Michigan. — People *v.* Sackett, 14 Mich. 320.

Minnesota. — Taylor *v.* Taylor, 10 Minn. 107.

Mississippi. — Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472.

New York. — People *v.* McKane, 62 N. Y. St. 6, 30 N. Y. Supp. 95.

North Carolina. — State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51.

Ohio. — Phelps *v.* Schroder, 26 Ohio St. 549.

Pennsylvania. — Weaver *v.* Given, 1 Brewst. (Pa.) 140.

Suspicious Circumstances May Be Explained. — Collins *v.* Price, 44 Law Times 192; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; McKinney *v.* O'Connor, 26 Tex. 5.

51. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Gilleland *v.* Schuyler, 9 Kan. 569; Fletcher *v.* Jeter, 32 La. Ann. 401; Word *v.* Sykes, 61 Miss. 649; People *v.* McKane, 62 N. Y. St. 6, 30 N. Y. Supp. 95; State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51.

Proof that the count or canvass was made secretly and the public denied access shows fraud. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218. And so proof that a large amount of work was done by the election officers in an unusually short time, tends to show fraud. Phelps *v.* Schroder, 26 Ohio St. 549. But that it would take time and pains to substitute tickets may be taken into consideration as indicating non-interference with the ballot box. Jones *v.* Caldwell, 21 Kan. 186.

52. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Keller *v.* Chapman, 34 Cal. 635; Board of Supervisors *v.* Davis, 63 Ill. 405; Pedigo *v.* Grimes, 113 Ind. 148; Russell *v.* State, 11 Kan. 308; Blue *v.* Peter, 40 Kan. 717; People *v.* Sackett, 14 Mich. 320; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546; State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51; Phelps *v.* Schroder, 26 Ohio St. 549. Actual fraud may be shown by proof that the returns have been altered or manipulated. Fletcher *v.* Jeter, 32 La. Ann. 401.

53. Keller *v.* Chapman, 34 Cal. 635; Board of Supervisors *v.* Davis, 63 Ill. 405; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; People *v.* Sackett, 14 Mich. 320; Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472; State *v.* Sadler, 25 Nev. 131; State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51; Phelps *v.* Schroder, 26 Ohio St. 549; Mann *v.* Cassidy, 1 Brewst. 11; McKinney *v.* O'Connor, 26 Tex. 5; State *v.* Conness, 106 Wis. 425, 82 N. W. 288.

Any evidence connecting the election officers with fraudulent practices goes to setting aside the return. Word *v.* Sykes, 61 Miss. 649. Evidence that one of the judges, who could not distinguish between men without glasses, left them at home, when home to dinner, and returned without them, indicates fraud. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442. Proof that clerks were selected with the understanding that they did not possess the necessary qualifications and would not perform the duties is strong evidence of fraud. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

errors, defects and irregularities occurred in the management of the proceedings.[54]

That an unusually large vote was cast is a circumstance indicating fraud at the polls,[55] which may be shown by a comparison of the vote cast with that cast at a prior election,[56] or at another precinct or district.[57] And so evidence tending to show an increase or decrease in the probable number of electors is proper,[58] or that persons apparently disqualified voted.[59]

It is also proper to take into consideration who were the candidates the issues involved and the circumstances surrounding the proceedings, as tending to show a motive for fraudulent acts.[60]

54. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Board of Supervisors *v.* Davis, 63 Ill. 405; State *v.* Hamilton Co. Com'rs, 35 Kan. 640, 11 Pac. 902; Taylor *v.* Taylor, 10 Minn. 107; Phelps *v.* Schroder, 26 Ohio St. 549.

Omission to observe a statutory provision designed to prevent fraudulent voting, casts suspicion upon the integrity of the election officers. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183. Proof that the returns were signed by an alleged clerk, who did not in fact act as such, the work being done by the judges, such signing being done two or three days after the election, Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218, or the refusal to allow the challenge of doubtful voters, Russell *v.* State, 11 Kan. 308; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11, or that voters when challenged could not tell where they lived and others were allowed to answer for them, Patton *v.* Coates, 41 Ark. 111; or that one party made out the returns while the other was excluded from participation therein, Word *v.* Sykes, 61 Miss. 649; or the calling into the room where the count was in progress, by the judges, of a candidate who stayed there all night, are circumstances strongly indicating fraud. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

55. Patton *v.* Coates, 41 Ark. 111; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; State *v.* Stephens, 23 Kan. 456, 33 Am. Rep. 175; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Blue *v.* Peter, 40 Kan. 717, 20 Pac. 442; Convery *v.* Conger, 53 N. J. L. 658, 24 Atl. 1,062.

56. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141; People *v.* Warfield, 20 Ill. 159; People *v.* Garner, 47 Ill. 246; State *v.* Stephens, 23 Kan. 456, 33 Am. Rep. 175; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Taylor *v.* Taylor, 10 Minn. 107.

A poll book of a recent prior election and the last assessor's return of the male residents are admissible. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442, but the legality or illegality of a former election cannot be inquired into. Weaver *v.* Given, 1 Brewst. (Pa.) 140.

57. State *v.* Hamilton Co. Com'rs, 35 Kan. 640, 11 Pac. 902; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; McKinney *v.* O'Connor, 26 Tex. 5.

58. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Word *v.* Sykes, 61 Miss. 649; People *v.* Teague, 106 N. C. 576, 11 S. E. 330.

59. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Russell *v.* State, 11 Kan. 308; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

Testimony that those whose names are on the voting lists are unknown in the community, or a comparison of the poll lists with the assessor's lists, Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; State *v.* Olin, 23 Wis. 309; McKinney *v.* O'Connor, 26 Tex. 5; or registration lists, is proper. Rigsbee *v.* Durham, 99 N. C. 341, 6 S. E. 64; Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Norment *v.* Charlotte, 85 N. C. 387.

60. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546; State *v.* Conness, 106 Wis. 425, 82 N. W.

The testimony of the witnesses must, however, be confined to the facts, and not opinions or beliefs, and evidence as to frustrated attempts to commit fraud is inadmissible.[61]

c. *Proof of Violence and Intimidation.* — Upon the issue of the regularity and legality of the election it is proper to show that a free and fair expression of the choice of the electors has been prevented by unlawful acts and disturbances or intimidation of voters at and about the polls.[62] Evidence tending to show the nature and extent of such acts or disturbances or other improper conduct, and whether or not the same actually prevented voters from going to the polls,[63] or from casting their votes;[64] or affected the manner in which the votes were cast, is competent.[65] And so evidence tending to show that an unusually large number of illegal votes were cast;[66] or that legal voters were denied the privilege of voting;[67] or that the supporters of certain candidates cast their votes with difficulty, and were threatened in case they voted in a certain way, while the supporters of the opposing candidates experienced no such difficulties, is

288. Evidence that the candidates were of two rival cities in different parts of the county is admissible where frequent or illegal voting is charged in one of the cities, as tending to show motive for fraud. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442. Evidence that the candidate used his official power for the benefit of the election officers is relevant, to show the probability of their co-operation with him in the fraudulent practices. People *v.* McKane, 62 N. Y. St. 6, 30 N. Y. Supp. 95. But the election may be set aside without proof of participation or guilty knowledge of the candidate in whose favor illegal votes are cast. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

61. Patton *v.* Coates, 41 Ark. 111. The testimony of a witness that the election officers were going to stuff the ballot box is inadmissible, but if he saw the illegal tampering with the ballots or other misconduct he may so testify. Word *v.* Sykes, 61 Miss. 649.

62. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Augustin *v.* Eggleston, 12 La. Ann. 366; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54; Wallace *v.* Simpson, 4 Brewst. (Pa.) 454; Mudd *v.* Compton, Rowell Con. Elec. Cas. 169; Bowen *v.* Buchanan, Rowell Con. Elec. Cas. 198; Smalls *v.* Elliott, Moberly Con. Elec. Cas. 663.

63. Wallace *v.* Simpson, 4 Brewst. (Pa.) 454; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54; Com. *v.* Woelper, 3 Serg. & R. 29, 8 Am. Dec. 628. Evidence of a few angry words passed between the supporters of one candidate and the friends of his opponent does not show violence or intimidation. Warren *v.* McDonald, 32 La. Ann. 987; Pradat *v.* Ramsey, 47 Miss. 24; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935. It is competent to prove improper marking. Combs *v.* Eversole, 24 Ky. L. Rep. 1,063, 70 S. W. 638, or folding of the ballots as a species of intimidation. Cole *v.* McClendon, 109 Ga. 183, 34 S. W. 384.

64. Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54; State *v.* Deniston, 46 Kan. 359, 26 Pac. 742. It may be shown whether certain persons did or did not vote. Moore *v.* Sharp, 98 Tenn. 491, 4 S. W. 587.

65. Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723; Patton *v.* Coates, 41 Ark. 111; Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177.

66. Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177.

67. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; State *v.* Mason, 14 La. Ann. 505; Augustin *v.* Eggleston, 12 La. Ann. 366.

competent.[68] It is competent to prove that armed persons were about the polls, how they were armed, what candidate they favored, and also the public feeling and excitement, the manner, cries, tones and gestures of persons about the polls, as well as whether their appearance was angry, serious, jocular or sportive.[69] On the other hand, it may be shown that the election was orderly and peaceable; that all voted who wished, and that they did so without difficulty. And the fact that a full vote was cast tends to disprove any undue disturbances.[70]

B. WEIGHT AND SUFFICIENCY. — a. *In General.* — The official records of the election are *prima facie* proof of the legality of the proceedings,[71] and proof of discrepancies in them has little weight in setting aside the return,[72] but such proof may weaken the force of the return as evidence.[73] Proof of misconduct on the part of the election officers or gross violation of the election laws is strong evidence of an illegal election.[74] The evidence to set aside the

68. Patton *v.* Coates, 41 Ark. 111; Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177.

69. Patton *v.* Coates, 41 Ark. 111; Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177; Combs *v.* Eversole, 24 Ky. L. Rep. 1,063. 70 S. W. 638.

70. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54.

71. Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505; Ald *v.* Walton, 12 La. Ann. 129. The election returns are evidence of the will of the electors as expressed by the ballots, and where they produced a reasonable conviction of what that will is, they should be allowed to have their legitimate effect. *In re* Strong, 20 Pick. (Mass.) 484; Woolley *v.* Louisville S. R. Co., 93 Ky. 223, 19 S. W. 595.

72. People *v.* Garner, 47 Ill. 246; Pradat *v.* Ramsey, 47 Miss. 24; Judkins *v.* Hill, 50 N. H. 140; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

Discrepancies between the vote as returned and the names upon the registration books, Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Norment *v.* Charlotte, 85 N. C. 387, Young *v.* Hendersonville, 129 N. C. 422, 40 S. E. 89, or poll lists will not impeach the return. People *v.* Garner, 47 Ill. 246.

73. People *v.* Garner, 47 Ill. 246; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012; People *v.* Sackett, 14 Mich. 320; Pradat *v.* Ramsey, 47 Miss. 24; Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Norment *v.* Charlotte, 85 N. C. 387; *In re* Zacharias, 3 Pa. Co. Ct. Rep. 656; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

Where the essential parts of the returns are contradicted both by direct and positive parol evidence, which is corroborated by circumstances, the return will be useless as evidence of the result. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

74. Lovewell *v.* Bowen, 69 Ark. 501, 64 S. W. 272; State *v.* Board, 16 Fla. 17; Littlefield *v.* Green, (Unreported), Brightly Con. Elec. Cas. 493; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012; People *v.* Sackett, 14 Mich. 320; Word *v.* Sykes, 61 Miss. 649; Pradat *v.* Ramsey, 47 Miss. 24; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Com. *v.* County Commissioners, 5 Rawle (Pa.) 75; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Truehart *v.* Addicks, 2 Tex. 217.

The test of the validity of the election is — did the qualified electors, acting in concert, hold the election at the time and place appointed, in a manner so far in conformity to the law that the true result can be reached with reasonable certainty? Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704. And so where the election officers are prevented from performing their duties, Meyers *v.* Moffet, 1 Brewst. (Pa.) 230; or the law has been entirely disregarded,

election must be clear,[75] and where the proof is insufficient to cast a reasonable doubt upon the result, the election will stand;[76] but where the result is uncertain it will be set aside.[77]

b. *To Show Fraud.* — An unusually large vote shown by the returns is strong proof of fraud,[78] but a comparison of the returns

Batturs *v.* Megary, 1 Brewst. (Pa.) 162; or where it clearly appears that fraudulent votes have been substituted, or genuine ones abstracted, the election will be set aside. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1,018.

75. State *v.* Board, 17 Fla. 29; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Jones *v.* Caldwell, 21 Kan. 186; Hardin *v.* Cress, 24 Ky. L. Rep. 513, 68 S. W. 1,090; Pradat *v.* Ramsey, 47 Miss. 24; Batturs *v.* Megary, 1 Brewst. (Pa.) 162; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54; Ferguson *v.* Allen, 7 Utah 263, 26 Pac. 570; Loomis *v.* Jackson, 6 W. Va. 613.

The result of the election, as shown by the tickets deposited by the legal electors, must not be set aside except for causes clearly within the law. State *v.* Phillips, 63 Tex. 390, 51 Am. Rep. 646, and where the proceedings are regular, it must appear that the true result cannot be ascertained to justify setting aside the proceedings. Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42.

While the existence of the power to discard the entire return of an election precinct is a public necessity, it should be exercised with great caution and only as a dernier resort. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

76. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; State *v.* Board, 17 Fla. 29; Spidle *v.* McCracken, 45 Kan. 356, 25 Pac. 897; Pettit *v.* Yewell, 24 Ky. L. Rep. 565, 68 S. W. 1,075; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; Hardin *v.* Cress, 24 Ky. L. Rep. 513, 68 S. W. 1,090; People *v.* Sackett, 14 Mich. 320. It must appear probable that the expression of the popular will has failed. Pradat *v.* Ramsey, 47 Miss. 24.

When the true result of a legal election has been ascertained, or can be ascertained by the officers charged with the performance of this duty, no irregularity, mistake or even fraud committed by any of the officers of election or by any other person can be permitted to defeat the fair expression of the popular will so expressed. Loomis *v.* Jackson, 6 W. Va. 613.

77. Lovewell *v.* Bowen, 69 Ark. 501, 64 S. W. 272; State *v.* Board, 16 Fla. 17; Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177; Kingery *v.* Berry, 94 Ill. 515; *In re* Strong, 20 Pick. (Mass.) 484; Attorney General *v.* Megin, 63 N. H. 378; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; Weaver *v.* Given, 1 Brewst. (Pa.) 140.

The election will be avoided where neither party can properly be adjudged to have been fairly elected. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Stewart *v.* Rose, 24 Ky. L. Rep. 1,759, 72 S. W. 271; or where the whole number of votes cast cannot be ascertained, Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54; or where the proceedings are shown to have been illegal or invalid, *Ex parte* Ellyson, 20 Gratt. (Va.) 10; or where the essential parts of the returns are contradicted by direct and positive parol evidence, corroborated by circumstances. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

An election will be set aside as undue, if the election officers adopted erroneous rules as to the qualifications of voters, which prevented legal voters from voting, and the fact being made known as to such decision, prevented other legal voters, similarly situated, from offering their votes, especially if it appears that such votes, if cast and received, would have changed the result. Scranton Borough Election, Brightly Con. Elec. Cas. 455.

78. Russell *v.* McDowell, 83 Cal.

with those of prior elections or with the other records of the election has very little weight to prove the same.[79]

Evidence which connects the election officials with willful misconduct or neglect of duty,[80] or which shows that they openly countenanced or encouraged such conduct;[81] or proof of circumstances indicating an intention to commit fraud in connection with proof of irregularities in the proceedings, by means of which fraud might be aided, strongly indicates its actual perpetration.[82] Actual fraud, or fraud sufficient to change the result, must appear,[83] but where it appears that the proceedings are so tainted with fraud that the true result cannot be ascertained, the return will be set aside.[84]

70, 23 Pac. 183; State *v.* Stephens, 23 Kan. 456, 33 Am. Rep. 175; Judkins *v.* Hill, 50 N. H. 140.

79. Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Taylor *v.* Taylor, 10 Minn. 107; Rigsbee *v.* Durham, 99 N. C. 341, 6 S. E. 64; Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Norment *v.* Charlotte, 85 N. C. 387.

80. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680; Board of Supervisors *v.* Davis, 63 Ill. 405; State *v.* Hamilton Co. Com'rs, 35 Kan. 640, 11 Pac. 902; Combs *v.* Eversole, 24 Ky. L. Rep. 1,063, 70 S. W. 638; State *v.* Conness, 106 Wis. 425, 82 N. W. 288; State *v.* Olin, 23 Wis. 309. Proof that irregularities in the proceedings were caused by an interested party. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135. Taylor *v.* Taylor, 10 Minn. 107, or that one side made out the returns while the other side was excluded, strongly indicates fraud. Word *v.* Sykes, 61 Miss. 649.

81. *Colorado.* — Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

Illinois. — Board of Supervisors *v.* Davis, 63 Ill. 405.

Kansas. — State *v.* Hamilton Co. Com'rs, 35 Kan. 640, 11 Pac. 902; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

Kentucky. — Combs *v.* Eversole, 24 Ky. L. Rep. 1,063, 70 S. W. 638.

Montana. — Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

North Carolina. — State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51.

Wisconsin. — State *v.* Conness, 106 Wis. 425, 82 N. W. 288.

Fraud sufficient to invalidate the election appears, where the uncontradicted evidence shows that the judges of election electioneered with the voters in the booths and urged them to allow such judges to prepare their ballots; that a large number of ballots were prepared by one judge instead of two as required by law, and that some ballots were prepared in a manner directly contrary to the wishes of the voters. Freeman *v.* Lazarus, 61 Ark. 347, 32 S. W. 680. And the same is true where it appeared that the judges of election received a large number of illegal votes and caused fictitious names to be placed upon the poll books and put spurious ballots in the boxes. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

82. Combs *v.* Eversole, 24 Ky. L. Rep. 1,063, 70 S. W. 638; Weaver *v.* Given, 1 Brewst. (Pa.) 140; Londoner *v.* People, 15 Colo. 557, 26 Pac. 135; Word *v.* Sykes, 61 Miss. 649.

83. Word *v.* Sykes, 61 Miss. 649; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129; Judkins *v.* Hill, 50 N. H. 140; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; State *v.* Conness, 106 Wis. 425, 82 N. W. 288; *In re* Pomery, T. & F. Con. Elec. Cas. 330.

Proof that provisions of the statute designed to prevent fraudulent voting were deliberately disregarded, will *prima facie* show fraud, and if the election officers are not called to testify, the evidence will be still stronger. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Collins *v.* Price, 44 Law Times 192.

84. Londoner *v.* People, 15 Colo.

c. *To Show Violence and Intimidation.* — Proof of slight disturbances at the polls will have no weight in setting aside the election upon the ground of violence or intimidation;[85] but the illegal acts must appear to be of such a character as to actually prevent persons from voting;[86] or the election officials from maintaining order at the polls;[87] and to warrant the setting aside of the election, the evidence should further show that enough voters were prevented from voting to change, or at least make the result uncertain.[88]

557, 26 Pac. 135; Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177; Word *v.* Sykes, 61 Miss. 649; People *v.* Bell, 119 N. Y. 175, 23 N. E. 533; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Meyers *v.* Moffet, 1 Brewst. (Pa.) 230; Weaver *v.* Given, 1 Brewst. (Pa.) 140; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

Where the voting lists prepared by the election officers show that the voters voted in the alphabetical order of their names and that every voter voted for all the candidates, fraud is apparent. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218. Where it appeared that a duly appointed registrar appointed a clerk to assist him, but who fraudulently got possession of the registration books and refused to surrender them, and proceeded in defiance of the demands and protests of the registrar to appoint judges of election, open polls, receive, canvass and make returns of the votes, the election was held to be void. State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51.

85. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54. Even though the disturbances were such as might alarm a few of the more timid of the voters. Patton *v.* Coates, 41 Ark. 111.

86. Pradat *v.* Ramsey, 47 Miss. 24; More *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; Mudd *v.* Compton, Rowell Con. Elec. Cas. 169; Bowen *v.* Buchanan, Rowell Con. Elec. Cas. 198; Smalls *v.* Elliott, Moberly Con. Elec. Cas. 663.

Where the evidence showed that the polls were opened and the election board organized without contention of disturbance, but some loud talk and boisterous conduct were observed and one person at the polls was struck by another, which might have been an accident, in connection with other slight disturbances, it was held insufficient to show a preconceived purpose to intimidate the voters. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935. But proof that a voter could not vote without being compelled to expose his ballot to the bystanders or be subjected to odium and ignominy, was held to be sufficient to show intimidation. Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723.

87. Combs *v.* Eversole, 24 Ky. L. Rep. 1,063, 70 S. W. 638; Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723.

88. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; State *v.* Mason, 14 La. Ann. 505; Augustin *v.* Eggleston, 12 La. Ann. 366; Pradat *v.* Ramsey, 47 Miss. 24.

Proof that a sufficient number of voters to have changed the result were prevented from voting by such violence, bloodshed and intimidation at and about the polls as to prevent ordinary persons from going there, will avoid the election. Wallace *v.* Simpson, 4 Brewst. 454.

To prove an illegal election it need not appear that a majority of the electors were actually prevented from voting, or voted against their wishes; it is sufficient if it appears that the freedom of the election was imperiled, not slightly and in individual cases, but generally to such an extent as to render the result doubtful. But efforts to influence the election through the influence of the church, ostracism from society and indignities which fall short of actual intimidation are not sufficient. Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723.

d. *Rejection of Legal, or Reception of Illegal, Votes.*—Usually, in the absence of some showing of fraud, improper conduct or injury resulting therefrom, proof that illegal votes were received or legal ones rejected has no weight in setting aside the election, without it further appears for whom the illegal votes were, or the legal ones rejected would have been, cast,[89] and even then the election will not be set aside unless it further appears that the illegal votes received or the legal ones rejected were sufficient in number to change the result;[90] but where the evidence shows that a sufficient number of legal votes were rejected or illegal ones received to have materially changed the result, or make the same doubtful, the election will be set aside.[91]

89. *Alabama.*—Griffin *v.* Wall, 32 Ala. 149.

Arkansas.—Rucks *v.* Renfrow, 54 Ark. 409, 16 S. W. 6.

California.—Whipley *v.* McKune, 12 Cal. 352.

Florida.—Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

Illinois.—Board of Supervisors *v.* Davis, 63 Ill. 405; Clark *v.* Robinson, 88 Ill. 498.

Kansas.—Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Massachusetts.—Trustees *v.* Gibbs, 2 Cush. 39; Sudbury *v.* Stearns, 21 Pick. 148.

Mississippi.—Pradat *v.* Ramsey, 47 Miss. 24.

New Hampshire.—Judkins *v.* Hill, 50 N. H. 140.

New Jersey.—Lehlbach *v.* Haynes, 42 N. J. L. 77, 23 Atl. 422.

New York.—*Ex parte* Murphy, 7 Cow. 153; People *v.* Cook, 14 Barb. 259.

North Carolina.—*Ex parte* Daughtry, 28 N. C. 155; People *v.* Teague, 106 N. C. 576, 11 S. E. 330, 19 Am. St. Rep. 547; Deloatch *v.* Rogers, 86 N. C. 357.

Pennsylvania.—Mann *v.* Cassidy, 1 Brewst. 11; Gibbons *v.* Sheppard, 2 Brewst. 54.

Texas.—Truehart *v.* Addicks, 2 Tex. 217.

West Virginia.—Loomis *v.* Jackson, 6 W. Va. 613.

Wisconsin.—State *v.* Olin, 23 Wis. 309.

90. Lee *v.* State, 49 Ala. 43; Whipley *v.* McKune, 12 Cal. 352; Pickett *v.* Russell, 42 Fla. 116, 28 So. 764; Piatt *v.* People, 29 Ill. 54; Augustin *v.* Eggleston, 12 La. Ann. 366; State *v.* Mason, 14 La. Ann. 505; Sudbury *v.* Stearns, 21 Pick. (Mass.) 148; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Pradat *v.* Ramsey, 47 Miss. 24; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422; People *v.* Cook, 14 Barb. (N. Y.) 259; *Ex parte* Heath, 3 Hill (N. Y.) 42; People *v.* Tuthill, 31 N. Y. 550; People *v.* Teague, 106 N. C. 576, 11 S. E. 330; *Ex parte* Daughtry, 28 N. C. 155; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; McKinney *v.* O'Connor, 26 Tex. 5; Ferguson *v.* Allen, 7 Utah 263, 26 Pac. 570; Young *v.* Deming, 9 Utah 204, 33 Pac. 818; State *v.* Olin, 23 Wis. 309. The evidence must affirmatively show that legal votes were rejected, or illegal ones accepted, in sufficient number to have changed the result. Rex *v.* Jefferson, 2 Nev. & M. 437; *Ex parte* Murphy, 7 Cow. (N. Y.) 153; Blake *v.* Hogan, 57 Minn. 45, 58 N. W. 867; McNeely *v.* Woodruff, 13 N. J. L. 352; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935. But if it be possible to show the number of illegal votes received, the election will stand after being purged thereof. Woolly *v.* Louisville S. R. Co, 93 Ky. 223, 19 S. W. 595; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

91. State *v.* Judge, 13 Ala. 805; Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224; New Orleans *v.* St. Romes, 9 La. Ann. 573; New Orleans *v.* Cordeviolle, 10 La. Ann. 732; Trustees *v.* Gibbs, 2 Cush. (Mass.) 39; People *v.* Hanna, 98 Mich. 515, 57 N. W. 738; People *v.* Cicott, 16

e. *Defects and Irregularities.* — (1.) In General. — Proof of irregularities, omissions or defects in the conduct of the election proceedings may tend to cast suspicion upon the result, but unless such evidence is supplemented by proof of other facts and circumstances tending to show that the result was actually affected thereby, the evidence has little weight when offered solely for the purpose of setting aside the election.[92]

As a general rule, proof that such provisions of the statute or constitution regulating the proceedings as are mandatory in their nature have not been strictly observed by the election officials will invalidate the proceedings,[93] but proof of mere irregularities, omis-

Mich. 283, 94 Am. Dec. 141; Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129; Downing *v.* Potts, 23 N. J. L. 66; Rathgen *v.* French, 22 Tex. Civ. App. 439, 55 S. W. 578.

Where votes that should have been received, were rejected in such numbers that if cast they would have changed the result, but the evidence was uncertain as to which candidate would have received such votes, the return was not set aside. Young *v.* Deming, 9 Utah 204, 33 Pac. 818. In a close contest, where it appeared that a large number of illegal votes were cast, and it was reasonable to suppose that each candidate received more than enough thereof to change the result, the election was set aside. State *v.* Conness, 106 Wis. 425, 82 N. W. 288. And so where the candidate was elected by a majority of one, and it appeared that several legal votes were rejected, the election was held void, although it did not appear that any more than one of the rejected votes would have been cast against the successful candidate. Cushing, Story & Josselyn, 67.

Where payment of taxes is requisite to qualify the elector, a sufficient number of votes cast by those whose taxes are in arrears, will invalidate the election. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

A legislator voting for himself as senator will not invalidate the election. *In re* Bateman, T. & F. Con. Elec. 80.

92. State *v.* Commissioners, 22 Fla. 29; Chamberlain *v.* Woodin, 2 Idaho 642, 23 Pac. 177; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Jones *v.* Caldwell, 21 Kan. 186; Pettit *v.* Yewell, 24 Ky. L. Rep. 565, 68 S. W. 1,075; Hardin *v.* Cress, 24 Ky. L. Rep. 513, 68 S. W. 1,090; People *v.* Sackett, 14 Mich. 320; Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 31 Am. Rep. 88; Meyers *v.* Moffet, 1 Brewst. (Pa.) 230; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

Failure to explain suspicious circumstances adds strength to the evidence. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183.

No irregularity, or even misconduct on the part of the election officers, or other persons, will vitiate an otherwise legal election, unless the result thereof has been thereby changed, or rendered so uncertain as to make it impossible to ascertain the true result. The possibility of injury is not sufficient, but it may be shown as tending to prove the fact of injury. Loomis *v.* Jackson, 6 W. Va. 613; Word *v.* Sykes, 61 Miss. 649.

93. *California.* — People *v.* Seale, 52 Cal. 71; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673.

Florida. — State *v.* Commissioners, 22 Fla. 29.

Illinois. — Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Kentucky. — Elliott *v.* Burke, 24 Ky. L. Rep. 202, 68 S. W. 445.

Missouri. — Gastor *v.* Lamkin, 115 Mo. 20, 21 S. W. 1,100; Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 653.

sions, defects or negligence on the part of the election officers in the observance of such provisions as are regarded as directory only, will have no such effect, so long as it appears that there has been a reasonable or substantial observance of all of the statutory provisions.[94]

New York. — People *v.* Cook, 14 Barb. 259.

Pennsylvania. — Melvin's Case, 68 Pa. St. 333.

Texas. — McKinney *v.* O'Connor, 26 Tex. 5.

Mandatory and Directory Provisions Distinguished.

California. — People *v.* City of Los Angeles, 133 Cal. 338, 65 Pac. 149; People *v.* Seale, 52 Cal. 71.

Georgia. — Tanner *v.* Deen, 108 Ga. 95, 33 S. E. 832.

Illinois. — Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615.

Indiana. — Jones *v.* State, 153 Ind. 440, 55 N. E. 229; Parvin *v.* Winberg, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775.

Kansas. — Jones *v.* State, 1 Kan. 259, 81 Am. Dec. 510; Gilleland *v.* Schuyler, 9 Kan. 569; Boyd *v.* Mills, 53 Kan. 594, 37 Pac. 16, 42 Am. St. Rep. 306.

Kentucky. — Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

Michigan. — People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; People *v.* Kopplekom, 16 Mich. 342; Adsit *v.* Osmun, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534.

Missouri. — Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 794.

Montana. — Stackpole *v.* Hallahan, 16 Mont. 40, 40 Pac. 80.

North Dakota. — Perry *v.* Hackney, 11 N. D. 148, 90 N. W. 483.

Oregon. — Miller *v.* Pennoyer, 23 Or. 364, 31 Pac. 830, 40 Pac. 80, 28 L. R. A. 502.

All provisions of the law are mandatory in the sense that they impose a duty upon those who come within their terms. It does not follow, however, that an election should be invalidated because of every departure on the part of public officers from the terms of the statute. Weaver *v.* Given, 1 Brewst. (Pa.) 140; Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743.

94. *Alabama.* — Patton *v.* Watkins, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43.

California. — Keller *v.* Chapman, 34 Cal. 635.

Illinois. — Keady *v.* Board of Supervisors, 34 Ill. 293; Clark *v.* Robinson, 88 Ill. 498.

Kansas. — Gilleland *v.* Schuyler, 9 Kan. 569; Morris *v.* Vanlaningham, 11 Kan. 269.

Maine. — State *v.* Gilman, 96 Me. 431, 52 Atl. 920.

Minnesota. — Taylor *v.* Taylor, 10 Minn. 107.

Mississippi. — Pradat *v.* Ramsey, 47 Miss. 24; Word *v.* Sykes, 61 Miss. 649.

Missouri. — Atkeson *v.* Lay, 113 Mo. 538, 22 S. W. 481; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754.

Montana. — Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

New York. — People *v.* Ferguson, 8 Cow. 102; People *v.* Vail, 20 Wend. 12.

North Carolina. — State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51.

North Dakota. — Perry *v.* Hackney, 11 N. D. 148, 90 N. W. 483.

Pennsylvania. — Batturs *v.* Megary, 1 Brewst. 162; Thompson *v.* Ewing, 1 Brewst. 67.

Virginia. — Nelms *v.* Vaughn, 84 Va. 696, 5 S. E. 704.

An irregularity not occasioned by the agency of a party seeking to derive a benefit therefrom, and which does not deprive any voter of his franchise, or allow the casting of an illegal vote, or cast uncertainty upon or change the result will not affect the validity of the election. Piatt *v.* People, 29 Ill. 54; Gass *v.* State, 34 Ind. 425; State *v.* Avery, 14 Wis. 122. If the true result can be ascertained with reasonable certainty. People *v.* Cook, 14 Barb. (N. Y.)

(2.) Irregularities That Will Not Invalidate. — In the absence of any showing of fraud or injury, or unless the law expressly declares the irregularity to be fatal,[95] proof of the non-performance by the election officials of a mere ministerial act,[96] or its irregular performance,[97] will have no weight when offered simply for the purpose of

259; McKinney *v.* O'Connor, 26 Tex. 5.

An election will not be set aside because of a failure of the officers to observe a directory provision of the statute for the maintenance of order on election days, whether such law is constitutional or not, and if it is unconstitutional it will not render the election void. Andrews *v.* Saucier, 13 La. Ann. 301.

95. Gilleland *v.* Schuyler, 9 Kan. 569; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754. The design of all election laws is, or should be, to secure a fair expression of the popular will in the speediest and most convenient manner, and failure to comply with statutory provisions not strictly essential to attain that object should not avoid an election, in the absence of language clearly showing that such was the legislative intent. Davis *v.* State, 75 Tex. 420, 12 S. W. 957; Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 653.

96. Bourland *v.* Hildreth, 26 Cal. 161; Gorham *v.* Campbell, 2 Cal. 135; State *v.* Board, 17 Fla. 29; People *v.* Hillard, 29 Ill. 413; Dishon *v.* Smith, 10 Iowa 212; Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75; Graham *v.* Graham, 24 Ky. L. Rep. 548, 68 S. W. 1,093; People *v.* Kopplekom, 16 Mich. 342; Taylor *v.* Taylor, 10 Minn. 107; Pradat *v.* Ramsey, 47 Miss. 24; West *v.* Ross, 53 Mo. 350; Ledbetter *v.* Hall, 62 Mo. 422; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Pitkin *v.* McNair, 36 Barb. (N. Y.) 75; People *v.* Vail, 20 Wend. (N. Y.) 12; *In re* Wheelock, 82 Pa. St. 297; Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106; State *v.* Elwood, 12 Wis. 551.

Proof of failure to erect election booths, Perry *v.* Hackney, 11 N. D. 148, 90 N. W. 483; Moyer *v.* Van De Vanter, 12 Wash. 377, 41 Pac. 60, 90 Am. St. Rep. 900, 29 L. R. A. 670; or preserve the ballots, State *v.* Judge, 13 Ala. 805; or sign the returns, State *v.* Board, 17 Fla. 29; Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75; or the poll books, Patton *v.* Coates, 41 Ark. 111; or seal the ballot boxes, Pradat *v.* Ramsey, 47 Miss. 24; or to file tally papers, Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Ewing *v.* Filley, 43 Pa. St. 384; or to keep poll lists, will not affect the validity of the election. State *v.* Elwood, 12 Wis. 551; Gilleland *v.* Schuyler, 9 Kan. 569; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Carpenter *v.* Ely, 4 Wis. 420.

97. *Alabama.* — Clifton *v.* Cook, 7 Ala. 114.

Colorado. — Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325.

Connecticut. — Conaty *v.* Gardner, 78 Conn. 48, 52 Atl. 416.

Florida. — State *v.* Commissioners, 22 Fla. 29; Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

Illinois. — Hodge *v.* Linn, 100 Ill. 397.

Kentucky. — Elliott *v.* Burke, 24 Ky. L. Rep. 292, 68 S. W. 445; Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867.

Louisiana. — Augustin *v.* Eggleston, 12 La. Ann. 366.

Michigan. — Attorney General *v.* Glaser, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828.

Mississippi. — Pradat *v.* Ramsey, 47 Miss. 24.

Missouri. — Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754.

Pennsylvania. — Thompson *v.* Ewing, 1 Brewst. 67.

Proof that the ballot boxes were delivered at the precinct station houses instead of at police headquarters, People *v.* Livingston, 79 N. Y. 279; or the delivery of the returns to the sheriff instead of to the managers of the court house, or that the canvass was postponed, will not invalidate the election. Truehart *v.* Ad-

setting aside the election.[98] And so proof of irregularities or defects in calling or ordering the election,[99] the giving of the notice thereof,[1] or in the appointment of election officers will not invalidate the proceedings.[2] Proof that the persons who acted as election officers were disqualified so to act will not in all cases invalidate the

dicks, 2 Tex. 217; People *v.* Sackett, 14 Mich. 320.

98. Keller *v.* Chapman, 34 Cal. 635; Sprague *v.* Norway, 31 Cal. 174; Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1,106; Conaty *v.* Gardner, 78 Conn. 48, 52 Atl. 416; Dishon *v.* Smith, 10 Iowa 212; Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 31 Am. Rep. 88; Taylor *v.* Taylor, 10 Minn. 107; Pradat *v.* Ramsey, 47 Miss. 24; People *v.* Cook, 14 Barb. (N. Y.) 259; Deaver *v.* State, 27 Tex. Civ. App. 453, 66 S. W. 256; State *v.* Elwood, 12 Wis. 551.

99. Keller *v.* Chapman, 34 Cal. 635; Russell *v.* State, 11 Kan. 308; Graves *v.* Rudd, 26 Tex. Civ. App. 554, 65 S. W. 63.

Such as failure to spread the order upon the records. People *v.* Gardner, 47 Ill. 246; or to sign, certify or seal the same. Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456; or a mistake in the date thereof. Thomas *v.* Com., 90 Va. 92, 17 S. E. 788.

1. *Arkansas.* — Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161.

California. — Knowles *v.* Yates, 31 Cal. 83; People *v.* Brenham, 3 Cal. 477.

Colorado. — Allen *v.* Glynn, 17 Colo. 388, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743.

Georgia. — Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120.

Illinois. — Chicago *v.* People, 80 Ill. 496.

Iowa. — Dishon *v.* Smith, 10 Iowa 212.

Michigan. — People *v.* McNeal, 63 Mich. 294, 29 N. W. 728.

Missouri. — Atkeson *v.* Lay, 115 Mo. 538, 22 S. W. 481.

New York. — Marchant *v.* Langworthy, 6 Hill 646; People *v.* Cowles, 13 N. Y. 350.

Tennessee. — McCraw *v.* Harrison, 4 Cold. 34.

Wisconsin. — State *v.* Stumpf, 21 Wis. 586.

2. *Alabama.* — Clifton *v.* Cook, 7 Ala. 114.

California. — Fragley *v.* Phelan, 126 Cal. 383, 58 Pac. 923; Keller *v.* Chapman, 34 Cal. 635; Sprague *v.* Norway, 31 Cal. 174.

Georgia. — Hardin *v.* Colquitt, 63 Ga. 588.

Kansas. — Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Jones *v.* Caldwell, 21 Kan. 186.

Kentucky. — Pratt *v.* Breckinridge, 23 Ky. L. Rep. 1,356, 65 S. W. 136; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307.

Minnesota. — Hankey *v.* Bowman, 82 Minn. 328, 84 N. W. 1,002.

Mississippi. — Pradat *v.* Ramsey, 47 Miss. 24.

Nebraska. — Peard *v.* State, 34 Neb. 372, 51 N. W. 828.

New York. — People *v.* Cook, 14 Barb. 259; People *v.* McManus, 34 Barb. 620.

Pennsylvania. — Thompson *v.* Ewing, 1 Brewst. 67.

Persons who act and are recognized as election officers and make the returns as such are *de facto* officers. Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764; Deaver *v.* State, 27 Tex. Civ. App. 453, 66 S. W. 256; Gilleland *v.* Schuyler, 9 Kan. 569; whose acts are valid. Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. 213; Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; People *v.* Covert, 1 Hill. 674; Tucker *v.* Aiken, 7 N. H. 113; McKinney *v.* O'Connor, 26 Tex. 5; Prohibitory Amendment Cas., 24 Kan. 700; Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Bashford *v.* Barstow, 4 Wis. 567; Whipley *v.* McKune, 12 Cal. 352. But to constitute an officer *de facto* there must be some color of appointment and induction into office. Thompson *v.* Ewing, 1 Brewst.

proceedings.[3] Nor will proof that the proceedings were conducted without a full quota of officers,[4] or that some of them were irregularly sworn, or not sworn at all.[5]

In the absence of some showing of resultant injury, proof of errors or irregularities in the establishment of polling places;[6] or that at certain precincts no election was held,[7] or return made;[8] or that the result cannot be ascertained, does not affect the validity of the election as a whole.[9] And so proof of the irregular opening or closing of the polls,[10] or of an unauthorized removal of voting

(Pa.) 67; State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51.

3. Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. 263; Pradat *v.* Ramsey, 47 Miss. 24; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546. So held where it appeared that one of the clerks was a resident of another ward. Jones *v.* Caldwell, 21 Kan. 186. Whether or not the proceedings are invalid depends upon the provisions of the statutes. Hardin *v.* Colquitt, 63 Ga. 588.

A general state election was held in a village separate from the township election. The village officers acted as officers of election. No other irregularities or fraud was shown and no doubt cast upon the good faith of the officers, nor proof that the irregularity affected the result. *Held*, that the election would not be set aside. Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. 95.

4. Fragley *v.* Phelan, 126 Cal. 383, 58 Pac. 923; Gilleland *v.* Schuyler, 9 Kan. 569; Pradat *v.* Ramsey, 47 Miss. 24; Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 653; People *v.* Cook, (N. Y.), 14 Barb. 259; Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456; State *v.* Stumpf, 21 Wis. 586. In the absence of any showing of fraud, proof that but two inspectors acted where the third was not qualified to act, will not affect the validity of the proceedings. People *v.* McManus, 34 Barb. (N. Y.) 620. But see United States *v.* Carbery, 2 Cranch C. C. 358, 25 Fed. Cas. No. 14,720.

5. State *v.* Commissioners, 22 Fla. 29; People *v.* Hillard, 29 Ill. 413; Dishon *v.* Smith, 10 Iowa 212; Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 653; McCraw *v.* Harrison, 4 Coldw. (Tenn.) 34; Deaver *v.* State, 27 Tex. Civ. App. 453, 66 S. W. 256.

6. People *v.* City of Los Angeles, 133 Cal. 338, 65 Pac. 749; Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615; Wildman *v.* Anderson, 17 Kan. 344; Gilleland *v.* Schuyler, 9 Kan. 569; Napier *v.* Cornett, 24 Ky. L. Rep. 576, 68 S. W. 1,076; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; Davis *v.* State, 75 Tex. 420, 12 S. W. 957. Where there is no place designated, if held at a place the use of which is sanctioned by custom, the election will be valid. Steel *v.* Calhoun, 61 Miss. 556.

7. Pradat *v.* Ramsey, 47 Miss. 24; *Ex parte* Heath, 3 Hill (N. Y.) 42; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; McCraw *v.* Harrison, 4 Cold. (Tenn.) 34; Louisville & N. R. Co. *v.* County Court, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; Marshall *v.* Kerns, 2 Swan (Tenn.) 68; Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456.

8. *Ex parte* Heath, 3 Hill (N. Y.) 42.

9. Powers *v.* Reed, 19 Ohio St. 189.

10. Graham *v.* Graham, 24 Ky. L. Rep. 548, 68 S. W. 1,093. Where the polls were not opened on time and it appeared that but one person was prevented from voting, and it did not appear that his vote would have changed the result, Hankey *v.* Bowman, 82 Minn. 328, 84 N. W. 1,002; or where the election officers took a recess for dinner, Board of Supervisors *v.* People, 65 Ill. 360; Jones *v.* Caldwell, 21 Kan. 186; Morris *v.* Vanlaningham, 11 Kan. 269; or where the polls were not closed at the proper time, it has been held that the return would not be rejected.

booths,[11] irregularities in reception of votes,[12] or challenge of voters;[13] or handling or care of the ballots;[14] or irregularities in the count;[15] or intoxication[16] or temporary absence of some election officer will have no effect upon the validity of the election.[17]

(3.) **Irregularities That Will Invalidate.** — Proof that the submission of the question to be voted upon to the electors was not strictly in conformity to the statutory or constitutional provisions under which the election was held;[18] or that officers were voted for which,

People *v.* Cook, 14 Barb. (N. Y.) 259; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Piatt *v.* People, 29 Ill. 54; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1,127, 51 Am. St. Rep. 585.

11. Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1,127, 51 Am. St. Rep. 585.

12. So held where for one election district, two polling places were designated with officers for each and votes were received at both. Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; and the same holding where only one ballot box was used instead of two. Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456.

13. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Weaver *v.* Given, 1 Brewst. (Pa.) 140; Gilleland *v.* Schuyler, 9 Kan. 569.

14. Hodge *v.* Linn, 100 Ill. 307; Jones *v.* Caldwell, 21 Kan. 186; Graham *v.* Graham, 24 Ky. L. Rep. 548, 68 S. W. 1,093; Pettit *v.* Yewell, 24 Ky. L. Rep. 565, 68 S. W. 1,075; Augustin *v.* Eggleston, 12 La. Ann. 366; Pradat *v.* Ramsey, 47 Miss. 24.

And so proof that the ballot box was temporarily out of the possession of the officers of election, Whipley *v.* McKune, 12 Cal. 352; or that the ballots were lost, Beardstown *v.* Virginia, 76 Ill. 34; or that the ballot box was opened to remove an obstruction, has been held not to affect the validity of the election. Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867.

15. Sprague *v.* Norway, 31 Cal. 174; Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1,106; Hodge *v.* Linn, 100 Ill. 397; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* Sackett, 14 Mich. 320; People *v.* Cook, 14 Barb. (N. Y.) 259; Truehart *v.* Addicks, 2 Tex. 217. But see *In re* Zacharias, 3 Pa. Co. Ct. Rep. 656.

It has been held that proof that the count was conducted in a private house, where it appeared that the regular place was in other public use, McCraw *v.* Harrison, 4 Cold. (Tenn.) 34; or that the count was postponed, Attorney-General *v.* Glaser, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828; or of a total failure to count some of the votes would not invalidate the return. *Ex parte* Heath, 3 Hill (N. Y.) 42; Truehart *v.* Addicks, 2 Tex. 217; Beardstown *v.* Virginia, 76 Ill. 34; *Ex parte* Murphy, 7 Cow. (N. Y.) 153; People *v.* Vail, 20 Wend. (N. Y.) 12; Judkins *v.* Hill, 50 N. H. 140.

Under a statute forbidding anyone but the election officers to take part in the count, a person who was a candidate, and had formerly been an election officer, and while so became familiar with the use of a machine used in opening envelopes containing the ballots, was requested by the officers to show them how to use the machine. He cut open a few envelopes, but took no other part in the count; it was held, that the irregularity was not fatal to the count. Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1,106.

16. Thompson *v.* Ewing, 1 Brewst. 67; Knowles *v.* Yates, 31 Cal. 83; Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867.

17. Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 54.

18. Andrews *v.* Saucier, 13 La. Ann. 301; Ledbetter *v.* Hall, 62 Mo. 422.

Where the statute requires that the question be submitted to a *viva voce* vote, an election by secret ballot is

under such provisions, could not be elected at such election;[19] or that the statute under which the question was submitted was inoperative at the time the election was held, shows a void election.[20] And so proof that an election was held without prior registration, where such was required,[21] or that it was not held by the proper officers,[22] or at the proper time,[23] or during the proper hours, will avoid the proceedings.[24] As a rule, proof that the election was not held at the proper place, or the place designated, will avoid the same,[25] but under some circumstances there have been exceptions to the rule.[26]

absolutely void. Elliott *v.* Burke, 24 Ky. L. Rep. 292, 68 S. W. 445. And the submission must be such as not to deceive the voters, *In re* Arnold, 32 Misc. 430, 66 N. Y. Supp. 557; Howard *v.* Shields, 16 Ohio St. 184; and so where, at an election for the location of a county seat, the statute provided that the electors might vote for any place within the county, and the question was so submitted that but two especially designated places could be voted for, was held to be absolutely void. State *v.* Commissioners, 22 Fla. 29.

Where the act providing for the submission of the question to the electors directed no specific manner of holding the election, and it was held under the general election law, it was held valid. Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255; Prohibitory Amendment Cas., 24 Kan. 700.

19. People *v.* Palmer, 91 Mich. 283, 51 N. W. 999; People *v.* McNeal, 63 Mich. 204, 29 N. W. 728. Where a justice of the peace is voted for under a provision which fixes the time for the election of judges, which is different from the election of other officers, the election as to such justice of the peace is void. Andrews *v.* Saucier, 13 La. Ann. 301. Courts will take judicial notice of what officers are to be voted for at a general election. State *v.* Minnick, 15 Iowa 123.

20. Keady *v.* Board Supervisors, 34 Ill. 293.

21. People *v.* Laine, 33 Cal. 55; People *v.* Kopplekom, 16 Mich. 342; Zeiler *v.* Chapman, 54 Mo. 502; State *v.* Stumpf, 21 Wis. 586; Pitkin *v.* McNair, 56 Barb. (N. Y.) 75.

22. Sprague *v.* Norway, 31 Cal. 174; Satterlee *v.* San Francisco, 23 Cal. 314; Norman *v.* Boaz, 85 Ky. 557, 4 S. W. 316; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51. A return made by one whose authority does not appear, as required by the statute, will be set aside unless shown by extrinsic evidence that the statute has been substantially complied with. McKinney *v.* O'Connor, 26 Tex. 5.

23. People *v.* Seale, 52 Cal. 71; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Knowles *v.* Yates, 31 Cal. 83; People *v.* Brewer, 20 Ill. 474; Gilleland *v.* Schuyler, 9 Kan. 569; Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 31 Am. Rep. 88; Melvin's Case, 68 Pa. St. 333; McCraw *v.* Harrison, 4 Cold. (Tenn.) 34. It is essential to the validity of an election that the time and place of holding be designated according to law and that the qualified electors then and there actually hold the election. McKinney *v.* O'Connor, 26 Tex. 5.

24. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; People *v.* Cook, 14 Barb. (N. Y.) 259; Melvin's Case, 68 Pa. St. 333. Where the statute prescribed that the polls should be opened one hour after sunrise and kept open until sunset, and it appeared that the notice of election stated that the polls would be open from one p.m. until six p.m., and it also appeared that they were, in fact, open only between such hours, the election was held to be void. People *v.* Seale, 52 Cal. 71.

25. Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424; Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757; Melvin's Case, 68 Pa. St. 333; State *v.* Alder, 87 Wis. 554, 58 N. W. 1,045.

26. Knowles *v.* Yates, 31 Cal. 83;

As where proof is made that an improper place was designated;[27] or the use of the designated place was unavailable;[28] or where other good reasons for the change appeared,[29] an election held at another place will be valid, provided it further appears that there was no fraud practiced, and that no one was prevented from voting.[30] Where, in connection with proof of irregularities in the conduct of the proceedings, other circumstances are shown which indicate that fraud was or might have been practiced,[31] or that because of the irregularity injury might have been done,[32] or the result materially

Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Bourland *v.* Hildreth, 26 Cal. 161; Preston *v.* Culbertson, 58 Cal. 198; Chicago *v.* People, 80 Ill. 496; Wildman *v.* Anderson, 17 Kan. 344; Gilleland *v.* Schuyler, 9 Kan. 569; Davis *v.* O'Berry, 93 Md. 708, 50 Atl. 273; Wheelock's Case, 82 Pa. St. 297; Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456. The adjournment of an election, in good faith, from one polling place to another, is at most an irregularity, and unless it appears that persons were prevented from voting, or that the rights of the candidates were prejudiced, or that it affected the result, the validity of the election will not be affected. Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 31 Am. Rep. 88. Absolute necessity alone will justify the holding of an election at a place other than that provided. Simons *v.* People, 18 Ill. App. 588; Melvin's Case, 68 Pa. St. 333.

27. Knowles *v.* Yates, 31 Cal. 83; Gilleland *v.* Schuyler, 9 Kan. 569; Melvin's Case, 68 Pa. St. 333.

28. Preston *v.* Culbertson, 58 Cal. 198; Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456.

Where the polls were opened at a place less than one hundred feet from the place designated, on the same side of the street, plainly visible from the designated place, and no showing of fraud or improper motive was made, and it appeared that no one was deprived of the privilege or opportunity to vote, the irregularity was held immaterial. Dale *v.* Irwin, 78 Ill. 170.

29. Chicago *v.* People, 80 Ill. 496; *In re* Wheelock, 82 Pa. St. 297; Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456.

Where it appeared that the house in which the voting had taken place for some years was moved several months before the election three-quarters of a mile from its former site, its name being unchanged, it was held that an election held in the house at its new site was valid. Steele *v.* Calhoun, 61 Miss. 556.

30. Preston *v.* Culbertson, 58 Cal. 198; Knowles *v.* Yates, 31 Cal. 83; Chicago *v.* People, 80 Ill. 496; Gilleland *v.* Schuyler, 9 Kan. 569; Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 31 Am. Rep. 88; *In re* Wheelock, 82 Pa. St. 297; Juker *v.* Com., 20 Pa. St. 484; Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456.

31. Whipley *v.* McKune, 12 Cal. 352; Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325; Bloome *v.* Hograeff, 193 Ill. 195, 61 N. E. 1,071; Bacon *v.* Malzacher, 102 Ill. 663; Pradat *v.* Ramsey, 47 Miss. 24; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546; People *v.* McManus, 34 Barb. (N. Y.) 620; People *v.* Cook, 14 Barb. (N. Y.) 259; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; McCraw *v.* Harrison, 4 Cold. (Tenn.) 34. Where it appears that there has been such neglect or failure to observe a directory provision of the statute designed especially to prevent fraudulent voting, in connection with evidence of actual fraud of a character sufficient to throw doubt upon the result, the whole return will be set aside if there be no means of purging the poll. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183.

32. Patterson *v.* Hanley, 136 Cal. 265, 68 Pac. 821; Whipley *v.* Mc-

affected,[33] or otherwise a full and fair expression of the will of the electors prevented, the election will be set aside.[34] And even in the absence of any showing of fraud, the evidence may disclose such irregularities or gross negligence on the part of the election officers in the performance of their duties as to warrant the setting aside of the returns.[35]

Kune, 12 Cal. 352; Sprague *v.* Norway, 31 Cal. 174; Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224; Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1,106; Conaty *v.* Gardner, 78 Conn. 48.

Florida. — Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

Illinois. — Clark *v.* Robinson, 88 Ill. 498; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Hodge *v.* Linn, 100 Ill. 397.

Kansas. — Blue *v.* Peter, 40 Kan. 761, 20 Pac. 442.

Louisiana. — Augustin *v.* Eggleston, 12 La. Ann. 366; Lanier *v.* Gallatas, 13 La. Ann. 175.

Michigan. — Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544, 31 Am. Rep. 88.

Mississippi. — Pradat *v.* Ramsey, 47 Miss 24.

Montana. — Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 210.

New Hampshire. — Judkins *v.* Hill, 50 N. H. 140.

New York. — People *v.* Cook, 14 Barb. 259; *Ex parte* Murphy, 7 Cow. 153.

Pennsylvania. — Thompson *v.* Ewing, 1 Brewst. 67.

Tennessee. — McCraw *v.* Harrison, 4 Cold. (Tenn.) 34.

Texas. — Truehart *v.* Addicks, 2 Tex. 217.

West Virginia. — Loomis *v.* Jackson, 6 W. Va. 613.

33. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422. *In re* Borough of Elizabethville, 2 Dauph. Co. Rep. 380. Where a statutory provision directed that the ballots should state to which term the candidate was voted for, where there were several members to be elected for different terms, and such provision was disregarded, the election was held void. State *v.* Schafer, 18 Ohio Cir. Ct. Rep. 525.

34. Hodge *v.* Linn, 100 Ill. 397; Bacon *v.* Malazacher, 102 Ill. 663; People *v.* Sackett, 14 Mich. 320; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Weaver *v.* Given, 1 Brewst. (Pa.) 140; Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456.

In San Luis Obispo *v.* Fitzgerald, 126 Cal. 279, 58 Pac. 699, the ordinance governing the election provided that each voter should indicate his wish by writing or causing to be written or printed upon his ballot the words "yes" or "no" opposite the propositions to be voted upon, and it was there held that each voter had the right to express his choice free from influence or outside suggestion, and that the printing by the authorities of the word "yes" only in one column of the ballot used in voting was a substantial departure from the provisions of the ordinance in a material manner, which rendered the election void.

35. Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424; Chicago *v.* People, 80 Ill. 496; People *v.* Sackett, 14 Mich. 320; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 210; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Melvin's Case, 68 Pa. St. 333. The rule is that there may be such a showing of radical omission and failure to comply with a directory provision of the statute as will lead to the presumption of injury therefrom. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, and it was there held that where it appeared that the ballot box was removed about one hundred yards from the polling place at noon, while the officers ate dinner, although not out of their sight or in other hands, and that the polls were not opened until ten a. m. when they should have been opened at sunrise, the election would be set aside.

An election not conducted according to law, either in substance or in

f. *Ineligible Candidate.* — An election may be shown to be void as to one or more of the candidates by proving that they are ineligible to hold the office for which they received a plurality of votes,[36] and proof that a candidate became eligible after the election will not affect the validity of his election,[37] but proof that one or more of the candidates are ineligible has no weight in determining the legality of the election as a whole.[38]

g. *Failure of the Majority to Vote.* — Where a majority of all the qualified voters is requisite to adopt a measure, the election may be shown to be void by proof that such a majority did not vote.[39] In such cases the registration lists are *prima facie* proof of the number of voters,[40] but it may be shown that illegal votes were cast.[41]

12. Admissions and Declarations. — A. ADMISSIBILITY. — a. *In General.* — The authorities as to the competency of the admissions and declarations of the voter are so inharmonious, and the grounds upon which they are admitted so various that it seems impossible to

form, is undue. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Batturs *v.* Megary, 1 Brewst. (Pa.) 162. But see Morris *v.* Vanlaningham, 11 Kan. 269. In a close contest any partisan action or bias of those having the election in charge that might influence the election will work an irregularity. Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

36. Rex *v.* Parry, 14 East 549; Rex *v.* Monday, Cowp. 530; Swepston *v.* Barton, 39 Ark. 549; Crawford *v.* Dunbar, 52 Cal. 36; State *v.* Swearingen, 12 Ga. 23; Fish *v.* Collens, 21 La. Ann. 289; People *v.* Molitor, 23 Mich. 341; State *v.* Vail, 53 Mo. 97; Gardner *v.* Burke, 61 Neb. 534, 85 N. W. 541; People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508; *In re* Abbott, 4 Brewst. (Pa.) 468; State *v.* Tierney, 23 Wis. 430.

Proof that the candidate bribed, or offered to bribe, the voters will make him ineligible, Carrothers *v.* Russell, 53 Iowa 346, 5 N. W. 499, 36 Am. Rep. 222; Carroll *v.* Green, 148 Ind. 362, 47 N. E. 223; or that he was incompetent, Alvord *v.* Collin, 20 Pick. (Mass.) 418. In the case of Gardner *v.* Burke, 61 Neb. 534, 85 N. W. 541, it appeared that many voters agreed to vote for a certain candidate who was ineligible and thus defeat his opponent, and the election was held void.

37. Searcy *v.* Grow, 15 Cal. 117. Where the statute provided that nonpayment of taxes would render a candidate ineligible, it was held that payment of such taxes on the morning of election day would render the candidate eligible. State *v.* Berkeley, 140 Mo. 184, 41 S. W. 732.

38. Satterlee *v.* San Francisco, 23 Cal. 314.

39. Beardstown *v.* Virginia, 81 Ill. 541; Taylor *v.* Taylor, 10 Minn. 107; State *v.* Otis (N. J.), 52 Atl. 305; Norment *v.* Charlotte, 85 N. C. 387; Reiger *v.* Commissioners, 70 N. C. 319.

The rule at common law is that where the electoral body is indefinite, the majority is estimated upon the basis of the total number of votes cast and not upon the basis of the number of votes which might lawfully have been cast, if those entitled to vote had chosen to attend and do so. Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

40. Norment *v.* Charlotte, 85 N. C. 387; Duke *v.* Brown, 96 N. C. 127 1 S. E. 873; Rigsbee *v.* Durham, 99 N. C. 341, 6 S. E. 64. The certificate of the assessor has been admitted as evidence. Cushing, Story & Josselyn, 64.

41. Beardstown *v.* Virginia, 81 Ill. 541; State *v.* Otis (N. J.), 52 Atl. 305; Rigsbee *v.* Durham, 99 N. C. 341, 6 S. E. 64.

formulate any general rule as to their admissibility,[42] but the nature,[43] time and place made,[44] and the status of the person making them, relative to the case in which the testimony is offered, seem to affect or determine their admissibility.[45]

b. *To Show the Fact of Having Voted.* — Unless confined to some particular election, the simple declaration of a party that he had voted is inadmissible,[46] and if made after the particular election referred to, the same rule applies;[47] but it has been held otherwise on

42. *Colorado.* — People *v.* Commissioners Grand Co., 7 Colo. 190, 2 Pac. 912.

Illinois. — Beardstown *v.* Virginia, 81 Ill. 541.

Indiana. — French *v.* Lighty, 9 Ind. 475.

Kansas. — Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Gilleland *v.* Schuyler, 9 Kan. 569.

Kentucky. — Stewart *v.* Rose, 24 Ky. L. Rep. 1,759, 72 S. W. 271.

Tennessee. — Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587.

Wisconsin. — State *v.* Olin, 23 Wis. 309; State *v.* Conness, 106 Wis. 425.

The general rule that declarations and admissions, when made against interest, are admissible, can be applied.

Alabama. — Black *v.* Pate, 130 Ala. 514, 30 So. 434.

Arkansas. — Patton *v.* Coates, 41 Ark. 111.

Georgia. — Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Illinois. — Beardstown *v.* Virginia, 76 Ill. 34; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

New York. — People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

North Carolina. — People *v.* Teague, 106 N. C. 576, 11 S. E. 330. Especially when supported by other evidence. Davis *v.* State, 75 Tex. 420, 12 S. W. 937. In the case of Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936, a distinction appears to have been made between a contest over the location of a county seat and an election to office.

43. People *v.* Com'rs Grand Co., 7 Colo. 190, 2 Pac. 912; Beardstown *v.* Virginia, 76 Ill. 34; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587; State *v.* Conness, 106 Wis. 425, 82 N. W. 288; Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5.

44. People *v.* Com'rs Grand Co., 7 Colo. 190, 2 Pac. 912; Beardstown *v.* Virginia, 81 Ill. 541; Black *v.* Pate, 130 Ala. 514, 30 So. 434; Sharp *v.* McIntire, 23 Colo. 99, 46 Pac. 115. Declarations of a party that he had "voted, but had no citizens' papers," when confined to no time, place or election, are not admissible to show that he was not qualified to vote at a specified election. Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5; State *v.* Conness, 106 Wis. 425, 82 N. W. 288.

A party cannot claim as competent evidence for himself, statements of a voter made at one precinct as to his right to vote, and ask to have stricken out the statements made by the same person at another precinct on the same subject. Norwood *v.* Kenfield, 30 Cal. 393.

45. Patton *v.* Coates, 41 Ark. 111; People *v.* Holden, 28 Cal. 123; Beardstown *v.* Virginia, 81 Ill. 541; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Davis *v.* State, 75 Tex. 420, 12 S. W. 957; State *v.* Olin, 23 Wis. 309.

It is incompetent for a witness not a party to the record to state what others not parties to the record told him subsequent to the election as to the number of times and the names under which they claimed to have voted. Griffin *v.* Wall, 32 Ala. 149; Gilleland *v.* Schuyler, 9 Kan. 569.

46. Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5; State *v.* Conness, 106 Wis. 425, 82 N. W. 288.

47. Griffin *v.* Wall, 32 Ala. 149; Gilleland *v.* Schuyler, 9 Kan. 569. Evidence of what others said to the witness after election of what they did at and before the election is hear-

the ground that the voter was a party to the proceedings;[48] or that his admissions and declarations were admissible as a part of the *res gestae*.[49]

c. *To Show Qualification to Vote.* — If made at or near the time of voting, a person's admissions and declarations as to his qualification to vote are admissible as part of the *res gestae*;[50] or if made prior to election and in disparagement of his right to vote,[51] but if made after election they are inadmissible.[52]

d. *To Show How the Person Voted.* — The admissions and declarations of a person as to how he voted are not admissible,[53] unless it further appears that he voted illegally.[54]

e. *To Show Fraud.* — Where it is sought to show fraud, or a fraudulent combination, the declarations and admissions of the co-conspirators are admissible,[55] but the casting of illegal votes cannot be so shown, unless it appears to have been in the furtherance of such combination.[56] Neither can an intention to commit fraud

say and incompetent. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

48. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; State *v.* Olin, 23 Wis. 309.

49. Patton *v.* Coates, 41 Ark. 111.

50. Sharp *v.* McIntire, 23 Colo. 99, 46 Pac. 115; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. W. 704; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Teague, 106 N. C. 576, 11 S. E. 330; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Where a person, when sought after to vote, stated he was alien born and had no right to vote, and immediately after election stated the same, such declarations were held admissible. Beardstown *v.* Virginia, 81 Ill. 541.

51. People *v.* Teague, 106 N. C. 576, 11 S. E. 330; Little *v.* State, 75 Tex. 616, 12 S. W. 965.

52. Sharp *v.* McIntire, 23 Colo. 99, 46 Pac. 115; Beardstown *v.* Virginia, 81 Ill. 541; French *v.* Lighty, 9 Ind. 475; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Teague, 106 N. C. 576, 11 S. E. 330; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Such declarations are not admissible unless confined to some particular election. Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5; State *v.* Conness, 106 Wis. 425, 82 N. W. 288.

53. Beardstown *v.* Virginia, 75 Ill. 34; Major *v.* Barker, 99 Ky. 305, 35 S. W. 543; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

Statements of a party made before election as to how he intended to vote are incompetent to show how he did vote. Com. *v.* Barry, 98 Ky. 394, 33 S. W. 400.

54. Patton *v.* Coates, 41 Ark. 111; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242. But see Gilleland *v* Schuyler, 9 Kan. 569.

Where it appears that a person voted illegally, his declarations made about the time of and recently before voting may be shown as tending to establish material facts. Black *v.* Pate, 130 Ala. 514, 30 So. 434.

55. People *v.* Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225; State *v.* Johnson, 40 Kan. 266, 19 Pac. 749; State *v.* Banks, 40 La. Ann. 736, 5 So. 18; People *v.* McKane, 62 N. Y. St. 6, 30 N. Y. Supp. 95; Merrill *v.* Whitmire, 110 N. C. 367, 15 S. E. 3.

56. Griffin *v.* Wall, 32 Ala. 149; Gilleland *v.* Schuyler, 9 Kan. 569; Little *v.* State, 75 Tex. 616, 12 S. W. 965.

Statements that the witness heard another say he had voted several times is hearsay and incompetent. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 933.

be so shown, unless for the purpose of proving the existence of such combination.[57]

B. Weight and Sufficiency. — Proof of the admissions and declarations of a person as to his right or qualification to vote, or as to how he intended to vote, or as to how he actually did vote, is entitled to slight consideration.[58]

13. Presumptions and Burden of Proof. — A. Presumptions. a. *In General.* — (1.) In General. — In the absence of contrary proof it will be presumed that the election officers correctly performed their duties, and that the conduct of the proceedings was regular and legal,[59] and that such officers were regularly appointed and qualified.[60]

(2.) As to the Returns, Canvass and Other Records. — The returns, canvass and other records, when made in the proper manner,[61]

57. Word *v.* Sykes, 61 Miss. 649. Before the declarations of a voter to show an illegal vote are admissible where bribery is charged, proof must be made that the public offer of bribery influenced the voter. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

58. Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Lessee of Butler *v.* Farnsworth, 4 Wash. C. C. 101, 4 Fed. Cas. No. 2,240; Davis *v.* State, 75 Tex. 420, 12 S. E. 957.

59. *Arkansas.* — Patton *v.* Coates, 41 Ark. 111.

California. — Powers *v.* Hitchcock, 129 Cal. 325, 61 Pac. 1,076.

Colorado. — Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

Illinois. — Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177; Russell *v.* State, 11 Kan. 308.

Kentucky. — Graham *v.* Graham, 24 Ky. L. Rep. 548, 68 S. W. 1,093.

Louisiana. — Fletcher *v.* Jeter, 32 La. Ann. 401.

Michigan. — People *v.* Sackett, 14 Mich. 320.

Mississippi. — Pradat *v.* Ramsey, 47 Miss. 24.

Missouri. — Hehl *v.* Guion, 155 Mo. 76, 55 S. W. 1,024.

New Hampshire. — Judkins *v.* Hill, 50 N. H. 140.

North Carolina. — Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749; Norment *v.* Charlotte, 85 N. C. 387.

West Virginia. — Loomis *v.* Jackson, 6 W. Va. 613.

Wisconsin. — Bashford *v.* Barstow, 4 Wis. 567.

Unless the election was legally authorized no presumptions will prevail in favor of the election officers. Piatt *v.* People, 29 Ill. 54.

60. Satterlee *v.* San Francisco, 23 Cal. 314; Sprague *v.* Norway, 31 Cal. 174; People *v.* Hillard, 29 Ill. 413; Dishon *v.* Smith, 10 Iowa 212; Gilleland *v.* Schuyler, 9 Kan. 569; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Pradat *v.* Ramsey, 47 Miss. 24; People *v.* Cook, 14 Barb. (N. Y.) 259; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; McCraw *v.* Harrison, 4 Cold. (Tenn.) 34; McKinney *v.* O'Connor, 26 Tex. 5; State *v.* Stumpf, 21 Wis. 586. In Patton *v.* Coates, 41 Ark. 111, the poll books were certified by different judges from those appointed, and it was there held that it would be presumed that the judges who so certified them had been substituted by the voters in the manner provided by law.

61. Phelps *v.* Schroder, 26 Ohio St. 549; Word *v.* Sykes, 61 Miss. 649. Where the statute required the reading and announcing of the vote as indicated by each ballot separately, and the ballots were sorted into parcels of ten or twenty and then read and announced in the aggregate as so many votes for each candidate

and by the proper officers,[62] are presumed to be correct.[63]

(3.) As to Fraud. — As a rule, fraud will not be presumed,[64] but there may be such a showing of gross irregularities or misconduct on the part of the election officers as to raise the presumption that fraud might have been practiced.[65]

whose name was supposed to be on all the ballots so sorted, it was there held that mistakes in the canvass would be presumed. O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

62. McKinney *v.* O'Connor, 26 Tex. 5. One who usurps an office may act for such a length of time or under such circumstances as to raise a presumption of his right to act, in which event his acts are valid as to the public and third persons. State *v.* Taylor, 108 N. C. 196, 12 S. E. 1,005, 23 Am. St. Rep. 51.

63. *Arkansas.* — Powell *v.* Holman, 50 Ark. 85.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177; Russell *v.* State, 11 Kan. 308.

Kentucky. — Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867.

Michigan. — People *v.* Robertson, 27 Mich 116; People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69.

Montana. — Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218.

North Carolina. — Rigsbee *v.* Durham, 99 N. C. 341, 6 S. E. 64.

Ohio. — Howard *v.* Shields, 16 Ohio St. 184; State *v.* Donnewirth, 21 Ohio St. 216.

Pennsylvania. — Ewing *v.* Filley, 43 Pa. St. 384.

Texas. — Roper *v.* Scurlock (Tex. Civ. App.), 69 S. W. 456.

Wisconsin. — State *v.* Melike, 81 Wis. 574, 51 N. W. 875; State *v.* Kersten (Wis.), 95 N. W. 120.

The presumption of the correctness of the returns rests on the three presumptions, to wit: First — That sworn officers of the law will act honestly and in good faith; Second — That they will perform their duties with care; and Third — That the votes received by such officers are legal.

The first of these presumptions may be rebutted by proof which shows that the duties were so carelessly performed that there were opportunities for others to commit frauds, and that they have probably been committed. The presumption may be partially rebutted by proof of mistakes in the returns, but the mistakes can be corrected and the presumption of correctness will be destroyed only so far as the mistakes are shown, and the returns will stand with the mistakes corrected. The presumption as to the legality of the vote can be partially rebutted by showing that particular votes cast were illegal, but unless the number of cases proved is so great as to amount to proof of fraud, the accuracy of the general return will not be affected, but it will be corrected by deducting the illegal votes. The presumption of good faith on the part of the officers may be rebutted. And when it is shown that they are parties to the fraud, the value of the returns as evidence of the result is destroyed, and the fact that a much larger number of votes is returned than the poll book shows to have been cast will be a circumstance tending to prove fraud; where the number is larger, and the fact unexplained it will be conclusive. Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

64. Loomis *v.* Jackson, 6 W. Va. 613; Weaver *v.* Given, 1 Brewst. (Pa.) 140.

65. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673. Proof that one clerk placed fraudulent votes in the ballot box and fraudulent names on the poll list, raises the presumption that the other clerk knew of it. Russell *v.* State, 11 Kan. 308.

Where it was alleged that 215 qualified voters held an election, and the evidence of ten old residents that they did not know such electors was produced, it was held that fraud would be presumed. McKinney *v.* O'Connor, 26 Tex. 5.

(4.) As to Bribery. — It will not be presumed that a voter was influenced by a public offer of bribery.[66]

B. Burden of Proof — a. *In General.* — One seeking to set aside an election or return has the burden of proving the same false, or to show irregularities, fraud, bribery or other cause or misconduct which operated to make the declared result different from what in the absence thereof it would have been.[67]

C. Purging the Poll. — It will be presumed that none but legal votes were accepted, or that none but illegal ones were rejected;[68] and the burden of proof to show the contrary is upon him who so asserts.[69] No presumptions will be indulged in as to how a voter voted.[70]

After a *prima facie* showing is made that illegal votes were cast, it will be presumed that they were cast for the party advantaged by the general count, and the burden of proof falls upon such party to show, either that such votes were legal, or that they were cast for his opponent;[71] but where the entire poll is rejected, the burden of proof to show that any legal votes were cast at such precinct rests

66. State *v.* Olin, 23 Wis. 309; State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485.

67. Powell *v.* Holman, 50 Ark. 85; Kellar *v.* Chapman, 34 Cal. 635; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Londoner *v.* People, 15 Colo. 557, 26 Pac. 135; Piatt *v.* People, 29 Ill. 54; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Hudson *v.* Solomon, 19 Kan. 177; Marshall *v.* Bryant, 39 Ind. 363; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Blake *v.* Hogan, 57 Minn. 45, 58 N. W. 867; O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416; Word *v.* Sykes, 61 Miss. 649; Judkins *v.* Hill, 50 N. H. 140; Deloatch *v.* Rogers, 86 N. C. 257; Ewing *v.* Filley, 43 Pa. St. 384; McCraw *v.* Harrison, 4 Cold. (Tenn.) 34; McKinney *v.* O'Connor, 26 Tex. 5; Phelps *v.* Schroder, 26 Ohio St. 549. The burden of proof to show that a public offer of bribery influenced the voter is upon the party objecting to the vote. State *v.* Olin, 23 Wis. 309; State *v.* Purdy, 36 Wis. 213, 17 Am Rep. 485.

68. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; People *v.* Holden, 28 Cal. 123; Hudson *v.* Solomon, 19 Kan. 177; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700. Such presumption is not rebutted by vague, indefinite and uncertain testimony. Todd *v.* Cass Co., 30 Neb. 823, 47 N. W. 196. as proof of the number of votes cast at a prior election. Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141.

Where persons whose names are on the registration lists are refused the privilege of voting, it will be presumed that their votes were rightfully rejected until the contrary appears. Zeiler *v.* Chapman, 54 Mo. 502; Hehl *v.* Guion, 155 Mo. 76, 55 S. W. 1,024; Whipley *v.* McKune, 12 Cal. 352.

69. Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Deloatch *v.* Rogers, 86 N. C. 357.

70. Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270. On a contested election case in which the question of the removal of a county seat was involved, and where the voters not voting are to be counted as voting against the proposition for removal, no presumption can be indulged in as to those not voting, but that they would have voted against the proposition. Beardstown *v.* Virginia, 81 Ill. 541.

71. *In re* Duffy, 4 Brewst. (Pa.) 531; Londoner *v.* People, 15 Colo.

upon the party claiming them.[72] Where the evidence shows that less than one-half of the votes cast were illegal, it will be presumed that the majority was made up of legal votes.[73]

D. As to the Ballots. — a. *In General.* — In the absence of proof to the contrary, all ballots are presumed to be regular, perfect and legal when put into the voter's hands,[74] while those bearing illegal marks are presumed to have been so marked innocently or unintentionally.[75] Where mistakes in the numbering of ballots are shown, and a particular ballot appears to have been wrongly numbered, the presumption is that there was a mistake made in numbering the particular ballot.[76] A ballot shown to have been voted, but missing upon the recount, will be presumed to have been lost or abstracted.[77]

b. *As to Genuineness.* — When the ballots are produced by the proper custodian, it will be presumed that they have been properly kept and preserved, and that they are the genuine ballots cast at the election until the contrary is shown, except in cases in which it is sought to overcome the *prima facie* proof of the result as shown by the returns, by a recount of the ballots.[78] In such cases no pre-

557, 26 Pac. 135; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

72. Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218; Phelps *v.* Schroder, 26 Ohio St. 549; Washburn *v.* Voorhis, 2 Bart. Con. Elec. Cas. 54; Londoner *v.* People, 15 Colo. 557, 26 Pac. 135; Vallandingham *v.* Campbell, 1 Bart. Con. Elec. Cas. 223; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Word *v.* Sykes, 61 Miss. 649.

73. Woolley *v.* Louisville S. R. Co., 93 Ky. 223, 19 S. W. 595. But where it appears that nearly one-half of the votes received are from persons not on the registry list, and no reason is given for the reception of such votes, they will be presumed to be illegal. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

74. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012; State *v.* Black, 54 N. J. L. 446, 21 Atl. 489, 1,021; Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018.

In Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, all the ballots cast at a certain precinct bore improper writing, and it was there held that it would be presumed that such writing was put upon the ballots after they reached the voters' hands.

75. Unless it appears from the marks themselves or by evidence *aliunde* that they were intended as distinguishing marks. Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1,018. A ballot had upon its back a faint impression of a portion of the face of a similar ballot, which impression is known among printers as an "offset" caused by too much ink on the type when printed, by placing one ticket face downward upon the back of another. Another ballot had a speck, apparently caused by a drop of oil, and it was there held that it would be presumed that such marks came upon the ballots through accident. Ruthledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761.

76. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

77. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

78. People *v.* Holden, 28 Cal. 123; Coffey *v.* Edmonds, 58 Cal. 521; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1,012; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

sumptions will be indulged in as to the genuineness of the ballots, and the burden of proving their genuineness rests primarily upon him who offers the evidence of the recount to impeach the returns.[79] But after the integrity of the ballots has been substantially established, the burden of proof to show that, nevertheless, they have in fact been tampered with, or to otherwise discredit them shifts to the opposite party.[80]

c. *Mutilated Ballots.* — Where mutilated ballots are found upon a recount thereof, the nature and time of mutilation seem to govern the presumptions relative thereto.[81] Thus, if a mutilated ballot

The mere fact that discrepancies appear between the returns and the ballots upon a recount thereof, does not raise the presumption that the latter have been tampered with. Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

79. *California.* — Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673.

Illinois. — Kingery *v.* Berry, 94 Ill. 515.

Iowa. — Davenport *v.* Olerich, 104 Iowa 194, 73 N. W. 603.

Kansas. — Hudson *v.* Solomon, 19 Kan. 177.

Kentucky. — Edwards *v.* Logan, 24 Ky. L. Rep. 1,099, 70 S. W. 852.

Louisiana. — Jones *v.* Freeman, 49 La. Ann. 565, 21 So. 719.

Minnesota. — O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

Mississippi. — Word *v.* Sykes, 61 Miss. 649.

Missouri. — Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

Nebraska. — Martin *v.* Miles, 40 Neb. 135, 58 N. W. 732; Albert *v.* Twohig, 35 Neb. 563, 53 N. W. 382.

New York. — People *v.* Livingston, 79 N. Y. 279.

North Dakota. — Howser *v.* Pepper, 8 N. D. 484, 79 S. W. 1,018.

Oregon. — Fenton *v.* Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801; Hartman *v.* Young, 17 Or. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

South Dakota. — McMahon *v.* Crockett, 12 S. D. 11, 80 N. W. 136.

Utah. — Farrell *v.* Larsen (Utah), 73 Pac. 227.

West Virginia. — Dent *v.* Board, 45 W. Va. 750, 32 S. E. 250.

Wyoming. — Fishback *v.* Bramel, 6 Wyo. 293, 44 Pac. 840.

80. People *v.* Holden, 28 Cal. 123; Coffey *v.* Edmonds, 58 Cal. 521; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129. But see Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738.

The presumption that sworn officers of the law faithfully perform their official duties applies equally to the preservation of the ballots and the making of the return of the number of votes cast. And so where the ballots are offered in evidence for the purpose of impeaching the returns, one of these presumptions must give way to the other. The general rule of evidence that where documentary proofs are offered by a party he must first establish the identity of such documents seems to here intervene and throw the burden of proving the ballots genuine upon the person offering them in evidence, but the burden of proving that they have in fact been tampered with, or that they have been so exposed as to afford an opportunity for so doing, shifts to the opposite party, in consonance with the other rule of evidence that no presumption of misconduct or wrong doing on the part of public officials will be indulged in. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

81. Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75. As where the name of the candidate was torn off, it was presumed to have been the act of the voter. People *v.* Holden, 28 Cal. 123; but when found torn in two from top to bottom across all the names of the can-

was counted at the time of the original count, it will be presumed without proof to the contrary that the mutilation occurred after the ballot was counted,[82] as mutilation by the election officers cannot be presumed,[83] but it will be presumed that the mutilation was either the act of the voter or that it occurred accidentally.[84]

E. As to Right or Qualification to Vote. — Where it appears that a person was registered,[85] or that his vote was accepted by the election officers, the presumption is, in the absence of proof to the contrary, that such person was a legally qualified voter.[86]

The burden of establishing disqualification to vote is upon the party objecting to the vote,[87] but slight proof of the lack of any one

didates, and the ballot appeared otherwise regular, it was presumed to have been accidental. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. And where a line was drawn through the names upon the ticket opposing that voted, it was presumed to have been merely for the purpose of emphasizing the voter's intention. Stearns *v.* Taylor, 1 Ohio (N. P.) 23.

82. Bates *v.* Crumbaugh, 24 Ky. L. Rep. 1,205, 71 S. W. 75.

83. People *v.* Holden, 28 Cal. 123; Stearns *v.* Taylor, 1 Ohio (N. P.) 23.

84. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Stearns *v.* Taylor, 1 Ohio (N. P.) 23. Where the candidate's name was torn off the ballot, it was presumed to have been the act of the voter. People *v.* Holden, 28 Cal. 123.

85. Rigsbee *v.* Town, 98 N. C. 81, 3 S. E. 749; Pradat *v.* Ramsey, 47 Miss. 24; Harbaugh *v.* People, 33 Mich. 241; Normont *v.* Charlotte, 85 N. C. 387; Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Southerland *v.* Goldsboro, 96 N. C. 49, 1 S. E. 760. If a non-registered person votes without proving his right to do so, in the absence of evidence showing that the vote was challenged, or any objection made to it, it will be presumed that he was a legal voter and so known to the judges. Dale *v.* Irwin, 78 Ill. 170.

86. Smith *v.* Jackson, Rowell Con. Elec. Cas. 27; Draper *v.* Johnson, C. & H. Con. Elec. Cas. 706; Cook *v.* Cutes, 2 Ells. Con. Elec. Cas. 266; LeMoyne *v.* Farwell, Smith Con. Elec. Cas. 411; Anderson *v.* Reed, 2 Ells. Con. Elec. Cas. 286.

California. — Whipley *v.* McKune, 12 Cal. 352; People *v.* Holden, 28 Cal. 123.

Illinois. — Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141; Clark *v.* Robinson, 88 Ill. 498.

Indiana. — Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Kansas. — Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Hudson *v.* Solomon, 19 Kan. 177.

Missouri. — Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1,127, 51 Am. St. Rep. 585.

Nebraska. — Todd *v.* Cass Co., 30 Neb. 823, 47 N. W. 196.

New Mexico. — Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York. — People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Thornton, 25 Hun 456.

Wisconsin. — State *v.* Olin, 23 Wis. 309.

Where no challenge or objection is made to a party voting, the presumption is that he is a legal voter. Dale *v.* Irwin, 78 Ill. 170. And long exercise of the right of franchise raises the presumption of having acquired the qualifications to vote although once disqualified. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407.

87. People *v.* Riley, 15 Cal. 48; Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; Beardstown *v.* Virginia, 81 Ill. 541; Hehl *v.* Guion, 155 Mo. 76, 55 S. W. 1,024; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

Proof that a foreign-born person had made a void declaration of his intention to become a citizen is sufficient. State *v.* Olin, 23 Wis. 309; Behrensmeyer *v.* Kreitz, 135 Ill. 591 26 N. E. 704. But proof that a per-

of the necessary qualifications to vote is sufficient to rebut the presumption of the voter's qualification arising from his having voted,[88] after which the burden of proving that the voter was possessed of all of the necessary qualifications to vote is thrown upon the party claiming the legality of the vote.[89] Qualification to vote, once acquired, is presumed to continue until it is otherwise shown.[90]

II. CORPORATE ELECTIONS.

Generally the same rules as are applicable to elections under the statute will govern the evidence in cases in which the regularity or legality of an election of officers of a corporation is in issue.[91] And

son is alien-born merely, is not. Beardstown *v.* Virginia, 76 Ill. 34; Beardstown *v.* Virginia, 81 Ill. 541.

88. People *v.* Thornton, 25 Hun 456; State *v.* Olin, 23 Wis. 309. The rule as stated in the text seems to prevail generally in cases before the law courts, and as was said in the case of People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242, "Full and conclusive proof, where a party has the burden of proving a negative, is not required, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party," but the House of Representatives seems to have adopted a somewhat different rule, which is that the evidence to rebut the presumption of legality of the vote arising from its having been cast and accepted must be overcome by a clear preponderance of evidence. Smith *v.* Jackson, Rowell Con. Elec. Cas. 27; Draper *v.* Johnson, C. & H. Con. Elec. Cas. 706; Cook *v.* Cutes, 2 Ells. Con. Elec. Cas. 266; LeMoyne *v.* Farwell, Smith Con. Elec. Cas. 411; Anderson *v.* Reed, 2 Ells. Con. Elec. Cas. 286.

If the fact be of a nature obviously within the power of the other party to give full proof, and he gives none, slight evidence would be strong and cogent proof of the negative. Commonwealth *v.* Bradford, 9 Metc. (Mass.) 268. And so the testimony of a person that he was a minor when he came to the United States; that he had never been naturalized and did not know that his father had, Beardstown *v.* Virginia, 76 Ill. 34; *s. c.* 81 Ill. 541; or that he came to the United States after reaching manhood, Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; or proof that in neither of the two counties, in which a foreign-born person had resided most of the time since coming to the United States, was there record of his declaration of intention to become a citizen, has been held sufficient to shift the burden of proof. State *v.* Olin, 23 Wis. 309. But the testimony of a person whose name was on the voting list, that he did not vote; that he did not live in the precinct, and that so far as he knew there was no other person of the same name living in the precinct, but that he was not generally acquainted throughout the precinct, was held insufficient to shift to the other party the burden of proving the legality of a vote cast in such precinct by a person of the same name as the witness. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

89. Ruthledge *v.* Crawford, 91 Cal. 526, 27 Pac. 770, 25 Am. St. Rep. 212, 13 L. R. A. 761; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Beardstown *v.* Virginia, 76 Ill. 34; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; State *v.* Olin, 23 Wis. 309.

90. Moffitt *v.* Hill, 131 Ill. 239; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

91. Sudbury *v.* Stearns, 21 Pick. 148; Trustees *v.* Gibbs, 2 Cush. 39; McNeely *v.* Woodruff, 13 N. J. L. 352; People *v.* Phillips, 1 Denio 388; Rudolph *v.* Southern Beneficial League, 7 N. Y. Supp. 135; People *v.* Devin, 17 Ill. 84; Christ Church *v.* Pope, 8 Gray (Mass.) 140; State *v.* McDaniel, 22 Ohio St. 354; Gorham

so it must appear that the proceedings were conducted substantially in accordance with the provisions of the by-laws, charter and statutes regulating the same.[92]

The records of the corporation, when tending to prove the necessary facts, are the best evidence,[93] and as a rule, in the absence of some proof of fraud, such records cannot be explained or contradicted by parol.[94] But where the necessary facts do not appear of record, other evidence tending to show the same may be heard,[95] and proof of transactions occurring prior to the election have been held competent.[96]

As a rule, in the absence of any showing of fraud, proof of mere irregularities or informalities in the calling of the election, or conduct of the proceedings, not appearing to have affected the result, will not invalidate the proceedings,[97] but proof of fraud or of gross

v. Campbell, 2 Cal. 135; Hathaway *v.* Addison, 48 Me. 440; Philips *v.* Wickham, 1 Paige (N. Y.) 590. It will be presumed that the election was conducted in a proper manner. Blanchard *v.* Dow, 32 Me. 557; and that it was legal. Ashtabula & N. L. R. R. Co. *v.* Smith, 15 Ohio St. 328.

92. Rex *v.* Mayor, 4 Burr. 2,008; Tide Water Pipe Co. *v.* Satterfield, 12 Wky. N. 457; *In re* Long Island R. R., 19 Wend. 37, 32 Am. Dec. 429; *In re* Newcomb, 42 N. Y. St. 412, 18 N. Y. Supp. 16; Johnston *v.* Jones, 23 N. J. Eq. 216; Philips *v.* Wickham, 1 Paige 590; Blodgett *v.* Holbrook, 39 Vt. 336. Proof that the meeting at which officers were chosen was not properly called, Grafton Bank *v.* Kimball, 20 N. H. 107; or that the proper officer did not preside, or that otherwise the proceedings were conducted in a grossly irregular manner, shows an invalid election. State *v.* Pettineli, 10 Nev. 141.

93. Downing *v.* Potts, 23 N. J. L. 66; *In re* Mohawk & H. R. R. Co., 19 Wend. 135; Beardsley *v.* Johnson, 49 Hun 607, 1 N. Y. Supp. 608; Manning *v.* Fifth Parish, 6 Pick. 6; Andrews *v.* Boylston, 110 Mass. 215; State *v.* Buchanan, Wright (Ohio) 233; State *v.* Ferris, 42 Conn. 560; Beckett *v.* Houston, 32 Ind. 393; People *ex rel.* Probert *v.* Robinson, 64 Cal. 373, 1 Pac. 156; Vandenburgh *v.* Broadway U. C. R. Co., 29 Hun 348; Savage *v.* Ball, 17 N. J. Eq. 142. Mere defects in the records will not render them inadmissible.

94. Orford *v.* Benton, 36 N. H. 395; Adams *v.* Crowell, 40 Vt. 31. Where the record showed that "it was voted that the district build a new school house, 16 for and 11 against it," and evidence was offered to prove that 7 of the 16 who voted in the affirmative were not legal voters, it was held that the evidence was properly rejected. Eddy *v.* Wilson, 43 Vt. 362.

95. Rex *v.* Gaborian, 11 East 77; Johnston *v.* Jones, 23 N. J. Eq. 216; People *v.* Phillips, 1 Denio (N. Y.) 388; People *v.* Devin, 17 Ill. 84; Rudolph *v.* Southern Beneficial League, 7 N. Y. Supp. 135; Tomlin *v.* Farmers' and Mer. Bank, 52 Mo. App. 430; Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; *In re* Pioneer Paper Co., 36 How. Pr. (N. Y.) 104.

96. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628. As where the qualification to vote was questioned, evidence of how the qualification was acquired was held admissible. Philips *v.* Wickham, 1 Paige (N. Y.) 590.

97. Reg *v.* Thwaites, 17 Jur. 712, 22 L. J. Q. B. 238; Philips *v.* Wickham, 1 Paige 590; Gorham *v.* Campbell, 2 Cal. 135; First Parish of Sutton *v.* Cole, 3 Pick. (Mass.) 232; Williams *v.* School Dist., 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Lyon *v.* Rice, 41 Conn. 245; Brewster *v.* Hyde, 7 N. H. 206; Blodgett *v.* Holbrook, 39 Vt. 336; Christ Church *v.*

irregularities,[98] or that the proceedings were merely colorable, will avoid the election.[99] And so proof of the acceptance of illegal votes or rejection of or refusal to count legal votes, if sufficient in number to affect the result, will have the same effect.[1]

Where the charter directs that the election must be held by a majority of the whole number of stockholders, an election held by a minority is void,[2] but if the majority refuse to vote, or vote in an illegal manner, a vote cast by a minority in the legal manner will elect.[3]

Proof that some of the stockholders entered into an illegal agreement relative to the election, whereby the control of the corporation was to remain in their hands, does not show their votes cast at the election to be illegal,[4] but proof that a person voted who lacked the

Pope, 8 Gray (Mass.) 140; People *v.* Devin, 17 Ill. 84; State *v.* Thompson, 27 Mo. 365. See Tide Water Pipe Co. *v.* Satterfield, 12 Wky. Notes 457. The election may be held upon a day subsequent to the designated day without imperiling its validity. People *v.* Fairbury, 51 Ill. 149.

Contra. — Rex *v.* May, 5 Burr. 268.

98. Rex *v.* Gaborian, 11 East 77; People *v.* Albany S. R. Co., 55 Barb. (N. Y.) 344; Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; People *v.* Phillips, 1 Denio (N. Y.) 388; State *v.* McDaniel, 22 Ohio St. 354; Walsenburg Water Co. *v.* Moore, 5 Colo. App. 144, 38 Pac. 60; Johnston *v.* Jones, 23 N. J. Eq. 216. Proof that the meeting at which the election was held was not legally called shows an invalid election. Grafton Bank *v.* Kimball, 20 N. H. 107. Where the election for officers was conducted by tellers appointed by the chairman and against the protest of the stockholders and in disregard of the law, which provided that the stockholders should elect the tellers by vote, the officers of the corporation so elected were held not to have even *prima facie* title to the offices. Tide Water Pipe Co. *v.* Satterfield, 12 Wkly. 457. Proof that only a portion of the stockholders were present; that the president did not preside and no president *pro tempore* was chosen; that no person was authorized to receive the ballots or to declare the result, shows an invalid election. State *v.* Pettineli, 10 Nev. 141.

99. Rex *v.* Bedford, 1 East 79. As the election of one who was absent, and who, it was known, would not return and discharge the duties of the office. Rex *v.* Mayor, 4 Burr. 2,008.

1. *In re* Long Island R. R., 19 Wend. (N. Y.) 37. 32 Am. Dec. 429; People *ex rel.* Putzel *v.* Simmonson, 61 Hun 338, 16 N. Y. Supp. 18; Election of Directors of Cape May & D. B. Nav. Co., 51 N. J. L. 78, 16 Atl. 191; State *v.* McDaniels, 22 Ohio St. 354; People *v.* Phillips, 1 Denio (N. Y.) 388.

But see *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529, and People *v.* Fairbury, 51 Ill. 149. Where the state was entitled to vote and the right was refused, the election was set aside, although it did not appear that the result would have been affected. State *v.* New Orleans J. & G. N. R. Co., 20 La. Ann. 489.

2. Rex *v.* Grimes, 5 Burr. 2,598. But see Commonwealth *v.* Read, 2 Ashmead 261.

3. Oldknow *v.* Wainwright, 2 Burr. 1,017. Where the law requires that the vote be by ballot, and the majority vote *viva voce*, a single ballot, if given and received as such, is sufficient to elect. Commonwealth *v.* Read, 2 Ash. (Pa.) 261.

4. As where such agreement was not to sell stock or to grant proxies, whereby the contracting parties were able to control the election of officers. Tomlin *v.* Farmers' and Mer. Bank, 52 Mo. App. 430.

qualifications prescribed by the statutes, by-laws or charter, shows an illegal vote.[5]

The transfer books of a corporation are conclusive evidence of a person's right to vote.[6]

III. CONTESTED ELECTIONS.

1. Admissibility of Evidence. — A. In General. — The right to try title to an office carries with it the right to establish that title by evidence of the means through which it was acquired.[7] And so the evidence in contested election cases to prove or disprove the right to an office is not limited to the result as declared by the election officials, but the whole proceedings may be investigated, and the true result ascertained.[8]

Generally, any evidence which tends to establish the true result of the election, or to rebut the contestant's proof, should be

5. People *v.* Devin, 17 Ill. 84; American R. Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377; Clarke *v.* Central R. & B. Co., 50 Fed. 338; State *v.* Leete, 16 Nev. 242; Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Proctor Coal Co. *v.* Finley, 98 Ky. 405, 33 S. W. 188; Taylor *v.* Griswold, 14 N. J. L. 222, 27 Am. Dec. 33; Com. *v.* Bringhurst, 103 Pa. St. 134, 49 Am. Rep. 119; People *v.* Twaddell, 18 Hun (N. Y.) 427. Opinions as to qualifications to vote are not evidence. People *v.* Lacoste, 37 N. Y. 192. Stockholders appealing from an assessment cannot vote pending an appeal. Lincoln *v.* State, 36 Ind. 161.

6. State *v.* Ferris, 42 Conn. 560; Downing *v.* Potts, 23 N. J. L. 66; *In re* Long Island R. R., 19 Wend. 37, 32 Am. Dec. 429; *In re* Lafferty, 2 Pa. Dist. Rep. 215; Beckett *v.* Houston, 32 Ind. 393; People *ex rel.* Probert *v.* Robinson, 64 Cal. 373, 1 Pac. 156; Vandenburgh *v.* Broadway U. C. R. Co., 29 Hun (N. Y.) 348; Savage *v.* Ball, 17 N. J. Eq. 142.

7. Wammack *v.* Holloway, 2 Ala. 31; People *v.* Jones, 20 Cal. 50; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769; State *v.* Marston, 6 Kan. 524; People *v.* VanCleve, 1 Mich. 362, 53 Am. Dec. 69; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; State *v.* Owens, 63 Tex. 261. The object of the judicial tribunal engaged in deciding upon a contested election is not so much to determine the private rights of the parties as to decide whom the people have elected, according to the very right of the case and the principles of justice. Ralston *v.* Meyer, 34 W. Va. 737, 12 S. E. 783. The order of the proof and extent of the investigation are regulated by the trial court. Weaver *v.* Given, 1 Brewst. (Pa.) 67. The distinction between the right to contest an election and to recover an office unlawfully withheld, announced. State *v.* Owens, 63 Tex. 261.

8. Stimson *v.* Breed, L. & R. Elec. Cas. 257; Atkinson *v.* Pendleton, Rowell Con. Elec. Cas. 55; Wallace *v.* McKinley, Moberly Con. Elec. Cas. 186; Blair *v.* Barrett, 1 Bart. Elec. Cas. 308; McDuffie *v.* Davidson, Moberly Con. Elec. Cas. 577; Warren *v.* McDonald, 32 La. Ann. 987; *In re* Payne, T. & F. Con. Elec. Cas. 604; Com. *v.* Meiser, 44 Pa. St. 341; Smalls *v.* Elliott, Moberly Con. Elec. Cas. 663. Under proper proceedings, courts may determine all matters pertaining to the conduct of the election, the making out of the returns and the issuance of the certificate of election. Ellison *v.* Barnes, 23 Utah 183, 63 Pac. 899. Parol evidence is competent to show all the circumstances of an election. United States *v.* Carbery, 2 Cranch C. C. 358, 24 Fed. Cas. No. 14,720.

received.[9] Thus it is proper to show that the proceedings are tainted with fraud,[10] bribery,[11] or other corrupt practices;[12] or that illegal votes were received, or legal ones rejected.[13]

In the absence of proof of fraud, evidence tending to show the

9. Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723; Keller *v.* Chapman, 34 Cal. 635; People *v.* Seaman, 5 Denio (N. Y.) 409; People *v.* Wiant, 48 Ill. 263; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Russell *v.* State, 11 Kan. 308; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Crouse *v.* State, 57 Md. 327; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Taylor *v.* Taylor, 10 Minn. 107; Word *v.* Sykes, 61 Miss. 649; Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Van Slyck, 4 Cow. 297; People *ex rel.* Stapleton, *v.* Bell, 119 N. Y. 175, 23 N. E. 533; People *v.* Teague, 106 N. C. 576, 11 S. E. 665; Weaver *v.* Given, 1 Brewst. (Pa.) 140; Truehart *v.* Addicks, 2 Tex. 217; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992; State *v.* Avery, 14 Wis. 122. That the defendant was not in fact elected is the issue, and any evidence tending to prove the same is admissible. Govan *v.* Jackson, 32 Ark. 553; *Ex parte* Norris, 8 S. C. 408; Baker *v.* Long, 17 Kan. 341. The election and not the returns is the foundation of the right to office. Brower *v.* O'Brien, 2 Ind. 423; Brown *v.* Osgood, 25 Me. 507; Bacon *v.* Commissioners, 26 Me. 491; *In re* Strong, 20 Pick. (Mass.) 484; *Ex parte* Heath, 3 Hill (N. Y.) 42; *In re* Mohawk & H. R. R. Co., 19 Wend. (N. Y.) 135. People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769. Where it appears that the result of the canvass was procured by fraud, courts should go behind the canvass and hear testimony as to the validity of the election. State *v.* Marston, 6 Kan. 524. In the case of Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349, an offer was made to prove by a legal voter that he voted a ballot of a certain number in favor of the contestee, and by other evidence that at the time of the recount no such ballot was found and counted, and it was there held that the evidence was admissible.

10. Finley *v.* Walls, Smith Con. Elec. Cas. 388; Washburn *v.* Voorhees, 2 Bart. Con. Elec. Cas. 54; Myers *v.* Moffett, 2 Bart. Con. Elec. Cas. 564; Reed *v.* Julian, 2 Bart. Con. Elec. Cas. 822; Covode *v.* Foster, 2 Bart. Con. Elec. Cas. 600; Kline *v.* Myers, 1 Bart. Con. Elec. Cas. 574; Atkinson *v.* Pendleton, Rowell Con. Elec. Cas. 46; Ellison *v.* Barnes, 23 Utah 183, 63 Pac. 899.

11. Collins *v.* Price, 44 L. Ts. 192; Beale *v.* Smith, 19 L. Ts. 565; *In re* Payne, T. & F. Con. Elec. Cas. 604; *In re* Ingalls T. & F. Con. Elec. Cas 596; Abbott *v.* Frost, Smith Con. Elec. Cas. 605; Sullivan *v.* Felton, Moberly Con. Elec. Cas. 755; Donnelly *v.* Washburn, 1 Ells. Con. Elec. Cas. 453; Page *v.* Price, Moberly Con. Elec. Cas. 491; Lowry *v.* White, Moberly Con. Elec. Cas. 624; Duffy *v.* Mason, 1 Ells. Con. Elec. Cas. 361.

Evidence of corrupt payments made after election by an agent is admissible. Buxton *v.* Garfit, 44 L. Ts. 287. But evidence of corruption at a previous election is inadmissible. Spencer *v.* Harrison, 44 L. Ts. 283.

12. Buxton *v.* Garfit, 44 L. Ts. 287; Spencer *v.* Harrison, 44 L. Ts. 283; Smalls *v.* Elliott, Moberly Con. Elec. Cas. 663; McGinnis *v.* Alderson, Rowell Con. Elec. Cas. 633; Mudd *v.* Compton, Rowell Con. Elec. Cas. 169; Bowen *v.* Buchanan, Rowell Con. Elec. Cas. 198; *In re* Payne, T. & F. Con. Elec. Cas. 604; *In re* Ingalls, T. & F. Con. Elec. Cas. 596. Schneider *v.* Duncan, 54 L. Ts. 618; Reg *v.* Bramwell, 5 W. R. 557.

13. Downing *v.* Potts, 23 N. J. L. 66; Conant *v.* Millandon, 5 La. Ann. 542; McDowell *v.* Massachusetts & S. Const. Co., 96 N. C. 514, 2 S. E. 351; Niblack *v.* Walls, Smith Con. Elec Cas. 101; *In re* Chenango Co. Mut. Ins. Co., 19 Wend. 635; McNally *v.* Woodruff, 13 N. J. L. 352; Frost *v.* Metcalfe, 1 Ells. Con. Elec. Cas. 289;

invalidity of the appointment of the election officers,[14] or that the contestee's name was improperly placed upon the ballot,[15] or that the ballots were illegally printed,[16] or other irregularities not shown to have affected the result, may be rejected without error,[17] and generally evidence tending to prove facts, which, if true, would not defeat defendant's right to the office, may properly be excluded.[18]

The committee of a legislative body, to which a contested election is referred, is, as a rule, judge of the admissibility of the evidence, and this has led to some conflicting rules,[19] but generally such committees are more liberal in the reception of evidence than are the law courts,[20] and so the House of Representatives has adopted a liberal rule as to the count of legal votes which have been rejected at the polls, which is that where legal voters have attempted to vote at the proper place and have been denied the privilege, if it can be

Bisbee *v.* Finley, 2 Ells. Con. Elec. Cas. 172; Wallace *v.* McKinley, Moberly Con. Elec. Cas. 185; Waddell *v.* Wise, Rowell Con. Elec. Cas. 223; Anderson *v.* Reed, 2 Ells. Con. Elec. Cas. 286; Draper *v.* Johnson, C. & H. Con. Elec. Cas. 706; Smith *v.* Jackson, Rowell Con. Elec. Cas. 27.

14. Tucker *v.* Aiken, 7 N. H. 113; McKinney *v.* O'Connor, 26 Tex. 5; Thompson *v.* Ewing, 1 Brewst. 67; Mann. *v.* Cassidy, 1 Brewst. (Pa.) 11; Prohibitory Amendment Cas., 24 Kan. 700; Satterlee *v.* San Francisco, 23 Cal. 314; Whipley *v.* McKune, 12 Cal. 352; Pradat *v.* Ramsey, 47 Miss. 24.

15. Lewis *v.* Boynton, 25 Colo. 486, 55 Pac. 732. An election cannot be contested because of defects or irregularities in the certificate of nomination. Jones *v.* State, *ex rel.* Wilson, 153 Ind. 440, 55 N. E. 229.

16. Lewis *v.* Boynton, 25 Colo. 486, 55 Pac. 732.

17. McNeeley *v.* Woodruff, 13 N. J. L. 352; Conant *v.* Millandon, 5 La. Ann. 542; Hurd *v.* Romeis, Moberly Con. Elec. Cas. 423; Bowen *v.* Buchanan, Rowell Con. Elec. Cas. 198. Irregularity in place of receiving votes, not affecting the result, is not fatal to the election. Smith *v.* Jackson, Rowell Con. Elec. Cas. 24. But see Howard *v.* Cooper, 1 Bart. Con. Elec. Cas. 282. An election held without a full quota of officers has been held invalid. United States *v.* Carbery, 2 Cranch C. C. 358, 24 Fed. Cas. No. 14,720.

18. Todd *v.* Stewart, 14 Colo. 286, 23 Pac. 426; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Ewing *v.* Filley, 43 Pa. St. 384; Russell *v.* State, 11 Kan. 308; Gilleland *v.* Schuyler, 9 Kan. 569; McDonald *v.* Wood, 118 Ala. 589, 24 So. 86; Jones *v.* Caldwell, 21 Kan. 186; Wade *v.* Oates, 112 Ala. 325, 20 So. 495; Patton *v.* Coates, 41 Ark. 111. It is incompetent to show acts and declarations of a candidate or his supporters at an election which was held some time prior to the one contested. Spencer *v.* Harrison, 44 L. Ts. 283; Word *v.* Sykes, 61 Miss. 649. Evidence not tending to prove that either party received more or less votes than was counted for him may be excluded without error. Morris *v.* Vanlaningham, 11 Kan. 269, and where it is admitted that the contestant received a certain number of votes, it is not error to exclude evidence that he received a smaller number. State *v.* Thompson, 10 Tex. Civ. App. 272, 30 S. W. 728.

19. Covode *v.* Foster, 1 Bart. Con. Elec. Cas. 525; Vallindigham *v.* Campbell, 1 Bart. Con. Elec. Cas. 223; Gause *v.* Hodges, Smith Con. Elec. Cas. 291; Sheridan *v.* Pinchback, Smith Con. Elec. Cas. 190.

20. Waddell *v.* Wise, Rowell Con. Elec. Cas. 224; Miller *v.* Elliott, Rowell Con. Elec. Cas. 515; Hunt *v.* Sheldon, 2 Bart. Con. Elec. Cas. 530; Sheridan *v.* Pinchback, Smith Con. Elec. Cas. 196; Porterfield *v.* McCoy, C. & H. Con. Elec. Cas. 267. But

shown for whom they offered to vote, such votes will be counted for such candidate.[21] But to entitle the vote to be so counted, it must affirmatively appear: First — That the person offering to vote was a legal voter at the place at which the vote was offered. Second — The vote must have been actually offered. Third — It must have been rejected. Fourth — It must appear for whom the elector offered to vote.[22] Such facts may be proven by direct or circumstantial evidence.[23]

Official or semi-official documents are usually admitted in evidence,[24] and in some cases the statements of voters concerning their votes have been received,[25] while in others they have been refused.[26] Depositions taken *ex parte* are inadmissible.[27]

generally the best evidence must be produced. McDuffie *v.* Turpin, Rowell Con. Elec. Cas. 299. An unofficial recount of the ballots has been accepted. English *v.* Peelle, Moberly Con. Elec. Cas. 171; Fredrick *v.* Wilson, Moberly Con. Elec. Cas. 403.

21. Covode *v.* Foster, 2 Bart. Con. Elec. Cas. 600; Waddell *v.* Wise, Rowell Con. Elec. Cas. 224; Buchanan *v.* Manning, 2 Ells. Con. Elec. Cas. 287; Taylor *v.* Reading, 2 Bart. Con. Elec. Cas. 661; Bell *v.* Snyder, Smith Con. Elec. Cas. 247; Niblack *v.* Walls, Smith Con. Elec. Cas. 101; Bisbee *v.* Finley, 2 Ells. Con. Elec. Cas. 172; Sessinghaus *v.* Frost, 2 Ells. Con. Elec. Cas. 380. Votes of persons illegally prevented from registering, otherwise qualified, if tendered and refused, have been counted. Miller *v.* Elliott, Rowell Con. Elec. Cas. 515.

22. Frost *v.* Metcalf, 1 Ells. Con. Elec. Cas. 289.

23. Waddell *v.* Wise, Rowell Con. Elec. Cas. 224; Smith *v.* Jackson, Rowell Con. Elec. Cas. 13; McDuffie *v.* Davidson, Moberly Con. Elec. Cas. 577; Delano *v.* Morgan, 2 Bart. Con. Elec. Cas. 168.

24. Norris *v.* Handley, Smith Con. Elec. Cas. 68; Niblack *v.* Walls. Smith Con. Elec. Cas. 101; Knox *v.* Blair, 1 Bart. Con. Elec. Cas. 521.

Testimony taken by the senate committee of privileges and elections has been received in a contest in the house. Sheridan *v.* Pinchback, Smith Con. Elec. Cas. 196. And so has the finding of the committee of the state legislature appointed to investigate the legality of an election proceeding. Hunt *v.* Sheldon, 2 Bart. Con. Elec. Cas. 530. The census taken by the United States has been admitted as tending to prove the probable number of voters. Niblack *v.* Walls, Smith Con. Elec. Cas. 101; Blair *v.* Barrett, 1 Bart. Con. Elec. Cas. 308.

25. Vallandingnam *v.* Campbell, 1 Bart. Con. Elec. Cas. 230; New Jersey Case, 1 Bart. Con. Elec. Cas. 26; Monroe *v.* Jackson, 1 Bart Con. Elec. Cas. 99; Bell *v.* Snyder, Smith Con. Elec. Cas. 257; Wallace *v.* McKinley, Moberly Con. Elec. Cas. 205; Delano *v.* Morgan, 2 Bart. Con. Elec. Cas. 169; Cessna *v.* Myers, Smith Con. Elec. Cas. 60; Newland *v.* Graham, 1 Bart. Con. Elec. Cas. 5. Affidavit of a voter may be read in evidence to prove his right to vote. Porterfield *v.* McCoy, C. & H. Con. Elec. Cas. 267. Evidence of conversations had after election is not usually admissible. Heywood *v.* Dodson, 44 L. Ts. 285.

26. Cessna *v.* Myers, Smith Con. Elec. Cas. 67; Wallace *v.* McKinley, Moberly Con. Elec. Cas. 189; Cook *v.* Cutts, 2 Ells. Con. Elec. Cas. 257; Dodge *v.* Brooks, 2 Bart. Con. Elec. Cas. 92; Newland *v.* Graham, 1 Bart. Con. Elec. Cas. 7; Letcher *v.* Moore, C. & H. Con. Elec. Cas. 750; Smith *v.* Jackson, Rowell Con. Elec. Cas. 13. Statements and declarations of other persons and conclusion of witnesses therefrom are hearsay and inadmissible in evidence. Hurd *v.* Romeis, Moberly Con. Elec. Cas. 423.

27. Spaulding *v.* Mead, C. & H. Con. Cas. 157; Hill *v.* Catchings, Rowell Con. Elec. Cas. 806; Wiggington *v.* Pacheco, 1 Ells. Con. Elec.

B. The Certificate as Evidence. — In contested election cases the certificate of election is the primary evidence of the right of the person to whom it is issued to hold the office,[28] and mere defects and irregularities therein will not exclude it as such evidence,[29] but they may be shown and corrected.[30]

The certificate is but evidence of the right to the office, and is subject to inquiry and disproof.[31] It may be shown that it was not

Cas. 8; Todd *v.* Jayne, 1 Bart. Con. Elec. Cas. 557; Knox *v.* Blair, 1 Bart. Con. Elec. Cas. 526.

28. State *v.* Johnson, 17 Ark. 407; Whitney *v.* Board, 14 Cal. 479; State *v.* Towns, 8 Ga. 360; Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; Taylor *v.* Taylor, 10 Minn. 107; People *v.* Perley, 80 N. Y. 624; People *v.* Thornton, 25 Hun 456; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Lacoste, 37 N. Y. 192; Commonwealth *v.* McAllister, 24 Pa. Co. Ct. Rep. 96; Crouse *v.* State, 57 Md. 327; McKinney *v.* O'Connor, 26 Tex. 5; State *v.* Kersten, (Wis.), 95 N. W. 120; State *v.* Avery, 14 Wis. 122.

29. Com. *v.* McAllister, 24 Pa. Co. Ct. Rep. 96.

The certificate of election is competent evidence although the name of the person to whom it is issued is not correctly stated therein, or if it does not show for what the votes were cast, if the same can be inferred by a fair construction thereof. People *v.* Ferguson, 8 Cow. (N. Y.) 102, and if it omits to give the number of votes cast, the returns may be resorted to in order to ascertain the same. People *v.* Wiant, 48 Ill. 263.

A certificate of the result which was signed by one inspector only, but had the name of another inspector written thereon by a person having no authority to do so, is not evidence of the facts therein stated, conceding that the duty to sign the certificate might be delegated. State *ex rel.* Bell *v.* Conness, 106 Wis. 425, 82 N. W. 288. Where two certificates and two returns, showing different and opposite results for the same office, are issued, the court will, if possible, blend the two and give one construction, or accept one of the certificates and reject the other. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

30. Smith *v.* Jackson, Rowell Con. Elec. Cas. 16; Root *v.* Adams, C. & H. Con. Elec. Cas. 271; Sleeper *v.* Rice, 1 Bart. Con. Elec. Cas. 473; Archer *v.* Allen, 1 Bart. Con. Elec. Cas. 169; Chrisman *v.* Anderson, 1 Bart. Con. Elec. Cas. 328; Shields *v.* Van Horn, 2 Bart. Con. Elec. Cas. 922.

31. Wammack *v.* Holloway, 2 Ala. 31; State *v.* Johnson, 17 Ark. 407; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Taylor *v.* Taylor, 10 Minn. 107; People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175, 23 N. E. 533; People *v.* Seaman, 5 Denio (N. Y.) 409; People *v.* Cook, 14 Barb. (N. Y.) 259; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Ewing *v.* Filley, 43 Pa. St. 384; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992; Ellison *v.* Barnes, 23 Utah 183, 63 Pac. 899; Bashford *v.* Barstow, 4 Wis. 567; McMillan *v.* Pinchback, T. & F. Con. Elec. Cas. 142. The certificate and the return upon which it is based are open to inquiry. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; and where it appears that there was intentional wrong on the part of those who made the count of votes, the certificate will not be evidence. Word *v.* Sykes, 61 Miss. 649. The real right of title to the office comes from the will of the electors as expressed at the election, and one not having the real title, but only the color of title given by the certificate, holds wrongfully. People *v.* Jones, 20 Cal. 50.

Parol evidence is admissible to disprove a certificate of election. People *v.* McGuire, 2 Hun 269. Want of the certificate is not evidence by which the right to the office can be disputed, but such right may be established by other means. Gun-

issued by the proper authority,[32] or that it is incorrect, false or fraudulent,[33] or that otherwise it does not exhibit the true result of the election proceedings.[34] When the correctness of the certificate is questioned it must be sustained by other evidence.[35]

C. The Returns and Other Records as Evidence. — The election returns, canvass and other records of the proceedings are competent evidence to prove the right to the office,[36] and irregu-

ter *v.* Wilshire, Smith Con. Elec. Cas. 130.

32. Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738; People *v.* Vail, 20 Wend. 12; State *ex rel.* Bell *v.* Conness, 106 Wis. 425, 82 N. W. 288.

A certificate of election made without authority confers no rights. Brower *v.* O'Brien, 2 Ind. 423; and does not give even color of title to the office. Truehart *v.* Addicks, 2 Tex. 217; People *v.* Stevens, 5 Hill (N. Y.) 616. The statement of a recorder of a municipal board, in a paper, that he was not required to make, notifying a person of his election to office, that it was done by the order of the board, is not evidence of that fact. Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308. Where the authority of the person to sign the certificate was disputed in a contest in the senate, the certificate was held not to be *prima facie* evidence of the right to the office. McMillen *v.* Pinchback, T. & F. Con. Elec. Cas. 142. But see *In re* Lamar, T. & F. Con. Elec. Cas. 538.

33. Patton *v.* Coates, 41 Ark. 111; Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723; Blake *v.* Hogan, 57 Minn. 45, 58 N. W. 867; Word *v.* Sykes, 61 Miss. 649; State *v.* Marston, 6 Kan. 524; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422; Ewing *v.* Filley, 43 Pa. St. 384; State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1,018; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

The certificate may be impeached by showing it to be fraudulent, incorrect or that illegal votes were cast in sufficient numbers to change the result. Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472. Where the contestee is free of fraud in obtaining the certificate, he may meet contestant's case of direct fraud with evidence of specific fraud. Weaver *v.* Given, 1 Brewst. (Pa.) 140, and his right to such evidence is not affected by the fact that frauds were perpetrated in his interest. Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700. The *prima facie* presumption of the correctness of a certificate of election never attaches, where it appears that there was any intentional wrong on the part of those who made the count of the votes. Word *v.* Sykes, 61 Miss. 649. The certificate itself may furnish evidence of its unreliability. McGinnis *v.* Alderson, Rowell Con. Elec. Cas. 633.

34. Keller *v.* Chapman, 34 Cal. 635; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Crouse *v.* State, 57 Md. 327; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; *In re* Strong, 20 Pick. (Mass.) 484; Taylor *v.* Taylor, 10 Minn. 107; Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; People *v.* Cook, 14 Barb. (N. Y.) 259; *Ex parte* Heath, 3 Hill (N. Y.) 42; Ewing *v.* Filley, 43 Pa. St. 384; Weaver *v.* Given, 1 Brewst. (Pa.) 140; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992; Ellison *v.* Barnes, 23 Utah 183, 63 Pac. 899; State *v.* Avery, 14 Wis. 122; McGinnis *v.* Alderson, Rowell Con. Elec. Cas. 633.

35. Jones *v.* Freeman, 49 La. Ann. 565, 21 So. 719; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; People *v.* Robertson, 27 Mich. 116; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; Thompson *v.* People, 23 Wend. (N. Y.) 538; People *v.* Clayton, 4 Utah 421, 11 Pac. 206; State *v.* Beardsley, 13 Utah 502, 45 Pac. 569; State *v.* Avery, 14 Wis. 122.

36. State *v.* Adams, 2 Stew. (Ala.) 231; Whitney *v.* Board, 14 Cal. 479;

larities, in the absence of fraud, will not exclude them as such,[37] but it has been held that where the returns were not signed or certified, they were not competent evidence.[38] The returns may be set aside or contradicted by parol evidence,[39] and the election officers may testify as to mistakes made by them in making up the returns.[40]

D. Ineligibility of Contestee. — The contestant may show the ineligibility of his opponent in order to defeat his claim to the office in dispute,[41] but proof of the ineligibility of the candidate who received the highest number of votes will not establish the election of the eligible candidate receiving the next highest number, without it further clearly appears that the disability of the plurality candidate was known to the electors at the time they cast their votes

State *v.* Marston, 6 Kan. 524; People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; Hawkins *v.* Carroll Co., 50 Miss. 735; People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175, 23 N. E. 533; Tomlin *v.* Farmers & Mer. Bank, 52 Mo. App. 430; Phelps *v.* Schroder, 26 Ohio St. 549; Ewing *v.* Filley, 43 Pa. St. 384; Williams *v.* State, 69 Tex. 368, 6 S. W. 845; Bashford *v.* Barstow, 4 Wis. 567. The count, canvass and returns are competent evidence for the defendant in a contest and may be proved by the record thereof or a certified copy, but the tally sheet kept by the officer of election, not being required by law to be kept, is not competent evidence for the relator. Echols *v.* State, 56 Ala. 131. Where the records of the election are put in evidence over the objection of the contestee, he waives any error therein by afterwards introducing the same records as his evidence. Morris *v.* Vanlaningham, 11 Kan. 269.

37. Niblack *v.* Walls, Smith Con. Elec. Cas. 103; Koontz *v.* Coffroth, 2 Bart. Con. Elec. Cas. 31; Yeates *v.* Martin, 1 Ells. Con. Elec. Cas. 385; Lyon *v.* Smith, C. & H. Con. Elec. Cas. 101. A succession of unexplained irregularities and disregard for the law makes the return less conclusive, and may be such as to throw the burden of proof upon the party claiming the legality of the count. Langston *v.* Venable, Rowell Con. Elec. Cas. 437. The original election returns are admissible to prove the true number of votes given, although they may have been for some time in an exposed situation and altered in some respects. State *v.* Adams, 2 Stew. (Ala.) 231.

38. Chrisman *v.* Anderson, 1 Bart. Con. Elec. Cas. 328; Barnes *v.* Adams, 2 Bart. Con. Elec. Cas. 760.

39. McDuffie *v.* Turpin, Rowell Con. Elec. Cas. 299; Ford *v.* Wright, 13 Minn. 480. Mistakes in the canvass may be so shown and corrected. People *v.* Vail, 20 Wend. 12; or by a recount of the ballots, People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; or the returns may be set aside so far as they appear to be erroneous. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

40. Adams *v.* Wilson, C. & H. Con. Elec. Cas. 375.

41. *England.* — Rex *v.* Hawkins, 10 East 211; Rex *v.* Parry, 14 East 549.

Arkansas. — Swepston *v.* Barton, 39 Ark. 549.

California. — Crawford *v.* Dunbar, 52 Cal. 36.

Georgia. — State *v.* Swearingen, 12 Ga. 23.

Indiana. — Carroll *v.* Greene, 148 Ind. 362, 47 N. E. 223.

Louisiana. — Jordy *v.* Hebrard, 18 La. 455; State *v.* Gastinel, 20 La. Ann. 114.

Michigan. — People *v.* Molitor, 23 Mich. 341.

Missouri. — State *ex rel.* Deering *v.* Berkeley, 140 Mo. 184, 41 S. W. 732.

Nebraska. — Gardner *v.* Burke, 61 Neb. 534, 85 N. W. 541.

New Jersey. — *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

New York. — People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508; Com. *v.*

for him.[42] It has been held that even though the ineligibility of the candidate be known to the voters, neither party will be entitled to the office,[43] and the same rule applies where the ineligibility is unknown.[44]

2. Presumptions and Burden of Proof. — In the absence of proof to the contrary, it will be presumed that the election was regular and legal,[45] and that the person to whom the certificate of election is

Cluley, 56 Pa. St. 270, 94 Am. Dec. 75.

Pennsylvania. — Wallace *v.* Simpson, 4 Brewst. 454.

Rhode Island. — *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

Vermont. — State *v.* Fisher, 28 Vt. 714.

West Virginia. — Dryden *v.* Swinburne, 20 W. Va. 89.

Wisconsin. — State *v.* Smith, 14 Wis. 497.

The disability of a candidate will not avoid an election, but such disability may be removed. Ransom *v.* Abbott, T. & F. Con. Elec. Cas. 300. But see Searcy *v.* Grow, 15 Cal. 117.

42. Rex *v.* Hawkins, 10 East 211; Claridge *v.* Evelyn, 5 Barn. & Ald. 81; Reg *v.* Franklin, Ir. R. 6 C. L. 239; Carson *v.* McPhetridge, 15 Ind. 327; Wallace *v.* Simpson, 4 Brewst. 454; *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

A minority of the electors may elect a candidate where the majority declines to vote, or where they vote for one ineligible, knowing of the disqualification. Notice of the disqualifying fact and of its legal effect may be given so directly to the voter as to charge him with actual knowledge of the disqualification; or the disqualifying fact may be so patent or notorious as that his knowledge of the ineligibility may be presumed as a matter of law. But not only the fact which disqualifies, but also the rule or enactment of law which makes it thus effectual must be brought home so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it in order to render his vote a nullity. People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508. Thus where the cause of the ineligibility arises by reason of a general law, voters are chargeable with notice thereof. Gulick *v.* New, 14 Ind. 93. And if an elector, with such notice or knowledge, willfully votes for him the vote is thrown away. Reg *v.* Tewkesbury, 9 Barn. & S. 683, 18 L. Ts. (N. S.) 851; Trench *v.* Nolan, Ir. R. 6 C. L. 464; *In re* Morton Ir. R. 9 C. L. 217.

43. State *v.* Vail, 53 Mo. 97; State *v.* Giles, 1 Chand. (Wis.) 112; State *v.* Smith, 14 Wis. 497. In the absence of proof, it will not be presumed that the voters voted for a disqualified person. *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

44. Reg *v.* Hiorans, 7 Ad. & E. 960; Rex *v.* Bridge, 1 M. & S. 76; Lowry *v.* White, Moberly Con. Elec. Cas. 623; Ransom *v.* Abbott, T. & F. Con. Elec. Cas. 300; Swepston *v.* Barton, 39 Ark. 549; State *v.* Swearingen, 12 Ga. 23; State *v.* Gastinel, 20 La. Ann. 114; Jordy *v.* Hebrard, 18 La. 455; People *v.* Molitor, 23 Mich. 341; Gardner *v.* Burke, 61 Neb. 534, 85 N. W. 541; State *ex rel.* Thayer *v.* Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508; *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538; Dryden *v.* Swinburne, 20 W. Va. 89; State *v.* Giles, 2 Pin. (Wis.) 166, 52 Am. Dec. 149; State *v.* Smith, 14 Wis. 497; State *v.* Tierney, 23 Wis. 430. Where an ineligible candidate receives the highest number of votes, the election is voidable, but not void, in the absence of a provision to the contrary in the charter. Crawford *v.* Powell, 2 Burr. 1,013.

45. Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867; State *v.* Kersten (Wis.), 95 N. W. 120; Judkins *v.* Hill, 50 N. H. 140; Phelps *v.* Schroder, 26 Ohio St. 549; People *v.* Lacoste, 37 N. Y. 192; Blanchard *v.* Dow, 32 Me. 557; State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265; State

issued is rightfully entitled to hold the office.[46]

As between the people and the defendant, the latter has primarily the burden of proving his possession of the office to be rightful and lawful,[47] but as between the relator and the defendant, the former has the burden of proof to show his title to the office to be better than that of the defendant.[48]

v. Hunton, 28 Vt. 594; Ashtabula & N. L. R. R. Co. *v.* Smith, 15 Ohio St. 328; Wallace *v.* Inhabitants of Townsend, 109 Mass. 263; Woodruff *v.* Dubuque & S. C. R. Co., 30 Fed. 91; Hathaway *v.* Addison, 48 Me. 440; Beardsley *v.* Johnson, 49 Hun 607, 1 N. Y. Supp. 608; United States *v.* Carbery, 2 Cranch C. C. 358, 24 Fed. Cas. No. 14,720; McDuffie *v.* Davidson, Moberly Con. Elec. Cas. 577; Loomis *v.* Jackson, 6 W. Va. 613. Where votes are cast by proxy, the presumption is that the proxies were regular and proper and the votes legal. People *v.* Crossley, 69 Ill. 195.

46. *Arkansas.* — State *v.* Johnson, 17 Ark. 407.

California. — Whipley *v.* McKune, 12 Cal. 352; Whitney *v.* Board, 14 Cal. 479.

Kentucky. — Bailey *v.* Hurst, 24 Ky. L. Rep. 504, 68 S. W. 867.

Maine. — Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156.

Michigan. — People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69.

New York. — People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175, 23 N. E. 533.

Texas. — McKinney *v.* O'Connor, 26 Tex. 5; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

Wisconsin. — State *v.* Avery, 14 Wis. 122; Bashford *v.* Barstow, 4 Wis. 567.

Where the election of certain persons to a public office was duly certified by the proper officers, it must be presumed that a proper canvass of the vote was had before such certificate issued, and that the canvassing officers determined that such person was duly elected. State *v.* Kersten (Wis.), 95 N. W. 120.

47. State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460; People *v.* Robertson, 27 Mich. 116; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Thompson, 21 Wend. (N. Y.) 235; People *v.* Clayton, 4 Utah 421, 11 Pac. 206. Such proof is made by the production of a proper and regular certificate of election. People *v.* Perley, 80 N. Y. 624; People *v.* Thornton, 25 Hun 456; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156. If the defendant shows no title, he cannot dispute claimant's title. State *v.* Beardsley, 13 Utah 502, 45 Pac. 569.

In New York, in an action to try title to an office under the code, the defendant must show that he has a legal title to the office — possession thereof is not evidence — the burden is upon him to show that his possession is legal and rightful. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; and he must show a good title. Thompson *v.* People, 23 Wend. (N. Y.) 538. And if he fail in this, judgment will be rendered against him, whether the relator's title prevails or not. People *v.* Robertson, 27 Mich. 116.

48. Smith *v.* Jackson, Rowell Con. Elec. Cas. 20; Garrison *v.* Mayo, Moberly Con. Elec. Cas. 56; Mudd *v.* Compton, Rowell Con. Elec. Cas. 152; Whipley *v.* McKune, 12 Cal. 352; People *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403; Jones *v.* Freeman, 49 La. Ann. 565, 21 So. 719; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Miller *v.* English, 21 N. J. L. 317; People *v.* LaCoste, 37 N. Y. 192; Blake *v.* Hogan, 57 Minn. 45, 58 N. W. 768; Pradat *v.* Ramsey, 47 Miss. 24; State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265; Judkins *v.* Hill, 50 N. H. 140; People *v.* Cook, 14 Barb. (N. Y.) 259; Phelps *v.* Schroder, 26 Ohio St. 549. Failure of the defendant to prove his title does not establish the title of the relator, but upon that issue the plaintiff has the burden of proof. People *v.* Thacher,

The burden of proof to show that illegal, irregular or wrongful acts affected the result of the election rests upon the party alleging the same,[49] but after doubt is so cast upon the result, the contestee has the burden of proving that he was elected by legal votes.[50]

3. Weight and Sufficiency. — A contested election proceeding cannot be allowed to go by default. Some evidence of the right to the office must be produced.[51] The certificate of election is *prima facie* proof of the right to hold the office,[52] and to impeach the same

55 N. Y. 525, 14 Am. Rep. 312. Where the certificate of election is manifestly wrong, the burden falls upon the contestee to show his election. Shields *v.* Van Horn, 3 Cong. Elec. Cas. 922.

49. United States *v.* Carbery, 2 Cranch C. C. 358, 24 Fed. Cas. No. 14,720; Keller *v.* Chapman, 34 Cal. 635; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Taylor *v.* Taylor, 10 Minn. 107; State *v.* Mason, 14 La. Ann. 505; Whitney *v.* Board, 14 Cal. 479; State *v.* Hunton, 28 Vt. 594. Contestor must sustain his material averments by a preponderance of evidence. Price *v.* Archuleta, 17 Colo. 288, 29 Pac. 460; State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364.

50. McDuffie *v.* Davidson, Moberly Con. Elec. Cas. 577; Sullivan *v.* Felton, Moberly Con. Elec. Cas. 747; Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723; Littlefield *v.* Newell, 85 Me. 273, 27 Atl. 156; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

51. Follett *v.* Delano, 2 Bart. Con. Elec. Cas. 113; Sheridan *v.* Pinchback, Smith Con. Elec. Cas. 196; Lord *v.* Dunster, 79 Cal. 477, 21 Pac. 865; Dorsey *v.* Barry, 24 Cal. 449; Keller *v.* Chapman, 34 Cal. 635; Mann *v.* Cassidy, 1 Brewst. 11; Bashford *v.* Barstow, 4 Wis. 567; Andrews *v.* Saucier, 13 La. Ann. 301. No stipulation as to the facts, People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Holden, 28 Cal. 123; nor admission in respondent s plea will sustain a judgment against him. People *v.* Molitor, 23 Mich. 341. But see Holmes *v.* Wilson, 1 Ells. Con. Elec. Cas. 322; Porterfield *v.* McCoy, C. & H. Con. Elec. Cas. 267. Contestant may voluntarily dismiss before issue joined. Moore *v.* Waddington (Neb.), 96 N. W. 279. And if no proof is made by either party the proceedings should be dismissed. Searcy *v.* Grow, 15 Cal. 117. A judgment of ouster of the defendant may be rendered, but not in favor of the relator. People *v.* Connor, 13 Mich. 238. In the case of Bahe *v.* Jones, 132 Ill. 134, 23 N. E. 338, it was held that, where the answer of the defendant admitted the election of the petitioner, the court might be justified in finding that the petitioner was elected, provided no other rights were involved, but if there were other rights which might be affected by the finding and decree based thereon, the petitioner must show his election by competent evidence.

52. People *v.* Vail, 20 Wend. (N. Y.) 12; People *v.* Miller, 16 Mich. 56, 205; People *v.* Perley, 80 N. Y. 624; Whipley *v.* McKune, 12 Cal. 352; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Thornton, 25 Hun 456; State *v.* Kersten (Wis.), 95 N. W. 120; Comm. *v.* McAllister, 24 Pa. Co. Ct. Rep. 96; Satterlee *v.* San Francisco, 23 Cal. 314. Whether rightfully or wrongfully given, People *v.* Miller, 16 Mich. 56, 205; and conclusive evidence of the right to the office, until in some legitimate way it is impeached. Crouse *v.* State, 57 Md. 327. But it becomes invalid upon the issuance of a commission to another who is legally elected to fill the office. State *v.* Johnson, 17 Ark. 407. Where a certificate showed upon its face that nearly eight thousand votes were ignored, it was held that it gave the holder no advantage as to the burden of proof. McGinnis *v.* Alderson, Rowell Con. Elec. Cas. 633. And the same was held in a case in which

the evidence must clearly show the election proceedings upon which it is founded to have been illegal, or so irregular as to have materially affected the result.[53] Thus proof that a sufficient number of illegal votes were cast, or legal ones rejected, to materially affect the result will be sufficient to impeach the certificate.[54] And so where bribery,[55] fraud,[56] or other corrupt practices are shown to have affected the result, the certificate will be impeached and the poll purged.[57]

IV. PROSECUTIONS FOR VIOLATION OF THE ELECTION LAWS.

1. Admissibility. — As the usual and ordinary rules of evidence governing criminal prosecutions in general are alike applicable to prosecutions for the violation of the election laws,[58] only such as are peculiar to the latter class of cases will be considered here, and no attempt made to state the general rules.

The election records and documents are usually admissible in

the right of the person signing the certificate was in dispute. McMillan *v.* Pinchback, T. & F. Con. Elec. Cas. 142.

53. Wade *v.* Oates, 112 Ala. 325, 20 So. 495; Searcy *v.* Grow, 15 Cal. 117; Keller *v.* Chapman, 34 Cal. 635; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; State *v.* Mason, 14 La. Ann. 505; Blake *v.* Hogan, 57 Minn. 45, 58 N. W. 867; Pradat *v.* Ramsey, 47 Miss. 24; People *v.* Cook, 14 Barb. (N. Y.) 259; People *v.* Teague, 106 N. C. 576, 11 S. E. 665; Yerby *v.* Snare, 107 Pa. St. 183; State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1,018; McKinney *v.* O'Connor, 26 Tex. 5; Halsted *v.* Rader, 27 W. Va. 806. It is sufficient to show that the election proceedings were conducted corruptly, without any reference to the connivance of the candidate. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

54. Wallace *v.* McKinley, Moberly Con. Elec. Cas. 185; Downing *v.* Potts, 3 Zabr. (N. J.) 66; McNeeley *v.* Woodruff, 13 N. J. L. 352; *In re* Chenango Co. Mut. Ins. Co., 19 Wend. 635; People *v.* Phillips, 1 Denio 388; McDowell *v.* Massachusetts & S. Const. Co., 96 N. C. 514, 2 S. E. 351; Davis *v.* State, 75 Tex. 420, 12 S. W. 957. It is evident that there would be no reason to contest the election if the result could not be changed. State *v.* Mason, 14 La. Ann. 505. It is not enough to show that illegal votes were received in a number greater than the plurality returned for the incumbent; there must also be shown circumstances rendering probable, *prima facie*, a conclusion that these illegal votes were cast for the incumbent. Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422. And if the contestor does not show that by reason of the illegal casting or rejection of votes the result is different from what it would otherwise have been, the proceeding should not be entertained. Todd *v.* Stewart, 14 Colo. 286, 23 Pac. 426.

55. *In re* Payne, T. & F. Con. Elec. Cas. 604; *In re* Ingalls, T. & F. Con. Elec. Cas. 596; Drinkwater *v.* Deakin, 43 L. J. C. P. 355, 30 L. Ts. 832.

56. Patton *v.* Coates, 41 Ark. 111; Word *v.* Sykes, 61 Miss. 649; Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472; Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

57. *In re* Payne, T. & F. Con. Elec. Cas. 604; *In re* Ingalls, T. & F. Con. Elec. Cas. 596; *In re* Pomeroy, T. & F. Con. Elec. Cas. 330; Smalls *v.* Elliott, Moberly Con. Elec. Cas. 663; Mudd *v.* Compton, Rowell Con. Elec. Cas. 169; Bowen *v.* Buchanan, Rowell Con. Elec. Cas. 198; Patton *v.* Coates, 41 Ark. 111; Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

58. People *v.* McKane, 80 Hun 322, 30 N. Y. Supp. 95; Morris *v.* State, 7 Blackf. (Ind.) 607; People *v.* Tripp, 4 N. Y. Leg. Obs. 344; Fra-

evidence when tending to prove the necessary facts,[59] but they must be shown to be authentic and correct.[60] Other writings, not kept by the election officers, when corroborated by other evidence, have been held admissible.[61]

Evidence tending to show the intent of the defendant in committing the offense is proper.[62] The testimony of the voters as to how they voted is admissible under a charge against the election officers for making a false return.[63]

In actions against the officials to compel the placing of his name upon the ballot by one claiming to have been nominated, evidence tending to show the validity or invalidity of the convention at which such person claimed to have been nominated, is competent,[64]

zee *v.* State, 58 Ind. 8; Russell *v.* Com., 3 Bush (Ky.) 469.

59. Hunter *v.* State, 55 Ala. 76; Wilson *v.* State, 52 Ala. 299; Com. *v.* O'Hara, 17 Ky. L. Rep. 1,030, 33 S. W. 412; Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302; Com. *v.* Wallace, Thach. 592; Com. *v.* McGurty, 145 Mass. 257, 14 N. E. 98.

60. Thus where a poll list was not certified to by the election officers, it was rejected as evidence. Hunter *v.* State, 55 Ala. 76.

61. Frazee *v.* State, 58 Ind. 8. A certified copy of the registration poll book kept by a challenger supported by evidence of its veracity was held admissible to show who did or did not vote. Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302.

62. United States *v.* Foster, 6 Fed. 247; Russell *v.* Com., 3 Bush (Ky.) 469; People *v.* McKane, 80 Hun 322, 30 N. Y. Supp. 95; Com. *v.* Alger, Thach. 412; People *v.* Harris, 29 Cal. 678; State *v.* Pearson, 97 N. C. 434, 1 S. E. 914, 2 Am. St. Rep. 303; Gilleland *v.* Schuyler, 9 Kan. 569; Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; Moran *v.* Rennard, 3 Brewst. (Pa.) 601. Evidence that his father told the defendant, before he voted, that he was old enough to vote was held proper in a prosecution for illegal voting. Carter *v.* State, 55 Ala. 181. But what others told the defendant as to his right to vote has been inadmissible. State *v.* Hart, 51 N. C. 389; State *v.* Sheeley, 15 Iowa 404; State *v.* Boyett, 32 N. C. 336. But see Com. *v.* Bradford, 9 Metc. (Mass.) 268; Morris *v.* State, 7 Blackf. (Ind.) 607; Gordon *v.* State, 52 Ala. 308, 23 Am. Rep. 575. Evidence that the defendant was intoxicated at the time the offense is alleged to have been committed is proper in order to enable the jury to determine whether his mental condition was such as to warrant a finding that he committed the alleged offense knowingly. People *v.* Harris, 29 Cal. 678. But intoxication itself is no defense. State *v.* Welch, 21 Minn. 22.

63. Com. *v.* Barry, 98 Ky. 394, 33 S. W. 400; Major *v.* Barker, 99 Ky. 305, 35 S. W. 543. But see United States *v.* Carpenter, 41 Fed. 330. Where the ballots have been destroyed under a statutory provision, their contents may be shown by the testimony of the voter. Com. *v.* McGurty, 145 Mass. 257, 14 N. E. 98.

64. State *ex rel.* Scharnikow *v.* Hogan, 24 Mont. 379, 62 Pac. 493; State *ex rel.* Granvold *v.* Porter, 11 N. D. 309, 91 N. W. 944; State *ex rel.* Foster *v.* Lavik, 9 N. D. 461, 83 N. W. 914. In such an action it appeared that the minutes of the convention at which the plaintiff claimed to have been nominated were lost and a partial transcript, shown to contain everything that the minutes contained on the question at issue, was admitted in evidence. Palmer *v.* Ruland, 28 Colo. 65, 62 Pac. 841. Evidence of custom as to the holding of conventions is admissible, but proof of but one instance is insufficient to establish a custom. State *ex rel.* Scharnikow *v.* Hogan, 24 Mont. 379, 62 Pac. 493, and the fact that a considerable number of the electors did not acquiesce in the

and it must appear that the proceedings of such convention were conducted as provided by the statute.[65]

2. Presumptions and Burden of Proof. — The officers of election are presumed to have acted lawfully,[66] and that the election proceedings were legal.[67] But where unlawful acts upon the part of such officers are shown, an intent to thereby affect the result will be presumed.[68] And so where one having no right to do so votes, his intention to vote illegally will be presumed,[69] and the burden of proof falls upon the party asserting the contrary.[70]

3. Weight and Sufficiency. — To sustain a conviction for the violation of the election laws it must appear that the election was legal,[71] and that the offense complained of was committed willfully, maliciously or with corrupt intent.[72] The election records, when showing the necessary facts, are the best evidence.[73]

custom, and while it had been uniformly followed there had been variations therefrom in different years is sufficient to sustain a finding that the custom was not a rule of the party, *In re* Wilkesbarre Tp. Nominations (Com. Pls.), 7 Kulp 529.

65. State *ex rel.* Scharnikow *v.* Hogan, 24 Mont. 379, 62 Pac. 493; State *ex rel.* Fosser *v.* Lavik, 9 N. D. 461, 83 N. W. 914; State *ex rel.* Granvold *v.* Porter, 11 N. D. 309, 91 N. W. 944.

66. Commonwealth *v.* Lee, 1 Brewst. (Pa.) 273; Moran *v.* Rennard, 3 Brewst. (Pa.) 601.

67. Cooper *v.* State, 26 Tex. App. 575, 10 S. W. 216.

68. Such intent will be presumed when unlawful acts which naturally or necessarily have that effect are shown to have been intentionally committed or knowingly permitted by the election officers. United States *v.* Carpenter, 41 Fed. 330.

69. People *v.* Harris, 29 Cal. 678; State *v.* Douglass, 7 Iowa 413; Com. *v.* Alger, Thach. 412; State *v.* Welch, 21 Minn. 22; State *v.* Boyett, 32 N. C. 336; Patterson *v.*. State, 2 Ohio Dec. 304.

70. People *v.* Harris, 29 Cal. 678; State *v.* Minnick, 15 Iowa 123; Jenkins *v.* Waldron, 11 John. 114; Patterson *v.* State, 2 Ohio Dec. 304; Moran *v.* Rennard, 3 Brewst. (Pa.) 601; Cooper *v.* State, 26 Tex. 575, 10 S. W. 216.

Where a number of voters testify that they voted a certain ticket and the returns show a less number counted and returned, it is upon the judges and officers of election to explain the discrepancy. United States *v.* Carpenter, 41 Fed. 330.

71. Com. *v.* Shaw, 7 Metc. (Mass.) 52; Com. *v.* Wallace, Thatch. 592; State *v.* Williams, 25 Me. 561. Proof that a meeting of the qualified voters held an election is sufficient. Com. *v.* Shaw, 7 Metc. (Mass.) 52. And proof of mere irregularities, in the absence of fraud, is immaterial. State *v.* Cohoon, 34 N. C. 178, 55 Am. Dec. 407; United States *v.* Hayden, 52 How. Pr. 471, 27 Fed. Cas. No. 15,333. And it is immaterial whether the election be legal or illegal, if held under the form of law. Cooper *v.* State, 26 Tex. App. 575, 10 S. W. 216.

72. Harman *v.* Tappenden, 1 East 555; Ashby *v.* White, 2 Ld. Raym. 938; U. S. *v.* Wright, 16 Fed. 112; U. S. *v.* Foster, 6 Fed. 247; People *v.* Burns, 75 Cal. 627, 17 Pac. 646; Gilleland *v.* Schuyler, 9 Kan. 569; Johnson *v.* Com., 90 Ky. 53, 13 S. W. 520; Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618; Friend *v.* Hamill, 34 Md. 298; State *v.* Bixler, 62 Md. 354; Com. *v.* Lee, 1 Brewst. (Pa.) 273; Jenkins *v.* Waldron, 11 Johns. (N. Y.) 114. So where one who is disqualified votes, in a prosecution for illegal voting, it must appear that he knew of his disqualification. State *v.* Macomber, 7 R. I. 349.

73. Com. *v.* Wallace, Thach. 592;

In a prosecution for illegal voting it must appear that the ballot was actually deposited in the box, and the name of the voter entered on the poll list.[74] Proof that the defendant voted, knowing that he was disqualified, is sufficient to show illegal voting.[75]

Under a charge of corruptly refusing to receive a vote, it must appear that the vote was actually offered, together with proof of qualification to vote.[76]

In a prosecution for illegally altering or changing the ballots, the number of ballots changed is immaterial.[77]

Wilson *v.* State, 52 Ala. 299. A certificate to a false return is *prima facie* proof that such return was signed by the election officers. Com. *v.* O'Hara, 17 Ky. L. Rep. 1,030, 33 S. W. 412.

74. Blackwell *v.* Thompson, 2 Stew. & Port. (Ala.) 348.

75. And it is not necessary to show who was voted for. Patterson *v.* Smith, 2 Ohio Dec. 304. The defendant's admission that he voted is sufficient. State *v.* Douglas, 7 Iowa 413; Com. *v.* Bradford, 9 Metc. (Mass.) 268. Proof of a favorable decision by the election officers of the defendant's right to vote is no defense to a charge of illegal voting; Morris *v.* State, 7 Blackf. (Ind.) 607. But see State *v.* Pearson, 97 N. C. 434, 1 S. E. 914, 2 Am. St. Rep. 303; nor is proof that the first vote was illegal and was not counted any defense to a charge of voting twice. State *v.* Perkins, 42 Vt. 399.

76. State *v.* Colton, 9 Houst. (Del.) 530.

77. United States *v.* Carpenter, 41 Fed. 330.

ELEVATED RAILROADS.—See Eminent Domain.

EMBEZZLEMENT.

I. MODE OF PROOF.

1. In General. — Embezzlement may be proved by circumstantial or by direct evidence.[1]

2. Corpus Delicti. — The taking and holding must be shown to have occurred in a manner in which the element of trespass, or breach of technical possession, is absent.[2] This may be shown by circumstantial evidence,[3] or by any fact which fairly tends to prove the point in issue.[4]

1. Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; New York & B. F. Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293; Epperson *v.* State, 22 Tex. App. 694, 3 S. W. 789; Malcolmson *v.* State, 25 Tex. App. 267, 8 S. W. 468.

2. State *v.* Hanley, 70 Conn. 265, 39 Atl. 148; Com. *v.* Barney, 24 Ky. L. Rep. 2,352, 74 S. W. 181; Secor *v.* State (Wis.), 95 N. W. 942.

3. Bulloch *v.* State, 10 Ga. 47, 54 Am. Dec. 369; Robson *v.* State, 83 Ga. 166, 9 S. E. 610; Robinson *v.* State, 109 Ga. 564, 35 S. E. 57, 77 Am. St. Rep. 392; State *v.* Cowan, 74 Iowa 53, 36 N. W. 886; State *v.* Porter, 26 Mo. 201; Mills *v.* State, 53 Neb. 263, 73 N. W. 761; State *v.* Hasledahl, 3 N. D. 36, 53 N. W. 430.

Inferences from General Course of Business. — In Reeves *v.* State, 95 Ala. 31, 11 So. 158, Thorington, J., said: "In embezzlement generally and especially in cases such as this now before us, the very confidence and trust reposed furnish the most potent means for its accomplishment and effectual concealment, so that guilt can generally be established only by reasonable inferences drawn from the general course of conduct of such officer, agent, clerk or servant, with respect to the subject matter of his trust, and from all the facts and circumstances surrounding his acts, which tend to throw light upon or illustrate their nature."

4. Com. *v.* Tuckerman, 10 Gray

3. Actual Conversion. — It is not necessary that the accused should have acquired physical or manual possession of the money, for evidence showing that the defendant by means of checks converted the property is sufficient;[5] if such act be one that could not rightfully be done by virtue of the defendant's employment, and be adverse to the right of the principal.[6]

4. Omission by Public Officer. — The mere failure of a public officer to pay over the funds due from him upon a settlement, without good and satisfactory reason being shown, is *prima facie* evidence of its conversion and embezzlement.[7]

5. By Private Party. — When the accusation pertains to private property, the proof of failure to pay is not sufficient to convict, but there must be shown to be an adverse holding which amounts to depriving the owner of possession.[8]

(Mass.) 173; Com. *v.* Sawtelle, 141 Mass. 140, 5 N. E. 312; State *v.* Woodward, 171 Mo. 593, 71 S. W. 1,015; New York & B. F. Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293.

5. Embezzlement by Check. — In State *v.* Krug, 12 Wash. 288, 41 Pac. 126, which was a prosecution for the embezzlement of the moneys of the city of Seattle by the treasurer, the evidence disclosed that the defendant, as such officer, drew a check for $10,000, in favor of F. upon a bank having funds of the city on deposit. The payee presented the check, and received in payment thereof New York exchange. The bank charged on the books the money to the city, and lessened its credit in said sum. The jury were instructed that the transaction constituted a payment of money, and that they should construe the check or instrument merely as an instrumentality by which the money of the city was transferred from the possession of the defendant. Dunbar, J., affirmed this instruction saying: "The instruction of the court is based upon the theory that, in contemplation of law at least, this was money. It would be a travesty upon the administration of law if treasurers, who are the custodians of the funds of the people, should be allowed to escape the penalty of embezzlement by any such subterfuge as this theory would protect."

6. Thornell *v.* People, 11 Colo. 305, 17 Pac. 904; Com. *v.* Este, 140 Mass. 279, 2 N. E. 769; Com. *v.* Parker, 165 Mass. 526, 43 N. E. 499; State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998.

Conversion Essential. — In State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282, the act of taking is dealt with. Burgess, J., said: "The rule of law appears only indistinctly in the books. Still we may infer from the authorities, and from the reasons inherent in the question, that, if the servant intentionally does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing less is sufficient; or, assuming the needful intent to exist, he must and need only do what, in our civil jurisprudence, is termed 'conversion,' defined to be any dealing with the thing which, impliedly or by its terms, excludes the owner's dominion."

7. *United States.* — U. S. *v.* Forsythe, 6 McLean 584.

Arkansas. — State *v.* Hunnicut, 34 Ark. 562; Fleener *v.* State, 58 Ark. 98, 23 S. W. 1.

Indiana. — Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490.

Iowa. — State *v.* King, 81 Iowa 587, 47 N. W. 775.

Louisiana. — State *v.* O'Kean, 35 La. Ann. 901.

Michigan. — State *v.* McKinney, 10 Mich. 54.

Minnesota. — State *v.* Ring, 29 Minn. 78, 11 N. W. 233; State *v.* Czizek, 38 Minn. 192, 36 N. W. 457.

8. Robinson *v.* State, 109 Ga. 564, 35 S. E. 57, 77 Am. St. Rep. 392;

6. Delivery. — The fact that the accused has placed the property out of his power and control is competent to show an actual conversion.[9]

7. Conversion by Series of Acts. — It is not error for the court to allow evidence showing a series of acts in pursuance of a conspiracy, as all the acts may together constitute the conversion.[10]

People *v.* Hurst, 62 Mich. 276, 28 N. W. 838; Chaplin *v.* Lee, 18 Neb. 440, 25 N. W. 609; Fitzgerald *v.* State, 50 N. J. L. 475, 14 Atl. 746.

9. Reg. *v.* Murdock, 8 L. & Eq. (Eng.) 577; Spalding *v.* People, 172 Ill. 40, 49 N. E. 993; Harris *v.* State (Tex. Crim.), 34 S. W. 922.

Intent to Restore Immaterial. In Com. *v.* Tenney, 97 Mass. 50, Judge Foster said: "To take from their place of deposit the bonds of a depositor and send them out of the state to be used as collateral security for the defendant's own debt, was a fraudulent conversion. Intention to restore the bonds, and the agreement of the party who received them not to sell or dispose of them, cannot do away with the criminal nature of the transaction. A guilty intent is necessarily inferred from the voluntary commission of such an act, the inevitable effect of which is to deprive the true owner of his property and to appropriate it to the defendant's own use. Perhaps in a majority of cases the party who violates his trust in such a manner does not expect or intend that the ultimate loss shall fall upon the person whose property he takes and misuses. But no hope or expectation of replacing the funds abstracted can be admitted as an excuse before the law."

10. Willis *v.* State, 134 Ala. 429, 33 So. 226; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; Brown *v.* State, 18 Ohio St. 497; Campbell *v.* State, 35 Ohio St. 70; Malcolmson *v.* State, 25 Tex. App. 267, 8 S. W. 468.

"The Body of the Crime Consists of Many Acts done by virtue of the confidential relations existing between the employer and the employe, with funds, moneys and securities over which the servant is given care, or custody, in whole or in part, by virtue of his employment. The separate acts may not be susceptible of direct proof, but the aggregate result is, and that is embezzlement." Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706.

Series of Conversions a Single Crime. — In Jackson *v.* State, 76 Ga. 551, the court said: "The evidence shows a continuous series of conversions of the money in pursuance of a conspiracy. Such evidence is sufficient to support a finding by the jury of the aggregate sum as the amount of a single embezzlement. It was, in fact and in law, a single embezzlement. Were it otherwise, the particular conversions could never be ascertained or proven, as there would have to be, in some cases, almost as many counts as there were dollars in the money embezzled."

In State *v.* Reinhart, 26 Or. 466, 38 Pac. 822, the court in the opinion said: "The trust and confidence reposed in him (the accused) necessarily affords the amplest opportunity to misappropriate the funds intrusted to his care, and makes it almost, if not quite, impossible to prove just when and how it was done, but the ultimate fact of embezzlement is susceptible of direct proof, and that is the act against which the statute is directed. The crime may, as in the case at bar, consist of many acts done in a series of years, and the fact at last be discovered that the employer's funds have been embezzled, and yet it be impossible for the prosecution to prove the exact time or manner of each or any separate act of conversion. In such case, if it should be compelled to elect, and rely for conviction upon any one single act, the accused, although he might be admittedly guilty of embezzling large sums of money in the aggregate, would probably escape conviction. The law does not afford exemption from just and merited punishment on mere technical grounds, which do not in any way affect the guilt or innocence of the defendant, or the merits of the case."

II. NECESSARY OR ADMISSIBLE EVIDENCE.

1. Value. — The statutes require proof that property of some value shall have been appropriated,[11] but it is not necessary to prove the specific property,[12] or the exact amount alleged.[13]

2. Receipt of Property. — Evidence which tends to show that the accused received the property, and that he has failed to account for it, is admissible.[14]

11. United States *v.* Nott, 1 McLean 499.

12. Rex *v.* Grove, 1 M. C. C. 447; United States *v.* Bornemann, 36 Fed. 257; Walker *v.* State, 117 Ala. 42, 23 So. 149; People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502; People *v.* Cobler, 108 Cal. 538, 41 Pac. 401; State *v.* Foster, 1 Pen. (Del.) 289, 40 Atl. 939; Jackson *v.* State, 76 Ga. 551; State *v.* Smith, 13 Kan. 207; State *v.* Boody, 53 N. H. 610; State *v.* Carrick, 16 Nev. 120.

Sufficient to Identify the Fund. In People *v.* Bringard, 39 Mich. 22, 33 Am. Rep. 344, Campbell, J., stated in his opinion: "A fund is a distinct thing, however frequently the coins or bills which may be received on its account are changed in identity. If a trustee receives a payment of $1000 on trust account, certainly the trust is not confined to that identical money. It attends its proceeds in whatever way they can be traced. It would be simply impossible to trace or identify the specific moneys which come into the hands of a public officer, who alone has the means of knowing what particular payments he receives and what he does with them. If a person receives a particular amount belonging to a trust fund, and uses it for his own purposes without repaying or accounting for it, no one has any difficulty in seeing that he has converted the money improperly, although every specific coin or bill may have been substituted for some other means which he has exchanged and abstracted. . . . Where the design is criminal, the misuse of the fund belonging to the public, though changing its form constantly, is just as clearly an embezzlement of the property of the public as if any specific chattel had been so misapplied."

13. State *v.* Fourchy, 51 La. Ann. 228, 25 So. 109; State *v.* Thomas, 28 La. Ann. 827; State *v.* Mook, 40 Ohio St. 588; State *v.* Hunt (R. I.), 54 Atl. 937.

Amount Immaterial. — In United States *v.* Harper, 33 Fed. 471, Jackson, J., instructing the jury said: "You are not required to find that the exact sum or amount stated in this count of the indictment was embezzled. If, under the circumstances and conditions already mentioned, you find that the defendant converted to his own use moneys, funds or assets of the bank, no matter how small its amount may have been, it will be sufficient to sustain a verdict of guilty under this count. Nor are you required in your verdict to specify the exact amount so embezzled."

14. Regina *v.* Moah, 36 L. & Eq. 592; Reg. *v.* Jackson, 1 Car. & K. 384, 47 E. C. L. 382; People *v.* Neyce, 86 Cal. 393, 24 Pac. 1,091; People *v.* Cobler, 108 Cal. 538, 41 Pac. 401; State *v.* New, 22 Minn. 76; State *v.* Baumhager, 28 Minn. 226, 9 N. W. 704.

Failure to Account. — In State *v.* Hasledahl, 3 N. D. 36, 53 N. W. 430, it was proved that in the month of July a carload of oats was shipped to defendant, and that thereafter he sold oats to various farmers and received pay, partly cash and partly in grain. The books kept by him disclosed no sale of oats after July 1st, although it was his duty to keep a daily account of sales, purchases, etc. *Held,* this was competent evidence that he had "been selling oats belonging to his employer for cash, and had not accounted for the cash. This was sufficient to warrant his conviction for embezzling money of his employers. It is true that the accused testified that he used the cash paid to him in the purchase of grain for the company; but the jury are not bound to believe his testimony,

3. Writings Showing Receipt. — The receipt given for money which the accused is bound to receive by virtue of his employment is competent to show the actual receipt of the same,[15] and under some circumstances the accused may be estopped to deny that he received the money.[16]

4. Motive. — Nor is it error for the court to admit evidence which tends to show that the accused must necessarily have used the property for his own benefit,[17] or had a very strong motive for so doing.[18]

5. Demand. — A. In General. — A person having lawful authority to demand property of another who holds it as bailee, the refusal to deliver the property upon such demand is evidence of a fraudulent conversion.[19]

for it appeared that he was short in his accounts some 1,400 bushels of wheat, on the theory of his making such purchases, and there was no attempt on his part to explain why he failed to observe as to the oats sold the usual mode of book-keeping, *i. e.*, charge himself with the cash received for the oats sold. It was his duty, under his employment, to keep his accounts in this manner, and there is no pretense that he failed to do so as to other items."

15. In People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520, McFarland, J., said: "Neither do we think that the court erred in admitting receipts given by appellant over his own signature to certain customers of said company; we do not mean to say that such a receipt would, itself, be sufficient to show an embezzlement, but it would be an act of a defendant admissible as evidence on that issue."

Draft as Receipt. — In State *v.* Brooks, 85 Iowa 366, 52 N. W. 240, a draft was offered in evidence to show how the property came into the defendant's possession. It was objected to upon the ground that the defendant was charged with the larceny of money and not the draft. The court said: "The charge is of larceny of money by embezzling it. The draft was simply the means by which he acquired possession of the money. We discover no error prejudicial to the defendant in the admission of the testimony."

16. Territory *v.* Meyer (Ariz.), 24 Pac. 183.

17. United States *v.* Camp, 2 Idaho 215, 10 Pac. 226.

Defendant's Financial Condition. In Boston & W. R. Co. *v.* Dana, 1 Gray (Mass.) 83, the plaintiff offered evidence tending to show that the defendant, at the time of entering into the plaintiff's service, was insolvent, and that he had since received only a limited salary and some small extra compensation; and that subsequent to the alleged misdoings, and during the period specified in the writ, he was the owner of large property, far exceeding the aggregate of all his salary and receipts while in the service of the plaintiff. Bigelow, J., said: "It appears to us that this evidence was competent, not on the ground, as the defendant supposes, of its being proof of possession of stolen property, but upon the broader and more general principle of being a material and relevant fact to the point in issue before the jury. . . . They were in the nature of *res gestae*, accompanying the very acts and transactions of the defendant under investigation and tending to give them character and significance. The testimony was therefore directly connected with the alleged fraudulent acts and tended to prove the possession of money and other property by the defendant at the very time of their supposed commission. This evidence, unexplained, had a direct tendency to implicate the defendant."

18. Bulloch *v.* State, 10 Ga. 47, 54 Am. Dec. 369; Govatos *v.* State, 116 Ga. 592, 42 S. E. 708.

19. The statute may require that the money shall be paid to a particular person at a particular place,

B. Knowledge by Bailee. — It must be shown that the bailee had knowledge that the person making the demand for the delivery of the property had authority so to do.[20]

C. What Demand Necessary. — Evidence showing any act or words amounting to a notification of what the agent is required to do is sufficient.[21]

D. When Necessary. — The crime of embezzlement may be established without proof of demand where the accused feloniously appropriated the property;[22] but when the time for the delivery is indefinite or not fixed, then a demand and refusal or other evidence of intent to retain the property is necessary to put the accused in a position of having converted the property to his own use.[23]

6. Deceit. — A. In General. — Facts are relevant which prove any dealing on the part of the accused, showing that after he

and refusal or willful neglect to pay upon demand thereof by the proper person entitled to receive the same, would be *prima facie* evidence of embezzlement. Dix *v.* State, 89 Wis. 250, 61 N. W. 760.

20. People *v.* Tomlinson, 66 Cal. 344, 5 Pac. 509.

21. State *v.* Bancroft, 22 Kan. 170.

22. *United States.*—United States *v.* Sanders, 6 McLean 598.

California. — People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502; People *v.* Royce, 106 Cal. 173, 37 Pac. 630; People *v.* Ward, 134 Cal. 301, 66 Pac. 372.

Illinois. — Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Kossakowski *v.* People, 177 Ill. 563, 53 N. E. 115.

Louisiana. — State *v.* Tompkins, 32 La. Ann. 620.

Massachusetts. — Com. *v.* Tuckerman, 10 Gray 173; Com. *v.* Hussey, 111 Mass. 432.

Minnesota. — State *v.* New, 22 Minn. 76.

Oregon. — State *v.* Thompson, 28 Or. 296, 42 Pac. 1,002.

In Wallis *v.* State, 54 Ark. 611, 16 S. W. 821, the court said: "It is necessary to allege and prove a demand only where the statute makes it an element of the crime. As the statute under consideration does not make a demand such an element, no demand was necessary. The crime charged was not a failure to pay over the money on demand, but simply a felonious conversion. If the defendant had thus converted the money, his crime was complete, and his response to a demand could not have absolved him; if he had not thus converted it, he was not guilty."

23. State *v.* New, 22 Minn. 76; State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

Place of Demand. — In State *v.* Chew Much Yon, 20 Or. 215, 25 Pac. 355, the accused was entrusted with certain gold-dust to be delivered to parties in Portland, and as to the demand for the gold by the party, Lord, J., said in his opinion: "When, therefore, sustaining the relation of bailee to the property intrusted to him, it was demanded of him by the person authorized to receive it, and he finally, upon the third demand, after he had promised twice to pay it over to such person, repudiated his trust, and refused to account for it, it was an act or conduct inconsistent with the nature of his trust, in violation of it, and effective as evidence of his conversion of the property." . . . (*Citing* Rex *v.* Taylor, 3 Bos. & P. 596.) "Nor, in the present case, was there any evidence of any act for which the defendant was liable, or which indicated an intent to repudiate his trust, and convert the property to his own use, until he denied receiving the money and refused to account. This, being charged and proved to have taken place within the venue where his offense is laid, was within the jurisdiction of the court which tried and convicted him."

received the property he made false entries upon his books,[24] or did not account where he should,[25] or denied the receipt of the property, or practiced any deceit by acts of concealment from which the jury

24. Ritter *v.* State, 70 Ark. 472, 69 S. W. 262; United States *v.* Adams (Dak.), 9 N. W. 718; Jackson *v.* State, 76 Ga. 551; People *v.* Flock, 100 Mich. 512, 59 N. W. 237; Hemingway *v.* State, 68 Miss. 371, 8 So. 317; State *v.* Baumhager, 28 Minn. 226, 9 N. W. 704; State *v.* Czizek, 38 Minn. 192, 36 N. W. 457; State *v.* Findley, 101 Mo. 217, 14 S. W. 185; State *v.* Noland, 111 Mo. 473, 19 S. W. 715.

Entries as Admissions. — In State *v.* Reinhart, 26 Or. 466, 38 Pac. 822, the court stated, "the entries of the defendant in the books of account which he was required to keep are not confessions or admissions of guilt, but are perfectly innocent in themselves; and it is only because they are shown to be false and fraudulent that the inference is irresistible, from the manner in which they were made, that they were intended to cover up his misappropriation of the funds of his employer. The books contain a record of the transactions of the firm, made by the defendant in the discharge of his duty, and it is only by these books the condition of the business can be ascertained or determined, or the shortage shown."

In People *v.* Blackman, 127 Cal. 248, 59 Pac. 573, the court said: "In this case one purpose for which the books were offered was to show that defendant did not keep correct books, but that they were falsified for the purpose of enabling the defendant to perpetrate the crime, or for the purpose of concealment. Under such circumstances they cannot be received as regular entries made in the course of business. The presumption of correctness is destroyed, and they are not offered as proof of the facts recited.

"If there was evidence that the entries were made by the defendant or under his direction, or with his knowledge, they would most undoubtedly be competent and important evidence against him. They are clearly inadmissible, except as admissions, or as acts done in furtherance of crime charged against him. His knowledge and complicity in falsifying the books must first be shown. The presumption of innocence with which the law clothes the defendant is sufficient to overcome the presumption which might prevail in a civil case, that he knew because it was his duty to know. . . . The books kept by the collectors and the bank books should have been offered in connection with the evidence of those who kept them."

Inference from False Entries. — In State *v.* Baumhager, 28 Minn. 226, 9 N. W. 784, Mitchell, J., rendering the opinion of the court, said: "In the absence of any explanation, there can have been reasonably but one purpose for such conduct, viz.: to obtain a false credit, so as to enable him to appropriate an equal amount of the public funds to his own use. And in the absence of any such explanation or rebutting evidence tending to show that he had not in fact made such appropriation, we think it would fully warrant the inference that this intent was carried out, without the State being required, in the first instance, to go into the general condition of his accounts and show that there was a deficiency to that amount in the amount of funds in his hands as treasurer.

"The distinction must be kept in view between the offense and the evidence of it. The first possession being lawful, the act of embezzlement consists, in a certain sense, in a mere act of the mind, without any outward and visible trespass, as in the case of ordinary larceny. That this mental act of fraudulent appropriation has taken place has to be inferred from the conduct of the defendant. Hence, the willful making of false entries is a kind of proof commonly relied on and held sufficient to make out an embezzlement."

25. Queen *v.* Rogers, 3 Q. B. Div. 28; Robinson *v.* State, 109 Ga. 564, 35 S. E. 57, 77 Am. St. Rep. 392; State *v.* Baldwin, 70 Iowa 180, 30 N. W. 476; Bartow *v.* People, 18 Hun (N. Y.) 22.

might infer that the accused actually disposed of the property, or withheld it with intent to deprive the owner of it.[26]

B. False Entries. — When the alleged deceit consists of writings which are too voluminous, or too intricate, for the comprehension of the jury within a reasonable time, their correctness or incorrectness may be shown by expert testimony.[27]

III. INTENT.

1. In General. — It must appear that the appropriation was made under such circumstances as to show an intent to deprive the owner of his property,[28] and if the accused has a *bona fide* belief that he

26. Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; People *v.* Bidleman, 106 Cal. 608, 38 Pac. 502; State *v.* Small, 26 Kan. 209; State *v.* Baumhager, 28 Minn. 226, 7 N. W. 704.

Concealment and False Account. In State *v.* Pierce, 77 Iowa 245, 42 N. W. 181, the court said: "It is scarcely denied, and is clearly proven, that the company is entitled either to property of considerable value, or to its equivalent in money, for which defendant was required to account. Evidence was given which tended to show that defendant concealed the facts as to the disposition made of some of the property, and that he rendered a false account of his agency in regard to it. At least two witnesses testified to a demand for the property in controversy, made on the part of the company. It is not shown that defendant complied with the demand, but it appears that he failed to do so. It was the province of the jury to weigh and determine the effect of the evidence. We are of the opinion that the evidence sustains the verdict."

27. Willis *v.* State, 134 Ala. 429, 33 So. 226; Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102; Ritter *v.* State, 70 Ark. 472, 69 S. W. 262; State *v.* Findley, 101 Mo. 217, 14 S. W. 185; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; Secor *v.* State (Wis.), 95 N. W. 942.

Expert Evidence as to Books. In Hollingsworth *v.* State, 111 Ill. 289, 12 N. E. 490, where two expert accountants had made an examination of the book, records of the treasurer's office, covering the time the accused was treasurer, were allowed to testify. The court said as to the admissibility of said evidence that "It is conceded by appellant's counsel that in civil actions, where, as here, the books, records, papers and entries are voluminous and multifarious, and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, expert accountants may be allowed to examine such books, etc., and to give to the jury the result of their examination and investigation. Some doubt is intimated as to whether or not such testimony should be allowed in criminal prosecutions, and it is said that, if allowed at all in such cases, it should be with the greatest caution. There should be caution in all cases, but we can think of no principle which would admit such testimony in civil cases and exclude it in criminal prosecutions."

28. *England.* — Reg. *v.* Creed, 1 Car. & K. 63, 47 E. C. L. 63; Rex *v.* Norman, 1 Car. & M. 501, 41 E. C. L. 274; Rex *v.* Hodgson, 3 Car. & P. 422, 14 E. C. L. 376.

Alabama. — Reeves *v.* State, 95 Ala. 31, 11 So. 158.

California. — State *v.* Murphy, 51 Cal. 376; People *v.* Klee, 137 Cal. XIX, 69 Pac. 696.

Delaware. — State *v.* Davis, 3 Pen. 220, 50 Atl. 99.

Florida. — Thomas *v.* State, 33 Fla. 464, 15 So. 225.

Georgia. — Snell *v.* State, 50 Ga. 219.

Iowa. — State *v.* Wallick, 87 Iowa 369, 54 N. W. 246.

Kansas. — State *v.* Eastman, 60 Kan. 557, 57 Pac. 109.

was dealing lawfully with the property, the prosecution fails through lack of the intent necessary to constitute the offense.[29]

2. How Shown. — It is competent to introduce any fact tending directly to show a fraudulent intent, or from which that intent might justly and reasonably be inferred.[30]

Louisiana. — State *v.* Smith, 47 La. Ann. 432, 16 So. 938.

Michigan. — People *v.* Calland, 55 Mich. 628, 22 N. W. 81.

Minnesota. — State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51; State *v.* Poe, 71 Minn. 296, 75 N. W. 235.

Missouri. — State *v.* Kielly, 4 Mo. App. 592; State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282; State *v.* Schilb, 159 Mo. 130, 60 S. W. 82; State *v.* Rigall, 169 Mo. 659, 70 S. W. 150.

Nebraska. — Hamilton *v.* State, 46 Neb. 284, 64 N. W. 965.

New Jersey. — State *v.* Temple, 64 N. J. L. 375, 44 Atl. 697.

Oregon. — State *v.* Littschke, 27 Or. 189, 40 Pac. 167.

Pennsylvania. — Com. *v.* Rockafellow, 164 Pa. 139, 29 Atl. 757.

Rhode Island. — State *v.* Hunt (R. I.), 54 Atl. 937.

Texas. — Eilers *v.* State, 41 Tex. Crim. 334, 30 S. W. 811.

Utah. — State *v.* Blue, 17 Utah 175, 54 Pac. 978.

Vermont. — Batchelder *v.* Tenney, 27 Vt. 578.

Felonious Intent Essential. — In State *v.* Littschke, 27 Or. 189, 40 Pac. 167, evidence was offered showing that the money received by the defendant was stolen and the true owner had demanded that it should not be paid back again to the bailor. The court said that, "without a felonious and criminal intent on the part of the defendant, there could have been no crime, although there may have been a breach of trust, and although Liebe's claim to the money may constitute no defense in a civil action by Mrs. Hess (bailee) to recover possession, because of the rule that a bailee cannot dispute the title of his bailor . . . If he (the defendant) was the bailee of Mrs. Hess, and in good faith retains possession of the money, and refused to pay it over to her because of Liebe's claim and demand, but with no intention of converting it to his own use, he cannot be convicted of the crime charged in the indictment, because in such case there would be an entire absence of the felonious or criminal intent which is an essential ingredient of the crime. For this reason we think the evidence was competent."

29. Rex *v.* Norman, 1 Car. & M. 501, 41 E. C. L. 274; People *v.* Lapique, 120 Cal. 25, 52 Pac. 40; People *v.* Klee, 137 Cal. XIX, 69 Pac. 696; State *v.* Foster, 1 Pen. (Del.) 289, 40 Atl. 939; Rose *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Beaty *v.* State, 82 Ind. 228; People *v.* Dorthy, 20 App. Div. 308, 46 N. Y. Supp. 970.

Appropriation Made Bona Fide. In Walker *v.* State, 117 Ala. 42, 23 So. 149, Head, J., in his opinion said: "It was a public prosecution of a charge of embezzlement made against the defendant by the grand jury, wherein the intent of the defendant, if he appropriated the moneys of his principal, as charged, was of most vital consideration. If the appropriation was not with the intent to defraud the employer, but was honestly made, to pay the office rent, in reliance upon the agent's statement, sought to be proven, as the defendant claimed to have been the case as to a part of the funds received by him, it would be manifestly unjust to deny the defendant the right to make proof of the promise of the agent as going to show his intent in making the appropriation. The rule that, as between the parties to a written contract, its terms cannot be added to, altered or varied by parol stipulations made at or before its execution, has no application to the case. That will apply when the contracting parties come to litigate their rights evidenced by the contract."

30. Dotson *v.* State, 51 Ark. 110, 10 S. W. 18; People *v.* Leonard, 106 Cal. 302, 39 Pac. 617; State *v.* Davis, 3 Pen. (Del.) 220, 50 Atl. 99; People

3. When Presumed. — A. From Unlawful Acts. — The intent may be presumed from the doing of wrongful, illegal acts, which in their natural results necessarily cause loss and injury to another.[31]

B. Against Insolvent Banker. — A presumption of fraudulent intent arises against a banker who received money as a deposit after insolvency, whereby the funds become lost to the depositor.[32]

4. Similar Acts. — For the sole purpose of showing intent, the

v. Wadworth, 63 Mich. 500, 30 N. W. 99; State *v.* Noland, 111 Mo. 473, 19 S. W. 715.

In State *v.* Foster, 1 Pen. (Del.) 289, 40 Atl. 939, Grubb, J., in his opinion stated: "The fraudulent intent — the intent to defraud the owner of it — may be proven to your satisfaction beyond a reasonable doubt, either by direct evidence or by the evidence of circumstances showing a fraudulent intent in a man's mind, from which you may infer that fraudulent intent. The question for you is whether in this case there have been circumstances shown to you in connection with this transaction, in view of all the testimony, which warrant you in inferring that he (the accused) did fraudulently appropriate this money or fraudulently misapply it; that is, with the fraudulent purpose of appropriating it to his own use, and not the use and benefit of Mrs. Wells."

A Just and Reasonable Inference Required. — In State *v.* Hellwig, 60 Mo. App. 483, the accused was custodian of certain books and ledgers, and upon demand refused to give the books for inspection until revised in his presence and he relieved of further responsibilities, agreeing, however, if this could be done, to deliver them. *Held* that "he made no claim to any personal ownership of said books. He merely required, as a matter of precaution for his own protection, that they should be revised in his presence, so that he might avoid ulterior responsibility for their condition after they were delivered to the corporation. There was nothing in such a qualified declination from which the evil intent necessary to constitute embezzlement could be inferred."

31. Dotson *v.* State, 51 Ark. 119, 10 S. W. 18; People *v.* Jackson, 138 Cal. 462, 71 Pac. 566; Spalding *v.* People, 172 Ill. 40, 49 N. E. 993; United States *v.* Adams (Dak.), 9 N. W. 718; State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51; State *v.* McGregor, 88 Minn. 77, 92 N. W. 458; State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282; State *v.* Schilb, 159 Mo. 130, 60 S. W. 82.

Intent Presumed from Wrongful Acts. — In United States *v.* Harper, 33 Fed. 471, Jackson, J., in his instructions to the jury, said: "If, therefore, the funds, moneys or credit of the Fidelity National Bank are shown to have been either embezzled or abstracted, or willfully misapplied, or its certificates of deposit wrongfully put in circulation, as already explained, by the accused, and converted to his own use, whereby, as a necessary, natural, or legitimate consequence, the association's capital is reduced or placed beyond the control of its directors, or its ability to meet its engagements or obligations, or to continue its business is lessened or destroyed, the intent to injure or defraud the bank may be conclusively presumed. Acts involving such consequences, when knowingly and wrongfully committed, establish not only the guilty intent to injure or defraud mentioned in the statute, but they disclose moral turpitude utterly inconsistent with an innocent intent."

32. Com. *v.* Rockafellow, 163 Pa. St. 139, 29 Atl. 757; American T. & S. B. *v.* Grueder & P. Mfg. Co., 150 Ill. 336, 37 N. E. 227.

Banker Presumed to Know His Financial Status. — In Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176, Judge Baker in his opinion said: "If one is a banker or a person doing a banking business and receives on deposit the money of his customer, it is to be presumed that he knows,

prosecution may be allowed to show that at other times the accused has appropriated the property of others to his own use.[33]

IV. RELATION OF PARTIES.

1. In General. — A fiduciary relation must be shown to have existed at the time of the taking, and that by virtue of this relation, or employment, the property was entrusted to the accused.[34] It is not enough that the relation of debtor and creditor exists between

at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is under all ordinary circumstances bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency."

33. *England.* — Rex *v.* Ellis, 6 Barn. & C. 145, 13 E. C. L. 123.

Alabama. — Stanley *v.* State, 88 Ala. 154, 7 So. 273.

California. — People *v.* Gray, 66 Cal. 271, 5 Pac. 240; People *v.* Neyce, 86 Cal. 393, 24 Pac. 1,091; People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520.

Georgia. — Jackson *v.* State, 76 Ga. 551.

Massachusetts. — Com. *v.* Tuckerman, 10 Gray 173.

Michigan. — People *v.* Wakeley, 62 Mich. 297, 28 N. W. 871; People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736.

Minnesota. — State *v.* Holmes, 65 Minn. 230, 68 N. W. 11.

Other Offenses. — In Com. *v.* Shepard, 1 Allen (Mass.), 575, Bigelow, J., said: "It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that, when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent."

In Stanley *v.* State, 88 Ala. 154, 7 So. 273, the court said: "It is true that in all criminal trials the evidence should be relevant, and confined to the proof or disproof of the point in issue; and generally it is not allowable to prove the commission of other offenses by the accused for the purpose of convicting him of the offense charged. But there are well recognized exceptions to this rule; and such evidence is receivable when necessary to prove *scienter*, to establish identity, or to complete a chain of circumstantial evidence of guilt in respect to the act charged."

34. *England.* — Rex *v.* Beacall, 1 Car. & P. 454, 11 E. C. L. 450; Rex *v.* Snowley, 4 Car. & P. 390, 19 E. C. L. 436.

Alabama. — Reeves *v.* State, 95 Ala. 31, 11 So. 158; Grider *v.* State, 133 Ala. 188, 32 So. 254.

California. — *Ex parte* Hedley, 31 Cal. 108; People *v.* Belden, 37 Cal. 51; People *v.* Gallagher, 100 Cal. 446, 35 Pac. 80.

Kentucky. — Lee *v.* Com., 8 Ky. L. Rep. 53, 1 S. W. 4.

Maine. — State *v.* Walton, 62 Me. 106.

Massachusetts. — Com. *v.* Bennett, 118 Mass. 443.

New York. — Bartow *v.* People, 78 N. Y. 377.

Wyoming. — Wilbur *v.* Territory, 3 Wyo. 268, 21 Pac. 698.

The Relation Must Be Fiduciary. In Carr *v.* State, 104 Ala. 43, 16 So. 155, the court held that notwithstanding the defendant as banker had described the check as a special deposit, and notwithstanding also that defendant "furnished her with a form of a filled out check to be used

the parties, and that on a balance being struck the defendant would be found indebted.[35]

in drawing out this fund, whereon he wrote the words, 'Special Deposit,' the deposit was nevertheless a general one, and was called and written down as 'special deposit' only for the purpose of keeping it safe from the creditors of Mrs. Rice's deceased husband, and not to the end that the bank should safely keep the particular money as hers, for her, and return it to her. If this was true, or if the jury had a reasonable doubt because of this evidence, whether the deposit was special or not, the defendant should not have been convicted, since a general deposit is not alleged in the indictment, and confessedly if it had been, no criminal responsibility attached to the use of the money so deposited by the defendant or the bank; it being the money of the bank, on account of which the relation of debtor and creditor only could exist between the parties."

The Agent's Possession May Be Concurrent. — If his "position and employment in the bank gave the defendant a superior or a joint and concurrent possession with subordinate employes, or agents of the bank, that would be sufficient to place him in such lawful possession as would enable him to commit the crime of embezzlement in relation to assets of the bank so committed to his keeping. If, for example, his position and employment in the bank gave the defendant a joint or concurrent possession and custody of the bank's moneys, funds and credits with the teller, cashier or other officer, this would constitute lawful possession on his part for the benefit of the association equal with that of such teller, cashier or agent; and if, while so lawfully in possession, either alone or jointly with other officers or agents of the bank, he wrongfully converts said funds or assets to his own use, with intent to injure or defraud the association, he would thereby commit the offense of embezzlement." United States *v.* Harper, 33 Fed. 471.

35. State *v.* Adams, 108 Mo. 208, 18 S. W. 1,000; Miller *v.* State, 16 Neb. 179, 20 N. W. 253; Hamilton *v.* State, 46 Neb. 484, 64 N. W. 965; State *v.* Covert, 14 Wash. 652, 45 Pac. 304.

Deposit with Employer. — In Mulford *v.* People, 139 Ill. 586, 28 N. E. 1,096, a salesman deposited money with his employer to be held as security for the faithful discharge of his duties during his employment. Later the employe called for the deposit, but the employer refused to deliver the money, contending that the contract required that S. should work a month and that he expected him to fulfill his contract. *Held*, that there is nothing in the evidence which leads to any certain conclusion that it was the intention or expectation of the parties that the identical money deposited was to be kept as a special deposit, and returned to Swigart in specie when the purpose for which it was deposited was accomplished. On the contrary, the money, the instant it was deposited, was by the defendant's cashier mingled with other funds of the defendant so as to be incapable of identification, and this was done in the presence and with the knowledge of Swigart, and without objection on his part. It is impossible to see how, under these circumstances, a subsequent failure or refusal by the defendant to repay said money to Swigart on demand could constitute embezzlement or larceny. It would be merely a failure to pay a debt, for which an action might lie, but would be no offense against the criminal law.

Effect of Promise to Pay Interest. In Kribs *v.* People, 82 Ill. 425, it is said that, "If Shaver placed the money in the hands of the defendant, and looked to him for a repayment, and relied upon the guaranty of the defendant for ten per cent. interest, from the time the money was paid over, then no conviction could be had. While we do not propose to express any opinion upon the evidence, yet, from the fact that the defendant guaranteed ten per cent. interest from the date the money was received, and the subsequent

2. How Created. — The existence of this relation may be shown by express words either written[36] or oral, or it may be proved by circumstances.[37]

3. Lawful Possession. — It must appear that the accused was in lawful possession of the property.[38] Gaining control by trick or accident,[39] or having merely the custody, as distinguished from the possession, is not sufficient.[40]

4. Duration of Relation. — It is not necessary that the employment be continuous or exclusive; it may have existed only upon the single occasion in question.[41]

V. DEFENSES, SUFFICIENT AND INSUFFICIENT.

1. Illegal Contract. — The fact that the accused acted under an illegal contract of agency will not be permitted as a defense, if he

payment of interest on the money to December 1, 1874, in connection with the agreement to repay the $400 on thirty days' notice, may properly raise a well founded doubt in regard to the guilt of the defendant.

"The proposition is too plain to admit of argument, that if S., when he gave the money to the defendant, relied upon his honesty or responsibility to return it, with ten per cent. interest, he cannot resort to the criminal laws of the state to assist him to collect the debt."

36. Foster *v.* State, 2 Pen. (Del.), 111, 43 Atl. 265; Denton *v.* State, 77 Md. 527, 26 Atl. 1,022.

37. People *v.* Royce, 106 Cal. 173, 37 Pac. 630.

In State *v.* Ezzard, 40 S. C. 312, 18 S. E. 1,025, the court held that, "If such a relation as principal and agent is recognized and acted upon by both principal and agent, in the absence of any writing between the parties, the consequences are just as fixed in the one case as in the other; and he who, as agent of his principal, receives the property of such principal, and, if personal property, converts it to his (the agent's) use, against the consent of the principal, and with a felonious intent, is just as guilty as if the relation of principal and agent arose under a deed."

38. Lowenthal *v.* State, 32 Ala. 589; People *v.* Bailey, 23 Cal. 577; State *v.* Davis, 3 Pen. (Del.) 220, 50 Atl. 99; Com. *v.* Barrey, 99 Mass. 428, 96 Am. Dec. 767; People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736; State *v.* Carrick, 16 Nev. 120; State *v.* Leicham, 41 Wis. 565.

39. People *v.* Johnson, 91 Cal. 265, 27 Pac. 663; Com. *v.* O'Malley, 97 Mass. 584.

Money Paid by Mistake. — In Fulcher *v.* State, 32 Tex. Crim. 621, 25 S. W. 625, the defendant was accused of appropriating money as bailee. The funds had been paid to him by mistake, the cashier of the First National Bank having paid the appellant $500 more than his check on that bank called for, which was converted by the appellant to his own use. *Held*, that as there was no intent on the part of the cashier to delivery the money, to wit, the $500, to the appellant, the proper fiduciary relation was not created and therefore no embezzlement. If, however, at the time the appellant received the property, he formed the criminal design to appropriate it to his own use, and did so appropriate it, it would be theft. Reg. *v.* Middleton, L. R. 2 C. C. 38.

40. Com. *v.* Barrey, 99 Mass, 428, 96 Am. Dec. 767; Phelps *v.* People, 72 N. Y. 334.

41. In Foster *v.* State, 2 Pen. (Del.) 111, 43 Atl. 265, the court held that, "It is not necessary that there should be more than one act authorized, or more than the undertaking of one act or transaction for, or in the name, or on account of the

has acted, and been permitted to act, as such agent, and the funds have been received while he was so acting.[42]

2. Unlawful Business. — Nor can the accused show that money appropriated by him was acquired by a transaction in an unlawful business,[43] or obtained to transact such business.[44]

3. Agent on Commission. — Nor can the fact that the accused works on a percentage and was to pay only the part that was remaining after his interest was deducted be shown in defense.[45]

master or employer. In the case at bar, the bare temporary charge of the possession of the notes and the negotiation thereof, undertaken by Foster for Mrs. Wells, although he may not have been in her regular employment, is sufficient to create the relation of principal and agent for the purpose of the engagement, if, in fact, the evidence discloses such an undertaking by him."

42. Corporation Not Authorized to Do Business. — In People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736, the Standard Oil Company, a foreign corporation, by the defendant as its agent carried on its business within the state. The returns from the sale of oil came into the defendant's possession, and for appropriating these funds he has been convicted, and from the ruling of the court he has excepted. Affirming the decision of the lower court, Hooker, J., said: "We are of the opinion that the statute was not intended to prohibit foreign corporations from doing business within the state until they should comply with its terms, as the expression of such intention is neither 'clear nor positive.' . . . But, if it should be held that the act under consideration was prohibitive, and that the company could not make or enforce contracts, it would not follow that this defendant could not be guilty of embezzlement. In fact, he was the agent of the company, whether it was a lawful enterprise or engagement, or not. By virtue of his relation, he became possessed of property which was not his, and which belonged to the company, if to anybody. He acted for, and permitted himself to be held out as the agent of, the company, and received money from various persons who were willing to pay. He was a *de facto* servant, and it is unnecessary that his relation should have grown out of a lawful contract of agency."

43. State *v.* Tumey, 81 Ind. 559; Woodward *v.* State, 103 Ind. 127, 2 N. E. 321; Com. *v.* Smith, 129 Mass. 104; State *v.* O'Brien, 94 Tenn. 79, 28 S. W. 311; State *v.* Hoshor, 26 Wash. 643, 67 Pac. 386.

In State *v.* Tumey, 81 Ind. 559, the court, in concluding, said: "In such a case, it seems to us that the fact, if it were the fact, that the appellee received such money, as such agent, for his principal, the association, upon an illegal consideration, and in the transaction of an unlawful business, did not constitute any valid or sufficient defense to him, the appellee, in this prosecution against him for his alleged embezzlement of such money."

44. In Com. *v.* Cooper, 130 Mass. 285, the accused was indicted for embezzling a check which was given into his possession to purchase railway stocks. The defendant contended that his contract to buy stock was intended as a gambling contract and was illegal under the statute, and that even if he had appropriated the margin, he could not be convicted of embezzlement. *Held*, that "there was no evidence that W. contemplated, or authorized the defendant to enter into, any gambling or illegal contract. If he had, the check or money sent by him would remain the subject of larceny or embezzlement; and if the defendant fraudulently appropriated it to his own use, it would be no defense to an indictment by the government for embezzlement to show that the property had been entrusted to him for an illegal purpose."

45. Rex *v.* Hartley, 1 Russ. & R. (Eng.) 139; Rex *v.* Hoggins, 1 Russ. & R. (Eng.) 145; Rex *v.* Carr, 1

4. Lien. — It is a good defense to an action to show that the accused has an interest in[46] or lien upon the property alleged to have been embezzled.[47]

5. Return of Property. — The fact that the accused intended to restore the property,[48] or that the losses claimed to have resulted from the wrongful acts of the accused have been paid, are not admissible as a defense.[49]

Russ. & R. (Eng.) 198; Wallis *v.* State, 54 Ark. 611, 16 S. W. 821; Com. *v.* Fisher, 24 Ky. L. Rep. 300, 68 S. W. 855; Com. *v.* Smith, 129 Mass. 104; People *v.* Hanaw, 107 Mich. 337, 65 N. W. 231; Campbell *v.* State, 35 Ohio St. 70.

The Interest Must Be as to the Whole Property. — In Territory *v.* Meyer (Ariz.), 24 Pac. 183, the defendant was an agent for the Wells, Fargo Express Co. and was indicted for appropriating the funds of the company. Sloan, J., held: "If an agent of a corporation authorized to carry on a business for his principal receives a commission upon the proceeds of the business, he is still a trustee for the use of his principal as to the remainder, and has in his possession property by virtue of his trust. In this case, Meyer was required to send at stated intervals the amount of the receipts of the office less his commission. These amounts, at least, he held in trust for the corporation, and it was these which constituted the subject-matter of the embezzlement."

46. Rose *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65; Van Etten *v.* State, 24 Neb. 734, 40 N. W. 289, 1 L. R. A. 669.

Collection of Salary After Void Assignment. — In State *v.* Williamson, 118 Mo. 146, 23 S. W. 1,054, 40 Am. St. Rep. 358, 21 L. R. A. 827, the accused was a government employe and had assigned his wages for one month to M. Defendant afterward sold the same salary to others, and when it became due, collected it and refused to pay M. *Held*, "that the contract (of assignment) was void because against public policy, and the defendant must be discharged." The defendant, then, was never divested of his right to collect for himself and in his own right, and was not the agent of M. in so doing. If there was no assignment, and we hold there was none, he was not the agent of M., but acted for himself, in collecting the moneys.

"As for the morals of the transaction, in so far as the defendant is concerned, they are certainly not to be approved or commended, but dishonest and dishonorable conduct does not always constitute criminal offense."

47. Van Etten *v.* State, 24 Neb. 734, 40 N. W. 289, 1 L. R. A. 669.

48. Vives *v.* United States, 92 Fed. 355; People *v.* De Lay, 80 Cal. 52, 22 Pac. 90; Spalding *v.* People, 172 Ill. 40, 49 N. E. 993; Com. *v.* Tuckerman, 10 Gray (Mass.) 173; Com. *v.* Tenney, 97 Mass. 50; People *v.* Butts, 128 Mich. 208, 87 N. W. 224; State *v.* Pratt, 98 Mo. 482, 11 S. W. 977; State *v.* Leicham, 41 Wis. 565.

49. Thalheim *v.* State, 38 Fla. 169, 20 So. 938; Robson *v.* State, 83 Ga. 166, 9 S. E. 610; Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; State *v.* Tull, 119 Mo. 421, 24 S. W. 1,010; Fagnan *v.* Knox, 66 N. Y. 525.

Repayment of Money Embezzled No Defense. — In Fleener *v.* State, 58 Ark. 98, 23 S. W. 1, the defendant contended that having hired the guaranty company to make his bond for faithful performance of duty to the Pacific Express Co., and that company having paid the express company for all losses claimed by it to have been suffered by reason of the defendant's alleged embezzlement, therefore there was no crime committed. That the express company had no longer any interest at stake, and even that the state has no interest in the matter. *Held*, that that was "no longer a controversy be-

6. Decoys. — Nor can the accused show that the specific property taken was only a decoy used for the purpose of entrapping him.[50]

tween himself and the two companies, or either of them, and has not been, since he fraudulently appropriated the money of the express company, if, indeed, he did so appropriate it. It is now a controversy between the state of Arkansas and himself, which the state will not permit either one of the said companies to determine, at present or in the future, nor will the state acknowledge the validity of any settlement of it, by anything they both, or either of them, have done in the past."

Restitution Not a Bar. — In Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176, Baker, J., said: "It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement. The effect of the tender and payment in court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned; but the crimes having been fully consummated before indictment found, it is not within the power of the banker or the depositor, or either of them, to compromise or take away the right of the state to insist upon a conviction for the crime committed. It is not to be presumed that in creating the offense and in providing for its punishment it was the intention of the legislature to make the criminal courts of the state collecting agencies for collecting the debts due to depositors from insolvent banks and bankers."

50. Goode *v.* United States, 159 U. S. 663; Com. *v.* Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, 15 L. R. A. 317.

EMBLEMENTS.—See Executors and Administrators; Landlord and Tenant.

EMINENT DOMAIN.

By A. I. McCormick.

CROSS-REFERENCES:

Damages; Dedication;
Highways;
Value;
Water and Watercourses.

I. RIGHT TO CONDEMN.

1. In General. — A. Proof of Statutory Authority Essential. It is elementary that no one but the state can exercise the right of eminent domain without showing a grant from the state of the authority to exercise the right.[1] Unless the statute expressly,[2]

1. Chicago B. & N. R. Co. *v.* Porter, 42 Minn. 527, 46 N. W. 75; Rensselaer & S. R. Co. *v.* Davis, 43 N. Y. 137; *In re* St. Paul & P. R. Co., 37 Minn. 164, 33 N. W. 701.

"The applicant must prove or the owner admit, or it must in some way appear to the court, that the applicant has a lawful right to take the land for the purposes stated in the application." Chesapeake & O. R. Co. *v.* Pack, 6 W. Va. 397.

Taking of Land Within Forest Reserve. — In a proceeding to condemn lands for reservoir purposes, said lands being situated within the limits of a United States Forest Reserve, the question as to whether the petitioner has authority from the government to use such lands can not be raised by a private proprietor against whom the condemnation is pending. The petitioner is not bound to show a compliance with the law relative to the location of reservoir sites on such forest reserve; that question concerns only the government. Denver P. & Irr. Co. *v.* Denver & R. G. R. Co., 30 Colo. 204, 69 Pac. 568.

2. *Connecticut.* — City of Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Georgia. — Butler *v.* Mayor of Thomasville, 74 Ga. 570.

Illinois. — Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589.

Indiana. — Allen *v.* Jones, 47 Ind. 438; Leeds *v.* City of Richmond, 102 Ind. 372, 1 N. E. 711.

Maine. — State *v.* Noyes, 47 Me. 189.

Massachusetts. — Bishop *v.* North Adams F. Dist., 167 Mass. 364, 45 N. E. 925; Boston & L. R. Co. *v.* Salem & L. R. Co., 2 Gray 1; Thacher *v.* Dartmouth Bridge Co., 18 Pick. 501; Worcester & N. R. Co. *v.* Railroad Com'rs, 118 Mass. 561.

Michigan. — Chaffee's Appeal, 56 Mich. 244, 22 N. W. 871; Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

Minnesota. — Milwaukee & St. P. R. Co. *v.* City of Faribault, 23 Minn. 167.

Missouri. — Schmidt *v.* Densmore, 42 Mo. 225.

New Jersey. — Carson *v.* Coleman, 11 N. J. Eq. 106; Chamberlain *v.* Elizabethport S. C. Co., 41 N. J. Eq. 43, 2 Atl. 775.

New York. — Matter of City of Buffalo, 68 N. Y. 167; *In re* Commissioner of Public Works (N. Y. Sup. Ct.), 10 N. Y. Supp. 705.

North Dakota. — Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

Ohio. — Miami Coal Co. *v.* Wigton, 19 Ohio St. 560; Hickok *v.* Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

Pennsylvania. — Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

West Virginia. — Chesapeake & O. R. Co. *v.* Pack, 6 W. Va. 397.

Wisconsin. — Bryant *v.* Robbins, 70 Wis. 258, 35 N. W. 545.

Presumption Against. — Where the legislature has given a corporation power to acquire the property necessary for its purpose and the act is silent as to the means by which, or the manner in which, said property is to be acquired, the presumption is that the legislature did not intend to grant the power to acquire by eminent domain. Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

"It is not to be presumed that such a power is intended . . . . unless the intent to do so can be clearly discovered in the act itself." Thacher *v.* Dartmouth Bridge Co., 18 Pick. (Mass.) 501.

Presumption That Legislature Intended Acquisition by Consent. Where the right to acquire property is given by statute or charter, and the mode in which the property is to be acquired is not pointed out, the

or by necessary implication,[3] grants the right to condemn in the given instance, the presumption is that no such power was intended to be delegated by the legislature; and this is especially true where the premises to be taken are already devoted to a public use.[4]

B. Conclusiveness of Legislative Determination. — Unless otherwise provided by the constitution,[5] the legislative department of the government alone determines for what public purposes,[6] and

presumption is that the acquisition of the necessary property should be by consent or contract with the owner of the land sought and not by the exercise of the right of eminent domain. Boston & L. R. Co. *v.* Salem & L. R. Co., 2 Gray (Mass.) 1.

3. Act Authorizing County Supervisors to Build Public Buildings. It was held in Supervisors *v.* Gorrell, 20 Gratt. (Va.) 484, that a statute giving a county board of supervisors power "to build and keep in repair county buildings, and in case there are no buildings, to provide suitable rooms for county purposes," the right to exercise eminent domain in order to acquire the property is necessary, and the presumption arises that the legislature intended the act to grant this right, although not expressly given therein.

4. Property Already Devoted to Same Public Use. — In the absence of a clearly expressed intention to the contrary in the statute or charter, the courts will not presume that the legislature, in granting a charter to build and operate a railroad or other improvement of a public character, intended to authorize the company to take the property of another already devoted to the same use. Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589.

Public Necessity. — In the absence of proof of express statutory authority or necessary implication therefrom, and proof that the overwhelming necessities of the public positively require the taking, the right to take property already devoted to public use is not shown. Denver P. & Irr. Co. *v.* Denver & R. G. R. Co., 30 Colo. 204, 69 Pac. 568. It was therefore held that proof that the reservoir site selected, extending over a large extent of an existing railroad right of way, was convenient and was the only available site on the stream, was not sufficient proof of the necessity, there being no proof that the construction of the reservoir at that or any point was an absolute public necessity. "Neither comparative convenience, benefits, nor cost to the respective parties can be taken into consideration."

Property Already Devoted to Public Use. — Where the authority to condemn is given in general terms the presumption is that the legislature did not intend to give the right to take property already devoted to public use.

The party seeking to condemn "must produce statutory authority, which in express terms gives it power to acquire these lands; or statutory authority from which the implication that it may, is necessary." *In re* City of Buffalo, 68 N. Y. 167.

5. Thus in Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475, it is held that, where the constitution prohibits the legislature from passing special laws granting any corporation the right to lay down railroad tracks, but requires it to pass general laws on the subject, the legislature cannot give to any corporation the right to exercise eminent domain by special act, and therefore it, itself, cannot determine the necessity for the exercise of the right. "It must, therefore, delegate the power" to determine the necessity.

And see note 15.

6. *California.* — Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547; Mahoney *v.* Spring Val. Water Works Co., 52 Cal. 159; Houghton *v.* Austin, 47 Cal. 646; California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599.

Illinois. — Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589.

by whom,[7] the right of eminent domain may be exercised, and when the necessity exists[8] which calls for its exercise; and its determination on these questions is conclusive on the courts.

a. *Delegation of Power by Legislature.* — The right to exercise the power of eminent domain may be delegated by the legislature

New Jersey. — Tide Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634.

New York. — Rensselaer & S. R. Co. *v.* Davis, 43 N. Y. 137; Buffalo & N. Y. C. R. Co. *v.* Brainard, 9 N. Y. 100.

7. Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1,062, 15 L. R. A. 505; Chicago & A. R. Co. *v.* City of Pontiac, 169 Ill. 155, 48 N. E. 485.

Grant of Power to Individual. Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

"The legislative branch of government alone determines whether the exigency exists which calls for the exercise of the power of eminent domain, and for its delegation to municipal or other public corporations of its creation." O'Hare *v.* Chicago, M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

8. *United States.* — Shoemaker *v.* United States, 147 U. S. 282; Boom Co. *v.* Patterson, 98 U. S. 403.

California. — Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

Delaware. — Whiteman *v.* Wilmington & S. R. R. Co., 2 Harr. 514, 33 Am. Dec. 411.

Illinois. — Chicago & E. I. R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49; Chicago & A. R. Co. *v.* City of Pontiac, 169 Ill. 155, 48 N. E. 485; Chicago & N. W. R. Co. *v.* Town of Cicero, 154 Ill. 656, 39 N. E. 574; Illinois Cent. R. Co. *v.* City of Decatur, 154 Ill. 173, 38 N. E. 626; O'Hare *v.* Chicago, M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

Indiana. — Water Works Co. *v.* Burkhart, 41 Ind. 364.

Indian Territory. — Tuttle *v.* Moore, 3 Ind. Ter. 712, 64 S. W. 585.

Kentucky. — Tracy *v.* Elizabethtown L. & B. S. R. Co., 80 Ky. 259.

Maine. — Spring *v.* Russell, 7 Me. 273.

Massachusetts. — Lowell *v.* City of Boston, 111 Mass. 454, 15 Am. Rep. 39; *In re* Wellington, 16 Pick. 87, 26 Am. Rep. 631; Eastern R. Co. *v.* Boston & M. R. Co., 111 Mass. 125, 15 Am. Rep. 13.

Michigan. — Swan *v.* Williams, 2 Mich. 427.

Minnesota. — Wilkin *v.* First Div. St. P. & P. R. Co., 16 Minn. 271; Weir *v.* St. Paul, S. & T. F. R. Co., 18 Minn. 155.

Missouri. — St. Louis, H. & K. C. R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483.

New Jersey. — Olsted *v.* Proprietors of Morris Aqueduct, 46 N. J. L. 495.

New York. — Secomb *v.* Milwaukee & St. P. R. Co., 49 How. Pr. 75; Buffalo & N. Y. C. R. Co. *v.* Brainard, 9 N. Y. 100; Beekman *v.* Saratoga & S. R. Co., 3 Paige Ch. 45, 22 Am. Dec. 679; Varick *v.* Smith, 5 Paige Ch. 137, 28 Am. Dec. 417; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

Utah. — Postal Tel. Cable Co. *v.* Oregon S. L. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

Vermont. — Williams *v.* School Dist. No. 6, 33 Vt. 271; Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398.

Act Is Conclusive Proof of the Extent, Necessity and Propriety. — The act itself is the only adjudication necessary on the extent, necessity or propriety of the proposed taking and is conclusive thereof. New York, N. H. & H. R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1,070.

"It rests with the legislature . . . to determine for what public uses private property may be taken, and when the necessity exists which calls for its appropriation. Rensselaer & S. R. Co. *v.* Davis, 43 N. Y. 137.

"When such necessity or convenience is disclosed by the . . . legislature, the courts cannot question the wisdom of such declara-

to other persons or corporations,[9] and a determination by these grantees as to the necessity or propriety of exercising the delegated power, in the given instance, is conclusive on the courts.[10] The

tions." Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1,062, 15 L. R. A. 505.

9. *California.* — California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599; Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

Connecticut. — New York, N. H. & H. R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1,070.

Illinois. — Chicago R. I. & P. R. Co. *v.* Town of Lake, 71 Ill. 333.

Iowa. — Bennett *v.* City of Marion, 106 Iowa 628, 76 N. W. 844.

Minnesota. — Weir *v.* St. Paul, S. & T. F. R. Co., 18 Minn. 155.

New Jersey. — Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

New York. — Beekman *v.* Saratoga & S. R. Co., 3 Paige Ch. 45, 22 Am. Dec. 679.

10. *California.* — Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127; County of Sutter *v.* Tisdale, 136 Cal. 474, 69 Pac. 141; County of Siskiyou *v.* Gamlich, 110 Cal. 94, 42 Pac. 468; Humboldt Co. *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710; Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577; Tehama Co. *v.* Bryan, 68 Cal. 57, 8 Pac. 673; Los Angeles Co. *v.* San Jose L. & W. Co., 96 Cal. 93, 30 Pac. 969.

Colorado. — Warner *v.* Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238.

Connecticut. — New York, N. H. & H. R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1,070.

Illinois. — Dunham *v.* Village of Hyde Park, 75 Ill. 371; Chicago & N. W. R. Co. *v.* Town of Cicero, 154 Ill. 656, 39 N. E. 574; Ligare *v.* Chicago M. & N. R. Co., 166 Ill. 249, 46 N. E. 803; Pike *v.* City of Chicago, 155 Ill. 656, 50 N. E. 567.

Indiana. — Macy *v.* City of Indianapolis, 17 Ind. 267.

Iowa. — Bennett *v.* City of Marion, 106 Iowa 628, 76 N. W. 844.

Kansas. — Seward *v.* Rheiner, 2 Kan. App. 95, 43 Pac. 423; Stewart *v.* City of Neodesha, 3 Kan. App. 330, 45 Pac. 110.

Massachusetts. — Boston Water Power Co. *v.* Boston & W. R. Co., 23 Pick. 360.

Minnesota. — Knoblauch *v.* City of Minneapolis, 56 Minn. 321, 57 N. W. 928; Fohl *v.* Village of Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1,097; Minneapolis & St. L. R. Co. *v.* Village of Hartland, 85 Minn. 76, 88 N. W. 423.

Missouri. — City of Savannah *v.* Hancock, 91 Mo. 54, 3 S. W. 215.

New Jersey. — Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

New York. — People *v.* Smith, 21 N. Y. 595.

Ohio. — Giesy *v.* Cincinnati W. & Z. R. Co., 4 Ohio St. 308.

Necessity of Proposed Improvement. — Where the legislature has authorized municipalities to construct improvements and to condemn property therefor, wherever the same may be necessary, the municipality is the judge of the necessity, and its determination cannot be questioned by the courts. City of Kokomo *v.* Mahan, 100 Ind. 242.

When Statute Dispenses With Direct Proof of Necessity. — Where the statute provides that "the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity," proof of such ordinance or resolution is conclusive and renders incompetent all other evidence to prove or disprove the necessity. City of Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287.

Where the Necessity Is Determined by a Court. — The same rule applies where the determination of the question is delegated to an inferior court. In such case its decision is final and conclusive. Aldridge *v.* Spears, 101 Mo. 400, 14 S. W. 118.

Necessity for Additional Cemetery. Determination by municipality is conclusive. Barrett *v.* Kemp, 91 Iowa 296, 59 N. W. 76.

Necessity for "Sewer." — The determination of a city as to when a

effect of this rule is to render evidence of the necessity for the exercise of the right in the given instance incompetent.[11]

C. How Far a Judicial Question. — The questions, however, of whether the use to which it is sought to appropriate the property in the given instance is a public use within the meaning of the constitution,[12] and as to whether the exercise of the right in the given instance is authorized by the legislature or falls within the

" sewer " is necessary, and what its plan and character shall be, is conclusive and can not be inquired into by the courts. Leeds *v.* City of Richmond, 102 Ind. 372, 1 N. E. 711; Joplin Consol. Min. Co. *v.* City of Joplin, 124 Mo. 129, 27 S. W. 406; City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

11. Evidence of Necessity Inadmissible. — Where the party to whom the right to condemn is granted, has determined the necessity of the improvement, evidence as to the necessity for the same is inadmissible. Chicago & A. R. Co. *v.* City of Pontiac, 169 Ill. 155, 48 N. E. 485; DeBuol *v.* Freeport & M. R. R. Co., 111 Ill. 499.

And see cases cited in note 10.

12. *United States.* — Shoemaker *v.* United States, 147 U. S. 282.

Alabama. — Sadler *v.* Laugham, 34 Ala. 311.

California. — *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755; Consolidated Channel Co. *v.* Central P. R. Co., 51 Cal. 269.

Illinois. — Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379.

Massachusetts. — Lowell *v.* City of Boston, 111 Mass. 454, 15 Am. Rep. 39.

Missouri. — St. Louis, H. & K. C. R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483.

Nebraska. — Welton *v.* Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L. R. A. 496.

New Hampshire. — Concord Railroad *v.* Greely, 17 N. H. 47.

New York. — *In re* Deansville Cemetery Assn., 66 N. Y. 569, 23 Am. Rep. 86; *In re* Townsend, 39 N. Y. 171; *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88; *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

North Dakota. — Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

Tennessee. — Memphis Freight Co. *v.* Mayor of Memphis, 4 Cold. 419.

Vermont. — Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398.

Question Is for the Courts. — In Allen *v.* Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185, the court uses this language: "As private property can only be taken without the consent of the owner for public uses and upon the payment of a just compensation . . . it becomes important to consider whether the legislature are the final and conclusive judges of the existence of the public use, for which private property is authorized to be taken under the constitution. 'The provision in the constitution that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that where it is appropriated to public uses, he shall receive a just compensation therefor, necessarily implies,' observes Bigelow, C. J., in Talbot *v.* Hudson, 16 Gray, 421, 'that it can be taken only by such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals.' In this view, it is a direct and positive limitation upon the exercise of legislative power, and an act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should, by statute, take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, when this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. But the legislature have no power to determine finally upon the

legislative grant of power,[13] are proper subjects for judicial determination.[14]

In Some Cases the Question of Necessity Is for the Courts. — In some of the states either the constitution or statute provides that the question of necessity for the exercise of the power of eminent domain in each instance is to be determined by the court or jury before which the proceeding is pending. In such case the necessity for the improvement as well as for the particular taking is a question of fact, to be determined, as are other questions of fact, according to the evidence.[15]

extent of their authority over private rights. This is a power in its nature essentially judicial, which they are, by article 30 of the Declaration of Rights, expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits of the constitution, must be determined by the judiciary."

Public Use. — Judicial Question. In the case of *In re* Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429, the general doctrine is enunciated, and the court held, after inquiring into the matter, that the enterprise was not a public one, although the legislature had so declared it.

Contra to General Rule. — In the case of *In re* City of Buffalo, 39 N. Y. St. 417, 15 N. Y. Supp. 123, it was held that an ordinance of the city of Buffalo, providing that certain property should be taken by the city "in fee for public streets," was conclusive upon the court that the intention of the city was to acquire the property for the stated public purpose; and it was held that an offer on the part of the owner to show that the city did not intend to acquire the lands in question for a street, but simply to enable it to carry out a contract by which the land condemned was to be turned over to a railroad company, to be used for railroad purposes, was incompetent and inadmissible. Hatch, J., in a separate opinion dissents.

13. South Chicago R. Co. *v.* Dix. 109 Ill. 237; St. Louis J. & C. R. Co. *v.* Trustees Ill. Inst. for Blind, 43 Ill. 303; *In re* New York C. & H. R. R. Co., 77 N. Y. 248; Eldridge *v.* Smith, 34 Vt. 484; Bradley *v.* New York & N. H. R. Co., 21 Conn. 293.

"Whether a charter which assumes to confer authority on a company to take private property for a given purpose, conforms to the requirements of the constitution, and whether the company, in appropriating and making compensation for the property, has proceeded according to law, are questions, in case of controversy, for the courts." Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589.

14. Chicago & E. I. R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49.

15. Grand Rapids & I. R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294; Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570; Spring Val. Water Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681; *In re* Minneapolis St. L. R. Co., 36 Minn. 481, 32 N. W. 556.

This is the rule when the right to condemn is, by the statute, made dependent on the existence of a necessity. Milwaukee & St. P. R. Co. *v.* City of Faribault, 23 Minn. 167; *In re* St. Paul & N. P. R. Co., 34 Minn. 227, 25 N. W. 345; Rensselaer & S. R. Co. *v.* Davis, 43 N. Y. 137. Thus, in Michigan, the constitution of 1850 provides that when private property is taken for public use, "the necessity for using such property" and the compensation therefor "shall be ascertained by a jury . . . ." In such case the legislative determination is not conclusive; the necessity is a question of fact to be determined in the proceeding according to the ordinary rules of evidence. Paul *v.* Detroit, 32 Mich. 108; People *v.* Brighton, 20 Mich. 57; Power's Appeal, 29 Mich. 504; To-

D. Burden of Proof. — Where the right to condemn in the given instance is controverted and is an issue before the court, the burden of proving the facts justifying the particular condemnation is upon the party seeking to exercise the right.[16]

E. Waiver of Proof of Right to Condemn. — The right existing in the owner to compel the party seeking to condemn to prove his right

ledo, A. A. & G. T. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Whether Amount of Land Sought Is Necessary. — Unless the statute authorizes the party condemning to determine the amount of land necessary to be taken, the question as to whether the amount sought is necessary or excessive is for the court. Tedens *v.* Sanitary Dist., 149 Ill. 87, 36 N. E. 1,033; Southern P. R. R. Co. *v.* Raymond, 53 Cal. 223.

Right to Determine Necessity. Where the statute under which the proceeding is brought fails to expressly give the condemning company the right to determine the question of the necessity of the taking, the question of the necessity of the particular taking is one to be determined by the court, and the determination of such necessity by the company is not conclusive. This is especially true when other similar chapters of the same statute provide expressly that this question of necessity is a judicial one. "Therefore, any corporation claiming to exercise it (the right to determine absolutely the question of necessity) *suo arbitio*, exempt from any judicial determination as to the necessity or propriety of such exercise, must show a clear and unambiguous grant from the legislature of the right claimed." *In re* St. Paul & P. R. Co., 37 Minn. 162, 33 N. W. 701.

16. *Illinois.* — Reed *v.* Ohio & M. R. Co., 126 Ill. 48, 17 N. E. 807; O'Hare *v.* Chicago, M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

Indiana. — Neff *v.* Reed, 98 Ind. 341.

Missouri. — City of St. Louis *v.* Franks, 78 Mo. 41.

New Jersey. — Kountze *v.* Proprietors of Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252; Olmsted *v.* Proprietors of Morris Aqueduct, 46 N. J. L. 495.

New York. — Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1,008; *In re* Lockport & B. R. Co., 77 N. Y. 557.

Washington. — Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

The rule is that the party who claims title under the exercise of the right of eminent domain must show affirmatively that the requirements of the statute have been complied with. Dyckman *v.* Mayor, 5 N. Y. 434.

New York Rule. — In the early New York cases of *In re* New York Bridge Co., 4 Hun 635, and Buffalo & S. L. R. Co. *v.* Reynolds, 6 How Pr. 96, which were decided under a statute providing that upon the filing of the petition containing the necessary allegations any person affected might show cause and "may disprove any of the facts alleged in it," it was held that the petition itself was *prima facie* evidence of the truth of the facts stated therein, and the burden was upon the owner to disprove them. But in the case of *In re* Metropolitan El. R. Co., 18 N. Y. St. 134, 2 N. Y. Supp. 278, all the former decisions of the state on the subject are reviewed and the rule laid down that the burden of proof as to any particular issue is upon the party whom the law presumes to have particular knowledge thereof.

Tender of Amount of Compensation. — Where the law provides that before the right to take land for public road purposes is complete, the petitioning county may deposit the amount of compensation with the treasurer to pay the damages assessed, it is incumbent upon the county to prove such fact, and in the absence of affirmative proof thereof, it must be presumed that said deposit or tender was not made. Morris *v.* Coleman Co. (Tex. Civ. App.), 28 S. W. 380.

And the ordinary presumption of

F. Prima Facie Showing of Right to Condemn. — Where the petitioner has made out a *prima facie* case, showing that the right to take the property in question is in him, the evidence, in order to be sufficient to rebut this proof, must show that what is sought is clearly an abuse of power and a taking for an object not required for the convenient operation of the public use.[18]

2. Whether Right to Condemn Authorized in Particular Instance. A. Regularity of Preliminary Proceedings. —a. *In General.* The general rule is that the record of the preliminary proceedings of the board or tribunal seeking to condemn must show on its face that all the jurisdictional requisites have been complied with before it is sufficient proof of the right to condemn.[19] Some cases hold that to condemn may be waived by the acts and conduct of the owner in the proceeding.[17]

proper performance of duties by public officials is immaterial and does not alter the rule. County of Sutter *v.* McGriff, 130 Cal. 124, 62 Pac. 412; Sharp *v.* Speir, 4 Hill (N. Y.) 76; Adams *v.* Saratoga & W. R. Co., 10 N. Y. 328.

17. O'Hare *v.* Chicago M. & N. Co., 139 Ill. 151, 28 N. E. 923; Cahill *v.* Village of Norwood Park, 149 Ill. 156, 36 N. E. 606.

Thus in Illinois where the issue as to the right to take must be first settled by the court before submission of question of compensation to jury, if the facts are stated in petition and the owner fails to raise the issue in mode pointed out by law or goes to trial on the question of damages without first insisting on proof of the facts showing the right to condemn, the court may take the facts as true without any affirmative proof from the petitioner. Lieberman *v.* Chicago & S. S. R. T. R. Co., 141 Ill. 140, 30 N. E. 544.

Filing of Cross-Petition for Extra Damages. — By filing a cross-petition asking to have damages assessed for the injury done to the part of his lands not taken, defendant admits the right of the petitioner in the premises, to wit: that petitioner had the right to exercise the right of eminent domain and may lawfully condemn owner's lands for public purposes. *Held* also that defendant further recognized petitioner's capacity to condemn by asking the court to compel petitioner to exhibit the plan of its proposed railroad across defendant's land sought to be condemned. Ward *v.* Minnesota & N. W. R. Co., 119 Ill. 287, 10 N. E. 365.

By Failure to Insist on Proof at Proper Stage of the Proceeding. Logansport C. & S. W. R. Co. *v.* Buchanan, 52 Ind. 163.

Failure to Raise Question Before Submission of Damages to Jury. Waives Proof of Right to Take. Presumption is that right to take was proven. Chesapeake & O. R. Co. *v.* Pack, 6 W. Va. 397.

Estoppel of Owner to Question. Conduct in Proceeding. — Where the owner has filed a motion to dismiss a petition for condemnation and thereafter stipulated that the same might be denied and an order to that effect entered, and making no objection to the introduction of the charter of the condemning company in evidence before the court on the preliminary hearing as to the right to condemn, and having then conceded that the petitioning company had the necessary capacity, and thereafter submitting the damages to the jury without objection, the owner is thereafter estopped to question the right or power of the petitioner to acquire the property by condemnation. Sexton *v.* Union S. Y. & T. Co., 200 Ill. 244, 65 N. E. 638; Suver *v.* Chicago S. F. & C. R. Co., 123 Ill. 293, 14 N. E. 12.

18. South Chicago R. Co. *v.* Dix, 109 Ill. 237.

19. *Alabama.* — Commissioners' Court *v.* Thompson, 15 Ala. 134;

where jurisdiction is shown to have once existed every reasonable presumption will be indulged in favor of the regularity of the proceedings.[20] In some states the statute makes this presumption

Barnett *v.* State, 15 Ala. 829; Molett *v.* Keenan, 22 Ala. 484; Commissioners' Court *v.* Thompson, 18 Ala. 694.

California. — *In re* Grove St., 61 Cal. 438.

Connecticut. — Nichols *v.* City of Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Illinois. — Commissioners of Highways *v.* Hoblit, 19 Ill. App. 259; Chaplin *v.* Highway Com'rs., 129 Ill. 651, 22 N. E. 484.

Maine. — Southard *v.* Ricker, 43 Me. 575; Prentiss *v.* Parks, 65 Me. 559; Leavitt *v.* Eastman, 77 Me. 117.

Maryland. — Owings *v.* Worthington, 10 Gill & J. 283.

Massachusetts. — Inhabitants of Lancaster *v.* Pope, 1 Mass. 86.

Michigan. — Dupont *v.* Highway Com'rs., 28 Mich. 362; Daniels *v.* Smith, 38 Mich. 660; Lane *v.* Burnap, 39 Mich. 736; Nielsen *v.* Wakefield, 43 Mich. 434, 5 N. W. 458.

Mississippi. — White *v.* Memphis B. & A. R. Co., 64 Miss. 566, 1 So. 730; Allen *v.* Levee Com'rs, 57 Miss. 163.

Missouri. — Doyle *v.* Kansas City & S. R. Co., 113 Mo. 280, 20 S. W. 970; City of St. Louis *v.* Franks, 78 Mo. 41; Chicago, R. I. & R. R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; Fore *v.* Hoke, 48 Mo. App. 254.

Nebraska. — Robinson *v.* Mathwick, 5 Neb. 252; State *v.* Otoe Co., 6 Neb. 129.

New Jersey. — Semon *v.* City of Trenton, 47 N. J. L. 489, 4 Atl. 312.

New York. — Gilbert *v.* Columbia Tpke. Co., 3 Johns. Cas. 107.

Ohio. — Harbeck *v.* Toledo, 11 Ohio St. 219.

Oregon. — Thompson *v.* Multnomah Co., 2 Or. 34; State *v.* Officer, 4 Or. 180.

Pennsylvania. — Appeal of Central R. Co., 102 Pa. St. 38.

Rhode Island. — Howland *v.* School Dist. No. 3, 16 R. I. 257, 15 Atl. 74.

Texas. — Parker *v.* Ft. Worth & D. C. R. Co., 84 Tex. 333; 19 S. W. 518.

Washington. — City of Seattle *v.* Fidelity Trust Co., 22 Wash. 154, 60 Pac. 133.

Wisconsin. — Isham *v.* Smith, 21 Wis. 32.

The record must show the specific facts. General statements or conclusions to the effect that the proceedings were regular are insufficient. Whitely *v.* Platte Co., 73 Mo. 30; Semon *v.* City of Trenton, 47 N. J. L. 489, 4 Atl. 312.

In Parker *v.* Ft. Worth & D. C. R. Co., 84 Tex. 333, 19 S. W. 518, this language is used: "The proceeding to condemn land for public use is special in its character, and its validity must depend upon a compliance with the law authorizing it. Nothing is to be presumed in favor of the power of such a special tribunal, and it is incumbent on one seeking to show a right under its decree to show that the court had acquired jurisdiction to render it. Notice to the owner of the land sought to be condemned is necessary to jurisdiction, and this cannot be presumed from declarations contained in the report of the commissioners, nor from recitals in the decree of condemnation, but must be proved."

20. *California.* — County of Sutter *v.* Tisdale, 136 Cal. 474, 69 Pac. 141; County of Sutter *v.* McGriff, 130 Cal. 124, 62 Pac. 412; County of Sonoma *v.* Crozier, 118 Cal. 680, 50 Pac. 845.

Connecticut. — Baker *v.* Town of Windham, 25 Conn. 597.

Illinois. — Dumoss *v.* Francis, 15 Ill. 543; Chicago, B. & Q. R. Co. *v.* Chamberlain, 84 Ill. 333; Galbraith *v.* Littiech, 73 Ill. 209; Ferris *v.* Ward, 9 Ill. 499; Galena & C. U. R. Co. *v.* Pound, 22 Ill. 399.

Indiana. — Ney *v.* Swinney, 36 Ind. 454.

Iowa. — Keyes *v.* Tait, 10 Iowa 123.

Kansas. — Willis *v.* Sproule, 13 Kan. 257.

Minnesota. — Cassidy *v.* Smith, 13 Minn. 129; Knoblauch *v.* City of Minneapolis, 56 Minn. 321, 57 N. W. 928.

conclusive.[21]

b. *Parol Evidence.* — The courts differ widely as to whether parol evidence is admissible to contradict or to remedy the record of the preliminary proceedings. It is held in a number of cases that such evidence is admissible to aid or to contradict[22] such record; while

Mississippi. — Cage *v.* Trager, 60 Miss. 563.

New Hampshire. — Robbins *v.* Town of Bridgewater, 6 N. H. 524.

New Jersey. — State *v.* Lewis, 22 N. J. L. 564; State *v.* Common Council of Trenton, 36 N. J. L. 198.

Pennsylvania. — Road from App's Tavern, 17 Serg. & R. 388.

Vermont. — Wead *v.* St. Johnsbury & L. C. R. Co., 64 Vt. 52, 24 Atl. 361.

Virginia. — Chesapeake & W. R. Co. *v.* Washington C. & St. L. R. Co., 99 Va. 715, 40 S. E. 20.

Wisconsin. — Church *v.* City of Milwaukee, 31 Wis. 512; Roehrborn *v.* Schmidt, 16 Wis. 519; Neis *v.* Franzen, 18 Wis. 537.

Defective Record. — Where the owner denies the right of the city to condemn for street improvements on the grounds that the record of the preliminary proceedings of the city is defective or invalid against him, the burden of proof as to the non-existence of the valid record, and as to the non-existence of the requisite payment or tender of damages, is upon the person assailing the record. City of New Albany *v.* Endress, 143 Ind. 192, 42 N. E. 683. But see Terre Haute & L. R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

Silence of Records. — Evidence offered for the purpose, merely, of showing that the records are silent in not finding that certain facts occurred, or that certain requisite actions were performed, is inadmissible, because the presumption is that all the requisites were performed, although the records do not show such fact. The burden is on the defendant to show the non-existence of the necessary facts affirmatively and by direct evidence. County of Siskiyou *v.* Gamlich, 110 Cal. 94, 42 Pac. 468.

21. Statutory Rule of Evidence. Where the statute provided that, upon the performance of certain preliminary acts, the Board of Supervisors may, by order, direct condemnation proceedings to be instituted and "that the order of the board shall be conclusive proof of the regularity," of said preliminary acts, it was held that this statute established a rule of evidence for the particular proceeding, and the court had no authority to inquire into the proceedings before said board to determine their regularity. Los Angeles Co. *v.* San Jose L. & W. Co., 96 Cal. 93, 30 Pac. 969; Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127.

In Northern Pac. Term. Co. *v.* City of Portland, 14 Or. 24, 13 Pac. 705, it was held that such a statute did not vary the rule that the record must show the jurisdictional facts.

22. *Connecticut.* — Nichols *v.* City of Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Illinois. — Chaplin *v.* Highway Com'rs, 129 Ill. 651, 22 N. E. 484; People *ex rel* Greenwood *v.* Board of Supervisors, 125 Ill. 334, 17 N. E. 802.

Kansas. — Willis *v.* Sproule, 13 Kan. 257; Oliphant *v.* Atchison Co. Com'rs, 18 Kan. 386; St. Louis & S. F. R. Co. *v.* Mossman, 30 Kan. 336.

Maine. — Leavitt *v.* Eastman, 77 Me. 117.

Massachusetts. — Kohlhepp *v.* Inhabitants of West Roxbury, 120 Mass. 596.

Minnesota. — Cassidy *v.* Smith, 13 Minn. 129.

Nebraska. — Robinson *v.* Mathwick, 5 Neb. 252.

New York. — People *v.* Highway Com'rs, 27 Barb. 94; Adams *v.* Saratoga & W. R. Co., 10 N. Y. 328; Harrington *v.* People, 6 Barb. 607; Stewart *v.* Wallis, 30 Barb. 344; Chapman *v.* Swan, 65 Barb. 210.

Ohio. — Anderson *v.* Hamilton Co., 12 Ohio St. 635.

Texas. — Parker *v.* Ft. Worth &

other decisions hold that parol evidence is incompetent[23] to cure defects in the record or to attack it.[24]

B. Corporate Capacity of Party Seeking to Condemn. — a. *Judicial Knowledge.* — The court will take judicial knowledge of the fact that a city or town possesses the requisite corporate capacity to exercise the right of eminent domain.[25]

b. *Burden of Proof.* — The burden is on the party seeking to condemn to prove that it possesses the requisite corporate capacity.[26]

c. *Proof of de Facto Corporate Existence Sufficient.* — Where corporate capacity is essential to the right to condemn and is in issue, it is not necessary for the party seeking to exercise the right to prove a strict compliance with the law, in all its details, as to its organization and incorporation. But it must at least show that it is a body corporate *de facto*,[27] and proof of this fact is sufficient to show the requisite capacity.[28]

D. C. R. Co., 84 Tex. 333, 19 S. W. 518.

Wisconsin. — Williams *v.* Holmes, 2 Wis. 129; Austin *v.* Allen, 6 Wis. 134; Rorheborn *v.* Schmidt, 16 Wis. 519; Williams *v.* Holmes, 2 Wis. 129.

23. Parol Evidence Inadmissible. Where the records of a school district, having special statutory authority to condemn lands for public purposes, are the only proper evidence of their acts, their silence on the question of failure to agree with the owner is conclusive proof that the district made no legal attempt to agree, and parol evidence is inadmissible to show the contrary. Howland *v.* School Dist. No. 3, 16 R. I. 257, 15 Atl. 74.

24. *Illinois.* — Galena & C. U. R. Co. *v.* Pound, 22 Ill. 399; Galbraith *v.* Littiech, 73 Ill. 209; Looley *v.* Austin, 19 Ill. App. 325.

Indiana. — Wild *v.* Deig, 43 Ind. 455, 13 Am. Rep. 399; Miller *v.* Porter, 71 Ind. 521.

New York. — People *v.* Kniskern, 50 Barb. 87.

Pennsylvania. — Pittsburg *v.* Cluley, 74 Pa. St. 262.

Virginia. — Chesapeake & W. R. Co. *v.* Washington, C. & St. L. R. Co., 99 Va. 715, 40 S. E. 20.

Fraud. — Parol evidence inadmissible to show that preliminary petition was obtained by fraud. People *v.* Kniskern, 50 Barb. (N. Y.) 87.

25. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Bennett *v.* City of Marion, 106 Iowa 628, 76 N. W. 844.

26. Postal Tel. Cable Co. *v.* Oregon S. L. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

The ordinary rule of evidence, namely, that one standing in the position of asserting and relving on the existence of a fact, must prove the fact, is applicable. "In cases like this, there are strong reasons for adhering to, rather than departing from, that rule. The evidence as to the fact of incorporation, if there be any, is more peculiarly within the power of the petitioner than of those opposing the petition." The burden of proof, therefore, as to the fact of incorporation, is on the petitioner. Chicago, B. & N. R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75.

27. Lake Shore & M. S. R. Co. *v.* Baltimore & O. & C. R. Co., 149 Ill. 272, 37 N. E. 91.

Railroad Corporation. — Indispensable Proof. — Where an attempt is made to take private property for a railroad, due incorporation as a railroad corporation of the party seeking to condemn by proof or by presumption, is indispensable. Chicago B. & N. R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75.

23. Colorado E. R. Co. *v.* Union P. R. Co., 41 Fed. 293; Ward *v.* Minnesota & N. W. R. Co., 110 Ill. 287, 10 N. E. 365; McAuley *v.* Columbus C. & I. C. R. Co., 83 Ill. 348; Peoria & P. U. R. Co. *v.* Peoria & F. R.

d. *Evidence of Internal Relations of Stockholders Immaterial.* When the fact appears that the corporation seeking to condemn is one of a class to which the power of eminent domain has been delegated, evidence as to the mutual relations existing between the corporation and its stockholders is inadmissible;[29] but where it is incumbent upon the corporation to prove that it intends "in good faith" to construct the improvement for which the condemnation is brought, it is competent for the owner to show that by reason of the insolvent condition of the company and its failure to carry out its objects in the past, it did not intend to construct the improvement.[30]

Co., 105 Ill. 110; Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589; St. Louis, A. & T. H. R. Co. *v.* Belleville City R. Co., 158 Ill. 390, 41 N. E. 916.

Corporate Capacity. — How Shown. The production of charter or articles of incorporation of petitioner, and evidence of user of the franchises therein contained, are competent and sufficient proof that petitioner possesses the requisite corporate capacity. Lake Shore & M. S. R. Co. *v.* Baltimore & O. & C. R. Co., 149 Ill. 272, 37 N. E. 91.

Allegation in Petition Sufficient Unless Specifically Denied. — In the absence of a direct denial sufficient to raise an issue to be tried, the statement of corporate capacity and existence in the verified petition of a railroad company seeking to condemn lands is sufficient evidence thereof, and the burden of proof is on the landowner to contradict the same by clear and affirmative evidence. *In re* New York, L. & W. R. Co., 99 N. Y. 12, 1 N. E. 27.

Decree of Court of Record Conclusive. — The decree of a court of record in a proceeding formerly brought to test the legality of the petitioner's organization and incorporation is admissible as proof of said petitioner's right to condemn, in a condemnation proceeding thereafter brought, and is conclusive evidence of petitioner's due incorporation and legal status as determined in said former proceeding. Rialto Irr. Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484.

Special Act. — Where a railroad company is formed under special act, giving it the right to condemn, without prescribing special requirements contained in general law, it is not incumbent upon it to show compliance with any requirements not prescribed in the special act. Tennessee C. I. & R. Co. *v.* Birmingham S. R. Co., 128 Ala. 526, 29 So. 455.

Proof De Facto. — Conclusive. Where the company seeking to condemn has proved its corporate capacity *de facto,* this is conclusive, and evidence is inadmissible to contradict or rebut such proof in the condemnation proceedings. Postal Tel. Cable Co. *v.* Oregon S. L. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; Wellington & P. R. Co. *v.* Cashie & C. R. & L. Co., 114 N. C. 690, 19 S. E. 646.

29. Character of Petitioning Corporation. — Evidence to show that the corporation is controlled merely for the private interest of a few of its stockholders is immaterial when the fact that it is a railroad corporation, organized under the laws of the state, appears. The court has nothing to do with the interior workings of the company. *In re* New York & H. R. Co., 11 Abb. Pr. (N. S.), (N. Y.) 90.

Evidence of internal relations of stockholders, or as to whether officers were legally elected, is incompetent and immaterial. *In re* Minneapolis & St. L. R. Co., 36 Minn. 481, 32 N. W. 556.

30. Good Faith of Party. — Where the statute requires the petition to allege that it is the intention of the company, "in good faith," to construct the railroad mentioned in its charter, and this allegation is properly controverted, evidence, on the part of the owner, that the company had no stability of capital and had done nothing during fifteen years of

e. *Determination to Condemn.* — It is not necessary that the corporation seeking to condemn produce positive evidence of a corporate resolution determining the intention of the company to exercise the right in the given instance.[31] The determination may sufficiently appear from the surrounding facts and circumstances.[32]

C. Use for Which Condemnation is Sought. — a. *Presumption.* — It is presumed that the property taken will be applied to the use for which it is sought to be condemned.[33]

b. *Use Within the Legislative Grant.* — Where the legislative grant in general terms authorizes the condemnation of private property for "any lawful use or purpose," it is upon the party seeking to condemn to show that the purpose is one for which the legislature has authorized the exercise of the power of eminent domain.[34]

c. *Whether the Proposed Use is a Public Use.* — **(1.) In General.** It is impossible to lay down any general rule governing the determination of the question as to whether a certain use is a public use.[35]

its corporation to show a *bona fide* purpose to construct the railway, is admissible, and it is error for the court to refuse it. *In re* Metropolitan Transit Co., 15 N. Y. St. 977, 1 N. Y. Supp. 114.

31. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Lake Shore & M. S. R. Co. *v.* Baltimore & O. & C. R. Co., 149 Ill. 272, 37 N. E. 91; City of East Dallas *v.* Barksdale, 83 Tex. 117, 18 S. W. 329; Tennessee C. I. & R. Co. *v.* Birmingham S. R. Co., 128 Ala. 526, 29 So. 455.

Preliminary Proceedings. — How Authenticated. — The records of the Board of Supervisors in a proceeding to condemn property for road purposes may be authenticated by the testimony of one of the supervisors. The minutes of the board are not essential. County of Siskiyou *v.* Gamlich, 110 Cal. 94, 42 Pac. 468.

Statement in Petition Sufficient. It is not necessary that the petitioning corporation show that a technical corporate action determining the necessity was made. The statement in the petition that the petitioner has determined it necessary to take the particular property sought is *prima facie* sufficient. Kountze *v.* Proprietors of Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252.

32. The determination may sufficiently appear from the surrounding circumstances, such as the passage of an ordinance or other acts of the city council in connection with the improvement. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Kountze *v.* Proprietors of Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252.

Presumption from Actual Taking. The intentions of a city to condemn property for public purposes may be presumed from the fact that they actually appropriated the property to public use without disclaiming that such was their purpose. This presumption operates against the city as well as in its favor. City of East Dallas *v.* Barksdale, 83 Tex. 117, 18 S. W. 329.

33. United States *v.* Certain Lands, 112 Fed. 622.

34. State *v.* City of Newark, 54 N. J. L. 62, 23 Atl. 129.

35. Olmstead *v.* Camp, 33 Conn. 532, 89 Am. Dec. 221.

What General Facts May Be Considered. — It is impossible to lay down any general rule by which it may be determined whether a certain use is a public use. "In all such cases, the character of the business proposed to be done, and the manner of doing it, must be looked to in determining whether the use will be a public or private one." "If, from the nature of the business, and the way

While the determination of the legislature that a certain use is a public use is not conclusive on the courts, yet, when the legislature has determined that private property may be taken for a certain designated purpose, this determination will not be interfered with or questioned by the courts except in case of gross error or palpable wrong.[36]

(2.) Burden of Proof. — Where the question as to whether the contemplated use is public is before the court for determination, the burden of proof is upon the party seeking to condemn to show that the use is public.[37]

d. *Prima Facie Proof of Public Use.* — Where the petitioner has proved *prima facie* that the use for which the taking is sought is a public use, the evidence of the owner in order to be sufficient to overcome the effect of such proof must be clear and convincing that the intended use is not for the public convenience or benefit.[38]

D. Necessity for the Proposed Improvement. — a. *No Presumption.* — In the absence of legislative assertion to the contrary, the law does not presume that the use to which it is sought to apply particular property by condemnation is a public necessity. It is

in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertains to all strictly private enterprises, it may safely be concluded the use is private, and not public." Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379.

36. *United States.* — U. S. *v.* Gettysburg Elec. R. Co., 160 U. S. 668.

California. — Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; Stockton & V. R. Co. *v.* City of Stockton, 41 Cal. 147; *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755; Los Angeles Co. *v.* Reyes (Cal.), 32 Pac. 233; Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577; Monterey Co. *v.* Cushing, 83 Cal. 507, 23 Pac. 700; Consolidated Channel Co. *v.* Central P. R. Co., 51 Cal. 269; City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

Connecticut. — Olmstead *v.* Camp, 33 Conn. 532, 89 Am. Dec. 221.

Indian Territory. — Tuttle *v.* Moore, 3 Ind. Ter. 712, 64 S. W. 585.

Iowa. — Bankhead *v.* Brown, 25 Iowa 540.

Nebraska. — Welton *v.* Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L. R. A. 496.

Nevada. — Dayton Gold & Sil. Min. Co. *v.* Seawell, 11 Nev. 394; Overman Sil. Min. Co. *v.* Corcoran, 15 Nev. 147.

Mining. — The determination of the legislature that mining is a public use will not be interfered with by the courts. Douglass *v.* Byrnes, 59 Fed. 29.

Legislative Determination Conclusive. — The determination of the legislature that a "sewer" is a public use is conclusive. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604. Also that a certain designated railroad is a public use. Buffalo & N. Y. C. R. Co. *v.* Brainard, 9 N. Y. 100.

37. City of St. Louis *v.* Franks, 9 Mo. App. 579, *affirmed* in 78 Mo. 41.

38. Sufficiency of Proof to Rebut Prima Facie Proof of Public Use. Evidence on the part of defendant that the strip of land sought to be taken for sidetrack, which was twenty-five feet wide, would not be of sufficient width for a team and wagon track and for loading and unloading cars on account of the inconvenience in passing, is sufficient to show that the track was not intended for public use. "The declarations of the petitioner's right-of-way agent

a question of fact to be established in the usual way, and the burden of proof is upon the party asserting the necessity.[39]

b. *Opinion Evidence Inadmissible.* — Opinion evidence is not admissible to prove or disprove the necessity of a proposed improvement.[40]

c. *Consideration of Future Conditions Competent* — Where the necessity of the proposed improvement is to be determined by the court, the evidence is not confined to the present existing needs of the community, but it is proper and competent to consider those conditions which may reasonably be expected to exist in the future.[41]

d. *Sufficiency of the Evidence.* — The evidence need not show an absolute necessity for the proposed improvement. Whenever it appears from the evidence that the public interest would be benefited to a reasonable extent by the improvement, this is sufficient;[42] but

during negotiations with owners prior to condemnation as to the intended use are incompetent, he not being authorized to determine the question about which declarations were made or to speak for petitioner on that subject." Hodgerson *v.* St. Louis, C. & St. P. R. Co., 160 Ill. 430, 43 N. E. 614.

Evidence That the Use Is a Nuisance Incompetent. — Evidence that the use would become a nuisance is immaterial and inadmissible. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

39. Minneapolis & St. L. R. Co. *v.* Village of Hartland, 85 Minn. 76, 88 N. W. 423; Mansfield C. & L. M. R. Co. *v.* Clark, 23 Mich. 519.

Thus in Michigan where the constitution provides that the "necessity for using such property" shall be determined by the jury, the evidence must show not only that the particular land is needed for the use, but that the use itself is public and necessary. Power's Appeal, 29 Mich. 504; Grand Rapids *v.* Grand Rapids & I. R. R. Co., 58 Mich. 641, 26 N. W. 159.

40. Opinion evidence is not admissible to prove the necessity for opening a street. City of Grand Rapids *v.* Bennett, 106 Mich. 528, 64 N. W. 585.

Public Utility of Proposed Ditch. Opinion of a witness as to whether or not a proposed ditch is or will be a public utility is inadmissible. Yost *v.* Conroy, 92 Ind. 464, 47 Am. Rep. 156. This was rejected on the general ground that the jury was capable of judging from the facts, and hence there was no need of expert opinion.

Harmless Error. — Where the witness is familiar with the subject and has stated *facts* showing the necessity, an error in permitting him to give his opinion will be held harmless. City of Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525.

41. Kountze *v.* Proprietors of Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252; Olmsted *v.* Proprietors of Morris Aqueduct, 46 N. J. L. 495; *In re* New York C. & H. R. R. Co., 77 N. Y. 248.

"Not only the present demands of the public, but those which may be fairly anticipated on account of the future growth of the city, are to be considered." Spring Val. Water Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

42. Opening of Street. — Where the jury view the premises and the evidence of petitioner tended to show that a considerable population would secure a more direct route into the city, that the fire department would secure better facilities, that school children in the vicinity would be better accommodated, and that the opening of the street would bring the people living beyond five blocks nearer the center of the city, this was held sufficient to sustain the finding

proof of mere private necessity or convenience is insufficient.[43]

E. Necessity for the Particular Taking — a. *In General.*

(1.) Reasonable Necessity for the Particular Taking. — Where the legislature has not delegated to the party seeking to condemn the absolute right to determine what property is necessary for the intended use, it must be shown that the taking of the particular property in question is reasonably required for the public purpose for which it is sought to be condemned.[44]

that a necessity for opening the street existed. City of Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525.

Public Utility of Proposed Highway. — Where the public utility of a proposed highway is the issue, this need not be shown positively by the direct evidence; it may sufficiently appear from the surrounding facts and circumstances in the evidence. Hagaman *v.* Moore, 84 Ind. 496.

Effect of Abandonment of Proceedings. — The fact that after the municipality had determined to open a street, they subsequently discontinued the proceedings is not even *prima facie* evidence that the improvement or the taking was unnecessary in the first instance, and does not have the effect of making such proceedings wrongful. Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38.

43. Memphis Freight Co. *v.* Mayor of Memphis, 4 Coldw. (Tenn.) 419.

Where the evidence of necessity merely shows that the proposed opening of the street would be a convenience to a manufacturing establishment on the north side thereof, and to a few lots on the south side thereof, this is insufficient. City of Detroit *v.* Daly, 68 Mich. 503, 37 N. W. 11.

44. New Orleans P. R. Co. *v.* Gay, 32 La. Ann. 471; *In re* St. Paul & N. P. R. Co., 34 Minn. 227, 25 N. W. 345; New York C. & H. R. R. Co. *v.* Metropolitan Gas Light Co., 5 Hun (N. Y.) 201; Carolina Cent. R. Co. *v.* Love, 81 N. C. 434; McWhirter *v.* Cockrell, 2 Head (Tenn.) 9; Baltimore & O. R. Co. *v.* Pittsburg, W. & Ky. R. Co., 17 W. Va. 812.

Failure to Plead Issue. — Proof of the necessity is not waived by omission of owner to raise the issue by answer. Carolina Cent. R. Co. *v.* Love, 81 N. C. 434.

California. — Wilmington C. & R. Co. *v.* Dominguez, 50 Cal. 505; City of Pasadena *v.* Stimson, 91 Cal. 238, 21 Pac. 604; Spring Val. Water Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

Michigan. — Power's Appeal, 29 Mich. 504.

New York. — *In re* N. Y. Cent. R. Co., 66 N. Y. 407.

Ohio. — Giesy *v.* Cincinnati W. & Z. R. Co., 4 Ohio St. 308.

Previous Conduct of Railroad Company. — Evidence that, at the time of original establishment and location of the railroad grounds, which was three months before the proceeding, the land in question was not included in the undisputed wants of the company, is admissible as an admission of the company that the land in question is not needed for the purposes of the company. Dietrichs *v.* Lincoln & N. W. R. Co., 13 Neb. 361, 13 N. W. 624.

Knowledge of Court. — On an *ex parte* presentation of a petition to assess damages for land sought to be taken by a railroad company, the court may resort to its own knowledge, in the absence of all proof to the contrary, and if satisfied therefrom that the extra land is not needed, he may dismiss the petition. It is indispensable that the petitioner prove affirmatively and conclusively that the necessity exists. Jefferson & P. R. Co. *v.* Hazeur, 7 La. Ann. 182.

Possible, Speculative, Future Requirements Insufficient. — Where the company seeking to condemn claims that the future conditions require the condemnation of the land sought, it is incumbent upon the company to prove beyond reasonable doubt that

(2.) Burden of Proof. — The party seeking to condemn has the burden of proving that the taking of the particular property in question is necessary for the use for which it is sought to be condemned.[45]

(3.) Sufficiency of the Evidence. — It is not essential that the party seeking to condemn prove that no other property obtainable would be sufficient for the contemplated use. Proof that the particular property in question is reasonably required for the purpose of the contemplated improvement is *prima facie* sufficient.[46] In the

the undisputed increase in business, upon which the necessity is based, will occur. Evidence showing merely the possibility of collateral enterprises which, if finally completed, will perhaps greatly increase the business of the railroad, "the evidence not showing that the enterprises had been commenced or were on a solid financial basis" is insufficient proof of the necessity for the taking. Rensselaer & S. R. Co. *v.* Davis, 43 N. Y. 137.

Great Convenience Insufficient. "Necessity is not made out by proof of great convenience, nor the enhancement of values, nor of the accumulation of property of the same kind for the same use." Spring Val. Water Works *v.* San Mateo Water Works, 64 Cal. 123, 28 Pac. 447; Prather *v.* Jeffersonville M. & I. R. Co., 52 Ind. 16.

45. Spring Val. Water Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681; Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605; *In re* New York Cent. R. Co., 66 N. Y. 407; *In re* Water Com'rs *v.* Clarke, 50 Hun 605, 3 N. Y. Supp. 347.

The party seeking to condemn, whether a municipality or not, has the burden of proving that the proposed improvement (and the taking of the particular land sought) is a public necessity. Minneapolis & St. L. R. Co. *v.* Village of Hartland, 85 Minn. 76, 88 N. W. 423.

46. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Giesy *v.* Cincinnati W. & Z. R. Co., 4 Ohio St. 308.

In Rialto Irr. Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484, the court says: "It was not necessary for plaintiff to show that there was absolutely no other way but the one designated in its complaint by which the water could be brought upon its land. The fact that it might have been possible, as shown by the evidence, by going a long way around and condemning other lands at a much greater expense, to accomplish the purpose sought, is immaterial."

Necessary Changing of River Course. — Riparian Rights. — The evidence need not show that the taking is absolutely essential; and where the testimony of competent railroad engineers is that the present location of a railroad, which crosses a river upon bridges at two points, is dangerous because of the probability of ice-floes destroying the bridges in winter, and that the most feasible way of averting this is to change the course of the river and cause it to flow all on one side of the road, thereby obviating the necessity of bridges, this is sufficient proof of the necessity of making such change, and of condemning the riparian rights thereby. Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

What Elements May Be Considered. — In Mahoney *v.* Spring Val. Water Works Co., 52 Cal. 159, where the question was as to the necessity of taking property for the purpose of supplying a city with water, the court says: "In arriving at a conclusion on this subject, the number of persons to be supplied by the corporation, and other incidents connected with its organization and objects, are to be considered. The purpose of the corporation may be to supply a small hamlet, or — as avowed by the articles of incorporation — it may be to supply a great and growing city. The distance of the water source from

absence of proof to the contrary, the fact that the party seeking to condemn has selected the particular land is sufficient proof of the necessity for the taking thereof.[47]

(4.) Selection by State Agents. — (A.) When Made Conclusive by Statute. — Where the statute delegates the right to determine what particular property is necessary to be taken to the party seeking to condemn, and such party has determined that the taking of the particular property in question is necessary, this is conclusive evidence of the fact, and in a subsequent proceeding to condemn the property, evidence that the particular taking is not necessary is inadmissible.[48]

whence the element is to be conducted — the fact that the corporation is already the owner of water reasonably sufficient to satisfy every demand — these and other circumstances may properly influence the judgment of a court in determining whether the property sought to be condemned is necessary to the public use."

47. Colorado E. R. Co. *v.* Union P. R. Co., 41 Fed. 293; Mobile & G. R. Co. *v.* Alabama Midland R. Co., 87 Ala. 501, 6 So. 404; Chicago & W. I. R. Co. *v.* Dunbar, 100 Ill. 110; Fall River I. W. Co. *v.* Old Colony & F. R. R. Co., 5 Allen (Mass.) 221; New York C. & H. R. R. Co. *v.* Metropolitan Gas Light Co., 5 Hun (N. Y.) 201; Cleveland & P. R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

In the absence of contradictory proof the determination by the general manager of the condemning company is sufficient. Dietrichs *v.* Lincoln & N. W. R. Co., 13 Neb. 361, 13 N. W. 624.

Evidence of the existence of the public use and that the condemning company has located its right of way through and across and on the lands sought, is *prima facie* sufficient to establish the necessity for the taking of the particular piece sought. San Francisco & S. J. Val. R. Co. *v.* Leviston, 134 Cal. 412, 66 Pac. 473; O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

Ordinance. — The ordinance adopted by the sanitary district locating the right of way across the lands in question is admissible in the condemnation proceeding as evidence of the necessity for the taking. Schuster *v.* Sanitary Dist., 177 Ill. 626, 52 N. E. 855.

48. County of Sutter *v.* Tisdale, 136 Cal. 474, 69 Pac. 141; County of Siskiyou *v.* Gamlich, 110 Cal. 94, 42 Pac. 468; Hays *v.* Risher, 32 Pa. St. 169; Supervisors *v.* Gorrell, 20 Gratt. (Va.) 484; Boston & M. R. Co. *v.* County of Middlesex, 1 Allen (Mass.) 324.

Necessity for Improvement. — Necessity for Particular Taking. — Distinction. — In Frick Coke Co. *v.* Painter, 198 Pa. St. 468, 48 Atl. 302, which was a proceeding to determine the necessity of a contemplated lateral railroad, and the damages to be caused thereby, under an act providing that the petitioner should "survey and mark such route as he . . . shall think proper to adopt," and thereupon the viewers and subsequently on appeal, the courts and jury, should determine the necessity for the road, and the damages sustained thereby, it was held that neither the viewers nor the jury on appeal had the right to consider the question as to the necessity of the particular location adopted by the petitioner; that their powers were confined to a determination of the necessity of the improvement itself and the damages; therefore the fact that a better and more convenient route might have been selected is immaterial and irrelevant.

Lack of Necessity Inadmissible. In Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402, it was held that "there is no constitutional right on the part of the landowners in this state to have the question of expediency of the taking in any par-

(B.) Presumption in Favor of Selection. — Although the statute does not make the selection of a particular locality for the proposed improvement by the party seeking to condemn conclusive, yet, where such selection has been made by a party to whom the right of condemnation has been delegated, it is presumed that he has made the best and most practicable selection possible. The burden is on the party assailing such selection to prove the contrary by clear and convincing evidence.[49]

(C.) What Admissible to Rebut. — Evidence of a better and more practical location for the improvement, the same being equally available with that which is sought, is competent.[50] But evidence that another railroad company had formerly chosen a different route than the one sought to be condemned is immaterial and incompetent.[51]

ticular instance submitted to a court or jury." *Citing* Holt *v.* Somerville, 127 Mass. 408. Evidence on the part of the owner that there was no necessity for the taking of said lands by the city was incompetent and inadmissible. The determination by said city that it was necessary to take said lands for said purposes was held to be conclusive evidence of the necessity.

49. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; *In re* New York & H. R. R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385; City of Philadelphia *v.* Ward, 174 Pa. St. 45, 34 Atl. 458.

Evidence that there are other satisfactory lands available is insufficient to overthrow the presumption. *In re* New York & H. R. Co., 11 Abb. Pr. (N. S.), (N. Y.) 90.

Selection by Company. — Where a railroad company to whom has been given the right to construct a railroad in the public street with the necessary switches and turn-outs, has constructed certain switches and turn-outs, the presumption of the law is that the same were necessary and proper, and the burden is on the party contesting to prove the contrary. Carson *v.* Central R. Co., 35 Cal. 325.

Telegraph Line, Discretion of Company. — The determination of the telegraph company, to whom has been delegated the right of condemnation, as to when and where its line shall be built, is sufficient proof of the necessity for the particular taking. The matter is in the discretion of the company, and such discretion will not be reviewed except in case of gross abuse. Postal Tel. Cable Co. *v.* Oregon S. L. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

Course of Sewer. — Where the statute provides that no sewer shall be constructed through private property when it is practicable to construct it along a street or highway, the judgment of the city that the sewer shall be constructed on private land will not be interfered with except upon strong showing of abuse. Joplin Consol. Min. Co. *v.* City of Joplin, 124 Mo. 129, 27 S. W. 406.

50. Testimony of an experienced engineer that he had surveyed a shorter route, through lands sparsely settled and upon a better grade than that chosen by the city for a sewer, is admissible and competent, but not conclusive. City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

51. In a proceeding to condemn lands for railroad right of way, where the question of the necessity for the particular taking was in issue, the owner offered to prove that the general line of the road, described in the petition, was formerly located by another railroad company across a different part of the land. The exclusion of this evidence was held proper. "The mere fact that some one had, at some time in the past, located a line of road, or had actually built on such line or a different part

(5.) When Direct Proof Unnecessary. — (A.) Acquiescence of Owner. The fact that the owner knew of the location and construction of the improvement on his property and acquiesced therein, and the operation thereof for a considerable time, is sufficient proof of the necessity for the taking of the particular land on which the improvement is constructed.[52]

(B.) Acts of Railroad Company in Possession. — It has been held that, in a statutory proceeding brought by the owner of land, which has been taken by a railroad company and used for railroad purposes for a number of years without payment of compensation, to recover just compensation therefor the owner is not bound to allege or prove the necessity for the taking, and that the company is estopped to urge the question.[53]

b. *Amount of Land Necessary.* — **(1.) Presumption from Statute or Charter.** — Where the statute or charter of the condemning corporation gives the right to appropriate land to a certain designated extent in area, this furnishes a conclusive presumption that the amount of land designated in the statute or charter is necessary for the purposes of the corporation, and dispenses with further proof of such necessity.[54]

(2.) Sufficiency of Proof. — Sufficient proof of the necessity for taking the desired quantity is made out by showing that the amount sought is reasonably required for the use.[55] The evidence is not limited to the present needs of the community, but the reasonable requirements of the future may and should be considered.[56] The amount of property necessary to be taken is to a great extent in the discretion of the party seeking to condemn.[57]

thereof from that which the respondents were seeking to condemn, was immaterial." Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

52. Chicago, M. & St. P. R. Co. *v.* Richardson, 86 Wis. 154, 56 N. W. 741.

53. In Babcock *v.* Chicago & N. W. R. Co., 107 Wis. 280, 83 N. W. 316, 81 Am. St. Rep. 845, the following language is used: "It would be incongruous to permit the latter to deny the necessity of its taking, or to necessitate the allegation of proof by the other party, when the whole proceeding rests on its own acts affirming such necessity in the most unambiguous manner." See also Charnley *v.* Shawano W. P. & R. I. Co. (Wis.), 83 N. W. 316.

Estoppel. — The company is estopped to urge that it acted illegally or outside its rights in appropriating the property. Parker *v.* Boston & Maine Railroad, 3 Cush. (Mass.) 107.

54. Stark *v.* Sioux City & P. R. Co., 43 Iowa 501; Wellington & P. R. Co. *v.* Cashie & C. R. & L. Co., 114 N. C. 690, 19 S. E. 646; Robinson *v.* Pennsylvania R. Co., 161 Pa. St. 561, 29 Atl. 268.

Where the charter of a railroad company gives it the right to condemn land not exceeding a certain width, the presumption is conclusive that the width designated in the charter is necessary. Wisconsin Cent. R. Co. *v.* Cornell University, 52 Wis. 537, 8 N. W. 491.

55. O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

56. Kountze *v.* Proprietors of Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252; Olmsted *v.* Proprietors of Morris Aqueduct, 46 N. J. L. 495.

57. Schuster *v.* Sanitary Dist., 177 Ill. 626, 52 N. E. 855; Chicago & E. I. R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49; O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 28 N. E. 923;

(3.) Extension of Improvement. — Where an attempt is made to enlarge or extend an existing improvement on the grounds of necessity, and for that purpose condemnation is brought to acquire other property in addition to that already devoted to the use, it is incumbent on the party seeking to condemn to establish clearly and affirmatively by direct evidence that such extra or additional property is needed for such use.[58]

F. Inability to Agree With Owner as to Compensation. a. *When Evidence of Inability to Agree is Essential.* — Where the statute makes an attempt and failure to agree with the owner of the property sought as to the compensation to be paid for the taking, an essential prerequisite to the right to condemn, and this fact is controverted, the attempt to agree and its failure must be

In re New York C. & H. R. R. Co., 77 N. Y. 248; Hays *v.* Risher, 32 Pa. St. 169; City of Philadelphia *v.* Ward, 174 Pa. St. 45, 34 Atl. 458; Eldridge *v.* Smith, 34 Vt. 484; Hingham & Q. B. Tpke. Corp. *v.* County of Norfolk, 6 Allen (Mass.) 353.

"Every company seeking to condemn land for public improvement must, in a modified degree, be permitted to judge for itself as to what amount is necessary for such purpose." Smith *v.* Chicago & W. I. R. Co., 105 Ill. 511.

But such company cannot abuse the right. It is subservient to the constitution and statutory conditions as to necessity. Tedens *v.* Sanitary Dist., 149 Ill. 87, 36 N. E. 1033.

"The very granting of the charter law implies that land is necessary to be taken for the right of way, and unless the discretion is abused, the courts will not interfere." Wellington & P. R. Co. *v.* Cashie & C. R. & L. Co., 114 N. C. 690, 19 S. E. 646.

Discretion of Municipality. — In Bennett *v.* City of Marion, 160 Iowa 628, 76 N. W. 844, which was a proceeding by a city to condemn lands for sewer purposes under a statute giving the city the right to acquire real estate "necessary for the purpose of outlets for their sewers," it was held "the city council had the power to finally determine the necessity for the improvement and its location, but its determination of the amount of land necessary theretor is subject to review by the courts." . . . "Large discretion is lodged with the city council in fixing the amount of land necessary for the particular improvement, and its determination should only be interfered with to prevent the abuse of power. If the land sought to be taken will to some extent conduce to the public use for which it is to be devoted, the decision of the municipality that it is necessary therefor should not be interfered with; otherwise it should be set aside."

58. Rensselaer & S. R. Co. *v.* Davis, 43 N. Y. 137; *In re* New York Cent. R. Co., 66 N. Y. 407; Olmsted *v.* Proprietors of Morris Aqueduct, 46 N. J. L. 495; Robinson *v.* Pennsylvania R. Co., 161 Pa. St. 561, 29 Atl. 268.

Necessity of Additional Land for Existing Railroad. — Where the charter gives to a railroad corporation the right to take a strip of land of a certain width for the purposes of its incorporation, and gives it the further right to take as much additional land *"as may be necessary"* for the purposes of the railroad, no extra or additional land can be appropriated until the necessity for taking the particular additional land sought is clearly established, and the burden of proof is on the railroad company. Wisconsin Cent. R. Co. *v.* Cornell University, 52 Wis. 537, 8 N. W. 391

Condemnation of Water Rights. Where an existing corporation seeks to condemn certain additional water rights, easements and lands for the purposes of its incorporation — viz., to supply a community with water — it must show affirmatively that the rights it seeks are necessary for that

shown before the right to take is complete.[59] But where the right to condemn is given by special act in which no mention is made

particular purpose. Kountze *v.* Proprietors of Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252.

59. *California.* — Gilmer *v.* Lime Point, 19 Cal. 47; Contra Costa C. M. R. Co. *v.* Moss, 23 Cal. 324.

Connecticut. — New York N. H. & H. R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1,070; Williams *v.* Hartford & N. H. R. Co., 13 Conn. 397.

Illinois. — Chicago, B. & Q. R. Co. *v.* Chamberlain, 84 Ill. 333; Reed *v.* Ohio & M. R. Co., 126 Ill. 48, 17 N. E. 807; Bowman *v.* Venice & C. R. Co., 102 Ill. 459; Chaplin *v.* Highway Com'rs, 129 Ill. 651, 22 N. E. 484.

Indiana. — Lake Shore & M. S. R. Co. *v.* Cincinnati W. & M. R. Co., 116 Ind. 578, 19 N. E. 440.

Kentucky. — Portland & G. Tpke. Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794.

Michigan. — Grand Rapids L. & D. R. Co. *v.* Weiden, 69 Mich. 572, 37 N. W. 872; Chicago & M. L. S. R. Co. *v.* Sanford, 23 Mich. 418.

Missouri. — Chicago, R. I. & R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776.

New York. — *In re* Lockport & B. R. Co., 77 N. Y. 557; *In re* Marsh, 71 N. Y. 315; *In re* Water Com'rs *v.* Clarke, 50 Hun 605, 3 N. Y. Supp. 347; Dyckman *v.* Mayor, 5 N. Y. 434.

Ohio. — Powers *v.* Hazelton & L. R. Co., 33 Ohio St. 429.

Oregon. — Oregon R. & N. Co. *v.* Oregon R. E. Co., 10 Or. 444.

Court Will Not Take Judicial Notice. — Where a city charter provides that if the city is unable to agree with the owners as to purchase price of a proposed right of way, then the justice of the peace is to issue a venire and summon a jury to pass upon the necessity and damages. The fact of such failure to agree must be affirmatively proven to the justice in such form as to be made a matter of record before he has any jurisdiction to proceed. The justice cannot take judicial notice of the failure to agree. Morseman *v.* Ionia, 32 Mich. 283.

Proof of Attempt and Failure Essential. — Where the statute provides in effect that, if any person claiming damages on account of the improvement of a highway, under an order of the board of supervisors, is dissatisfied with the award of the viewers, "and cannot agree with the board of supervisors as to the amount of damages sustained," such person shall commence an action to recover said damages. It is incumbent upon the plaintiff in said action to allege and prove an attempt and failure to agree with the board as to the damages sustained. The filing of a petition for "just and reasonable damages" with the board, which filing is made a statutory condition precedent to the action for damages, is not sufficient proof of an attempt and failure to agree; there must be a distinct and *bona fide* attempt to agree made by the party. Lincoln *v.* Colusa Co., 28 Cal. 663.

Contra. — In Swinney *v.* Ft. Wayne M. & C. R. Co., 59 Ind. 205, which was a proceeding under a statute which provided "*in case any company* formed under this act is *unable to agree* for the purchase of any real estate required" that "such company is hereby authorized to enter upon any land for the purpose of examining and surveying its railroad line," and further providing that "*if the corporation shall not agree* with the owner of the land, such corporation shall deliver to such owner . . . a copy of such statement of appropriation," whereupon the court shall appoint commissioners to fix the amount of compensation, it was held that it was not necessary for the company to show that it had offered to purchase the land before commencing the proceedings to appropriate it. An attempt was made to distinguish the decisions of other states holding a contrary doctrine on the ground that the statutes in such other states give the right of appropriation only upon the express condition that the owner refuses to convey upon the ap-

of the necessity of an attempt to agree as to compensation, such inability to agree is immaterial, and need not be proven.[60]

b. *When Proof of Inability to Agree Excused.* — Where the owner of the property sought to be condemned is a minor,[61] or non-resident,[62] proof of an inability to agree is not required.

c. *Burden of Proof.* — The burden of proving a failure to agree as to the amount of compensation is upon the party seeking to condemn.[63]

d. *Good Faith of Petitioner.* — In case the inability to agree is in issue, evidence on the part of the owner to show the reasonable value of the property, for the purpose of proving that the alleged attempt of the company to agree was not made in good faith, because the amounts offered by the company were disproportionate to the value, is admissible and competent.[64]

plication of the party desiring the lands.

In Cory *v.* Chicago, B. & K. C. R. Co., 100 Mo. 282, 13 S. W. 346, it is held that, although the constitution provides that when "such corporation and the owners cannot agree upon the proper compensation to be paid such corporation may bring proceedings to condemn, the averment in the petition as to the failure to agree is sufficient proof thereof" and it was not necessary for the defendant (railroad corporation) to sustain this averment of the petition by oral testimony. See also Chicago, M. & St. P. R. Co. *v.* Randolph Town Site Co., 103 Mo. 451, 15 S. W. 437.

60. Chicago & N. W. R. Co. *v.* Town of Cicero, 154 Ill. 656, 39 N. E. 574; Lake Shore & M. S. R. Co. *v.* City of Chicago, 151 Ill. 359, 37 N. E. 880; Chicago & A. R. Co. *v.* City of Pontiac, 169 Ill. 155, 48 N. E. 485; Cahill *v.* Village of Norwood Park, 149 Ill. 156, 36 N. E. 606; Joplin Consol. Min. Co. *v.* City of Joplin, 124 Mo. 129, 27 S. W. 406.

Nor is the rule affected by the fact that the general statute relating to eminent domain requires the proof of an inability to agree. Lake Shore & M. S. R. Co. *v.* City of Chicago, 148 Ill. 509, 37 N. E. 88.

61. Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1,058; Grand Rapids L. & D. R. Co. *v.* Chesbro, 74 Mich. 466, 42 N. W. 66; Charleston & S. Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

62. Where part of the owners are non-residents and certain of them are minors, this dispenses with proof of an inability to agree with such owners. Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1,058.

63. *California.* — Gilmer *v.* Lime Point, 19 Cal. 47; Contra Costa C. M. R. Co. *v.* Moss, 23 Cal. 324.

Connecticut. — New York, N. H. & H. R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1,070; Williams *v.* Hartford & N. H. R. Co., 13 Conn. 397.

Illinois. — Reed *v.* Ohio & M. R. Co., 126 Ill. 48, 17 N. E. 807.

Missouri. — Chicago, R. I. & R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776.

New York. — Dyckman *v.* Mayor, 5 N. Y. 434; *In re* Lockport & B. R. Co., 77 N. Y. 557; *In re* Water Com'rs *v.* Clarke, 50 Hun 605, 3 N. Y. Supp. 347.

Ohio. — Powers *v.* Hazleton & L. R. Co., 33 Ohio St. 429.

64. Value of Property in Comparison With Offer. — "By comparing the sum offered with the price asked, and with the value of the premises, the court would be enabled to determine whether the allegations of the petition were true; and if he found there had not been a fair offer made, or a good faith effort to acquire the title by agreement, he would have dismissed the petition. It is difficult to see how he could exercise

e. *Sufficiency of Evidence.* — **(1.) In General.** — Whenever the evidence shows that the party seeking to condemn, or his authorized agent, has, in good faith, attempted to agree with the owner of the property sought to be condemned as to the amount of compensation to be paid for the taking of the property, and that such attempt failed, it is sufficient proof of a failure to agree.[65]

(2.) Affidavit of Petitioner or Agent. — It has been held that the affidavit of the party seeking to condemn, or his authorized agent, alleging an attempt and failure to agree with the owner, is sufficient *prima facie* proof of the fact.[66]

a sound judicial discretion or form a correct judgment, without the aid of the testimony excluded." Grand Rapids L. & D. R. Co. *v.* Weiden, 69 Mich. 572, 37 N. W. 872.

Statements of Petitioner's Agent as to Intended Use of Property. Where the question as to whether the petitioner was unable to agree with the owner as to compensation is in issue, it is proper for the owner to ask the agent of the company seeking to condemn, who, it is claimed, made an attempt to agree, whether he did not say to the owner, at the time he was trying to agree for the purchase, that the property was wanted by the company for purposes other than those for which the condemnation was sought. The allegation that the land was needed for railroad purposes and could not be obtained by agreement is not sustained by proof that it could not be obtained for steamboat purposes. New York, N. H. & H. R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1,070.

65. Booker *v.* Venice & C. R. Co., 101 Ill. 333; DeBuol *v.* Freeport & M. R. R. Co., 111 Ill. 499.

"When the evidence shows that negotiations have gone far enough to reasonably indicate that the agreement is impossible" this is sufficient. *Held,* therefore, that where the evidence showed that owner put a price on his property ten times its value, this fact itself is sufficient proof of failure to agree. *In re* Village of Middleton, 82 N. Y. 196.

No particular acts or form of agreement are necessary. Williams *v.* Hartford & N. H. R. Co., 13 Conn. 397.

Smallness of Offer Not Conclusive. The fact that the offers were in small amounts and were all uniform and made a short time before suit, does not show want of good faith on the part of petitioner in attempting to agree. *In re* Metropolitan El. R. Co., 18 N. Y. St. 134, 2 N. Y. Supp. 278.

Evidence that petitioners called on the owners asking them to state their terms as to the amount of damages required, and that one of the owners made no answer, and the others named so large a sum that the proposition was rejected, is sufficient. Todd *v.* Austin, 34 Conn. 78.

Authority of Agent. — Where the evidence shows that negotiations had been carried on for about a year between the president of the corporation owning the land on the one side, and the engineer, superintendent and vice-president of petitioning corporation on the other, in an attempt to agree, and that such negotiations all failed, such evidence is sufficient to prove a failure to agree as a condition precedent to the right to take. The authority of petitioner's agent in the premises need not be shown directly when his said authority was recognized and not disputed by the other party. Lake Shore & M. S. R. Co *v.* Baltimore & O. & C. R. Co., 149 Ill. 272, 37 N. E. 91.

Attempt to Agree With Only One of Several Owners Insufficient. Where the failure to agree as to compensation is an indispensable prerequisite to condemnation, evidence of an unsuccessful attempt to agree with only one of several joint owners is insufficient. Contra Costa C. M. R. Co. *v.* Moss, 23 Cal. 324. *Contra.* Dyckman *v.* Mayor, 5 N. Y. 434.

66. Doughty *v.* Somerville & E. R. Co., 21 N. J. L. 442.

The affidavit of a person stating

(3.) **Conduct of Parties.** — It has been held that the inability to agree with the owner may appear sufficiently to meet the requirements of the statute, from the acts and conduct of the parties before and during the condemnation proceeding, independent of any direct testimony thereon.[67]

f. *Waiver of Proof of Inability to Agree.* — It has been held in some of the decisions that a failure on the part of the owner to insist upon the proof, at the proper time and in the proper manner, dispenses with direct proof of an attempt and failure to agree as to the compensation.[68]

G. Province of Court and Jury. — It is a general rule that all questions relating to the right to exercise the power of eminent domain shall be first decided by the court itself, before the question of compensation is submitted to the jury or commissioners. In such case evidence of the corporate capacity of the petitioner,[69] or of its determination to condemn,[70] or of the necessity of the proposed

that he was appointed agent for the purpose of agreeing if possible with the owner as to compensation, and that he was unable to so agree, is sufficient, although said affidavit fails to state directly that said agent made an effort to agree. It was held that the fact that he made an effort to agree was implied from the statement that he was unable to agree. Tucker *v.* Erie & N. E. R. Co., 27 Pa. St. 281.

Affidavit Inadmissible to Disprove. Where the statute imposes upon the defendant, who denies the facts of the petition, the burden of proof, and provides that the court "shall hear the proofs and allegations of the parties, and if no sufficient cause is shown" it shall order the condemnation. *Held,* that said "proof" could only be made by legal evidence, and hence that affidavits were inadmissible to disprove the allegations of an attempt and failure to agree. Buffalo & S. L. R. Co. *v.* Reynolds, 6 How. Pr. (N. Y.) 96.

67. Lake Shore & M. S. R. Co. *v.* Baltimore & O. & C. R. Co., 149 Ill. 272, 37 N. E. 91; Ward *v.* Minnesota & N. W. R. Co., 119 Ill. 287, 10 N. E. 365.

Pendency of Action for Damages Caused. — Where the evidence shows that owners have already commenced actions claiming damages in immense sums for the taking, and that petitioner has answered these actions in good faith, denying damages in any sum, the pleadings being verified, this, with the surrounding circumstances, showing that an attempt to agree would be fruitless, is sufficient and dispenses with other proof of an actual attempt to agree. *In re* Metropolitan El. R. Co., 18 N. Y. St. 134, 2 N. Y. Supp. 278.

The fact that the owners filed a cross-petition seeking damages to property not taken, and the evidence showing a great divergence in the minds of the respective parties as to the value of the property, and the fact that both parties proceeded to a trial of the question of compensation without objection, are sufficient to show the inability to agree. Schuster *v.* Sanitary Dist., 177 Ill. 626, 52 N. E. 855.

68. Doughty *v.* Somerville & E. R. Co., 21 N. J. L. 442; Ward *v.* Minnesota & N. W. R. Co., 119 Ill. 287, 10 N. E. 365; State *v.* Trenton, 53 N. J. L. 178, 20 Atl. 738; Lieberman *v.* Chicago & S. S. R. T. R. Co., 141 Ill. 140, 30 N. E. 544.

69. Ward *v.* Minnesota & N. W. R. Co., 119 Ill. 287, 10 N. E. 365; O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 28 N. E. 923; Cahill *v.* Village of Norwood Park, 149 Ill. 156, 36 N. E. 606.

70. The question of whether the municipality has determined the necessity for the taking is for the court. Evidence thereof is incom-

improvement,[71] or of the necessity for the taking,[72] or of the inability to agree as to the compensation,[73] or as to whether the contemplated use is a public use,[74] is incompetent and inadmissible on the hearing before the jury or commissioners.[75]

II. COMPENSATION.

1. In General. — Although in most states proceedings in eminent domain are special proceedings, it may be stated as a general rule that in the determination of the question of compensation before a court or jury, the ordinary rules of evidence apply, except so far as they may be modified by statute.[76]

2. Who Entitled to Compensation. — A. TITLE OF OWNER TO PROPERTY AFFECTED. — a. *Presumption from Possession.* — Evidence of actual occupation of the land sought to be condemned under

petent before the jury called to assess damages. Barrett *v.* Kemp, 91 Iowa 296, 59 N. W. 76.

71. Warner *v.* Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238; Brown *v.* Peterson, 40 Pa. St. 373.

Where under Pennsylvania Lateral Road Act of 1832, providing for the appointment of viewers to report whether the road is necessary and the amount of damages to be sustained thereby, and thereafter if the court of original jurisdiction, to which the report is made, adopts, it may authorize and direct the construction and operation of the road, and if the owner of any property sought to be taken is dissatisfied with said report he may appeal to an appellate jury which is given authority to assess the damages. *Held,* that evidence of the necessity of the proposed road is inadmissible at the hearing before said appellate jury. Boyd *v.* Negley, 40 Pa. St. 377.

72. DeBuol *v.* Freeport & M. R. R. Co., 111 Ill. 499.

Necessity for the Taking. — Province of Court and Jury. — Where the petition in condemnation proceedings shows the right of the petitioner to condemn, a description of the land sought and the purpose for which it is sought, as it must show in every case under the Illinois statutes, the question whether the amount sought is necessary depends merely on the truth of the facts stated in the petition, and the court itself, as distinguished from the jury, decides the question independent of testimony. The court itself must decide the question on the facts stated in the petition in connection with its knowledge and information concerning the circumstances of the case, and having decided the question in the affirmative, evidence on the part of the land owner that the land taken is not necessary is inadmissible. Smith *v.* Chicago & W. I. R. Co., 105 Ill. 511.

73. Colorado, F. & I. Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

74. Colorado F. & I. Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

75. In General. — Evidence relating to the right to take is inadmissible before jury or commissioners. Chesapeake & O. R. Co. *v.* Pack, 6 W. Va. 397; Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570; London *v.* Sample Lumb. Co., 91 Ala. 606, 8 So. 281; Cahill *v.* Village of Norwood Park, 149 Ill. 156, 36 N. E. 606.

Order of Proof.— Immaterial Error. Though the statute requires proof of the right to take to be made before submitting question of compensation to jury, yet where the issue is heard with the consent of both parties and determined after the verdict of the jury, any error in refusing to hear issue before the verdict is cured. O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

76. Farwell *v.* Chicago R. I. & P. R. Co., 52 Neb. 614, 72 N. W. 1,036.

As to the rules of evidence con-

claim of title raises the presumption that the person in possession is the owner thereof, and entitled to compensation.[77]

b. *Estoppel of Petitioner to Question Title.* — The party seeking to condemn by ascertaining the person against whom it proceeds, and naming him as owner in the petition to condemn, thereby admits his ownership to the property affected, and is estopped from questioning his right to compensation; in such case the person proceeded against is not bound to prove his title in order to entitle him to compensation.[78]

cerning hearings before statutory commissioners or viewers, see *infra* "HEARING BEFORE COMMISSIONERS."

77. Bensley *v.* Mountain Lake Water Co., 13 Cal. 306; Sacramento Valley R. R. Co. *v.* Moffatt, 7 Cal. 577; Gunter *v.* Geary, 1 Cal. 462.

Illinois. — City of Morrison *v.* Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

Iowa. — Ham *v.* W. I. & N. R. Co., 61 Iowa 716, 17 N. W. 157.

Massachusetts. — Tufts *v.* Charlestown, 117 Mass. 401; Trustees *v.* Worcester Co., 1 Metc. 437; Hawkins *v.* Commissioners, 2 Allen 254; Chandler *v.* Aqueduct Corp., 125 Mass. 544.

Minnesota. — St. Paul & S. C. R. Co. *v.* Matthews, 16 Minn. 341; Sherwood *v.* St. Paul & C. R. Co., 21 Minn. 127.

Nebraska. — Burlington & M. R. Co. *v.* Beebee, 14 Neb. 463, 16 N. W. 747.

North Carolina. — Pace *v.* Freeman, 32 N. C. 103.

Pennsylvania. — Commissioners *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582; Philadelphia R. Co. *v.* Obert, 109 Pa. St. 193, 1 Atl. 398; Shoenberger *v.* Mulhollon, 8 Pa. St. 134.

Texas. — City of East Dallas *v.* Barksdale, 83 Tex. 117, 18 S. W. 329.

Wisconsin. — *Contra.* — Robbins *v.* Milwaukee & H. R. Co., 6 Wis. 610; Winchester *v.* Stevens Point, 58 Wis. 350, 17 N. W. 3, 457. Two justices dissenting.

Adverse Possession Not Essential. The fact that the possession had not existed for a length of time required to constitute adverse possession is immaterial. Andrew *v.* Nantasket B. R. Co., 152 Mass. 506, 25 N. E. 966.

In Chandler *v.* Jamaica A. Corp., 125 Mass. 544, it was held that, where the petitioner for damages had shown a possessory title, evidence that he had only a base fee in part of the land was inadmissible.

Title of Defendant. — Presumption from Possession. — Where a defendant in a proceeding to condemn lands for public use is in the full and uninterrupted possession of the property he is presumed to be the owner thereof. St. Louis & S. E. R. Co. *v.* Teters, 68 Ill. 144, disapproving County of Sagamon *v.* Brown, 13 Ill. 207.

78. *Arkansas.* — Bentonville R. R. Co. *v.* Stroud, 45 Ark. 278.

California. — Bensley *v.* Mountain Lake Water Co., 13 Cal. 306.

Colorado. — G. B. & L. R. Co. *v.* Haggart, 9 Colo. 346, 12 Pac. 215.

Georgia. — Selma R. & D. Co. *v.* Camp, 45 Ga. 180.

Illinois. — St. Louis & S. E. R. Co. *v.* Teters, 68 Ill. 144; Metropolitan C. R. Co. *v.* Chicago W. D. R. R. Co., 87 Ill. 317; Chicago & I. R. R. Co. *v.* Hopkins, 90 Ill. 316; Peoria & R. I. Co. *v.* Bryant, 57 Ill. 473; Peoria P. & J. R. R. Co. *v.* Laurie, 63 Ill. 264; Mount Sterling *v.* Givens, 17 Ill. 255.

Iowa. — Cummins *v.* Des Moines & St. Louis R. Co., 63 Iowa 397, 19 N. W. 268; Ham & W. I. & N. R. Co., 61 Iowa 716, 17 N. W. 157.

Kansas. — Missouri River F. S. & G. R. Co. *v.* Owen, 8 Kan. 409.

Kentucky. — Jones *v.* Barclay, 2 J. J. Marsh. 73.

Minnesota. — Rippe *v.* Chicago D. & M. R. Co., 23 Minn. 18; St. Paul & S. C. R. Co. *v.* Matthews, 16 Minn. 341; Knauft *v.* St. Paul & T. F. R. Co., 22 Minn. 173; Wilcox *v.* St. Paul & N. P. R. Co., 35 Minn. 439, 29 N. W. 148.

c. *Burden of Proof.* — (1.) **Where Owner Institutes Proceeding.** Where the owner institutes the proceeding to recover damages caused by the taking, the burden of proof as to his title and right to compensation is upon him.[79]

Missouri. — Swenson *v.* Lexington, 69 Mo. 157.

Nebraska. — Republican Val. R. Co. *v.* Hayes, 13 Neb. 489, 14 N. W. 521; Nebraska R. Co. *v.* Van Dusen, 6 Neb. 160; Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557; Omaha N. & B. H. R. Co. *v.* Gerrard, 17 Neb. 587, 24 N. W. 279.

Pennsylvania. — Church *v.* Northern C. R. Co., 45 Pa. St. 339.

Contra. — Allyn *v.* Providence W. & B. R. R. Co., 4 R. I. 457.

Nature and Extent of Defendant's Interest in Property Condemned. Where the condemning company claims that the defendant is not the owner of the fee but only the tenant of the property, the burden of proof is upon it to prove that fact, and in the absence of affirmative proof it will be presumed that he was the owner of the fee. Plank Road Co. *v.* Thomas, 20 Pa. St. 91.

Full Compensation. — In G. B. & L. R. Co. *v.* Haggart, 9 Colo. 346, 12 Pac. 215, the court uses this language: "We are of the opinion that when one files his petition naming a respondent, and seeking the condemnation of certain specified property, the petitioner thereby, in the absence of special averment to the contrary, admits such title in the respondent named as authorizes the assessment of full compensation for the taking of the premises described, or the injury thereto."

Proof of Dedication Inadmissible. Where a city has brought condemnation proceedings against a defendant, naming him as owner, evidence to show that the land in question had already been dedicated to the public as a street is inadmissible. San Jose *v.* Reed, 65 Cal. 241, 3 Pac. 806.

When Petitioner Not Estopped to Question. — Where at the time of the filing of the petition for the assessment of compensation one of the parties against whom the proceeding was instituted was a tenant holding under a lease which expired thereafter and prior to the time when damages were assessed, the fact that the tenant was made a party in the petition does not entitle him to compensation, his interest in the property having ceased. Schrieber *v.* Chicago & E. R. Co., 115 Ill. 340, 3 N. E. 427.

Amended Petition to Condemn. Where the original petition to condemn, and the proceedings had thereunder fixing the amount of compensation, were void on account of defective services, the filing of an amended petition sometime thereafter (by which said defects were cured) against the original defendant, admits that there was some title, interest or claim of the property remaining in the defendant. But the petitioner "was at liberty to show, by proper pleadings and proof, if it could do so, that such title or claim was nothing more than the bare legal title without any equity in the defendant, and that the damages were merely nominal, and that her estate was something less than the full legal and equitable interest, on account of the payment and acceptance of the compensation therefor, as pleaded; but nothing in disparagement of defendant's title, unless fairly within the scope of the pleadings, could be properly admitted in evidence." Colorado C. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

Collateral Action. — Effect of Pending Condemnation Proceedings. — In an action to restrain the construction of the improvement upon the lands of the plaintiff, for the condemnation of which a proceeding has been instituted by the defendant city, and is pending, the burden of proof as to the plaintiff's title is upon himself, and said city is not estopped from questioning the same in the collateral action. Colby *v.* City of Spokane, 12 Wash. 690, 42 Pac. 112.

79. *Indiana.* — City of Lafayette *v.*

(2.) Where Party Condemning Institutes Proceeding and asks to have all persons interested made parties and their compensation determined, if the issue of title is properly raised, the burden of proof is on the party claiming compensation.[80]

d. *Sufficiency of the Evidence.* —If it is incumbent on the owner to prove his title, a *prima facie* case is all that is necessary. The production of a deed with proof of possession in the grantor or grantee is sufficient proof that the grantee is the owner of the title it purports to convey.[81] It has been held that the mere production of

Wortman, 107 Ind. 404, 8 N. E. 277.

Iowa. — Waltemeyer *v.* Wisconsin I. & N. R. Co., 71 Iowa 626, 33 N. W. 140; Costello *v.* Burke, 63 Iowa 361, 19 N. W. 247.

Kentucky. — Jones *v.* Barclay, 2 J. J. Marsh. 73.

Maine. — Minot *v.* Cumberland Co. Comm., 28 Me. 121; Thurston *v.* Portland, 63 Me. 149.

Massachusetts. — Brainard *v.* Boston & N. Y. C. R. Co., 12 Gray 407.

North Carolina. — Fuller *v.* Elizabeth City, 118 N. C. 25, 23 S. E. 922.

Pennsylvania. — Philadelphia R. Co. *v.* Obert, 109 Pa. St. 193, 1 Atl. 398; Directors *v.* R. R. Co., 7 Watts & S. 236.

Washington. — Colby *v.* City of Spokane, 12 Wash. 690, 42 Pac. 112.

Wisconsin. — Robbins *v.* Milwaukee & H. R. Co., 6 Wis. 610; Winchester *v.* Stevens Point, 58 Wis. 350, 17 N. W. 3, 547.

Presumption in Absence of Denial. If plaintiff's title is not controverted he need not prove the same. Benson *v.* Soule, 32 Me. 39.

What Owner Must Show. — Burden of Proof. — In an action to recover damages sustained by the laying out of a road by the county supervisors, the plaintiff has the burden of proving that his land has been regularly condemned by the county by proper proceedings. The absence of such proof is fatal to this right to recover compensation. Lesieur *v.* Custer Co., 61 Neb. 612, 85 N. W. 892.

80. Pennsylvania S. V. R. Co. *v.* Keller (Pa.), 11 Atl. 381.

On an appeal to the court by the owner from the award of the commissioners assessing damages, the burden is upon the owner to show that he owned the land sought to be condemned. Woster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401.

81. *Georgia.* — City of Atlanta *v.* Word, 78 Ga. 276.

Maine. — Williamson *v.* Carlton, 51 Me. 449.

Massachusetts. — Whitman *v.* Boston & M. R. Co., 3 Allen 133; Whitman *v.* Railroad, 85 Mass. 133.

New York. — Hine *v.* New York El. R. Co., 149 N. Y. 154, 43 N. E. 414; Levin *v.* New York El. R. Co., 165 N. Y. 572, 59 N. E. 261.

Wisconsin. — Carl *v.* Sheboygan & F. du L. R. Co., 46 Wis. 625, 1 N. W. 295.

Title of Owner. — Evidence that the party seeking compensation was the heir at law of the original patentee is sufficient. Snyder *v.* Western U. R. Co., 25 Wis. 60.

Filing of Official Map and Plat. Evidence that land had been mapped and platted by defendant, as owner, and plat filed with proper county officer is *prima facie* proof of ownership. Chicago K. & W. R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779.

Deed from Trustee Under U. S. Townsite Act. — Estoppel. — Where a trustee, under the United States Townsite Act, who holds the title to the land in trust for the occupants, has executed a conveyance of a part of said land to one claiming to be a beneficiary under the trust, this conveyance is sufficient proof of the right of the grantee therein or his assigns to compensation for damages to said land caused by the construction of a railroad, and the railroad company cannot attack or call in question the validity or regularity of such conveyance. Tucker *v.* Chicago & S. P., M. & O. R. Co., 91 Wis. 576, 65 N. W. 515; Taylor *v.* Winona &

the deed, without proof of possession in the grantor or grantee, is insufficient,[82] but this has been denied.[83] Proof of legal adverse possession is sufficient,[84] but if this is relied upon all the essential attributes of adverse possession must be shown to exist.[85]

e. *Nature and Extent of Owner's Interest in Property.* — The owner is entitled to compensation only to the extent of his particular

St. P. R. Co., 45 Minn. 66, 47 N. W. 453.

Sufficiency of the Evidence. — Proof of a deed of land conveying a privilege in an adjacent canal to the grantee and his heirs forever is sufficient *prima facie* evidence of a right to compensation for injury to such privilege. The deed is presumptive proof that the grantor had such title as would render the conveyance operative. Whitman *v.* Railroad, 85 Mass. 133.

Evidence Must Show Direct Chain of Title from Original Owner. Proof of a deed wherein is recited the fact that the grantors are the heirs of a person in whose name the title to the property formerly stood is insufficient; nor is this defect remedied by the introduction of a judgment against a third person, to which claimant was not a party, determining that said grantors were the owners of said land. The evidence must affirmatively show a direct chain of title from original owner. Costello *v.* Burke, 63 Iowa 361, 19 N. W. 247. This was proceeding brought by owner to recover damages.

Occupation Under Deeds. — Proof of continuous possession and occupation by the plaintiff and her predecessors in title of the premises, under written conveyances, for forty-seven years and a record title by deeds and bonds for twenty-eight years, is sufficient *prima facie* proof of the plaintiff's right to compensation, although the proof fails to show the record title prior to said last mentioned twenty-eight years. Levin *v.* New York El. R. Co., 165 N. Y. 572, 59 N. E. 261.

Parol Gift With Possession. — Proof of the parol gift from his father to the owner, together with possession taken and maintained for fifteen years, the erection of a house and other improvements, the death of the father, and a quitclaim deed from the other heirs to the owner is *prima facie* proof of the owner's right and title to compensation. Royer *v.* Ephrata Borough, 171 Pa. 429, 33 Atl. 361. But the rule is different where both the condemning company and the person seeking compensation claim under the same source of title. See Erie & W. V. R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250.

Where the Owner Brings Action to recover damages alleging a permanent injury to the freehold by the improvement, he must prove a freehold title in himself, and proof of possessory title is insufficient. Waltemeyer *v.* Wisconsin I. & N. R. Co., 81 Iowa 626, 33 N. W. 140.

In Benton *v.* City of Milwaukee, 50 Wis. 368, 7 N. W. 241, the court was in doubt as to whether mere proof of possession under claim of title was sufficient to authorize the owner to recover damages for change of grade of street.

82. Deed without proof of possession in grantor or grantee is insufficient. City of Lafayette *v.* Wortman, 107 Ind. 404, 8 N. E. 277; Costello *v.* Burke, 63 Iowa 361, 19 N. W. 247; Brainard *v.* Boston & N. Y. C. R. Co., 12 Gray (Mass.) 407.

83. Production of recorded deed is sufficient without proof of possession. Williamson *v.* Carlton, 51 Me. 449.

84. Tufts *v.* Charlestown, 117 Mass. 401.

85. In Fuller *v.* Elizabeth City, 118 N. C. 25, 23 S. E. 922, it was held that evidence of twenty-one years' possession under color of title (statute only required seven) was sufficient to ripen the title, but it must be accompanied by proof that the possession was *adverse*, and in the absence of such proof the evidence was held insufficient.

estate or interest in the property at the time of the taking,[86] and, when the title is in issue, it is competent to show the nature and extent of this estate or interest,[87] and for this purpose evidence of an outstanding incumbrance or existing easement on the property is admissible.[88] But the owner may show that at the time of the assessment of compensation he owns the full and complete title, although at the time of the taking he owned a lesser estate therein.[89]

86. Missouri Pac. R. Co. *v.* Hays, 15 Neb. 224, 18 N. W. 51; North Eastern R. Co. *v.* Frazier, 25 Neb. 42, 40 N. W. 604.

Owner's Estate Must Be Certain and Definite. — Where the owner claims damages to a part of the farm, evidence that his only interest therein is under a verbal lease from his mother, who owns only a life estate therein, is incompetent as proof of his right to compensation for injuries to such leasehold estate, because of the uncertain duration thereof, and proof of damages thereto is too remote and speculative. Conness *v.* Indiana I. & I. R. Co., 193 Ill. 464, 62 N. E. 221.

87. Evidence showing that part of premises in question does not belong to party seeking compensation is proper. Pennsylvania S. V. R. Co. *v.* Keller (Pa.), 11 Atl. 381.

Where City Claims Part as a Street. Where part of the land, for which the owner claims damages, is claimed by the city as a public street, evidence of any public declaration that the land was a public street, such as the existence of an official map designating the land as a public street, and the fact that it has not been taxed, is competent. Failure to show that claimant had actual knowledge thereof is immaterial. Tingley Bros. *v.* City of Providence, 8 R. I. 493.

88. The deed to the party claiming compensation, in which is contained a reservation to the grantor and his assigns of the right to make a crossing over the land conveyed, is admissible in evidence as affecting the extent of damage sustained. "The reservation contained in it (deed) created an easement in the land conveyed, and as that necessarily detracted somewhat from the value of the unincumbered estate, it was essential to a just estimation of the injury done to petitioners that it should be taken into consideration in estimating the damages which they were entitled to recover." Boston & M. R. Co. *v.* County of Middlesex, 1 Allen (Mass.) 324.

89. **Cancellation of Lease After Taking.** — Where the interest of the party claiming damages was a leasehold, part of which was taken for the public improvement, evidence that, after the taking, the lessee and landlord cancelled the lease is immaterial, the court holding that the taking was probably the reason for the cancellation. Pegler *v.* Inhabitants of Hyde Park, 176 Mass. 101, 57 N. E. 327.

Execution of New Lease. — Where the lease under which the owner held at the time of the commencement of the action for damages caused by the improvement had expired before the trial it was held proper and competent for the owner to introduce in evidence a new lease of the same premises showing the estate to be continued and preserved in him. Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78; North Eastern R. Co. *v.* Frazier, 25 Neb. 42, 40 N. W. 604; San Antonio & A. P. R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1,040.

Effect of Existing Lease. — Where, on cross-examination by the condemning company, the owner testifies that part of the land in question is under lease to another, he may testify on re-direct that said leased land is not affected by the railroad, as this explains his testimony, although the same may have been immaterial in the owner's case. Reading & P. R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518, 13 Atl. 294.

Evidence of execution of new lease extending old one which ex-

(1.) Damage Sustained by Tenant. — Evidence of damage sustained by a tenant of the owner is inadmissible where the inquiry is as to the compensation to the owner himself.[90] But it has been held unnecessary to direct the evidence solely to the reversion as distinguished from the possession.[91]

B. Record of Former Condemnation Proceedings. — In a subsequent collateral action brought either to recover damages caused by the taking of the property for public use or to try the title or possession of the property, the judgment and record in a former condemnation proceeding, brought for the purpose of condemning such property for said use, are conclusive evidence of the right of the owner to the compensation therein awarded,[92] and of the right of

pired after taking, is admissible. Cobb *v.* Boston, 109 Mass. 438.

Acquisition After Taking. — Where a railroad company took and used land without authority at the time it belonged to an estate from which it was subsequently purchased by defendant, and thereafter condemnation proceedings were commenced against defendant to condemn right of way over land of which the aforementioned land was a part, evidence as to the value of the land formerly belonging to the estate, and which was wrongfully taken, is admissible; the fact that the land belonged to some one else when trespass was committed and land first taken, and that the road was built before defendant bought and before condemnation makes no difference. Chicago & I. R. Co. *v.* Hopkins, 90 Ill. 316.

Deed Delivered After Taking. Evidence that prior to the taking the owner had purchased the land in question at a sheriff's sale, but that sheriff's deed did not issue until after the taking but before the assessment of damages, is admissible and sufficient proof of the owner's right to compensation. On the delivery of the deed the title relates back to and takes effect as of the date of the sheriff's sale. Pennsylvania S. V. R. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 11 Am. St. Rep. 913.

Surrender of Outstanding Lease. Evidence of a surrender of a lease which was in existence at the time of the taking, and the term of which had not then expired, is admissible as enhancing the damages to which the owner of the reversion is entitled, because by said surrender he becomes the absolute owner of the whole estate unincumbered, when before he had the reversion only. Dickenson *v.* Fitchburg, 13 Gray (Mass.) 546.

90. Telephone and Telegraph Co. *v.* Forke, 2 Ct. App. Civ. Cas. (Tex.) § 365.

91. When the premises were under lease to a tenant, testimony of witnesses that the property taken as a whole was damaged in a certain amount, was held competent. City of Chicago *v.* McDonough, 112 Ill. 85.

92. North Hudson C. R. Co. *v.* Booraem, 28 N. J. Eq. 450; Charles *v.* Porter, 10 Metc. (Mass.) 37.

Compliance With Preliminary Requirements. — Presumption. — Under a statute providing that any person injured by an improvement, in order to be entitled to compensation, must file a written request with the commissioners to assess his damages, it was held that the making and filing of an award of damages in favor of said person by the commissioners, raises a conclusive presumption that the person mentioned in the award complied with all the preliminary matters required by the statute. Board of Commissioners *v.* State, 156 Ind. 550, 60 N. E. 344.

Estoppel of Municipality to Deny. — In a subsequent action to recover from a municipality the amount of damages awarded to plaintiffs for the taking of their land for street purposes under proceedings in eminent domain commenced by the city authorities,

the party condemning to the property.[93] It is also conclusively presumed that the verdict or award in said former proceedings included the full and complete compensation to which the owner was entitled in said proceeding,[94] but as to damages which were not a proper

the record of the proceedings by the village condemning the land is conclusive as to all facts therein stated, where the village had general jurisdiction of the proceeding. Buell *v.* Trustees of Lockport, 8 N. Y. 55. And in City of Chicago *v.* Le Moyne, 119 Fed. 662, it was said, "The city having caused the construction, must respond for the damages occasioned. It cannot shield itself under cloak of a void order."

Record Must Be Produced. — The affidavit of an owner resisting condemnation, to the effect that other proceedings to condemn were formerly instituted and his compensation therein awarded is insufficient proof of the facts therein stated. The award itself, or the record of the proceedings, must be produced or satisfactory proof of their loss must be made. Trimmer *v.* Pennsylvania P. & B. R. Co. (N. J. Eq.), 17 Atl. 967.

93. Chesapeake & W. R. Co. *v.* Washington C. & St. L. R. Co., 99 Va. 715, 40 S. E. 20; North Hudson C. R. Co. *v.* Booraem, 28 N. J. Eq. 450; Asher *v.* Jones Co., 29 Tex. Civ. App. 353, 68 S. W. 551; Davidson *v.* Texas & N. O. R. Co., 29 Tex. Civ. App. 54, 67 S. W. 1,093.

Parol Evidence Inadmissible to Limit Decree. — A decree or order of the court determining the necessity for the taking and appointing the commissioners to assess damages in the proceeding is conclusive evidence of the right of the condemning company to the exclusive possession of the land, unless otherwise expressly provided in the order. In a subsequent proceeding in which the question as to the estate or interest of the condemning company in the land condemned is in issue, evidence is inadmissible to limit the effect of the order or to show that the condemning company is entitled to only a qualified estate in the property. Hopkins *v.* Chicago St. P. M. & O. R. Co., 76 Minn. 70, 78 N. W. 969.

Limitations of the Rule. — The effect of the former condemnation proceedings is confined to the extent of property actually involved as determined by the petition for condemnation. Where the petition asked for a right of way one hundred feet in width, and the commissioners were appointed to assess damages therefor, their action in giving damages for a more extensive width, or in attempting to extend the right of way, is void, and such proceedings are inadmissible as evidence of the company's right to any property in excess of the land stated in the petition. Pfaender *v.* Chicago & N. W. R. Co., 86 Minn. 218, 90 N. W. 393.

94. *United States.* — Grafton *v.* Railroad Co., 21 Fed. 309.

Iowa. — Miller *v.* Keokuk & D. M. R. Co., 63 Iowa 680, 16 N. W. 567.

Massachusetts. — Cassidy *v.* Old Colony R. Co., 141 Mass. 174, 5 N. E. 142.

Minnesota. — Leber *v.* Minneapolis & N. W. R. Co., 29 Minn. 256, 13 N. W. 31.

Nebraska. — Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637; Atchison & N. R. Co. *v.* Forney, 35 Neb. 607, 53 N. W. 585, 37 Am. St. Rep. 450.

New Hampshire. — Johnson *v.* Atlantic & St. L. R. Co., 35 N. H. 569, 69 Am. Dec. 560; Dearborn *v.* Boston C. & M. R. Co., 24 N. H. 179.

New York. — Furnis *v.* Hudson River R. Co., 5 Sandf. 551; Steele *v.* Western I. L. N. Co., 2 Johns. 283.

Evidence of Value Before and After Inadmissible. — Where the damages have been assessed and paid and a decree entered in a condemnation proceeding, it is presumed that the owner recovered all the damages to which he was entitled by reason of the taking for the intended use, and in a subsequent action to recover damages caused by the improvement

subject of consideration in said condemnation proceeding no such presumption exists.[95]

C. Waiver of Right to Compensation. — a. *In General.* — In proceedings to assess damages for the taking of land for a public use it is competent for the party seeking to condemn to submit any proper evidence tending to show that the owner had, prior to the location of the improvement, and with a view to securing the same, waived all claim for damages to the property which would be occasioned by such improvement.[96] The previous acts and conduct of the owner may have been such as to estop him from claiming compensation in the condemnation proceeding.[97]

for which part of the property was originally condemned, it is error to allow the owner to prove what was the market value of the property before the improvement and its value afterward. Kiel *v.* Chartiers Val. Gas Co., 131 Pa. 466, 19 Atl. 78, 17 Am. St. Rep. 823.

Presumption of Assessment of Damages from Assessment of Benefits. In public improvement cases where the proceedings show that benefits have been assessed against the property, it will be conclusively presumed, against a collateral attack, that the damages, if any, have also been estimated and deducted from the aggregate benefits. Gas Light Coke Co. *v.* New Albany, 158 Ind. 268, 63 N. E. 458.

95. King *v.* Iowa M. R. Co., 34 Iowa 458; Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637; Johnson *v.* Atlantic & St. L. R. Co., 35 N. H. 569, 69 Am. Dec. 560; Delaware Lack. & W. R. R. Co. *v.* Salmon, 39 N. J. L. 299; Southside R. R. Co. *v.* Daniel, 20 Gratt. (Va.) 344. And see Sabin *v.* Vermont C. R. Co., 25 Vt. 363.

Parol Evidence Inadmissible to Explain Award. — In a subsequent proceeding by the owner to recover damages not properly ascertainable in the former condemnation proceeding it is not competent to show by evidence dehors the award that the damages in question were included in it. Leber *v.* Minneapolis & N. W. R. Co., 29 Minn. 256, 13 N. W. 31.

Damage from Negligent or Improper Construction. — The proceedings in the former condemnation constitute a bar only to such damages as arise from the proper construction of the road and not for damages due to a negligent or improper construction or operation thereof. Miller *v.* Keokuk & D. M. R. Co., 63 Iowa 680, 16 N. W. 567.

Extent of the Presumption. — In National Docks & N. J. J. C. R. Co. *v.* United Companies, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421, it was held that the presumption was limited to the damages recoverable as determined from the petition and pleadings in the condemnation proceeding, and where the petition showed that the improvement was to be constructed in a certain definite manner, any damages occasioned by the use of the property in any other manner was not presumed to be included.

96. Brown *v.* Worcester, 13 Gray (Mass.) 31.

An agreement made with the parties seeking to condemn, by which owner agrees to waive compensation, is admissible. Cummings *v.* City of Williamsport, 84 Pa. St. 472.

97. Denver C. I. & W. Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234.

Payment Under Former Void Proceeding. — In Colorado C. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605, it was held that, although the original proceedings to condemn were void, on account of fatal defects in the petition and in the service of the notice, still where the owner thereafter received and accepted the amount of compensation fixed in said void proceeding, this fact estopped said owner to claim further compensation for the injury.

b. *Agreement of Owner With Third Parties Inadmissible.* — An agreement, by the owner of the property sought to be taken, made with parties other than persons who are parties to the litigation, to waive all claim for damages by reason of the proposed improvement, is inadmissible and irrelevant.[98]

c. *Conditional Deed of Right of Way.* — Where the railroad company defends under a deed conveying the right of way, said deed containing conditions precedent, the owner may show that such conditions have not been fulfilled.[99]

d. *Burden of Proof.* — The burden of proof proving that the owner has waived his right to compensation is upon the party asserting the fact; he must show it affirmatively and clearly.[1]

3. Burden of Proof. — A. As to Amount of Compensation. — a. *Where Owner Institutes Proceeding.* — Where the owner of land which has already been taken or damaged for a public use institutes proceedings to have his damages assessed, the burden of proof as to the amount of compensation to which he is entitled is upon him.[2]

Payment by Former Company to Owner's Husband. — In Ragan *v.* Kansas City & S. E. R. Co., 111 Mo. 456, 20 S. W. 234, the defendant railway company offered to prove that the plaintiff's husband, acting as her agent, had theretofore been paid for the right of way in question by a former company whose rights defendant had acquired, after the road had been constructed.

The refusal of the trial court to allow this evidence was held error, the court saying that the fact that plaintiff was a married woman did not exempt her from the liability of the acts of her agent, and the conduct of plaintiff in permitting the old company to lay the roadbed and to pay her husband for it and to spend money in constructing the road without protest from her, estopped her from claiming the land against not only the old company but its grantees.

Waiver of Prepayment of Compensation. — Silence of Owner. — Proof that the owner remained silent and failed to institute proceedings against a railroad company who trespassed upon his land and constructed their road thereupon, is sufficient proof of a waiver of his right to prepayment of compensation. Leber *v.* Minneapolis & N. W. R. Co., 29 Minn. 256, 13 N. W. 31.

98. Cummings *v.* City of Williamsport, 84 Pa. St. 472.

Void Subscription Agreement for Stock. — In Rochester H. & L. R. Co. *v.* Hartshorn, 18 N. Y. St. 654, 2 N. Y. Supp. 457, an agreement signed by the owner, purporting to be a subscription for stock in the condemning railroad company, in consideration for which the company was to have the right to purchase the right of way at a certain price, was held inadmissible because it failed to comply with the laws relating to subscriptions to corporate stock.

99. Taylor *v.* Cedar Rapids & St. P. R. R. Co., 25 Iowa 371.

1. Brown *v.* Worcester, 13 Gray (Mass.) 31.

2. Sexton *v.* North Bridgewater, 116 Mass. 200.

Where Owner Files Cross-Petition. When the petition describes only the property to be taken, and defendant files a cross-petition to recover damages to parts of the property not sought to be taken, the burden of proof as to the damages to the latter is on defendant in the first instance, and it is error to require plaintiff to enter upon proof as to damages to the property described in the cross-petition before landowner has given any testimony in support of his claim therein. Village of Hyde Park *v.* Dunham, 85 Ill. 569.

b. *Where Party Condemning Institutes Proceeding. — Conflict of Authorities.* — Where proceedings to condemn are instituted by the party seeking the property, and the question of "just compensation" is submitted to a jury or commission as a part of said proceeding, the question as to which party has the burden of proof is one upon which the authorities conflict. In the states of Indiana, Massachusetts, Minnesota, Nebraska, New York, Oregon, South Carolina, Arkansas and California it is held that it is incumbent on the owner in the first instance to prove the amount of compensation to which he is entitled;[3] while in Alabama, Illinois, Georgia, Ohio, Texas, Tennessee and Washington the decisions hold that the burden is on the party seeking to condemn, and that, in the absence of proof as to the

3. *Arkansas.* — Springfield & M. R. Co. *v.* Rhea, 44 Ark. 258.

California. — Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127; Monterey Co. *v.* Cushing, 83 Cal. 507, 23 Pac. 700; California S. R. R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123; San Diego L. & T. Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 664; Los Angeles Co. *v.* Reyes (Cal.), 32 Pac. 233.

Colorado. — Colorado C. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

Indiana. — Evansville & C. R. Co. *v.* Miller, 30 Ind. 209; Grand Rapids & I. R. Co. *v.* Horn, 41 Ind. 479.

Massachusetts. — Connecticut River R. Co. *v.* Clapp, 1 Cush. 559; Winnisimmet Co. *v.* Grueley, 111 Mass. 543; Burt *v.* Wigglesworth, 117 Mass. 302.

Minnesota. — Minnesota V. R. Co. *v.* Doran, 17 Minn. 188; St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 433.

Nebraska. — Omaha N. & B. H. R. Co. *v.* Umstead, 17 Neb. 459, 23 N. W. 350.

New York. — Matter of New York L. & W. R. R. Co., 33 Hun 148.

Oregon. — Oregon & C. R. R. Co. *v.* Barlow, 3 Or. 311.

South Carolina. — Charleston & S. R. Co. *v.* Blake, 12 Rich. 634.

The case of Omaha & V. R. Co. *v.* Walker, 17 Neb. 432, 23 N. W. 348, the court holds that although the proceeding is instituted by the party seeking to condemn, and the constitution provides that just compensation shall be made before the right to take is complete, still the burden of proof as to the amount of compensation is upon the owner. The court in this case, after referring to the general rule that the burden of proof is upon the party maintaining the affirmative, says: "When a railroad corporation condemns land for the right of way, the constitution and statute provide that just compensation to the land owner shall be made. The law authorizes the company to go upon the land, and provides that the damages sustained thereby by the land owner shall be paid. The railroad admit having taken the land, but do not admit any specific amount of damages. In the absence of proof, the land owner could take judgment for no sum whatever, and would fail in the action. We have no doubt therefore that the land owner is entitled to open and close, and this has been the general rule in the courts of this state."

Burden Partly on Each Party. Immaterial Error. — In Warner *v.* Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238, the court says: "We are therefore free to say that, according to the statute, there seems to us to be a portion of the burden of proof laid on the one party and a portion on the other; and while, in our judgment, the right to open and close ought probably to be given to the owners of the property, the refusal to accord them that right is not, in these cases, a substantial and prejudicial error."

amount of compensation, the petitioner will fail and the entire proceeding fall.[4]

B. As to Benefits. — It is incumbent upon the party asserting the existence of special benefits to prove the fact by clear evidence.[5]

C. Waiver of Right to Insist on Burden of Proof. — The right of the owner to insist on the burden of proof being maintained

4. *Alabama.* — Montgomery S. R. Co. *v.* Sayre, 72 Ala. 443.

Georgia. — Harrison *v.* Young, 9 Ga. 359; Williams *v.* Macon & B. R. Co., 94 Ga. 709, 21 S. E. 997; Wolff *v.* Georgia, S. & F. R. Co., 94 Ga. 555, 20 S. E. 484; Streyer *v.* Georgia, S. & F. R. Co., 90 Ga. 56, 15 S. E. 637.

Illinois. — McReynolds *v.* B. & O. R. Co., 106 Ill. 152; South Park Com'rs *v.* Trustees, 107 Ill. 489.

Ohio. — Neff *v.* Cincinnati, 32 Ohio St. 215.

Tennessee. — Alloway *v.* City of Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

Texas. — Gulf C. & S. F. R. Co. *v.* Abney & Stout, 3 Civ. Cas. Ct. App. § 413; Fort W. & R. G. R. Co. *v.* Culver (Tex. App.), 14 S. W. 1,013.

Washington. — Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Principle of These Cases. — These cases proceed on the theory that the determination of just compensation by a jury and its payment are, by the constitution, made conditions precedent to the right to condemn, and as proof of just compensation must be made before it can be determined, this proof must come from the party who seeks to exercise the right.

Under the Washington constitution which provides that "no private property can be taken . . . without just compensation being first made or paid into court for the owner, and no right of way can be appropriated . . . until full compensation therefor be first made in money, or ascertained and paid into court, . . . *which compensation must be ascertained by a jury* . . . in the manner prescribed by law," it has been held that "Before the land can be taken at all, the petitioner must proceed affirmatively, and have the amount of compensation 'ascertained and determined' according to law, or not succeed in the appropriation. If no proof should be offered, the petitioner would be defeated and the proceeding would be dismissed." Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

In McReynolds *v.* B. & O. R. Co., 106 Ill. 152, the court says: "The present proceeding is not by the land owner to have an assessment made of his damages, or compensation for the taking of his land, but is a proceeding instituted by the railroad company to ascertain what is the just compensation for the land sought to be appropriated. . . . The statute upon the subject contemplates that the jury are to ascertain the compensation 'after hearing the proof offered.' Should there be no proof offered, the petitioner would be defeated."

5. Pochila *v.* Calvert W. & B. V. R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255; Herold *v.* Metropolitan El. R. Co., 37 N. Y. St. 896, 13 N. Y. Supp. 610; Johnson *v.* N. Y. El. R. Co., 60 N. Y. St. 491, 30 N. Y. Supp. 920.

In the absence of affirmative evidence as to special benefits the court will not instruct the jury to consider benefits. Doyle *v.* Kansas City & S. R. Co., 113 Mo. 280, 20 S. W. 970.

Necessity for Direct Proof. — "The existence of peculiar benefits can not be presumed, but must be proved. The presence of a station [elevated railroad station] two blocks away is not necessarily a benefit, and the defendants [railway company] should have shown the facts, if they exist, from which the inference of benefit could reasonably have been drawn. . . . We cannot assume that the effect of the station was to increase the business carried on in the plaintiff's building." Israel *v.* Manhattan R. Co., 158 N. Y. 624, 53 N. E. 517.

by the party seeking to condemn may be waived by his conduct in the proceeding.[6]

4. Time With Reference to Which Compensation Is Fixed. — The compensation to which the owner is entitled must be estimated as of the time the property is judicially taken, and the evidence of value and damages must be directed to the value and condition of the property at that time.[7] This is generally held to be the time when

6. Waiver of Right to Insist on Burden of Proof. — Where owner has assumed and obtained the right to show value and damage in the first instance, and has requested instruction that burden of proof as to benefits is on condemning company, he cannot complain of instruction telling jury that burden of proof was on him. St. Louis, K. & N. W. R. Co. *v.* Knapp, S. & Co., 160 Mo. 396, 61 S. W. 300

7. *Arkansas.* — Texas & St. L. R. R. Co. *v.* Cella, 42 Ark. 528.

Indiana. — Logansport C. & S. R. Co. *v.* Buchanan, 52 Ind. 163; Railroad Co. *v.* Hunter, 8 Ind. 74.

New Jersey. — Lehigh Val. R. Co. *v.* McFarlan, 43 N. J. L. 605.

Massachusetts. — Parks *v.* Boston, 15 Pick. 198; Drury *v.* Midland R. R. Co., 127 Mass. 571.

Minnesota. — County of Blue Earth *v.* St. Paul & S. C. R. Co., 28 Minn. 503, 11 N. E. 73.

Mississippi. — Isom *v.* Mississippi C. R. Co., 36 Miss. 300.

Missouri. — Ragan *v.* Kansas City & S. E. R. Co., 111 Mo. 456, 20 S. W. 234.

In San Antonio & A. P. R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1,040, the court says: "The rule is believed to be universal that compensation must be estimated by facts existing at the time the land is taken, though there is some diversity of opinion as to whether this occurs when the proceedings to condemn are instituted or at time of trial. The latter view we hold correct in its practical application, though strictly there can be no 'taking' within the meaning of the law, until the party seeking to condemn has been adjudged to be entitled, has paid or secured the compensation fixed."

Official Map and Plat showing land divided into lots and streets, as affecting its value, made after the taking, is incompetent. Walker *v.* South Chester R. Co., 174 Pa. 188, 34 Atl. 560.

Crops Planted Before Taking, but After Location. — Where after location of contemplated railroad through plaintiff's land, but before judicial taking thereof, plaintiff planted the usual crops, which were afterwards destroyed by the construction of the road, evidence as to the injury to the crops is admissible, although the same had not been planted at the time of the original location.

Evidence as to whether the witness did not know at the time of planting the crop that said crop was on that part of the land where the road was to be constructed, was held inadmissible, because under the statute the right to take the land was not complete until a bond was tendered the owner, and the planting of these crops took place before that time. Gilmore *v.* Pittsburgh V. & C. R. R. Co., 104 Pa. St. 275.

Value Eleven Years After Taking Inadmissible. — Evidence that eleven years after taking, a person offered to purchase the land not taken, was inadmissible because made too long after the time when value was to be ascertained. Drury *v.* Midland R. R. Co., 127 Mass. 571.

Damages Sustained After Completion of Improvement. — Evidence of injuries sustained after the completion and operation of the railroad is not competent in the condemnation proceedings. Gilmore *v.* Pittsburgh V. & C. R. Co., 104 Pa. St. 275.

Where Owner Holds Over After Taking. — Evidence of the value of the owner's occupation of the property after the taking is inadmissible

the commissioners originally make their award, or where the original assessment is by the jury, then at the time of the trial;[8] but some of the decisions direct the evidence to the time of the filing of the petition for condemnation,[9] and others to the time when the

as an offset to the compensation to which he is entitled for the taking. Pegler *v.* Inhabitants of Hyde Park, 176 Mass. 101, 57 N. E. 327.

Modification of General Rule. Present Condition. — While it is a general rule that evidence as to the value and effect of the improvement must be confined to time of taking, still where the improvement has already been constructed and the damages are thereafter before the tribunal for consideration, it is proper to show the exact condition in which the improvement actually leaves the property; and the jury is not prohibited from considering the facts as they really exist at the time of trial. Manson *v.* Boston, 163 Mass. 479, 40 N. E. 850; Butchers' S. & M. Ass'n. *v.* Com., 163 Mass. 386, 40 N. E. 176; Cummins *v.* Des Moines & St. L. R. Co., 63 Iowa 397, 19 N. W. 268.

Immaterial Error. — Where it is not claimed that value differed between the two dates, which were only two weeks apart, an error in not confining the testimony to the specific time of the taking (filing petition) is immaterial. Tedens *v.* Sanitary District, 149 Ill. 87, 36 N. E. 1,033, and in Northeast R. Co. *v.* Frazier, 25 Neb. 42, 40 N. E. 604, it was held that where petition was filed in June, evidence of value in the following August was not incompetent in the absence of proof of a change in values.

8. *Alabama.* — Alabama & F. R. Co. *v.* Burkett, 42 Ala. 83.

Florida. — Orange B. R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444.

Georgia. — Georgia S. & F. R. Co. *v.* Small, 87 Ga. 355, 13 S. E. 515.

Kansas. — St. Joseph & D. C. R. Co. *v.* Orr, 8 Kan. 419.

Minnesota. — Winona & St. P. R. Co. *v.* Denman, 10 Minn. 267; County of Blue Earth *v.* St. Paul & S. C. R. Co., 28 Minn. 503, 11 N. W. 73; Morin *v.* St. Paul, M. & M. Co., 30 Minn. 100, 14 N. W. 460.

Missouri. — Doyle *v.* Kansas City & S. R. Co., 113 Mo. 280, 20 S. W. 970.

Nebraska. — Fremont, E. & M. V. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

New Jersey. — Metler *v.* Easton & A. R. Co., 37 N. J. L. 222.

Texas. — Railway Co. *v.* Lyons, 2 Civ. Cas. Ct. App. 133; San Antonio & A. P. R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1,040.

Wisconsin. — Driver *v.* Western U. Co., 32 Wis. 569, 14 Am. Rep. 726; Lyon *v.* Green Bay & M. R. Co., 42 Wis. 538.

Evidence of value one month after assessment was held inadmissible in Sheldon *v.* Minneapolis & St. L. R. Co., 29 Minn. 318, 13 N. W. 134.

Trespass Committed Before Condemnation. — Evidence of compensation or damage must be directed to the time when the damages are assessed in the condemnation proceeding, by the commissioners appointed for that purpose, and hence evidence of damage for a trespass committed before that time is inadmissible. Leber *v.* Minneapolis & N. W. R. Co., 29 Minn. 256, 13 N. W. 31.

Value at Time of Trial on Appeal. The evidence as to the value and damages to the entire property must be directed to the time when the assessment by the commissioners is made, and evidence of the value of damages at the time of the trial, which was several months after the assessment, was inadmissible. Ellsworth *v.* Chicago & I. W. R. Co., 91 Iowa 386, 59 N. W. 78; Parks *v.* Boston, 15 Pick. (Mass.) 198.

9. Northeast Neb. R. Co. *v.* Frazier, 25 Neb. 42, 40 N. E. 604; Newgass *v.* Railway Co., 54 Ark. 140, 15 S. W. 188.

Condition Before and After. — Evidence of value and damages should be directed to the date of the filing of the petition, and proof that the land had been subjected to overflow both before and after that date is admissi-

summons is issued in the proceeding.[10] This rule is not affected by the fact that the land has theretofore been entered, and the improvement constructed without the consent of the owner, and prior to the right being acquired by proper condemnation proceedings.[11] But if the original entry was with the consent of the owner, the evidence as to the value and damages should be directed to the time

ble. Schuster *v.* Sanitary District, 177 Ill. 626, 52 N. E. 855.

Filing of Amended Petition Immaterial. — Where a petition in condemnation was originally filed in October, 1888, and was thereafter several times amended until September, 1890, the evidence as to the value of the land taken and damages to the residue must be restricted to the condition of the property at the time of the filing of the original petition. The filing of the amended petitions is immaterial. Lieberman *v.* Chicago & S. S. R. T. R. Co., 141 Ill. 140, 30 N. E. 544.

10. San Jose & A. R. R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522, wherein it was held error to confine the evidence to the value at time of trial.

11. *Florida.* — Orange R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444.

Iowa. — Cummins *v.* Des Moines & St. L. R. Co., 63 Iowa 397, 19 N. W. 268.

Minnesota. — Winona & St. P. R. R. Co. *v.* Denman, 10 Minn. 267.

Missouri. — Ragan *v.* Kansas City & S. E. R. Co., 111 Mo. 456, 20 S. W. 234; Doyle *v.* Kansas City & S. R. Co., 113 Mo. 280, 20 S. W. 970.

New York. — Kenkele *v.* Manhattan R. Co., 29 N. Y. St. 95, 8 N. Y. Supp. 707.

It is error to exclude evidence of the value and damages at the time of trial, although value had increased since original wrongful entry. Newgass *v.* Railway Co., 54 Ark. 140, 15 S. W. 188.

Increased Value Since Taking. Where the railroad was completed in the fall of 1886, at which time the land was worth $150 per acre, but condemnation was not commenced until August, 1887, and the hearing before the commissioners was had on August 25, 1887, at which date the land was of the estimated value of $2000 per acre, it was held that the evidence as to value and damages should be directed to the condition and value of the property at the date of the judicial appropriation, to-wit, August 18, 1887, there being no proof that the original entry and construction was by consent of the owners; the fact that they knew of the entry and failed to openly protest is immaterial. Chicago, M. & St. P. R. Co. *v.* Randolph Townsite Co., 103 Mo. 451, 15 S. W. 437.

Failure to Make Necessary Tender. In a proceeding to assess compensation caused by the taking of part of the owner's land for the public road, the general rule in Texas is that the evidence of value and damages must be confined to the time the county commissioner's court ordered the road opened. But in Morris *v.* Coleman Co. (Tex. Civ. App.), 28 S. W. 380, it was held that in the absence of proof that a deposit was made with the treasurer of the county to pay the damages assessed, prior to the hearing of the proceeding by the county court, on appeal from the order of the commissioner's court, the owner was entitled to show the market value of the land and the damages at the time of the trial in said county court. The failure to make the necessary deposit prevented the right to take from being complete.

The same rule is declared in Arnold *v.* Bridge Co., 1 Duvall (Ky.) 372, and in Georgia, S. F. R. Co. *v.* Small, 87 Ga. 355, 13 S. E. 515, where the original assessment was in July, 1888, and the trial on appeal therefrom occurred in May, 1890.

Time of Location and Completion. Evidence as to when the road was first located and when it was finally constructed is admissible and relevant as proof of the time at which damages are to be assessed. Gilmore *v.*

of the original taking.[12] In any event the owner is not entitled to recover the value of the improvement, but the evidence should be directed to the property in the condition it would have been at the time of the assessment, had the improvement not been constructed.[13]

5. Compensation for Property Taken. — A. In General. — The measure of damages to which the owner is entitled for the property actually taken is the market value[14] of such property at the time of the taking, considered in view of all the purposes to which it is adapted,[15] but evidence of the value of the component materials,

Pittsburgh V. & C. R. Co., 104 Pa. St. 275.

Evidence of value and damage at time of location, several years before assessment of compensation, is incompetent. Alabama & F. R. Co. *v.* Burkett, 42 Ala. 83.

Condition at Time of Trial. — Evidence based on the actual condition of affairs as apparent at time of trial is competent, although the railroad is already constructed. Cummins *v.* Des Moines & St. L. R. Co., 63 Iowa 397, 19 N. W. 268.

Benefits Since Taking. — In Hayes *v.* Ottawa, O. & F. R. V. R. R. Co., 54 Ill. 376, it was held that evidence that the railroad company (petitioner) was about to build a depot in close proximity to defendant's land, thereby benefiting same, was admissible, although at time land was taken, which was one year before trial, the company had not agreed to build the depot.

12. Harris *v.* Schuylkill R. E. S. R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

Where the party seeking to condemn has, prior to the condemnation, actually taken and used the land with the consent of the owner, and has expended considerable money on the improvement, and thereafter condemnation is brought, the evidence of value is directed to the time of the original taking of possession and not to the date when the damages are assessed in the condemnation proceedings. North Hudson C. R. Co. *v.* Booraem, 28 N. J. Eq. 449.

13. Toledo A. A. & G. T. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271; California S. R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123; Morris *v.* Coleman Co. (Tex. Civ. App.), 28 S. W. 380; California Pac. R. R. Co. *v.* Armstrong, 46 Cal. 85.

Fixtures. — Ordinary rule relating to fixtures does not apply. Newgass *v.* Railway Co., 54 Ark. 140, 15 S. W. 188.

14. For a consideration of the rules of evidence governing the proof of market value the reader is referred to article "Value."

Corporate Stock Taken in Condemnation. — In Gregg *v.* Northern R. Railroad, 67 N. H. 452, 41 Atl. 271, which was a proceeding to condemn certain shares of the capital stock of the Northern Railroad belonging to Gregg, in order to obviate his objection to a contemplated lease of the road to another corporation, it was held that the question to be determined was the market value of the stock at the date the same was taken in the proceedings, and that evidence of past mismanagement on the part of the company, by reason of which the stock was worth less than it otherwise would have been, was incompetent and inadmissible.

15. In the leading case of Boom Company *v.* Patterson, 98 U. S. 403, Mr. Justice Field, in delivering the opinion of the court, uses this language: "So many and varied are the circumstances to be taken into account in determining the value of the property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, hav-

considered separately, is incompetent.[16] In ascertaining the value of the part taken it is competent to consider its relation to the whole tract,[17] but evidence as to the damages resulting to the remainder can not be considered in fixing the value of the part taken.[18]

B. Peculiar Value to Condemning Party. — In considering the value of the property actually taken, evidence of its peculiar value to the party seeking to condemn,[19] or its value for the public use for which it is sought,[20] is inadmissible; nor is it proper

ing regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

See also Manning *v.* Lowell, 173 Mass. 100, 53 N. E. 160.

16. Manning *v.* Lowell, 173 Mass. 100, 53 N. E. 160; Sanitary District *v.* Loughran, 160 Ill. 362, 43 N. E. 359.

Taking Part of Stone Quarry. Where the right of way sought to be taken, in fee, appropriates a part of the land containing a ledge of stone which is valuable for building purposes, evidence of the special value of the part taken as stone-producing land is competent, and to prove the value of the land as such it is proper to consider the quantity of stone that could be obtained, and the value of such stone as a guide in arriving at the value of the land, and evidence of the royalties received by the owner under a lease of said quarry is competent; but any inquiry as to the profits or the value of the stone itself after it has been taken out will not be permitted. Seattle & M. R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

17. In Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328, it was held error to exclude evidence of the value of the part taken, considered as a part of the whole tract.

18. Evidence of the value of the land taken must be limited to its value unaffected by the improvement, and evidence to the effect that by virtue of the improvement the residue is damaged, and that for this reason the part taken is worth more than the balance not taken, is inadmissible. In other words, the damage resulting to the remainder cannot be considered as an element in fixing the value of the part taken. Selma R. & D. R. Co. *v.* Redwine, 51 Ga. 470.

Examination of Witness. — In examining witnesses, only as to the value of the part taken, it is error for a counsel to direct their notice to the manner the improvement injures the remainder. Railroad Co. *v.* Hinds, 50 La. Ann. 781, 24 So. 287.

19. Ligare *v.* Chicago, M. & N R. Co., 166 Ill. 249, 46 N. E. 803; Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

But if land has on it improvements which materially add to its market value, either for the purpose for which it is sought to be taken or otherwise, the owner may show this by evidence. *Held*, that where some grading and excavating had been done on land to be taken, the owner might show the character of the grading and excavating, and how much it added to the value of the land. DeBuol *v.* Freeport & M. R. Co., 111 Ill. 499.

20. United States *v.* Taffe, 78 Fed. 524.

Opening of Street. — Evidence of value of land for street purposes is inadmissible. Chicago, B. & Q. R. Co. *v.* City of Naperville, 166 Ill. 87, 47 N. E. 734.

Evidence of speculative value based upon the anticipated effect of the proceedings under which the condemnation is brought is incompetent. Shoemaker *v.* United States, 147 U. S. 282.

Effect of Improvement. — In a proceeding to assess the value of lands taken for park purposes, the evidence of value must be confined to the time when possession was judicially taken by the authorities, and evidence of the value of the land as affected by

to take into consideration the fact that such particular property is necessary for the particular purpose for which it is sought.[21]

C. Where Owner's Estate is Less Than the Fee. — a. *Compensation Measured by Character of the Owner's Estate.* — The amount of compensation to which the owner is entitled for the property actually taken is limited to the market value of his estate

the laying out of the park is inadmissible. The increase in value of the lands caused by the public knowledge of the fact that they were to be taken for park purposes should not be considered. Kerr *v.* South Park Com'rs, 117 U. S. 379.

Value for Public Use. — In United States *v.* Seufert Bros. Co., 78 Fed. 520, which was a proceeding by the United States to condemn land in a pass for the construction of a boat railway, to avoid obstructions to navigation in an adjacent river, it was held that evidence of the peculiar value of the land for the particular purpose for which it was taken (it being the only land available for such purposes), and of the public necessity calling for its condemnation could not be taken into consideration as enhancing the value of said land. The court, in distinguishing Boom Co. *v.* Patterson, 98 U. S. 403, says: "The demand which is thus created can not be considered in estimating the value of the land taken. The owner can not avail himself of the adaptability of these lands to a boat railway line to enhance his recovery. The character and mode of such an undertaking as a practical matter take it out of the field of private enterprise. . . . He (the owner) is entitled to the full value of his land considered with reference to all the uses, present and prospective, which he can or has the right to make of it; but the necessity of the government can not be made a measure of his compensation." The case of Young *v.* Harrison, 17 Ga. 30, is criticised and disapproved.

Contra. — In Young *v.* Harrison, 17 Ga. 30, in which the facts showed that a parcel of land in a village and bordering a river had been appropriated for a bridge site, it was competent for the owner to prove the probable extent of the town or village, the amount of travel, tolls, commerce and the probable value of warehouses, wharves, etc., to grow up on the other side of the river by reason of the bridge, and also the value of the property as a bridge site at the time when taken, taking into consideration the number of lots in the vicinity belonging to other persons which might be used for such purpose, and the probable value of the bridge to its owners when it should be erected. All of this evidence was held admissible to prove the compensation to which the owner was entitled.

21. Northwest R. Co. *v.* Knapp S. & Co., 160 Mo. 396, 61 S. W. 300.

Land Occupied by Railroad. Where the land sought to be condemned is already in use by the railroad company, and the circumstances are such that its use is practically a necessity to the company, the opinion of a witness as to its value for railroad purposes alone is incompetent as tending to mislead the jury. Ligare *v.* Chicago, M. & N. R. Co., 166 Ill. 249, 46 N. E. 803.

Condemnation of Land for National Military Park at Gettysburg. — In Five Tracts of Land *v.* United States, 101 Fed. 661, which was a proceeding by the United States to condemn the land on which was fought the battle of Gettysburg, for the purpose of establishing there a national military park, it was held that the measure of compensation to which the owner was entitled was the market value of the land, and if such value was enhanced by the historic associations connected with the property, it was proper for the jury to consider that fact; but that it was not proper for the jury to consider the necessities of the government's taking the property or the particular purpose to which the government proposed to put it.

or interest in the property,[22] and when he owns less than the fee, or his rights are limited to certain uses, evidence of the value of the fee or the damages thereto is incompetent.[23] Thus, in proceedings to condemn a part of a railroad right of way for the purpose of laying out a street, the evidence of value must be confined to the value of the easement for railroad purposes, and evidence of the value of the fee is incompetent.[24]

b. *Value for Precise Use.* — It has been held that where the interest of the owner in the property taken is less than the fee, such as an easement for a railroad right of way, the compensation is measured by the value of the property for the precise use to which it is devoted at the time of the taking, and evidence of its value for other railroad purposes is inadmissible in the absence of a showing of a definite determination to use it for such other purposes.[25]

D. Amount of Land Appropriated. — A railroad company authorized by law to take for its right of way a strip of land not exceeding a certain width, may limit the width of its appropriation to less than the extent allowed, but unless such limitation is expressly shown, it will be presumed that it has appropriated the full width allowed by law.[26] But where the facts clearly show that the

22. The nature of the estate and the title of the owner are proper matters to be considered by the jury. Sexton *v.* Union S. U. T. Co., 200 Ill. 244, 65 N. E. 638.

23. Indiana I. & I. R. Co. *v.* Conness, 184 Ill. 178, 56 N. E. 402.

24. Chicago & A. R. Co. *v.* City of Pontiac, 168 Ill. 155, 48 N. E. 485; St. Louis & C. R. Co. *v* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

It is held in Illinois C. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62, that the ordinary rule which allows proof of value for all purposes to which the property is adapted, does not apply to proceedings to condemn part of a railroad right of way for other public purposes. In such case the evidence is not confined to proof of the value of the part taken for the specific use to which it has been applied, but the evidence as to its value for other adaptable purposes must be limited to railroad purposes.

Telegraph Line on Railroad Right of Way. — The same rule applies where condemnation is instituted to acquire the right to construct a telegraph line along a railroad right of way. Evidence of the value of the land or of the damage to such value is incompetent. Mobile & O. R. Co. *v.* Postal Tel. Cable Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223.

25. In Illinois C. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62, it was held that where part of a railroad right of way, which was then being used solely for track purposes, was taken for a street, evidence of its value as a site for warehouses, elevators, depots and other railroad uses was incompetent in the absence of a showing that the company had definitely decided to use it for such purposes. But where it is shown that the company had definitely decided to use the land in question for other railroad purposes than that for which at present used, the value of such strip for such other purposes is competent. Illinois C. R. Co. *v.* Chicago, 156 Ill. 98, 41 N. E. 45.

26. Philadelphia R. Co. *v.* Obert, 109 Pa. St. 193, 1 Atl. 398.

Actual Possession Immaterial. The fact that the company is not in actual possession of a certain part of the width makes no difference. It was held, therefore, that where part of one's property was within thirty

company has not appropriated the full width allowed the presumption will not be indulged in.[27]

E. Quality of Estate Taken. — Determined by Statute. Where the statute gives the right to take whatever property is necessary for the public purpose stated therein, the right is limited to the taking of only such estate or interest in the property as may be necessary to acccomplish the purpose, and the assessment of compensation, on the assumption that the fee is taken when only an easement is required, is error.[28] But it has been held that, in the absence of proof to the contrary, the evidence as to damages caused by the taking of a piece of land for railroad purposes should be

feet of the center line of the railroad whose charter gave it the right to appropriate a right of way sixty feet wide, said owner had the right to recover compensation for all that part of his property included within the thirty feet. Jones *v.* Erie & W. V. R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758.

Needs of Party Condemning Immaterial. — Where a statute gave a town authority to take for its uses the water of a certain pond and the waters flowing into and from the same, and said town proceeded to take and hold all of said waters, it is presumed that the town will have the right to and will use all the waters in question, and the damages should be assessed on this basis; therefore evidence on the part of the town for the purpose of showing that only a part of the water would be used is inadmissible. "Evidence that all the water was not needed and would not be used for the purposes for which it was taken would be incompetent to show either that the taking was illegal or that all the water was not taken." Howe *v.* Weymouth, 148 Mass. 605, 20 N. E. 316.

Intentions of Condemning Company Immaterial. — Where the law gives the condemning company the right to take the whole or a part of the land sought to be condemned, and it elects to take the whole and brings condemnation proceedings therefor, "in view of the right which it acquires to occupy and use the whole of the lot, it can not have the damages assessed on the theory that it will in future use but a part of it." The presumption is that the whole of the part condemned will be used, and evidence is admissible on this basis. Cummins *v.* Des Moines & St. L. R. Co., 63 Iowa 397, 19 N. W. 268. And where the road is already in operation, evidence to show that in the past the company has not used or needed the exclusive possession is inadmissible. Auman *v.* Philadelphia R. Co., 133 Pa. St. 93, 20 Atl. 1,059.

27. **Where Rule Does Not Apply.** Where the statute provided that the railroad should not "exceed four rods in width," and the company had entered upon and constructed and used only a part of said width, in another action, where the extent of the width owned by the railroad was in issue, the owner claiming that the company did not actually include the full width in its original location, it was held that the statutory presumption did not apply, and that the actual existing conditions governed. Philadelphia R. Co. *v.* Obert, 109 Pa. St. 193, 1 Atl. 398.

28. Clark *v.* Worcester, 125 Mass. 226; Bishop *v.* North Adams Fire Dist., 167 Mass. 364, 45 N. E. 925; Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Sweet *v.* Buffalo, N. Y. & P. R. Co., 79 N. Y. 293; *In re* Thompson, 35 N. Y. St. 266, 12 N. Y. Supp. 182.

"No implication ought to be indulged that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of the statute making the appropriation." Washington Cemetery *v.* Prospect Park & C. I. R. Co., 68 N. Y. 591.

Where only an easement is required evidence of the value of the fee and damages thereto is incompetent. *In*

introduced on the assumption that the railroad will have the full and exclusive possession and use of the premises.[29]

6. Compensation for Injuries to Property Not Taken. — A. Extent or Amount of Land Damaged by Improvements. — Evidence as to the extent or amount of the land damaged by reason of the improvement is not confined to the piece or parcel on or through which the improvement is constructed, but it is proper to show the effect of the improvement, and the damage resulting therefrom to the whole farm or tract, if the separate parcels constitute one integral whole and are devoted to the one use.[30] The same rule is

re Commissioners of Public Works, 10 N. Y. Supp. 705.

29. Clayton *v.* Chicago, I. & D. R. Co., 67 Iowa 238, 25 N. W. 150.

"It is for the railroad . . . to indicate in its petition the nature and extent of the easement proposed to be taken. Cedar Rapids, I. F. & N. W. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

Question of Fact. — Whether the necessities of a railroad demand exclusive occupancy of its lands or a lesser estate therein is a question of fact. Kansas City R. Co. *v.* Allen, 22 Kan. 285, 31 Am. Rep. 190.

30. *Illinois.* — Keithsburg & E. R. R. Co. *v.* Henry, 79 Ill. 290; Chicago & W. M. R. Co. *v.* Huncheon, 130 Ind. 529, 30 N. E. 636.

Iowa. — Remvick *v.* D. & N. R. Co., 49 Iowa 664; Dudley *v.* Minnesota & N. W. R. Co., 77 Iowa 408, 42 N. W. 359; Ham *v.* W. I. & N. R. Co., 61 Iowa 716, 17 N. W. 157; Ellsworth *v.* Chicago & S. W. R. Co., 91 Iowa 386, 59 N. W. 78.

Kansas. — Kansas City E. & S. R. R. Co. *v.* Merrill, 25 Kan. 421; Atchison & N. R. Co. *v.* Gough, 29 Kan. 94; Atchison, R. & S. F. R. Co. *v.* Blackshire, 10 Kan. 477.

Minnesota. — Wilmes *v.* Minneapolis & N. W. R. R. Co., 29 Minn. 318, 13 N. W. 39; Sheldon *v.* Minneapolis & St. L. R. Co., 29 Minn. 318, 13 N. W. 134; St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 433.

Missouri. — R. Co. *v.* Calkins, 90 Mo. 538.

Nebraska. — Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Northeast Nebraska R. Co. *v.* Frazier, 25 Neb. 42, 40 N. W. 604.

Pennsylvania. — O'Brien *v.* Schenly Park & H. R. Co., 194 Pa. St. 336, 45 Atl. 89.

Texas. — Telephone & Telegraph Co. *v.* Forke, 2 Ct. App. Civ. Cas., § 365.

Wisconsin. — Robbins *v.* Milwaukee & H. R. Co., 6 Wis. 610; Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478; Parks *v.* Wisconsin C. R. Co., 33 Wis. 413.

Where the statute provided that the jury in assessing damages caused by a mill and dam "may take into consideration in their assessments any other damage occasioned to such person as well as the damage to the land overflowed," it was held that evidence of damage done to land adjacent the land actually overflowed was competent. Menson & B. Mfg. Co. *v.* Fuller, 15 Pick. (Mass.) 554.

Parcels Separated by Driveway. Where two parcels of land, although separated by a driveway belonging to a party, are used together in a manufacturing business, and a railroad right of way is taken across one of the parcels, evidence as to the effect of the road on the whole of the two tracts is competent. Union T. R. Co. *v.* Peet Bros. Mfg. Co., 58 Kan. 197, 48 Pac. 860.

Farm in Two Counties. — This is the rule although the farm may be part in one county and part in another. Atchison & N. R. Co. *v.* Gough, 29 Kan. 94.

Government Subdivisions Immaterial. — "Government subdivisions, we think, are entitled to no consideration and cut no figure in the determination of the damages sustained. This should be arrived at by taking

applicable where a railroad or other improvement is constructed on or across a tract of land in a city which has been subdivided into lots. The evidence is not confined to the particular lots on or across which the improvement is constructed.[31] But where the several lots or parcels are used as separate and distinct properties, the evidence of damages is confined to the parcel on or through which the improvement is located.[32]

into consideration the entire farm, of whatever size, and consider how much less, as a whole, it is worth after than before the taking of the right of way." Hartshorn *v.* B. C. R. & N. R. Co., 52 Iowa 613, 3 N. W. 648; Chicago & W. M. R. Co. *v.* Huncheon, 130 Ind. 529, 30 N. E. 636.

31. Port Huron & S. W. R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Cox *v.* Mason City & Ft. D. R. Co., 77 Iowa 20, 41 N. W. 475; Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637; Laflin *v.* Chicago W. & N. R., 33 Fed. 415; Welch *v.* Milwaukee & St. P. R. Co., 27 Wis. 108.

City Block Divided by Alley. Evidence showing that the lots fronting on one street are damaged by reason of their access to the other street being interfered with by the improvement, is competent; it appearing that the two properties, although separated by the alley, were used in common and had two frontages, one upon each of the streets. City of Chicago *v.* Le Moyne, 119 Fed. 662.

Taking Homestead for School Purposes. —Where part of several city lots, used as a homestead, has been taken for school purposes, evidence as to the injury to the whole of the homestead is competent. Haggard *v.* Independent School Dist., 113 Iowa 486, 85 N. W. 777.

32. Wilcox *v.* St. Paul & N. P. R. Co., 35 Minn. 439, 29 N. W. 148; Wellington *v.* Boston & M. R. Co., 158 Mass. 185, 33 N. E. 393; Fleming *v.* Chicago, D. & M. R. R. Co., 34 Iowa 353.

In the case of Potts *v.* Pennsylvania V. R. R. Co., 119 Pa. St. 278, 13 Atl. 291, 4 Am. St. Rep. 646, the owners were engaged in the business of quarrying and selling marble. Their quarry was located on a tract of land about a mile distant from a railroad siding which was likewise owned by them and used for the purpose of shipping the marble, and they also owned a sales yard in a city some distance therefrom. The railroad was constructed across that part of the land used for the siding. The refusal of the court to allow proof that the several properties were all used as parts of one business was held proper.

Taking One of Several Plants. Evidence of the effect of the taking of a certain water plant and system for public purposes, on other distinct water plants and systems situated at other places, although belonging to the same company, is incompetent. It was therefore held that the fact that the general expenses of supervision and management would still remain practically unchanged, and that therefore the other systems would be compelled to bear a heavier burden than formerly, was immaterial, the fact showing that each of said systems was separate and distinct property. Kennebec Water Dist. *v.* City of Waterville, 97 Me. 185, 54 Atl. 6.

Taking Part of Railroad. — Where it is sought to condemn part of the right of way and adjacent land of a railroad company for the construction of sewage works, it is proper for the company to prove in addition to the value of the land taken, the damages to its adjacent land which formed substantially one parcel with the land taken; but it was not proper to allow the company to prove or recover damages to its entire railway system as a whole. "To have done so would have involved the question of the value of the whole of the petitioner's road before and after the taking, and under the circumstances of the case would clearly have been

a. *Whether the Whole is One Tract.* — Whether the whole of the property which the owner claims is damaged by the improvement is one tract or several is a question for the jury.[33]

B. ADMISSIBILITY. — a. *In General.* — The amount of compensation to which an owner is entitled by reason of the taking of part of his land for a public use is the difference in value of his entire property, as a whole, as it was before the taking, and as it is, or will be, after the construction of the improvement.[34] It is impossible to lay down any hard and fast rule governing the admissibility of evidence on the question of compensation,[35] but, generally, it may be said that unless affected by statute,[36] any evidence that tends to show

absurd. It is plain that the land taken and the adjacent remaining parcel injured, bore no such integral and substantial relation to the whole railroad that their severance from it would occasion any consequential damage." It was intimated, however, in the opinion, that if the part taken had been a terminal station or an integral or important portion of the road, the loss of which would sensibly interfere with the operation of the whole, the company would have been entitled to show damages to the whole system. Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56. The same rule was applied in a proceeding to condemn part of a turnpike, in Turnpike Road *v.* Berks Co., 196 Pa. St. 21, 46 Atl. 98.

33. Westbrook *v.* Muscatine N. & S. R. Co., 115 Iowa 106, 88 N. W. 202; Ellsworth *v.* Chicago & F. W. R. Co., 91 Iowa 386, 59 N. W. 78; Chicago & W. M. R. Co. *v.* Huncheon, 130 Ind. 529, 30 N. E. 636; St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 433.

Two Lots Separated by Street. Where the contention of the owner is that two lots, although separated by highway, are one homestead or residence, the question is for the jury to determine from all the evidence including their view, and it is error for the court to refuse evidence as to effect of the condemnation on the whole of the two lots — on the assumption that they are separate and distinct. Charleston & S. S. Bridge *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

34. *Colorado.* — Colorado M. R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Illinois. — Metropolitan W. S. E. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1,098, 26 L. R. A. 773; Chicago M. & St. P. R. Co. *v.* Hall, 90 Ill. 42.

Nebraska. — Chicago R. I. & P. Co. *v.* Buel, 56 Neb. 205, 76 N. W. 571.

New York. — Bohm *v.* Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.

Pennsylvania. — Danville H. & W. R. Co. *v.* Gearhart, 81 Pa. St. (32 P. F. Smith) 260; Frick Coke Co. *v.* Painter, 198 Pa. 468, 48 Atl. 302; Harris *v.* Schuylkill R. E. S. R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278; Shano *v.* Fifth Ave. H. St. B. Co., 189 Pa. 245, 42 Atl. 128, 69 Am. St. Rep. 808.

35. Kennebec Water Dist. *v.* City of Waterville, 97 Me. 185, 54 Atl. 6.

36. General rule allowing proof of value before and after improvement does not govern when statute or constitution excludes the consideration of benefits. Little Rock & Ft. S. R. Co. *v.* Allister, 68 Ark. 600, 60 S. W. 953; St. Louis O. H. & C. R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1,069.

But this rule is not universal; some of the decisions holding that a constitutional or statutory provision excluding benefits does not alter the rule — and that the diminution in value is the sole test. Metropolitan W. S. E. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1,098, 26 L. R. A. 773.

the effect of the improvement on the value of the property is admissible.[37]

b. *Specific Elements of Compensation.* — Evidence as to the particulars or details in which the property will be damaged or benefited by the improvement is admissible so far as the same tends to show the effect of the improvement on the value of the property;[38]

37. *Arkansas.* — North Ark. & W. R. Co. *v.* Cole (Ark.), 70 S. W. 312.

Colorado. — Colorado R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Illinois. — Metropolitan W. S. E. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1,098, 26 L. R. A. 773; Springer *v.* City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

Iowa. — Britton *v.* D. M. O. & S. R. Co., 59 Iowa 540, 13 N. W. 710; Bell *v.* Chicago, B. & I. R. Co., 74 Iowa 343, 37 N. W. 768.

Minnesota. — Colville *v.* St. Paul & C. R. Co., 19 Minn. 283; Sigafoos *v.* Minneapolis L. & M. R. Co., 39 Minn. 8, 38 N. W. 627; Cedar Rapids I. F. & N. W. R. Co. *v.* Ryan, 36 Minn. 546, 33 N. W. 35.

Nebraska. — Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557.

New York. — Galway *v.* Metropolitan El. R. Co., 35 N. Y. St. 628, 13 N. Y. Supp. 47.

Texas. — G. C. & S. F. R. Co. *v.* Abney & Stout, 3 Tex. App. Civ. Cas., § 413; G. H. R. Co. *v.* Waples P. & Co., 3 Tex. App. Civ. Cas., § 411.

Condition Before and After. — Evidence of condition of the property immediately before and after the improvement is competent. Carraher *v.* Revere, 182 Mass. 427, 65 N. E. 840, and in Markle *v.* Philadelphia, 163 Pa. St. 344, 30 Atl. 149, it was said: "It was competent for the parties to present evidence descriptive of this condition at either time, and evidence explanatory of the effect upon it of the work done."

Value Before and After. — It is always proper to prove the value of the property injured before the improvement and the value of the same after the improvement. Cedar Rapids I. F. & N. W. R. Co. *v.* Ryan, 36 Minn. 546, 33 N. W. 35.

"Everything which tended to show that the continued presence and operation of the road across the farm tended to make it more valuable was competent, and everything which tended to show that the continuing presence and operation of the road across the farm depreciated its market value was competent." Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557.

"It may be stated as a general principle that whatever injuriously affects property, as the direct and necessary result of the construction of the railroad upon it, may be given in evidence on account of damages." Schuylkill E. S. R. Co. *v.* Kersey (Pa. St.), 19 Atl. 553.

"All injuries and expenses consequent upon the taking and the intended use are proper subjects of evidence." Milwaukee & M. R. Co. *v.* Eble, 3 Pin. (Wis.) 334.

38. *Iowa.* — Hartshorn *v.* B. C. R. & N. R. Co., 52 Iowa 613, 3 N. W. 648.

Kansas. — Le Roy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Com'rs Dickinson Co. *v.* Hogan, 39 Kan. 606, 18 Pac. 611; Omaha H. & G. R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831.

Missouri. — Kansas City & N. C. R. Co. *v.* Shoemaker, 160 Mo. 425, 61 S. W. 205.

Nebraska. — R. Co. *v.* Janeck, 30 Neb. 276, 46 N. W. 478, 27 Am. St. Rep. 399; Chicago K. & N. R. Co. *v.* Hazels, 26 Neb. 364, 42 N. W. 93.

New York. — Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528.

Ohio. — Columbus H. V. & T. R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69.

Pennsylvania. — Gilmore *v.* Pittsburgh V. & C. R. Co., 104 Pa. St. 275; Harris *v.* Schuylkill R. E. S. R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278; Pittsburgh B. & B. R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555; Shano *v.* Fifth

but these elements are not admissible as independent items of damage or benefit.[39]

Ave. H. St. Bridge Co., 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808.

Texas. — Gulf C. & S. F. R. R. Co. *v.* Eddins, 60 Tex. 656; Morris *v.* Coleman County (Tex. Civ. App), 28 S. W. 380.

Wisconsin. — Weyer *v.* Chicago W. & N. R. Co., 68 Wis. 180, 31 N. W. 710.

"But it has never been held that the specific elements of computation may not be given in evidence as the means of enabling the viewers or jury to reach a just conclusion of the whole matter." Danville H. & W. R. Co. *v.* Gearhart, 81 Pa. St. (32 P. F. Smith) 260.

As to what particular effects may be shown, see II-6-A-d (4).

39. *Illinois.* — Chicago P. & St. L. R. Co. *v.* Grieney, 137 Ill. 628, 25 N. E. 798.

Iowa. — Henry *v.* Dubuque & P. R. Co., 2 Iowa 288.

Kansas. — Le Roy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Omaha H. & G. R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831.

Nebraska. — Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557; Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289.

New York. — Canandaigua & N. F. R. Co. *v.* Payne, 16 Barb. 273; Matter of N. Y. W. S. & B. R. Co., 29 Hun 609.

Pennsylvania. — Harris *v.* Schuylkill R. E. S. R. Co., 141 Pa. 242, 21 Atl. 590, 23 Am. St. Rep. 278; Shano *v.* Fifth Ave. H. St. B. Co., 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808; Chambers *v.* South Chester, 140 Pa. St. 510, 21 Atl. 409.

Texas. — Morris *v.* Coleman County (Tex. Civ. App.), 28 S. W. 380.

Washington. — Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Wisconsin. — Neilson *v.* Chicago M. & N. W. R. Co., 58 Wis. 516, 17 N. W. 310; Snyder *v.* Western U. R. Co., 25 Wis. 60.

An instruction, "You are not to take up these separate items and award separate damages for them, and add them together and say that is the damage suffered," was held correct in Chambers *v.* South Chester, 140 Pa. St. 510, 21 Atl. 409.

The opinion of the witness as to the amount of damages caused by each one of these items separately is inadmissible. Matter of N. Y. W. S. & B. R. Co., 29 Hun (N. Y.) 609.

Proper Instruction. — The refusal of the court to instruct the jury that the evidence of the particulars and details of the damage was to be considered *only* as it affected the value of the property, was held material error in Omaha H. & G. R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831.

Principle of the Rule. — In Morris *v.* Coleman Co. (Tex. Civ. App.), 28 S. W. 380, it is said: "So we think the item in the account for the cost of five miles of fence, as a distinct item of damages, was properly stricken out. The question is, what additional burden was put upon the land affecting its value by opening the road? The question is not, what expense was incurred by the owner. The necessity of building fences to restore the land to the practical uses the owner intended it for, and the damage so caused, is the issue; not the cost of certain fences built. The general inquiry of damages would admit evidence of reasonable cost of fences made essential to the proper use and enjoyment of the land by the owner [citing cases]. The inquiry should be confined to what was necessary to be done so that plaintiff could enjoy his land. The court below admitted testimony of the cost of the fences built, whether they were required to be built under the circumstances, whether the expense of building was reasonable, and the jury must have considered the sum in estimating the damages. We think, however, that the cost of building the fences that were actually built by the owner was not the issue, but the reasonable cost of sufficient fences to enable the owner to enjoy his land in uses to which it was adapted, and

c. *Opinion Evidence.* — **(1.) Value of Property Before and After Improvement.** — The decisions are almost uniform in holding that the opinion of a qualified witness as to the market value of the property before and after the taking is admissible.[40] But some of the decisions holding, as they do, that opinion evidence is not competent to prove the extent or amount of the damages or benefits resulting from the improvement,[41] confine the opinions to the value of the land before the taking, and exclude opinion evidence of the value as affected by the improvement.[42]

(2.) Amount of Damages or Benefits. — On the question whether, in condemnation proceedings, the opinion of a qualified witness as to the amount of damages or benefits resulting to the property by the improvement is admissible, there is direct and substantial conflict in the authorities. Many of the decisions declare that the ordinary rule, which excludes opinion evidence of the precise fact which the jury is to determine, does not apply in proceedings to condemn, and that the opinion of a qualified witness as to the amount or extent of the damages or benefits resulting from the improvement is competent and proper.

The decisions in Arkansas, California, Florida, Illinois, Massachusetts, Maine, Minnesota, Missouri, Montana, Oregon, Pennsyl-

to which he had applied it, was the issue."

40. *Arkansas.* — Texas & St. P. R. Co. *v.* Kirby, 44 Ark. 103.

Iowa. — Henry *v.* Dubuque & P. R. Co., 2 Iowa 288; Dalzell *v.* City of Davenport, 12 Iowa 437; Sater *v.* Burlington & M. P. R. Co., 1 Iowa 386.

Massachusetts. — Swan *v.* County of Middlesex, 101 Mass. 173.

Nebraska. — Republican Val. R. Co. *v.* Arnold, 13 Neb. 485, 14 N. W. 478; City of Omaha *v.* Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504.

New York. — Matter of Furman Street, 17 Wend. 649; Roberts *v.* N. Y. El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499.

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

And see cases cited in notes 43 and 44 *infra.*

In Durham & N. R. Co. *v.* Trustees, 104 N. C. 525, 10 S. E. 761, the court says: "This is a common, reasonable and necessary way of proving the quantum of damages." And in Matter of Furman Street, 17 Wend. (N. Y.) 649, this is declared to be the best method.

Form of Question. — A question asking the opinion of the witness as to the "value," without specifying "market" value, was held improper in City of Dallas *v.* Taylor (Tex. Civ. App.), 69 S. W. 1,005.

41. See II, 6 B. c. (2.)

42. City of Logansport *v.* McMillen, 49 Ind. 493; Fremont E. & M. R. Co. *v.* Whalen, 11 Neb. 585, 10 N. W. 491.

"What was the entire tract worth immediately before and after the railroad was completed through it?" *Held* inadmissible — because it called for a conclusion or opinion of the witness on the question the jury were called to determine. Fremont E. M. & V. R. Co. *v.* Lamb, 11 Neb. 592, 10 N. W. 493.

"While the witness might give his opinion on the subject of the value of defendant's land, he might not as to the amount of damages done to it by the construction of the railroad; and when stating how much the land is rendered worth by the construction of the railroad, he is but stating how much in his opinion the land is injured by the construction of the road." Baltimore P. & C. R. W. R. Co. *v.* Johnson, 59 Ind. 247, 480.

vania, South Dakota and Wisconsin, and in some of the Federal cases hold such opinions competent.[43]

43. *United States.* — Laflin *v.* Chicago W. N. R. Co., 33 Fed. 415.

Arkansas. — Texas & St. P. R. Co. *v.* Kirby, 44 Ark. 103; Railroad Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418; Springfield & M. R. Co. *v.* Rhea, 44 Ark. 258.

California. — Eachus *v.* Los Angeles Consol. Elec. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; County of Siskiyou *v.* Gamlich, 110 Cal. 94, 42 Pac. 468.

In these two California cases the opinion was held proper, but the specific objection was not made.

Florida. — Orange B. R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444.

Illinois. — Green *v.* Chicago, 97 Ill. 370; Chicago P. & St. L. R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81; Cairo & St. L. R. Co. *v.* Woolsey, 85 Ill. 370; Eberhart *v.* Chicago M. & St. P. R. Co., 70 Ill. 347; Cooper *v.* Randall, 59 Ill. 317; Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290; (*Contra.* — Chicago R. R. Co. *v.* Springfield & N. W. R. R. Co., 67 Ill. 142;) Hayes *v.* Ottawa O. & F. R. V. R. R. Co., 54 Ill. 373; Ottawa Gas L. C. Co. *v.* Graham, 35 Ill. 346; Galena & S. W. R. R. Co. *v.* Haslam, 73 Ill. 494; City of Chicago *v.* McDonough, 112 Ill. 85; City of East St. Louis *v.* O'Flynn, 19 Ill. App. 64; Spear *v.* Drainage Com'rs, 113 Ill. 632.

Massachusetts. — Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1,029; Shattuck *v.* Stoneham R. R. Co., 6 Allen 115; Vandine *v.* Burpee, 13 Metc. 288, 46 Am. Dec. 733; Hosmer *v.* Warner, 15 Gray 46; Shaw *v.* Charleston, 2 Gray 107, 68 Mass. 107; Dickenson *v.* Fitchburg, 13 Gray 546; Swan *v.* County of Middlesex, 101 Mass. 173; Brainard *v.* Boston & N. Y. C. R. Co., 12 Gray 407; Brown *v.* Railroad Co., 71 Mass. 35; Dwight *v.* Commissioners, 11 Cush. 201; Sexton *v.* North Bridgewater, 116 Mass. 200.

Minnesota. — Emmons *v.* Minneapolis & St. L. R. R. Co., 41 Minn. 133, 42 N. W. 789; Sherman *v.* St. Paul M. & M. R. R. Co., 30 Minn. 227, 15 N. W. 239; Grannis *v.* St. Paul & C. R. Co., 18 Minn. 194; Lehmicke *v.* St. Paul S. & T. F. R. Co., 19 Minn. 464; Winona & St. P. R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100; Sherwood *v.* St. Paul & C. R. R. Co., 21 Minn. 127; Curtis *v.* St. Paul S. & T. R. Co., 20 Minn. 28; St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 433; Leber *v.* Minneapolis & N. W. R. Co., 29 Minn. 256, 13 N. W. 31; Sigafoos *v.* Minneapolis L. & M. R. Co., 39 Minn. 8, 38 N. W. 627; Johnson *v.* Chicago B. & N. R. Co., 37 Minn. 519, 35 N. W. 438.

Missouri. — Nevada & M. R. Co. *v.* De Lissa, 103 Mo. 125, 15 S. W. 366; Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

These two Missouri cases are criticised, but not directly overruled in Spencer *v.* Metropolitan St. R. Co., 120 Mo. 154, 23 S. W. 126.

Oregon. — City of Portland *v.* Kamm, 10 Or. 383.

Pennsylvania. — White Deer Creek Imp. Co. *v.* Sassaman, 67 Pa. St. 415; Dawson *v.* Pittsburg, 159 Pa. St. 317, 28 Atl. 171; Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184; Lewis *v.* Springfield Water Co., 176 Pa. St. 230, 35 Atl. 186; Jones *v.* Erie & W. V. R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Pennsylvania & N. Y. C. R. Co. *v.* Bunnell, 81 Pa. St. (31 P. F. Smith) 414.

South Dakota. — Schuler *v.* Board of Supervisors, 12 S. D. 460, 81 N. W. 890.

Washington. — Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Wisconsin. — Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328; Snyder *v.* Western U. R. R. Co., 25 Wis. 60; Diedrich *v.* N. W. U. R. Co., 47 Wis. 662; Wooster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401; Neilson *v.* Chicago M. & N. W. R. Co., 58 Wis. 516, 17 N. W. 310.

Contra. — Church *v.* City of Milwaukee, 31 Wis. 512; Gilmore *v.* Pittsburgh V. & C. R. Co., 104 Pa. St. 275; Gallatin Canal Co. *v.* Lay, 10 Mont. 528, 26 Pac. 1,001.

General rule that opinion evidence of damage is inadmissible does not apply to condemnation proceedings. Telephone & Telegraph Co. *v.* Forke, 2 Ct. App. Civ. Cas. (Tex.) § 365.

The difference in value of the land affected before and after the improvement is a proper subject of opinion evidence — and it is "immaterial whether the testimony was admitted in this form or in answer to a direct question as to the amount of the damage. In either case it must come as an opinion." Texas & St. P. R. Co. *v.* Kirby, 44 Ark. 103.

In Railroad Co. *v.* Foreman, 24 W. Va. 662, the following question asked a qualified witness was held admissible, namely, "State what in your opinion would be a fair value for the damages to the residue of said land beyond the pecuniary benefits which will be derived in respect to said residue from the work to be constructed?"

"What is the difference in value of the land with the railroad and without?" *Held*, a proper question in Simmons *v.* St. Paul & C. R. Co., 18 Minn. 184.

"The witnesses being competent to testify to the value . . . before and after the alteration . . . might testify to the simple question of arithmetic, which of those two values is the greater? In other words, whether the petitioner's estate was benefited or injured?" Swan *v.* County of Middlesex, 101 Mass. 173.

"It was clearly competent to ask a witness who had knowledge of the property, whether its value was increased or diminished by the construction of the railroad through it, and if its value was lessened by such construction, we see no reason why he may not say how much, provided he has knowledge." Beck *v.* Pennsylvania P. & B. R. Co., 148 Pa. St. 271, 23 Atl. 900, 33 Am. St. Rep. 822.

"The reason for its exclusion . . . that it would instruct the jury as to the amount of the verdict to be rendered would seem to be a very good reason for its admission." Snow *v.* B. & M. R. R. Co., 65 Me. 230.

"Parties shown by the evidence to be acquainted with the value or damage may, in connection with the facts, state their opinion as to the value or damages." Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

Damage by Blasting. — The damage caused to the petitioner's buildings by blasting in the construction of defendant's railroad may be proven by the testimony of a witness that it amounted to a certain sum pecuniarily. Brown *v.* Providence W. & B. R. Co., 5 Gray (Mass.) 35.

Form of Question. — The question, "How much in your opinion has the railroad depreciated the value of your farm as a whole?" is not rendered incompetent because it does not exclude from the estimate of the witness the land actually taken, which was appraised separately. *Held*, that the question meant the farm owned by the plaintiff at the time of the trial, the land taken then constituting no part of it. Wooster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401.

Opinion Confined to Property in Question. — This rule is confined to the subject and the specific land in controversy. Evidence relating to other property similarly situated must be limited to facts; opinions not admissible. Shattuck *v.* Stoneham Branch R. R., 6 Allen (Mass.) 115.

Principle of These Decisions. — In Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738, the court settles this conflicting question in the following clear language: "It is also objected that one of the respondents was permitted to state how much, in his opinion, the land would be depreciated in value on account of the appropriation of the right of way and the construction of the railroad. It is conceded by appellant that it is competent for the witness, if properly qualified, to state his opinion of the value of the land before and after the appropriation; but it is contended that it is for the jury to say what the damages are, and not the witness. While there is undoubtedly a conflict of authority upon this question, it seems difficult to perceive any substantial reason for rejecting the testimony. To admit evidence of the value of the land before and after the taking is to admit, in effect, the same thing to be done which appel-

The contrary rule is maintained in Alabama, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Nebraska, New Jersey, New Mexico, New York, Ohio, Rhode Island and Texas. In these states the witness is confined to the facts in showing how much the property has been injured or benefited by the improvement.[44]

lant complains of, since the amount of the damages is then ascertained by the jury by the mere process of subtraction. And, this being so, we are unable to understand why the witness should not be permitted to state the result as well as the facts from which such result is reached. In either case, the amount of the damages is ultimately based on the opinion of the witness. The distinction here insisted on between the two methods is based on mere form, rather than substance. The facts upon which the witness bases his opinion may be shown on cross-examination, and when this is done the jury have all the means which can be afforded for forming an independent judgment as to the damages."

44. *Alabama.* — Montgomery & W. P. R. Co. *v.* Varner, 19 Ala. 185; Alabama & F. R. Co. *v.* Burkett, 42 Ala. 83.

Georgia. — Central R. B. Co. *v.* Kelley, 58 Ga. 107; Brunswick & A. R. Co. *v.* McLaren, 47 Ga. 546.

Indiana. — Yost *v.* Comoy, 92 Ind. 464, 47 Am. Rep. 156; City of Logansport *v.* McMillen, 49 Ind. 493; Hagaman *v.* Moore, 84 Ind. 496; Evansville I. & C. S. L. R. Co. *v.* Fitzpatrick, 10 Ind. 120; Baltimore P. & C. R. W. Co. *v.* Johnson, 59 Ind. 247, 480; Baltimore C. & P. R. W. Co. *v.* Stoner, 59 Ind. 579; New Albany & S. R. Co. *v.* Huff, 19 Ind. 315.

Iowa. — Harrison *v.* Iowa M. R. Co., 36 Iowa 323; Dalzell *v.* City of Davenport, 12 Iowa 437.

Kansas. — Chicago K. & W. R. Co. *v.* Woodward, 48 Kan. 599, 29 Pac. 1,146; Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 675, 17 Pac. 322; Chicago K. & N. R. Co. *v.* Neiman, 45 Kan. 533, 26 Pac. 22; Ottawa O. C. & C. G. Co. *v.* Adolph, 41 Kan. 600, 21 Pac. 643.

Kentucky. — City of Paducah *v.* Allen, 111 Ky. 361, 63 S. W. 981.

Michigan. — Grand Rapids *v.* Grand Rapids & I. R. R. R. Co., 58 Mich. 641, 26 N. W. 159.

Nebraska. — Burlington & M. R. Co. *v.* Beebe, 14 Neb. 463, 16 N. W. 747; City of Omaha *v.* Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504; Fremont, E. M. & V. R. Co. *v.* Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; Burlington & M. R. Co. *v.* Schluntz, 14 Neb. 421, 16 N. W. 439, Maxwell, J., dissenting.

New Mexico. — New Mexico R. Co. *v.* Hendricks, 6 N. M. 611, 30 Pac. 901.

New Jersey. — Thompson *v.* Pennsylvania R. R. Co., 51 N. J. L. 42, 15 Atl. 833.

New York. — Avery *v.* New York C. & H. R. Co., 121 N. Y. 31, 24 N. E. 20; Purdy *v.* Manhattan El. R. Co., 51 N. Y. St. 766, 22 N. Y. Supp. 943; Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5; McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957; Troy & B. R. Co. *v.* Northern T. Co., 16 Barb. 100; Canandaigua & N. S. R. *v.* Payne, 16 Barb. 273; McGay *v.* Manhattan El. R. Co., 40 N. Y. St. 669, 16 N. Y. Supp. 157; Wallach *v.* Manhattan El. R. Co. 40 N. Y. St. 669, 16 N. Y. Supp. 157; Gray *v.* Manhattan R. Co., 128 N. Y. 499, 28 N. E. 498.

Contra. — Rochester & S. R. *v.* Budlong, 10 How. Pr. 289; Hine *v.* New York El. R. Co., 36 Hun 293; Troy & B. R. Co. *v.* Lee, 13 Barb. 169.

Ohio. — Atlantic & G. W. R. Co. *v.* Campbell, 4 Ohio St. 583, 64 Am. Dec. 607; Columbus V. V. & T. R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69; Powers *v.* Hazleton & L. R. Co., 33 Ohio St. 429.

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

Texas. — San Antonio & A. P. R. Co. *v.* MacGregor, 2 Tex. Civ. App. 586, 22 S. W. 269.

Contra. — Telephone & Telegraph

(3.) Whether Improvement Is a Benefit or an Injury. — It has been held proper to ask the opinion of a qualified witness as to whether the improvement in question is a benefit or an injury to the property.[45] But this rule is not uniform; many of the decisions

Co. *v.* Forke, 2 Ct. App. Civ. Cas., § 365.

Vermont. — It is hinted, although not decided, in Wead *v.* St. Johnsbury & L. C. R. Co., 66 Vt. 420, 29 Atl. 631, that the opinion of a witness as to the amount of damages sustained is inadmissible.

"How much less was the farm worth immediately after the railroad went through, per acre, than it was before?" *Held,* inadmissible because it was the very question jury were to decide and therefore opinion was not admissible. Chicago K. & W. R. Co. *v.* Muller, 45 Kan. 85, 25 Pac. 210.

"What in your judgment would the property be worth without the elevated railroad?" *Held,* incompetent. Doyle *v.* Manhattan R. Co., 128 N. Y. 488, 28 N. E. 495.

Principle of These Decisions. — The majority opinion, in the case of Roberts *v.* N. Y. El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499, is one of the leading authorities holding opinion evidence as to the amount of damages caused by an improvement, inadmissible. Previous authorities in the state of New York are reviewed, and the question is thoroughly discussed in the majority opinion of Peckham, J. The question asked of the witness, to which the objection was made, was as follows: "To what extent, if at all, in your judgment, is the value of Mr. Roberts' four buildings on Third avenue . . . is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?" On this question the court said: "The first question asked of this witness, to which exception is taken as above noted, calls for his opinion as to the amount of said damages. . . . The precise and specific question which is to be determined by the court and jury is by this interrogatory placed before the witness for his opinion and decision. To permit it to be asked and answered is beyond all question against the great mass of authority in this and other states." The former cases of Rochester & S. R. R. Co. *v.* Budlong, 10 How. Pr. (N. Y.) 289, and Hine *v.* New York El. R. Co., 36 Hun 293, which hold the opposite doctrine, are expressly overruled. The decision, however, holds that the witness, if qualified, may state his opinion as to the value of the property immediately before the construction of the improvement, and may likewise state his opinion of the value of the property immediately after the construction of the improvement, thereby allowing the very thing to occur, the prevention of which is the sole reason given for the exclusion of the opinion in the first instance. In an able and exhaustive dissenting opinion, concurred in by Ruger, Chief Justice, Judge Gray reviews all of the authorities cited in the majority opinion, and by a process of clear reasoning, arrives at a directly opposite result. He holds that the case before the court, which was an action by an abutting owner to recover damages caused by the construction of an elevated railroad in front of his premises, is governed by the same rules and is the same in principle as the case of Rochester & S. R. Co. *v.* Budlong, 10 How. Pr. 289, which was a proceeding in eminent domain, and in which, in an able opinion, the court held that the opinions of qualified witnesses as to the amount of damages sustained were admissible. Gray, J., concludes his dissenting opinion in these words: "Upon the grounds of superior convenience, of necessity, and of obvious propriety, if we would have intelligent and just decisions of such issues, I think the evidence objected to is admissible in such cases."

45. Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Pennsylvania & N. Y. C. R. Co. *v.* Bunnell, 81 Pa. St. (31 P. F. Smith) 414; Republican Val. R.

holding that the facts as to damage and benefit must be shown, and the determination left to the court or jury.[46]

(4.) Basis of Opinion. — Where a witness is called upon to express an opinion, either as to the value or to the damages or benefits resulting from the improvement, it is proper, either in the direct or cross-examination, to test the value of his opinion by requiring him to state the elements of his calculation,[47] although the evidence

Co. *v.* Linn, 15 Neb. 234, 18 N. W. 35, 315; Beck *v.* Pennsylvania P. & B. R. Co., 148 Pa. St. 271, 23 Atl. 900, 33 Am. St. Rep. 822; Lake Shore & M. S. R. Co. *v.* Baltimore & O. C. R. Co., 149 Ill. 272, 37 N. E. 91; Chicago B. & Q. R. Co. *v.* Chicago, 149 Ill. 457, 37 N. E. 78.

Effect of Improvement. — "Would the flowing of the water upon the land, and its being stopped by the railroad, have a tendency to convey the alluvium and enrich the land?" *Held,* proper. Milwaukee & M. R. Co. *v.* Eble, 3 Pin. (Wis.) 334.

46. Dalzell *v.* City of Davenport, 12 Iowa 437, "Was the property of Mr. C. injured or benefited by the grading of 1870?" *Held,* inadmissible. Church *v.* City of Milwaukee, 31 Wis. 512.

"In your opinion, based on your experience, do you consider that these physical effects in any way affect the value of these premises?" *Held* incompetent as calling for the conclusion of the witness. McGay *v.* Manhattan El. R. Co., 40 N. Y. St. 668, 16 N. Y. Supp. 155.

Best Use to Which Property Formerly Applicable. — It is error to allow an expert witness to answer the question as to what, in his opinion, "is the best use to which this property could have been put if it had not been for the elevated railroad and this interference?" Gray *v.* Manhattan R. Co., 128 N. Y. 499, 28 N. E. 498.

47. See Holmann *v.* Chicago, 140 Ill. 226, 29 N. E. 671.

Iowa. — McClean *v.* Chicago I. & D. R. Co., 67 Iowa 568, 25 N. W. 782.

Massachusetts. — Hawkins *v.* City of Fall River, 119 Mass. 94; Dickenson *v.* Fitchburg, 13 Gray 546; Sexton *v.* North Bridgewater, 116 Mass. 200.

Pennsylvania. — Lewis *v.* Springfield Water Co., 176 Pa. St. 230, 35 Atl. 186.

Wisconsin. — Neilson *v.* Chicago M. & N. W. R. Co., 58 Wis. 516, 17 N. W. 310; Hutchinson *v.* Chicago & N. W. R. Co., 41 Wis. 541; Hutchinson *v.* Chicago & N. W. R. Co., 37 Wis. 582.

Benefits — Reason for Opinion. Where witness has testified that land would be benefited by laying out of public street by city over land that the owner had reserved for, and used, as a street, and which he had graded and otherwise improved, but in which he retained a fee, witness may give as his reason for such opinion the fact that the defendant would no longer be burdened with the cost of repairs. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1,029.

Witness may testify that the reason property has been damaged in value is because former traffic has been diverted to other side of street. City of Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1,013, 1,135.

Effect of Improvement on Other Property. — Where a witness has given his opinion of the value of the property as affected by an elevated railroad, he may state how its value is affected, and as proof of his knowledge may testify the effect of an elevated railroad on adjacent property to his knowledge. Metropolitan W. S. E. R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978.

Witness May State All Details. Where a witness has stated the amount of depreciation in value of the property caused by the improvement, he may state his grounds or reasons for fixing the damages at the specific sum named by him, and to do this he may be permitted to state all causes of injury and elements of

adduced by the answers may be inadmissible as independent evidence.[48]

(5.) **Weight of Opinion.** — The opinions of witnesses as to the damages or benefits resulting or to result from the improvement are not conclusive on the jury in condemnation proceedings. They may and should consider all the evidence in the case, including their view of the premises,[49] and draw their own conclusions therefrom, and although such conclusions may be against the weight of the opinion evidence, if justified by the evidence as a whole, the verdict will stand.[50] It has been held that the mere opinion of a witness, standing alone, that the property is benefited or damaged by the

damage which he believes together go to make up the depreciation testified to by him. Neilson *v.* Chicago M. & N. W. R. Co., 58 Wis. 516, 7 N. W. 310.

Cross-Examination. — Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738; Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711; Sigafoos *v.* Minneapolis L. & M. R. Co., 39 Minn. 8, 38 N. W. 627; Reading & P. R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518, 13 Atl. 294.

Cross-Examination.—Where a witness on behalf of the condemning company has testified his opinion of the effect of the railroad on the value of plaintiff's land it is proper for the owner to ask him on cross-examination as to the effect upon such value of the probability or possibility that horses might be frightened or fire communicated by passing trains. Wooster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401.

48. Neilson *v.* Chicago M. & N. W. R. Co., 58 Wis. 516, 17 N. W. 310; Hutchinson *v.* Chicago & N. W. R. Co., 41 Wis. 541; City of Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1,013, 1,135.

Special Items of Damage. — The special items or details of the damage may not be admissible as independent facts before the jury, but are proper to be drawn out on cross-examination of a witness who has given his opinion as to the amount of damages sustained. Harris *v.* Schuylkill R. E. S. R. Co., 141 Pa. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

49. *In re* Thompson, 121 N. Y. 277, 24 N. E. 472; Chicago P. & M. R. Co. *v.* Mitchell, 159 Ill. 406, 42 N. E. 973.

As to the effect of the "view" as evidence see article "VIEW."

50. *Illinois.* — Green *v.* Chicago, 97 Ill. 370; Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290; Chicago P. & M. R. Co. *v.* Mitchell, 159 Ill. 406, 42 N. E. 973.

Kansas. — Chicago K. & W. R. Co. *v.* Drake, 46 Kan. 568, 26 Pac. 1,039.

Minnesota. — Johnson *v.* Chicago B. & N. R. Co., 37 Minn. 519, 35 N. W. 438.

New York. — *In re* Thompson, 121 N. Y. 277, 24 N. E. 472. See also Patterson *v.* Boston, 20 Pick. (Mass.) 159.

Necessity of Other Evidence. — It was held in Wead *v.* St. Johnsbury & L. C. R. Co., 66 Vt. 420, 29 Atl. 631, that the master in chancery erred in basing his estimate of damages solely on the opinions of expert witnesses and in failing to consider other evidence in the case, which he did not take into account for the alleged reason that such other testimony was too indefinite and uncertain to aid him.

In Jacksonville & S. R. Co. *v.* Kidder, 21 Ill. 131, the court said that, in assessing damages in a condemnation proceeding, the jury is warranted in giving but slight, if any, weight to evidence of experts based simply on theory and conjecture as to the damages caused to the owners of a grain elevator by the construction of a railroad between it and a river.

improvement is insufficient to justify a finding of damages or benefits.[51]

(6.) Qualification of Witness. — (A.) In General. — The general rule as to what witnesses are qualified to testify as experts applies to eminent domain proceedings.[52]

(B.) Viewer or Commissioner May Testify. — The fact that the witness was one of the original viewers or commissioners who originally assessed the compensation does not disqualify him.[53]

d. *How the Improvement Affects the Property.* — **(1.) Manner of Construction and Operation.** — (A.) Presumption of Ordinary Construction and Natural Consequences. — It is presumed that a railroad will be constructed in the ordinary manner in which railroads are constructed, and that the usual natural consequences will follow such construction.[54]

51. Anderson *v.* Wharton Co., 27 Tex. Civ. App. 115, 65 S. W. 643; Jones *v.* New York El. R. Co., 44 N. Y. St. 878, 18 N. Y. Supp. 134.

Railroad Benefited by Highway. In Hook *v.* Chicago & A. R. R. Co., 133 Mo. 313, 34 S. W. 549, it was held that the opinions of the witnesses that the defendant railroad company was benefited by the laying out of a highway across the railroad, standing alone, were not sufficient to support a finding that the railroad was so benefited, in the absence of proof of facts sufficient to support such opinion.

But It Was Held in Gulf C. & S. F. Co. *v.* Necco (Tex.), 18 S. W. 564, that the verdict of a jury awarding damages in a certain sum is sufficiently sustained by the mere opinion of the witnesses, expressed in a general way, as to the amount of damages caused by a particular part of the improvement, although the evidence did not show that the witnesses had confined their estimates to the effect of the particular part of the improvement in question as distinguished from the effect of the whole, which latter proposition was not involved in the proceeding.

52. Orange B. R. Co. *v.* Craver, 32 Fla. 28, 18 So. 444; Shaw *v.* City of Charleston, 68 Mass. 107; Le Roy & W. R. Co. *v.* Hawk, 39 Kan. 638, 18 Pac. 943, 7 Am. St. Rep. 566.

Note. — For a consideration of the rules governing the question of the qualifications of expert witnesses the reader is referred to the title "Expert and Opinion Evidence."

53. Plank Road Co. *v.* Thomas, 20 Pa. St. 91.

Viewer. — The fact that the witness had been a viewer did not disqualify him. Dorlan *v.* East Brandywine & W. R. R. Co., 46 Pa. St. 520.

Member of Board of Supervisors. A member of a board of supervisors who acted on the petition to condemn is competent to testify as to the damages which defendant would sustain by reason of the construction of the improvement, and an objection that the records of the board fixing the amount of damages is the best evidence of his opinion is not well taken. County of Siskiyou *v.* Gamlich, 110 Cal. 94, 42 Pac. 468.

Commissioners. — One of the commissioners from whom the appeal was taken is competent. Dickenson *v.* Fitchburg, 13 Gray (Mass.) 546.

54. Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738; Pittsburgh F. W. & C. R. Co. *v.* Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97.

Evidence to show that the owner would not have been injured if the circumstances had been different is inadmissible. Thus, the question, "State whether the depreciation in the value of the property is not mainly caused by the omission to locate a depot on the property?" is incompetent. St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 433.

(B.) Presumption of Compliance With Statute or Ordinance. Where the statute or city ordinance prescribes certain requisites to be complied with in the construction and operation of the improvement, it is presumed, where the question of the effect of the construction is the issue, that the condemning company will do all that it is required by law to do in the construction and operation of the improvements.[55]

(C.) Presumption That Same Will Be Skillful. — Where the assessment of compensation precedes the construction of the improvement, the presumption is that the improvement will be built and operated with skill and proper precautions.[56]

(2.) Comparison With Effect On Other Properties. — Where the question at issue is the effect of the railroad on the particular property, it is permissible to prove the general effect of the road on the whole of the property in the vicinity.[57] But evidence of its effect

Possible Actions of Others Immaterial. — In Fifth National Bank *v.* New York El. R. Co., 28 Fed. 231, where plaintiff claimed that the elevated railroad structure cut off his light, and intercepted the rays of the sun towards plaintiff's building, the railroad company sought to prove that if the buildings on the opposite side of the street were raised as high as the law would allow, the railroad structure would be in their shadow during all the time that plaintiff's building was in its shadow, so that the railroad would not intercept any of the direct rays of the sun towards plaintiff's building. The exclusion of this evidence was held proper on the ground that the fact that others have a right to do something which would injure plaintiff's property does not authorize the defendant to injure plaintiff's property without right.

55. Troy & B. R. Co. *v.* Northern T. Co., 16 Barb. (N. Y.) 100; Fremont E. M. & V. R. Co. *v.* Lamb, 11 Neb. 592, 10 N. W. 493; Philadelphia W. & R. R. Co. *v.* Trimble, 4 Whart. (Pa.) 47; Bell *v.* Chicago B. & I. R. Co., 74 Iowa 343, 37 N. W. 768; King *v.* Iowa Midland R. Co., 34 Iowa 458; *citing* Pingery *v.* Cherokee & D. R. Co., 78 Iowa 438, 43 N. W. 285.

Jury may consider the fact that law requires railroad company to construct proper crossing. Lough *v.* Minneapolis & St. L. R. Co., 116 Iowa 31, 89 N. W. 77.

56. Springfield & M. R. Co. *v.* Rhea, 44 Ark. 258.

Colorado. — Denver C. I. & W. Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234.

Iowa. — Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844; Miller *v.* Keokuk & D. M. R. Co., 63 Iowa 680, 16 N. W. 567.

Nebraska. — Burlington & M. R. Co. *v.* Schluntz, 14 Neb. 421, 16 N. W. 439; Fremont E. & M. R. Co. *v.* Whalen, 11 Neb. 585, 10 N. W. 491.

New Hampshire. — Dearborn *v.* Boston C. & M. R. Co., 24 N. H. 179.

Pennsylvania. — Pittsburg F. W. & C. R. Co. *v.* Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97; Huyett *v.* Philadelphia & R. R. Co., 23 Pa. St. 373.

Oregon. — Oregon & C. R. R. Co. *v.* Barlow, 3 Or. 311.

Virginia. — Southside R. R. Co. *v.* Darrill, 20 Gratt. 344.

Wisconsin. — Chapman *v.* Oshkosh & M. R. R. Co., 33 Wis. 629; Lyon *v.* Green Bay & M. R. Co., 42 Wis. 538.

And see Meelen *v.* Western R. Corp., 4 Gray (Mass.) 301; and Rowe *v.* Granite Br. Corp., 21 Pick. 344.

57. Galway *v.* Metropolitan El. R. Co., 35 N. Y. St. 628, 13 N. Y. Supp. 47; Johnson *v.* New York El. R. Co., 62 N. Y. St. 491, 30 N. Y. Supp. 920; Braun *v.* Metropolitan W. S. E. R. Co., 166 Ill. 434, 46 N. E. 974; Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12

on another particular piece or parcel of property is inadmissible.[58] It has been held proper to show the course and current of the values of other properties in the vicinity which are not affected by the railroad, and compare the value of the property in question therewith.[59]

N. E. 568, 60 Am. Rep. 437; Doyle *v.* Manhattan R. Co., 128 N. Y. 488, 28 N. E. 495; Flynn *v.* Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556.

Decrease in Value of Adjacent Property. — Evidence is admissible to prove that the trade and business transacted on the property had fallen off, and that business along the whole street had fallen off since the erection of the railroad, and by reason thereof the property had diminished in value. Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437.

Increase in Value of Adjacent Property. — It is proper for the railway company to show the effect of the railroad on the business and traffic upon the other property in the same street, in the vicinity of the owner's premises, and that the same has been benefited by the operation of the road. Doyle *v.* Manhattan R. Co., 128 N. Y. 488, 28 N. E. 495.

Expert Testimony. — In an action to recover damages to property caused by an elevated railroad, it is proper to question an expert witness as to the general course and current of values of property within two or three blocks, as affected by the railroad. Shepard *v.* Manhattan R. Co., 169 N. Y. 160, 62 N. E. 151.

Throwing Cinders on Adjacent Property. — Evidence that the operation of the railroad cuts off light and throws dirt and cinders upon the adjoining property, being precisely similar in location to the property in question, is sufficient proof of the injury to the property in question. Johnson *v.* Manhattan R. Co., 41 N. Y. St. 682, 16 N. Y. Supp. 434.

58. *Illinois.* — Kiernan *v.* Chicago S. F. & C. R. Co., 123 Ill. 188, 14 N. E. 18.

Maryland. — Lake Roland R. Co. *v.* Frick, 86 Md. 259, 37 Atl. 650.

New Hampshire. — Concord R. Co. *v.* Greely, 23 N. H. 237.

New York. — Shepard *v.* Manhattan R. Co., 169 N. Y. 160, 62 N. E. 151; Brush *v.* Manhattan R. Co, 44 N. Y. St. 111, 17 N. Y. Supp. 540; Stutyvesant *v.* Railroad Co., 74 N. Y. St. 223, 38 N. Y. Supp. 595; Clinical Instruction Co. *v.* New York El. R. Co., 74 N. Y. St. 449, 38 N. Y. Supp. 21.

Testimony of Other Owners. — Testimony of other owners whose property was injured by the same railroad, as to the effects of the road on the value of their premises, is incompetent, as it raises a collateral issue. Jamieson *v.* Kings Co. El. R. Co., 147 N. Y. 322, 41 N. E. 693.

Benefits to Land at Other Places. Evidence of the effect of railroads in general upon the value of lands at other places and remote from the lands in question is inadmissible, because it raises other and collateral issues and casts no light on the true issue of benefits to the particular land in question. Sommerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495.

59. Shepard *v.* Manhattan R. Co., 169 N. Y. 160, 62 N. E. 151; Galway *v.* Metropolitan El. R. Co., 35 N. Y. St. 628, 13 N. Y. Supp. 47.

Irresistible Inference. — In Israel *v.* Manhattan R. Co., 158 N. Y. 624, 53 N. E. 517, which was an action to recover damages caused to abutting property occupied by a hotel, it was held that, where the evidence showed that the fee and rental values of the property during the period that the railroad had been in operation, had fallen below their value, even in former panic times, and no improvement in the rental of fee values of other property affected by the railroad was shown, while property on adjacent streets where there was no railroad had advanced rapidly both in fee and rental values, in the absence of any explanation, the inference was irresistible that the presence and operation of the railroad

(3.) Nature and Extent of Improvement. — (A.) Testimony as to Mode of Construction and Operation. — Where the improvement has already been constructed and is in operation, it is proper to prove by a competent witness the effect that the improvement as constructed will have on the use and enjoyment of the remaining property.[60]

(B.) Intentions of Condemning Company. — The mere intention of the condemning company, when it is not bound to fulfill such intentions, as to the manner in which it proposes to construct and operate the improvement, is inadmissible as evidence on the question of damages.[61] Especially is this true when the improvement is already constructed and in operation.[62]

(C.) Plans and Profiles of Proposed Improvement. — The definite plans and profiles of the condemning company, illustrating the nature and extent of the improvement, are admissible to show how the property will be affected.[63] In an Illinois case it was held error for

kept the values of the hotel property down.

60. Lyon *v.* Hammond & B. I. R. Co., 167 Ill. 527, 47 N. E. 775; Oregon R. & N. Co. *v.* Owsley, 3 Wash. Ter. 38, 13 Pac. 186.

Testimony that the sewer was so constructed as not to weaken the surface ground over it, and so that repairs could be made from inside it without disturbing the soil, is admissible as showing the effect of sewer in the land. Butchers' S. & M. Ass'n *v.* Com., 163 Mass. 386, 40 N. E. 176.

61. Colorado M. R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87; Dorlan *v.* East Brandywine & W. R. Co., 46 Pa. St. 520; Chicago & A. R. R. Co. *v.* Springfield & N. W. R. R. Co., 67 Ill. 142.

62. The actual existing condition of the land and improvements is the criterion. Chicago I. & E. R. Co. *v.* Loer, 27 Ind. App. 245, 60 N. E. 319.

Stipulation of Attorney Incompetent. — In Wabash St. L. & P. R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 1 L. R. A. 207, a proceeding to assess damages caused by an alteration of a railroad already constructed across the owner's lands, the change consisting in substituting a trestle for what was formerly an embankment (which had been washed away by flood) the evidence should be submitted on the assumption that the railroad would remain in its present condition with the trestle instead of the embankment, unless the condemning company shows in its petition to condemn and substantiate by proper proof the fact that the trestle is but temporary, and that the embankment will be permanent. In the absence of such pleading and proof, a stipulation on the part of the attorneys for the condemning company, to the effect that the trestle was but temporary, and that the company intended to restore the embankment, was held incompetent.

And see St. Louis K. & N. W. R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 906; and Oregon R. & N. Co. *v.* Owsley, 3 Wash. Ter. 38, 13 Pac. 186.

63. *Illinois.* — Jacksonville & L. R. R. Co. *v.* Kidder, 21 Ill. 131; Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589; Illinois & St. L. & C. R. Co. *v.* Switzer, 117 Ill. 399, 7 N. E. 664, 57 Am. Rep. 875.

Kansas. — Kansas City & E. R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15.

Missouri. — St. Louis K. & N. W. R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906.

New Jersey. — National Docks & N. J. C. R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

New York. — Hill *v.* Mohawk & H. R. R. Co., 7 N. Y. 152.

Fact That Plans May Be Altered Immaterial. — In a proceeding to condemn a right of way for a railroad over a strip of land lying between a grain elevator and a river,

the court to refuse the owner's request that the condemning company be compelled to produce its plans.[64] The plans and profiles should be preserved in and made a part of the record in the proceeding, so that they may subsequently be referred to as the certain and definite plan upon which the damages were assessed.[65]

(a.) *Parol Evidence to Explain.* — If the plans need explanation, parol evidence is admissible to explain them.[66]

(D.) Ordinance Prescribing Mode of Construction. — An ordinance of a city or other municipal board which prescribes the manner in which the improvement must be constructed and operated is admissible to show how the property will be affected.[67] But the ordinance must be definite, and relevant to the subject in order to render it admissible.[68]

the plans which the company proposes to follow in building the road, and which show that the road is to be built on trestles so high as not to interfere with the operation of the elevator or the transfer of grain from it to the river, are admissible in evidence on the question of compensation. The fact that plans may be thereafter altered makes no difference. Peoria & P. U. R. Co. *v.* Peoria & F. R. Co., 105 Ill. 110. In this case the court said: "Indeed it seems to us that the plan upon which the road was to be built and the mode of construction were of the utmost importance to enable the jury to come to a correct conclusion, and that it was not only the right but it was the duty of the railroad company to furnish full plans, . . . profiles and estimates of that part of the road, and if they failed or neglected to do so the jury were authorized to presume that the road would be constructed in the mode most injurious within the bounds of reasonable probability."

Road Already Constructed. — Original plans or draft may be admissible to show that road was finally constructed as originally designed. Dorlan *v.* East Brandywine & W. R. Co., 46 Pa. St. 520.

64. Chicago & N. W. R. Co. *v.* Chicago & E. R. R. Co., 112 Ill. 589.

Material Error. — A failure of the condemning party to produce its plans and specifications of the proposed improvement when demanded by owner is material error. Tedens *v.* Sanitary District, 149 Ill. 87, 36 N. E. 1,033.

65. St. Louis K. & N. W. R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 906; National D. & N. J. C. R. Co. *v.* United Companies, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

This is material because a subsequent departure from such plans would render the company liable in additional damages. Illinois & St. L. R. & C. R. Co. *v.* Switzer, 117 Ill. 399, 7 N. E. 664, 57 Am. Rep. 875.

66. Testimony of the officers and engineers of the company explaining the plans and estimates is admissible. Jacksonville & S. R. Co. *v.* Kidder, 21 Ill. 131.

67. Pittsburg, Ft. W. & C. R. R. Co. *v.* Lyons, 159 Ill. 576, 43 N. E. 377.

Ordinance Regulating Speed of Trains. — Ordinances of the city relating to the manner of constructing and maintaining railroads within the city, regulating the speed of trains and preventing the blockading of street crossings, were held admissible as tending to show the mode of construction of the track, the probable manner of its use and as having a legitimate bearing on the question of damages. Mix *v.* Lafayette B. & M. R. R. Co., 67 Ill. 319.

68. Thus in Baltimore & C. V. R. Ex. Co. *v.* Duke (Pa. St.), 18 Atl. 566, where the question to be determined was the damages sustained by an abutting owner from the construction of a railroad on embankments in the street, an ordinance of

(a.) *Parol Evidence to Explain.* — If the ordinance contains a description of the proposed improvement which is claimed to be uncertain, parol evidence is admissible to explain it in order to show that it is certain.[69]

(E.) Map or Plat. — A correct map or plat of the premises in question made by a competent engineer may be used in evidence to enable the jury to understand and apply the other evidence.[70] The official map on file with the proper county officer is also competent.[71]

(F.) Photographs. — A photograph, showing the premises with the improvement thereon, is admissible to aid the jury in arriving at a clear and accurate idea of the situation of the premises, and to enable them to clearly understand the effect of the improvement thereon.[72]

(G.) Admissions of Agents of Condemning Company. — The statements and declarations made by an agent of the condemning company, in the exercise of his authority, as to the manner in which the company proposes to construct the improvement, are competent as admissions of the company.[73] But the agent's particular authority in the premises must be shown; the mere fact that he was an officer or agent of the company does not render his declarations competent as admissions.[74]

(H.) Rights Reserved or Offered to Owner. — The mere offer of the party condemning to grant or to reserve to the owner of the

the town granting to the railroad company the right to use the street, provided it conformed to grade, but not designating the grade, was held irrelevant and inadmissible, there being no established grade.

69. Ordinance and Diagram of Proposed Street. — Where a city ordinance and diagram of the proposed improvement of a street are rejected as indefinite and uncertain, parol evidence to explain the diagram and the meaning of the terms marked thereon, in order to show that the same is certain, is admissible. Village of Hyde Park *v.* Andrews, 87 Ill. 229.

70. Chicago R. I. & P. Co. *v.* Buel, 56 Neb. 205, 76 N. W. 571; Chicago K. & N. R. Co. *v.* Davidson, 49 Kan. 589, 31 Pac. 131.

71. This is the rule although the condemning railroad company has made the map required by the statute and this is in evidence. Chicago K. & W. R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779.

72. The fact that the jury had a right to view the premises does not alter the rule. Church *v.* City of Milwaukee, 31 Wis. 512.

73. Declarations of President. The statements and declarations made by the president of the defendant railway company during the negotiations for an agreement upon a plan for the construction of the proposed improvement are admissible against the company. Lake Shore & M. S. R. R. Co. *v.* Baltimore & O. C. R. Co., 149 Ill. 272, 37 N. E. 91.

74. Baltimore & O. R. Co. *v.* Sulphur Springs S. Dist., 96 Pa. St. 65, 42 Am. Rep. 529.

Admissions of General Manager Incompetent. — "He was not an agent of the corporation for the purpose of making admissions." Wellington *v.* Boston & M. R. R., 158 Mass. 185, 33 N. E. 393.

Rebuttal. — Where an elevated railway company has offered in evidence a circular formerly issued by the company stating the benefits to be derived by the building of an elevator connecting the street with the station, this does not authorize the owner to show conversations and declarations by the members of the company as to whether they considered the railroad a benefit or a dam-

remainder certain rights or privileges in the property taken is immaterial and inadmissible in the absence of the owner's acceptance thereof.[75] But it has been held in a number of cases that an offer made in such a way as to be a binding obligation by which a condemning railroad company agrees to construct and maintain the road in such a manner as to allow the owner of the residue certain privileges in the property taken, not inconsistent with its use for railroad purposes, and which he would not otherwise have, is competent for the jury's consideration, as showing the effect the road will have on the part not taken.[76]

age. Brush *v.* Manhattan R. Co., 44 N. Y. St. 111, 17 N. Y. Supp. 540.

75. Brown *v.* Worcester, 13 Gray (Mass.) 31.

And see Central O. R. Co. *v.* Holler, 7 Ohio St. 220; Railroad Co. *v.* Halstead, 7 W. Va. 301.

Parol Evidence Inadmissible. Where under statutory authority a city had taken certain lands, the statute providing that within 60 days the city should file with the registrar of deeds an accurate description of the property taken and shall pay all damages caused by the taking, said written description constituting the act of taking, it was held that parol evidence was inadmissible to show that certain rights not mentioned in the written description were reserved to the owner in order to mitigate his damages. Hamm *v.* Salem, 100 Mass. 350.

Proposed Plan of Operation of Owner's Property. — Where the use and operation of the mining property, across which the railroad is to be constructed, will be materially injured by the operation of the road, the condemning company maintaining that, by the following of a certain plan which it proposed, the damage would be materially lessened, it was held that the offer on the part of the company to prove that it had tendered to the owner a release to a certain part of the right of way to be used for locating the engine-house and engine, in order to conform to the proposed plan, was properly excluded as incompetent, in the absence of the owner's acceptance thereof. "Plaintiff had no more right to tender or prove that he had tendered defendant certain privileges than defendant had to offer to donate, or prove that he had offered to donate, the right of way if a different location should be adopted." Chicago S. F. & C. R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

City Ordinance. — An ordinance of the city reserving to the owner certain privileges in the land sought to be condemned, to which the owner did not assent, is not admissible as a set-off to the damages caused by the taking. Roanoke *v.* Berkowitz, 80 Va. 616.

Reservation Must Be in Legal Form. — If the party condemning would lessen the damages by reserving any rights to the landowner, it must secure those rights to him in the mode pointed out by statute. Presbrey *v.* Old Colony & U. R. Co., 103 Mass. 1.

Release of Rights to Third Parties. Evidence on the part of the condemning company of a release of its rights to part of the land for which condemnation was originally instituted, which release runs to the heirs of one C., who owned only a part of the land, is inadmissible against the parties seeking compensation who are not shown to be the heirs of said C., and who have not accepted the abandonment. Cushing *v.* Nantasket B. R. Co., 143 Mass. 77, 9 N. E. 22.

76. *Illinois.* — Hayes *v.* Ottawa O. & F. R. V. R. R. Co., 54 Ill. 373; Lyon *v.* Hammond & B. I. R. Co., 167 Ill. 527, 47 N. E. 775; Chicago & A. R. Co. *v.* Joliet L. & A. R. Co., 105 Ill. 388, 44 Am. Rep. 799.

Kansas. — Kansas City & E. R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15.

New Jersey. — National Docks &

N. J. C. R. Co. *v.* State, 53 N. J. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

Pennsylvania. — McGregor *v.* Equitable Gas Co., 139 Pa. St. 230, 21 Atl. 13. And see Penn Gas Coal Co. *v.* Versailles Fuel Gas Co., 131 Pa. 522, 19 Atl. 933.

Error to admit evidence of damage on the assumption that no reservation had been made. Tyler *v.* Hudson, 147 Mass. 609, 18 N. E. 582.

Stipulation in Court. — "We think it is competent, upon the trial of a condemnation case, for the party seeking condemnation to bind itself by an offer in open court, to the performance of duties like those here offered to be performed (construction of railroad in certain manner), and to thereby, and to the extent that such performance will prevent damages that would otherwise occur, abridge the claim by the land owner for damages." Elgin, J. & E. R. Co. *v.* Fletcher, 128 Ill. 619, 21 N. E. 577.

Railroad Crossing. — Acceptance of Owner Immaterial. — In St. Louis K. & N. W. R. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, which was a proceeding to condemn a railroad right of way through certain lands used for manufacturing purposes within the city of St. Louis, the right of way dividing the land in two parcels and cutting off access to the adjacent river, the railroad company offered in evidence a stipulation signed by its authorized engineer in which it was stipulated and agreed that the road should be constructed in a certain defined manner "and that said company will construct and maintain for the use of said defendant Clark, his heirs and assigns, across the tracks of its railroad within the land of said defendant Clark two crossings," in such places as the owner should select, the same to be safely and securely made. The offer was rejected by the lower court as irrelevant and incompetent on the question of compensation, especially in view of the fact that the owner did not consent to or accept it. On the appeal this ruling was held error, the court saying that, "the effect of these crossings if constructed would be to materially diminish the amount of damages sustained by the owner."

Railroad Across Navigable Canal. In Packard *v.* Burgen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506, it appeared that the landowner had devised and was executing a plan for improving his land, by dredging a channel of navigable depth from New York Bay up to and through his land; and the land proposed to be taken by the railroad crossed the proposed canal. Upon request, at the trial, the counsel of the railroad company announced that the road would be constructed along this land on an elevation of six feet above ordinary high tide, and supported by a trestle or solid embankment. The court said: "The condemning party may designate the mode of use in its petition for the appointment of commissioners, and, if it does, the award should include damages predicated upon the use of the land in the designated mode. If the mode is not designated in the petition, or when called on before the commissioners or jury, then the award should include damages predicated upon the use of the land in any lawful mode for the purposes of the party, and if, when called upon to declare before the commissioners or jury the mode in which the land is to be used, the party announces its plan, the award may be made on the basis of the most injurious use based within such plan, and equity will restrain from a more injurious use. When a plan for the use of the condemned land is announced upon the trial of an appeal, the trial judge may properly require it to be entered upon the record by amendment of the issue or otherwise. Therefore, in this case, the jury were properly instructed to make their award upon a consideration of the construction of their railroad by the company on the mode announced by their counsel, which plan of construction the court seem to have designed to be made part of the record."

Specifications in Complaint. — It was held in Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604, in which case the city, seeking to condemn for

(4.) Particulars in Which the Property is Damaged. — (A.) In General. In considering the effect of the improvement on the part not taken, the owner may show the particular use to which the property was applied before the taking, and the effect of the improvement on such use.[77] The owner may show the present resources of the land, and the effect of the taking on the same.[78]

sewer purposes, specified in its complaint the character, nature and extent of the proposed sewer, that the city was limited in its right to the laying of a sewer in exact accordance with such specifications, and therefore the damage to the defendants must be estimated upon the assumption that the sewer would be constructed in accordance with such specifications.

77. R. Co. *v.* Manufacturing Co. (Kan.), 48 Pac. 860; Republican Val. R. *v.* Arnold, 13 Neb. 485, 14 N. W. 478.

Land Used for Church Purposes. In a proceeding to assess damages to land, used for church purposes, by construction of railroad across part of it, it is competent and proper to show that the churchgoers were in the habit of coming to the church by means of horses and vehicles; that the noise of the passing trains would frighten the horses, and that the operation of the railroad would disturb the services and distract the attention of the worshippers. All these elements go to impair or destroy the usefulness of the property for church purposes, to which it was and had been devoted, and therefore the property was on that account rendered less valuable. Durham & N. R. Co. *v.* Trustees, 104 N. C. 525, 10 S. E. 761.

78. Dupuis *v.* Chicago & N. W. R. Co., 115 Ill. 97, 3 N. E. 720; Seattle & M. R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

Navigable Stream. — Owner may show that improvement interferes with his use of the river front for lumbering and shipping purposes. Chapman *v.* Oshkosh & M. R. R. Co., 33 Wis. 629.

Former Resources and Advantages. In a proceeding to assess damages caused by the taking of a part of the owner's farm for a railroad right of way, evidence that before the railroad was constructed a canal running alongside the land, and operated by the same railroad, afforded the owner a cheap and sufficient means of conveying his products to market is material and proper as a means of showing how the farm was situated and also as assisting the jury in arriving at its value. The fact that the canal belonged to the defendant and might be abandoned at any time was immaterial. Pennsylvania & N. Y. & C. R. Co. *v.* Bunnell, 81 Pa. St. (31 P. F. Smith) 414.

But evidence of a verbal contract with an existing railroad for privileges which may never be needed is inadmissible. St. Louis K. & N. W. R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906.

Taking of Water. — Evidence that by the taking of owner's water supply, his pasture and other land was wholly deprived of water, and that another water right which had been reserved to him in a former taking was of practically no use on account of the conditions annexed thereto, is competent. Fosgate *v.* Hudson, 178 Mass. 235, 59 N. E. 809.

Navigable River. — Cross-Examination. — Where the owner testifies that the railroad, being located between that part of his land on which coal was produced and a navigable river which he formerly used as a means of transporting the coal to market, and that in his opinion the railroad would prevent the coal from being carried to the river, he may be asked on cross-examination, "Will the facilities for transportation of coal to a market be diminished by the reason of the construction of this railroad?" Because, if by the means of the railroad the former river transportation would be superseded by a cheaper and better mode of

It is also proper to consider each and all of the uses to which the property is adaptable, and to estimate the effect of the improvement on the present value of the property considering its adaptability to all such uses.[79] Evidence of the effect of the improvement on the

transportation, the damage that the owner suffers by reason of the loss of river transportation would be merely nominal. Cleveland & P. R. Co. *v.* Ball, 5 Ohio St. 568.

79. *California.* — Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Colorado. — Colorado M. R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Illinois. — South Park Com'rs *v.* Dunlevy, 91 Ill. 49; Chicago & E. Co. *v.* Jacobs, 110 Ill. 414; Johnson *v.* Freeport & M. R. R. Co., 111 Ill. 413; Calumet R. R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764.

Indiana. — Chicago I. & E. R. Co. *v.* Curless, 27 Ind. App. 306, 60 N. E. 467.

Iowa. — Lough *v.* Minneapolis & St. L. R. Co., 116 Iowa 31, 89 N. W. 77; McClean *v.* Chicago I. & D. R. Co., 67 Iowa 568, 25 N. W. 782.

Kansas. — Chicago K. & N. R. Co. *v.* Davidson, 49 Kan. 389, 31 Pac. 131; Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 22, 20 Pac. 538; Kansas City & T. R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202; Chicago K. & W. R. Co *v.* Willits, 45 Kan. 110, 25 Pac. 576.

Massachusetts. — Maynard *v.* Northampton, 157 Mass. 218, 31 N. E. 1,062; Fales *v.* Easthampton, 162 Mass. 422, 38 N. E. 1,129; Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56; Drury *v.* Midland R. R. Co., 127 Mass. 571.

Michigan. — Commissioners *v.* Chicago D. & C. G. T. R. R. Co., 91 Mich. 191, 51 N. W. 934

Ohio. — Cincinnati & S. R. Co. *v.* Longworth, 3 Ohio St. 108.

Pennsylvania. — O'Brien *v.* Schenley Park & H. R. Co., 194 Pa. St. 336, 45 Atl. 89; Jefferson Gas Co. *v.* Davis (Pa. St.), 23 Atl. 218; Walker *v.* South Chester R. Co., 174 Pa. St. 288, 34 Atl. 560; Shenango & A. R. Co. *v.* Brahan, 79 Pa. St. 447; Alleghany *v.* Black, 99 Pa. St. 152; Pennsylvania S. V. R. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 11 Am. St. Rep. 913; Schuylkill R. E. S. R. Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399; Harris *v.* Schuylkill R. E. S. R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278; Phillips *v.* St. Clair Incline P. Co., 166 Pa. St. 21, 31 Atl. 69, 71.

Texas. — G. H. R. Co. *v.* Waples P. & Co., 3 Tex. App. Civ. Cas, § 411.

Vermont. — Hooker *v.* Montpelier & W. R. Co., 62 Vt. 47, 19 Atl. 775.

Wisconsin. — Driver *. Western U. R. Co., 32 Wis. 569, 14 Am. Rep. 726.

Evidence that before construction of railroad, the parcel was susceptible of division into town lots and that after construction this was impossible, is admissible. Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557.

Unimproved Property. — May be shown to be ripe for building improvements and the effect of the condemnation on such use of the property. Wilson *v.* Gas Co., 152 Pa. St. 566, 25 Atl. 635.

Land Used as a Farm may be shown to be *valuable for limestone*, and as such that it was injured by improvement. Reading & P. R. Co. *v.* Balthasar, 126 Pa. St. 1, 17 Atl. 518, 13 Atl. 294; or that it is valuable as coal land. Doud *v.* Mason City & Ft. D. R. Co., 76 Iowa 438, 41 N. W. 65; *or for other minerals.* Cincinnati & S. R. Co. *v.* Longworth, 30 Ohio St. 108.

An Official Map or Plat, on file at time of taking, showing the tract platted into lots and streets, is admissible and is "evidence of the capacity of the land for improvement in a certain way." Phillips *v.* St. Clair Incline P. Co., 116 Pa. St. 21, 31 Atl. 69, 71.

Plans of Contemplated Structure. The plans of a structure which the owner of the land has definitely decided to erect on the premises are competent as evidence of one of the uses to which the prop-

property applied to mere speculative purposes is incompetent.[80]

(B.) Damage to Business. — If by reason of the taking the business conducted on the premises is damaged, and the estate of the owner in the land is thereby rendered less valuable, such facts are proper to be considered in estimating the compensation.[81] Where

erty might be adapted, but such evidence must be limited to that object and is inadmissible to enhance the damage. Chicago & E. R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488. So with a map or plat showing land divided into lots and blocks when land is adaptable thereto. Rock Island & E. I. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810.

Intentions of Owner. — It was held in Union T. R. Co. *v.* Peet Bros. Mfg. Co., 58 Kan. 197, 48 Pac. 860, that it was competent for the owner to testify to the present business conducted on the land, the size of the buildings, and that he contemplated the erection of other buildings and improvements to be used in connection with the business, and the effect the railroad would have on the contemplated change. The court says that this was "one method of stating the purpose to which the land was adapted, and that the jury were quite competent to weigh the probabilities of its ever being employed for any such purpose."

Value of Part Cut Off for Building Purposes. — Rebuttal. — Where the condemning company has given evidence tending to show that the part of the farm cut off from the farm buildings might be sold for building lots, the owner may show in rebuttal thereto that said buildings are too extensive and valuable for less than the entire farm. Chicago P. & St. L. R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798.

80. Markle *v.* City of Philadelphia, 163 Pa. 344, 30 Atl. 149; Pennsylvania S. V. R. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 11; Schuylkill R. E. S. R. Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399; Chicago B. & I. R. Co. *v.* Chicago, 149 Ill. 457, 37 N. E. 78; Chicago & N. R. Co. *v.* Town of Cicero, 157 Ill. 48, 41 N. E. 640; Fleming *v.* Chicago D. & M. R. R. Co., 34 Iowa 353; Opening of Negley Ave., 146 Pa. St. 456, 23 Atl. 221.

Map or Plat Made After the Taking, showing the farm divided in lots and streets, is inadmissible. Walker *v.* South Chester R. Co., 174 Pa. 288, 34 Atl. 560.

81. *United States.* — Fifth Nat. Bank *v.* New York El. R. Co., 28 Fed. 231.

Colorado. — Denver & R. G. R. Co. *v.* Bourne, 11 Colo. 59, 16 Pac. 839.

Illinois. — Dupuis *v.* Chicago & N. W. R. Co., 115 Ill. 97, 3 N. E. 720; St. Louis & T. H. R. Co. *v.* Capps, 72 Ill. 188.

Iowa. — Ellsworth *v.* Chicago & S. W. R. Co., 91 Iowa 386, 59 N. W. 78.

Massachusetts. — Patterson *v.* Boston, 23 Pick. 425.

New York. — Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437.

Pennsylvania. — West Pennsylvania R. Co. *v.* Hill, 56 Pa. St. 460.

Owner may show how his trade or business conducted on the property is affected by the construction of the railroad. Because, if the effect of the improvement is to decrease or destroy plaintiff's business, it lessens the value of his property. Pittsburg V. & C. R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764.

Brick-yard. — Diminution of Capacity. — Where part of a tract, used as a brick-yard, was taken for railroad purposes it was held proper to show that the railroad prevented the extension of the works, thereby diminishing the capacity of the yard. Sherwood *v.* St. Paul & C. R. Co., 21 Minn. 127.

Railroad Across Mining Property. In Chicago S. F. & C. R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931, it was held proper to consider the probable length of time the mining business would be interrupted, and all the circumstances that would tend to diminish the value of the business

the property damaged is a leasehold, the owner may show the value of the lease and the business conducted thereunder, and the effect of the improvement thereon.[82]

Under a statute allowing compensation to any "individual owning an established business" for any depreciation in value of said business caused by the improvement, it was held that a physician whose office and residence was damaged by the improvement had the right to submit evidence of his damages to the commissioners appointed under the statute.[83] But it is the general rule that evidence of damage resulting to the business itself, such as a loss of profits, should be excluded.[84]

during the interruption and the consequent loss therefrom.

Taking Part of Railroad for Street. Evidence as to the effect of the opening and use of the street on the operation of the appellant's switch engines in handling cars, making up trains, etc., on a part of the company's property adjacent to the street is competent. Lake Shore & M. R. Co. *v.* Chicago, 151 Ill. 359, 37 N. E. 880.

82. Philadelphia & R. R. Co *v.* Getz, 113 Pa. St. 214, 6 Atl. 356; Pause *v.* City of Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; Patterson *v.* Boston, 23 Pick. (Mass.) 425.

In Ehret *v.* Schuylkill R. E. S. R. Co., 150 Pa. St. 158, 24 Atl. 1,068, it was held proper and competent for the owners to show that by reason of the taking of the leasehold they were greatly damaged and inconvenienced in performing a contract by which they had agreed to remove continuously, all the tar produced at a gas plant on the adjoining land, and that the taking necessitated the erection of new distilling works and the transporting of the tar thereto by a specially constructed boat.

Injury to Stock of Goods. — In Shaw *v.* City of Philadelphia, 169 Pa. St. 506, 32 Atl. 593, it was held that, as proof of the damages sustained by a lessee occupying a store in the building, part of which was removed in the widening of a street, it was proper to show the actual injury from dirt and grime which was necessarily encountered in tearing away the part, and which injured the stock more or less. The extent of the injury and the manner in which the work was done, whether with care or negligence, was held a question for the jury. The damages were not limited to the depreciation in value of the leasehold as a whole.

83. Earle *v.* Com., 180 Mass. 579, 63 N. E. 10, 91 Am. St. Rep. 326, 57 L. R. A. 292.

84. *California.* — Central Pacific R. R. Co. *v.* Pearson, 35 Cal. 247; San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720.

Georgia. — Pause *v.* City of Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290.

Illinois. — Holmann *v.* Chicago, 140 Ill. 226, 29 N. E. 671; Jacksonville & S. E. R. Co. *v.* Walsh, 106 Ill. 253; Braun *v.* Metropolitan W. S. E. R. Co., 166 Ill. 434, 46 N. E. 974.

Massachusetts. — Cobb *v.* Boston, 109 Mass. 438.

Missouri. — St. Louis K. & N. W. R. Co. *v.* Knapp, S. & Co., 160 Mo. 396, 61 S. W. 300; Chicago S. F. & C. R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

New York. — Troy & B. R. Co. *v.* Northern T. Co., 16 Barb. 100.

Pennsylvania. — Becker *v.* Philadelphia & R. T. R. Co., 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583; Pittsburg & W. R. Co. *v.* Patterson, 107 Pa. St. 461; Thoburn's Case, 7 Serg. & R. (Pa.) 411.

Capital Stock. — Income. — Expenses. — On a proceeding to assess damages caused by the construction of a railroad across a turnpike owned and operated by a turnpike company, evidence of the amount of the capital stock of the turnpike company,

(C.) Extra Expenses and Changes Made Necessary. — A number of cases hold that it is proper for the owner to show the changes made necessary in order to accommodate the property to the new conditions and the expenses incident thereto.[85] Thus, where a street is opened across a railroad right of way it has been held proper for the railroad company to prove the necessity and expense of maintaining crossings and safeguards[86] against accidents, the keeping

and its income and expenses from the operation of the turnpike for the year previous, is irrelevant and inadmissible. Troy & B. R. Co. *v.* Northern T. Co., 16 Barb. 100.

Loss of Salaries Paid Employes is Too Remote. — Metropolitan W. S. E. R. Co. *v.* Siegel, 161 Ill. 638, 44 N. E. 276.

Street Across Railroad Premises. Evidence of the freight charges theretofore received from freight shipped from elevators on the premises over the road, and evidence of prospective profits of the railroad from the same, are incompetent, being remote and purely speculative. Illinois C. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62.

Loss of Advertising is Incompetent. — Braun *v.* Metropolitan W. S. E. R. Co., 166 Ill. 434, 46 N. E. 974.

85. *Illinois.* — Chicago B. & Q. R. Co. *v.* City of Naperville, 166 Ill. 87, 47 N. E. 734; City of Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1,018.

Massachusetts. — Brown *v.* Worcester, 13 Gray 31; Butchers S. & M. Ass'n *v.* Com., 163 Mass. 386, 40 N. E. 176.

Pennsylvania. — Schuylkill E. S. R. Co. *v.* Kersey (Pa. St.), 19 Atl. 553.

Presumption. — Damages should be estimated on the assumption that the owner will incur every reasonable expense and use every reasonable exertion in the readjustment of his property to suit the changed conditions. Chicago S. F. & C. R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

Cost of Retaining-wall Made Necessary by Street Improvement. Manson *v.* Boston, 163 Mass. 479, 40 N. E. 850.

Increased Taxation. — Expense of additional fencing and increase of taxation, caused by laying out new highways. Schuler *v.* Board of Supervisors, 12 S. D. 460, 81 N. W. 890.

Taking of Private Street, Belonging to Owner of Adjacent Lots. — In a proceeding by an owner of a private street and the adjoining lots, to ascertain the compensation to which he is entitled by reason of the taking of said street for public purposes, evidence of the increased cost of building on the petitioner's remaining abutting lots by reason of city ordinances and regulations applicable to public streets, and the increased cost of removing sand and dirt therefrom, is admissible, not as showing independent and definite items to be added to his losses, but as elements which might be considered in determining the real value of what petitioner had before taking and what he had afterwards. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1,029.

Evidence of the cost of a new shaft made essential in the working of a mine by construction of railroad is admissible. Chicago S. F. & C. R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

Manufacturing Property. — Changes Necessary in Water-power. — The owners of premises used for manufacturing purposes, the power being generated by water carried through a flume, may show that certain changes in the flume are made necessary by reason of the construction of the railroad through the premises, and the cost of said changes; they may also show the cost of removing inflammable property to a place less exposed to the increased danger from fire occasioned by the construction of a railroad. Colorado M. R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

86. Commissioners *v.* Michigan C. R. Co., 90 Mich. 385, 51 N. W. 447; City of Grand Rapids *v.* Bennett, 106 Mich. 528, 64 N. W. 585; Grand

of a flagman at the crossing,[87] the increased expenditure in switching and moving trains.[88] But evidence of expense which the company is compelled to pay under police regulations is incompetent.[89]

It was held in an Illinois case that where the taking would necessitate a removal of a stock of merchandise, fixtures and machinery used in a business, evidence of the cost thereof and damage sustained thereby was competent;[90] but other decisions hold the contrary.[91]

(D.) Rental Value. — Where the property injured by the taking is valuable for rental purposes, evidence as to what extent the taking and improvement will affect the rental value of the property is admissible.[92] Evidence that the improvement made it more difficult to procure tenants,[93] and that the owner was unable to rent the property after the improvement,[94] has been held admissible. In an

Rapids *v.* Grand Rapids & I. R. R. Co., 58 Mich. 641, 26 N. W. 159.

87. Commissioners *v.* Chicago D. & C. G. T. R. Co., 91 Mich. 291, 51 N. W. 934.

88. It is competent for the company to call witnesses and have them approximate the average daily increased expenditure that will ensue as tending to show damages to the property not taken. Railway Co. *v.* City of Chicago, 151 Ill. 359, 37 N. E. 880.

89. Chicago & A. R. Co. *v.* Pontiac, 168 Ill. 155, 48 N. E. 485.

90. Metropolitan W. S. E. R. Co. *v.* Siegel, 161 Ill. 638, 44 N. E. 276. But in the absence of proof that such removal was absolutely necessary this evidence would be incompetent. Braun *v.* Metropolitan W. S. E. R. Co., 166 Ill. 434, 46 N. E. 974.

The testimony of a qualified witness as to the cost of moving the house from the land covered by the newly located street is admissible. Brown *v.* Worcester, 13 Gray (Mass.) 31.

And see Patterson *v.* Boston, 20 Pick. (Mass.) 159, *s. c.* 23 Pick. (Mass.) 425; St. Louis V. & T. H. R. Co. *v.* Capps, 72 Ill. 188.

91. St. Louis K. & N. R. Co. *v.* Knapp S. & Co., 160 Mo. 396, 61 S. W. 300; Becker *v.* Philadelphia & R. T. R. Co., 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583; Cobb *v.* City of Boston, 109 Mass. 438; Edmands *v.* Boston, 108 Mass. 535; Central P. R. R. Co. *v.* Pearson, 35 Cal. 247.

92. *Colorado.* — Denver & R. G. R. Co. *v.* Bourne, 11 Colo. 59, 16 Pac. 839; City of Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Illinois. — Rock Island & E. D. R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; City of Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1,018.

Minnesota. — Minnesota & B. L. R. & T. Co. *v.* Gluck, 45 Minn. 463, 48 N. W. 194.

Nebraska. — City of Omaha *v.* Hansen, 36 Neb. 135, 54 N. W. 83; Fremont E. & M. V. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

New York. — Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 26 N. E. 1,048; Wright *v.* New York El. R. Co., 60 N. Y. St. 783, 29 N. Y. Supp. 223.

Ohio. — Columbus H. V. T. R. Co. *v.* Gardner, 45 Ohio 309, 13 N. E. 69.

Pennsylvania. — Pittsburg V. & C. R. Co. *v.* Rose, 74 Pa. St. 362.

Proof of damage to rental value is not uncertain or speculative where the damage to the fee value is in issue. Rock Island & E. D. R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810.

Owner may prove that his tenant refused to remain unless rent was reduced. Hine *v.* New York El. R. Co., 149 N. Y. 154, 43 N. E. 414.

The fact that rent was payable otherwise than in money is immaterial. Fremont E. & M. V. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

93. Pittsburg V. & C. R. Co. *v.* Rose, 74 Pa. St. 362.

94. Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 26 N. E. 1,048;

Ohio case it was held incompetent to prove what had actually been received for rents before and after the improvement.[95]

(E.) Diversion of Travel. — It is held in some decisions that where the effect of the improvement has been to cause a cessation or diversion of travel from the highway on which the owner's premises abut, thereby affecting the value of the property, it is proper to consider such fact in estimating the compensation.[96] But such diversion of travel must be shown to have a direct effect on the value of the property in order to render the evidence admissible.[97]

(F.) Ingress and Egress. — Light. — It is proper to show the effect of the improvement on the means of ingress and egress to and from the property,[98] and that it obstructs the light.[99]

(G.) Noise, Smoke, Cinders, Emitted From Passing Trains. In considering the effect of a railroad on the abutting property, it is competent to show the noise, smoke, dust, and cinders emitted from passing trains,[1] and the jarring of the earth which is produced or

City of Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1,018.

95. Columbus H. & V. & T. R. Co. *v.* Gardner, 45 Ohio 309, 13 N. E. 69.

Contra. — Wright *v.* N. Y. El. R. Co., 60 N. Y. St. 783, 29 N. Y. Supp. 223. In this latter case it was held that the difference between the two amounts was not conclusive proof of the extent of the damage sustained.

96. Schuler *v.* Board of Supervisors, 12 S. D. 460, 81 N. W. 890.

It was held in City of Omaha *v.* McGavock, 47 Neb. 313, 66 N. W. 415, that the owner might show that by reason of the construction of a viaduct the former travel along the surface of the abutting street had been changed to the viaduct, and that the business of the owner's tenants on the street had been greatly injured as a result thereof.

97. Root *v.* Butte A. & P. R. Co., 20 Mont. 354, 51 Pac. 155.

Presumption. — It was held in Flynn *v.* Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556, that the natural effect of an elevated railway being to divert the former travel from the street, it is presumed to cause special damage to the abutting property, "because diversion of trade inevitably follows diversion of travel."

98. City of Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1,018; Sanitary District *v.* Loughran, 160 Ill. 362, 43 N. E. 359; St. Louis, V. & T. H. R. Co. *v.* Capps, 72 Ill. 188; Shano *v.* Fifth Ave. H. St. B. Co., 189 Pa. St. 245, 69 Am. St. Rep. 808, 42 Atl. 128.

It is Proper to Show that the means of ingress and egress to the only public highway in the vicinity are cut off by the railroad. Cedar Rapids I. F. & N. W. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

99. Shano *v.* Fifth Ave. H. St. B. Co., 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808.

1. *Illinois.* — St. Louis & T. H. R. Co. *v.* Haller, 82 Ill. 208.

Kansas. — Omaha H. & G. R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831.

Minnesota. — County of Blue Earth *v.* St. Paul & S. C. R. Co., 28 Minn. 503, 11 N. E. 73.

Nebraska. — Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557.

New York. — Lahr *v.* Metropolitan R. Co., 104 N. Y. 248, 10 N. E. 528.

Ohio. — Columbus H. V. & T. R. Co. *v.* Gardner, 45 Ohio 309, 13 N. E. 69.

Pennsylvania. — Shano *v.* Fifth Ave. H. St. B. Co., 189 Pa. 245, 42 Atl. 128, 69 Am. St. Rep. 808.

Texas. — Gulf C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

Wisconsin. — Meyer *v.* Chicago W. & U. R. Co., 68 Wis. 181.

Evidence of inconvenience from

may be caused by the operation of the railroad and the running of trains thereon.[2]

(H.) Escape of Sewer Gas. — Where the proposed taking is for sewer purposes evidence is admissible to prove the dangerous and offensive properties of sewer-gas and its tendency to float over the adjacent property.[3]

(I.) Seepage and Leakage From Canal. — Where it is sought to condemn a right of way for a canal, evidence of injuries likely to result from seepage and leakage is competent.[4]

(J.) Physical Injuries. — In an inquiry as to the amount of compensation to which the owner of a tract of land, such as a farm, is entitled by reason of the appropriation of part thereof for the construction and operation of a railroad, it is competent and proper to show the amount of land taken,[5] the size of the whole tract,[6] its situation with respect to the railroad,[7] the improvements thereon, and how located,[8] how the road divides the tract as to water, pasturage, etc.,[9] the cuts, ditches and embankments made or to be made in the

ringing of bells, sounding of whistles, etc., is competent. G. C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

2. St. Louis & T. H. R. Co. *v.* Haller, 82 Ill. 208; Omaha H. & G. R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831; Omaha & N. P. R. Co. *v.* Janeck, 30 Neb. 276, 46 N. W. 478, 27 Am. St. Rep. 399; Columbus H. V. & T. R. Co. *v.* Gardner, 45 Ohio 309, 13 N. E. 69.

3. Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844.

4. Denver C. I. & W. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; Chesapeake & O. Canal Co. *v.* Grove, 11 Gill & J. (Md.) 398; Hoffer *v.* Pennsylvania Canal Co., 87 Pa. St. 221.

5. Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Rockford R. I. & St. L. R. Co. *v.* McKinley, 64 Ill. 338.

6. Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289.

7. Gilmore *v.* Pittsburg V. & C. R. R. Co., 104 Pa. St. 275; North Pacific R. Co. *v.* Reynolds, 50 Cal. 90.

Station and Stock-Yards Near Land. — Evidence of the location of the railway station and stock-yards near the land is admissible. Cedar Rapids I. F. & N. W. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

Owner may show that freight depot and tracks are located in close proximity to residue. Cummins *v.* Des Moines & St. L. R. Co., 63 Iowa 397, 19 N. W. 268.

8. Omaha H. & G. R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831; Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289.

9. *California.* — North Pacific Co. *v.* Reynolds, 50 Cal. 90.

Illinois. — Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290; Rockford R. I. & St. L. R. Co. *v.* McKinley, 64 Ill. 338; Peoria & R. I. R. Co. *v.* Bryant, 57 Ill. 473; Chicago & St. L. R. Co. *v.* Blume, 137 Ill. 448, 27 N. E. 601; Chicago P. & St. L. R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81; Rock Island & E. I. R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810.

Iowa. — Dreher *v.* Iowa S. W. R. Co., 59 Iowa 599, 13 N. W. 754.

Pennsylvania. — Danville H. & W. R. Co. *v.* Gearhart, 81 Pa. St. (32 P. F. Smith) 260.

That a spring or well of water is cut off from the dwelling house or destroyed. Chicago P. & St. L. R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798.

Evidence of disfiguration, washing of the soil, disconnecting the tract is admissible. Snyder *v.* Western U. R. Co., 25 Wis. 60.

construction of the road,[10] that the land is made less productive,[11] and in general all physical injuries or inconveniences[12] caused by the improvement are proper elements for the consideration of the jury.

(K.) Danger and Inconvenience in Crossing Railroad Track. Where a railroad is sought to be constructed through a farm, the danger and inconvenience in crossing the track from one part of the farm to another,[13] and the probability of stock being frightened[14] or killed,[15] are proper matters to be shown by the evidence.

10. North Pacific R. Co. *v.* Reynolds, 50 Cal. 90; Dreher *v.* Iowa S. W. R. Co., 59 Iowa 599, 13 N. W. 754; Cummins *v.* Des Moines & St. L. R. Co., 63 Iowa 397, 9 N. W. 268; Kansas City & N. C. R. Co. *v.* Shoemaker, 160 Mo. 425, 61 S. W. 205; Sioux City & P. R. Co. *v.* Weimer, 16 Neb. 272, 20 N. W. 349; Danville H. & W. R. Co. *v.* Gearhart, 81 Pa. St. (32 P. F. Smith) 260.

Effect of Embankment. — Evidence that by reason of the embankment deposits of valuable sediment, formerly supplied from adjacent river, are cut off, is competent. Concord Railroad *v.* Greely, 23 N. H. 237; or that a deep cut in which track was laid might cave in and injure adjacent land. Stolze *v.* Manitowoc Co., 100 Wis. 208, 75 N. W. 987; or that a ditch constructed by railroad is of such character as to cause inconvenience in passing from one part of farm to another and injures adjoining land. Chicago K. & W. R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634.

11. Weyer *v.* Chicago W. & N. R. Co., 68 Wis. 180, 31 N. W. 710.

If the effect of constructing the road would be to make the culture and management of the farm more difficult, or any of the land less productive, these are proper elements to be presented. Matter of N. Y. W. S. & B. R. Co., 29 Hun (N. Y.) 609.

12. *California.* — North Pac. R. Co. *v.* Reynolds, 50 Cal. 90.

Illinois. — Rock Island & E. I. R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810.

Nebraska. — Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557; Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289.

Pennsylvania. — Gilmore *v.* Pittsburg V. & C. R. Co., 104 Pa. St. 275.

In Rockford R. I. & St. L. R. Co. *v* McKinley, 64 Ill. 338, the court said: "The jury are entitled to know the amount of land taken, how it affects the remainder, how it divides the farm (in case of farm lands) as to water, pasturage, improvements, etc., and also the dangers and inconveniences in the perpetual use of the tract from moving trains, and what injury, if any, to stock kept on the farm, and many other things connected therewith which are understood and can be better explained by persons of large experience in such matters, and we may say, as a general rule, that any evidence that tends to illustrate these various subjects is admissible."

13. Chicago P. & St. L. R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Keithburg & E. R. Co. *v.* Henry, 79 Ill. 290; Alton & S. R. Co. *v.* Carpenter, 14 Ill. 190; Rock Island & E. I. R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; Kansas City & N. C. R. Co. *v.* Shoemaker, 160 Mo. 425, 61 S. W. 205; Omaha S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289.

Crossing Track With Cattle. — Witness may state inconvenience and trouble in crossing track with cattle and farming implements. Snyder *v.* Western U. R. Co., 25 Wis. 60.

14. Wooster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401; Snyder *v.* Western U. R. Co., 25 Wis. 60; Blesch *v.* Chicago & N. W. R. Co., 48 Wis. 168, 2 N. W. 113.

15. *Illinois.* — Chicago P. & St. L. R. Co. *v.* Grieney, 137 Ill. 628, 25 N. E. 798; St. Louis & S. E. R. Co. *v.* Teters, 68 Ill. 144; Rockford R. I.

(L.) Danger From Fire. — In estimating the compensation to be paid for the damages to the remainder of the tract, where a part thereof is taken for railroad purposes, evidence showing the danger from fire, communicated from passing locomotives (without the fault of the company,[16]) to the buildings, timber and crops on the premises, so far as such danger affects the value of the remainder, is competent and admissible.[17] This is usually proven by testimony showing the relative situation and close proximity of the railroad with respect to the buildings and crops.[18] It has been held that the statement of a witness that there was such danger from fire was incompetent, and that the facts must be shown and the inference left to the jury.[19] In a Minnesota case it was held that the danger from fire in such cases was a matter of common knowledge, which

& St. L. R. Co. *v.* McKinley, 64 Ill. 338.

Nebraska. — Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Fremont E. & M. V. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 958.

Kansas. — Le Roy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217.

Wisconsin. — Parks *v.* Wisconsin C. R. Co., 33 Wis. 413; Snyder *v.* Western U. R. Co., 25 Wis. 60.

Danger of Frightening Animals. Wooster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401.

16. See note 31, p. 234 *post.*

17. *Arkansas.* — North Ark. & W. R. Co. *v.* Cole (Ark.), 70 S. W. 312.

Illinois. — Centralia & C. R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820; Indiana I. & I. R. Co. *v.* Stauber, 185 Ill. 9, 56 N. E. 1,079; Rock Island & E. I. R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; Chicago P. & St. L. R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81; Chicago P. & St. L. R. Co. *v.* Blume, 137 Ill. 448, 27 N. E. 601; Chicago P. & St. L. R. Co. *v.* Grieney, 137 Ill. 628, 25 N. E. 798; St. Louis & S. E. R. Co. *v.* Teters, 68 Ill. 144; Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290.

Indiana. — Swinney *v.* Ft. Wayne M. & C. R. R. Co., 59 Ind. 205.

Kansas. — Le Roy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217.

Kentucky. — Elizabethtown L. & B. S. R. Co. *v.* Combs, 10 Bush. 382, 19 Am. Rep. 67.

Minnesota. — Johnson *v.* Chicago B. & N. R. Co., 37 Minn. 519, 35 N. W. 438; Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283.

New Hampshire. — Adden *v.* White Mts. N. H. R. R. Co., 55 N. H. 413, 20 Am. Rep. 220.

Nebraska. — Omaha & S. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Fremont E. & M. V. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

New York. — Matter of N. Y. W. S. & B. R. Co., 29 Hun 609.

Pennsylvania. — Setzler *v.* Pennsylvania S. V. R. Co., 112 Pa. St. 56, 4 Atl. 370; Wilmington & R. R. Co. *v.* Stauffer, 60 Pa. St. 374, 100 Am. Rep. 574.

Texas. — Ry. Co. *v.* Vedins, 60 Tex. 656.

Washington. — Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Wisconsin. — Wooster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401; Parks *v.* Wisconsin C. R. Co., 33 Wis. 413; Snyder *v.* Western U. R. Co., 25 Wis. 60.

Specific Instance. — Evidence that on one occasion plaintiff's feel-mill caught fire from sparks emitted by a passing locomotive on the railroad was held admissible. Hutchinson *v.* Chicago & N. W. R. Co., 41 Wis. 541.

18. Centralia & C. R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820; Adden *v.* White Mts. N. H. R. R. Co., 55 N. H. 413, 20 Am. Rep. 220.

19. Lance *v.* C. M. & St. P. R. Co., 57 Iowa 636, 11 N. W. 612.

the jury had the right to consider independent of direct evidence.[20] It is proper to show the increased rates of insurance resulting from the presence of the railroad.[21] Some of the decisions distinguish between the risk or exposure to fire and the probable destruction that may ensue therefrom, holding evidence of such probable destruction too remote and inadmissible.[22]

(M.) Necessary Fencing and Crossings. — Where the location of a railroad through a tract of land will render necessary the construction and maintenance of fences and crossings, and the railroad company is not compelled by law to provide the same, such necessity and the reasonable cost of providing and maintaining such fences

20. In Johnson *v.* Chicago B. & N. R. Co., 37 Minn. 519, 35 N. W. 438, the court uses this language: "Now there are some things connected with the running of railroads that are matters of common knowledge and observation, and which everybody is supposed to know. Among these is that locomotives passing to and fro are liable to scatter sparks, and that such sparks lighting on any combustible material, may ignite it. And the jury have the right to apply this common knowledge in determining whether a witness, who testifies that the railroad, laid and used within 15 ft. of a building, does not affect its value, or one who testifies that it will diminish the value, is most entitled to credit."

21. Indiana I. & I. R. Co. *v.* Stauber, 185 Ill. 9, 56 N. E. 1,079; Eslich *v.* Mason City & Ft. D. R. Co., 75 Iowa 443, 39 N. W. 700; Webber *v.* Eastern R. Co., 2 Metc. (Mass.) 147.

Contra. — Pingery *v.* Cherokee D. R. Co., 78 Iowa 438, 42 N. W. 285.

Increased Rate of Insurance. Evidence of the value of buildings upon the residue and that the rate of insurance would be increased at least one per cent. a year by reason of the close proximity of the railroad is admissible. Cedar Rapids I. F. & N. W. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

Contra. — In Pingery *v.* Cherokee & D. R. Co., 78 Iowa 438, 42 N. W. 285, evidence of the increased rate of insurance caused by the increased risk through danger from fires communicated from the railroad to the building on the adjacent farm was held inadmissible because too remote, as the owner was not bound to insure.

Rebuttal. — The railroad company may show, by a qualified witness, that distance from railroad to improvements was so great as not to increase rate of insurance. North Ark. & W. R. Co. *v.* Cole (Ark.), 70 S. W. 312.

22. Le Roy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Kansas City & E. R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Weyer *v.* Chicago W. & N. R. Co., 68 Wis. 180, 31 N. W. 710.

In Lance *v.* Chicago M. & St. P. R. Co., 57 Iowa 636, 11 N. W. 612, the statement of a witness that, owing to the proximity of the railroad, there was danger of fire from passing engines destroying a grove of trees and the buildings on the farm, was held inadmissible. The court says: "It was competent to show the situation of the grove and buildings, and the jury were as well qualified as the witnesses to determine the probable effect upon the property by the operation of said road. The most that can be claimed is that it is competent to take into consideration the risk of fire set out by the defendant without its fault and by reason of the operation of the road through the premises. But this risk or hazard or exposure of the property is an entirely different question from that involved in its destruction by fire without the fault of the company. In the one case, while the risk may somewhat

and crossings are proper subjects to be shown by the evidence.[23] But the proof must show the necessity,[24] and where the railroad company is compelled by law to provide fences and crossings, the owner is not entitled to have the cost thereof considered by the jury.[25] The same rule applies in proceedings to lay out a road other than railroad.[26] These items are not admissible as specific damages, but only as affecting the market value of the remainder.[27]

(N.) The Specific Damages Must Be Reasonably Expected. — The specific elements of damage in order to be admissible must be such

decrease the value of the property and is a legitimate consideration for what it may be worth, in fixing the compensation of the owner, in the other case the destruction of buildings, groves and the like, by fire, is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law."

23. *Alabama.* — Montgomery & W. P. R. Co. *v.* Varner, 19 Ala. 185.

California. — Colusa Co. *v.* Hudson, 85 Cal. 633, 24 Pac. 791.

Illinois. — St. Louis J. & C. R. Co. *v.* Mitchell, 47 Ill. 165; Alton & S. R. Co. *v.* Carpenter, 14 Ill. 190.

Indiana. — Evansville I. & C. S. L. R. Co. *v.* Fitzpatrick, 10 Ind. 120; Watson *v.* Crowsore, 93 Ind. 220.

Kansas. — Atchison & N. R. Co. *v.* Gough, 29 Kan. 94.

Massachusetts. — Stone *v.* Heath, 135 Mass. 561.

Pennsylvania. — Plank Road Co. *v.* Thomas, 20 Pa. St. 91; Delaware L. & W. R. Co. *v.* Burson, 61 Pa. St. 369.

Washington. — Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

Wisconsin. — Robbins *v.* Milwaukee & H. R. Co., 6 Wis. 610; Thompson *v.* Milwaukee & St. P. R. Co., 27 Wis. 93.

Form of Question. — The question, "How much, if any, does the burden of fencing the railroad detract from the value of the farm?" was held entirely proper and meant the same as "How much less would the whole farm sell for in the market on account of the additional fencing made necessary by the road?" Pennsylvania & N. Y. & C. R. Co. *v.* Bunnell, 81 Pa. St. (31 P. F. Smith) 414.

Character and Cost of Fence. Evidence of the necessity for fencing, the character of fence required, as well as the cost thereof, is admissible on the question of the depreciation in value of the residue caused by the improvement. Milwaukee & M. R. Co. *v.* Eble, 3 Pin. (Wis.) 334.

24. In the absence of proof showing the necessity for the additional fencing it is no error to disregard the item. Newgass *v.* Railway Co., 54 Ark. 140, 15 S. W. 188.

Question is for Jury. — The question as to whether fencing is necessary and the character and extent of fence required is for the jury. Colusa Co. *v.* Hudson, 85 Cal. 633, 24 Pac. 791; Milwaukee & M. R. Co. *v.* Eble, 3 Pin. (Wis.) 334.

25. See notes 56 *supra* and 29 *infra.*

Crossing. — In Snyder *v.* Western U. R. Co., 25 Wis. 60, it was held proper to admit evidence as to the cost of constructing a proper crossing over the right of way sought to be condemned, the law, at the time of the taking, not making it incumbent upon the company to provide such crossings.

Contra. — Cost Not Admissible. It was held in Henry *v.* Dubuque & P. R. Co., 2 Iowa 288, that the jury might consider the fact that fencing was necessary, but that evidence of the cost thereof was incompetent.

26. Butte Co. *v.* Boydston, 64 Cal. 110, 29 Pac. 511; Com'rs Dickinson Co. *v.* Hogan, 39 Kan. 606, 18 Pac. 611; Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73; Morris *v.* Coleman Co. (Tex. Civ. App.), 28 S. W. 380.

27. Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

as are reasonably expected to result directly[28] from the construction and operation of the improvement, on the assumption that it will be accomplished in a proper and skillful manner,[29] and in accordance with the requirements of the statute, if any, prescribing the manner of construction and operation.[30] Evidence of damage occurring or

28. Canandaigua & N. F. R. Co. *v.* Payne, 16 Barb. (N. Y.) 273; Cleveland & P. R. Co. *v.* Ball, 5 Ohio St. 568; Southwestern T. T. Co. *v.* Gulf C. & S. F. R. Co. (Tex.), 52 S. W. 107; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738; Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 675, 17 Pac. 322; Gilmore *v.* Pittsburgh V. & C. R. Co., 104 Pa. St. 275.

Danger from Fire. — Must Be Imminent and Appreciable. — The probable danger from fire, in order to be admissible as proof of damages which the owner will sustain by reason of the construction and operation of the railroad, must be imminent and appreciable. Proprietors Lock & Canals *v.* Nashua L. R. Corp., 10 Cush. (Mass.) 385.

Remoteness. — Telegraph Line on Existing Railroad Right of Way. Evidence to show damages from the added expense of burning grass from the right of way by reason of the erection of telegraph poles is too remote. Postal Tel. Cable Co. *v.* Oregon S. L. R. Co., 23 Utah 474, 65 Pac. 735.

Injury to Speculative, Imaginary Use. — In an action for damages done to a mill property by construction of a railroad, evidence must be directed to the property in the condition it was when road was constructed, hence evidence as to the power that could be gained by erecting new dam and making shorter race for the power and other possible alterations, which were impossible after road was constructed, is irrelevant and inadmissible. Dorlan *v.* East Brandywine & W. R. R. Co., 46 Pa. St. 520.

Adoption of Ordinance. — Evidence of damage resulting from the adoption of the ordinance ordering the improvement is incompetent. Eachus *v.* Los Angeles Consol. Elec. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

29. *Iowa.* — King *v.* Iowa M. R. Co., 34 Iowa 458; Miller *v.* Keokuk & D. M. R. Co., 63 Iowa 680, 16 N. W. 567; Waltmeyer *v.* Wisconsin I. & N. R. Co., 71 Iowa 626, 33 N. W. 140; Doud *v.* Mason City & Ft. D. R. Co., 76 Iowa 438, 41 N. W. 65.

Kansas. — Chicago K. & W. R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634; Kansas City & E. R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Reisner *v.* Atchison U. D. R. Co., 27 Kan. 382; Le Roy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Leavenworth N. & S. R. Co. *v.* Usher, 42 Kan. 637, 22 Pac. 734.

Exception to General Rule. — Peculiar Facts and Circumstances. In Chicago S. F. & C. R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931, which was a proceeding to assess damages caused by the construction of a railroad across mining property, it was held that, owing to the exceptional circumstances of the case, it was proper for the owner to prove that there would be danger of accidents to the employes of the mine after the construction of the road. After affirming the general rule, the court says: "We are of opinion that the facts in this case are exceptional. . . . When we remember the close proximity of the railroad to the engine on one side and the shaft and superstructure on the other, and that employes of defendant would necessarily be engaged over and about the track of the road, it will be readily seen that damage from accident may occur for which the railroad company would not be liable. It is clear that persons exposed to danger, as defendant's employes would necessarily be, could not perform their labors with the same degree of efficiency, and, at the same time, exercise the care to avoid danger which the law imposes on them, as they could if not so exposed."

30. Chicago, M. & St. P. R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64;

that may occur through the negligent or improper construction or operation of the improvement is incompetent.[31]

(5.) **Benefits.** — (A.) In General. — The question of when, for what purposes, and to what extent the benefits resulting to the remaining property of the owner from the construction and operation of the improvement on the part taken may be considered, depends entirely upon the provisions of the constitution and statutes under which the proceeding is brought, but even when these provisions are substantially similar, their proper interpretation and application is a subject upon which the decisions substantially conflict.[32]

(B.) Direct and Special Benefits. — The authorities seem to be uniform to the effect that in the absence of constitutional or statutory prohibition it is proper for the parties to prove and for the court or jury to consider any special benefit to the part of the property not

Winona & St. P. R. R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Rep. 100; Jones *v.* Chicago & I. R. R. Co., 68 Ill. 380; St. Louis, O. H. & C. R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1.069.

Fencing Required by Statute. Where the railroad company is required by law to fence and provide crossings for its right of way, evidence as to the necessity or cost thereof is inadmissible in the condemnation proceeding. Fremont, E. & M. V. R. Co. *v.* Lamb, 11 Neb. 592, 10 N. W. 493.

Contra. — In Eslich *v.* Mason City & Ft. D. R. Co., 75 Iowa 443, 39 N. W. 700, the witnesses were allowed to testify that the rails of the railroad projected from eight to twelve inches above the surface of the street, which was shown to be on about the established grade, and to base their testimony on that fact, although the city ordinance required the company to conform its track to the established grade. The court held that the company, while claiming the right to maintain the track in the raised condition, would not be permitted to assert that such maintenance was unlawful.

31. Fleming *v.* R. Co., 34 Iowa 353; McGregor *v.* Equitable Gas Co., 139 Pa. St. 230, 21 Atl. 13; Le Roy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; King *v.* Iowa M. R. Co., 34 Iowa 458; Chicago, K. & M. R. Co. *v.* Palmer, 44 Kan. 110, 24 Pac. 342. And see Delaware, Lackawanna & W. R. R. Co. *v.* Salmon, 39 N. J. L. 299.

Violent Entry. — Improper Evidence. — Evidence of the violent entry into the premises sought to be taken, in which was detailed at great length the forcible acts of petitioner upon the premises, going to show a willful trespass by him, is inadmissible, because it would naturally prejudice the jury and tend to mulct the company in vindictive damages. Error not cured by instruction to disregard it. Lafayette, B. & M. R. Co. *v.* Winslow, 66 Ill. 219.

Damage from Fire. — Possible damages from fire and otherwise to be caused by the negligence of the company in operating the railroad are not to be considered. Fremont, E. & M. V. R. Co. *v.* Whalen, 11 Neb. 585, 10 N. W. 491.

Trespass Committed in Construction. — Evidence of damage occurring from an improper construction (unlawful taking of soil from adjacent land) is inadmissible. Doud *v.* Mason City & Ft. D. R. Co., 76 Iowa 438, 41 N. W. 65; Leavenworth N. & S. R. Co. *v.* Usher, 42 Kan. 637, 22 Pac. 734.

Where Damage Has Occurred. — In King *v.* Iowa M. R. Co., 34 Iowa 458, it was held that evidence of damage from the negligent and wrongful acts of the company was incompetent, although such damage occurred prior to the assessment of compensation.

32. See Lewis on Eminent Domain (2nd ed.), § 465, *et seq.*, where the subject is thoroughly discussed.

taken, and not shared in by other property in the neighborhood, when such benefit is directly due to the improvement.[33]

(C.) Where Constitution or Statute Excludes Benefits. — On the question as to the effect of a constitutional or statutory provision providing, in effect, that in the assessment of compensation no benefits that may result from the improvement shall be considered, the decisions are not at all in harmony. In many of the states these provisions are given a strict construction, and it is held that evidence of any benefit, whether direct, special or otherwise, is incompetent.[34] On the other hand, some of the courts, notably those

33. *Colorado.* — City of Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Illinois. — Hayes *v.* Ottawa, O. & F. R. V. R. R. Co., 54 Ill. 373; Mix *v.* Lafayette B. & M. R. R. Co., 67 Ill. 319.

Indiana. — Terre Haute & L. R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648; Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463; Indiana C. R. Co. *v.* Hunter, 8 Ind. 74; Hagaman *v.* Moore, 84 Ind. 496; McIntire *v.* State, 5 Blackf. 384.

Maryland. — Lake Roland El. R. Co. *v.* Frick, 86 Md. 259, 37 Atl. 650.

Missouri. — Chicago, S. F. & C. R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

New York. — Newman *v.* Metropolitan El. R. Co., 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289.

Pennsylvania. — Pittsburg etc. Co. *v.* Robinson, 95 Pa. St. 426.

Increased Facilities for Transportation. — Evidence of former lack of transportation, and the increased facilities resulting from construction of railroad, and applicability of land to such change, is competent. Pittsburg Co. *v.* Robinson, 95 Pa. St. 426.

Building of Railroad Siding and Stopping Place on Land Taken. Shattuck *v.* Stoneham Branch R. R. Co., 6 Allen (Mass.) 115; Hayes *v.* Ottawa, O. & F. R. V. R. R. Co., 54 Ill. 373.

Non-Acceptance by Owner Immaterial. — The fact that owner refused to avail himself of the advantages made possible by the proposed improvement is immaterial. Dorlan *v.* East Brandywine & W. R. R. Co., 46 Pa. St. 520.

Benefits as Rebuttal to Evidence of Damage. — Where the evidence already in tends to show that the property after the construction of the railroad track would be useless for business purposes, it is competent for the condemning company to show that after the construction of the track the property may be used for warehouses or for any other purpose. Mix *v.* Lafayette B. & M. R. R. Co., 67 Ill. 319.

Benefits to Other Part of Same Property. — Cross-Examination. Where the testimony on the part of the owner is confined to the damages sustained by that part of the land below the railroad by reason of its being flooded with water flowing through a break in the railroad embankment, it is proper for the railroad company to ask said witness on cross-examination if the effect of the break in the embankment did not benefit the part of the land above the railroad by draining it. Wabash, St. L. P. R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 1 L. R. A. 207.

34. *Indiana.* — McMahon *v.* Cincinnati & C. S. L. R. Co., 5 Ind. 413; New Castle & R. R. *v.* Brumback, 5 Ind. 543; Evansville I. & C. S. L. R. Co. *v.* Fitzpatrick, 10 Ind. 120; White Water Val. R. R. Co. *v.* McClure, 29 Ind. 536; Grand Rapids & I. R. Co. *v.* Horn, 41 Ind. 479.

Iowa. — Frederick *v.* Shane, 32 Iowa 254; Lough *v.* Minneapolis & St. L. R. Co., 116 Iowa 31, 89 N. W. 77; Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844; Britton *v.* D. M. O. & S. R. Co., 59 Iowa 540, 13 N. W. 710; Bland *v.* Hixenbaugh, 39 Iowa 532; Lough *v.* Minneapolis & St. L. R. Co., 116 Iowa 31, 89 N. W. 77.

Kansas. — St. Joseph & D. C. R. Co. *v.* Orr, 8 Kan. 419.

of New York and Illinois, have apparently disregarded the prohibition entirely, and allowed proof of any and all benefits in considering the question of compensation.[35]

(D.) Whether the Benefits Must Be Special and Peculiar. Where the consideration of benefits is proper, the question of whether they must be special and peculiar to the particular property in question is a subject on which the decisions do not agree. The majority of the courts hold that in order to render consideration thereof competent, the benefits must be special and peculiar to the

Inadmissible for Any Purpose. It was held in Haggard *v.* Independent School Dist., 113 Iowa 486, 85 N. W. 777, that in estimating the damages of the remainder of the property resulting from the proximity of the improvement on the part taken, the jury could not consider the advantages resulting from the improvement even as an offset to the disadvantage claimed to be caused thereby.

Benefits Inadmissible for Any Purpose. — Constitution. — Under the California constitution, which provides that compensation for the appropriation of a right of way by any corporation *"other than municipal"* shall be ascertained "irrespective of any benefit," it was held in San José & A. R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522, that evidence of benefits, either general or special, was incompetent in a proceeding to condemn by railroad corporation.

N. B. — This provision of the California constitution was held to be in violation of the United States constitution in Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1,040.

It was held in LeRoy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217, that this rule did not conflict with the equally well settled rule in that state, viz., that the proper way of determining the injury due to the appropriation is to determine the market value of the premises before the right of way is appropriated, and then again thereafter, and that the difference is the true measure of damages — because it is said that the supposed conflict between the two principles "is more theoretical than substantial. The jury do not generally consider benefits when they ascertain the market value of the land before the appropriation, and then the market value of the land after the appropriation . . . , and determine the difference as to damages."

35. *Illinois.* — Metropolitan & W. S. E. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1,098, 26 L. R. A. 773; Metropolitan & W. S. E. R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978; Rigney *v.* City of Chicago, 102 Ill. 64; Page *v.* Chicago M. & St. P. R. Co., 70 Ill. 324.

New York. — Newman *v.* Metropolitan El. R. Co., 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289; Sutra *v.* Manhattan R. Co., 137 N. Y. 592, 33 N. E. 334.

Statute Excluding Consideration of Benefits. — Under the ordinary rule of damage, viz., the ascertainment of the difference between the value of a thing as damaged by the improvement and its value in its original condition, the commissioners are justified in following this rule, notwithstanding the fact that the act under which they are appointed provides that they are not to take into consideration the question of benefits. *In re* Riverside Ave., 64 N. Y. St. 366, 31 N. Y. Supp. 735.

In Oregon C. R. Co. *v.* Wait, 3 Or. 91, the act provided that compensation was to be ascertained "irrespective of any increased value thereof." A consideration of the increased value of the property resulting from the taking was held proper in estimating the damages sustained.

The Principle of These Decisions is that the owner is entitled to "just compensation" and nothing more; that this does not necessarily have to be paid in money, and that if his property is as valuable after the taking as it was before he has re-

particular land, and that evidence of benefits, although directly due to the improvement, if shared in by other property in the vicinity, should not be considered.[36] On the contrary, another line of decisions holds that any benefit appreciably enhancing the value of the particular property, whether shared in by the neighboring

ceived just compensation. Thus in Bohm *v.* Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344, the New York court says: "To prove that the land has been specially benefited may be proof that it has not been diminished in value." "Strictly speaking, it is not a question of benefits at all, except that proof of benefits may be one way of showing that there has been no injury. The value of the easements taken was merely nominal; and the sole question which remains is, therefore, has the owner suffered any damage or injury whatever, which has been caused by this taking? For if there have been no injuries there can be no recovery."

36. *United States.* — City of Chicago *v.* LeMoyne, 119 Fed. 662.

Alabama. — Alabama & F. R. Co. *v.* Burkett, 42 Ala. 83.

Arkansas. — Little Rock & Ft. S. R. Co. *v.* Allister, 68 Ark. 600, 60 S. W. 953.

Maryland. — Lake Roland El. R. Co. *v.* Frick, 86 Md. 259, 37 Atl. 650.

Massachusetts. — Meacham *v.* Fitchburg R. Co., 4 Cush. 291; Upton *v.* South Reading Branch R. Co., 8 Cush. 600.

Missouri. — St. Louis & St. J. R. Co. *v.* Richardson, 45 Mo. 466; McReynolds *v.* Kansas City C. & S. Co., 110 Mo. 484, 19 S. W. 824; Ragan *v.* Kansas City C. & S. Co., 111 Mo. 456, 20 S. W. 234; Hickman *v.* City of Kansas, 119 Mo. 110, 25 S. W. 225; St. Louis O. H. & O. R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1,069.

Nebraska. — City of Omaha *v.* Schaller, 26 Neb. 522, 42 N. W. 721; Fremont E. & M. V. R. Co. *v.* Whalen, 11 Neb. 585, 10 N. W. 491.

New Hampshire. — Adden *v.* White Mts. R. R., 55 N. H. 413, 20 Am. Rep. 220.

New Jersey. — Summerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495.

Pennsylvania. — Reading & P. R. Co. *v.* Balthasar, 126 Pa. St. 1, 17 Atl. 518, 13 Atl. 244.

Texas. — Pochila *v.* Calvert W. & B. V. R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255.

Wisconsin. — Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328.

Benefits from Street Railway. Evidence as to whether any advantage had resulted to the abutting property by reason of the building of an electric railroad on the street was inadmissible because any such benefit was common to the neighborhood and could not be charged as a specific benefit to the land. City of Chicago *v.* LeMoyne, 119 Fed. 662; Eachus *v.* Los Angeles Consol. Elec., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

Improper Question. — It was held in St. Louis O. H. & C. R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1,069, that it was improper to ask a witness the question, "What was the remainder . . . , after the right of way was taken out of it by the railroad company, worth?" "Was it worth as much . . . after the right of way was taken out as it was before?" Because this question would allow the witness to take into consideration the benefits common to other land in the neighborhood, which was of course incompetent.

Principle of the Rule. — The reason for the rule excluding general benefits common to the vicinity is the injustice of taxing the owner, part of whose property is taken, with benefits which accrue to others whose property is neither taken nor injured; in other words he should not be made to pay for something which the rest of the neighborhood obtains for nothing. Little Rock & Ft. S. R. Co. *v.* Allister, 68 Ark. 600, 60 S. W. 953.

property or not, is a proper element to be considered in estimating the damage.[37]

(E.) Certainty of Benefits. — These must be shown to be certain,[38]

37. *California.* — San Francisco A. & S. R. Co. *v.* Caldwell, 31 Cal. 367; California Pac. R. Co. *v.* Armstrong, 46 Cal. 85; Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1,040. But see Eachus *v.* Los Angeles Consol. Elec. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

Delaware. — Whiteman *v.* Wilmington & S. R. R. Co., 2 Harr. 514, 33 Am. Dec. 411.

Georgia. — Atlanta *v.* Green, 67 Ga. 386.

Illinois. — Metropolitan R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978; Rigney *v.* City of Chicago, 102 Ill. 64.

New York. — Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1,073; Bohm *v.* Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; Sutro *v.* Manhattan R. Co., 137 N. Y. 592, 33 N. E. 334.

In Metropolitan & W. S. E. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1,098, 26 L. R. A. 773, the court uses this language: "The fact that other property in the vicinity is likewise increased in value from the same cause — that is, also specially benefited by the improvement — furnishes no excuse for excluding the consideration of special benefits to the particular property, in determining whether it has been damaged or not, and if it has, the extent of depreciation in value." . . . The former case of Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290, is overruled.

Basis of These Decisions. — In California R. R. Co. *v.* Armstrong, 46 Cal. 85, the court says: "In other words, they insist that the benefit must be special and peculiar to that particular tract — something different from, and in excess of, the benefits resulting to other adjoining lands. But there is no valid reason for this distinction. The theory of the statute is that the land owner shall receive a fair, just compensation for the damage he suffers, and if that portion of his tract which is not taken will be enhanced in value by the construction of a railroad, the damages will be dismissed to the extent of the enhancement, and hence the statute contemplates that by deducting this benefit from the damages, the sum which remains will constitute a 'just compensation' in the sense of the constitution."

Definition of "Special" Benefits. Divergent Views. — The respective differences in opinion on this question are well illustrated in the two opposite cases cited, viz.: Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328, and Bohm *v.* Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.

38. Metropolitan & W. S. E. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1,098, 26 L. R. A. 773; Evansville I. & C. S. L. R. Co. *v.* Fitzpatrick, 10 Ind. 120; Lullamire *v.* Co., 3 Will. Civ. Cas. Ct. App. (Tex.), § 326; Betjeman *v.* New York El. R. Co., 48 N. Y. St. 721, 20 N. Y. Supp. 628.

Speculative Benefits. — Increase of Population. — In a proceeding to assess damages caused by the overflowing of a part of a tract of land, as a matter of set-off to the damages claimed, evidence of the benefits that might result to the owner in the increased value of his remaining land in that vicinity by the erection of manufactories and the consequences which might result therefrom in the increase of population, establishment of schools, stores, banks and all the usual incidents to the establishment of a manufacturing village in a district which was before exclusively agricultural, is inadmissible. The Palmer Co. *v.* Ferrill, 17 Pick. (Mass.) 58.

Highway Across Railroad. — Remoteness. — Evidence of the supposed or possible advantage to a railroad by an anticipated increase of trade and business thereon in consequence of the sale and improvement of adjacent lands, likely to re-

permanent,[39] and directly due to the improvement,[40] in order to render evidence thereof competent.

(6.) Prevention or Removal of the Cause of Special Damage. — Where the owner claims that his property has been depreciated in value by reason of a particular damage which has been brought about by

sult from the laying out of a highway across the railroad and of the many house lots on the land adjacent to said highway and railroad, is too remote and contingent to be made the basis of any proper estimate of damages and is inadmissible. Boston & M. R. Co. *v.* County of Middlesex, 1 Allen (Mass.) 324.

Increase of Travel Raises No Presumption. — Evidence of an increase of travel by the presence of an elevated railroad is not conclusive proof that stores along the line of the road were benefited thereby. There is no legal presumption that the increase of travel benefits the stores along the line of said travel. Betjeman *v.* New York El. R. Co., 48 N. Y. St. 721, 20 N. Y. Supp. 628.

Possible Building of Railroad Station. — Evidence that the remaining land of petitioner, part of which is sought to be taken for railroad purposes, would be benefited by the location of a station at petitioner's place by the railroad company, is inadmissible if no distinct affirmative act has been done by the company towards building the station. Brown *v.* Providence W. & B. R. Co., 5 Gray (Mass.) 35. But see Hayes *v.* Ottawa O. & F. R. V. R. R. Co., 54 Ill. 373, in which it was held where a condemning railroad company stated that it intended to build a depot near the land of the owner, thereby benefiting said land, evidence as to the manner and the amount in which the same would benefit said land was allowed on the question of benefits. The jury were to judge whether the hypothesis was supported by the evidence.

39. Lowering of Freight Rates by Railroad. — Evidence that, by the construction of a railroad, freight rates have been lowered, thereby benefiting the property, is inadmissible in the absence of positive proof that the change is permanent. The court will not presume this. Reading & P. R. Co. *v.* Balthasar, 126 Pa. St. 1, 13 Atl. 294, 17 Atl. 518.

Taking of Part of Land for Street. Construction of Sidewalks. — Evidence of the fact that, at the time the damage was assessed, sidewalks had been laid over the land and on the land taken, and the value of such sidewalks to the residue, is inadmissible, because that use might be changed afterwards to any other use for which the street may be used. Dickenson *v.* Fitchburg, 13 Gray (Mass.) 546.

40. Anderson *v.* Wharton Co., 27 Tex. Civ. App. 115, 65 S. W. 643.

Benefits Must Be Directly Due to the Improvement. — Where the property which is claimed to have been benefited by the construction of a railroad is situated in a new country where values are likely to increase rapidly, although remote from railroads, the question "Has not the market value of the lands through which the proposed railroad already runs, increased since the construction of the road?" is immaterial and irrelevant. There was no proof that such enhancement of value was directly due to the proposed building of the road. Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Construction of Viaduct. — Benefits from Trolley System. — Where the improvement is a viaduct erected by the city, evidence of a benefit resulting from the building of a trolley system after the construction of the viaduct is incompetent. City of Chicago *v.* Le Moyne, 119 Fed. 662. The fact that the viaduct induced the construction of the trolley system is immaterial.

Unexplained Increase of Value. Although the evidence showed that there was a steady increase in the rental value of the premises since the operation of the railway, yet this was not sufficient to prove that the railway was not a damage instead of a benefit. "The rents received might

the construction or operation of the improvement, it is proper for the condemning party to show that the particular damage can be remedied, prevented or the cause thereof removed, and the cost of such prevention or removal.[41] But where the party condemning claims that the ordinary consequences of the improvement will be obviated, it has the burden of proving the fact.[42]

have been greater if the air were freer and purer, and the access unincumbered." Herold *v.* Metropolitan El. R. Co., 37 N. Y. St. 896, 13 N. Y. Supp. 610; Johnson *v.* New York El. R. Co., 62 N. Y. St. 491, 30 N. Y. Supp. 920.

But it has been held that the proximity of an elevated railroad and its stations to the premises in question, and the extensive communication thereby afforded and facilitated, in itself, is evidence of benefits. Nette *v.* New York El. R. Co., 48 N. Y. St. 723, 20 N. Y. Supp. 627.

41. Hannibal Bridge Co. *v.* Schanbacher, 57 Mo. 582; Fort St. Union Depot *v.* Backus, 92 Mich. 33, 52 N. W. 790.

Bridge Over Canal. — In a proceeding to assess damages caused by the construction of a canal through plaintiff's land, which canal separated the dwelling-house from the rest of the tract, evidence is admissible on the part of the condemning company to prove the expense of building a bridge over the canal and how much it would cost to drain off the overflow on plaintiff's land caused by the canal. State *v.* Beackemo, 6 Blackf. (Ind.) 488.

Small Cost of Removal. — Particular Damage. — Where plaintiff claimed damage in a large amount by reason of a particular mischief which has been brought about by the construction of a railroad, evidence that the particular cause of the mischief complained of could be removed for a certain small sum was held admissible. Barclay R. & C. Co. *v.* Ingham, 36 Pa. St. 194.

Cutting Off Water Supply. — Where the owner had introduced testimony tending to show a total destruction of his former water supply, the petitioner sought to prove, in rebuttal, that there were other available and sufficient supplies of water, which could be acquired at small cost. The exclusion of this testimony was held material error, the court saying: "It obviously should have permitted the petitioner to show there were other sources of water supply, not, as is supposed by appellee's counsel, for the purpose of showing that there would be no damage, but for the purpose of affecting the amount of damage." Illinois & St. L. R. C. R. Co. *v.* Switzer, 117 Ill. 399, 7 N. E. 664, 57 Am. Rep. 875.

Harmless Error. — The admission of evidence that the condemning company had offered to repair all damages and remove inconvenience caused by a construction of the road is immaterial, where jury were instructed that work was never done, and the offer of defendant to repair was immaterial. Dorlan *v.* East Brandywine & W. R. Co., 46 Pa. St. 520.

Offer Made After Action Begun. An offer of defendant railroad company, made after commencement of suit for damages, to repair the grade of the street which was cut down by the railroad, is irrelevant and inadmissible. Pochila *v.* Calvert W. & B. V. R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255.

42. In Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738, it was held proper for the owner to show loss of drainage to his land caused by the building of the railroad embankment, and if culverts were to be constructed underneath the roadbed that fact should have been shown affirmatively by the company.

Prevention of Fire. — Character of Railroad Rolling Stock. — Evidence that the railroad seeking to condemn the lands used a certain kind or character of a screen on the smokestack of the locomotive (they claiming that this would prevent the

(7.) Relevancy. — To the Pleadings. — Proceedings in condemnation are generally treated as special proceedings, and the necessary pleadings and the effect thereof are usually prescribed by the statute. The ordinary rule of evidence, confining the proof to the allegations of the pleadings, is not strictly enforced. Thus, it is generally held that an owner may prove the effect of the taking on the whole of the tract, although only the part taken is described in the record.[43] It is also held that it is not necessary for the owner to allege the special damages in order to render evidence thereof admissible.[44] But in Illinois the rule is that before evidence of damage to any part of the land not described in the petition is admissible, the owner must file a cross-petition describing such additional land, and alleging damage thereto.[45] In Kansas the evidence is confined to the land described in the commissioner's report.[46] In a case in California it was said that the evidence must be based on the assumption that the improvement would be constructed as set forth in the complaint.[47] Where the owner brings the proceeding to recover damages occasioned by a previous taking, it has been held that all evidence as to lands not embraced in the pleadings is inadmissible.[48]

(8.) Evidence Directed to Property as a Whole. — It has been held in Iowa and Pennsylvania that the evidence as to the effect of the improvement must be directed to the property as a whole, and that it is not competent to prove the damage or benefit to a distinct

escape of fire) is inadmissible, because the use is not certain or continuous. It may be changed. Pingery *v.* Cherokee & D. R. Co., 78 Iowa 438, 43 N. W. 285.

43. *Indiana.* — Chicago & W. M. R. Co. *v.* Huncheon, 130 Ind. 529, 30 N. E. 636.

Iowa. — Cox *v.* Mason City & Ft. D. R. Co., 77 Iowa 20, 41 N. W. 475.

Massachusetts. — Drury *v.* Midland Railroad, 127 Mass. 57.

Minnesota. — Sheldon *v.* Minneapolis & St. L. R. Co., 29 Minn. 318, 13 N. W. 134; St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 433. (But see *In re* St. Paul & N. P. R. Co., 34 Minn. 227, 25 N. W. 345.)

Missouri. — Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

Nebraska. — North Eastern Neb. R. Co. *v.* Frazier, 25 Neb. 42, 40 N. W. 604; Atchison & N. R. Co. *v.* Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637.

Wisconsin. — Welch *v.* Milwaukee & St. P. R. Co., 27 Wis. 108.

44. North Pacific R. Co. *v.* Reynolds, 50 Cal. 90.

Injury to Ingress and Egress. The owner may prove the injury to the facilities for ingress to and egress from the premises sought to be taken, as affecting its value, although he has filed no cross-petition setting up these facts. Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359.

45. Chicago & I. R. Co. *v.* Hopkins, 90 Ill. 316; Mix *v.* Lafayette B. & M. R. Co., 67 Ill. 310; Jones *v.* Chicago & I. R. Co., 68 Ill. 380.

46. Chicago, K. & W. R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779.

Evidence of the taking of land outside of the property condemned as described in the proceedings is inadmissible. Such taking is without right and unlawful. Reisner *v.* Atchison U. D. R. Co., 27 Kan. 382.

47. Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

48. Ball *v.* Keokuk & N. W. R. Co., 71 Iowa 306, 32 N. W. 354; Waltemeyer *v.* Wisconsin I. & N. R. Co., 71 Iowa 626, 33 N. W. 140.

portion.[49] But in a case in Missouri it was declared to be proper to ask a witness as to whether a particular piece, considered by itself, was damaged or benefited.[50]

(9.) Amount Paid by Condemning Company to Others. — Evidence of the amount paid by the party seeking to condemn as compensation for the taking and damages to the owners of other properties is incompetent,[51] as is evidence of what another company paid to the same owner for another right of way on the same tract.[52]

7. View of Premises. — A. In General. — The law of evidence as applicable to the question of the view of the premises involved in any litigation is fully treated elsewhere in this work.[53]

B. Right to Have the Jury or Commissioners View the Premises. — a. *Generally Governed by Statute.* — This is generally governed by the statute of the state in which the proceeding is pending.[54]

b. *Presumption From Statute Giving Viewers the Right.* — When the statute gives the original *viewers* authority to view the prem-

49. Winklemans *v.* Des Moines N. W. R. Co., 62 Iowa 11, 17 N. W. 82; Lough *v.* Minneapolis & St. L. R. Co., 116 Iowa 31, 89 N. W. 77; Hartshorn *v.* B. C. R. & N. R. Co., 52 Iowa 613, 3 N. W. 648; Schuylkill R. E. S. R. Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399.

Contra. — Damage to Separate Parts Admissible. — In O'Brien *v.* Schenley Park & H. R. Co., 194 Pa. St. 336, 45 Atl. 89, where a railroad has been constructed across one of two parcels of land owned by the plaintiff, and constituting an entire property but separated by a street, testimony was held admissible to prove that the injury was confined to the parcel through which the road was laid. If the testimony showed an injury to a certain part of the land, and no injury to the other part, the injury to the part affected was the injury to the whole.

50. St. Louis O. H. & C. R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1,069.

51. Cobb *v.* City of Boston, 112 Mass. 181; United States *v.* Freeman, 113 Fed. 370; Peoria G. L. & C. Co. *v.* Peoria T. R. Co., 146 Ill. 372, 34 N. E. 550; Schuster *v.* Sanitary District, 177 Ill. 626, 52 N. E. 855; King *v.* Iowa Midland R. R. Co., 34 Iowa 458; Seefeld *v.* Chicago, M. & St. P. R. Co., 67 Wis. 96, 29 N. W. 904.

Evidence of what amounts the city paid for a water-right similar to that which is sought in the proceeding, and in the same vicinity, is incompetent. *In re* Thompson, 121 N. Y. 277, 24 N. E. 472.

Offer of Compromise Inadmissible. Evidence that the railroad company had offered the owners a certain sum in full compensation is inadmissible. Upton *v.* South Reading Br. R. Co., 8 Cush. (Mass.) 600.

52. Lyon *v.* Hammond & B. I. R. Co., 167 Ill. 527, 47 N. E. 775.

Evidence of the sum paid by one former owner of the dam for annual damages done to same land by the overflow from said mill and dam is admissible in the sound discretion of the court in reply to similar testimony offered by respondent. Hosmer *v.* Warner, 81 Mass. 46.

53. See article "View."

54. Statutory Restrictions. Where the statute authorizes the jury to view the premises in charge of a sworn bailiff, the jury have no right to view the premises accompanied by any one else. Colorado Fuel & Iron Co. *v.* Fourmile R. Co., 29 Colo. 90, 66 Pac. 902.

No Right to View Other Lands. Where statute gives jury right to view the premises in question, this does not give them authority to view other lands in vicinity to ascertain

ises, the parties have the right to have a *jury*, on appeal from the viewers' award, view the premises, although the statute is silent on the question, so far as the *jury* is concerned.[55]

c. *Where no Statutory Authority.* — Where there is no statutory authority the parties have no absolute right to have the jury view the premises in a condemnation proceeding.[56] The matter is within the discretion of the court.[57]

C. Waiver of Right. — The right to have the jury view the premises, although given by statute, may be waived by the conduct of the party in the proceeding.[58]

D. Effect of the View as Evidence. — Where, in conformity with the statute, the jury or commissioners view the premises, they may take into consideration and act upon the impressions and information obtained from the view in fixing the amount of compensation.[59] But the general rule is that the verdict must be supported

their similarity. O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 28 N. E. 923; Tedens *v.* Sanitary District, 149 Ill. 87, 36 N. E. 1,033.

View of Other Premises. — Immaterial Misconduct. — The mere circumstance that the jury was conducted from other adjoining property, in the absence of other judicial misconduct, is immaterial. United States *v.* Freeman, 113 Fed. 370.

55. Rules of Court. — Where the practice authorizes the court to make all necessary orders and inquisitions, this authorizes a view by the jury. Traut *v.* Ry. Co. (Pa. St.), 15 Atl. 678.

Presumption in Favor of Right from General Laws. — Where, under a special act providing that the proceedings shall be the same as prescribed in the general laws relating to street openings, which general laws authorize the commissioners to view the premises, the commissioners appointed under such special act have the right to view the premises, although this special act does not expressly so provide. *In re* Riverside Ave., 64 N. Y. St. 366, 31 N. Y. Supp. 735.

56. G. & H. R. Co. *v.* Waples P. & Co., 3 Will. Civ. Cas. Ct. App. (Tex.), § 410.

57. Bellingham Bay & B. C. R. Co. *v.* Strand, 4 Wash. 311, 30 Pac. 144.

58. Change of Venue. — Where the statute gives the party the right to have the jury inspect the premises at his request, the party by procuring a change of venue from the county where the proceeding was commenced and where land is situated thereby, waives the right. Rockford R. I. & St. L. R. R. Co. *v.* Coppinger, 66 Ill. 510.

59. *Illinois.* — Mitchell *v.* Illinois & St. L. R. R. & C. Co., 85 Ill. 566; Culbertson & B. P. Co. *v.* Chicago, 111 Ill. 651; Green *v.* City of Chicago, 97 Ill. 372.

Indiana. — Evansville I. & C. I. R. Co. *v.* Cochran, 10 Ind. 560.

Kansas. — Chicago K. & W. R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1,083; City of Topeka *v.* Martineau, 42 Kan. 387, 32 Pac. 419, 5 L. R. A. 775.

Michigan. — Toledo A. A. & G. T. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Effect as Evidence. — Where, in conformity with statute, the jury view the premises during the trial "it is the evident intention of the law that such personal examination by the jury is in the nature of evidence to be considered by them. . . . The result of such personal investigation may have been such as to have fully justified the assessment made, even if it was clear the preponderance of the evidence was against so large an amount." Chicago & I. R. R. Co. *v.* Hopkins, 90 Ill. 316.

Effect on Materiality of Subsequent Testimony. — Where the

by evidence, other than the view, otherwise it will be set aside.[60] The Illinois decisions lay down the rule that a verdict will not be set aside, although against the preponderance of evidence, if the jury has viewed the premises.[61]

8. Hearing and Award of Commissioners. — A. RIGHT OF COMMISSIONERS TO HEAR TESTIMONY. — Where the statute provides that the commissioners are to view the property and assess the damages occasioned by the improvement, they may, in addition to their view of the premises, hear the testimony of the parties, although the statute does not expressly give this right.[62]

jury had viewed the ground occupied by a railroad, it was held not error to refuse to allow the plaintiff to ask a witness on the trial "whether the common roads on this farm crossing and recrossing the road rendered it more or less dangerous for horses, cattle and teams in going from one part of the farm to another;" the jury having viewed the ground themselves, the question was held immaterial. Pinneo *v.* Lackawanna & B. R. R. Co., 43 Pa. St. 361.

60. Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328; City of Topeka *v.* Martineau, 42 Kan. 387, 32 Pac. 419, 5 L. R. A. 775; Bigelow *v.* Draper, 6 N. D. 254, 69 N. W. 570; City of Grand Rapids *v.* Perkins, 78 Mich. 93, 43 N. W. 1,037.

Duty of Commissioners to Consider Other Testimony. — Presumption. — The commissioners appointed under the statute to assess the damages caused by the improvement are not to be guided solely by the testimony of their own senses or their view of the premises. They must hear the proofs of the parties and give to the testimony of the witnesses its proper weight, and it is presumed that they have done so. Central P. R. R. Co. *v.* Pearson, 35 Cal. 247.

Verdict Must Be Supported by Other Evidence. — In Chicago K. & N. W. R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1,083, the court said: "The evidence which the jury may acquire from making the view is not to be elevated to the character of conclusive or predominating evidence. The verdict should be supported by other evidence than the view, and, unless it is supported by substantial evidence given by sworn witnesses," the court may set it aside.

Disregard of Other Evidence. — It was held in City of Detroit *v.* Detroit G. H. & M. R. Co., 112 Mich. 304, 70 N. W. 533, that where the undisputed evidence as to the location of the railway, across which the city had located a street, showed the necessity for keeping a flagman and gates at the crossing in order to render the same safe, the jury could not disregard this evidence and find solely from their view of the premises that such precautions were not necessary.

61. Conness *v.* Indiana I. & I. R. Co., 193 Ill. 464, 62 N. E. 221. And see Illinois cases cited in note 59 *supra.*

In Kiernan *v.* Chicago, S. F. & C. R. Co., 123 Ill. 188, 14 N. E. 18, an instruction was held proper which informed the jury that the result of their personal view of the premises was evidence proper to be taken into consideration in fixing the damages, and that if they believed from the whole evidence that they had, by virtue of such view, arrived at a more accurate judgment as to the damages sustained than was shown by the evidence in open court, they might rightfully fix the amount of compensation on the basis of the information acquired by said view, notwithstanding the fact that such determination might differ greatly from and not be supported by the weight of the testimony given in open court.

62. Inhabitants Readington *v.* Dilley, 24 N. J. L. 209; Spring Garden Street Case, 4 Rawle (Pa.) 192.

Contra. — Leeds *v.* Camden & A. R. Co., 53 N. J. L. 229, 23 Atl. 168.

B. Admissibility of Evidence Before Commissioners. — a. *Whether Ordinary Rules of Evidence Apply.* — The courts differ as to whether the commissioners are bound by the ordinary rules of evidence in their determination of the question of compensation. The general rule seems to be that they are not bound by the technical rules of evidence, but are at liberty to acquire information in any of the ways in which men usually acquire knowledge.[63] On

How Information May Be Acquired. The commissioners may, upon their own motion, seek information in any way that a prudent man might take to satisfy his own mind concerning like matters, and may of their own motion take the testimony of witnesses. St. Paul & S. C. R. Co. *v.* Covell, 2 Dak. 483, 11 N. W. 106.

Testimony Under Oath. — Where the statute requires the commissioners to view and examine property to be taken and to make a just appraisement and assessment of the damage, commissioners may, in addition to their own view, seek information from others to guide their judgment, and in their discretion receive the information under oath. State *v.* Lehigh Val. R. Co. *v.* Dover, 43 N. J. L. 528.

Right of Commissioners to Examine Documents. — The commissioners appointed to assess damages do not commit any error by examining deeds and records of other land in the vicinity, and hearing statements from persons with a view of aiding them in forming the correct judgment. Coster *v.* N. J. & T. R. Co., 23 N. J. L. 227. Same case on appeal, 24 N. J. L. 730; Columbia Del. Bridge Co. *v.* Geisse, 36 N. J. L. 537.

63. *United States.* — Shoemaker *v.* U. S., 147 U. S. 282.

Dakota. — St. Paul & S. C. R. Co. *v.* Covell, 2 Dak. 483, 11 N. W. 106.

Illinois. — Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567.

Michigan. — Port Huron & S. W. R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Toledo A. A. & G. T. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271; Chamberlain *v.* Brown, 2 Doug. 120.

New Jersey. — Inhabitants of Readington *v.* Dilley, 24 N. J. L. 209; Columbia Del. Bridge Co. *v.* Geisse, 36 N. J. L. 537.

New York. — *In re* New York El. R. Co., 40 N. Y. St. 647, 15 N. Y. Supp. 909; *In re* Sobel, 29 N. Y. St. 190, 8 N Y. Supp. 707; *In re* N. Y. L. & W. R. Co., 27 Hun 116; Rochester H. & L. R. Co. *v.* Hartshorn, 18 N. Y. St. 654, 2 N. Y. Supp. 457; Troy & B. R. Co. *v.* Lee, 13 Barb. 169; *In re* William & Anthony Streets, 19 Wend. 678.

Ordinary Rules of Evidence Do Not Apply. — In Detroit W. T. & J. R. Co. *v.* Crane, 50 Mich. 182, 15 N. W. 73, the court, quoting from the opinion of Graves, J., in Mich. Air Line Railway *v.* Barnes, 44 Mich. 222, 6 N. W. 651, uses this language: "When the law provided how the tribunal should be constituted for these cases, and prescribed the method to be observed, it obviously contemplated that the practice respecting the admission of testimony should be as simple as a due regard to substantial justice would permit. It was not intended to leave the fate of the determination had in view to any fine-spun theories, or to the refinements which are not uncommon at the circuit; they were not supposed to be necessary to the fundamental purpose or beneficial working of inquests of this nature, and no provision was made for the certain attendance of any one presumptively qualified to deal with them. The statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert, and under circumstances in which it would be difficult, if not impracticable, to preserve technical or hair-drawn questions in a shape to be reviewed. And were the niceties of *nisi prius* to be insisted on, the proceeding would soon break down under the perplexities and embarrassments due to its own methods. The conclusion to which these and

the other hand, it is held in some cases that the commissioners must follow the rules of evidence the same as courts and juries,[64] and that, on the hearing of a motion to set aside the award, the court would look into the action of the commissioners in receiving or rejecting evidence. If it appears that wrong rulings were made, affecting the rights of the parties, the award will be set aside.[65]

b. *Evidence of Title.* — Generally the question of title and right to compensation is settled at the bar of the court either before or after the question of the amount of compensation is submitted to the commissioners, and in such case evidence concerning the title to the property affected is inadmissible before them.[66] But it has been held that where the nature and extent of the owner's interest in the property damaged are material to a consideration of the question of the amount of compensation to which he is entitled, the com-

other considerations lead is that a very large discretion in admitting and rejecting testimony is left to the jury or attending officer when there is one, and that when the case is brought here by appeal the award cannot be disturbed on account of such decisions, unless it is fairly evident, in view of the facts and circumstances, that the ruling was not only inaccurate but was a cause of substantial injustice to the appellant in the matter of the result."

Testimony Not Controlling. — And if the commissioners see fit to take the testimony of witnesses "it is but an item in the account which may go to qualify, but cannot control, their opinion." *In re* William & Anthony Streets, 19 Wendell (N. Y.) 678.

64. Troy & B. R. Co. *v.* Northern T. Co., 16 Barb. (N. Y.) 100; Rochester & S. R. Co. *v.* Budlong, 6 How. Pr. (N. Y.) 467. "Commissioners, in their proceedings, ought to be guided by the established rules of evidence. No testimony should be received which a court of law would reject, and none should be rejected which a court of law would hold to be admissible."

In the hearing before commissioners appointed under the act to assess damages, commissioners should receive as testimony none but legal testimony, and the taking of said testimony is governed by the same rules by which the admission and exclusion of evidence in other cases in courts of justice are regulated. Central P. R. R. Co. *v.* Pearson, 35 Cal. 247.

65. Fort St. Union Depot *v.* Backus, 92 Mich. 33, 52 N. W. 790.

66. Port Huron & S. W. R. Co. *v.* Voorheis, 50 Mich 506, 15 N. W. 882; Sacramento Val. R. R. Co. *v.* Moffatt, 7 Cal. 577.

Under a statute authorizing the appointment of commissioners to "ascertain the compensation to be made to the owners and persons interested;" on the hearing before said commissioners, evidence of the right or title of the claimants is inadmissible, and the refusal on the part of commissioners to hear evidence on the question of title or ownership is not error. Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

Commissioners appointed under a statute to assess damages caused by taking private property for public purposes, have no authority to pass upon conflicting claims of title in the property sought to be condemned, and therefore evidence in relation to such title is immaterial before them. *In re* William & Anthony Streets, 19 Wend. (N. Y.) 678.

Right to Compensation. — Under a statute providing in effect that all matters going to the right to maintain the action are to be first settled before the bar of the court, and the matter is then submitted to the jury to assess the damages, evidence is inadmissible before the jury to show that a former owner received and released the damages caused by the

missioners have a right to consider such interest and evidence to prove the same is competent on the hearing before them.[67]

C. Effect of Report and Award as Evidence. — The award of commissioners fixing the amount of compensation is not admissible as evidence of the damages or of the owner's title, on a retrial of the question of compensation before a jury.[68] In Rhode Island it was held inadmissible for any purpose on the appeal from said award.[69] But the whole report has been held admissible as proof of the regularity of the proceedings,[70] and for certain other purposes.[71]

D. Proceedings to Confirm or Set Aside Award. — a. *Affidavits and Oral Testimony.* — Where the statute provides that the court, on the presentation of the report of the commissioners awarding compensation, shall review the same and confirm it or set it aside

improvement, or to show that plaintiff did not own all the land described in the complaint. These questions should have been settled before the bar of the court. The jury has no jurisdiction to try them. Darling *v.* Blackstone Mfg. Co., 16 Gray. (Mass.) 187.

67. Thurston *v.* City of Portland, 63 Me. 149; Sexton *v.* Union S. U. T. Co., 200 Ill. 244, 65 N. E. 638.

Amount of Land Damaged. — In ascertaining the amount of land damaged, evidence on the part of the owner to prove that he owns the whole tract is admissible before the commissioners. Winona & St. P. R. R. Co. *v.* Denman, 10 Minn. 267.

68. *Indiana.* — Terre Haute & L. R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

Iowa. — Bell *v.* Chicago B. & Q. R. Co., 74 Iowa 343, 34 N. W. 768.

Massachusetts. — Wellington *v.* Boston & M. R., 158 Mass. 185, 33 N. E. 393; White *v.* Boston & P. R. Corp., 60 Mass. 420; Chapin *v.* Boston & P. R. Corp., 60 Mass. 422.

Minnesota. — Sherman *v.* St. Paul M. & M. R. Co., 30 Minn. 227, 15 N. W. 239.

Missouri. — Kansas City S. B. & L. R. Co. *v.* McElroy, 161 Mo. 584, 61 S. W. 871.

Wisconsin. — Seefeld *v.* Chicago M. & St. P. R. Co., 67 Wis. 96, 29 N. W. 904.

Report Is No Evidence of the Title. The report of commissioners, appointed under the statute to assess damages, is not evidence of the owner's title to the land, nor is it to be considered as evidence of the status of the title to the land in question. Wooster *v.* Sugar Val. R. Co., 57 Wis. 311, 15 N. W. 401.

69. Daigneault *v.* Woonsocket, 18 R. I. 378, 28 Atl. 346; Ennis *v.* Wood River B. R. Co., 12 R. I. 73.

70. Terre Haute & L. R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

71. Description of Premises. — In Sherman *v.* St. Paul M. & M. R. Co., 30 Minn. 227, 15 N. W. 239, it was held that the commissioner's report might be used and referred to, so far as necessary to a correct understanding of the location of the contemplated railroad and the description of the premises.

Computation of Interest. — In Kansas City S. B. & L. R. Co. *v.* McElroy, 161 Mo. 584, 61 S. W. 871, it was held that award was admissible to enable jury to compute the interest of the excess of the verdict over the award, where court instructed that award was not to be considered as to damage.

Where the report directed condemning railroad company to construct and maintain certain improvements on the land not taken, it was held admissible, on the hearing on appeal, to show the fact. White *v.* Boston & P. R. Corp., 60 Mass. 420; Chapin *v.* Boston & P. R. Corp., 60 Mass. 422.

and direct a new appraisement, the facts may be presented to the court by means of affidavits or oral testimony.[72]

b. *What Proof Essential to Set Aside Award.* — Where the award fixing the compensation is before the court for confirmation, the evidence, in order to be sufficient to set the award aside, must be clear, and must prove conclusively such improper conduct on the part of the jury or commissioners as to show a gross abuse of their authority by which the rights of the parties are substantially injured.[73]

E. Parol Evidence Inadmissible to Cure Mistake in Report. The report of the commissioners appointed to ascertain the extent and location of the contemplated improvement, and to assess the compensation for the taking, is conclusive evidence of the acts of the commissioners, and in a subsequent proceeding parol evidence is

72. Marquette H. & O. R. Co. *v.* Probate Judge, 53 Mich. 217, 18 N. W. 788; Matter of Petition of N. Y. L. & W. R., 93 N. Y. 385.

The facts may be presented by affidavits, by other competent testimony, or in any legal mode which the court, in the exercise of its general supervision over cases of this character, may prescribe by its rules or adopt for the occasion. Central P. R. R. Co *v.* Pearson, 35 Cal. 247, *citing* New Jersey & R. & T. Co. *v.* Suydam, 17 N. J. L. 25.

73. *California.* — Central P. R. R. Co. *v.* Pearson, 35 Cal. 247.

Illinois. — Chicago & I. R. Co. *v.* Hopkins, 90 Ill. 316; Peoria & F. R. Co. *v.* Barnum, 107 Ill. 160.

Michigan. — Port Huron & S. W. R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Detroit W. T. & J. R. Co. *v.* Crane, 50 Mich. 182, 15 N. W. 73; Fort St. Union Depot *v.* Backus, 92 Mich. 33, 52 N. W. 790.

Nebraska. — Omaha & V. R. Co. *v.* Walker, 17 Neb. 432, 23 N. W. 348.

New York. — Troy & B. R. Co. *v.* Lee, 13 Barb. 169; *In re* City of Rochester, 48 N. Y. St. 358, 20 N. Y. Supp. 506.

Award of commissioners will not be set aside unless the evidence against it shows manifest misconduct or the application of erroneous principles by the commissioners, materially affecting the rights of the parties. Railroad Co. *v.* Northern Turnpike Co., 16 Barb. 100.

Character of Evidence Necessary. "It would require very strong evidence of inadequacy or excess in the appraised value of the land and damages to influence the court, for that cause alone, to set aside the report. Without proof of impropriety or irregularity" the report will be confirmed. Chesapeake & O. R. Co. *v.* Pack, 6 W. Va. 397.

Presumption in Favor of Award. Under statute providing that good cause must be shown before the report or award of a jury or commissioners who have assessed compensation, will be set aside, the presumption is in favor of the report and that the jury probably discharged their duty. Orange B. R. Co. *v.* Craver, 32 Fla. 28, 13 S. W. 444.

When Award Will Be Set Aside. Where the evidence of the motion to set aside clearly shows that the amount awarded is grossly unreasonable and indicates that the award was the result of prejudice or that the commissioners must have acted upon the wrong basis, this is sufficient cause for setting aside the report. Marquette H. & O. R. Co. *v.* Probate Judge, 53 Mich. 217, 18 N. W. 788; Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790.

inadmissible to cure a mistake in the report or to show that it does not correctly state the acts performed by the commissioners.[74]

74. It was held in Larned Mer. R. E. & L. S. Co. *v.* Omaha H. & G. R. Co. (Kan.), 42 Pac. 713, that, in a collateral proceeding to recover damages for injuries to land not mentioned in the report, it is error to allow parol evidence on the part of the condemning company to show that by mistake the commissioners failed to include in their report a description of the particular property in question. "The law requires the commissioners to embody their doings in a written report, and to file the same with the county clerk. This report becomes an evidence, and the only evidence of their doings."

ENTRIES IN REGULAR COURSE OF BUSINESS.

By Glenda Burke Slaymaker.

CROSS-REFERENCES:

Accounts; Admissions;

Books of Account;

Declarations;

Public Documents.

I. SCOPE.

This article will not treat specially of entries made by a party to the action, or his agent, nor of entries made by a third party, in his shop books or customary books of account. The expressions "shop books" and "books of account," have a well-defined meaning in the law, and are elsewhere separately treated in this work.[1] While it is essential to the admissibility of such books that entries therein should have been made in the regular course of the party's business, the ground of their admissibility is not that they are entries made in the regular course of business, but that they constitute a party's shop books or books of account. The courts of various of the states have recognized as legal evidence certain other entries made by the agent of a party to the action, or by a third party or his agent, in the regular course of his office, business or profession, solely because they are so made, and which may or may not constitute one's shop books or books of account. This article will, therefore, treat of entries made by the agent of a party in recording matters that may not properly be included in shop books or books of account, and entries in general made by one not a party to the action or his agent. Some courts seem to attach a technical significance to the expression, "entries made in the regular course of business," and treat it as including only entries made in the usual course of their business by persons not parties to the action, who are since deceased. It would seem, however, that the subject is broader than this, and includes entries made, not only by a third party, but by the agents of parties to the action, and, as recognized by some cases, entries made by a party himself, in his own favor, or, when he is deceased, in favor of his executor or administrator.

II. DEFINITION.

An entry in the "regular course of business" is a record setting forth a fact or transaction made by one in the ordinary and usual course of one's business, employment, office or profession, which it was the duty of the enterer in such manner to make, or which was commonly and regularly made, or which it was convenient to make, in the conduct of the business to which such entry pertains.[2]

1. See in this work, "Books of Account," Vol. II, pp. 596-692.

2. Carlton *v.* Carey, 83 Minn. 232, 86 N. W. 85; Lewis *v.* Meginniss, 30 Fla. 419, 12 So. 19.

"The mere fact that an entry is made contemporaneously with the transaction which it purports to record, does not of itself entitle it to admission as a piece of substantive evidence. It must also appear to have been made in the regular course of business, and under such circumstances as to import trustworthiness." Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; Donovan *v.* Boston & M. R., 158 Mass. 450, 33 N. E. 383.

Entry in Regular Course of Business Distinguished from Private Memorandum. — An entry is within

III. GENERAL RULE.

1. Grounds of Admissibility. — Entries made as above set out, when relevant to the issues, are admissible as original evidence, upon the conditions and subject to the limitations hereinafter set forth.[3] Some courts treat such evidence as admissible under the

the rule of the text only when it is made as a part of the regular routine work of the business. It is from this that it derives its value as legal evidence. Merely sporadic memoranda, made for a special purpose and for temporary and limited use, out of the usual order in which the transactions of the business are recorded, are merely memoranda, proper only for refreshing the recollection, and are not within the definition of the text. Black *v.* Lamb, 12 N. J. Eq. 108; Doe *v.* Turford, 3 Barn. & Ad. (Eng.) 890; Harrison *v.* Cordle, 22 Ala. 457; Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Dec. 839; Peck *v.* Valentine, 94 N. Y. 569; Townsend *v.* Pepperell, 99 Mass. 40.

Single Entry. — Where the entry sought to be introduced is the only one appearing upon the record in which it is found, the entry is not one made in the regular course of business, within the meaning of the rule upon this subject. Ryan *v.* Dunphy, 4 Mont. 356, 5 Pac. 324; Metzger *v.* Burnett, 5 Kan. App. 374, 48 Pac. 599; Kibbe *v.* Bancroft, 77 Ill. 18. But see Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625, where entries made on the fly-leaf of a Bible were held to be within the statute of Missouri, defining a book of account regularly kept.

Entry How Made. — An entry not sufficiently intelligible to furnish information from which its correctness may be ascertained by one familiar with the business of the class in which the entry is made, is inadmissible. *In re* McGarry's Estate, 9 Pa. Dist. Rep. 172.

Clerk's Private Entry. — An entry must not be upon, or as a part of, a private record of the clerk entering it. The principal must have an interest in the entry made, and the entry must be made as required in the ordinary conduct of business. Wheeler *v.* Walker, 45 N. H. 355.

Records of Payment. — A record of payments, omitting the amounts paid, and reciting only the fact of payment, is not a record made in the regular course of business such as would be competent evidence of payment. Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1,073, 34 L. R. A. 581.

Official Registers Not Required by Law. — Official registers, though not required by law, but kept as convenient and appropriate modes of discharging official duties, are admissible. Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

3. The Leading Case on the admissibility of entries made in the regular course of business is the English one of Price *v.* Earl of Torrington, 1 Salk. 285, 1 Smith's Lead. Cas. 563. This was an action in assumpsit brought by a brewer to recover the value of beer alleged to have been sold and delivered to the defendant. To establish the fact of the delivery of the beer, a book, in which was set down at night an account, signed by the drayman making the delivery of the beer delivered by him, showing the delivery to the defendant of the beer sued for, the drayman at the time of the trial being dead, was held competent to prove delivery.

England. — Warren *v.* Greenville, 2 Strange 1,129; Doe *v.* Turford, 3 Barn. & Ad. 890.

United States. — Chaffee *v.* United States, 18 Wall. 516; Bank of United States *v.* Davis, 4 Cranch C. C. 533, 2 Fed. Cas. No. 915; Gale *v.* Norris, 2 McLean 469, 9 Fed. Cas. No. 5,190; Kinney *v.* United States, 60 Fed. 883; Nicholls *v.* Webb, 8 Wheat. 326.

Alabama. — Avery *v.* Avery, 49 Ala. 193; Clemens *v.* Patton, 9 Port. 289; Grant *v.* Cole, 8 Ala. 519; Batre *v.* Simpson, 4 Ala. 305.

res gestae rule,[4] while others treat it as an exception to the hearsay rule, founded upon the necessity of the case, being received to obviate a failure of justice between the parties,[5] and still another ground, that of general convenience, has been suggested.[6]

Connecticut. — Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415.

Florida. — Lewis *v.* Meginniss, 30 Fla. 419, 12 So. 19.

Illinois. — Kibbe *v.* Bancroft, 77 Ill. 18.

Indiana. — Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1,086, 7 L. R. A. 489; Cleland *v.* Applegate, 8 Ind. App. 499, 35 N. E. 1,108.

Iowa. — Wormley *v.* District Tp., 45 Iowa 666; Cormac *v.* Western White Bronze Co., 77 Iowa 32, 41 N. W. 480; Karr *v.* Stivers, 34 Iowa 123.

Maine. — Augusta *v.* Windsor, 19 Me. 317.

Maryland. — Heiskell *v.* Rollins, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455.

Massachusetts. — North Bank *v.* Abbott, 13 Pick. 465, 25 Am. Dec. 334; Shove *v.* Wiley, 18 Pick. 558; Washington Bank *v.* Prescott, 20 Pick. 339; Welsh *v.* Barrett, 15 Mass. 380.

Michigan. — Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489, 90 Am. Dec. 252; De Armond *v.* Neasmith, 32 Mich. 231.

Mississippi. — Barnard *v.* Planters' Bank, 4 How. 98.

New York. — Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Dec. 839.

Pennsylvania. — Shoemaker *v.* Kellog, 11 Pa. St. 310.

West Virginia. — Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Rule Stated. — In Bank of Montgomery *v.* Planet, 37 Ala. 222, the court thus tersely states the rule: "Books of account, kept by a deceased clerk, and all other memoranda made in the course of business or duty, by any one who at the time would have been a competent witness to the fact he registers, are admissible evidence."

Party's Version of Parol Contract. — A record made by a party of his version of a parol contract, even if made at the time the contract is entered into, is not competent evidence of such contract. Collins *v.* Shaw, 124 Mich. 474, 83 N. W. 146.

4. Res Gestae Doctrine. — Still *v.* Reese, 47 Cal. 294; Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415; Muckle *v.* Rennie, 47 N. Y. St. 97, 16 N. Y. Supp. 208.

In Abel *v.* Fitch, 20 Conn. 90, the court said: "Entries by persons, since deceased, having full and peculiar means of knowledge, made at the time, in the regular course of business, in the usual and proper place and manner, especially if in the discharge of one's duty, are admissible to the jury as part of the *res gestae*."

5. Doctrine of Necessity. — Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Dec. 839; Brewster *v.* Doane, 2 Hill (N. Y.) 537; Wilbur *v.* Selden, 6 Cow. (N. Y.) 162; Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130.

In West Branch Lumb.'s Ex. *v.* American Cent. Ins. Co., 9 Pa. Dist. Rep. 367, it was observed by the court that entries made in the regular course of business are often the only evidence of the transaction, and as they find their way into the proof in some form, usually under the pretext of refreshing the witness' memory, the entries themselves should be admissible after proper preliminary proof of their genuineness, probable accuracy and contemporaneous character.

6. General Convenience. — In Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562, the court, after referring to the rule announced by some courts, that such evidence is admissible on the ground alone of necessity, say: "But it is not true that the allowing of original entries in books, made at the time the transaction occurred in the usual and regular course of business by a party

2. Preliminary Matters. — A. Question of Law. — Whether an entry is made in the regular course of business is a question of law for the court's determination, and such determination will not be disturbed except in very plain cases of error.[7]

B. Presumption. — On the question whether a proper preliminary showing was made to admit an entry, it will be presumed, where the contrary does not appear, that a proper and sufficient showing was made.[8]

3. Entries. — By Whom Made. — A. By Party to the Action. While it is the prevailing rule that the doctrine of this article has no application to entries by individual parties to the action, it is conceived that there may be circumstances under which an entry, made by a party to the action, should be received in his favor, as where the entry is of such a nature as entirely to forbid the existence of a motive to falsify, and the enterer has since forgotten the subject matter of the entry.[9]

B. By Partner. — It has been held in Connecticut that an entry made by an absconding partner is admissible in favor of the partnership;[10] while in Maryland the court has refused to apply the rule to an entry made by a deceased partner, in favor of the surviving partners.[11]

C. By Agent of Party to Action. — The rule admitting in evidence entries made in the regular course of business has peculiar application to entries so made by agents of parties to the action, and authorizes their being received in favor of the one for whom they are made.[12]

D. By Strangers to the Action or Their Agents. — The great weight of authority affirms the admissibility, when relevant, of entries made by strangers to the action, upon the same conditions

having personal knowledge of the transaction recorded, is permitted only from *necessity;* on the contrary, other and very strong reasons are given for the admission of such entries as evidence; first, they are a part of the *res gestae;* secondly, general convenience is much promoted by their admissions as evidence."

7. Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84.

8. Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

9. Manheimer *v.* Stern, 45 N. Y. St. 648, 18 N. Y. Supp. 366.

See Dismukes *v.* Tolson, 67 Ala. 386; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Chicago & A. R. Co. *v.* American Strawboard Co., 190 Ill. 26, 60 N. E. 518, *affirming* 91 Ill. App. 635.

10. New Haven & Northampton Co. *v.* Goodwin, 42 Conn. 231.

11. Romer *v.* Jaecksch, 39 Md. 585.

12. Price *v.* Earl of Torrington, 1 Salk. (Eng.) 285, 1 Smith's Lead. Cas. 563; Chaffee *v.* United States, 18 Wall. (U. S.) 516; Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1,086, 7 L. R. A. 489; Swan *v.* Thurman, 112 Mich. 416, 70 N. W. 1,023; Carlton *v.* Carey, 83 Minn. 232, 86 N. W. 85; Diament *v.* Colloty, 66 N. J. L. 295, 49 Atl. 445; Goodwin *v.* O'Brien, 53 Hun 637, 6 N. Y. Supp. 239, *affirmed* 127 N. Y. 649, 27 N. E. 856; Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Dec. 839.

prescribed for the admissibility of entries made by the agents of parties to the action.[13]

4. Knowledge of Enterer. — A. General Rule. — An entry, such as is hereinbefore defined, is competent as original and independent evidence only when the enterer had personal knowledge of the facts entered, and when it was his duty to inform himself of the truth of the matters he has undertaken to record.[14]

B. Exception. — a. *Information or Data Furnished by Others to Entrant.* — Where an entry is made by one in the performance of his duty, of facts reported to him by another in the discharge of a duty devolving upon such other by virtue of his employment, it is nevertheless admissible. It is essential to the admissibility of such evidence, however, that the report from which the entry is made should have been communicated under the sanction of a duty or

13. Gilmore *v.* Merritt, 62 Ind. 525; Cleland *v.* Applegate, 8 Ind. App. 499, 35 N. E. 1,108; Dow *v.* Sawyer, 29 Me. 117; Briggs *v.* Rafferty, 14 Gray (Mass.) 525; Oliver *v.* Phelps, 21 N. J. L. 597; Ridgeley *v.* Johnson, 11 Barb. (N. Y.) 527; Campbell *v.* Wright, 8 N. Y. St. Rep. 471; Anonymous, (M. V. W.), 21 Misc. 656, 48 N. Y. Supp. 277; Wittenberg *v.* Mollyneaux, 55 Neb. 429, 75 N. W. 835; Smith *v.* Hawley, 8 S. D. 363, 66 N. W. 942; Robinson *v.* Mulder, 81 Mich. 75, 45 N. W. 505.

Physician's Record of Attendance Upon Paupers. — In an action by one municipality against another, to recover amounts paid by one for medicines and medical attention furnished to a pauper which are legally chargeable upon the other, the records of the physician attending the pauper are competent to establish the date such medicines and services were provided. Augusta *v.* Windsor, 19 Me. 317; Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415.

Admissibility to Show Character and Cause of Injury. — In Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525, the plaintiff sued the railway company for personal injuries alleged to have been caused by the company's negligence in permitting its locomotive to collide with the wagon in which plaintiff was riding. One of the rear wheels of the wagon was broken and the question was presented whether it was done by a collision with the defendant's locomotive, or by the plaintiff's turning and cramping the wagon and throwing himself out after passing the crossing. The character and extent of the injury to the wheel therefore becoming material, the trial court permitted the plaintiff to give in evidence the account book of one who repaired the wagon, showing a charge made for sixteen new spokes for the damaged wheel. The court on appeal, after a full and careful review of the authorities, held that such evidence was properly admitted.

Contra. — In Minton *v.* Underwood Lumb. Co., 79 Wis. 646, 48 N. W. 857, on a petition by logmen to enforce a lien on logs for their labor in driving them, it was held that entries regularly made in the time and account books of the contractors for whom the logmen worked, the contractors being strangers to the action, were inadmissible.

14. Price *v.* Earl of Torrington, 1 Salk. (Eng.) 285, 1 Smith's Lead. Cas. 563; Chaffee *v.* United States, 18 Wall. (U. S.) 516; Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525; Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; Goodwin *v.* O'Brien, 53 Hun 637, 6 N. Y. Supp. 239, *affirmed* 127 N. Y. 649, 27 N. E. 856; Carlton *v.* Carey, 83 Minn. 232, 86 N. W. 85; Dykman *v.* Northridge, 80 Hun 258, 30 N. Y. Supp. 164; Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153.

obligation, and not casually or voluntarily.[15] But preliminary to the admissibility of such evidence it should be shown by the one making the report, if he be living, that such report was true, and by the enterer, if he be living, that he correctly entered the report made to him.[16]

15. Cobb *v.* Wells, 124 N. Y. 77, 26 N. E. 284; West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450; Bloomington Min. Co. *v.* Brooklyn Hygienic Ice Co., 58 App. Div. 66, 68 N. Y. Supp. 699, *affirmed* 171 N. Y. 673, 64 N. E. 1,118; Payne *v.* Hodge, 71 N. Y. 598; Chisholm *v.* Beaman Machine Co., 160 Ill. 101, 43 N. E. 796; Diament *v.* Colloty, 66 N. J. L. 295, 49 Atl. 445; Van Wie *v.* Loomis, 77 Hun 399, 28 N. Y. Supp. 803; Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Chicago R. Co. *v.* Provine, 61 Miss. 288; Stanley *v.* Wilkerson, 63 Ark. 556, 39 S. W. 1,043.

Contra. — A contrary doctrine has been announced in at least three cases, one of them being Carlton *v.* Carey, 83 Minn. 232, 86 N. W. 85. That was an action by Carlton against Hulett's administrator, the question in the case being the amount of stone taken from Hulett's land by one Glass, pursuant to contract between the parties. Glass, who personally worked the quarry, kept a memorandum of the amount and kind of stone regularly loaded onto cars at the quarry. This memorandum was daily taken to one Gasper, who made therefrom a record of such facts as were noted by Glass. The decision is silent as to some important facts material to this question, but the court significantly observes, after stating the rule governing the admissibility of entries made in the regular course of business: "And such entries are not admissible if made on information from a third person, although communications to him in the course of duty." See Thomas *v.* Price, 30 Md. 483; White *v.* Wilkinson, 12 La. Ann. 359.

16. Chicago Lumb. Co. *v.* Hewitt, 64 Fed. 314; West *v.* Van Tuyl, 17 N. Y. St. 273, 1 N. Y. Supp. 718; Rathborne *v.* Hatch, 80 App. Div. 115, 80 N. Y. Supp. 347; Bloomington Min. Co. *v.* Brooklyn Hygienic Ice Co., 58 App. Div. 66, 68 N. Y. Supp. 699; Swan *v.* Thurman, 112 Mich. 416, 70 N. W. 1,023; Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 326; Stettauer *v.* White, 98 Ill. 72.

In Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Dec. 839, an instructive case on this subject, it was said: "The case is of an account, kept in the ordinary business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts that the transactions of business in numerous cases are authenticated, and business could not be carried on and accounts kept, in many cases, without great inconvenience, unless this method of keeping and approving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity be kept by a person not cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified, as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is

b. *Employes' Reports of Materials Furnished and Labor Performed.* — Where, conformably to the foregoing rules, reports are regularly made by a foreman or other employe to his master or superior, as a part of his duty, the facts so reported being entered upon other records of the master, such reports with the records made therefrom are competent in the master's favor as against third parties, for whom labor is performed or materials are furnished, to establish the amount due to the master therefor.[17]

5. Duty to Make Entry. — There must have been a duty devolving upon the enterer to make the specific entry that is sought to be introduced.[18] The early English cases recognized only a special or

often necessary to prevent a failure of justice.

"We are of the opinion, however, that it is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually, and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested."

Complex Entries and Abstracts. Where entries or abstracts thereof are complex, and it would be difficult to ascertain who the original observers are and to produce them, this may be dispensed with. Northern Pacific R. Co. *v.* Keyes, 91 Fed. 47; Fielder *v.* Collier, 13 Ga. 495; Schaefer *v.* Georgia R. Co., 66 Ga. 39; Dohmen *v.* Niagara Fire Ins. Co., 96 Wis. 38, 71 N. W. 69.

17. Chisholm *v.* Beaman Machine Co., 160 Ill. 101, 43 N. E. 796; Van Wie *v.* Loomis, 77 Hun 399, 28 N. Y. Supp. 803; McGoldrick *v.* Traphagen, 88 N. Y. 334.

Reports as Part of One's System of Carrying on Business. — In a recent case of this character, Diament *v.* Colloty, 66 N. J. L. 295, 49 Atl. 445, Garretson, J., said: "The slips cannot be regarded as a book of original entry. They were in reality no more than memoranda, which might be used by the witness for the purpose of refreshing his memory, but could not of themselves, standing alone, be competent evidence of the facts therein contained, and, if nothing else appeared, their admission would have been error. But they were a part of the system under which plaintiff conducted his business. . . . The work in question was carried on at a long distance from the plaintiff's store, where his books and book-keeper were, and the items of material and labor might not be ascertained, so as to be capable of proper entry in or become as a charge against the customer until sometime after the job was completed. The entries in this book appear to have been made in the usual course of business according to the system and method adopted by the plaintiff. The entries were made in a day book from information derived largely from these slips or reports, and, the book being competent evidence, the slips as a source of the information, together with the ledger, which was a condensation of the day book, all forming together a part of the system of carrying on the business, all become competent testimony when all were admitted in evidence."

The case of the Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Dec. 839, also emphasizes the fact that such reports partake somewhat of the nature of memoranda, and that it must be clearly made to appear that they are a part of a party's system of recording his business; that is, that they are memoranda required to be made in the usual and ordinary course of the party's business.

18. Sheriff's Return As to Extraneous Matters. — Place of Arrest.

particular duty, involving the element of accountability to another;[19] but the American rule does not go thus far, being satisfied if the entry was such as was, in the party's method of transacting his business, properly and regularly, or even convenient to be made, and within the authority of the entrant to make.[20]

6. Time of Making Entry. — It is essential, also, that the entry should have been made contemporaneously, or nearly so, with the fact or transaction recorded, or at a reasonable time thereafter, consistently with the usual and regular conduct of the business in which the entry is made.[21] Statements of past transactions, made after the completion of the act recorded, or after the regular

Tome Institute of Port Deposit *v.* Davis, 87 Md. 591, 41 Atl. 166.

In Chambers *v.* Bernasconi, 1 Cromp. & J. (Eng.) 451, where it became material to show the place of arrest of a party, the return to the sheriff of the deputy making the arrest was held competent to show the fact of arrest, but not the place of arrest, even though recited therein, as the only duty of the deputy was to make a return of the *fact,* and not of the *place,* of arrest.

Authority to Make Entry. — Corporate Minute Books. — Entries made in the minute books of a corporation, which are no part of the minutes of any meeting, and which were made without authority from the corporation, are inadmissible against it. Davison *v.* West Oxford Land Co., 126 N. C. 704, 36 S. E. 162.

19. English Doctrine. — Massey *v.* Allen, L. R. 13 Ch. Div. 558; Reg. *v.* Inhabitants of Worth, 4 Ad. & El. 132; Percival *v.* Nanson, 7 Exch. 1, 7 Eng. Law & Eq. 538; Lyell *v.* Kennedy, 35 Wkly. Rep. 725; Smith *v.* Blakely, L. R. 2 Q. B. 330; Polini *v.* Gray, L. R. 12 Ch. Div. 411.

20. Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Wood *v.* Coosa & C. R. Co., 32 Ga. 273; Arms *v.* Middleton, 23 Barb. (N. Y.) 571; Leland *v.* Cameron, 31 N. Y. 115; Fisher *v.* Mayor of New York, 67 N. Y. 73.

21. *England.* — Doe *v.* Turford, 3 Barn. & Ad. 890; Poole *v.* Dicas, 1 Bing N. C. 649.

United States. — Maxwell *v.* Wilkinson, 113 U. S. 656; Bates *v.* Preble, 151 U. S. 149; Chaffee *v.* United States, 18 Wall. 516.

Alabama. — Elliott *v.* Dycke, 79 Ala. 150; Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281; Terry *v.* Birmingham Bank, 93 Ala. 599, 9 So. 299; Sands *v.* Hammell, 108 Ala. 624, 18 So. 489.

Arkansas. — St. Louis & I. M. R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419, 43 Am. Dec. 2,021.

California. — Sill *v.* Reese, 47 Cal. 294.

Connecticut. — Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415.

Georgia. — Wood *v.* Coosa & C. R. Co., 32 Ga. 273.

Maryland. — Oelrichs *v.* Ford, 21 Md. 489.

Massachusetts. — Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84.

Mississippi. — Chicago R. Co. *v.* Provine, 61 Miss. 288.

North Carolina. — Ray *v.* Castle, 79 N. C. 580.

What is Reasonable Time After Occurrence of Transaction. — In Diament *v.* Colloty, 66 N. J. L. 295, 49 Atl. 445, the plaintiff was a dealer in wall paper. In the course of his business he sent his employes to hang the paper sold by him and charged the paper sold to the employe doing the work. When the work was done the employe delivered to the book-keeper slips showing the value of the work done and materials used. These slips were transferred by the book-keeper to the day book, and it appeared here that the entries in the day book were not transferred until twenty days after the work was completed, and it was held that such entries were sufficiently contemporaneous.

Telephone Company's Entries of Rent and Service. — Where a tele-

recording thereof, are inadmissible.[22] So entries made by a party after the rights of an opposite party have accrued,[23] or after a dispute between the parties has arisen,[24] or an action begun,[25] are inadmissible.

7. Interest of Enterer. — A. Entry Need Not be Against Interest. — The rule admitting in evidence entries made in the regular course of business is not to be confused with the rule admitting in evidence declarations against the interest of the declarant, as an entry in the regular course of business, to be admissible, is not required to be against the interest of the enterer.[26]

B. Absence of Interest to Falsify. — But as such evidence is received as an exception to the hearsay rule, the enterer not testifying under the sanction of an oath, it is required, as a condition to its admissibility, that the enterer should have had, at the time, no special interest to make the entry falsely, any more than in the making of other entries similar in character;[27] and, in general

phone company enters on slips, arranged for that purpose, the number of each service at the time thereof, the footings only of these slips being entered monthly, whereupon the slips are destroyed, entries so made lack the element of contemporaneousness and are therefore inadmissible. State *ex rel.* Rumsey *v.* New York & N. J. Tel. Co., 49 N. J. L. 322, 8 Atl. 290.

22. Burley *v.* German-American Bank, 111 U. S. 216; Scott *v.* Devlin, 89 Fed. 970.

Journal Entries from Stubs of Check Books. — Journal entries made by transcribing the data from the stubs of checks retained in the check books after the checks had been detached, and written up several days after the giving of the checks, are not made sufficiently contemporaneous with the transactions they record to be admissible as an entry made in the regular course of business. Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1,022.

23. Burley *v.* German-American Bank, 111 U. S. 216.

24. Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572, 39 Atl. 293.

25. Healey *v.* Bauer, 47 N. Y. St. 499, 19 N. Y. Supp. 989.

26. Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 216, 6 Atl. 415; Augusta *v.* Wendson, 19 Me. 317.

27. Pool *v.* Dicas, 1 Bing. N. C. (Eng.) 649; Williams *v.* Geaves, 8 Car. & P. (Eng.) 592; Barnard *v.* Planters' Bank, 4 How. (Miss.) 98; Lord *v.* Moore, 37 Me. 208; Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525; Fennerstein's Champagne, 3 Wall. (U. S.) 145; Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84.

Rule Stated. — "It has long been held," said the Maryland court, "that entries made by a clerk, in the regular course of business, he having no interest at the time in stating an untruth, should be received in evidence, after the clerk's death, on proof of his handwriting." Reynolds *v.* Manning, 15 Md. 510.

Where straw destroyed by fire had been weighed and put into stacks, stack sheets made for keeping an inventory of the number of tons in each stack, and shown to have been correctly prepared from scale tickets, that were used as memoranda in making up the stack sheets, are admissible as original documents in an action to recover for the stacks destroyed, such sheets being made in the regular course of business, and shown to have been correctly kept, there being no motive of the Strawboard Company to falsify such a record. Chicago & A. R. Co. *v.* American Strawboard Co., 190 Ill. 26, 60 N. E. 518, *affirming* 91 Ill. App. 635.

the entry must have been made under such circumstances as to import trustworthiness and preclude the probability of its falsity.[28]

C. Effect of Mere Possibility of Interest to Falsify. — To exclude such entries there must have been a fair probability of the corrupt intention or motive of the entrant to falsify the record he has made. A mere possibility of such is not sufficient.[29]

8. Inability of Enterer to Testify. — A. From Death. — As it is the policy of the law to receive as evidence the declarations of a person only when given under the sanction of an oath, and when such person is subject to cross-examination, so entries made even in the regular course of business or duty are not receivable if the one making them can be produced at the trial himself to testify to the matters he has recorded.[30] Hence the death of the enterer, or an equivalent impossibility to produce the entrant personally to testify, is required to be shown preliminary to the receiving of such entries.[31]

28. Carlton *v.* Carey, 83 Minn. 232, 86 N. W. 85.

29. Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415.

30. Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99; Chicago & Northwestern R. Co. *v.* Ingersoll, 65 Ill. 399; Poor *v.* Robinson, 13 Bush (Ky.) 290; Railway Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878; Philadelphia Bank *v.* Officer, 12 Serg. & R. (Pa.) 49; Hicks *v.* Southern R. Co., 63 S. C. 559, 38 S. E. 725, 41 S. E. 753.

Corroboration of Witness. — But where a witness is present and testifies that entries made by him were made correctly, and contemporaneously with the fact recorded, such entries may be admitted in corroboration of the witness and as a detailed statement of the items involved. St. Paul Fire & Marine Ins. Co. *v.* Gotthelf, 35 Neb. 351, 53 N. W. 137.

In Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153, the court thus states its position after referring to the general rule: "The rule is designed to prevent a failure of justice and is limited by this necessity. If the proof can be made by any person who has personal knowledge of the facts, then the books are not admissible. If the book-keeper's memory has failed as to the facts, or if he is dead or beyond the jurisdiction of the court, and there is no other person who has knowledge of the charges, then a necessity may arise."

See tending *contra.* In the case of Fennerstein's Champagne, 3 Wall. (U. S.) 145, Mr. Justice Swayne, in delivering the opinion of the court, said: "We think the letters in question in this case (passing between strangers to the action) were properly admitted. In reaching this conclusion we do not go beyond the verge of the authorities to which we have referred. In some of those cases the person asserted to be necessary as a witness was dead. But that can make no difference in the result. The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business."

31. *England.* — Price *v.* Earl of Torrington, 1 Salk. 285, 1 Smith's Lead. Cas. 563; Warren *v.* Greenville, 2 Strange 1,129.

United States. — Chaffee *v.* United States, 18 Wall. 516; Kinney *v.* United States, 60 Fed. 883; Gale *v.* Norris, 2 McLean 469, 9 Fed. Cas. No. 5,190.

Alabama. — Bank of Montgomery *v.* Planet, 37 Ala. 222; Elliott *v.* Dycke, 78 Ala. 150; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919.

Arkansas. — Railway Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878.

Indiana. — Culver *v.* Marks, 122

B. Absence From Jurisdiction. — a. *Permanent Absence.* Though there is some conflict in the authorities, the general rule prevails that the permanent absence of the enterer from the jurisdiction of the court in which an entry is offered is equivalent to the death of such enterer, so far as the necessities of the case are concerned, and, other conditions concurring, renders the entry admissible.[32]

b. *Clandestine Disappearance.* — Where an entrant has absconded and his whereabouts, after diligent search, cannot be ascertained, the same reason applies for receiving his entries as evidence, and,

Ind. 554, 23 N. E. 1,086, 7 L. R. A. 489.

Louisiana. — Lathrop *v.* Lawson, 5 La. Ann. 238, 52 Am. Dec. 585.

Maine. — Dow *v.* Sawyer, 29 Me. 117; Augusta *v.* Windsor, 19 Me. 317.

Maryland. — Heiskell *v.* Rollins, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455.

Massachusetts. — Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 181.

New York. — Brewster *v.* Doane, 2 Hill 537; Wilbur *v.* Selden, 6 Cowen 162; Merrill *v.* Ithaca & O. R. Co., 16 Wend. 86, 30 Am. Dec. 130.

Pennsylvania. — Sterrett *v.* Bull, 1 Binn. 234, 238.

South Carolina. — Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56.

Vermont. — Bacon *v.* Vaughn, 34 Vt. 73.

32. Permanent Absence from Jurisdiction Sufficient.

United States. — Chaffee *v.* United States, 18 Wall. 516; Burton *v.* Driggs, 20 Wall. 125; Clark *v.* Rist, 3 McLean 49, 5 Fed. Cas. 286.

Alabama. — Elliott *v.* Dycke, 78 Ala. 150; Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281; Terry *v.* Birmingham Bank, 93 Ala. 599, 9 So. 299; Sands *v.* Hammell, 108 Ala. 624, 18 So. 489.

Arkansas. — St. Louis I. & M. S. R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878.

Connecticut. — Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415; New Haven Co. *v.* Goodwin, 42 Conn. 230; Bartholomew *v.* Farwell, 41 Conn. 107.

Indiana. — Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1,086, 7 L. R. A. 489; Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153.

Maryland. — Reynolds *v.* Manning, 15 Md. 510; Morris *v.* Columbia Iron Wks. & D. Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 857; Heiskell *v.* Rollins, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455.

Massachusetts. — Union Bank *v.* Knapp, 3 Pick. 96; North Bank *v.* Abbott, 13 Pick. 465.

New York. — Shipman *v.* Glynn, 31 App. Div. 425, 52 N. Y. Supp. 691.

Pennsylvania. — Sterrett *v.* Bull, 1 Binn. 234, 238; Crouse *v.* Miller, 10 Serg. & R. 155; Alter *v.* Berghaus, 8 Watts 77.

Rhode Island. — Kinney *v.* Flym, 2 R. I. 319.

South Carolina. — Footes *v.* Simper, 12 Bay. 40; Elms *v.* Chevis, 2 McCord 349.

Vermont. — Cummings *v.* Fullman, 13 Vt. 434.

West Virginia. — Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

See *contra,* Moore *v.* Andrews, 5 Port. (Ala.) 107; County of Mahaska *v.* Ingalls, 16 Iowa 81; Welsh *v.* Barrett, 15 Mass. 380; Brewster *v.* Doane, 2 Hill (N. Y.) 537; Wilbur *v.* Selden, 6 Cow. (N. Y.) 162; Merrill *v.* Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Halliday *v.* Martinet, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262; Butler *v.* Wright, 2 Wend. (N. Y.) 369; Nichols *v.* Goldsmith, 7 Wend. (N. Y.) 160.

But where a witness is shown to be living, even if beyond the jurisdiction of the court, some effort must be made by the party offering his entries to produce him personally to testify at the trial. St. Louis, I.

accordingly, they are held admissible the same as entries made by a person permanently beyond the jurisdiction.[33]

c. *Temporary Absence.* — It is doubtful whether the temporary absence of a witness is sufficient to admit his entries, especially if such absence will not be long continued, as a continuance for a reasonable time would eliminate the necessity temporarily existing.[34]

C. From Insanity. — As insanity, not less than death, incapacitates a witness to testify, entries made in the regular course of business, by one who is insane at the time of the trial, are likewise admissible.[35]

D. Inability of Enterer, Living and Present, to Recall Matters Entered. — With equal reason, where an enterer is living, and is present at the trial, but has forgotten the facts entered, upon its being made to appear that the entry was made by him in the regular course of his business or duty, and that he would not have made it if it had not been true, the entry should be treated as admissible, and the courts uniformly so hold.[36]

& M. S. R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878; Cummings *v.* Fullam, 13 Vt. 434; Reynolds *v.* Manning, 15 Md. 510; Bartholomew *v.* Farwell, 41 Conn. 107; Alter *v.* Berghaus, 8 Watts (Pa.) 77; Little Rock Granite Co. *v.* Dallas Co., 30 U. S. App. 55.

33. North Bank *v.* Abbott, 13 Pick. (Mass.) 465; State *v.* Mace, 6 R. I. 85.

34. See Hay *v.* Kramer, 2 Watts & S. (Pa.) 137, indicating that temporary absence of the entrant will authorize the receiving of his entries upon his handwriting being proved.

Quaere. — Whether temporary absence from the state is sufficient, and whether in such a case the proper course is not to procure a continuance, the court, by Green, J., in Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562, says: "I am not prepared to say that the temporary absence of the book-keeper from the state ought to dispense with the necessity of his being produced, though there is some authority therefor. It seems to me, however, that as this temporary absence may be readily brought about for the very object of obtaining the advantage of using such entries, without the accompanying statement and explanation of the book-keeper, it would be probably unwise to relax the rule so far as to dispense with the presence of the witness when he was only temporarily absent from the state, especially as the alternative of a temporary continuance of the cause till his return to the state might be but a small inconvenience."

35. Chaffee *v.* United States, 18 Wall. (U. S.) 516; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; County of Mahaska *v.* Ingalls, 16 Iowa 81; Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415; Holbrook *v.* Gay, 6 Cush. (Mass.) 215; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

36. Spann *v.* Baltzell, 1 Fla. 301; Briggs *v.* Rafferty, 14 Gray (Mass.) 525; Bank of Monroe *v.* Culver, 2 Hill (N. Y.) 531; Wilson *v.* Kings Co. El. R. Co., 114 N. Y. 487, 21 N. E. 1,015; Rosenstock *v.* Heggarty, 36 N. Y. St. 92, 13 N. Y. Supp. 228; Farmers' & Mechanics' Bank *v.* Boraef, 1 Rawle (Pa.) 152; Bourda *v.* Jones, 110 Wis. 52, 85 N. W. 671; Jennings *v.* Talbott, 10 Gray (Mass.) 312.

Rule Stated. — "And when the party is living, who made such an entry in the regular course of business, though he remembers and can testify nothing about the facts recorded in the entry, but simply testifies that he made the entry in the usual course of business at the time of the transaction, such entry is of

9. Original Character of Entry. — As in the case of books of account, entries sought to be admitted as made in the regular course of business are required to be original entries of the transactions they record.[37]

10. Competency as Negative Evidence. — Where in the regular course of business certain entries should appear upon an appropriate record, if certain transactions were had, the production of such record, kept by an agent of a party or by a stranger, with no entries thereon, is some evidence that such transactions were not had, and such record is therefore admissible as evidence negativing such transactions.[38]

itself primary evidence of the facts recorded, though the witness be living and testifies in court if he knows that he made the entry in the regular course of business." Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Necessity of Receiving Such Entries. — In Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1,086, 7 L. R. A. 489, entries on the books of a bank shown to have been made, some by persons since deceased, some by non-residents of the state, and some by persons living and present, but unable to recall the facts entered, in the regular course of their business as employes of a bank, and offered to prove the state of a depositor's account, were all alike held admissible, the court saying of the entries collectively: "Unless the evidence admitted was competent, the appellee is deprived of making proof of the facts."

So, in an action against a railroad company on a contract for building its road, where a witness testified that he measured the work as it progressed, and when finished made a memorandum of the whole work done, but did not remember the result independently of the memorandum, it was held that the memorandum was properly received in evidence. Cunningham *v.* Massena Springs & Ft. C. R. Co., 63 Hun 439, 18 N. Y. Supp. 600, *affirming* 138 N. Y. 614, 33 N. E. 1,082.

37. Strauss *v.* Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822; State *ex rel.* Rumsey *v.* New York & N. J. Tel. Co., 49 N. J. L. 322, 8 Atl. 290.

38. **Negative Evidence. — In General.** — State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. Dec. 341; Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; Mayor, etc., *v.* Goldman, 125 N. Y. 395, 26 N. E. 456; White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; *In re* Silvernail, 45 Hun 575.

Teller's Book. — A bank teller's book, kept by a teller since deceased, was held competent as against a surety to show that on certain days no money was received for certain certificates of deposit, where it was shown by other competent evidence that, in the usual course of the bank's business and the regular recording thereof, such moneys, if received, would have been entered in the teller's book, there being no entry of the particular transaction thereon. American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644.

Letter Books. — The case of Continental Nat. Bank *v.* Moore, 83 App. Div. 419, 82 N. Y. Supp. 302, was an action brought by a bank as a creditor of its deceased teller to set aside as fraudulent an assignment of certain policies of insurance on the teller's life. It was contended by the bank that the teller was guilty of having appropriated certain funds of the bank. It appeared that, in the regular course of its business, the teller in forwarding drafts for collection would accompany the same with letters of advice, copies of which were retained in the letter book kept by, or under the supervision of, the teller. The latter book contained no copies of the advices which should have accompanied certain collections, had they been forwarded. To establish the indebtedness of the teller for such items, it

11. Right of Defendant in Criminal Prosecution to Confront Witnesses. — An entry made in the regular course of business is not incompetent as an infringement of the defendant's constitutional right as conferred by the state and federal constitutions, to meet the witnesses against him face to face, where the entrant is dead or is beyond the jurisdiction of the court, and his residence is unknown.[39]

IV. APPLICATION OF RULE TO PARTICULAR RECORDS.

1. Abstracts of Books and Records. — The same requisites to the admissibility of abstracts of entries must be made preliminary to the receiving of such abstracts as where the entries themselves are offered.[40]

2. Advancements. — Entries of advancements, when shown to have been made by the ancestor, are admissible, both as evidence of the fact of an advancement having been made, and of the intention of the ancestor in giving it.[41] Nor is it necessary that a book of

was held that the bank's letter book, kept under such circumstances, was competent in favor of the bank.

39. Enterer Absent and Residence Unknown. — In the case of State *v.* Mace, 6 R. I. 85, on the indictment of a defendant for keeping the nuisance of a cockpit, to show that the nuisance was maintained by the defendant, an entry on the books of a gas company, made by its clerk, who was absent from the state and in parts unknown, showing a payment for gas by the defendant, consumed at the place alleged to be a nuisance, was held to be admissible. The court does not specially refer to the constitutional question, although it was urged by counsel, but the court, without elaboration, held the evidence to be admissible.

Inadmissible Where Enterer Absent from Jurisdiction, but Residence Known. — State *v.* Thomas, 64 N. C. 74, was a criminal prosecution for perjury; in the course of the trial the state offered in evidence entries made in the books of a railway company to show that certain cotton, in regard to which it was contended perjury had been committed, had been received by the defendant. The entries were made in the regular course of business by the railway company's clerk, who was shown to be in the state of Missouri. It was held that to receive such entries against the defendant was an infringement of his constitutional right to confront the witnesses against him.

As Corroborative of Evidence of Accomplice. — In State *v.* Smalls, 11 S. C. 262, the court held admissible, on an indictment for bribery, entries in the books of a bank made in the regular course of its business, showing the deposit by the defendant, a short time after the alleged bribery, of a check to his credit for an amount equal to the amount of the alleged bribe, as corroborative of the evidence of the accomplice that the bribe was given.

40. Hughes *v.* Eschback, 7 D. C. 66.

In an action against the bondsmen of a bank cashier to recover for a breach of a bond for failure to enter a true account and turn over the money in his custody, it was held that there must be preliminary proof of who made the entries in the bank's books, the custom of keeping them, that the party who kept them was dead, or beyond the jurisdiction of the court, before computations therefrom by an expert were admissible in evidence. State Bank *v.* Brown, 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513.

41. Clark *v.* Warner, 6 Conn. 355; Van Houten *v.* Post, 33 N. J. Eq. 344; Oller *v.* Bonebrake, 65 Pa.

such entries be identified according to the ordinary rule relating to the use of books of account in evidence.[42]

3. Assignments. — An entry made in a book kept in the regular course of business of one, since deceased, of the transfer of commercial paper to another, is competent evidence of the title of the transferee to the instrument which is the subject of the entry.[43]

4. Attorney's Dockets. — The docket entries of an attorney, made in a matter in which he is acting as such,[44] or by his clerk,[45] are admissible as against strangers as entries made in the regular course of business. So the entries of an attorney upon his docket are admissible in his favor, in an action to recover for services rendered, to show that they were rendered for the defendant.[46]

5. Bank Records. — A. Ordinary Books of Bank as Between Strangers. — As a general rule, the books of a bank by it duly and regularly kept, by its proper agents and officers, under the rule

St. 338. See *In re* Perkins' Estate, 109 Iowa 216, 80 N. W. 335.

Partition. — Suit Between Devisees. In a suit between devisees, heirs at law, to partition an estate of the testator, which, by the terms of the will, was to be equally divided between the devisees, taking into consideration advancements made them in determining the amount of advancements to each, a book purporting to have been kept by the testator in his lifetime, containing an account or statement of advancements made by him to his children, upon its authenticity and identity being fairly established, was held admissible upon the issue thus made. Whisler *v.* Whisler, 117 Iowa 712, 89 N. W. 1,110.

42. Whisler *v.* Whisler, 117 Iowa 712, 89 N. W. 1,110.

43. Macomb *v.* Wilkinson, 83 Mich. 486, 47 N. W. 336, was an action by M. against W. on a note executed by W. to T. and afterwards assigned to M. To establish the transfer, the entry on the day book of T., then deceased, shown to have been made in T.'s handwriting, "John N. Macomb, debtor, to loan A. H. Wilkinson, $1,525.00 by check No. 1,514, $1,525," was held competent evidence of the title of M.

44. Fisher *v.* Mayor of New York, 67 N. Y. 73.

Service of Notice to Tenant to Quit Possession. — An entry by an attorney, since deceased, of the service by him of a notice upon the tenant of a client to quit the possession of the demised premises, is competent evidence of the fact and time of such service. Doe *v.* Turford, 3 Barn. & Ad. (Eng.) 890.

Delivery of Execution. — The delivery of an execution to an officer, as part of an attorney's employment, may be shown, in an action by the judgment creditor against the officer for failure to return the execution, by the attorney's entry of such facts upon his docket, where the attorney, though present, has no recollection of having delivered the execution, but testifies that, unless he had done so, he should not have made the entry that was offered. Bunker *v.* Shed, 8 Metc. (Mass.) 150; Prindle *v.* Beveridge, 7 Lans. (N. Y.) 225; Leland *v.* Cameron, 31 N. Y. 115.

45. Entry of Attorney's Clerk Since Deceased. — Stapylton *v.* Clough, 22 Eng. Law. & Eq. 275. But in England, where oral declarations in the course of business or duty are competent, oral declarations made by the clerk after he has performed the duty concerning which he speaks, and concerning which a written memorandum was, in the course of his duty, made at the time of the transaction, may not be received to contradict the written entry.

46. In Action Against Client for Services Rendered. — In an action by an attorney for services rendered a surety on a bail-bond in prosecuting an appeal from an order directing the arrest of the principal who had left

admitting, when relevant, the records of a third party in an action between other persons, are competent.[47]

B. Depositor's Pass Book. — a. *General Rule.* — Entries in a bank pass book, made therein by its proper officers, are competent as between the bank and the depositor,[48] or the depositor's administrator or executor.[49] They are, however, not original entries, especially as to the credits thereon (debits against the depositor), and are not, as between the bank or the depositor and third parties, competent evidence of the matters therein entered.[50]

b. *As Between Depositors and Stockholders of the Bank.* — Where by statute the stockholders in a banking corporation are made individually liable for deposits, the depositor's pass books are competent to ascertain the amount of the depositor's recovery in such cases.[51]

c. *As Corroborative of Party's Evidence.* — On the question of the fraudulent character of a transaction, to show that money has passed between the parties, the bank book of one of the parties, who has testified as to the transaction, is competent in corroboration of such witness.[52]

C. Teller's Books and Records. — The teller's book of a bank, kept in the regular course of its business, is competent as between the bank and third parties.[53]

D. Messenger's Records. — A record regularly kept as required by the rules of the bank, by its messenger, of notices given by him, is likewise admissible.[54]

E. Bank's List of Depositors. — The book of a bank, in which is kept a full and complete list of its depositors, is, upon its being identified by the cashier or other proper officer of the bank, admissi-

the state, an entry in the attorney's books is admissible to show whether the services had been credited to the principal or to the surety, in order to charge the surety therefor. Murphey *v.* Gates, 81 Wis. 370, 51 N. W. 573.

47. Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59; Pike *v.* Crehore, 40 Me. 503.

48. Debits on Pass Book. — A bank pass book is a book of original entry as to deposits, and is entitled to as much credit as the deposit slips or regular books of the bank. Kux *v.* Central Mich. Sav. Bank, 93 Mich. 511, 53 N. W. 828; Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348.

In an action by a depositor against a bank to recover the amount of a draft claimed to have been handed in with his bank book, the depositor's pass book is admissible to show when such book was balanced, where there is a controversy on this point, and the bank seeks to settle it in its favor by introducing its own books, permanently and regularly kept at the bank. Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

49. Nicholson *v.* Randall Banking Co., 130 Cal. 533, 62 Pac. 930.

50. Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348.

51. McGowan *v.* McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; Borland *v.* Haven, 37 Fed. 394. But see Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1,046, 22 Am. Rep. 816, 12 L. R. A. 473.

52. Wright *v.* Towle, 67 Mich. 255, 34 N. W. 578.

53. American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644.

54. Welsh *v.* Barrett, 15 Mass. 380; North Bank *v.* Abbott, 13 Pick. (Mass.) 465; Shove *v.* Wiley, 18 Pick. (Mass.) 558; Washington Bank *v.* Prescott, 20 Pick. (Mass.) 339.

ble to show that a certain person was not a depositor, without any further proof of its correctness than that it was a record kept by the bank in the usual course of its business.[55]

6. Carrier's Entries. — A. As Between Consignor and Consignee. — Entries made by a carrier of goods in the regular course of its business, concerning the quantity or weight of a shipment entrusted to it, are admissible in an action between the consignor and consignee or their assigns as evidence of the facts so recorded;[56] and this rule is not affected by the fact that such entries are made up from cards on which the matter of such entries is furnished, where such cards have been destroyed.[57]

B. Best Evidence: Freight Books. — Where, in the course of its business as a common carrier of goods, a railway company transcribes into a freight book, a permanent record, at the place of the delivery of a shipment, the name of the consignor, the consignee, the nature of the shipment, its weight, and other pertinent matters from its way bills, the freight books, and not the way bills, become the best evidence of, and are admissible to prove, the matters so appearing therein.[58]

55. In State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. Dec. 341, the defendant was prosecuted upon the charge of obtaining from one Fritz a horse upon false pretenses. The defendant represented himself, in obtaining the horse from the prosecuting witness, as one Jones, that he was engaged in the business of horse trading, and gave Fritz his check on the Interstate National Bank of Kansas for the agreed price for the horse. Fritz made some objection to receiving the check, but was assured by the defendant that it was all right, and that another person, with whom Fritz was acquainted, had accepted the defendant's check, whereupon Fritz accepted the check and delivered the horse to the defendant. To show that the transaction was fraudulent, and that the defendant at the time had no funds on deposit at the drawee bank, and was not a depositor thereof, the bank's book purporting to be a list of the depositors of the bank was held admissible to show that neither the name of Jones nor the name of McCormick appeared on the list as a depositor, in connection with the evidence of the cashier that the defendant did not, in either name, have any funds on deposit with the bank, such book being identified by the cashier as the bank's record.

56. Briggs *v.* Rafferty, 14 Gray (Mass.) 525; Meyer *v.* Brown, 130 Mich. 449, 90 N. W. 285.

As Evidence of Sale and Delivery. In an action by a seller of goods to recover the price thereof, it is competent, to establish the sale and delivery, to introduce the freight books of the carrier, kept at the destination and place of delivery of the goods, showing the receipt at such station of the goods sued for and the delivery thereof to the defendant's drayman. Robinson *v.* Mulder, 81 Mich. 75, 45 N. W. 505.

57. Weight of Shipment. — In an action by a consignor and seller of wood against the purchaser, for the price, the defense being that the wood was green and not dry, as required by the contract of sale, the books of the carrier containing entries made in the regular course of business of the weight of cars, taken from cards on which the weights of cars are first entered under the supervision of one whose duty it is to ascertain such weights, are admissible. Meyer *v.* Brown, 130 Mich. 449, 90 N. W. 285.

58. Robinson *v.* Mulder, 81 Mich. 75, 45 N. W. 505.

7. Cash Transactions. — Cash items are not generally considered proper subjects of book accounts.[59] But where a party's business consists of the borrowing and lending of cash,[60] or where cash advances, as well as payments thereon, are made,[61] entries made in the regular course of one's business concerning such loans, advances and payments made thereon may be admissible.

8. Clergyman's Records of Baptism, etc. — The records of a priest or clergyman of the fact and time of baptisms performed,[62] or of marriages solemnized[63] by him, may be admissible between third parties in proof of such facts, as entries made in the regular course of business.

9. Commission Merchant's Sales Books. — A. As Evidence of Ownership of Consignment. — Entries made by the deceased clerk of a commission merchant on the latter's books, pertaining to the receipt and sale of goods on commission, are admissible in support of the consignor's claim of title to the consignment, in an action between the consignor and third parties.[64]

B. As Evidence of Commissions Earned and Due. — So, also, the records of commission merchants, showing the names of purchasers and the amount of their purchases, are admissible in the broker's behalf, in an action for commissions, especially where the sales made are numerous, and the entrant has no recollection of

59. Kelton *v.* Hill, 58 Me. 114; Burns *v.* Fay, 14 Pick. (Mass.) 8; Bassett *v.* Spofford, 11 N. H. 167; Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

60. Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214; Cummins *v.* Hull, 35 Iowa 253. See also Orcutt *v.* Hanson, 70 Iowa 604, 31 N. W. 950.

61. Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

62. **Records of Baptism.** — Huntly *v.* Compstock, 2 Root (Conn.) 99; Weaver *v.* Leiman, 52 Md. 708; Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Witcher *v.* McLaughlin, 115 Mass. 167; Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521; Clark *v.* St. James Church Society, 21 Hun (N. Y.) 95.

63. Maxwell *v.* Chapman, 8 Barb. (N. Y.) 579.

Record of Marriages. — A record of marriages solemnized, kept by a priest in the ordinary course of his duty, made at the time such ceremonies are performed, is competent to show whether certain parties were ever married by him. And where such a record is regularly kept and the priest keeping it testifies that if a marriage had been solemnized by him he would have made a record of it, his record, silent as to the performing of a ceremony alleged to have been performed by him, is competent to show that there was no marriage of the parties. Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175.

64. In Smith *v.* Hawley, 8 S. D. 363, 66 N. W. 942, the plaintiff shipped to C. E. Peck & Company, commission merchants, merchandise to be sold, the proceeds of which were to be placed to the credit of the account of the plaintiff. The sale of the goods was effected and the proceeds, while in the hands of the commission merchants, were seized as the property of a third party, in attachment by the sheriff. In an action by the consignor against the sheriff having the custody of the fund, as for a conversion thereof, upon evidence that such shipment had been made, it was held that entries in the books of the merchandise brokers in relation to the transaction, made in the ordinary course of their business, and in the handwriting of their book-keeper, since deceased, were admissible in support

the sales, and where the amount of recovery can be ascertained in no other manner.[65]

10. Hospital Records of Condition of Patients. — Hospital records of the condition of patients, kept in manner as required, may be competent as entries of third parties made in the regular course of business.[66]

11. Hotel Registers. — A hotel register, kept by a stranger to the action, may, upon proper preliminary proof, be received to show the extent of the business of such hotel, where such fact becomes material.[67] It is not competent as negative evidence, however, to prove that a person whose name does not appear thereon, but who stays at the hotel whose register is offered, when in the city where such hotel is located, was not at a given time in that city.[68]

12. Inspection Records of Cars and Locomotives. — It is the prevailing rule that records of inspections of the cars and locomotives of a railway company, though made in obedience to a rule of the

of the plaintiff's claim of title to the consignment and of his right to the proceeds thereof.

65. Where the plaintiff testified that between June, 1888, and September, 1889, he had booked sales of merchandise for more than sixty persons; that at the time of each sale he made a record of the name of the purchaser and the amount of his purchase, in a book kept in the due course of business for that purpose; that without such book he was unable to state such names and amounts, it was held, in an action for the recovery of the commission due on account of the sales so made, that to ascertain the names of such purchasers and the amount of their purchases, the entries so made were admissible. Manheimer *v.* Stern, 45 N. Y. St. 648, 18 N. Y. Supp. 366.

66. As Foundation for Opinion of Expert. — Such records are competent to form the foundation for an expert's opinion as to the sanity of the patient whose condition is so made to appear. Townsend *v.* Pepperell, 99 Mass. 40; Butler *v.* St. Louis Ins. Co., 45 Iowa 93.

Criminal Law. — Furnishing Impure Foods to Patients. — On the trial of an indictment of the superintendent and the steward of an asylum for misfeasance in office in giving impure food to the inmates, to their injury, the daily reports of the ward physician concerning the health of the patients in their wards are competent evidence of the condition of the inmates, as against the defendants. State *v.* Kinkley, 19 N. J. Law Journal 118.

Nurse's Record of Condition of Patient. — A hospital record of remarks by the nurse attending a patient, upon his condition, is not competent in favor of the patient in an action by him against a master for negligently causing the injuries for which he was being treated at the hospital. Baird *v.* Reilly, 92 Fed. 884, 35 C. C. A. 78.

67. Wittenberg *v.* Mollyneaux, 55 Neb. 429, 75 N. W. 835, was an action against plaintiff's grantees for selling a hotel to another and permitting such other to operate the same, in alleged violation of a contract in partial restraint of trade. To show the extent of the business transaction by the one to whom the hotel was sold, the hotel register, kept by the purchaser's clerk, was held to have been erroneously admitted, only because there was no proper preliminary proof made warranting their introduction, the court indicating that but for such omission the books may have been competent as entries made in the regular course of business.

68. Missouri, K. & T. Trust Co. *v.* German Natl. Bank, 77 Fed. 117, 23 C. C. A. 65.

company, are merely memoranda, and not admissible as entries made in the regular course of business.[69]

13. Insurance Solicitor's Records. — A register of policies of fire insurance issued, regularly kept by an insurance agent, is competent in an action between third parties involving title to the premises insured, to show to whom such policies were issued, as evidence of title to the property insured.[70]

14. Letter Books. — Copies of letters, preserved in a party's own letter books, regularly kept, are competent as corroborative evidence of the sending of such letters and of their contents.[71]

15. Letters, Invoices, Price-Currents, etc., as Evidence of Market Value. — Letters addressed generally to the trade, written by reputable mercantile houses, making quotations of goods at certain

69. Taylor *v.* Chicago, M. & St. P. R. Co., 80 Iowa 431, 46 N. W. 64; Hoffman *v.* Chicago, M. & St. P. R. Co., 40 Minn. 60, 41 N. W. 301.

In Favor of the Railway Company Against Its Employe. — In an action by a brakeman against a railway company for injuries alleged to have been sustained by reason of the negligence of the latter in using defective machinery and appliances, a car inspector's records may be used only to refresh the recollection of the inspector, and are not admissible as independent evidence. Hicks *v.* Southern R. Co., 63 S. C. 559, 38 S. E. 725, 41 S. E. 753.

As Against Third Parties for the Negligent Setting of Fires. — In Baltimore & Ohio S. W. R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833, the court held the record of an inspection of a locomotive engine incompetent as against the plaintiff in an action for the setting of a fire alleged to have resulted from the improper condition of one of the locomotives of the defendant where the witness making the inspection was present and used the record to refresh his recollection.

70. Roberts *v.* Rice, 69 N. H. 472, 45 Atl. 237.

71. **Payment. — Rendering of Statements to Defendant.** — A sued B for goods sold and delivered; plea, payment. On the issue joined B sought to show that on a certain day he had paid A's agent for the goods sued for, and that since said date he had received from A no bill therefor. It was held that A's letter book, in connection with his own evidence, was competent to show that he had sent B two bills for the goods after the date named. Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557.

To Establish Contents of Letter That Opposite Party on Notice Fails to Produce. — In Pritt *v.* Fairclough, 3 Camp. (Eng.) 305, the plaintiffs sued for the value of certain goods sent the defendants for sale on commission, for which defendants had failed to account. A notice was served on defendants to produce all letters written to them by plaintiffs. A letter was given in evidence, written to plaintiffs by defendants, in which they acknowledged the receipt of a letter from plaintiffs, which plaintiffs alleged contained a copy of the invoice of the goods, with directions for selling them. Upon its being made to appear that, in the regular course of the plaintiffs' business, their letters were written by the senior member of the firm and afterwards copied into a letter book by a clerk since deceased, and thereupon mailed to the proper parties, Lord Ellenborough held competent an entry made under such circumstances, purporting to be the contents of the letter so written by plaintiffs, remarking that "The rules of evidence must expand according to the exigencies of society;" and if the entry were not received "there would be no way in which the most careful merchant could prove the contents of a letter after the death of his entering clerk."

As Negative Evidence Against Custodian Thereof. — As against an

prices,[72] and price-currents[73] and invoices[74] passing between third parties in the regular course of business, are competent evidence of the market value of the goods therein described at the time when, and the place where, such goods are offered for sale. And upon the same principle, the market reviews and summaries of reputable newspapers have been held competent.[75]

16. Logmen's Scale Books. — Logmen's scale books, in which are recorded the number of logs cut by them and the contents thereof, where there are no suspicious circumstances under which they are kept, are competent as original evidence in favor of the one for whom they are kept, entries therein being made daily, and otherwise in the regular course of business.[76]

17. Notaries' Records. — Official registers of notaries, setting forth the fact and time of the presentation and demand for payment, refusal, and notice of protest, of commercial paper are admissible in support of such facts, subject to the conditions hereinbefore set forth.[77] The same rule applies to entries made by the deceased clerk of a notary, when the clerk has sufficient authority in the

agent charged with the keeping in a letter book of copies of letters necessary, according to the principal's usual method of conducting his business, to be written in a class of transactions of which the agent has charge, to show that such transactions have not been had, the letter book, so in the agent's custody, not containing copies of such letters, is admissible. Continental Nat. Bank *v.* Moore, 83 App. Div. 419, 82 N. Y. Supp. 302.

72. Letters. — In Fennerstein's Champagne, 3 Wall. (U. S.) 145, on a libel of information and seizure, the question was presented, whether certain champagne wines, imported from Rheims, France, had been knowingly invoiced below their actual market value at the time and place of shipment, in violation of the federal statute requiring invoices to be made at the market value. The government, to rebut the evidence of the claimant tending to show that at their place of manufacture and shipment the wines had no fixed market value, offered in evidence letters, written at or about the time the shipment was made, from various large dealers at Rheims to intending purchasers of such goods, naming sale prices. The court, by Mr. Justice Swayne, held such evidence competent, as a written declaration in the ordinary course of business of the writer.

73. Price-Currents. — Cliquot's Champagne, 3 Wall. (U. S.) 114.

74. Invoices. — Taylor *v.* United States, 3 How. (U. S.) 197.

75. Newspaper Reviews of Markets. — In a case in which evidence of this character was offered, Judge Cooley, after reviewing the cases, said: "The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489, 90 Am. Dec. 252.

76. Mississippi River Logging Co. *v.* Robson, 69 Fed. 773, 16 C. C. A. 400; Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98.

77. Nicholls *v.* Webb, 8 Wheat.

premises.[78] And when a record is offered as the notary's own, it is not incompetent because not made in his handwriting if it is signed by the notary.[79]

18. Partnerships: Entries to Show Existence. — The books of a disinterested third party, in which are recorded transactions purporting to have been had with certain persons as partners, are admissible as tending to show that a partnership existed at a particular time.[80]

19. Physician's Entries. — Entries on the books of a deceased physician are competent as the records of a third party made in the regular course of his business.[81]

20. Principal and Surety. — A. ENTRIES BY PRINCIPAL AS AGAINST SURETY. — The books kept by an agent, in the course of his duty, are competent against the sureties for the faithful performance of his duties, to establish a liability for breach of such duty.[82] But entries so made, in which the agent charges himself

(U. S.) 326; Bodley *v.* Scarborough, 5 How. (Miss.) 729; Ogden *v.* Glidewell, 5 How. (Miss.) 179; Lathrop *v.* Lawson, 5 La. Ann. 238; Welsh *v.* Barrett, 15 Mass. 380; Porter *v.* Judson, 1 Gray (Mass.) 175; Butler *v.* Wright, 2 Wend. (N. Y.) 369; Hart *v.* Wilson, 2 Wend. (N. Y.) 513; Halliday *v.* Martinet, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262.

78. Wilbur *v.* Selden, 6 Cow. (N. Y.) 162; Gawtry *v.* Doane, 51 N. Y. 84.

79. Barnard *v.* Planters' Bank, 4 How. (Miss.) 98.

80. C. sued A. as surety on a note executed by one G. as principal. Upon the trial of the case it became material to show whether or not C. and G., the principal, had been doing business as partners about the time the note in suit was executed. It was claimed that G. and C. as such partners had transacted business with another firm at the particular time in question. It was held that the books of the firm with which such dealings were had, containing the accounts of C. and G., as partners, were properly admitted in evidence. It was insisted that the testimony of the person who made the entries was the best evidence of the facts. The book-keeper who made the entries testified to the occurrences generally as disclosed by the records he had kept, but testified that he had forgotten the details of the transaction. In holding this evidence admissible, the court said: "The entries were made by a disinterested person and in the usual course of business. There was nothing to show that they were in any degree inaccurate, and their truthfulness was vouched for by the testimony of the book-keeper who made them. We think that the entries were competent, and the court below did not err in admitting them." Cleland *v.* Applegate, 8 Ind. App. 499, 35 N. E. 1,108.

81. Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 6 Atl. 415; Augusta *v.* Windsor, 19 Me. 317. See Higham *v.* Ridgeway, 10 East (Eng.) 109.

82. State Bank *v.* Johnson, 1 Mill (S. C.) 404, 12 Am. Dec. 645; Wilkesbarre *v.* Rockafellow, 171 Pa. St. 177, 33 Atl. 269, 50 Am. Dec. 795, 30 L. R. A. 393.

Bank Teller's Book as Against Cashier. — In an action by a bank to recover on a bond, executed by a fidelity insurance company, on account of the default of the bank's cashier, it was held that the teller's book, which had been kept by one since deceased, was competent to show that on certain days no money was received by the bank for certificates of deposit, where it was shown that, in the ordinary course of business, such money, if received, would have been shown on such record. American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644.

with various sums, are only *prima facie* evidence against his sureties.[83]

B. Creditor's Entries of Payment to Charge Principal in Favor of Surety. — In an action by a surety against the principal debtor for the purpose of showing the indebtedness of the principal to the surety, entries on the books of the creditor, since deceased, showing the payment by the surety of the principal's obligations, may be received.[84]

21. Real Estate and Rental Agent's Entries. — A. As Between Landlord and Tenant. — In an action by a landlord against a tenant to recover rent due, entries by a rental agent, in the course of his business, recording transactions had with him as such agent, are admissible against the tenant in favor of the landlord.[85]

B. As Between Landlord and Third Parties. — It has been held, however, that entries in the books of such an agent, made in the regular course of the agent's duty, he being absent from the state at the time of the trial, showing payment by him of an account for the landlord for repairs, are not competent against the one making such repairs in an action for the value thereof against the landlord.[86]

22. Surveyor's Notes. — Entries and memoranda made by a surveyor in the scope of his employment as such under the agreement of both the parties to an action are admissible upon the death of the surveyor.[87]

23. Ticket Agent's Records of Tickets Sold. — A railway company's record of tickets sold, kept by its agent, is competent as the record of a third party regularly kept.[88]

83. Wilkesbarre *v.* Rockafellow, 171 Pa. St. 177, 33 Atl. 269, 50 Am. Dec. 795, 30 L. R. A. 393; American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644.

84. Sands *v.* Hammell, 108 Ala. 624, 18 So. 489.

85. As Evidence of Tenancy. On the issue whether the defendant had ever occupied the plaintiff's house as his tenant, entries made by plaintiff's rental agent, since deceased, of the receipts of moneys for the rent of such house, are competent. Jones *v.* Howard, 3 Allen (Mass.) 223.

86. McKeen *v.* Providence Co. Savings Bank, 24 R. I. 542, 54 Atl. 49.

87. Walker *v.* Curtis, 116 Mass. 98.

88. The case of State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693, was a prosecution against Brady for cheating by false pretenses. The defendant was overseer of the poor for the City of Ottumwa, Iowa, and as such was authorized to furnish transportation to indigent poor persons found within his jurisdiction that they might be carried to their respective legal settlements, and not become a charge upon the county in which they were found. To show that Brady had made charges for the transportation of fictitious persons from his jurisdiction, and received various sums therefor from the county, the state was permitted to introduce tabulated statements from the records of the railway companies, from whom it was alleged such transportation had been obtained, showing no sales of tickets between such points from and to which such transportation was claimed to have been furnished, on the days the defendant claimed such transportation had been provided. The supreme court of Iowa held this

24. Time Books. — A record of the time of an employe, kept and entered in a book regularly used for that purpose, by a foreman or other agent of the employer, is competent evidence of the amount of time given to the employer's business in favor of the employer, either in an action by the employe to recover his wages,[89] or in an action by the employer to recover from another for labor rendered by his employes in the performance of a contract with such other person.[90] Such books are also competent to contradict the foreman of a defendant employer in an action by the employe to recover for wages due him.[91]

25. Train Sheets. — A. Rule of Admissibility in Favor of Railway Company. — Train sheets, made by a telegraph operator, or by the train dispatcher of a railway company from telegraphic reports, in the regular course of the company's business, and as a duty thereunder, setting forth the time of the arrival and departure of trains at its stations, are admissible in favor of the railway company in support of the facts appearing therefrom.[92]

evidence competent, saying, however: "This statement was made up from the claims introduced in evidence, which aggregated more than five hundred. The records from the ticket offices were necessarily long, and somewhat complicated, as they covered the ticket sales of the different offices for the period of nearly one year. It is said that these exhibits were not the best evidence — that they were secondary, hearsay, and incompetent. It is no doubt true that they were not substantive evidence tending to establish either the number or amount of claims filed by the defendant, nor of the number of tickets sold by the different railway companies. They were simply tabulated statements, made by competent persons, taken from voluminous and numerous claims and records which were already in evidence, made for the purpose of assisting the jury in arriving at their verdict."

89. Cobb *v.* Wells, 124 N. Y. 77, 26 N. E. 284.

90. Mayor of New York *v.* Second Avenue R. Co., 102 N. Y. 592, 7 N. E. 905, 55 Am. Dec. 839.

91. Healey *v.* Wellesley & B. St. R. Co., 176 Mass. 440, 57 N. E. 703.

92. In an action against a railway company for personal injuries, the plaintiff's contention was that at the hour at which he was injured, his view of the train injuring him was obscured by another train, at that time standing on the track at the defendant's station. To show that there was no train at that time at the station besides the one striking plaintiff, the defendant introduced in evidence the train sheet for that day made by the train dispatcher and kept at his office, as required by the company. In giving its reasons for holding such evidence admissible, the court say: "The principal question is whether the train sheet, with the testimony of the witnesses who made the entries upon it, was competent evidence for the defendant. It is clear that the sheet was worse than useless if its statements, as seen by the dispatcher, were not accurate. Every interest of the defendant demanded that an entry, when made, should be true; and no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the trains at a station and telegraphed the information to the dispatcher's office, or the person who there received the messages and made the entries on the sheet, had any interest to misstate the facts or to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum; and

B. Rule of Inadmissibility in Favor of Railway Company. In some jurisdictions the rule has been announced that such entries are only private memoranda of the railway company, and, as between the company and strangers, may be used only to refresh the recollection of the enterer.[93]

C. Admissibility as Between Strangers. — Such a register, if made in pursuance of a duty to the railway company owing from the one making it, and otherwise duly authenticated, is competent, as between third parties, to establish the facts therein recorded.[94]

every step by which the information spread upon it was gathered, transmitted and entered, was an act performed by some person in the line of his duty, and in the usual course of his employment, under a sanction tending to make his statements true; and these acts were so connected with and dependent upon each other as to form parts of one transaction. If the sheet had been used and kept in the course of business by a third person, and not by the party by whom it was offered, there is authority in the decisions of this court for its competency. . . . In our opinion, because there is no reasonable possibility that any designed untruth had part in placing upon the train sheet the statements of which it is the vehicle, and all known circumstances concerning it favor its accuracy, and because it was an act, rather than a declaration, and was sufficiently identified as genuine, it was competent evidence without the production or proof of the death of the operator who sent the messages; and its entries, material to the issue, were admissible and proper for the jury to consider, notwithstanding the fact that it was made by the servants of the party by whom it was offered." Donavan *v.* Boston & M. R. Co., 158 Mass. 450, 33 N. E. 583.

Movements of Freight Cars. — In an action by a shipper of cattle against a railway company for the loss of certain cattle as a result of defendant's having knowingly and negligently loaded the same in a car infected with the germs of Texas fever, it was held competent to show by a record kept by the company of the movement of its freight cars, that the car in which such cattle had been shipped had not recently been used for such purposes. St. Louis I. & M. R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878.

93. Pittsburgh Co. *v.* Noel, 77 Ind. 110; Railroad Co. *v.* Cunnington, 39 Ohio St. 327.

94. Such a record must be authenticated by the one making it, or having knowledge thereof, and where this is not done, the register will not be admissible. In a recent case, such evidence, while held admissible when properly authenticated, was rejected for lack of due authentication, the court thus stating the requisites to its admissibility: "The train dispatcher, or some one in the office who knew of the making of these entries, or upon what authority they were made, and that they had not been tampered with, should have been sworn in authentication of this register. This register was a scrapbook, filled with leaves or sheets of paper, upon which entries appeared in pencil of the time when trains arrived and departed at different places on the road, on different days. There was no proof who made the entries, or whether the record was an original one or a copy. There was no showing who the train dispatcher was, or what knowledge Morris had of the handwriting; nor did it appear that it was an official register, required to be kept by the railway company. If this record had been shown to be an official register of the arrival and departure of trains, required to be kept as a permanent record, and the original record made by the train dispatcher at Hillsdale, or some one in his office, as required by the railway company, from tele-

graphic dispatches sent by the station agents upon the arrival and departure of the various trains, and entered in the register immediately upon receiving the same, we think it would have been competent evidence to submit to the jury." Bronson *v.* Leach, 74 Mich. 713, 42 N. W. 174.

ERASURE.—See Alteration of Instruments; Bills and Notes; Deeds.

EROSION.—See Water and Water-Courses.

ESCAPE.

CROSS-REFERENCES:

Debt;

Officers.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. Criminal Prosecutions. — A. Intent. — On a criminal prosecution of a prisoner for an escape from custody it is incumbent upon the prosecution to show that the prisoner left with intent to escape.[1] So also on a prosecution for aiding a prisoner to escape, it is incumbent upon the prosecution to show that the acts charged were done with intent to facilitate the escape, since without such intent no crime is committed.[2] But it is not necessary to show an attempt to liberate any particular prisoner; it is sufficient to show a general intent to liberate.[3]

B. Negligence of Officer. — On a prosecution of an officer for unlawfully and negligently permitting a prisoner to escape from his custody, the law implies negligence on the part of the officer in whose custody the prisoner was placed from the fact of the escape, and it is not necessary for the prosecution to prove negligence in order to secure a conviction.[4]

1. Riley v. State, 16 Conn. 47.

Under the Missouri Statute it is not material on the prosecution of an indictment for breaking jail, to prove the use of force on the defendant's part in effecting the escape. State v. Whalen, 98 Mo. 222, 11 S. W. 576.

2. Hurst v. State, 79 Ala. 55; House v. State, 9 Tex. App. 567. See also Kelly v. State, 72 Ala. 244; Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72; Stone v. State, 63 Ala. 115.

In Pondo v. State, 28 Tex. App. 104, 12 S. W. 413, a prosecution for conveying into the county jail "an instrument, that is, one certain knife, the same being useful to aid———, a prisoner, then and there lawfully detained in said jail on an accusation of felony, in escaping from said jail, and with the intent then and there to facilitate the escape of said———;" there was no evidence to show how the knife was useful or could be used by the prisoner in effecting his escape, and there was no evidence that the prisoner ever attempted to use it for that purpose; and it was held that the evidence was wholly insufficient to support the conviction, both as to the criminal intent of the defendant and the fact that the knife was useful to aid the prisoner to escape.

In Simmons v. State, 88 Ga. 169, 14 S. E. 122, the fact that a prisoner confined in jail, after effecting an exit from his cell into a common hall, used a saw upon the fastenings of the door to the cell of a fellow-prisoner in such a way as to indicate a purpose to open that door was held evidence sufficient to convict him on an indictment for aiding such a fellow-prisoner to escape under the Georgia statute declaring that the offense may be complete whether the escape be actually effected or not.

Under the Alabama Statute making it a felony to aid in the escape of a person charged with felony, the offense has three ingredients: (1) A prisoner confined under a lawful charge or conviction of felony; (2) the conveying into the jail of some disguise, instrument, etc., useful to aid the escape; and (3) the intent to facilitate the escape of such prisoner. And in Wilson v. State, 61 Ala. 151, it was held that it was not incumbent on the prosecution to show that the defendant knew that the prisoner was confined on a charge of felony. "The fact that the prisoner is in jail, or other place of confinement, and needs, or is supposed to need, some instrument or disguise to facilitate his escape, doubtless satisfied the legislature that any one conveying such instrument or disguise into the prison with intent to facilitate such prisoner's escape must have known the confinement was involuntary and on a charge of grave import."

3. Hurst v. State, 79 Ala. 55.

4. Shattuck v. State, 51 Miss. 575; Blue v. Com., 4 Watts (Pa.) 215.

C. Conviction, Commitment, Escape, etc. — a. *In General.* On a prosecution of a convict for escape from prison, inasmuch as the offense can be committed by a convict only, in order to fix that character upon the defendant, the burden is upon the prosecution to prove his conviction by the record.[5]

Hired Convicts. — But the fact that a hirer of convicts received the prisoners from the state is an admission that they were legally convicted, and in an action to recover for escapes it is not incumbent upon the state to show conviction.[6]

b. *Subsequent Conviction of Rescued Prisoner.* — On a prosecution for rescuing a prisoner lawfully detained for a criminal offense it is not incumbent upon the prosecution to show that the rescued prisoner had been subsequently convicted of the offense for which he was under arrest.[7]

2. Civil Actions. — A. In General. — In an action against an officer for an escape on mesne process it is incumbent upon plaintiff to prove cause of action in the original suit, the issue and delivery of

See also Holland *v.* State, 60 Miss. 939; Johnston *v.* Macon, 4 Call (Va.) 367.

In State *v.* Hunter, 94 N. C. 829, an indictment of a deputy sheriff for permitting a prisoner to escape, the court charged the jury that the burden of proof was upon the prosecution to show that the prisoner who escaped was committed to the custody of the defendant and escaped, and that then the burden of proof shall be shifted to the defendant and he must prove that "such escape was not by his consent or negligence, but that he used all legal means to prevent the same, and acted with proper care and diligence."

In Kentucky a statute provides that if any jailer, officer or guard negligently suffer or permit any person convicted of or charged with a public offense to escape he shall be punished as therein provided; and it is held that on a prosecution under this statute it is not necessary to show that the officer should have designed or intended that the prisoner committed to his care should escape or evade, either in part or wholly, the judgment of conviction. Another statute, however, provides that sheriffs, jailers, etc., shall be subject to indictment, in the county in which they reside, for misfeasance, malfeasance and willful neglect in the discharge of official duties; and it is held that in order to justify a conviction under this statute, an intention on the part of the officer to do a wrong must be shown by the prosecution, as it is one of the fundamental and essential ingredients. Lynch *v.* Com., (Ky.), 73 S. W. 745.

5. State *v.* Murphy, 10 Ark. 74, where it was said that the fact that the record showed that a person of the same name as the defendant was convicted of a felony by no means proved that the present defendant was thus convicted; that he was the identical individual which the record purported to have been convicted is a question of fact, proof of which was incumbent upon the state to make out in order to authorize a conviction under the indictment charged.

6. Georgia Penitentiary Co. No. 2 *v.* Gordon, 85 Ga. 159, 11 S. E. 584.

7. State *v.* McLeod, 97 Me. 80, 53 Atl. 878, holding that it is sufficient for the prosecution to show by any competent evidence that the prisoner was lawfully detained for a criminal offense. See also State *v.* Garrett, 80 Iowa 589, 46 N. W. 748, where it was held that a conviction for resisting an officer while arresting another for the violation of a city ordinance cannot be set aside on the ground that the ordinance and the guilt of the person arrested are not proved.

the warrant to the defendant, the arrest and the escape, unless these facts are admitted by the pleadings.[8]

B. Demand for Body of Prisoner. — It is not incumbent, however, upon the plaintiff in an action against the officer for an escape on mesne process to prove that demand was made upon the officer for the body of the prisoner on the execution issued in the original suit.[9]

C. Loss of Debt. — In such an action the presumption is that the plaintiff lost his entire debt by the escape.[10]

II. SUBSTANCE AND MODE OF PROOF.

1. Criminal Prosecutions. — A. Conviction, Commitment, etc. On a criminal prosecution of a prisoner for an escape, the fact that the defendant was convicted and in lawful custody at the time of the escape may be shown by the original records of the committing court, and the process of commitment;[11] or by a certified copy of the

8. Faulkner *v.* State, 6 Ark. 150.

Fact of Commitment. — In an action against an officer for an escape on mesne process of a debtor who was surrendered in open court, it is incumbent upon the plaintiff to show that the debtor was committed to the custody of the officer by an order of the court. State *ex rel.* Siler *v.* McKee, 47 N. C. 379.

Prisoner Seen Walking at Large. In an action against an officer for an escape of a prisoner held on mesne process, it is sufficient evidence on the part of the plaintiff, *prima facie*, to entitle him to recover, that the prisoner was seen at large walking through the streets. Steward *v.* Kip, 7 Johns. (N. Y.) 165; Bissell *v.* Kip, 5 Johns. (N. Y.) 89.

9. Hart *v.* Stevenson, 25 Conn. 499.

10. Faulkner *v.* State, 6 Ark. 150, holding also that the plaintiff in such case need not show that the debtor was in solvent circumstances and that the debt could have been made out of him.

11. State *v.* Whalen, 98 Mo. 222, 11 S. W. 576. See also Peeler *v.* State, 3 Tex. App. 533.

Compare United States *v.* Brown, 4 Cranch C. C. 333, 24 Fed. Cas. No. 14,659, an indictment for breaking jail while committed for felony, wherein the commitment did not state any offense but was written on the back of a warrant of arrest which charged a felony, but did not refer to the warrant of arrest; it was held that it was no evidence of a commitment for felony.

In State *v.* Hunter, 94 N. C. 829, it was held that on a prosecution of a deputy sheriff for permitting a prisoner to escape, the original bound volumes of the records of the courts of another county proved by the clerk of that court, and the original bill of indictment and the endorsement thereon, brought from those records, were admissible for the purpose of showing that the escaped prisoner had been indicted in that county for a felony.

On the prosecution of a hirer of a county convict for a negligent escape, the bond executed by the defendant reciting therein the terms of the contract of hire, the name and sentence of the convict, etc., is admissible in evidence against the defendant to establish the fact of hiring as therein recited, notwithstanding a record of those facts is required to be kept. Smith *v.* State, 76 Ala. 69, where the court said: "It is manifest that the act of hiring does not derive any legal validity from the entering of this memorandum upon the record, nor would such hiring be vitiated by its entire omission from the record. The entry is intended as a mere memorial of antecedent facts, being open to inspection by the public for their con-

judgment of the court.[12] Nor is it necessary to the admissibility of such certified copy that the transcript of the whole record of conviction be produced.[13]

B. Identity of Prisoner. — Upon a criminal prosecution for an escape from lawful custody the identity of the defendant may be established by direct testimony,[14] or by circumstantial evidence.[15]

C. Accomplice Testimony. — A prisoner under indictment for felony who procures the aid and assistance of another to facilitate his escape from custody is not an accomplice within the rule that conviction cannot be had upon the uncorroborated evidence of an accomplice.[16]

venient information. It is no part of the facts to be proved, but collateral and subsequent to them. Where this is the case, the facts may be proved by any other legal medium of proof besides the record."

12. Sandford *v.* State, 11 Ark. 328, where it appeared by the record entry that the defendant was sentenced for the crime alleged in the indictment for the escape.

13. Hudgens *v.* Com., 2 Duv. (Ky.) 239, wherein it was held that as the legislature had provided that such a copy of the judgment shall be furnished the sheriff, to be left with the keeper of the penitentiary, it must be presumed that this was intended as sufficient evidence of the conviction, in the first instance, to be used on the trial for an illegal escape; and the accessibility of such copies, and the convenience to the prosecuting attorney, greatly strengthen this presumption, whilst there is no serious cause of apprehended danger to the convict by the use of such copies alone.

14. State *v.* Whalen, 98 Mo. 222, 11 S. W. 576, where the sheriff was permitted to testify to the identity of the defendant with the party originally committed.

15. State *v.* Murphy, 10 Ark. 74, where the court said: "The fact that a particular person had been brought and delivered to the keeper of the penitentiary by the sheriff of a certain county, or a person representing himself as such sheriff, or others acting under his authority, and then of his having escaped and been recaptured, all this when taken in connection with the record showing upon its face the conviction of a party of the same name, would raise a strong presumption of identity, and, if not rebutted, would fully warrant the jury in inferring that he was the identical individual which the record purported to have been convicted. . . . The circumstance that the same individual had submitted to his punishment by going into the penitentiary raises a strong presumption that he was the identical party who is shown by the record to have been convicted of larceny."

In Gillian *v.* State, 3 Tex. App. 132, a prosecution of William Gillian for jail-breaking, the *corpus delicti* was proved, and that it was committed by a number of persons; but that the defendant was one of them was proved only by a witness who testified that there was a man present in the crowd who was called William Gillian. It was held that although this testimony was admissible it was not sufficient proof of the identity of the defendant as one of the perpetrators.

16. Ash *v.* State, 81 Ala. 76, 1 So. 558, where the court said that the prisoner so detained "was not an accomplice in the crime charged in the indictment, which is aiding his escape. The statute strikes at the offense of one man aiding the escape of another, not that of himself, and this is made a felony. The test is whether the witness could have been indicted and convicted of the offense charged, either as principal or accessory. Bass *v.* State, 37 Ala. 469. It is clear that he could not, for there is no law which makes it a felony to effect his own escape."

The Arkansas Statute provides for the punishment of one who by force or menaces of bodily harm, or by

2. Civil Actions. — A. Original Cause of Action. — a. *In General.* — In an action against an officer for an escape on mesne process, the judgment obtained against the defendant in the original action is competent evidence against the defendant as to the cause of action in the original suit,[17] and the amount of the debt.[18] So also in an action by an officer against the county for damages sustained in consequence of no jail having been provided, the record of the original action by the party injured against the sheriff is admissible.[19]

b. *Admissions of Debtor.* — And in an action against an officer for an escape on mesne process, the admissions of the defendant debtor in the original suit are admissible for the purpose of proving the cause of action;[20] and it is not necessary to the admissibility of such admissions that they should have been made before the escape.[21]

III. DEFENSES.

1. Insecurity of Place of Confinement. — The general rule is that an officer who is sought to be held responsible for permitting a prisoner to escape from his custody, whether held under a criminal or civil arrest, can excuse the escape only by showing that it was caused by the act of God or other irresistible and adverse forces,[22]

other unlawful means, shall set at liberty a person in custody after lawful arrest for a felony, and that all persons being present, aiding, aiding or abetting, or ready and consenting to aid and abet in any felony, shall be deemed principal offenders and indicted and punished as such. And in Hillian *v.* State, 50 Ark. 523, 8 S. W. 834, it was held that under this statute, a prisoner in a county jail who aided the defendants in the rescue of other prisoners who were confined there on the charge of felony, was an accomplice in such rescue, although he himself escaped at the same time through an opening made by the defendants with his assistance; and that a conviction of the defendants for rescuing the prisoners could not be had on his testimony unless corroborated by other evidence tending to connect them with the commission of the offense.

17. Hart *v.* Stevenson, 25 Conn. 499, so holding even though the judgment was obtained by default.

18. Patton *v.* Halstead, 1 N. J. L. 277.

19. Brown Co. *v.* Butt, 2 Ohio 348.

20. Hart *v.* Stevenson, 25 Conn. 499. *Citing* Kempland *v.* Macauley, 4 T. R. 436; Slowman *v.* Herne, 2 Esp. 695; Williams *v.* Bridges, 2 Stark. 42.

21. Hart *v.* Stevenson, 25 Conn. 499, where the court said: "The uniform practice here has been to admit such evidence in an action for an escape, for the purpose of proving the indebtedness of the original defendant, to the same extent as if the suit were against him; and we are not satisfied with the reasons which have been urged for qualifying the rule as it has hitherto been understood and acted on, which is plain, intelligible, and in our opinion just, so as to make the admissibility of such evidence to depend on the time of the declarations or acts of the debtor, although that circumstance may be proper to be considered, in determining the weight to which they are entitled."

22. Fairchild *v.* Case, 24 Wend (N. Y.) 381.

In Prather *v.* Clarke, 3 Brev. (S. C.) 393, where a husband had been committed by attachment for not paying alimony as decreed, it was held that in an action brought by the wife against the sheriff for per-

and that accordingly evidence of the insecurity of the place of confinement is not admissible.[23]

2. Illegality of Arrest or Commitment. — An officer who is sought to be held responsible for permitting the escape of a prisoner in his custody may, however, excuse the escape by showing illegality in the warrant of arrest or commitment,[24] but not by showing a mere irregularity or error.[25]

3. Guilt or Innocence of Prisoner. — On a prosecution for aiding a prisoner to escape, evidence on the part of the defendant to the effect that the prisoner was not in fact guilty of the crime with which he is charged is not admissible.[26]

4. Merits of Original Cause of Action. — And in an action against an officer for an escape it is not competent for the defendant officer

mitting the husband to escape, evidence that the husband had complied with the decree was inadmissible.

23. Shattuck *v.* State, 51 Miss. 575; Richardson *v.* Spencer, 6 Ohio 13; Kepler *v.* Barker, 13 Ohio St. 177; Smith *v.* Hart, 1 Brev. (S. C.) 146; State *v.* Halford, 6 Rich. L. (S. C.) 58.

Compare Stiles *v.* Dearborn, 6 N. H. 145, where the court said: "The prison keeper is made liable, by statute, for all escapes which he voluntarily permits, and for all which happen through his negligence. But it is the duty of the court of common pleas to build, inspect and keep in repair, prisons; and when an escape happens, through the insufficiency of the gaol, an action is given against the sheriff. But the action is brought, not for the default or neglect of the sheriff, but of the county, and he is entitled to recover of the county, not only what he may be compelled to pay, but for his costs and trouble. It is therefore clear that the prison keeper is not responsible for the sufficiency of the gaol." *Compare* Patton *v.* Halstead, 1 N. J. L. 277.

24. *Arkansas.* — Martin *v.* State, 32 Ark. 124.

Connecticut. — Austin *v.* Fitch, 1 Root 288.

Georgia. — Howard *v.* Crawford, 15 Ga. 423.

Illinois. — Housh *v.* People, 75 Ill. 487.

Massachusetts. — Hitchcock *v.* Baker, 2 Allen 431.

New York. — Carpentier *v.* Willett, 19 N. Y. Super. Ct. 25; Goodwin *v.* Griffis, 88 N. Y. 629; Ontario Bank *v.* Hallett, 8 Cow. 192.

See also Tuttle *v.* Wilson, 24 Ill. 553, where the court said that an officer "may stop in the execution of process, regular on its face, whenever he becomes satisfied that there is a want of jurisdiction in the court or officer issuing it; and if sued for neglect of duty may show in his defense such want of jurisdiction."

25. State *v.* Lewis, 19 Kan. 260, 27 Am. Rep. 113; Griffin *v.* Brown, 2 Pick. (Mass.) 304; Dunford *v.* Weaver, 84 N. Y. 445. See also State *v.* Armistead, 106 N. C. 639, 10 S. E. 872, where it was held that it is a criminal offense to take by force from the custody of an officer, a prisoner lawfully committed to his charge to convey to jail, and that the defendant on a prosecution for such an offense could not excuse his conduct by showing that the mittimus in the hands of the officer did not comply in all respects with the requirements of the statute.

26. State *v.* Bates, 23 Iowa 96, where the court in so holding said that the defendant "could not escape liability by proving that the party charged and arrested by the officers was not, in fact, guilty. His simple duty was to let the law take its course, and the guilt or innocence of the party escaping by his aid or assistance had nothing to do with his responsibilities as a citizen, nor with his liability under this indictment." See also Peeler *v.* State, 3 Tex. App. 533. *Compare* State *v.* Beebe, 13 Kan. 437.

to show in defense that the evidence adduced upon the trial of the original suit failed to make out the cause of action complained of.[27]

5. Consent of Creditor. — An officer who is sought to be held liable for the escape of a prisoner held by him under civil arrest may excuse the escape by showing the consent of the creditor to the discharge of the prisoner.[28]

6. Insolvency of Debtor Held on Civil Arrest. — In an action against an officer for an escape on mesne process, it is competent for the defendant to show in mitigation of damages that the debtor had no property.[29]

27. Wesson *v.* Chamberlain, 3 N. Y. 331, so holding on the ground that the judgment of the justice was not open to attack upon the merits in a collateral action.

28. Bridge *v.* McLane, 2 Mass. 520. See also Scott *v.* Seiler, 5 Watts (Pa.) 235; Douglas *v.* Haberstro, 88 N. Y. 611; *reversing* 25 Hun 262. *Compare* Powers *v.* Wilson, 7 Cow. (N. Y.) 274; Prather *v.* Clarke, 3 Brev. (S. C.) 393, wherein a husband had been committed by attachment for not paying alimony as decreed, and it was held that in an action brought by the wife against the sheriff for the escape of the husband, the defendant could not defend by showing that the husband was permitted to escape at the request of the wife.

In Lovell *v.* Orser, 1 Bosw. (N. Y.) 349, an action against a sheriff for the escape of a debtor in his custody under a body execution, it was held that the defendant could not show by way of defense that the plaintiff's attorney had consented that the debtor might go to a place outside of the bailiwick of the sheriff in order to attempt to raise money with which to pay the judgment on which the execution was issued.

29. Faulkner *v.* State, 6 Ark. 150; Richardson *v.* Spencer, 6 Ohio 13, where the court said: "In such case the *prima facie* right of the plaintiff is to recover the whole debt due by his debtor, on proving the judgment, arrest, and escape. But this *prima facie* right may be rebutted by facts conducing to prove that in truth the loss was not the amount of the debt and to establish the exact injury. The total inability of the debtor to pay conduces directly to lessen the damages, and would be received to reduce them in all cases where the escape was not voluntary on the part of the officer." Patterson *v.* Westervelt, 17 Wend. (N. Y.) 543; Shuler *v.* Garrison, 5 Watts & S. (Pa.) 455. *Compare* Fairchild *v.* Case, 24 Wend. (N. Y.) 381, wherein it was held that evidence of the general reputation of the insolvency of the prisoner was not admissible.

In Vermont a statute provided that in an action brought for the escape of any prisoner, the sheriff might give in evidence the circumstances, situation and property of the prisoner at the time of the escape. Middlebury *v.* Haight, 1 Vt. 423, where the court said: "If the prisoner was destitute of property, and had no means of paying the damages for which he was sued, the plaintiffs' cause of action against him must have been of very little value to them, whether the prisoner, on final process, would or would not have been entitled to the liberties of the prison and the benefit of the poor debtor's oath. The legitimate object of imprisonment, in civil cases, is to coerce the debtor to apply the means which may be in his power to the payment of the debt for which he is committed."

ESCHEAT.

By George P. Cook.

Scope Note. — This article includes generally all cases where property goes to the state or sovereign power through a failure of persons capable of taking by succession from the person last seised. It excludes: 1. The disability of certain classes, such as aliens, bastards and foreign corporations to take and hold property. 2. All cases of forfeitures and attainder.

I. PROOF REQUIRED OF STATE.

1. In General. — A. Not Necessary to Exhaust all Possibilities. — As a general rule, it is not necessary for the state to exhaust all possibilities as to heirship in order to establish a title by escheat.[1]

2. Must Prove Absence of Will. — It is incumbent on the state, however, to prove that the last owner dies intestate, and that there was no administration upon his estate.[2]

1. Not Necessary to Exhaust All Possibilities. — In cases of escheat, the proof on the part of the state or those claiming under it cannot be required to exhaust all possibilities; and in cases where aliens are disqualified to inherit, proof that the persons last seised were aliens, and that they died without issue, is sufficient, because no heirs are possible upon such an hypothesis. Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

2. Must Prove Absence of Will. In order to sustain an action for

3. Proof of Alienage Not Sufficient. — It is not sufficient for the state merely to show that the persons last seised were aliens, without proving that they died without leaving heirs capable of inheriting.[3]

4. The Inquest. — A. What it Must Show. — An inquest of escheat must not only find that the last owner died seised, but that he left no heirs or known kindred.[4]

B. Must be Confirmed by the Court. — The inquest which the state produces in support of her title must have been confirmed by the court.[5]

II. PROOF REQUIRED OF TRAVERSER.

1. Difference of Authority. — A. Must Show Title in Himself. The English, and some of the American, authorities hold that the

escheat, it is incumbent on the state to produce some evidence that the last person seised of the property died without having devised it to anyone, and that there was no administration upon the estate. Wiederanders *v.* State, 64 Tex. 133.

Where escheat proceedings were instituted in a newly organized county, *held* that it was not sufficient to raise the presumption that no devise was made to show that the records of such county did not show such devise; that it was necessary to prove the absence of the will, by an examination of the records of the original county, as far back as seven years. Hanna *v.* State, 84 Tex. 664, 19 S. W. 1,008.

3. Proof of Alienage Not Sufficient. — The state cannot recover property by escheat by merely showing that the persons last seised were foreigners; it must also be shown that they died without issue, and that they left no relatives entitled by law to succeed to the property. Catham *v.* State, 2 Head (Tenn.) 553.

In an action brought for the purpose of escheating to the state certain property alleged in the petition to have belonged to one T., who, it was averred, had abandoned the state many years previously, without having sold or transferred said property, and without leaving any heirs surviving him, to establish the facts alleged in the petition, it was proved by one witness that he had known T., who was an Englishman or Scotchman, about the time Texas was annexed to the United States. That shortly afterwards he left the state and had never been seen in it since to the witness' knowledge, and witness never knew of his having any relatives in the state. Two other witnesses testified that they did not know T., but had heard that he left the state at the time mentioned by the other witness, and if he ever returned they had never heard of it. *Held* that the evidence was too meager and unsatisfactory to establish the facts alleged in the petition. State *v.* Teulon, 41 Tex. 249.

4. What the Inquest Must Show. An inquest of escheat must find that the decedent died intestate, and without heirs or any known kindred; otherwise it is a nullity. Ramsey's Appeal, 2 Watts (Pa.) 228, 27 Am. Dec. 301.

An inquest of escheat must find that the last owner died seised, as well as without heirs capable of inheriting. Matter of Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645.

5. Must Be Confirmed by the Court. — Before the state can recover personal property from the administrator of an intestate, on the ground that it is liable to escheat, she must first establish her right by an inquest, which has been confirmed by the court. Crawford *v.* Com., 1 Watts (Pa.) 480.

Inquisition Without Judgment. In an action brought by a purchaser at an administrator's sale, to recover lands after an escheat, *held* that an inquisition taken pursuant to the

person setting up a claim to escheated property must succeed on the strength of his own title, and not on the weakness of his adversary's.[6]

B. Bare Possession Sufficient. — Other authorities hold that he is not required to show title in himself, and that bare possession is sufficient.[7]

III. EVIDENCE OF TITLE.

1. The Escheat Patent. — It has been held that an escheat patent is conclusive evidence of an escheat grant.[8]

2. The Escheat Grant Prima Facie Evidence of Title. — An escheat grant is *prima facie*, but not conclusive, evidence of title.[9] But where the proceedings wholly fail to disclose the name of the person last seised, the evidence of title is greatly weakened.[10]

3. The Judgment. — A. When Conclusive. — Where all the proceedings instituted in behalf of the state, and leading up to the

statute concerning escheats, though no judgment or decree had been entered upon it, was competent, though not conclusive, evidence on behalf of defendant, to establish the death of the former owner intestate, and without heirs. O'Hanlin *v.* Van Kleeck, 20 N. J. L. 31; Van Kleek *v.* O'Hanlon, 21 N. J. L. 582.

6. **Traverser Must Show Title in Himself.** — The person traversing an inquest of office in a case of escheat must show title in himself, and will not succeed by merely impeaching the title of the state. French *v.* Com., 5 Leigh (Va.) 512, 27 Am. Dec. 613; Com. *v.* Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226; Dunlop *v.* Com., 2 Call (Va.) 284; Reg. *v.* Mason, 2 Salk. (Eng.) 447; *Ex Parte* Gruydir, 4 Madd. (Eng.) 281.

7. **Bare Possession Sufficient.** The person attacking an inquest of office in a case of escheat is not required, as against the state, to show title in himself; if he prove that the people have no title, he will recover, even though he shows nothing but a bare possession in himself. People *v.* Cutting, 3 Johns. (N. Y.) 1.

It is not necessary for the person attacking an escheat grant to show an interest in himself in the property in dispute. Armstrong *v.* Bittinger, 47 Md. 103.

Statement of the Doctrine. — "In most cases, the caveat proceeds upon the ground that some right or title of the caveator would be interfered with by the grant of the patent; but as the question is always whether it is lawful, right and just to issue the patent, this may and sometimes does depend upon other and higher considerations than the rights of the caveator, and therefore a caveat will not be dismissed merely for want of interest in the caveator in the matter in dispute; nor would this court refuse to entertain his appeal merely on that ground." Patterson *v.* Gelston, 23 Md. 432.

8. Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658.

9. **Escheat Grant Prima Facie Evidence.** — An escheat grant is *prima facie* evidence of title; but the presumption of title may be overcome by other evidence. Hall *v.* Gittings, 2 Har. & J. (Md.) 112; Lee *v.* Hoye, 1 Gill (Md.) 188; Armstrong *v.* Bittinger, 47 Md. 103; Clements *v.* Ruckle, 9 Gill (Md.) 326.

10. **Presumption of Title Weakened.** — "But where the proceedings wholly fail to disclose the name of the owner of the land, who is supposed to have died seised in fee, intestate and without heirs, it is clear the ground of the *prima facie* presumption is seriously weakened. At any rate, the patent should not be issued in such case, upon the presumed acquiescence of the public, without better notice than the proceedings

judgment, are regular, and all the parties have been properly notified, the judgment is conclusive evidence of the state's title.[11]

B. When Not Conclusive Against State. — A judgment against the personal representative of the party last seised is not conclusive against the state, when she was not a party to the proceedings by which the judgment was obtained.[12]

4. The Record the Only Competent Evidence. — It has been held that the record of the proceedings in escheat is the only competent evidence by which title by escheat can be established.[13]

IV. EVIDENCE AS TO CHARACTER OF LAND.

1. Escheat Patent Prima Facie Evidence. —An escheat patent is *prima facie* evidence that the land granted was liable to escheat at the time of issuing the escheat warrant.[14]

themselves afford." Armstrong *v.* Bittinger, 47 Md. 103.

11. When Judgment Conclusive. When escheat proceedings are instituted on behalf of the state, in which the petition describes the name of the former owner, and alleges that he died intestate and without heirs, that no letters of administration upon his estate had been granted, that there is no tenant or person in actual or constructive possession of the lands, nor any person known to the petitioner claiming an estate therein, and that the land has escheated to the state, and an order of notice to all persons interested in the estate has been published as required by statute, and, after a hearing of all who appear and plead, judgment is entered, describing the land, and declaring that it has escheated to the state, the judgment is conclusive evidence of the state's title to the land, not only against any tenants or claimants having had actual notice by *scire facias* or having appeared and pleaded, but also against all other persons interested in the estate and having had constructive notice by publication. Hamilton *v.* Brown, 161 U. S. 256.

When Not Conclusive Against Third Parties. — A judgment of escheat in favor of the state is not conclusive evidence against any heirs of the last owner, who were not properly notified of the escheat proceedings and did not appear and answer. Newman *v.* Crowls, 60 Fed. 220, 8 C. C. A. 577.

12. When Not Conclusive Against State. — A judgment against the personal representative of one who has died intestate and without heirs, subjecting the property of his intestate to the claim of a creditor, and in pursuance of which the property is sold to satisfy such claim, is not conclusive against the state claiming the same property by escheat, since the state was not made a party to the proceeding by which the judgment was obtained. Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348.

13. The Record the Only Competent Evidence. — The proceeding instituted by the state, to recover land liable to escheat, is in the nature of an inquest of office, and the record of such proceeding is the only competent evidence by which title by escheat can be established. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519. (*Citing* Com. *v.* Hite, 6 Leigh [Va.] 588.)

Recital in Act of Assembly. —"An escheat patent is *prima facie* evidence that the land was liable to escheat at the date of the warrant, and an act of assembly reciting that the property had escheated, and making a grant, would have the same effect." Hammond *v.* Inloes, 4 Md. 138.

14. Escheat Patent Prima Facie Evidence. — Lee *v.* Hoye, 1 Gill (Md.) 188.

No Evidence as to Previous Condition of Land. — An escheat patent is

2. Certificate Remaining in Office. — The fact that a certificate has been returned and has remained in the land office for some length of time, without any person putting in an adverse claim, may raise a presumption that the land was escheatable.[15]

V. PRESUMPTIONS AS TO HEIRSHIP.

1. In General. — A. Every Person Presumed to Leave Heirs. As a general rule, every person dying seised of property is presumed to leave heirs capable of succeeding to his estate.[16]

B. Rule Does Not Apply to Aliens. — It has been held that this rule applies to citizen subjects, but not to aliens.[17]

no evidence that the land granted was liable to escheat, previous to the issuing of the escheat warrant. Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; Peterkin *v.* Inloes, 4 Md. 175; Wilson *v.* Inloes, 6 Gill (Md.) 121.

Act and Patent Inconsistent. — An escheat patent, being *prima facie* evidence that the property was liable to escheat at the date of the warrant, takes precedence over a subsequent act of assembly granting certain privileges over the property, as though it were vacant land. The subsequent act of assembly is not sufficient, in itself, to overcome the *prima facie* presumption created by the prior escheat patent. Hammond *v.* Inloes, 4 Md. 138.

15. Goodwin *v.* Caton, 4 Md. Ch. 160; Lee *v.* Hoye, 1 Gill (Md.) 188; Armstrong *v.* Bittinger, 47 Md. 103.

16. *Illinois.* — Harvey *v.* Thornton, 14 Ill. 217; Pile *v.* McBratney, 15 Ill. 314; Fell *v.* Young, 63 Ill. 106.

Kentucky. — Bank of Louisville *v.* Board of Trustees, 83 Ky. 219.

New York. — Ettenheimer *v.* Heffernan, 66 Barb. 374; People *v.* Fulton Fire Ins. Co., 25 Wend. 205.

North Carolina. — University of North Carolina *v.* Harrison, 90 N. C. 385 (*criticising* University of North Carolina *v.* Johnston, 1 Hayw. 373).

Texas. — *Compare* Brown *v.* State, 36 Tex. 282.

Statement of the Doctrine. — "The ordinary rational as well as legal presumption as to every person is that he must have some relations, and consequently some heirs, however remote, and whether known to him or not. From the natural laws of human relationship, this must be so, and the necessary presumption must be that every citizen dying leaves some one entitled to claim as his heir, however remote, unless one or other of the only two exceptions known to our law should intervene. That law has established that an *alien* cannot inherit real estate, and that the *illegitimate child* can claim no legal relationship through his parents. In order then to make an absolute failure of heirs possible, there must be either illegitimacy of the person last seised or of some near ancestor, or else he must be sprung from a foreign stock, through which the policy of our laws has determined that no inheritable blood can flow. Otherwise, no matter how distant the relationship, or to how remote an ancestor the descent may be traced, still there must be somewhere persons living who came from the same common stock." People *v.* Fulton Fire Ins. Co., 25 Wend. (N. Y.) 205.

Proof of Death Not Sufficient. Where death only is proved, there must be some further negative proof as to the non-existence of heirs. Hammond *v.* Inloes, 4 Md. 138; Peterkin *v.* Inloes, 4 Md. 175; Sprigg *v.* Moale, 28 Md. 497, 92 Am. Dec. 698.

17. Wilbur *v.* Tobey, 16 Pick. (Mass.) 177.

"When a citizen dies without a will, the presumption may be that he leaves some person who is his heir and entitled to take any land he may have died seised of, by descent. When, however, it appears that the

2. Evidence to Rebut Presumption. — A. When Sufficient. — a. *Absence of Knowledge Among Intimate Associates.* — The fact that a man's intimate associates, who had known him for years, had never heard him speak of any relatives, has been held *prima facie* evidence that he had none.[18]

b. *Absence for Number of Years from Locality.* — The fact that a person, after receiving a grant of lands, had departed from the locality, and neither he nor any of his relatives ever again heard of, may raise a presumption that the property had afterward escheated to the state for want of heirs.[19]

c. *Recital in Escheat Warrant.* — A recital in an escheat warrant of the death of a person without heirs is not sufficient to throw the *onus* of proof on the other side.[20]

3. Statutory Regulations. — Statutes have been passed in some of the states which affect and alter somewhat the presumptions as to heirship.[21]

person claiming to be heir is an alien, he cannot, for that reason, take by descent. No presumption can be indulged in his favor." Ettenheimer *v.* Heffernan, 66 Barb. (N. Y.) 374. *Compare* Catham *v.* State, 2 Head (Tenn.) 553, where it was held that it cannot be presumed from the mere fact that the parties last seised of property were unnaturalized foreigners, that they died without issue, or without leaving any relatives capable of inheriting their property.

18. Absence of Knowledge Among Intimate Associates. — In an action of ejectment brought by the state to recover escheated lands, where it appears that the intimate associates of a man who had known him for a number of years did not know the place of his birth, and had never heard him speak of his family or relatives, this is *prima facie* evidence that he had no heirs; but this proof may be rebutted by slight evidence of heirship. Jackson *v.* Etz, 5 Cow. (N. Y.) 14.

19. Absence for Number of Years. In an action of ejectment to recover certain lands, the defendant in possession claimed under a grant from the state issued to one P. in 1795. Plaintiff claimed under a regrant from the state issued in 1845. *Held,* that had proof been made, on the part of the plaintiff, that the grantee in the 1795 grant had not been known in that section of the state from that time down, or for half a century, or any long series of years, nor his heirs at law or representatives or any one claiming said land as his, the jury would have been justified in presuming that the land had escheated to the state before it was regranted in 1845. In the absence of this proof, judgment was given for defendant. Sutton *v.* McLeod, 29 Ga. 589.

A grant was issued by the state to one B. in 1788. Since that time he was never heard of, nor did it appear that he ever made any will or left any heir. *Held,* that in 1851 it was to be presumed that, subsequent to the grant, he died, and died without a will or an heir, and that therefore the land escheated to the state on due inquest of office. Vickery *v.* Benson, 26 Ga. 582.

20. Mere Negative Testimony. The presumption that every person leaves heirs capable of inheriting his estate will not be overcome by mere negative testimony, showing that the person has been absent for a number of years, and that no one has appeared to claim the estate. Bank of Louisville *v.* Board of Trustees, 83 Ky. 219; Hanna *v.* State, 84 Tex. 664, 19 S. W. 1,008; Goodwin *v.* Caton, 4 Md. Ch. 160.

21. Statutory Regulations. Louisville School Board *v.* Bank of Kentucky, 86 Ky. 150, 5 S. W. 739; Hanna *v.* State, 84 Tex. 664, 19 S. W. 1,008.

See the statutes of the different states, also note to American Mort-

VI. BURDEN OF PROOF.

1. In General. — As a general rule, where the proceedings are instituted on behalf of the state, she has the burden of proving the non-existence of heirs, and that the property is, in all respects, liable to escheat.[22]

2. Where Alienage is Admitted by Pleadings. — Where it is admitted by the pleadings that the claimants are foreigners by birth, this renders them *prima facie* aliens, and the burden is upon them to overcome this presumption.[23]

3. Where Third Parties Intervene. — Third parties intervening between the state and another claimant have the burden of proving their heirship.[24]

VII. ADMISSIBILITY OF EVIDENCE.

1. Family Reputation. — The existence or non-existence of heirs may be proved by the declarations of deceased members of the person last seised, or by the reputations as to this fact existing in such family.[25]

gage Co. *v.* Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529.

22. University of North Carolina *v.* Harrison, 90 N. C. 385.

"Where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is that he had heirs, and this presumption will be good against the commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs can be ascertained, and if this fact is established in favor of the commonwealth, it rebuts the contrary presumption, and the commonwealth, by force of the judgment, and of the statute before cited, become seised in law and in fact." Wilbur *v.* Tobey, 16 Pick. (Mass.) 177.

Under a statute providing that where no lawful claim is asserted to, or lawful acts of ownership exercised over, property for the period of seven years, it shall be deemed *prima facie* evidence of the death of the owner and of the failure of heirs; *held*, that the burden of proof in such a case rests upon the state, not only to show that lawful acts of ownership have not been exercised, but also to show that no lawful claim has been made by any person, and it is not sufficient to show the mere failure of the original grantee or someone holding under him, to list the land for taxation, and pay the taxes upon it. Hanna *v.* State, 84 Tex. 664, 19 S. W. 1,008.

23. White *v.* White, 2 Metc. (Ky.) 185.

24. Where Third Parties Intervene. — One T. died unmarried without issue, leaving all her property by will to one legatee. The state claimed by succession on the ground that the legatee was disqualified to take and that there were no heirs. In an action brought by the state against the legatee, certain other parties intervened claiming as heirs of T. *Held*, that the burden of proof was on the intervenors to prove their heirship, and not upon the state to prove the non-existence of heirs. Succession of Townsend, 40 La. Ann. 66. See also Succession of Fletcher, 11 La. Ann. 59.

25. Family Reputation. — In an action of ejectment brought by the state to recover land alleged to have escheated for the want of heirs, the declarations of deceased members of the family of the person last seised and the reputation existing in such family, may be resorted to to prove

2. Warrant of Resurvey Without Patent. — It has been held that a warrant of resurvey, issued many years previously, but upon which no patent had ever been issued, is inadmissible as evidence of the facts recited therein.[26]

VIII. MATTERS IN ESTOPPEL.

1. When State is Estopped. — The state is estopped from setting up any subsequent claim which is in conflict with a prior express legislative grant.[27]

2. When Not Estopped. — The assessment of taxes upon land after the failure of heirs will not estop the state from subsequently claiming title by escheat.[28]

3. When Claimant is Estopped. — A person cannot set up a claim to escheated property which is inconsistent with another title which he has already availed himself of.[29]

IX. ADMISSIONS OF PERSONAL REPRESENTATIVE.

The admissions of the personal representative of the person last seised are not binding upon the state claiming title by escheat.[30]

such defect of heirs; and such evidence may be sought among the relatives of the mother as well as those of the father of the person last seised; but such evidence is inadmissible if derived from a branch of the family who have set up a claim to the property in dispute. People *v.* Fulton Fire Ins. Co., 25 Wend. (N. Y.) 205.

26. Wilson *v.* Inloes, 6 Gill (Md.) 121.

27. Com. *v.* Andre, 3 Pick. (Mass.) 224.

28. Reid *v.* State, 74 Ind. 252.

29. Inconsistent Claims. — Where two persons joined in a petition to the crown, and procured a grant of an estate to them, which they represented to have escheated; *held,* that this would estop one of them from afterwards setting up a claim to a part of the property under a prior title in himself, while at the same time taking the benefit of the grant as to the rest. Cumming *v.* Forrester, 2 Jac. & W. 334.

Parties in possession of property, claiming to own it, and having the right of mortgagees in possession, and against whom it is assessed for delinquent taxes and sold to a third party, cannot set up as a defense to the tax title the fact that the property had escheated to the state, and was not liable to taxes. The right of escheat is not available to them as a defense. Croner *v.* Cowdrey, 139 N. Y. 471, 34 N. E. 1,061, 36 Am. St. Rep. 716.

30. Admissions of Personal Representative. — In an action brought against the state by a creditor of an intestate, whose property escheats to the state, to subject the real assets to the payment of his debt, any admissions of the executor or administrator are not binding upon the state. Moores *v.* White, 6 Johns. Ch. (N. Y.) 360.

ESCROW.— See Delivery.

ESTOPPEL.— See Admission; Assent.

EVICTION.— See Adverse Possession; Ejectment.

EVIDENCE.

I. DEFINITIONS.

Various definitions of evidence have been made by commentators and text-writers, some of which will be found in the notes.[1] As a

1. "Evidence, 'Evidentia.' This word in legal understanding doth not only contain matters of record, as letters patent, fines, recoveries, enrollments, and the like; and writings under seal, as charters and deeds; and writings without seals, as court rolls, accounts, and the like — which are called evidences 'instrumenta;' but in a larger sense it containeth also testimonia, the testimony of witnesses and other proofs to be produced and given to a jury for the finding of any issue joined between the parties." 1 Coke Inst. 283*a*.

"Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the offered fact of point in issue, either on the one side or on the other." Blackstone Com., Bk. 3, p. 367.

"By the term 'evidence,' considered according to the most extended application that is ever given to it, may be, and seems in general to be, understood any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact — a persuasion either affirmative or disaffirmative of its existence;" 1827, Mr. Jeremy Bentham, Rationale of Judicial Evidence, Bk. 1, c. 1. (Bowring's ed., Vol. VI, p. 208.) See also Best, "Principles of Evid.," § 11.

"Evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." Greenleaf on Ev., § 1. See also Hill *v.* Watson, 10 S. C. 268; Morrison *v.* State, 13 Neb. 527, 14 N. W. 475; Schloss *v.* His Creditors, 31 Cal. 201.

"That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of evidence." Starkie on Ev., Bk. 1, p. 9; Wait, Law & Pr. (5th ed., 1885), Vol. III, p. 374.

"Evidence means — (1.) Statements made by witnesses in court under a legal sanction in relation to matters of fact under inquiry; such statements are called oral evidence. (2.) Documents produced for the inspection of the court or judge; such

legal term its meaning is narrower than when used in its popular sense.[2]

The Law of Evidence includes not only the rules for the determination of what is legal evidence, but also those rules governing the necessity for or the manner of its production, and its probative effect.[3]

II. DISTINGUISHED FROM "PROOF" AND "TESTIMONY."

1. Proof. — The term *proof* is frequently used as synonymous with *evidence*, not only in popular language, but by courts as well.[4] This use of the term is said to be incorrect, because properly speaking *proof* means the effect[5] produced by evidence upon the judicial mind.

documents are called documentary evidence." Stephen's Digest of the Law of Evidence (Chase's ed.), p. 3.

"Any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact." Prof. J. B. Thayer, "Presumptions and the Law of Evidence," 3 Harv. L. Rev. 142.

"That which tends to prove or disprove any matter in question, or to influence the belief respecting it." Bouv. Dict., Title "Evidence."

"The word 'evidence,' considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact the truth of which is submitted to judicial investigation." McKelvey on Ev., p. 6.

"Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a conviction, positive or negative, on the part of the tribunal as to the truth of a proposition not of law or of logic, on which the determination of the tribunal is to be asked." Wigmore on Ev., Vol. I.

"Evidence is whatever may be given to the jury as tending to prove a cause. It includes the testimony of witnesses, documents, admissions of parties, etc." Lindley *v.* Dakin, 13 Ind. 388.

"Means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact." Cal. Code Civ. Proc., § 1823.

2. "Judicial or Legal Evidence is a general name given to any fact, in contemplation of its being presented to the cognizance of a judge, in the view of its producing in his mind a persuasion concerning the existence of some other fact — of some fact on which, supposing the existence of it established, a decision to a certain effect would be called for at his hands." Bentham, Rationale of Judicial Evidence, Bk. 1, c. 1 (Bowring's ed., Vol. VI, p. 208).

"Judicial evidence may be defined, the evidence received by courts of justice in proof or disproof of facts the existence of which comes in question before them." Best, "Principles of Evidence," § 33. See also Jones Ev., Vol. I, § 1.

3. See Wigmore on Ev., Vol. I, §§ 2-3; McKelvey on Ev., p. 6.

"The law of evidence is . . . a collection of general rules established by law. 1. For declaring what is to be taken as true without proof. 2. For declaring the presumptions of law, both disputable and conclusive. 3. For the production of legal evidence. 4. For the exclusion of what is not legal. 5. For determining in certain cases the value and effect of evidence." Cal. Code Civ. Proc., § 1825.

4. See Parkhurst *v.* McGraw, 24 Miss. 134; Com. *v.* Cobb, 14 Gray (Mass.) 57; Shea *v.* Mabry, 1 Lea (Tenn.) 319; Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

5. "Evidence and proof are often used indifferently, as synonymous

Proof, however, is also used to denote the means or reasons which are sufficient to produce a particular conclusion or conviction of the mind.[6]

with each other; but the latter is applied by the most accurate logicians to the effect of evidence, and not to the medium by which truth is established." Greenleaf on Evidence, Vol. I, § 1; Tift *v.* Jones, 77 Ga. 181; Schloss *v.* His Creditors, 31 Cal. 201; Glenn *v.* State, 64 Miss. 724, 2 So. 109. See Davenport *v.* Cummings, 15 Iowa 219.

"Proof is the effect or result of evidence, while evidence is the medium of proof." Jones Ev., Vol. I, § 3; People *v.* Beckwith, 108 N. Y. 67, 15 N. E. 53.

"Proof is the effect of evidence and not the medium by which truth is established." Glenn *v.* State, 64 Miss. 724, 2 So. 109.

"Proof is logically defined as the sufficient reason (*ratio sufficiens*) for assenting to a proposition as true. Proof, in civil process, is a sufficient reason for the truth of a juridical proposition by which a party seeks either to maintain his own claim or to defeat the claim of another." Whart. Ev., Vol. I, § 1.

Term "Proof" in Statutes. — A statute providing that a judgment may be set aside "upon satisfactory proof being made" that it is erroneous, means that such judgment may be set aside upon satisfactory *evidence*. "'Proof,' taken literally, is the 'perfection of evidence' or is the 'effect of evidence.' But as in common use the end is often confounded with the means, so in language 'proof' is often used as a synonym with 'evidence,' and in this ordinary sense it manifestly is used in this act." Hill *v.* Watson, 10 S. C. 268.

In Jastrzembski *v.* Marxhausen, 120 Mich. 677, 79 N. W. 935, the term "proof" used in a statute providing that the defendant's notice in his jurisdiction in an action for slander, of the truth of the words used, though not maintained by the evidence, shall not of itself be *proof* of malice, was held not to take away the right of the jury to consider such a notice as *evidence* of malice. "'Proof' is that which convinces; 'evidence' is that which tends to convince. We must assume that the legislature used the word in its well-understood definition."

The Term "Proof" in Instructions. In Perry *v.* Dubuque S. W. R. Co., 36 Iowa 102, an instruction that a certain fact was "not of itself *proof* of negligence" was held properly refused as misleading, although embracing a correct legal principle; since proof and evidence are used interchangeably in popular language the jury might interpret an instruction to mean that the fact stated was not *evidence* of negligence.

An instruction that in determining the credibility of a witness the jury might take into consideration "proof of his having made statements which he denies under oath," was held misleading as confounding the term proof with evidence. Glenn *v.* State, 64 Miss. 724, 2 So. 109.

Term "Evidence" in Instructions. In McWilliams *v.* Rodgers, 56 Ala. 87, an instruction that "the use to which a deed is applied is *evidence* of the intent with which it is made" was held properly refused on account of its tendency to mislead the jury, on the ground that they might confound the term *evidence* with *proof*.

6. Proof. — "Anything which serves either immediately or mediately to convince the mind of the truth or falsehood of a fact or proposition. Also applied to the conviction generated in the mind by proof properly so called." Best, "Principles of Evidence," § 10.

"'Proof' has a far wider meaning than 'evidence.' Evidence includes the reproduction before the determining tribunal, of the admissions of parties, and of facts relevant to the issue. Proof, in addition, includes presumptions either of law or fact, and citations of law. Proof, in this sense, comprehends all the grounds on which rests assent to the truth of a specific proposition. Evidence, in this view, is adduced only by the parties, their witnesses, documents or inspection; proof may be adduced by

2. Testimony is that species of evidence which is produced through the language of a witness.[7]

counsel in argument, or by the judge in summing up a case. 1st. Proof may be used in the wide sense, just noticed, of the reasons or grounds on which a particular proposition may be maintained. 2nd. In a more narrow and arbitrary sense, proof may be used as convertible with conviction, and as producing conclusions as to which there can be no doubt. 3rd. Proof may be received in its formal and juridical sense, as the instrument which tends to lead the minds of judge or jury to a particular conclusion. Proof, in this sense, is to be regarded not as an instrument to produce mathematical or even moral certainty — not as a means of convincing the opposing party — not even as a means of working a moral conviction in the minds of judge or of jury; but as a means of bringing them to such an official or juridical conclusion as will require from them a particular legal action. In this sense, the only one in which we have here to consider the term 'proof,' the distinction between proof and evidence becomes the more clear. Evidence is a part, and only a mere part, of proof. It is part of the material on which proof acts; it is not reason, but a part of the basis of reason. It is therefore such juridical admissions, and such reproduction of relevant facts as under due check of law may be received on the trial of a litigated issue." Whart. Ev., Vol. I, § 3.

"'Proof' is the logically sufficient reason for assenting to the truth of a proposition advanced. In its juridical sense it is a term of wide import, and comprehends everything that may be adduced at a trial, within the legal rules, for the purpose of producing conviction in the minds of the judge or jury, aside from mere argument; that is, everything that has a probative force intrinsically, and not merely as a deduction from, or combination of, original probative facts. But 'evidence' is a narrower term, and includes only such kinds of proof as may be legally presented at a trial, by the act of the parties and through the aid of such concrete facts as witnesses, records, or through documents. Thus, to urge a presumption of law in support of one's case is adducing proof, but it is not offering evidence. 'Testimony,' again, is a still more restricted term. It properly means only such evidence as is delivered by a witness on the trial of a cause, either orally or in form of affidavits or depositions. 'Belief' is a subjective condition resulting from proof. It is a conviction of the truth of a proposition, existing in the mind and induced by persuasion, proof or argument addressed to the judgment." Black's L. Dict., Title "Evidence."

7. McDonald *v.* Elfes, 61 Ind. 279; Lindley *v.* Dakin, 13 Ind. 388; Carroll *v.* Bancker, 43 La. Ann. 1078, 10 So. 187.

Term "Testimony" in Bill of Exceptions. — A statement in the bill of exceptions following a recital of certain evidence or testimony, that the matter recited is "all of the testimony introduced on the trial" does not sufficiently show that the matter set out is all of the "evidence" to justify a review of the evidence on appeal. McDonald *v.* Elfes, 61 Ind. 279; McConaha *v.* Carr, 18 Ind. 443; Lindley *v.* Dakin, 13 Ind. 388; Harvey *v.* Smith, 17 Ind. 272; Craggs *v.* Bohart (Ind. Ter.), 69 S. W. 931.

In Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889, the appellant's statement, "It [the cause] was submitted as per agreement upon the following testimony, being all the testimony introduced in said cause," was held to sufficiently show that the abstract purported to be the abstract of all the evidence. Though slightly inaccurate because the evidence embraces documents as well as testimony, the latter term appeared to be used as synonymous with evidence.

Term "Testimony" in Instructions. — An instruction that "if there is a conflict in the *testimony* it is your duty to take such a view of the *evidence* as will enable you to believe all the witnesses, if that can be done," was held not misleading although

III. CLASSIFICATIONS OF EVIDENCE.

Evidence has been variously classified, and some of the classifications made will be found in the notes.[8] They are based upon the intrinsic nature and quality of evidence, its legal character, the means by which or the manner in which it is presented, and its logical or probative effect. A discussion of the various kinds of evidence will be found elsewhere in this work under the appropriate titles.[9]

objected to on that ground for using the words "testimony" and "evidence" interchangeably without calling the attention of the jury to the difference in their signification. Forgey *v.* Bank of Cambridge City, 66 Ind. 123.

In Jones *v.* Gregory, 48 Ill. App. 228, an instruction that the defendant must establish his defense by a preponderance of the *testimony* was objected to as erroneous because ignoring the distinction between testimony and evidence, since a considerable part of the defendant's evidence consisted of written documents and circumstances. The objection was held to be not well taken on the ground that the jury were probably not misled.

8. **Bouvier's Dictionary,** title "Evidence," classifies evidence as to its nature, 1. Direct; 2. Presumptive; 3. Circumstantial. As to its legal character, 1. Primary and secondary; 2. *Prima facie* and conclusive.

Black's Dictionary, title "Evidence," makes the following classifications: 1. Judicial and extrajudicial; 2. Primary and secondary; 3. Direct and indirect; 4. Intrinsic and extrinsic. As to its *nature* evidence may be circumstantial, presumptive, *prima facie,* partial, satisfactory, conclusive, indispensable, documentary, hearsay. As to its *object,* substantive, corroborative, cumulative.

Best makes four classifications of evidence: 1. Direct and indirect or circumstantial, subdividing the latter class into conclusive and presumptive; 2. Real and personal; 3. Original and derivative; 4. Preappointed and casual. "Principles of Evidence," p. 1.

Starkie on Evidence, Vol. I, p. 17, classifies evidence generally as direct or testimonial, and indirect. Direct or testimonial evidence is subdivided into immediate and mediate, and the latter into original and secondary. Indirect evidence is subdivided into presumptive and circumstantial.

Jones on Evidence, Vol. I, §§ 4 and 5, classifies as, 1. Demonstrative and moral; 2. Direct and circumstantial.

Elliot on Evidence classifies evidence as to its nature and qualities, and the basis or source of belief, as, 1. Demonstrative and moral; 2. Direct and circumstantial. As to its legal character and grade, 1. Primary and secondary; 2. *Prima facie* and conclusive. As to its legal character and admissibility, 1. Competent and incompetent; 2. Relevant and irrelevant.

9. See the following articles: "Best and Secondary Evidence;" "Circumstantial Evidence;" "Competency;" "Conclusive Evidence;" "Corroborative Evidence;" "Cumulative Evidence;" "Demonstrative Evidence;" "Direct Evidence;" "Documentary Evidence;" "Hearsay Evidence;" "Presumptions."

EVIDENCE AT FORMER TRIAL.—See Former Testimony.

EXAMINATION BEFORE COMMITTING MAGISTRATE.

By Glenda Burke Slaymaker.

I. INTRODUCTORY.

1. Purpose of Preliminary Examination. — A. To Ascertain the Commission of Crime and Probable Guilt of Accused. — The purpose of a preliminary examination, as commonly provided for by the statutes of the various states, is twofold: First, to ascertain whether the offense of which the accused is charged has been committed; and, second, whether, if it has been committed, there is probable cause to believe that the accused is guilty of having committed it; and thereupon to commit, recognize or discharge the accused.[1]

B. To Perpetuate Testimony. — It is sometimes said that a further purpose of a preliminary examination is to perpetuate the testimony against the accused,[2] and that for such purpose the state

1. State *v.* Brunot, 104 La. 237, 28 So. 996; Latimer *v.* State, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *In re* Garst, 10 Neb. 78, 4 N. W. 511; State *v.* Huegin, 110 Wis. 189, 85 N. W. 1,046.

2. State *v.* Ozer, 5 La. Ann. 744. **State's Right to Mandamus to Compel Preliminary Examination.** Where to perpetuate testimony is one of the objects of the preliminary examination the state is entitled to and by mandamus may compel the holding of a preliminary examination; and the fact that the grand jury, after considering the matter, adjourned it over, and that a new grand jury would be impaneled, with the

may have an examination before a committing magistrate, even if the defendant consents to being held without it.[3]

2. Manner of Conducting Examination. — While a preliminary examination is not in the nature of a trial of the accused, it must nevertheless be conducted with judicial deliberation, and with a just regard to the rights of the defendant generally under the law.[4]

II. COMPETENCY AND SUFFICIENCY OF EVIDENCE AT EXAMINATION.

1. Technical Rules of Evidence Inapplicable to Preliminary Hearing. — The evidence receivable in an examination before a committing magistrate is not strictly to be limited by the technical rules governing the admissibility of evidence at the trial.[5] Such examinations are not in an exact sense judicial, but partake more of the nature of an informal proceeding or inquiry, and liberal rules should therefore be applied in conducting them.

2. What Evidence Sufficient. — A. To Support Issuing of Warrant. — The constitutional provision that no warrant shall issue but upon probable cause, supported by oath, requires that a magistrate should have before him the oath of the real accuser to the facts on which the charge is based, and upon which the belief or suspicion of guilt is founded.[6] And there must, likewise, be

duty of further investigation, will not defeat the right of the state in this regard. State *v.* Brunot, 104 La. 237, 28 So. 996.

Defendant's Right to Mandamus to Compel Preliminary Examination. A defendant also, where it is by statute the duty of a magistrate to make a preliminary examination into the charge against an accused brought before him, may by mandamus compel the granting of such an examination. People *v.* Barnes, 65 Cal. 16, 2 Pac. 493.

3. "While the defendant in a criminal prosecution may waive a hearing before the magistrate, so far as his interests are concerned, he cannot, by so doing, interfere with the right of the commonwealth to institute such preliminary examination before a committing magistrate. The ends of public justice may imperatively require such a preliminary investigation, and as many meetings or hearings may be held as public justice requires." Com. *v.* Keck, 148 Pa. St. 639, 24 Atl. 161.

4. "The record," said the court in a recent case, "we are prone to say, presents in this regard an extraordinary condition of affairs, and shows an undue activity on the part of the prosecution to force the defendants into a preliminary hearing without having a due regard for their rights or the proprieties which should characterize proceedings of the kind then engaged in. We apprehend the spirit of the law requires that such proceedings should be conducted with deliberation, with every reasonable opportunity accorded to those accused of crime to show either that no offense has been committed, or that there is no probable cause for believing them guilty of the offense charged." Van Buren *v.* State (Neb.), 91 N. W. 201.

5. United States *v.* Greene, 108 Fed. 816; *s. c.* 100 Fed. 941; Turner *v.* People, 33 Mich. 363.

6. *In re* Rule of Court, 3 Woods 502, 20 Fed. Cas. No. 12,126; *Ex parte* Dimmig, 74 Cal. 164, 15 Pac.

some competent evidence in support of the guilt of the accused.[7] But in the absence of a statute requiring the evidence on an application for a warrant of arrest to be reduced to writing, it will be presumed, where the defendant has been taken into custody, that the magistrate had before him sufficient evidence to confer jurisdiction in the premises.[8]

B. To Support Commitment. — It is not necessary that the evidence before a magistrate, upon which the accused is committed, should be sufficient to support a conviction at the trial.[9] It is sufficient, upon a review of the preliminary proceedings, if there is any competent evidence before the magistrate in support of his determination of the probable guilt of the defendant of the commission of the crime charged.[10]

C. Conflicting Evidence. — The weight of the evidence on a preliminary examination is a matter to be determined by the magistrate; and his determination cannot therefore be disturbed merely because there is a conflict in the evidence against the accused.[11]

619; City of Holton *v.* Bimrod, 61 Kan. 13, 58 Pac. 558; Comfort *v.* Fulton, 39 Barb. (N. Y.) 56; Conner *v.* Com., 3 Binn. (Pa.) 38; City of Garnett *v.* Guynn, 7 Kan. App. 414, 53 Pac. 275; *In re* Boutler, 5 Wyo. 329, 40 Pac. 520.

What Sufficient Showing of Examination of Complainant Prior to Issuing of Warrant. — State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

7. People *v.* Bechtel, 80 Mich. 623, 45 N. W. 582; People *v.* Berry, 107 Mich. 256, 65 N. W. 98; People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213.

What Evidence Sufficient. — In the case of *Ex parte* Dimmig, 74 Cal. 164, 15 Pac. 619, the California court said: "A mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant."

8. **After Indictment.** — After an indictment has been found, the evidence against the accused adduced before the magistrate or a coroner cannot be examined or looked into. People *v.* Dixon, 3 Abb. Pr. (N. Y.) 395; *Ex parte* Tayloe, 5 Cow. (N. Y.) 39; People *v.* McLeod, 1 Hill (N. Y.) 376, 392; People *v.* Van Horne, 8 Barb. (N. Y.) 158.

9. United States *v.* Greene, 108 Fed. 816; Rhea *v.* State, 61 Neb. 15, 84 N. W. 414; Yaner *v.* People, 34 Mich. 286.

10. *In re* McFarland, 59 Hun 304, 13 N. Y. Supp. 22; *In re* Blair, 32 Misc. 175, 65 N. Y. Supp. 640; State *v.* Huegin, 110 Wis. 189, 85 N. W. 1,046; People *v.* Beach, 122 Cal. 37, 54 Pac. 369.

Evidence Examined in Detail and Held Sufficient. — People *v.* Crane, 80 App. Div. 202, 80 N. Y. Supp. 408.

Holding to Answer Offense Proved. — It is the duty of a committing magistrate to hold, and of the prosecutor in drawing an information to charge, the defendant according to the facts proven at the examination, even if they should constitute an offense different from the one charged or specified in the warrant of arrest. People *v.* Staples, 91 Cal. 23, 27 Pac. 523; People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796; People *v.* Smith, 1 Cal. 9.

"We do not desire to be understood that the magistrate must nicely weigh evidence as a petit jury would, or that he must discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial." Yaner *v.* People, 34 Mich. 286.

11. *In re* McFarlane, 59 Hun 304, 13 N. Y. Supp. 22.

If there is any competent evidence

D. Insufficient Evidence: Remedy. — As a committing magistrate is authorized only upon evidence adduced before him to commit or recognize an accused, if there was no competent evidence before the magistrate to establish the commission of the crime charged, and to connect the accused with its commission, the accused may be released upon a proceeding in habeas corpus, the error, it has been held, being jurisdictional in its nature.[12]

3. Who May Administer Oath to Witness. — A committing magistrate has been held to be unauthorized to delegate the duty of administering the oath to witnesses before him, the duty, unless otherwise provided by statute, being one required to be performed personally by the magistrate to render the examination a valid one.[13] The contrary rule, however, has been announced by the Texas court.[14]

4. Number of Witnesses Examined. — Where the statute relating to the examination of witnesses before committing magistrates provides that upon the defendant's being brought before the magistrate he shall examine the witnesses in support of the accusation, it is not necessary to a legal examination that all of the witnesses known to the state shall be examined. It is required only that such a num-

before a justice, sitting as a committing magistrate, on the application for a warrant, jurisdiction of the magistrate will not be reviewed upon the weight of the evidence; that is a question for the justice alone, and if it satisfies him and his warrant issues, his decision is conclusive. People *v.* Lynch, 24 Mich. 274.

12. *Ex parte* Jones, 96 Fed. 200; Palmer *v.* Coladay, 18 App. D. C. 426; People *v.* Martin, 1 Park. Crim. Rep. 187; *In re* Snell, 31 Minn. 110, 16 N. W. 692; *In re* Hardigan, 57 Vt. 100; *In re* Simon, 37 N. Y. St. 48, 13 N. Y. Supp. 399; State *v.* Hayden, 35 Minn. 283, 28 N. W. 659; People *v.* New York Catholic Protectory, 106 N. Y. 604, 13 N. E. 435; *Ex parte* Becker, 86 Cal. 402, 25 Pac. 9; *Ex parte* Willoughby, 14 Nev. 451; Jones *v.* Darnall, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545.

Where the evidence adduced at the examination established the commission of the offense charged, and it cannot be said to be of a character insufficient to warrant the committing magistrate in holding the accused to answer, he will not be released on *habeas corpus*. *Ex parte* Buckley, 105 Cal. 123, 38 Pac. 686.

Rule Stated. — "The statute awarding the privilege [of a preliminary examination] provides that the examining magistrate shall act, in determining the facts, upon evidence, and that contemplates," said the court, "that there must be evidence and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a quasi-judicial body, authorized to act upon evidence, is jurisdictional." State *v.* Huegin, 110 Wis. 189, 85 N. W. 1,046.

13. People *v.* Cohen, 118 Cal. 74, 50 Pac. 20. A county judge, sitting as a committing magistrate, has no power to delegate the authority to another to administer the oath to witnesses testifying before him, without a statute giving him such power either expressly or by necessary implication, his authority in that regard not being greater than that of any other magistrate.

14. Texas. — A county judge in the state of Texas, sitting as a committing magistrate, may himself, it has been held, swear the witnesses before him, or cause them to be sworn by the clerk or the deputy clerk of the county court. Sullivan *v.* State, 6 Tex. App. 319.

ber of witnesses be examined as to bring before the magistrate sufficient evidence to justify the committing or binding over of the accused.[15]

5. Incriminating Evidence: Privilege. — The right of a witness not to give incriminating evidence against himself applies to an examination before a committing magistrate to the same extent as at a trial in a court of record,[16] and by the weight of authority a witness may, in the absence of a statute providing for full immunity from prosecution therefor, refuse at such examination to disclose any circumstances or any sources of evidence that would aid the prosecution against him, whether testifying in his own case, or as a witness in a prosecution against another.[17]

III. RIGHTS OF ACCUSED AT HEARING.

1. To Attend Hearing and Confront Witnesses. — It has been said that an accused is entitled to be present at the time of the taking of every step in a prosecution affecting his rights;[18] but the probably correct rule is that the guaranty to an accused of the right to be present at the trial against him and to meet the witnesses against him face to face does not apply to a preliminary hearing, but only to the trial before a petit jury;[19] but such right is generally con-

15. In discussing this question under a statute of the kind referred to in the text, the court said: "It is claimed by the plaintiffs in error that this statute is mandatory, and that, unless the complaining witness and all the witnesses known to the state are examined, no legal preliminary examination is had. It is sufficient to say that we cannot agree with this contention. We regard the statute as directory only. A sufficient number of witnesses were examined to amply justify the magistrate in binding over Lord for trial, and this must be held to satisfy the statute." Emery *v.* State, 92 Wis. 146, 65 N. W. 848; People *v.* Curtis, 95 Mich. 212, 54 N. W. 767.

16. People *v.* O'Brien, 81 App. Div. 51, 80 N. Y. Supp. 816; Kelly *v.* State, 72 Ala. 244.

17. Lamson *v.* Boyden, 160 Ill. 613, 43 N. E. 781; Smith *v.* Smith, 116 N. C. 386, 21 S. E. 196; *Ex parte* Cohen, 104 Cal. 529, 38 Pac. 364, 43 Am. St. Rep. 127, 26 L. R. A. 423; *In re* Carter, 166 Mo. 604, 66 S. W. 540, 57 L. R. A. 654; Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831; People *v.* O'Brien, 81 App. Div. 51, 80 N. Y. Supp. 816; Counselman *v.* Hitchcock, 142 U. S. 547.

18. *Ex parte* Bryan, 44 Ala. 402; People *v.* Ward, 105 Cal. 652, 39 Pac. 33.

19. Tooke *v.* State, 23 Tex. App. 10, 3 S. W. 782; Hawes *v.* State, 88 Ala. 37, 7 So. 302; Hussey *v.* State, 87 Ala. 121, 6 So. 420; State *v.* Wolcott, 21 Conn. 272; Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575.

Speaking of the constitutional right of an accused to confront the witnesses against him, and also to be represented by counsel, McGrath, D. J., said: "But it should be remembered, in the language of Judge Marshall, that, 'before the accused is put upon his trial, all the proceedings are *ex parte*.' *Ex parte* Bollman, 4 Cranch (U. S.) 75, 129. That these constitutional rights which are supposed to be invaded by this construction are rights which are not contemplated by the constitution in connection with preliminary proceedings; that the privilege of confronting the witnesses is a privilege which pertains to the trial in court; that it does not extend to all periods in the

ferred by statute. And where this right is so granted, but is withheld by those charged with the administration of the law, the information will be quashed.[20] But it is not a right, howsoever secured, that may not be waived.[21]

2. To Produce Witnesses. — In most of the states a prisoner is given the right by statute to produce witnesses at his preliminary examination; but unless this right is conferred by statute or by special constitutional provisions, it does not exist, as the constitutional right of a defendant, ordinarily conferred, to produce witnesses in his own behalf has no application to the preliminary examination, but only to the trial.[22]

3. Right to Compulsory Process for Attendance of Witnesses. — So, also, as an accused has only to the extent provided by statute the right to produce witnesses in his own behalf at his preliminary examination, the right to compulsory process for the attendance of witnesses thereupon must likewise have its foundation in some statutory provision.[23]

proceeding, is manifest in the fact that it cannot be claimed before the grand jury; a period when, if allowed, it would be far more available for the accused than in the preliminary proceedings before the magistrate." *In re* Bates, Betts' Scr. Bk. 574, 2 Fed. Cas. No. 1,099*a*.

At Coroner's Inquest. — A prisoner is not entitled to confront the witnesses called against him at an inquest before a coroner. People *v.* Collins, 20 How. Pr. (N. Y.) 111.

20. Com. *v.* Hughes, 11 Pa. Co. Ct. Rep. 470; Com. *v.* Sheriff, 10 Pa. Co. Ct. Rep. 341.

21. State *v.* Polson, 29 Iowa 133; State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 773, 561; State *v.* Olds, 106 Iowa 110, 76 N. W. 644; Williams *v.* State, 61 Wis. 281, 21 N. W. 56; State *v.* Bowker, 26 Or. 309, 38 Pac. 124; Butler *v.* State, 97 Ind. 378; State *v.* Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305; People *v.* Murray, 52 Mich. 288, 17 N. W. 843; State *v.* O'Connor, 65 Mo. 374, 27 Am. Rep. 291; State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131; Hancock *v.* State, 14 Tex. App. 392.

22. United States *v.* White, 2 Wash. C. C. 29, 28 Fed. Cas. No. 16,685; Lung's Case, 1 Conn. 428; State *v.* Wolcott, 21 Conn. 272; Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575.

Waiver of Time to Prepare for Preliminary Examination. — People *v.* Cokahnour, 120 Cal. 253, 52 Pac. 658.

At Coroner's Inquest. — An accused has no right, except as conferred by statute, to produce witnesses in his behalf before a coroner at an inquest into the homicide. People *v.* Collins, 20 How. Pr. (N. Y.) 111.

23. See Tooke *v.* State, 23 Tex. App. 10, 3 S. W. 782.

Rule Announced in Aaron Burr's Case. — In Aaron Burr's Case, Coomb's trial of Aaron Burr, 37, 25 Fed. Cas. No. 14,692*d*, Marshall, C. J., said: "The eighth amendment to the constitution gives to the accused, 'in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor.' The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. . . . The words of the law are, 'and every such person or persons accused or indicted of the crimes aforesaid [that is, of treason or any other capital offense], shall be allowed and admitted in his said defense to make any proof that he or they can produce by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or

4. Right to Be Heard. — Nor has the accused an inherent or ordinarily constitutional right to testify at his preliminary examination; nor has the magistrate the common law authority to receive evidence from him;[24] but generally, by statute, a person accused of crime may,[25] if he so desire, become a witness at his examination.

IV. USE AT TRIAL OF EVIDENCE GIVEN AT HEARING.

1. As Substantive Evidence: Constitutional Right to Confront Witnesses. — A. EARLY DECISIONS. — The tendency of the early decisions was greatly to limit or wholly to deny the admissibility at the trial of the evidence of a witness who could not be produced at the trial, given at the preliminary examination of the accused.[26] In most jurisdictions the early rule has been either wholly abrogated or its operation greatly limited.

B. MODERN RULE. — a. *Death of Witness.* — The prevailing modern rule is that the evidence of a witness, given at the preliminary examination of an accused, is competent on behalf of the prosecution at the trial of the defendant in the event of the death of such witness prior to the trial, if the accused was present at the examination and afforded an opportunity to confront and to cross-

their trial as is usually granted to compel witnesses to appear on the prosecution against them.' This provision is made for persons accused or indicted. From the imperfection of human language, it frequently happens that sentences which ought to be the most explicit are of doubtful construction, and in this case the words 'accused or indicted' may be construed to be synonymous, to describe a person in the same situation, or to apply to different stages of the prosecution. The word 'or' may be taken in a conjunctive or a disjunctive sense. A reason for understanding them in the latter sense is furnished by the section itself. . . . The fair construction of this clause would seem to be that, with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and the defense are placed by the law on equal ground. The right of the prosecutor to take out subpoenas, or to avail himself of the aid of the court, in any stage of the proceedings previous to the indictment, is not controverted. This act of congress, it is true, applies only to capital cases; but persons charged with offenses not capital have a constitutional and a legal right to examine their testimony, and this act ought to be considered as declaratory of the common law in cases where this constitutional right exists.

"Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses."

24. See People *v.* Gibbons, 43 Cal. 557.

25. People *v.* Kelley, 47 Cal. 125; State *v.* Glass, 50 Wis. 218, 6 N. W. 500, 36 Am. Rep. 845.

26. Early American Cases. — In Finn *v.* Com., 5 Rand. (Va.) 701, which presented the question whether the evidence of a witness absent from the state, given at the preliminary examination of a defendant, was competent at the defendant's trial, the court said: "In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he

examine the witness whose testimony is sought to be shown.[27] The right of a defendant in a criminal prosecution to confront the witnesses against him and to meet them face to face, as conferred by the constitutions of most of the American states, does not affect the reception of such evidence, the constitutional requirements in this regard being satisfied if the defendant, at any stage of the

swore to on the former trial may be given in evidence, for the evidence was given on oath, and the party had an opportunity of cross-examining him. Peake, 60; Phillips, 199. But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise. Nor can we find that the rule in civil cases extends to the admission of the evidence formerly given by a witness who has removed beyond the jurisdiction of the country; much less can it be admitted in a criminal case."

See also Brogy *v.* Com., 10 Gratt. (Va.) 722; Montgomery *v.* Com. (Va.), 37 S. E. 841. (This case is reported in 99 Va. 833, but the official report does not contain the matter relating to this question, which is set out in the unofficial reporter.)

In People *v.* Newman, 5 Hill (N. Y.) 295, the court said: "It seems to be settled in this court that nothing short of the witness' death can be received to let in his testimony given on a former trial. . . . But if the rule were otherwise in respect to civil cases, we are of opinion that it should not be applied to criminal proceedings."

In State *v.* Atkins, 1 Overt. (Tenn.) 229, the court held incompetent the evidence of a deceased witness given at a previous trial of the accused, at which the accused was present, saying of such evidence: "It would go a long way in overthrowing this wise provision of the constitution" (giving the accused the right to confront the witnesses against him). But see Kendrick *v.* State, 10 Humph. (Tenn.) 479, expressly overruling State *v.* Atkins, *supra*.

27. The King *v.* Joliffe, 4 T. R. 290; United States *v.* Macomb, 5 McLean (U. S.) 286, 26 Fed. Cas. No. 15,702; Rex *v.* Barber, 1 Root (Conn.) 76; Motes *v.* United States, 178 U. S. 458; Reg. *v.* Scaife, 2 Den. C. C. 281, 17 Q. B. 238, 5 Cox C. C. 243; State *v.* Wilson, 24 Kan. 189, 22 Alb. L. J. 499; Robinson *v.* State, 68 Ga. 833, 26 Alb. L. J. 137; Mattox *v.* United States, 156 U. S. 237; State *v.* George, 60 Minn. 503, 63 N. W. 100; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920; Barnett *v.* People, 54 Ill. 325; State *v.* McO'Blenis, 24 Mo. 402, 69 Am. Dec. 435; State *v.* Baker, 24 Mo. 437; State *v.* Houser, 26 Mo. 431; State *v.* Harman, 27 Mo. 120; State *v.* Moore, 156 Mo. 204, 56 S. W. 883; Johnston *v.* State, 2 Yerg. (Tenn.) 58; Tharp *v.* State, 15 Ala. 792; Floyd *v.* State, 82 Ala. 16, 2 So. 683; State *v.* Hooker, 17 Vt. 658; Roberts *v.* State, 68 Ala. 515; Bostick *v.* State, 3 Humph. (Tenn.) 344; United States *v.* Wood, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756; Summons *v.* State, 5 Ohio St. 325; United States *v.* Macomb, 5 McLean (U. S.) 286, 26 Fed. Cas. No. 15,702; State *v.* Byers, 16 Mont. 565, 45 Pac. 708; State *v.* Johnson, 12 Nev. 121.

"Under the common law," it has been said, "the depositions of witnesses, taken in the presence of the defendant, could be used at the trial of the cause in case of the death or absence of the witness." Territory *v.* Evans, 2 Idaho 651, 23 Pac. 232, 7 L. R. A. 646.

Contra. — The Virginia case of Montgomery *v.* State, as reported in 37 S. E. 841, 3 Va. Sup. Ct. Rep. 118, follows the decisions of the court of appeals of that state in the case of Finn *v.* Com., 5 Rand. (Va.) 701, and Brogy *v.* Com., 10 Gratt. 722, and holds that the evidence of a witness since deceased given at a former trial of the accused is not admissible at a subsequent trial even in favor of the accused; but the official report of the case (99 Va. 833)

proceedings against him, was afforded an opportunity to confront, in the character of an accused, the witnesses against him.[28] Nor does it affect the admissibility of such evidence that the defendant was not in fact present at such preliminary examination where he was afforded, but did not avail himself of, an opportunity to be present.[29] It is, however, an indispensable requisite to the competency of this evidence that the defendant should have had the right to cross-examine the witness whose evidence is offered against him.[30] In Texas alone of the American states it has been held that the constitutional right of a defendant to meet the witnesses against him face to face is violated by receiving at the trial the evidence of a witness, since deceased, given at the preliminary examination of the accused, on the charge for which he is being tried.[31]

b. *Absence of Witness.* — The reason of the rule affirming the admissibility at the trial of the evidence of a deceased witness given at the preliminary examination of a defendant, operates to the same extent in the case of a witness who is absent from the state at the time of the trial, or who, after diligent search, cannot be found. Recognizing the identity, in reason, of the two classes of cases, it is very generally held that the absence from the state of a witness who testified at the preliminary examination of a defendant, all

is silent on this question, no reference whatever there being made to such a question.

28. State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920; Brown *v.* Com., 73 Pa. St. 321; Com. *v.* Keck, 148 Pa. St. 639, 24 Atl. 161; Barnett *v.* People, 54 Ill. 325; State *v.* McO'Blenis, 24 Mo. 402; Com. *v.* Richards, 18 Pick. (Mass.) 434; Hair *v.* State, 16 Neb. 601, 21 N. W. 464; Brown *v.* Com., 73 Pa. St. 321; Kendrick *v.* State, 10 Humph. (Tenn.) 479; Bostick *v.* State, 3 Humph. (Tenn.) 344; Summons *v.* State, 5 Ohio St. 325; State *v.* King, 24 Utah 482, 68 Pac. 418, 91 Am. St. Rep. 808; Devaugh *v.* Clemens, 17 Ohio Cir. Ct. Rep. 33; State *v.* Byers, 16 Mont. 565, 41 Pac. 708; McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; Territory *v.* Evans, 2 Idaho 651, 23 Pac. 232, 7 L. R. A. 646. See Goldsby *v.* United States, 160 U. S. 70.

Waiver. — The right conferred by statute to confront the witnesses against one at his trial may be waived by a defendant. People *v.* Bird, 132 Cal. 261, 64 Pac. 259.

29. McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; Pooler *v.* State, 97 Wis. 627, 73 N. W. 336.

30. Bostick *v.* State, 3 Humph. (Tenn.) 344.

31. Cline *v.* State, 36 Tex. Crim. 320, 36 S. W. 1,099, 61 Am. St. Rep. 850. The statute held unconstitutional was one authorizing the use of "depositions" taken in the examining trial of an accused. The court, so far as the constitutional question involved is concerned, makes no distinction between such depositions and examining trial evidence, but treats the receiving of all as in violation of the defendant's constitutional right to confront the witnesses against him. For the earlier rule obtaining in Texas, see Johnson *v.* State, 1 Tex. App. 333; Sullivan *v.* State, 6 Tex. App. 319; Flood *v.* State, 19 Tex. App. 584; Bohmy *v.* State, 21 Tex. App. 597, 2 S. W. 886; Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771; *Ex parte* Sundstrom, 25 Tex. App. 133, 8 S. W. 207; *Ex parte* Garza, 28 Tex. App. 381, 13 S. W. 779, 91 Am. St. Rep. 845; Lynn *v.* State, 33 Tex. Crim. 153, 25 S. W. 779.

Former Trial. — *Kentucky.* — Kean *v.* Com., 10 Bush 190, 19 Am. Rep. 63.

Virginia. — Montgomery *v.* Com., as reported in 37 S. E. 841, but see

other necessary conditions concurring, will authorize the reproduction of his evidence at the trial.[32] The contrary rule, however, finds support in very many authorities,[33] and it is difficult to say which is the prevailing rule. The admissibility of the evidence of a witness, who cannot for any reason be produced at the trial, is, in many cases, said to be founded upon the necessity of the case, and the decisions announcing the inadmissibility of the evidence in this class of cases deny the necessity of its being received. In some cases, also, it has been held that to receive the evidence of a witness who is merely absent is violative of the constitutional right of the accused to confront the witnesses against him,[34] though in most cases where the constitutional phase of the question has been considered, it has been held that the defendant's right of confrontation is not violated under such circumstances.[35] Where, however, the

official report of same case in 99 Va. 833.

32. Hurley *v.* State, 29 Ark. 17; Perry *v.* State, 87 Ala. 30, 6 So. 425; Shackelford *v.* State, 33 Ark. 539; Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30; McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; State *v.* Kline, 109 La. 603, 33 So. 618; State *v.* Bolden, 109 La. 484, 33 So. 571; Territory *v.* Evans, 2 Idaho 651, 23 Pac. 232, 7 L. R. A. 646; Long *v.* State, 81 Miss. 448, 33 So. 224; People *v.* Williams, 35 Hun (N. Y.) 516.

Absence from Parish and Not from the State Not Sufficient. State *v.* Laque, 41 La. Ann. 1,070, 6 So. 787.

The Rule in California. — In California there is no constitutional provision guaranteeing to an accused the right to confront the witnesses against him. By statute, however, it is provided that an accused shall be entitled to confront the witnesses against him, except where the charge against him has been preliminarily examined and the testimony taken down by question and answer in the presence of the defendant, who has had proper opportunity to examine the witness, when it is satisfactorily shown to the court that the witness is dead or insane, or cannot, after due diligence, be found within the state. Under this statute, the deposition is the only competent evidence of the testimony given before the magistrate (People *v.* Gardner, 98 Cal. 127, 32 Pac. 880); nor will such a statute admit proof of testimony given at a previous trial of the defendant on the same charge (People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; Parker *v.* Brown, 59 Cal. 345).

Use by Grand Jury. — Without a special provision therefor, the grand jury may not use, to find an indictment against one, the deposition of a witness, taken by a magistrate, who refuses to testify when produced before the grand jury. Reg. *v.* Rendle, 11 Cox C. C. 209. But the deposition may be used by the grand jury if the witness is absent from their jurisdiction. Reg. *v.* Bullard, 14 Moak Eng. Rep. 603, 12 Cox C. C. 353.

33. People *v.* Newman, 5 Hill (N. Y.) 295; Finn *v.* Com., 5 Rand. (Va.) 701; Brogy *v.* Com., 10 Gratt. (Va.) 722; State *v.* Houser, 26 Mo. 431; Collins *v.* Com., 12 Bush (Ky.) 271; Pittman *v.* State, 92 Ga. 480, 17 S. E. 856; United States *v.* Angell, 11 Fed. 34; State *v.* Lee, 13 Mont. 248, 33 Pac. 690; Owens *v.* State, 63 Miss. 450; but see Long *v.* State, 81 Miss. 448, 33 So. 224.

34. United States *v.* Angell, 11 Fed. 34; State *v.* Lee, 13 Mont. 248, 33 Pac. 690; Cline *v.* State, 36 Tex. Crim. 320, 36 S. W. 1,099, 61 Am. St. Rep. 850.

35. Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1,110; Hurley *v.* State, 29 Ark. 17; Sneed *v.* State, 47 Ark. 180, 1 S. W. 68; State *v.* Kline, 109 La. 603, 33 So. 618; Deveaux *v.* Clemens, 17 Ohio Cir. Ct. Rep. 33; State *v.* Lee, 13 Mont. 248, 33 Pac.

defendant procures a witness for the state to be absent from the jurisdiction of the court at the time of his trial, he cannot complain if secondary evidence of the testimony of such witness, given before the magistrate, be received at his trial.[36] The merely temporary absence of a witness will not warrant the receiving of secondary evidence of his testimony given before the magistrate. It must be made to appear either that the witness is permanently absent from the state,[37] or that he will be absent therefrom indefinitely.[38]

c. *Sickness of Witness.* — It has been held in England that the sickness of a witness, rendering him physically unable to be present at the trial of the accused, will justify the receiving of secondary evidence of his testimony given at the preliminary examination of the same charge against the defendant.[39] The American courts, however, require more than the mere illness of a witness, who is within the reach of the process of the court, and the English rule may be said not to have obtained in this country.[40]

690; Territory *v.* Evans, 2 Idaho 651, 23 Pac. 232, 7 L. R. A. 646; People *v.* Williams, 35 Hun (N. Y.) 516; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319.

36. Reg. *v.* Scaife, 2 Den. C. C. 281, 17 Q. B. 238, 5 Cox C. C. 243; State *v.* Houser, 26 Mo. 431; Pittman *v.* State, 92 Ga. 480, 17 S. E. 856.

In a recent case the supreme court of the United States said: "We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial, when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution." Motes *v.* United States, 178 U. S. 458.

Absence of Witness Procured by Private Prosecutor. — The right of the state to introduce evidence of the testimony of a witness, given at the defendant's preliminary examination, is not affected by the fact that the private prosecutor procured the absence of such witness from the state. Peddy *v.* State, 31 Tex. Crim. 547, 21 S. W. 542.

37. Thompson *v.* State, 106 Ala. 67, 17 So. 512; Lucas *v.* State, 96 Ala. 51, 11 So. 216; Perry *v.* State, 87 Ala. 30, 6 So. 425; Pruitt *v.* State, 92 Ala. 41, 9 So. 406.

38. Perry *v.* State, 87 Ala. 30, 6 So. 425; Pruitt *v.* State, 92 Ala. 41, 9 So. 406.

39. English Rule. — In Rex *v.* Hogg, 6 Car. & P. 176, a prosecution for larceny, the prosecutrix was an old woman, "bedridden," and there was no probability that she would ever again be able to leave her house. The court allowed her examination, taken before the committing magistrate, to be read at the defendant's trial, on the ground that there was no likelihood of her ever being able to attend at the trial, rendering the case the same as if she were dead.

"And it was adjudged in the Earl of Stafford's trial (3 St. Tr. 204) that where witnesses could not be produced *viva voce*, by reason of sickness, etc., their depositions might be read for or against the prisoner on a trial of high treason, but not where they might have been produced in person." 2 Hawk. Pl. Cr. Ch. 46, § 20.

In Rex *v.* Savage, 5 Car. & P. 495, the deposition of a witness only temporarily ill was held inadmissible.

40. American Rule. — People *v.* Bojorquez, 55 Cal. 463; Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389.

In State *v.* Staples, 47 N. H. 113, upon an offer to prove what the wife

d. *Insanity of Witness.* — The insanity of a witness at the time of the trial is generally held to be sufficient ground for reproducing at the trial the evidence of such witness given at the preliminary examination of the same charge against the accused.[41] And this is true, even if the witness who testified before the magistrate is only temporarily insane.[42]

e. *Presence of Witness at Trial.* — Secondary evidence of the testimony of a witness given at a preliminary examination is, of course, inadmissible to establish the truth of the facts testified about, if such witness is present or can be produced at the trial. There is, as is evident to every one, no necessity for the receiving of such evidence; and the rule requiring the production of the best evidence in proof of an issue operates also to render such evidence inadmissible.[43]

C. Sufficiency of Predicate. — a. *In General.* — It may be stated as a general rule that the predicate for the introduction at the trial of the evidence of a witness given at a preliminary examination must be established by the same quantum of competent evidence as any other issuable fact in the case.[44]

b. *Return of "Not Found."* — Where the testimony of a witness given at a preliminary examination is admissible at the trial, upon due diligence being shown to procure the presence of the witness, the return of the sheriff to a subpoena for such witness of "not

of the prosecutor, then within the jurisdiction of the court, but physically unable to be present at the trial, testified at a former trial, the court said: "We have not known a practice in this state where the witness is alive and within the jurisdiction of the court, and in criminal proceedings, to allow the former statements of the witness to be used. Such testimony is admitted at any time only upon urgent necessity, and in violation of the familiar rule that the best testimony is to be used, and it would be an anomaly on our practice to introduce the produced former statements of a living witness, through a copyist or a bystander."

41. Rex *v.* Eriswell, 3 T. R. (Eng.) 707; Reg. *v.* Marshall, Car. & Mar. (Eng.) 147; Marler *v.* State, 67 Ala. 55; Sullivan *v.* State, 6 Tex. App. 319.

42. Reg. *v.* Marshall, Car. & Mar. (Eng.) 147.

43. State *v.* Staples, 47 N. H. 113.

44. **Evidence Reviewed and Held Sufficient.** — Conner *v.* State, 21 Tex. App. 176, 17 S. W. 157; Parker *v.* State, 22 Tex. App. 105, 3 S. W. 100; Johnson *v.* State, 27 Tex. App. 135, 11 S. W. 34; People *v.* Nelson, 85 Cal. 421, 24 Pac. 1,006; People *v.* Riley, 75 Cal. 98, 16 Pac. 544.

Evidence Reviewed and Held Insufficient. — Menges *v.* State, 21 Tex. App. 413, 2 S. W. 812; McCollum *v.* State, 29 Tex. App. 162, 14 S. W. 1,020.

Where a witness at the trial has no positive knowledge of the whereabouts of a witness who testified at the preliminary examination, but states merely that he supposes he is absent, such evidence is not sufficient. Harwood *v.* State, 63 Ark. 130, 37 S. W. 304.

In Mitchell *v.* State, 114 Ala. 1, 22 So. 71, it was said: "The rule is exceptional, and is founded on a principle of necessity, rather than upon ideas of mere convenience. To dispense with the primary evidence, and to substitute for it secondary evidence, the existence of some one of the contingencies which create the necessity must be satisfactorily shown."

found," supplemented by a showing of slight search and inquiry for the witness sought, is a sufficient showing of diligence, and renders such testimony competent.[45]

c. *Circumstantial Evidence.* — The predicate for the introduction in evidence of the testimony of a deceased or absent witness, given at the examination of a defendant before a magistrate, may, like any other issue in the case, be established by circumstantial evidence.[46]

d. *Hearsay to Establish Death or Absence.* — Where it is sought to prove the death or absence of a witness in order that his testimony at the preliminary examination may be proved at the trial, hearsay evidence of the death of such witness is not admissible.[47]

e. *Competency of Affidavits.* — Affidavits of the death or nonresidence of a witness are not competent to establish the facts therein recited to warrant the receiving of secondary evidence of the testimony of such witness at the trial.[48]

f. *Question of Law.* — Whether there has been a sufficient showing to admit secondary evidence of the testimony of a witness given at a preliminary examination is a question of law for the court,[49] and is a matter resting largely in the court's discretion.[50]

g. *Res Gestae.* — The statement of a witness, whose evidence given at the preliminary examination is sought to be proved at the trial on the ground of the absence of such witness, made some time prior to the trial when in the act of leaving the state, that he was going to another state, is admissible under the *res*

45. State *v.* Tyler, 46 La. Ann. 1,269, 15 So. 624.

Best Evidence. — The return to the subpoena is not the best evidence, or the only evidence, of the diligence of the sheriff in ascertaining the whereabouts of a witness. State *v.* Riley, 42 La. Ann. 995, 8 So. 469.

46. McCullum *v.* State, 29 Tex. App. 162, 14 S. W. 1,020.

47. General Report. — The mere general report of the death of a witness in the neighborhood where he was last known to reside is inadmissible. State *v.* Wright, 70 Iowa 152, 30 N. W. 388; Mitchell *v.* State, 114 Ala. 1, 22 So. 71.

Letters. — Letters from the guardian of the witness to the son-in-law of the latter, stating that the witness was absent from the state, are only hearsay and not sufficient to establish the absence of such witness. Scruggs *v.* State, 35 Tex. Crim. 622, 34 S. W. 951.

48. People *v.* Plyler, 126 Cal. 379, 58 Pac. 904. "The sole showing made by the prosecution going to the fact of the death of the witness was in the form of an affidavit made by his sister, to the effect that he was dead. This affidavit was admitted under objection. Any evidence introduced to show the death of the witness was as much a part of the trial as any other part of it. And the fact that the witness was dead could no more be shown by affidavit than the fact that the declarations could be shown by affidavit to have been made under the sense of impending death, or that the contents of a written document could be shown, supplemented by an affidavit to the effect that the document was lost. The statute says the fact of death must be satisfactorily shown to the court. It means the fact of death must be shown by relevant and competent evidence. We know of no case where it has ever been held that an affidavit may be introduced as evidence at the actual trial of a defendant."

49. Burton *v.* State, 107 Ala. 68, 18 So. 240.

50. State *v.* King, 24 Utah 482, 68 Pac. 418, 91 Am. St. Rep. 808.

gestae rule, and is a sufficient foundation to admit the evidence of such witness given before the magistrate.[51]

D. Identity of Issue. — The evidence of the defendant, or of any other witness, given at a preliminary examination is competent at the trial of the defendant only when the issues before the magistrate and at the trial are the same.[52] It is not sufficient that the charges at the trial and at the examination before the magistrate grew out of the same unlawful act of the accused. There must be a substantial identity of issue,[53] unless, of course, by stipulation between the prosecution and the defendant this requirement is waived.[54] Parol evidence is competent to show the identity of the issue at the preliminary examination and at the trial.[55]

E. How Established at Trial. — a. *By Parol.* — Unless the testimony of a witness at a preliminary examination has been reduced to writing pursuant to some statute having relation thereto, the testimony so given may be subsequently established by the oral evidence of any competent person who was present at the time the testimony before the magistrate was given.[56]

b. *Competency Where Statute Requires Examination to Be Reduced to Writing.* — The failure of the magistrate to reduce to writing the evidence of witnesses at an examination before him, as required by statute, or to observe the statutory formalities necessary to the competency of such written examinations, will not render parol evidence of such testimony incompetent.[57]

51. In a case of this character the court said: "What one says when he goes upon a journey or returns to his home is admissible in evidence as a verbal act, indicating a present purpose and intention; and in this case the proof at least raised a *prima facie* case that the witness was in the state of Arkansas." Scruggs *v.* State, 35 Tex. Crim. 622, 34 S. W. 951.

52. Reg. *v.* Beeston, Dean's C. C. (Eng.) 405; People *v.* Brennan, 121 Cal. 495, 53 Pac. 1,098; People *v.* Chung Ah Chue, 57 Cal. 567; Davis *v.* State, 17 Ala. 354; Dukes *v.* State, 80 Miss. 353, 31 So. 744; Lett *v.* State, 124 Ala. 64, 27 So. 256; Williams *v.* People, 20 Colo. 272, 57 Pac. 701.

53. Larceny of Two Articles Simultaneously. — Where the defendant stole a buggy, and a mule hitched thereto, the evidence of a witness who testified at the preliminary examination of the defendant on the charge for the larceny of the buggy was held to be incompetent at the trial of the defendant on the charge of stealing the mule. Davis *v.* State, 17 Ala. 354.

Robbery and Murder. — Where a defendant committed a robbery, and while in its commission inflicted injuries upon the person whom he robbed, which resulted in the death of such person, the evidence of a witness given at the preliminary examination of the defendant for the robbery was not competent against him at his trial for the homicide. Dukes *v.* State, 80 Miss. 353, 31 So. 744.

54. People *v.* Brennan, 121 Cal. 495, 53 Pac. 1,098.

55. Lett *v.* State, 124 Ala. 64, 27 So. 256.

56. Robinson *v.* State, 68 Ga. 833, 26 Alb. L. J. 137; Davis *v.* State, 17 Ala. 354; Gamblin *v.* State (Miss.), 33 So. 724.

57. "We deem it proper to say that it was not an objection to the admissibility of the evidence that the justice of the peace had not reduced to writing the examination of the witness, as is required by the statute. The neglect of the justice

c. *Substance of Previous Testimony Sufficient.* — The prevailing modern rule is that the substance only of the evidence of a witness given before the magistrate is required.[58] But, of course, the evidence of a witness who does not remember at least the substance of the testimony so given is inadmissible.[59]

d. *Rule That Exact Language is Necessary.* — The rule announced in many of the early decisions was that only the exact language of the witness in testifying before the magistrate is competent, and that unless the witness by whom it is sought to establish at the trial the testimony given by a witness before the magistrate remembers the exact language, he will not be permitted to testify concerning the same.[60]

e. *General Recollection.* — The general recollection of a witness at the trial as to what the evidence of a witness who can not be produced was, before the magistrate, is inadmissible.[61]

f. *Quantum of Evidence Remembered.* — It is an indispensable requisite to the competency of such evidence that the witness assuming to detail it remembers the whole of the testimony of the witness whose evidence he assumes to give at the trial.[62] But it is not incumbent upon the prosecution, however, to introduce all of the evidence of a witness, as the defendant may introduce any evidence omitted by the prosecution, or may cross-examine the witness called by the prosecution to establish the evidence given before the magistrate.[63]

to perform this duty cannot prejudice the parties, nor does it lessen or add to the tests upon which the admissibility of the testimony depends." Brickwell, C. J., in Thompson *v.* State, 106 Ala. 67, 17 So. 512; Cunning *v.* State, 79 Miss. 284, 30 So. 658. *Quaere*, whether statute is not exclusive. Steele *v.* State, 76 Miss. 387, 24 So. 910.

What is Sufficient Showing That Testimony of Witness Was Not Reduced to Writing So as to Admit Parol. — The testimony of the committing magistrate that to the best of his recollection the testimony of a witness before him was not reduced to writing, is a sufficient showing to render parol evidence of such testimony sufficient. Miller *v.* State, 68 Miss. 221, 8 So. 273.

58. United States *v.* Macomb, 5 McLean (U. S.) 286, 25 Fed. Cas. No. 15,702; United States *v.* White, 5 Cranch C. C. 457, 28 Fed. Cas. No. 16,679; State *v.* Hooker, 17 Vt. 658; Marler *v.* State, 67 Ala. 55; Brown *v.* Com., 73 Pa. St. 321; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Gildersleeve *v.* Caraway, 10 Ala. 260; Sloan *v.* Somers, 20 N. J. L. 66; Garrott *v.* Johnson, 11 Gill & J. (Md.) 173; Smith *v.* Natchez S. S. Co., 1 How. (Miss.) 479; Moore *v.* Pearson, 6 Watts & S. (Pa.) 51; Tharp *v.* State, 15 Ala. 749; Davis *v.* State, 17 Ala. 354; Cornell *v.* Green, 10 Serg. & R. (Pa.) 14; Caton *v.* Lenox, 5 Rand. (Va.) 31.

59. Gamblin *v.* State (Miss.), 33 So. 724.

60. United States *v.* Wood, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756; Summons *v.* State, 5 Ohio St. 325; Com. *v.* Richards, 18 Pick. (Mass.) 434; Wilbur *v.* Selden, 6 Cow. (N. Y.) 162.

61. State *v.* Lee, 13 Mont. 248, 33 Pac. 690.

62. Com. *v.* Richards, 18 Pick. (Mass.) 434; Davis *v.* State, 17 Ala. 354.

63. Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

Evidence of Defendant Before Coroner. — Emery *v.* State, 92 Wis.

g. *Inadmissibility of Effect of Evidence.* — A witness at the trial will not be permitted to state merely the effect of the testimony of a witness before the magistrate.[64]

h. *Refreshing Recollection.* — The notes of evidence made by one who was present at the preliminary examination, if not themselves admissible, may be used to refresh the recollection of the witness called upon to prove such evidence at the trial.[65]

i. *By Deposition and Other Writings.* — Depositions or other written statements of the testimony of witnesses given before a magistrate are competent to prove the testimony of such witnesses only when it is so provided by statute.[66] This being true, the provisions of such a statute must be substantially, if not minutely, complied with.[67]

j. *Best and Secondary Evidence: Presumption.* — Where, pursuant to and conformably with a statutory provision, the

146, 65 N. W. 848. "The state was allowed to introduce certain parts of the statements under oath, made by the defendant Emery at the inquest, it being objected by the defendant that the state must introduce the whole of the testimony or none. This was not error. The defendant was entitled to introduce in evidence the remainder of the statement and he did so."

64. Ballenger *v.* Barnes, 14 N. C. 460; Bowie *v.* O'Neale, 5 Har. & J. (Md.) 226; Wolf *v.* Wyeth, 11 Serg. & R. (Pa.) 149; Tharp *v.* State, 15 Ala. 749.

65. People *v.* Carty, 77 Cal. 213, 19 Pac. 490; People *v.* Kennedy, 105 Mich. 434, 63 N. W. 405; State *v.* George, 60 Minn. 503, 63 N. W. 100; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865; Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731; Wilson *v.* Com., 21 Ky. L. Rep. 1,333, 54 S. W. 946.

Newspaper Report. — The newspaper report of the evidence adduced at a preliminary examination may be used to refresh the recollection of a witness who was present at the examination and prepared the statement of the evidence for publication. United States *v.* Wood, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756.

66. People *v.* Schildwachter, 87 Hun 363, 34 N. Y. Supp. 352; People *v.* Ward, 105 Cal. 652, 39 Pac. 33; People *v.* Gardner, 98 Cal. 127, 32 Pac. 880; People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862; Bass *v.* State, 29 Ark. 142; State *v.* Collins, 32 Iowa 36; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; State *v.* Potter, 6 Idaho 584, 57 Pac. 431; Cunning *v.* State, 79 Miss. 284, 30 So. 658; Gamblin *v.* State (Miss.), 33 So. 724; People *v.* Chung Ah Chue, 57 Cal. 567; People *v.* Bojorquez, 55 Cal. 463.

Notes of Counsel. — The Pennsylvania court has held that the notes of the evidence of a witness taken down by the defendant's counsel are competent when shown to be correct. Brown *v.* Com., 73 Pa. St. 321. But see Territory *v.* Evans, 2 Idaho 651, 23 Pac. 232, 7 L. R. A. 646.

Authority Must Be Conferred by Statute. — "The right of a defendant in a criminal prosecution to be confronted with the witnesses against him in the presence of the court is one of the fundamental principles of the common law, and can be taken from him only by the provisions of some express statute. As this is a right clearly connected with his personal liberty any statute purporting to impair the right is to be liberally construed in his favor; and whenever the state in its prosecution for a crime would offer against the accused the testimony of witnesses not given in the presence of the court, it must point to a statute which authorizes such procedure, and bring itself clearly within the provisions of that statute." People *v.* Ward, 105 Cal. 652, 39 Pac. 33. See also People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862.

67. Gamblin *v.* State (Miss.), 33 So. 724; People *v.* Ward, 105 Cal. 652, 39 Pac. 33; People *v.* Mitchell,

magistrate reduces to writing the testimony given before him, the writing becomes in the absence of the witness the best evidence of what such testimony was, and operates to exclude parol evidence thereof.[68] It will be presumed, where the statute requires it, that the magistrate has performed his duty to reduce the testimony before him to writing, and before oral evidence of such testimony will be received it must be made to appear that the statute was not complied with, or the inadmissibility of the writing must be otherwise satisfactorily shown.[69]

k. *Proper Custody.* — It is no objection to the admissibility of a deposition taken by a magistrate that, prior to the trial, the deposition was taken from the files of the court by an attorney in the case.[70]

l. *Admissibility of Part of Written Examination.* — It is no proper ground of objection that part only of an examination reduced to writing by the magistrate is offered in evidence at the trial, as both the defendant and the state have the right to introduce the remainder thereof in their own behalf if they so desire.[71]

m. *Admissibility of Incomplete Statement.* — Where part only of an examination has been reduced to writing by the magistrate, the incomplete statement is inadmissible, unless the other parts of

64 Cal. 85, 27 Pac. 862; People *v.* Chung Ah Chue, 57 Cal. 567; People *v.* Morine, 54 Cal. 575.

68. Tharp *v.* State, 15 Ala. 749; Cunning *v.* State, 79 Miss. 284, 30 So. 658; Sullivan *v.* State, 6 Tex. App. 319.

Parol to Show Incompleteness of Writing. — It is error to permit a magistrate to testify, for the purpose of explaining the testimony of some of the witnesses for the state, who stated things at the trial which did not appear at the preliminary examination, that he did not take down all the evidence of all the witnesses. Gilbert *v.* Smith, 79 Miss. 284, 30 So. 658.

Contradiction by Parol. — Evidence so reduced to writing cannot be contradicted or varied by the magistrate's statements from his recollection of the testimony. Matthews *v.* State, 96 Ala. 62, 11 So. 203.

69. Gilbreath *v.* State, 26 Tex. App. 315, 9 S. W. 618; O'Connell *v.* State, 10 Tex. App. 567; Guy *v.* State, 9 Tex. App. 161; Sullivan *v.* State, 6 Tex. App. 319; State *v.* Simien, 30 La. Ann. 296.

Loss of Written Deposition. Evidence examined and loss held to be sufficiently shown to warrant the receiving of oral evidence of previous testimony. Pitts *v.* State, 29 Tex. App. 374, 16 S. W. 189.

The minutes of testimony not read to or signed by the witnesses detailing it are not conclusive upon what such witnesses testified to at a preliminary examination. State *v.* Hull, 26 Iowa 292.

70. State *v.* Moore, 156 Mo. 204, 56 S. W. 883.

71. Emery *v.* State, 92 Wis. 146, 65 N. W. 848; Webb *v.* State, 100 Ala. 47, 14 So. 865; Burns *v.* State, 49 Ala. 370.

State's Right to Introduce Part of Examination Not Introduced by Defendant. — Where the defendant, being authorized to introduce at the trial the written statement of the testimony at his preliminary examination, introduces only a part thereof, it is not error to permit the state to introduce the remainder of the testimony of the witness upon the same subject and explanatory thereof. People *v.* Arthur, 93 Cal. 536, 29 Pac. 126; State *v.* Jackson, 9 Mont. 508, 24 Pac. 213.

the examination, not reduced to writing, can be supplied by parol.[72]

n. *Defendant's Right to Use Notes of Testimony Given Before the Magistrate.* — In the absence of a statute conferring that right, a defendant is not entitled to have produced at his trial for his inspection the written statement of the testimony before the magistrate.[73]

o. *Harmless Error.* — Error, if any, in admitting in evidence at the trial an insufficient deposition taken at the preliminary examination of accused is harmless if the defendant at his trial testifies to the same state of facts,[74] or if the evidence set forth in the insufficiently authenticated deposition is shown also by parol by a competent witness.[75]

2. For Purposes of Contradiction or Impeachment. — The evidence of a witness, or of a defendant testifying as a witness, at a preliminary examination is of course competent for the purpose of contradiction or impeachment at the trial.[76] The written examination or deposition, if formally taken, is competent at the trial as original evidence to discredit the witness who made it, without cross-examining him concerning it.[77] If not taken conformably to

72. Tharp *v.* State, 15 Ala. 749.

73. Territory *v.* McFarlane, 7 N. M. 421, 37 Pac. 1,111. "The third ground," said the court, "is on the exception to refusing the motion to require the production of the testimony taken before the justice of the peace for the inspection of the defendant at the trial. We know of no statute requiring the production of the testimony on preliminary hearings for the inspection of the defendant, and the ruling of the trial judge on that point is sustained."

Private Notes of Prosecutor's Stenographer. — A defendant has no right to the notes of the evidence given at his preliminary examination, made by the private stenographer of the commonwealth's attorney at his own expense and for his own use. Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

74. State *v.* Hatcher, 29 Or. 309, 44 Pac. 584.

75. Campbell *v.* State, 81 Miss. 417, 33 So. 224.

76. People *v.* Hawley, 111 Cal. 78, 43 Pac. 404; People *v.* Lambert, 120 Cal. 170, 52 Pac. 307; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865; Armstrong *v.* State, 33 Tex. Crim. 417, 26 S. W. 829; Collins *v.* State, 39 Tex. Crim. 441, 46 S. W. 933.

Denial of Correctness of Deposition. — If the written examination of the defendant is properly taken, it is competent for the purpose of impeachment, even if the witness denies the correctness of the record. Jackson *v.* State, 33 Tex. Crim. 281, 26 S. W. 194, 47 Am. St. Rep. 30.

Deposition May Be Explained. But where a witness is sought to be impeached by his deposition taken before the magistrate, he may, upon redirect examination, explain his former testimony; to do so does not violate the rule that a record cannot be explained or varied by parol. People *v.* Lambert, 120 Cal. 170, 52 Pac. 307. It is held in same case that the prosecution cannot, for the purpose of impeaching a witness, introduce more of the impeaching deposition than bears upon the matter concerning which the witness is supposed to have testified differently; if more than this, any other part of the record is inadmissible.

Effect of Statute. — The statute authorizing the reading of an authenticated deposition at a trial where the witness is dead or absent does not exclude such deposition for the purpose of impeaching a present witness. People *v.* Hawley, 111 Cal. 78, 43 Pac. 404.

77. People *v.* Kennedy, 105 Mich.

the statute, however, it has been held not competent, even for the purpose of impeachment.[78] But in such a case, what the testimony before the magistrate was may be shown by parol.[79] So affidavits taken at the preliminary examination, while not competent to prove the truth of the statements therein set forth, may be used for the purpose of impeaching the witness testifying at the trial;[80] and where a witness merely is sought to be impeached, this does not infringe the defendant's constitutional right to confront the witness against him.[81]

3. Practice: Sufficiency of Depositions and Written Examination. A. By Whom Reduced to Writing. — a. *Waiver of Unofficial Character of Stenographer.* — The failure of a defendant to object at a preliminary examination that the stenographer who reduced to writing the testimony of the witnesses before the magistrate is not the official stenographer authorized by law to act in that capacity amounts to a waiver of any objection on that ground to the admissibility of such writing at the trial of the defendant.[82]

B. Signature of Witness to Examination. — Where it is required that the written statement of the testimony of a witness, given before a committing magistrate, shall be read to or by the witness and by him signed, the failure of the witness to sign such statement renders the same essentially defective, and inadmissible as evidence in a subsequent proceeding.[83] The witness must sign

434, 63 N. W. 405; People *v.* Butler, 55 Mich. 409, 21 N. W. 385; Lightfoot *v.* People, 16 Mich. 507. But see State *v.* Hayden, 45 Iowa 11.

78. Cunning *v.* State, 79 Miss. 284, 30 So. 568.

Contra. — State *v.* Jordan, 110 N. C. 491, 14 S. E. 752; Bryan *v.* Moring, 94 N. C. 687; State *v.* Pierce, 91 N. C. 606.

79. Cunning *v.* State, 79 Miss. 284, 30 So. 568.

Interpreter. — If a witness, whom it is sought to impeach by showing contradictory statements made before a magistrate in an examination of the same charge, testifies in a foreign language, the interpreter, or some other person present who understands the language in which the witness testifies, should be called to prove the evidence so given at the hearing. People *v.* Ah Yute, 56 Cal. 119; People *v.* Lee Ah Yute, 60 Cal. 95; People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

80. People *v.* Lindgren, 128 Mich. 694, 87 N. W. 1,026.

81. People *v.* Case, 105 Mich. 92, 62 N. W. 1,017.

82. State *v.* Turner, 114 Iowa 426, 87 N. W. 287; People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1,049, 40 L. R. A. 269.

Statute Not Mandatory. — Under a statute requiring the magistrate to reduce to writing the evidence of the witnesses testifying before him, it is sufficient that it be reduced to writing under his direction. State *v.* Wiggins, 50 La. Ann. 330, 23 So. 334; People *v.* McIntyre, 127 Cal. 423, 59 Pac. 779.

83. People *v.* Smith, 25 Mich. 497.

The failure of all the witnesses testifying before a magistrate to sign their written depositions will have the effect to render the examination of the defendant at such a hearing null — the same as if no examination were given him; but of course the failure of only one of a number of witnesses to sign his deposition will not have this effect, provided there was sufficient testimony from witnesses who did subscribe their depositions to bind the accused over. People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857.

Under the Louisiana statute it is

the written statement of his testimony at the time it is taken down, and before it is filed with the trial court.[84] Even where the statute does not require it, the accused may demand that the deposition of a witness taken by the magistrate be read to the witness before signing it,[85] but the mere failure to do so in such a case without objection from the defendant will not affect the validity of the deposition.[86]

C. Filing in Trial Court. — The failure to reduce to writing and to file with the trial court the testimony of a witness given at the preliminary examination of an accused, as required by statute, does not deprive the magistrate, or the trial court, of jurisdiction of the cause.[87] Statutes requiring such filing are directory only,[88] and it is sufficient if the filing is done before the conclusion of the trial,[89] or within a reasonable time after the same is reduced to writing.[90]

D. Identification of the Written Examination of a Witness. — The magistrate before whom a witness testifies and the stenographer who reduces the testimony of the witness to writing, as well as any other person familiar with the facts, are competent witnesses to identify or to establish the correctness of the writing so made, when offered in evidence at the trial of the accused in such proceeding.[91]

E. Certifying: Amendment of Certificate and Transcript. It is ordinarily within the power of a magistrate, after a case has been certified by him to the trial court, to complete his transcript and otherwise perform the clerical duties that he should have performed upon the preliminary hearing.[92] But he may not amend his transcript so as to make it speak something entirely different from what it had spoken before, or show an additional fact, upon the non-existence of which the defendant may have waived some legal right.[93]

F. Authentication. — Parol evidence of the magistrate or of the stenographer is competent to show, where the deposition is silent, that the deposition was taken and the examination had in accordance with the requirements, constitutional and statutory, of

not necessary that the witness sign his written deposition. State *v.* Wiggins, 50 La. Ann. 330, 23 So. 334.

Authenticating by Parol When Not Signed. — Roberts *v.* State, 68 Ala. 515.

84. People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857.

85. People *v.* Smith, 25 Mich. 497; People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857.

86. People *v.* Gleason, 63 Mich. 626, 30 N. W. 210.

87. State *v.* Flowers, 58 Kan. 702, 50 Pac. 938.

88. People *v.* Eslabe, 127 Cal. 243, 59 Pac. 577; People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

89. People *v.* Eslabe, 127 Cal. 243, 59 Pac. 577.

90. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

91. Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30; State *v.* Wise, 83 Iowa 596, 50 N. W. 59.

92. State *v.* Geary, 58 Kan. 502, 49 Pac. 596.

93. State *v.* Geary, 58 Kan. 502, 49 Pac. 596; Long *v.* State, 81 Miss. 448, 33 So. 224.

the law.[94] But in California it has been held that the deposition should be so authenticated that an inspection thereof will show that it is testimony taken at the preliminary examination of the accused who is then on trial, and cannot be made to depend upon, or be established by, the parol evidence of the magistrate or of the reporter that it is such testimony;[95] and it has been held that if the deposition depends upon a certificate thereto, containing certain recitals as to the contents of the deposition, any omissions therein cannot be supplied by parol.[96]

G. Interpreters. — Where the testimony before the magistrate is given through an interpreter, the notes of such testimony, taken as given by the interpreter, are mere hearsay and therefore inadmissible at any subsequent proceeding.[97] The interpreter, however, may be called at the trial to give oral evidence of such testimony;[98] where, however, it is provided by statute that, upon the interpreter's being sworn, his statement of the testimony may be reduced to writing and subsequently used in evidence, there is no legal objection to its being so used,[99] and it may be shown by parol that the interpreter was sworn as required by the statute.[1]

H. Waiver of Irregularities. — Mere irregularities in preparing the written examinations of witnesses may be waived by a defendant by a failure to object at the examination,[2] or by his subsequently attempting to use such examination for his own purposes.[3]

94. State *v.* Depositer, 21 Nev. 107, 25 Pac. 1,000; Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30; People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920; State *v.* Jones, 7 Nev. 408; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

95. People *v.* Ward, 105 Cal. 652, 39 Pac. 33.

96. People *v.* Carty, 77 Cal. 213, 19 Pac. 490.

97. People *v.* Lee Fat, 54 Cal. 527.

Where the examination of a witness was all in English except one immaterial question, such examination is not open to the objection that it was taken through an interpreter. People *v.* Sierp, 116 Cal. 249, 48 Pac. 88.

98. People *v.* Thiede, 11 Utah 241, 39 Pac. 837; People *v.* Lee Ah Yute, 60 Cal. 95; People *v.* Lee Fat, 54 Cal. 527.

People *v.* Ah Yute, 56 Cal. 119. "These statements," said the court, "were not spoken by the defendant in English. They were spoken in a foreign language and translated into the English language for the use of the court, the jury and the reporter. In taking them down in shorthand, the reporter received them from the lips of the interpreter, and not from the defendant. It is, therefore, evident that the reporter did not understand the language in which the defendant spoke, and that he did not pretend to testify from his own knowledge or recollection of what the witness said, but from the shorthand notes of what the interpreter had said. The interpreter, or some other witness who heard and understood the language in which the statements of the defendant were made, should have been called to prove them."

99. State *v.* Bolden, 109 La. 484, 33 So. 571.

1. People *v.* Dowdigan, 67 Mich. 95, 39 N. W. 920.

2. State *v.* Kline, 109 La. 603, 33 So. 618.

3. State *v.* Kline, 109 La. 603, 33 So. 618.

V. TESTIMONY AND CONFESSIONS OF ACCUSED.

1. Competency at Trial. — A. Must Be Voluntary. — Where a defendant is by statute made a competent witness in his own behalf, and authorized to testify at his preliminary examination, his voluntary statements made before the magistrate may be given against him at his trial,[4] or he may be cross-examined concerning them;[5] and the same rule applies to the voluntary confessions of an accused, whether made at his own examination,[6] at the examination of another,[7] or at the inquisition before a coroner.[8] And the voluntary confession, reduced to writing, is admissible against the defendant at his trial, even, it has been held, if not authenticated by the magistrate according to the provisions of the statute under which it was

4. Wilson *v.* United States, 162 U. S. 613; People *v.* Kelley, 47 Cal. 125; People *v.* O'Brien, 66 Cal. 602, 6 Pac. 695; State *v.* Rover, 13 Nev. 217; State *v.* Melton, 120 N. C. 591, 26 S. E. 933; Hill *v.* State, 64 Miss. 431, 1 So. 494; Steele *v.* State, 76 Miss. 387, 24 So. 910; State *v.* Mullins, 101 Mo. 514, 14 S. W. 625; Stephens *v.* State, 36 Tex. Crim. 386, 37 S. W. 425; Copeland *v.* State, (Tex. Crim.), 40 S. W. 589; United States *v.* Kirkwood, 5 Utah 123, 13 Pac. 234; State *v.* Glass, 50 Wis. 218, 36 Am. Rep. 845.

Where the defendant at a preliminary examination is by statute forbidden to be sworn, statements made by him under oath are not competent against him at his trial. People *v.* Gibbons, 43 Cal. 557; People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404.

Silence. — The silence of an accused before a magistrate does not amount to a confession. Kirby *v.* State, 23 Tex. App. 13, 5 S. W. 165. Nor is an inference of guilt to be indulged against a defendant who nods his assent to incriminating evidence when detailed against him. State *v.* Hale, 156 Mo. 102, 56 S. W. 881.

5. Steele *v.* State, 76 Miss. 387, 24 So. 910.

6. Rex *v.* Tubby, 5 Car. & P. (Eng.) 530; Rex *v.* Haworth, 4 Car. & P. (Eng.) 254; People *v.* Eaton, 59 Mich. 559, 26 N. W. 702; People *v.* Taylor, 93 Mich. 638, 53 N. W. 777; People *v.* Butler, 111 Mich. 483, 69 N. W. 734; Salas *v.* State, 31 Tex. Crim. 485, 21 S. W. 44; Shaw *v.* State, 32 Tex. Crim. 155, 22 S. W. 588; State *v.* Carson, 36 S. C. 524.

Statements and Confessions of Defendants Jointly Charged. — Where two defendants are jointly charged and together examined before the magistrate, the statements of each, exonerating himself and charging the other as solely responsible for the crime, are not admissible as the confession of the one against whom such statements are made. State *v.* Carson, 36 S. C. 524, 15 S. E. 588. But of course where two defendants so charged and examined confess at their examination, the confession made by each is competent against him at his trial.

7. O'Connell *v.* State, 10 Tex. App. 567.

8. Statements Before Coroner. The voluntary statements of a witness made at the inquisition before a coroner, before he was accused or suspected of the commission of the homicide, to ascertain which the coroner's inquisition was held, may be given against the accused at his trial as a confession. People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404; Com. *v.* King, 8 Gray (Mass.) 501; Com. *v.* Bradford, 126 Mass. 42; Kirby *v.* State, 23 Tex. 13, 5 S. W. 165; Wilson *v.* State, 110 Ala. 1, 20 So. 415.

Defendant's Knowledge That He is Charged or Suspected. — Under the common law, the statements of a witness, knowing himself to be charged or suspected, made before a coroner, are not competent against him at his trial. People *v.* McMahon, 15 N. Y. 384; Wood *v.* State, 22 Tex. App. 431, 3 S. W. 336.

taken.[9] If involuntarily given, the testimony or confession of an accused is not subsequently admissible for any purpose.[10] The common law rule was that the statements of a defendant in a criminal prosecution were involuntary if made under oath, the administering of the oath being considered compulsion;[11] but where by statute the defendant is made a competent witness in his own behalf, his statements, if given under oath, will not for that reason be considered involuntary.[12] Nor does it affect the voluntary character of the statement of an accused that questions were propounded to him by the magistrate, and by the state's attorney to elicit certain information after the accused had decided to give it.[13] But where a magistrate is not authorized to examine one brought before him as an accused, any statements elicited by an examination under such circumstances are inadmissible against the accused at his trial.[14]

B. STATUTORY WARNING. — a. *What Sufficient.* — It is commonly provided by statute that the magistrate shall, before the person brought before him for examination testifies or makes any statement concerning the charge against him, inform him of his right to remain silent, but that if he should elect to testify, his statements may

9. Luera *v.* State (Tex. Crim.), 32 S. W. 898.

"Let us concede," said the Texas court in a recent case, "that the appellant should not have been sworn; and concede that his statement is not properly authenticated by the justice. Still he was cautioned that it might be used against him, and he, under these facts, voluntarily made and signed it. Suppose he had written a letter containing the statement under discussion, would not the letter have been evidence against him? . . . We are of the opinion that the statement was properly admitted in evidence." Salas *v.* State, 31 Tex. Crim. 485, 21 S. W. 44.

Oral Evidence Admissible if Written Statement is Not. — Stephens *v.* State, 36 Tex. Crim. 386, 37 S. W. 425.

10. People *v.* Butler, 111 Mich. 483, 69 N. W. 734.

Excitement of Defendant. — A voluntary confession is not inadmissible at the defendant's trial merely because at the time it was made he was greatly excited. People *v.* Cokahnour, 120 Cal. 253, 52 Pac. 505.

11. Aiken *v.* State, (Tex. Crim.), 64 S. W. 57; Bailey *v.* State, 26 Tex. App. 706, 9 S. W. 270; State *v.* Baker, 58 S. C. 111, 36 S. E. 501.

Privilege. — The defendant can no more be compelled to testify against himself at his examination before the magistrate than at his trial. Kelly *v.* State, 72 Ala. 244.

Testimony Before Coroner. — The testimony of an accused at the coroner's inquest is inadmissible against him, where he testified upon the belief that it was his legal duty to answer the questions propounded to him. State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1,091.

12. Wilson *v.* United States, 162 U. S. 613; Steele *v.* State, 76 Miss. 387, 24 So. 910; Farkas *v.* State, 60 Miss. 847; Jackson *v.* State, 56 Miss. 311; People *v.* McMahon, 15 N. Y. 384; People *v.* McGloin, 91 N. Y. 241; Com. *v.* Clark, 130 Pa. St. 641, 18 Atl. 988.

13. Wilson *v.* United States, 162 U. S. 613; Wilson *v.* State, 108 Ala. 680, 20 So. 415; People *v.* Kelley, 47 Cal. 125; Com. *v.* Bradford, 126 Mass. 42; Steele *v.* State, 76 Miss. 387, 24 So. 910; State *v.* Eddings, 71 Mo. 545; Com. *v.* Clark, 130 Pa. St. 641, 18 Atl. 988; People *v.* Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; Wolf *v.* Com., 30 Gratt. (Va.) 833; State *v.* Glass, 50 Wis. 218, 36 Am. Rep. 845.

14. Aiken *v.* State, (Tex. Crim.), 64 S. W. 57; Bailey *v.* State, 26 Tex. App. 706, 9 S. W. 270; State *v.*

be used against him at his trial. Consonant to the well-established rule that proper official action will always be presumed, the trial court and the court on appeal will indulge the presumption, the record showing nothing to the contrary, that the defendant, before he testified or made any statements before the magistrate, was duly cautioned.[15] The Oregon court in a recent case has taken the contrary view of this question, and held that it must affirmatively appear from the record of the proceedings before the magistrate that the defendant was warned as required by statute before his statement or confession will be competent against him at his trial.[16] But it is not necessary that the warning be given in the very language of the statute; a substantial compliance therewith is all that is required.[17] There is no duty to warn a defendant of his right not to testify unless it is imposed by statute.[18] The failure to caution a defendant as required by the statute will render his statements before the magistrate incompetent at his trial.[19] Nor will a confession made by a defendant in custody on one charge, without having been properly warned, be admissible against him on the trial of another charge.[20]

b. *Presumption.* — It will be presumed that a magistrate proceeds legally at an examination, nothing to the contrary affirmatively appearing; and witnesses testifying before him will be presumed, when their testimony so given is offered against them as a defendant in a subsequent proceeding, to have testified voluntarily.[21]

2. Formalities in Taking and Preserving Same. — A. Failure to Comply With: Effect. — As in the case of the depositions of witnesses, where it is the statutory duty of the magistrate to reduce to writing the statements or confessions of the accused before him and to observe certain formalities in doing so, it will be presumed that this duty was performed.[22] While parol evidence of what the defendant testified to or voluntarily confessed before the magistrate is generally admissible at the trial if it was not reduced to writing conformably with the statute,[23] it must first be made affirmatively to appear that the magistrate did not perform his duty in that regard, as the writing is the best evidence.[24] But informalities of a merely technical nature, such as transmitting the written statement of the

Baker, 58 S. C. 111, 36 S. E. 501; Wilson *v.* State, 84 Ala. 426, 4 So. 383; Kelly *v.* State, 72 Ala. 244.

15. People *v.* Gibbons, 43 Cal. 557; People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404.

16. State *v.* Hatcher, 29 Or. 309, 44 Pac. 584.

17. State *v.* DeGraff, 113 N. C. 688, 18 S. E. 507; State *v.* Rogers, 112 N. C. 874, 17 S. E. 297; Stare *v.* Collins, 70 N. C. 241.

18. Dill *v.* State, 35 Tex. Crim. 240, 33 S. W. 126, 60 Am. St. Rep. 37. But see Seaborn *v.* State, 20 Ala. 15.

19. Walker *v.* State, 28 Tex. App. 112, 12 S. W. 503.

20. Neiderluck *v.* State, 21 Tex. App. 320, 17 S. W. 467.

21. Steele *v.* State, 76 Miss. 387, 24 So. 910; Wright *v.* State, 50 Miss. 332.

22. Wright *v.* State, 50 Miss. 332.

23. O'Connell *v.* State, 10 Tex. App. 567; Guy *v.* State, 9 Tex. App. 161; State *v.* Simien, 30 La. Ann. 296.

24. O'Connell *v.* State, 10 Tex.

defendant to the trial court unsealed when the statute provides that it shall be in a sealed envelope, do not affect the admissibility of such writings at the trial.[25]

App. 567; Peter *v.* State, 4 Smed. & M. (Miss.) 31. In Wright *v.* State, 50 Miss. 332, the court said: "As the statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, and shall certify and send up the same to the next term of the circuit court of the proper county, on or before the first day of the term, the law *conclusively presumes* that if anything was taken down in writing, the justice of the peace performed his whole duty by taking down all that was material. In such case no parol evidence of what the person may have said on that occasion can be received. But if it be shown that the examination was not reduced to writing, or if the written examination is wholly inadmissible by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty and oral evidence will be rejected." See also Hightower *v.* State, 58 Miss. 636.

25. Luera *v.* State (Tex. Crim.), 32 S. W. 898.

EXAMINATION OF PARTIES BEFORE TRIAL.

By C. R. Mahan.

CROSS-REFERENCES:

Depositions; Discovery; Documentary Evidence.

I. THE RIGHT.

1. Statutory Provisions in the United States. — A. In General. Excepting the right of discovery in equity, the right of a party litigant to examine an adverse party in advance of trial for the purpose of eliciting disclosures from him, whether by means of interrogatories to be answered by him, or by an oral examination, is one authorized only by statute.[1]

B. The Object of the Statutes. — The object of these statutes authorizing the examination of an adverse party in advance of trial has been to provide a substitute for, and obviate the necessity of, a resort to the ancient bill of discovery;[2] although in some juris-

1. Frawley *v.* Cosgrove, 83 Wis. 441, 53 N. W. 689; Smith *v.* Olsen, 92 Tex. 181, 46 S. W. 631; Paul *v.* Baltimore & O. R. Co. (Ind. App.), 69 N. E. 1,024; State *ex inf.* Crow *v.* Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737, where the statute of Missouri is set out in full and an extended discussion of this provision is to be found.

Imprisonment for Non-Appearance. Under a statute authorizing any party to a civil action at law to compel his adversary to testify as a witness in his behalf in the same manner and subject to the same rules as other witnesses, such adverse party may be compelled to give his deposition in the same manner as any other witness. Buckingham *v.* Barnham, 30 Conn. 358, so holding on a petition for a writ of *habeas corpus*, the object of which was to try the legality of the imprisonment of the applicant for not appearing before a justice of the peace to give his deposition in an action at law then pending between himself and another.

2. *Alabama.* — Saltmarsh *v.* Bower, 22 Ala. 221; Huggins *v.* Carter, 7 Ala. 630.

Florida. — Jacksonville T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1,157, 9 So. 661.

Indiana. — Barnard *v.* Flinn, 8 Ind. 204.

Massachusetts. — Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031.

Michigan. — Riopelle *v.* Doeltner, 26 Mich. 102.

New Jersey. — Wolters *v.* Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627.

New York. — Glenney *v.* Stedwell, 64 N. Y. 120.

North Carolina. — Strudwick *v.* Brodnax, 83 N. C. 401.

Texas. — Barnard *v.* Blum, 69 Tex. 608, 7 S. W. 98; Love *v.* Keowne, 58 Tex. 191.

Wisconsin. — Noonan *v.* Orton, 28 Wis. 386.

Rule Stated. — "A bill of discovery was born of necessity, for there was then no other way by which a party to an action could secure the benefit of facts within the exclusive personal knowledge of his adversary, or of documents in his exclusive possession; but the remedies provided by our civil code and other statutes, giving a party the right to call his adversary as a witness, and compel the production of books and documents, have swept away every ground and reason for a bill of discovery, and substituted for it simple, prompt and efficient remedies and methods, which are radically inconsistent with the cumbersome, expensive and dilatory machinery of the former chancery practice. These remedies, furnished by our reform code of procedure, are not simply cumulative, but abrogate bills of discovery and the practice and procedure in the former court of chancery, so far as they are inconsistent therewith." Turnbull *v.* Crick, 63 Minn. 91, 65 N. W. 135.

The Main Purpose of the Massachusetts Practice Act in this respect, "was to substitute, in place of the tedious, expensive and complex process of a bill of discovery on the equity side of the court, an easy, cheap and simple mode of interrogat-

dictions they are not intended wholly to exclude the right to resort to a technical bill of discovery.[3]

Application of Rules Governing Equitable Discovery. — It is accordingly ruled that, except as it is otherwise expressly provided by the governing statute, the examination of a party before trial is governed generally by the same rules which govern the bill of discovery in equity.[4]

C. LIBERAL CONSTRUCTION OF STATUTES. — It is generally held that the statutes giving a party the right to examine an adverse party in advance of trial are remedial, and are to be liberally construed,[5] although there is authority to the contrary.[6]

ing an adverse party, as incident to and part of the proceedings in the cause in which the discovery was sought. It was not intended to make the parties to a cause witnesses, who might, at the pleasure of the party interrogating, be made to testify respecting the whole case; but only to give a limited right to obtain evidence from an adverse party, in analogy to the well settled rules regulating bills of discovery in the court of chancery in England." Wilson *v.* Webber, 2 Gray (Mass.) 558.

3. See Wilson *v.* Webber, 2 Gray (Mass.) 558. See also the article "DISCOVERY."

4. Kinney *v.* Roberts, 26 Hun (N. Y.) 166. See also the cases cited generally in the previous note.

In Connecticut a statute provides that the plaintiff in an action at law at any time after the entry of the action, or the defendant at any time after the answer, may file a motion praying for the discovery of facts or the production of documents material to the support or defense of the suit within the knowledge, possession or power of the adverse party, and such facts or documents being disclosed or produced may be given in evidence by the party filing the motion; and in Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977, it is held that this statute was not designed to enlarge the scope of any equitable principle, but simply to enable courts of law in administering legal remedies to exercise a clearly defined power of a court of equity.

"**The Doctrine and Rules Concerning the Subject-matter of Discovery** established by courts of equity, are believed to be still in force and to control the same matters in the new procedure, but the bill of discovery, as a separate action, is practically obsolete in this state." Chapman *v.* Lee, 45 Ohio St. 356, 13 N. E. 736.

Alabama Statute. — In Cain. Lumb. Co. *v.* Standard Dry-Kiln Co., 108 Ala. 346, 18 So. 882, the court said: "The purposes of the two statutes, and the mode of procedure prescribed, are similar, if not identical. Each created a right to a discovery in civil suits at law, which, in the absence of statute, could be obtained only in equity. The mode of procedure is assimilated to that pursued in equity. The filing of interrogatories, which, when read in connection with the issues formed, disclose the materiality and pertinency of the testimony sought to be elicited, is the equivalent of the necessary allegations of a bill in equity for discovery. The requisition of a verified answer to them, and the proceedings to which the court may resort, if answer is not made, or if it be not full, or is evasive, indicate that the practice and procedure should be analagous to the practice and procedure of courts of equity."

5. Cleveland *v.* Burnham, 60 Wis. 16, 18 N. W. 190; Schmidt *v.* Menasha Woodenware Co., 92 Wis. 529, 66 N. W. 695; Frawley *v.* Cosgrove, 83 Wis. 441, 53 N. W. 689, wherein the court said: "The object of the section was to abolish, not only the form, but also the substance, of the old bill of discovery, and to enable the party to obtain the benefits of the bill, and also a more ample remedy by taking the deposition of the adverse party as a witness in the case upon all questions involved in the issues."

6. Wheeler *v.* Burckhardt, 34 Or.

D. Denial of Material Averment. — The fact that a party has denied in his pleading a material averment in his adversary's pleading will not exempt him from being examined before trial.[7]

E. Denial of Ability to Give Information. — The fact that a party to be examined denies that he can give any information will not defeat an application.[8]

F. Intended Presence at Trial. — The mere fact that the party to be examined orally states that it is his present intention to be present at the trial is no ground for refusing the examination.[9]

G. Party to Be Examined Without Equivalent Right. — It has been held that the right of a party to examine an adverse party by means of interrogatories is not affected by the fact that the party to be examined is without equivalent right as against the examining party.[10]

H. Competency of Party as Witness. — The statute making parties in civil actions competent witnesses, either for or against themselves, does not supersede or take away the right under the statute to examine them on written interrogatories.[11]

I. Mode of Examination. — The mode of examining an adverse party in advance of trial is always fixed by statute, and the mode thus provided must be followed.[12]

504, 56 Pac. 644. See also Roberts *v.* Parrish, 17 Or. 583, 22 Pac. 136.

7. Olney *v.* Hatcliff, 37 Hun (N. Y.) 286; Sweeney *v.* Sturgis, 24 Hun (N. Y.) 162.

8. Wallace *v.* Reinhardt, 11 Misc. 519, 32 N. Y. Supp. 740; Davis *v.* Stanford, 37 Hun (N. Y.) 531.

9. Commerical Pub. Co. *v.* Beckwith, 57 App. Div. 574, 68 N. Y. Supp. 600; Press Pub. Co. *v.* Star Co., 33 App. Div. 242, 53 N. Y. Supp. 371; Presbrey *v.* Public Opinion Co., 6 App. Div. 600, 39 N. Y. Supp. 957.

10. National Union Bank *v.* Dodge, 42 N. J. L. 316.

11. Hubbard *v.* Hubbard, 6 Gray (Mass.) 362. See also the article "Discovery."

12. **In Minnesota** it is error for the court to order a party to answer written interrogatories addressed to him by his adversary. "The statute enables a party, by verifying his own pleading, to compel his adversary to answer or reply to it under oath, and to compel him to exhibit for inspection books, papers and documents in his possession, and also to appear and testify in his behalf as a witness. These are the only means that the statute has provided to compel disclosures by the opposite party in lieu of the means which the system of pleading in the former court of chancery afforded by interrogatories appended to the bill or answer." Leuthold *v.* Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

In Wisconsin the statute provides that "the examination of a party thereunder at the instance of an adverse party 'may be taken, without the state, upon commission in the manner provided for taking other depositions.' It provides further that 'the party examining shall, in all cases, be allowed to examine upon oral interrogatories.' The manifest purpose of the statute is to give the examining party every reasonable opportunity for a most thorough examination of his adversary, and this is accomplished most effectually by an oral examination. We cannot doubt, therefore, that the clause of the statute last above quoted should apply to every examination under § 4,096, whether before or after issue joined, or within or without the state. The respondent would construe the first clause of the section above quoted as though it read that the examination 'may be taken without the state upon commission in the manner provided

J. Number of Examinations. — Although a party cannot, as a matter of right, file successive sets of interrogatories to an adverse party to be answered by him, the court may, in its discretion, allow supplemental interrogatories where new and unexpected facts are disclosed in the answers already made, or where for some reason not involving neglect on the part of the interrogator he has failed to obtain the information sought by his first interrogatories.[13] Nor under the statutes allowing an oral examination should a second examination be permitted except for special cause.[14]

Examination at Instance of Party Subsequently Brought In. — But the fact that a plaintiff has been examined at the instance of a defendant does not defeat the right of another defendant, subsequently brought into court, to examine the plaintiff again.[15]

Previous Examination in Other Proceeding. — Nor should an order for the examination of a defendant in advance of trial be denied merely because he had been previously examined in another proceeding.[16]

K. Discretion of Court. — In the case of an oral examination of an adverse party in advance of trial, although the applicant's moving papers therefor disclose a case giving the judge power to act, his action thereon is purely a discretionary one,[17] and where

for taking other depositions *upon commission;*' we construe the statute as though it read: 'In the manner provided for taking other depositions upon notice or commission.' This construction gives the right of examination upon oral interrogatories." Neeves *v.* Gregory, 86 Wis. 319, 56 N. W. 909.

13. Hancock *v.* Franklin Ins. Co., 107 Mass. 113, wherein the court did not think that that was a case in which this discretion should be exercised. See also Wetherbee *v.* Winchester, 128 Mass. 293, wherein it was held that a party might disregard an additional interrogatory subsequently filed without leave of court after the interrogatories have been filed, and that he could not be defaulted for not answering it.

14. Dambmann *v.* Butterfield, 15 Hun (N. Y.) 495.

15. Larimore *v.* Bobb, 114 Mo. 446, 21 S. W. 922.

16. Watts *v.* Wilcox, 43 N. Y. St. 417, 17 N. Y. Supp. 647, where the court in so holding said: "There is a wide difference between an examination in supplementary proceedings and the examination of a witness for the procurement of testimony to be used and read upon the trial of an action, and they proceed upon entirely different lines. The one is for the discovery of property and the other is for the discovery of evidence. The examination under this order will be conducted for the purpose of eliciting testimony relevant to the issues involved in this action, which can be read in evidence upon the trial, whereas a former examination was made with no such view, and can be made available only as admissions against the party examined."

17. Glenney *v.* Stedwell, 64 N. Y. 120; Schepmoes *v.* Bowsson, 52 How. Pr. (N. Y.) 401; Greer *v.* Allen, 15 Hun (N. Y.) 432; *In re* Porter Screen Mfg. Co., 70 App. Div. 329, 75 N. Y. Supp. 286.

A Special Statute Denouncing Monopolies in articles of common use and authorizing the attorney-general, when about to commence an action to prevent and restrain contracts made for that purpose, to apply for an order to examine witnesses, etc., which makes it the duty of the justice to whom the application is made for the order to grant it, is unconstitutional because it takes from the justice all discretionary power and is in fact an attempt to coerce him. People *ex rel.* Morse *v.* Nussbaum,

the judge can from the nature of the action and the facts disclosed see that the examination is not necessary, that it is sought merely for annoyance or delay, he may, in his discretion, deny the application.[18] And an objection that an order for such an examination is too broad cannot be reviewed on appeal.[19] There is authority, however, to the effect that an examination of an adverse party before trial is a matter of right where the applicant has, by his moving papers, made the showing required by the statute.[20]

L. Actions Pending in Federal Courts. — Prior to 1892 it was the settled rule that a state statute authorizing the examination of an adverse party before the trial did not apply to actions at law pending in a federal court.[21] But since the act of March 9, 1892, providing that in addition to the mode of taking depositions of witnesses in causes pending at law or equity in the federal courts it is lawful to take the depositions "or testimony" in the mode prescribed by the laws of the state in which the court is sitting, the rule seems to be otherwise.[22]

55 App. Div. 245, 67 N. Y. Supp. 492. In this case it was also held that an *ex parte* order for the examination of parties under this statute is an appealable order within the provisions of the New York Code.

18. Jenkins *v.* Putnam, 106 N. Y. 272, 12 N. E. 613, where the court said: "While it is said in § 873 that the judge 'must' grant the order, when an affidavit conforming to the requirements of the previous section is presented to him, yet we do not think that the language is absolutely mandatory, and that it was intended to deprive the judge of all discretion. The affidavit is required to disclose the nature of the action, and to set forth that the testimony of the party is material and necessary, and the judge must be able to see from the facts stated that the testimony is material and necessary. If from the nature of the action and the other facts disclosed he can see that the examination is not necessary for the party seeking it, then it cannot be supposed that it was the legislative intent that he should be obliged, nevertheless, to make the order. . . . The very purpose of requiring that the affidavit should set forth the nature of the action, and of the defense thereto, is to enable the judge to determine whether the examination should be ordered, and to place limits upon it. While the whole examination is placed within the absolute control of the judge by the power given him to place limits upon it, it cannot be supposed that it was intended to absolutely bind him to grant it, whatever might be his judgment as to its propriety or necessity."

19. Rosenbaum *v.* Rice, 36 Misc. 410, 73 N. Y. Supp. 714.

20. Cook *v.* Bidwell, 17 Abb. Pr. (N. Y.) 300; McGuffin *v.* Dinsmore, 4 Abb. N. C. (N. Y.) 241; Ludewig *v.* Pariser, 4 Abb. N. C. (N. Y.) 246. See also Watts *v.* Wilcox, 43 N. Y. St. 417, 17 N. Y. Supp. 647.

21. *Ex parte* Fisk, 113 U. S. 713, so ruling because, as declared by that court, such a statute was in conflict with the federal statute on this question. See also Tabor *v.* Indianapolis Journal News Co., 66 Fed. 423.

Contra. — Bryant *v.* Leyland, 6 Fed. 125.

22. Smith *v.* Northern Pac. R. Co., 110 Fed. 341, where Hanford, J., quoting from International Tooth Crown Co. *v.* Hanks Dental Ass'n, 101 Fed. 306, said; "The practice of examination before trial . . . is a most wholesome one; it tends to simplification of the trial and frequently leads to settlement out of court." See also Arnold Monophase Elec. Co. *v.* Wagner Elec. Mfg. Co., 118 Fed. 653. *Compare* National Cash Register Co. *v.* Leland, 94 Fed. 502, where the court, in ruling that the statute did not apply, said: "The

2. Statutory Provisions in England. — In England the judicature act authorizes the promulgation of rules permitting and regulating the propounding of interrogatories to an adverse party.[23]

II. MATTERS AFFECTING THE ENFORCEMENT OF THE RIGHT.

1. As Respects the Action. — A. In General. — The right to examine an adverse party in advance of trial is authorized by statute only in proceedings which arise in an action, or which are incidental thereto, and does not extend to a separate proceeding.[24]

B. Nature of Action. — As a general rule, the statutes of the various states authorizing the examination of an adverse party before trial do not confine the right to suits in equity,[25] but extend it very generally to actions at law.[26] And it is equally well settled that whether the action be founded on contract or in tort, if the party seeking to invoke the statutory right comes within the purview of the statute in other respects, his right to examine an adverse party will be enforced.[27]

act of 1892, as stated by the learned judge in the circuit court, was intended only 'to simplify the practice of taking depositions by providing that the mode of taking in instances authorized by the federal laws might conform to the mode prescribed by the laws of the state in which federal courts were held,' and not 'to authorize the taking of depositions in instances not heretofore authorized by the federal statutes, and to confer additional rights to obtain proofs by interrogatories addressed to the adverse party in actions at law.' For these reasons the exception to the refusal of the judge of the circuit court to default the defendants must be overruled."

23. "Rule 1, of Order 441, provides that in any cause or matter the plaintiff or defendant, by leave of the court or judge, may deliver interrogatories for the examination of the opposite parties." Dalgleish *v.* Lawther, L. R. 2 Q. B. 590.

24. People *ex rel.* Harriman *v.* Paton, 20 Abb. N. C. (N. Y.) 172.

The Texas Statute has prescribed a mode of discovery as auxiliary to a suit, but not as an independent remedy disconnected from a regular suit. Cronin *v.* Gay, 20 Tex. 461.

In Frawley *v.* Cosgrove, 83 Wis. 441, 53 N. W. 689, it was held that the presentation to the county court of a claim against the estate of a decedent is a commencement of a proceeding or action within the contemplation of the Wisconsin statute authorizing the taking of the deposition of an adverse party in any action or proceeding, and authorizing the examination of the claimant.

25. Cobb *v.* Rice, 130 Mass, 231, wherein it was held that the Massachusetts statute authorizing interrogatories applies to suits in equity, so ruling upon a bill of interpleader filed for the purpose of determining the conflicting claims of different persons as to the ownership of the property in controversy, and holding that interrogatories might be propounded to the claimants.

26. Pritchett *v.* Munroe, 22 Ala. 501; Lanier *v.* Union Mortgage, Bkg. & T. Co., 64 Ark. 39, 40 S. W. 466; Jacksonville T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1,157. 9 So. 661; Illinois Cent. R. Co. *v.* Sanford, 75 Miss. 862, 23 So. 355.

27. Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691; Simons *v.* Simons, 107 Ind. 197, 8 N. E. 37.

The fact that the action is in tort and relates to personal injuries and that discovery cannot be had, perhaps, in equity, does not affect the right to file interrogatories in an action for personal injuries. Gunn *v.*

C. Action Pending at Passage of Statute. — The right under the statute to propound interrogatories to an adverse party is not confined to the actions commenced subsequent to the enactment of statute, but applies also to actions then pending.[28]

D. Actions Appealed From Justice of the Peace. — The right to enforce answers to interrogatories in an action appealed from a justice of the peace is not lost, because of the party's omission to compel answers to interrogatories filed before the justice.[29]

2. As Respects the Parties. — A. In General. — The general rule is that the statutory right to examine an adverse party before trial, whether by interrogatories or by an oral examination, can be had only when the party to be examined is a party to the record,[30] and that the fact that a person is a party in interest is not sufficient to authorize his examination.[31]

A Defendant in Default cannot be examined before trial at the instance of the plaintiff.[32]

B. Nominal Party. — The fact that a plaintiff is a mere nominal party, and is, in fact, prosecuting the action for the benefit

New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031.

Slander. — In Dalgleish *v.* Lawther, L. R. 2 Q. B. 590, an action for slander, the defendant was required to answer the following interrogatories: "Did you on or about the 1st of March, or when, speak the following words of the plaintiff (setting out the words), or words to that effect?"

28. Robbins *v.* Holman, 11 Cush. (Mass.) 26.

29. Kennedy *v.* Gooding, 7 Gray (Mass.) 417. *Compare* Atwood *v.* Reyburn, 5 Mo. 555.

30. Seeley *v.* Clark, 78 N. Y. 220; Sweetzer *v.* Claflin, 74 Tex. 667 12 S. W. 395.

Judgment Debtor in Garnishment Action. — In Mygatt *v.* Burton, 74 Wis. 352, 43 N. W. 100, it is held that the Wisconsin statute authorizing the examination of an adverse party authorizes the examination and deposition in a garnishment action of the judgment debtor, who has not answered, but which is at issue on the answer of the garnishee.

Beneficiaries Under Trust Deed. In West Michigan Furniture Co. *v.* Lacy (Tex. Civ. App.), 34 S. W. 167, a garnishment proceeding by an unpreferred creditor against the trustee of the principal debtor to reach the assets in the hands of the defendant as such trustee, it was held that the beneficiaries of the trust deed, although not named as parties defendant, were the real parties in interest, and that answers to interrogatories propounded to them by the plaintiff were admissible against the defendant trustee. The court said: "The case is somewhat analogous to that of a suit in the name of one person for the use of another. She was the real party in interest, and consequently any previous admissions made by her were competent evidence against her. The statute under which the *ex parte* deposition was taken is founded upon this well-established principle of evidence. Rev. St., arts. 2,240-2,242. The object of this suit evidently was to annul the deed of trust so far as she was concerned, on the ground of her failure to accept prior to the service of the garnishment. The trustee garnisheed and in possession of the goods was her trustee, if she had any rights under the conveyance, and stood as her representative in this suit, so as to dispense with her being made a party on the record."

31. Knowlton *v.* Bannigan, 11 Abb. N. C. (N. Y.) 419.

32. Sharp *v.* Hutchinson, 16 Jones & S. (N. Y.) 101.

of another, does not deprive the defendant of the right to examine the plaintiff before trial.[33]

C. Next Friend. — But one prosecuting an action or proceeding as next friend is not an adverse party.[34]

D. Fiduciaries. — The statutes authorizing interrogatories to be propounded to an adverse party have been held to apply to fiduciaries.[35]

E. Non-Resident Parties. — Such a statute extends to non-resident parties.[36]

F. Private Corporations. — a. *Interrogatories.* — Under such a statute a corporation may be examined,[37] although there is authority that an officer of the corporation is not a party within the contemplation of such a statute.[38]

33. Harding *v.* Morrill, 136 Mass. 291. See also Harding *v.* Noyes, 125 Mass. 572; Woods *v.* DeFiganiere, 1 Rob. (N. Y.) 607, 16 Abb. Pr. 1.

34. Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641.

35. Alexander *v.* Alexander, 48 Ind. 559; Blauchin *v.* Pickett, 21 La. Ann. 680; Delacroix *v.* Prevost, 6 Mart. (O. S.) (La.) 727; Blackman *v.* Green, 17 Tex. 322.

36. Townsend *v.* Gibbs, 11 Cush. (Mass.) 158. See also Huggins *v.* Carter, 7 Ala. 630; Reid *v.* Reid, 11 Tex. 585; Brown *v.* Merceir, 82 Ga. 550, 9 S. E. 471.

37. Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031; Illinois Cent. R. Co. *v.* Sanford, 75 Miss. 862, 23 So. 355, wherein the court said: "We are of the opinion that § 1,761 (of the Mississippi Code) applies to and includes corporations. It seems natural and reasonable to suppose that that section should apply in favor of all litigants and against all parties to the suit, whether such parties be natural or artificial persons. . . . And these officers or heads of department may well speak for the corporation in matters confided to their management."

In Iowa, even prior to the adoption of the code of 1897, which expressly provides therefor, a corporation, like an individual defendant, could be required to answer interrogatories attached to a petition. Blair *v.* Sioux City & Pac. R. Co., 109 Iowa 369, 80 N. W. 673.

Interrogatories, Under the New Jersey Statute, presented to a corporate adversary, should not ordinarily extend beyond corporate transactions — transactions which must have been conducted by some corporate agent on behalf of the corporation, and of which, therefore, the agent must have original, not simply derivative, knowledge. To that extent the sworn answer of the agent, delivered to the inquirer by the corporation, may justly be treated as an admission of the corporation. No interrogatory should be presented to a corporation unless the answer thereto of a corporate officer, agent or employe might reasonably be deemed legitimate evidence against the corporation at the trial. Wolters *v.* Fidelity Trust Co. (N. J.), 46 Atl. 627. In this case, an action against a corporation, it is held that the interrogatories cannot lawfully demand the inspection or copy of books, papers or documents in the possession or under the control of the corporation; but patent unmistakable facts, to be gathered from such writings, as for example, the date and amount of a draft, the number of shares represented by a certificate of stock, may legally be demanded under that section.

Unofficial Information. — Interrogatories to a corporate officer which do not call for official information, but apparently inquire as to his personal knowledge of facts to which he could testify as a witness on the stand or in a deposition, need not be answered. Hancock *v.* Franklin Ins. Co., 107 Mass. 113.

38. Gulf C. & S. F. R. Co. *v.* White (Tex. Civ. App.), 32 S. W.

b. *Oral Examination.* — Under a statute authorizing the oral examination of an adverse party before trial, it is held that officers of a corporation, which is a party, are not parties within the meaning of the statute so as to permit their examination.[39]

Agents and Employes of a corporation are also held not to be parties within the meaning of the statute authorizing the oral examination of an adverse party before trial.[40]

The President or Treasurer of an Association named as a nominal party representing it is a party within the contemplation of a statute authorizing the examination of an adverse party before trial.[41]

c. *Proof of Corporate Existence.* — Where interrogatories are permitted to be propounded to a corporation, it is held that before an officer thereof will be ordered to answer, the party propounding interrogatories must prove the existence of the corporation to the satisfaction of the court.[42]

G. Municipal Corporations. — A statute authorizing interrogatories to be propounded to corporate officers does not apply in the case of officers of a municipal corporation.[43] But a municipal corporation is not deprived of the right to propound interrogatories to an adverse party merely because the latter is without an equivalent right as against the corporation.[44]

H. Several Parties. — Several but not joint answers to interrogatories may be required from two or more adversaries, each being

322, where the court said that the term "party," when used in a statute with reference to court proceedings, must be understood in its technical sense and limited to those who are parties to the record, unless the context shows that the legislature used it in a more popular sense

39. Boorman *v.* Atlantic & P. R. Co., 78 N. Y. 599; LaFarge *v.* LaFarge Fire Ins. Co., 6 Duer (N. Y.) 680; Goodyear *v.* Phoenix Rubber Co., 48 Barb. (N. Y.) 522; People *v.* Mutual Gaslight Co., 74 N. Y. 434, 54 How. Pr. 286, *affirming* 14 Hun 157, where the court said: "Corporations, when parties, are from their very nature exempt from examination under this statute."

Contra. — Carr *v.* Great Western Ins. Co., 3 Daly (N. Y.) 160. *Compare* Press Pub. Co. *v.* Star Co., 33 App. Div. 242, 53 N. Y. Supp. 371.

In Wallace *v.* Syracuse B. & N. Y. R. Co., 30 App. Div. 186, 51 N. Y. Supp. 760, an action to recover damages for injuries which the plaintiff alleged he received while a passenger upon the defendant's cars, and wherein the pleadings present the issue as to whether or not the plaintiff was a passenger of the defendant at the time or of another railroad company who operated its trains over the defendant's tracks, it was held that the plaintiff was entitled to examine officers of the defendant before trial in order to enable him to prove, if such was the fact, that the train was either the defendant's or under its control.

40. Reichmann *v.* Manhattan Co., 26 Hun (N. Y.) 433.

41. McGuffin *v.* Dinsmore, 4 Abb. N. C. (N. Y.) 241; Woods *v.* De Figaniere, 1 Rob. (N. Y.) 607, 16 Abb. Pr. 1.

42. Gott *v.* Adams Express Co., 100 Mass. 320. As to the mode of proving corporate existence, see article "Corporations," Vol. III.

43. Linehan *v.* Cambridge, 109 Mass. 212, where the court said that this construction of the statute is aided by the consideration that the same necessity for a discovery of the records and acts of a private corporation cannot exist in the case of a public municipal corporation.

44. See Sheren *v.* Lowell, 104 Mass. 24.

required to answer and verify in accordance with his own personal knowledge only.[45] But a statute authorizing the examination of an adverse party without notice, and on leading questions, does not authorize such an examination of one of two joint parties, the interests of the other one being adverse to the deponent, even though the party against whom they are sought to be used had notice and an opportunity to cross-examine.[46]

I. INCOMPETENCY OF PARTIES. — The fact that the party to be examined is insane is sufficient ground for refusing to grant an order for his examination before trial.[47]

J. EXAMINATION OF INTENDED DEFENDANT. — In New York a statute expressly authorizes the examination of a party against whom the action is about to be brought, upon the application of the person who is about to bring the action.[48] But the examination of

45. McGowan *v.* Randolph, 26 Tex. 492; Stetson *v.* Wolcott, 15 Gray (Mass.) 545, wherein the court said: "The objection urged against their admissibility is that the question should have been proposed to all of the defendants and their joint answer taken. But this would lead to absurd results. Each individual is to answer for himself, and to make oath to the truth of his own statements; neither of them can be required to testify of facts not known by him, though they may be within the knowledge of the other parties to the suit."

46. Bizzell *v.* Hill (Tex. Civ. App.), 37 S. W. 178, *distinguishing* McGowan *v.* Randolph, 26 Tex. 492, on the ground that the latter case was decided under a different statute. The court said: "If a defendant whose defense conflicts with the interest of his codefendant, as in this case, is to be deprived of the right to object to leading questions propounded to such codefendant, the same construction of the statute would hold him bound by the action of such codefendant in purposely allowing the interrogatories to be taken as confessed, which no court would tolerate. Nor can the ruling complained of be sustained upon the ground that it is within judicial discretion to allow leading questions."

47. Mason *v.* Libbey, 2 Abb. N. C. (N. Y.) 137.

48. Merchants' Nat. Bank *v.* Sheehan, 101 N. Y. 176, 4 N. E. 333; *In re* Nolan, 70 Hun 536, 24 N. Y. Supp. 238; Baas *v.* Pain, 45 N. Y. St. 80, 24 N. Y. Supp. 583; Sweeney *v.* Sturgis, 24 Hun (N. Y.) 162.

In re Singer, 40 Misc. 561, 82 N. Y. Supp. 870, it was held that an examination of a party charged on hearsay information to be in control of a newspaper, would not be ordered at the instance of the person claiming to have been injured by a libelous article published in the paper, for the purpose of ascertaining the ownership thereof, notwithstanding it appeared in former actions commenced against the party sought to be examined that he had appeared by counsel and denied connection with the newspaper, either as the editor or owner.

In re Porter Screen Mfg. Co., 70 App. Div. 329, 75 N. Y. Supp. 286, it appeared that the applicant had sued a corporation on an account rendered and had obtained judgment thereon. Before the judgment was obtained a new corporation was organized for the purpose of carrying on the same business and the persons in control of the new corporation were substantially the same as those in control of the corporation sued. The new corporation was in possession and control of the business and plant of the former corporation. The applicant asked for and obtained an order for the examination of an officer of both corporations in an action to be brought against him and the corporations for the dissolution of the old corporation and the sequestration of its property and the enforcement of the liability of the said individual defendants as officers and

a defendant will not be permitted where its purpose is to ascertain whether there are other persons against whom a cause of action exists.[49]

3. As Respects the Pleadings. — A. In General. — Under the statutes authorizing the examination of an adverse party by means of interrogatories, while it is held to be unnecessary that the interrogatories should be filed with any specific pleading, but that they may be filed at any time before the issues are closed or the right to file pleadings has terminated,[50] yet if the pleading sought to be supported by the evidence elicited by the interrogatories be insufficient, an exception to the interrogatories will be sustained for that cause.[51]

B. Examination to Enable Party to Plead. — Sometimes it is expressly provided that a plaintiff is entitled to examine a defendant in a proper case therefor for the purpose of enabling him to properly frame his complaint.[52] And a defendant is also entitled to examine the plaintiff to enable him to properly frame his answer.[53]

directors of the corporation to its creditors.

49. Ziegler *v.* Lamb, 5 App. Div. 47, 40 N. Y. Supp. 65.

In an action to foreclose a mortgage the plaintiff is not entitled to an order for the examination of some of the defendants for the purpose of discovering whether or not certain other defendants, whom the plaintiff cannot locate, are infants or absentees. Byrne *v.* Van Dolsen, 75 N. Y. Supp. 413.

50. Sherman *v.* Hoagland, 73 Ind. 472.

Where an Amendment to a Petition is Permitted to Be Filed by the court, the plaintiff may attach interrogatories thereto, although the statute mentions only the petition and not an amendment thereto in connection with attaching interrogatories. Blair *v.* Sioux City & Pac. R. Co., 109 Iowa 369, 80 N. W. 673.

An Amendment to the Plaintiff's Declaration does not operate to exclude the answer to interrogatories filed before the amendment. Weatherby *v.* Brown, 106 Mass. 338.

51. Cleveland *v.* Hughes, 12 Ind. 512; Martell *v.* Hernshein, 5 Tex. 205. See also Wheeler *v.* Reitz, 92 Ind. 379, where the record did not show that the interrogatories were filed with or after the answer, and in fact they appeared to have been filed several days before the answer was filed, and the court held that as the statute gave the right to propound interrogatories to be filed with the pleadings "relevant to the matters in controversy" the court could not before the filing of the answer know that there was "any matter in controversy respecting the points involved in the interrogatories."

52. Glenney *v.* Stedwell, 64 N. Y. 120, 1 Abb. N. C. 327, 51 How. Pr. 329; Jerrells *v.* Perkins, 25 App. Div. 348, 49 N. Y. Supp. 597; Havemeyer *v.* Ingersoll, 12 Abb. Pr. (N. S.) (N. Y.) 301; O'Reilly *v.* Western Union Tel. Co., 12 Hun (N. Y.) 124. See also Winston *v.* English, 3 Jones & S. (N. Y.) 512.

In Wisconsin it is declared that "perhaps there may be cases where the pleadings have been served, and yet the issues are so indefinite that it may be necessary to define by such order more definitely what the issues are, and the general scope of the inquiry; but such limitation should not, in any event, be carried to the extent of narrowing the real issues, and thus prevent disclosure of any matters of substance relevant to the controversy. This court has already held that the scope of such examination may be as broad as that on cross-examination." Stuart *v.* Allen, 45 Wis. 158; Cleveland *v.* Burnham, 60 Wis. 16; Kelly *v.* Chicago & N. W. R. Co., 60 Wis. 480, 19 N. W. 521.

53. Campbell *v.* American Zylonite Co., 21 Jones & S. (N. Y.) 131.

Bill of Particulars. — So, also, an examination of the adverse party before trial may be ordered to enable the applicant to properly furnish a bill of particulars which he has been ordered to furnish.[54]

Immaterial Matters. — An examination of an adverse party for the purpose of enabling the applicant to plead, should not be ordered as to matters wholly immaterial for that purpose.[55]

Amending Complaint. — An examination of a defendant in advance of trial should not be granted where the examination is desired solely for the purpose of discovering whether any cause of action exists in favor of the plaintiff against the defendant, with a view of amending the complaint if it does, and discontinuing the action if it does not.[56]

4. As Respects the Necessity of the Examination. — A. In General. — As a general rule a party is not entitled to examine an adverse party in advance of trial as to matters which are within

54. Ball *v.* Evening Post Pub. Co., 48 Hun (N. Y.) 149.

55. Clarke *v.* Ennis, 65 App. Div. 164, 72 N. Y. Supp. 581.

The action may arise from a series of transactions from which is to be ascertained the amount which the plaintiff is entitled to recover, and the dealings between the parties may be of such a character that the amount to which he is entitled may be peculiarly within the knowledge of defendant, and under such circumstances, dependent upon the facts of the particular case, the plaintiff may be entitled to an examination of the defendant in advance of trial. *In re* Erie Malleable Iron Co., 90 Hun 62, 35 N. Y. Supp. 597. But where the amount of the plaintiff's demand may be stated with approximate accuracy and such demand is not complicated with other matters, an examination of the defendant at the instance of the plaintiff will not be ordered. Boeck *v.* Smith, 85 App. Div. 575, 83 N. Y. Supp. 428. See also Tayler *v.* American Ribbon Co., 38 App. Div. 144, 56 N. Y. Supp. 667; Stanton *v.* Friedman, 47 App. Div. 621, 67 N. Y. Supp. 291.

The Extent of the Damages to which the stockholder is entitled as against the directors of a corporation for mismanagement is not properly the subject of an examination of the directors before trial to enable such stockholder to frame a complaint in an action to recover the damages. Elmes *v.* Duke, 39 Misc. 244, 79 N. Y. Supp. 425; Butler *v.* Duke, 39 Misc. 235, 79 N. Y. Supp. 419. See also Schmerber *v.* Reinach, 38 App. Div. 622, 58 N. Y. Supp. 84; Hutchinson *v.* Simpson, 73 App. Div. 520, 77 N. Y. Supp. 197, an action against promoters of a corporation to compel them to account for profits due to the corporation, wherein it is held that an examination of the defendants before issue joined and for the purpose of enabling the plaintiff to frame his complaint, will not be ordered where the information sought does not relate to any of the material facts required to be alleged in the complaint, but relates solely to the question of damages to be determined on the accounting.

Fraud. — In an action by a stockholder against the directors of a corporation for fraud, an examination of the defendants is not necessary for the purpose of procuring precise information as to the fraud to enable the plaintiff to frame his complaint. Butler *v.* Duke, 39 Misc. 235, 79 N. Y. Supp. 419.

56. Tenoza *v.* Pellam-Hod Elev. Co., 50 App. Div. 581, 64 N. Y. Supp. 99, where the court said: "There may be other similar cases in the books and in some of the courts, and in some the courts may have permitted examinations, which in their nature were inquisitorial rather than probative, but in none has the examination been permitted after issue for the sole purpose of enabling a party to determine whether to proceed with or discontinue the action."

his own knowledge;[57] and it is accordingly held that an order for such an examination will not be made unless the applicant in his moving papers states facts showing the necessity and importance of the examination.[58] And it is held that these facts should be alleged positively and not inferentially, nor argumentatively.[59]

Following Language of Governing Rule of Court. — Although a rule of court may require the moving papers for the examination of an adverse party before trial to specify the facts showing the necessity of the examination, it is not incumbent upon the applicant to state these facts in the words of the rule; it is sufficient if the inference of necessity is clearly and fairly deducible from all the papers.[60]

B. Exclusive Knowledge of Party to Be Examined. — **Under a Statute Authorizing an Oral Examination** of an adverse party before trial, there is authority to the effect that in order to justify the granting of an order for such an examination the applicant must show that the party to be examined has knowledge of the facts

57. Cohen *v.* Yetter, 54 App. Div. 633, 66 N. Y. Supp. 1,017; McGuire *v.* McGuire, 65 App. Div. 74, 72 N. Y. Supp. 490; Wallace *v.* Norvell, 1 Bail. (S. C.) 125.

Assignee. — The rule that a party is not entitled to examine his adversary in advance of trial, where it appears that he is in possession of the information desired to be elicited by the examination, applies with equal force to his assignee. McNamara *v.* Keene, 37 Misc. 864, 76 N. Y. Supp. 992. In this case, an action by the plaintiff as assignee to recover on an account in which the defendant pleaded a counterclaim, the plaintiff asked for the examination of the defendant to enable him to plead to the counterclaim and to prepare for trial, but it was held that the examination was improperly granted because it appeared that he had not made any effort to obtain the information from his assignor.

Employment and Authority of Agent. — On an issue as to whether or not a person was employed by or had authority to act for one of the parties, the latter may be examined with reference thereto before trial. Bloom *v.* Pond's Extract Co., 27 Abb. N. C. (N. Y.) 366, 18 N. Y. Supp. 177; Railway Age & N. W. R. Co. *v.* Pryibil, 18 Misc. 561, 42 N. Y. Supp. 697.

In Tanenbaum *v.* Hilborn, 44 App. Div. 89, 60 N. Y. Supp. 406, the defendant was sued for the breach of a contract by which he agreed with the plaintiff's assignors that they should procure, as his agents, certain insurance, and also that he would not procure insurance through any other brokers. Two breaches of the contract were signed: First, the nonemployment of the plaintiff's assignors; second, the employment of other brokers. It was held that the plaintiff was entitled to examine the defendant for the purpose of ascertaining who the other brokers were who were employed by the defendant, as the plaintiff showed in his affidavit that he had no means of ascertaining those facts except by the examination of the defendant.

58. Hay *v.* Zeiger, 50 App. Div. 462, 64 N. Y. Supp. 202, *reversing* 61 N. Y. Supp. 647; Hunt *v.* Sullivan, 79 App. Div. 119, 79 N. Y. Supp. 708; Blennerhassett *v.* Stephens, 58 Hun 611, 12 N. Y. Supp. 602; Sheehan *v.* Albany & B. Tpke. Co., 54 Hun 639, 8 N. Y. Supp. 14; Waters *v.* Shayne, 57 Hun 587, 10 N. Y. Supp. 772; Williams *v.* Folsom, 54 Hun 308, 7 N. Y. Supp. 568; Bandmann *v.* Jones, 27 N. Y. St. 231, 7 N. Y. Supp. 577; Swift *v.* Mayer, 25 Jones & S. 580, 7 N. Y. Supp. 680; Crooke *v.* Corbin, 23 Hun 176; Cahill *v.* Kursheedt, 30 Misc. 833, 61 N. Y. Supp. 1,100.

59. Fluchtwanger *v.* Dessar, 23 N. Y. St. 379, 5 N. Y. Supp. 129.

60. Rosenbaum *v.* Rice, 36 Misc. 410, 73 N. Y. Supp. 714.

necessary for the applicant to know; that he has taken steps to discover those facts from other sources, but has been unable to make such discovery;[61] and that where such a showing is made a proper case is made for the granting of such an order.[62]

61. Naab *v.* Stewart, 32 App. Div. 478, 52 N. Y. Supp. 1,094. *Compare* Bloom *v.* Pond's Extract Co., 27 Abb. N. C. (N. Y.) 366, 18 N. Y. Supp. 177.

An examination of a party before trial is not proper except upon a showing of the necessity therefor and that the facts are within the exclusive knowledge of the party to be examined. Just when this necessity arises it may at times be difficult to determine. That such an examination will not ordinarily be permitted solely to ascertain in advance the nature of the testimony which the party will give upon the trial seems clear. Each case must necessarily be determined upon its own peculiar circumstances. Bagley *v.* Winslow, 34 Misc. 223, 69 N. Y. Supp. 611.

In an action to recover damages for personal injuries alleged to have been sustained by the plaintiff owing to a defective sidewalk adjacent to premises alleged to have been in the possession and under the defendants' control, which the defendants deny, it is proper to grant an examination of the defendants in advance of trial on the subject of their possession and control over the premises where it is probable that the plaintiff cannot prove these facts except by such examination and there is nothing in the nature of the issues by which it appears that the defendants will be prejudiced thereby. Vial *v.* Jackson, 73 App. Div. 355, 76 N. Y. Supp. 668.

62. Press Pub. Co. *v.* Star Co., 33 App. Div. 242, 53 N. Y. Supp. 371; Chaffee *v.* Equitable Reserve Fund Life Ass'n, 18 N. Y. St. 960, 2 N. Y. Supp. 481; Grout *v.* Strong, 49 N. Y. St. 78, 20 N. Y. Supp. 881; Carter *v.* Good, 57 Hun 116, 10 N. Y. Supp. 647.

In an action to recover back moneys deposited by the plaintiff with the defendants, wherein the plaintiff shows that he has no means of ascertaining what the defendants did with his money except by examining them, and that it is his purpose to use that examination on the trial, an order for the examination of the defendants is proper. Leach *v.* Haight, 34 App. Div. 522, 54 N. Y. Supp. 550. Nor can the defendants in such case obtain a vacation of the order for their examination on the mere ground that they would be unable to answer the questions.

In Commercial Pub. Co. *v.* Beckwith, 57 App. Div. 574, 68 N. Y. Supp. 600, an action to recover moneys collected by the defendant from various persons, wherein neither the names nor residences of those persons, nor the amounts collected, nor the times of collection were known to the plaintiff, but were peculiarly the personal knowledge of the defendant, it was held that evidence of the defendant was material and necessary for the plaintiff to have upon the trial of the action, and that accordingly plaintiff was entitled to examine the defendant as to the collections.

In Corn Exchange Bank *v.* Lorillard, 84 App. Div. 194, 82 N. Y. Supp. 641, an action to reach a portion of the income from a trust fund and to have the same applied toward the payment of a judgment recovered against the *cestui que trust,* who was entitled to so much of the income as would suitably support and maintain him, it was held that the plaintiff was entitled to examine the trustees of the fund for the purpose of ascertaining the extent and amount of the income as well as a surplusage, if any, which had accumulated during the period of the trusteeship, and for the purpose of ascertaining in whose possession the books and papers relating to the trust estate were. "Definite and accurate information of such subjects is peculiarly within the knowledge of the trustees, and the plaintiff, having no knowledge upon the subject, has a right in advance of the trial to take their testimony. It is not obliged to wait until the trial, and take its chances of their

Under the Statutes Authorizing Interrogatories it is sometimes expressly provided that interrogatories are proper only where the party propounding them makes oath that he knows of no other person than the party to whom they are propounded by whom he can prove these same facts.[63] But in the absence of such an express provision it is not necessary to make such a showing,[64] although he must show that the facts sought to be discovered are within the knowledge of the party called on to answer.[65]

C. Intended Use of Examination on Trial. — An examination of a party before trial will not be ordered where it does not appear that the applicant intends to use the examination on the trial,[66] and accordingly it is held that it must be shown that such use is intended by the moving papers.[67] It is not necessary, however, that

then being present either as parties or witnesses." It was held further that the plaintiff had the right to examine all the trustees who had been appointed at different times, there being no suggestion in the answering affidavits that the facts could be established by any one of them.

In Caldwell *v.* Labaree, 40 Misc. 564, 82 N. Y. Supp. 865, an action by customers against stock-brokers to surcharge accounts rendered, it being alleged that certain items were false and fraudulent, and that the pretended transactions set forth were fictitious; wherein it was stated in the moving papers that the plaintiffs had no means of securing information as to the pretended buyers and sellers except by the examination of the defendants, and that such examination before trial was material and necessary, it was held that the plaintiffs were entitled to examine the defendants as to those facts.

In Bernheiner *v.* Schmid, 59 App. Div. 564, 69 N. Y. Supp. 659, an action for the dissolution of a copartnership and a disposal of its property, it was held that as an interlocutory decree for accounting must follow almost as a matter of course, the defendant was not entitled to an examination of the plaintiff before trial except as to subjects concerning which the interlocutory judgment may make some disposition, and concerning which the facts are peculiarly within the knowledge of the plaintiff.

In Cohen *v.* Yetter, 54 App. Div. 633, 66 N. Y. Supp. 1,017, an action for personal injuries, the plaintiff's claim was that his injuries were occasioned by reason of the intermittent current of electricity by which the machine at which he was working was operated. That machine did not belong to and was not under the control of the defendant, although he supplied the motive power for its operation. The defendant's theory was that the injuries were to be attributed to the fault of the plaintiff's employers in that they failed to furnish the necessary and proper appliances for the safety and protection of their employes. It was held that the defendant was entitled to examine the plaintiff respecting the machine, its condition and the manner in which it was operated.

63. Blackman *v.* Green, 17 Tex. 322.

64. Alston *v.* Graves, 6 Ala. 174.

65. Branch Bank *v.* Parker, 5 Ala. 731.

66. Dudley *v.* New York Filter Mfg. Co., 80 App. Div. 164, 80 N. Y. Supp. 529.

67. Spero *v.* West Side Bank, 54 Hun 638, 7 N. Y. Supp. 546; Batterson *v.* Sanford, 13 Jones & S. (N. Y.) 127.

Although it may be alleged that the examination of a defendant in advance of trial is material and necessary for the plaintiff in the prosecution of his action, it is insufficient if it does not also allege either in substance or effect that the plaintiff intends to use the evidence upon the trial. McNamara *v.* Keene, 37 Misc. 864, 76 N. Y. Supp. 992.

this fact be stated in express terms,[68] but it is sufficient if that fact can be inferred from the language of the moving papers.[69] That an examination is intended to be used on the trial need not be shown by the moving papers where the purpose of the examination is to obtain facts to enable the party to plead.[70]

D. EXAMINATION TO ENABLE PARTY TO PLEAD. — a. *In General.* The requirement under discussion to the effect that an examination of an adverse party before trial must be necessary applies with equal force where the purpose of the examination is to enable the applicant to properly frame his pleadings,[71] and it is accordingly

68. Moses *v.* Newburgh Elec. R. Co., 91 Hun 278, 36 N. Y. Supp. 149.

69. Ridert *v.* Blumenkrohn, 48 N. Y. St. 517, 20 N. Y. Supp. 614; Fogg *v.* Fisk, 30 Hun (N. Y.) 61; Van Ray *v.* Harriot, 66 How. Pr. (N. Y.) 269.

The mere fact that the affidavit does not allege that the examination is to be used at the trial does not defeat the order providing it also appears from the facts set forth that it would necessarily be used. St. Clair Paper Mfg. Co. *v.* Brown, 16 App. Div. 317, 44 N. Y. Supp. 625. In that case the affidavit on which the orders were granted set forth fully the facts showing that it was material and necessary that the examination should be made in order that the evidence of parties likely to absent themselves should be before the jury.

70. Brisbane *v.* Brisbane, 20 Hun (N. Y.) 48.

When it appears that the plaintiff asking for the examination of a defendant to enable him to frame his complaint is entitled to relief, it must further appear by the affidavit that he cannot formulate a complete statement of the relief sought without the aid of the examination of the defendant. A mere general averment that the testimony is material and necessary is insufficient where the affidavit does not specify the facts and circumstances showing wherein the examination is material and necessary in conformity with Rule 82 of the General Rules of Practice. Butler *v.* Duke, 39 Misc. 235, 79 N. Y. Supp. 419, wherein the moving affidavit contained no statement of facts and circumstances showing the necessity of the examination, but it clearly appeared therefrom that the plaintiff had sufficient knowledge of all the facts which he claimed constituted his cause of action and which on his theory of the case were requisite for him to allege in framing his complaint.

71. Bloodgood *v.* Slayback, 54 App. Div. 634, 66 N. Y. Supp. 610; Dreyfus *v.* Bernhard, 31 App. Div. 628, 55 N. Y. Supp. 6; Kastner *v.* Kastner, 53 App. Div. 293, 65 N. Y. Supp. 756.

Sufficiency of Affidavit. — An affidavit to authorize the granting of an order directing the examination of a defendant for the purpose of enabling the plaintiff to frame his complaint must show that the plaintiff does not possess the information necessary to enable him to properly state the facts which constitute his cause of action. This must be clearly and definitely made to appear by the affidavit and in such a manner that the court can see from the facts stated that the plaintiff does not possess such information. Nothing short of this will suffice. Merritt *v.* Williamson, 27 App. Div. 121, 50 N. Y. Supp. 113, where the plaintiff's own affidavit showed that he had sufficient information to frame a complaint without the aid of an examination.

In an Action to Establish a Lost Will it is essential that the plaintiff in his complaint should set forth the provisions of the will claimed to have been lost, and accordingly, on a showing that the plaintiff has no knowledge of such provisions, but that defendant has such knowledge, the plaintiff is entitled to examine the defendant to obtain the information essential to frame his complaint. Blatchford *v.* Paine, 24 App. Div. 140, 48 N. Y. Supp. 783.

held that such an examination will not be permitted where it appears that the applicant has sufficient information on which to frame his pleadings.[72]

That Defendants Are of Age. — An affidavit on an application for the examination of an expected defendant for the purpose of enabling the plaintiff to frame his complaint, must show that the persons expected to be made defendants are of full age.[73]

b. *Efforts to Secure Information.* — It is held also that in order to entitle a party under such a statute to examine an adverse party to enable him to plead he must show that he made proper efforts to secure the information desired, and a refusal thereof, or what would amount to a refusal.[74]

c. *Stating Cause of Action.* — The moving papers of a party asking for the oral examination of an adverse party for the purpose of enabling him to plead must show the existence of a cause of action in his behalf.[75] And it is not enough to state only suspicions or

An Affidavit for the Examination of the Directors of a Corporation in an action against them by a stockholder to recover damages for fraud and mismanagement of the corporate affairs, sought for the purpose of enabling the plaintiff to frame his complaint, is defective where it does not appear that the information desired is peculiarly within the knowledge of the defendant whose examination is sought and is not accessible to the plaintiff. Elmes *v.* Duke, 39 Misc. 244, 79 N. Y. Supp. 425, holding also that the affidavit in such a case should show that the plaintiff had demanded the information desired to be elicited by the examination.

Examination to Aid in Framing Bill of Particulars. — An order for the examination of a defendant to enable the plaintiff to frame his bill of particulars will not be made where the facts stated in the affidavit are sufficiently explicit, so far as they go, to enable plaintiff to frame his bill, and the other facts necessary for that purpose are within the plaintiff's knowledge, and could not, by any possibility, be within the knowledge of the defendant. Tanenbaum *v.* Lindheim, 54 App. Div. 188, 66 N. Y. Supp. 375. See also Campbell *v.* Brock's Com. Agency, 38 App. Div. 137, 56 N. Y. Supp. 540. An order for a bill of particulars required the plaintiff to give to the defendant certain information which the defendant's books alone contained, and it was accordingly held that the plaintiff was entitled to examine the defendant to obtain from him the necessary information in order that he might comply with the order.

72. Butler *v.* Duke, 39 Misc. 235, 79 N. Y. Supp. 419; Hutchinson *v.* Simpson, 73 App. Div. 520, 77 N. Y. Supp. 197; Schmerber *v.* Reinach, 38 App. Div. 622, 58 N. Y. Supp. 84; Green *v.* Carey, 81 Hun 496, 31 N. Y. Supp. 8.

Although a plaintiff may have sufficient information on which to frame his complaint so as to preclude him from having an examination of the defendant before issue joined, he may be entitled to such an examination after issue joined. St. John *v.* Buckley, 39 App. Div. 629, 56 N. Y. Supp. 635.

73. *In re* Darling, 31 Misc. 543, 64 N. Y. Supp. 793.

74. Sherman *v.* Beacon Construction Co., 58 Hun 143, 11 N. Y. Supp. 369. See also cases cited in notes immediately preceding.

75. Butler *v.* Duke, 39 Misc. 235, 79 N. Y. Supp. 419; Muller *v.* Levy, 52 Hun 123, 5 N. Y. Supp. 118; *In re* E. & H. T. Anthony & Co., 42 App. Div. 66, 58 N. Y. Supp. 907.

In re Darling, 31 Misc. 543, 64 N. Y. Supp. 793, where the court said that the New York statute should not be construed "so as to exclude such an examination before action brought for the purpose of

facts indicating the mere possibility of a cause of action.[76] It is not necessary, however, that a complete cause of action be stated, providing its nature and the substance of the judgment demanded be stated, and it be shown that the applicant is entitled to some relief.[77]

d. *Naming Intended Defendant.* — And where the purpose of the examination is to enable the plaintiff to plead, the proposed defend-

ascertaining the persons who should be made parties, or obtaining facts necessary to draw the complaint. The object was to make the said provisions cover all that could formerly be accomplished by a bill in chancery, and their language is broad enough for that purpose. Why resort to a construction which curtails such purpose? The requirement of section 872 is that the affidavit shall show that the testimony of the person to be examined 'is material and necessary for the party making such examination, or the prosecution or defense of such action.' The context shows that the word 'party' includes an expected party, and the words 'necessary for the party making such examination,' include every necessity, including the necessity for the testimony for the purpose of ascertaining who the persons who should be made parties are, and framing the pleading. There is no reason to confine the meaning of such necessity to the purpose of getting testimony for the trial. To do so would so curtail the code provisions as to exclude an examination of an expected adverse party in order to ascertain who should be made parties, or to get facts necessary to draw a pleading; and instead of any such thing having been intended by their adoption, the intention was to embrace every case where discovery could formerly be had by a bill in equity; and that was one of the cases. . . . If the code provisions allowed such an examination as is sought here only in cases where the applicant could disclose the 'specific' persons against whom his cause of action is, they would be useless, for in such cases he would need no examination to find out who they are."

While it may be that after issue is joined the plaintiff may be entitled to examine the defendant to procure testimony to be used on the trial, it is manifestly improper to allow an examination before service of the complaint for the purpose of ascertaining whether or not he has a cause of action against persons who are not parties to the action. Bloodgood *v.* Slayback, 54 App. Div. 634, 66 N. Y. Supp. 610.

76. *In re* E. & H. T. Anthony & Co., 42 App. Div. 66, 58 N. Y. Supp. 907.

77. Butler *v.* Duke, 39 Misc. 235, 79 N. Y. Supp. 419; Hart *v.* Chase, 67 App. Div. 445, 73 N. Y. Supp. 957.

In Butler *v.* Richardson, 31 App. Div. 281, 52 N. Y. Supp. 756, an action by a temporary administrator to recover certain securities alleged to be in the possession of the defendant, the plaintiff, after service of summons, and before serving a complaint, and before the defendant appeared, obtained an order requiring the defendant to appear and submit to an examination concerning the matters relevant to the cause of action as described in his affidavit for the purpose of enabling him to frame his complaint. It appeared from the affidavits that the defendant, who was the daughter of the decedent, had had possession of a large portion of the property during the decedent's lifetime, and was then in possession of a considerable portion of the property, and claimed that it belonged to her without any attempt to show how she acquired title to it. It was held that there was enough to show that the plaintiff had at least a cause of action against the defendant to recover possession of the property in her hands, and that it was impossible that the plaintiff could properly prepare a complaint until

ant must be definitely and not tentatively named in the moving papers.[78]

5. As Respects the Materiality and Relevancy of the Examination. A. In General. — It is a general rule that interrogatories propounded to an adverse party must be confined to facts and matters material and relevant to the support or defense of the case of the party propounding the interrogatories as made by his pleadings,[79] and accordingly interrogatories cannot be propounded for the purpose of obtaining the disclosure of facts which will not be of service to the interrogating party in maintaining his own allegations.[80] And upon proper exceptions interrogatories will be expunged which seek to elicit merely privileged disclosures and

he had ascertained what property the defendant had in her hands.

78. *In re* E. & H. T. Anthony & Co., 42 App. Div. 66, 58 N. Y. Supp. 907; *In re* Schoeller, 74 App. Div. 347, 77 N. Y. Supp. 614; *In re* Singer, 40 Misc. 561, 82 N. Y. Supp. 870; *In re* White, 44 App. Div. 119, 60 N. Y. Supp. 702; Muller *v.* Levy, 52 Hun 123, 5 N. Y. Supp. 118. *Compare In re* Darling, 31 Misc. 543, 64 N. Y. Supp. 793.

79. *England.* — Kennedy *v.* Dodson, L. R. 1 Ch. Div. 334.

Alabama. — Culver *v.* Alabama M. R. Co., 108 Ala. 330, 18 So. 827.

Florida. — Volusia Co. Bank *v.* Bigelow (Fla.), 33 So. 704.

Indiana. — Mutual Benefit Life Ins. Co. *v.* Cannon, 48 Ind. 264.

Massachusetts. — Hancock *v.* Franklin Ins. Co., 107 Mass. 113; Baker *v.* Carpenter, 127 Mass. 226; Wetherbee *v.* Winchester, 128 Mass. 293; Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852; Wilson *v.* Webber, 2 Gray 558; Elliott *v.* Lyman, 3 Allen 110.

Texas. — Parr *v.* Johnston, 15 Tex. 294; Barnard *v.* Blum, 69 Tex. 608, 7 S. W. 98.

Interrogatories Must Be Concerning Material Matters Which Are in Issue. — McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233, where it was held that interrogatories to a plaintiff in an action for personal injuries, attached to the answer, as to where she was born, where she lived from the time she was twenty years old, and the name of those with whom she lived or for whom she worked, and their addresses, and whether her parents were living, are not allowable under Iowa Code, § 2,693.

Where the defendant in an action of contract relies in defense upon a discharge in insolvency which the plaintiff alleges to be invalid because of various acts done by the defendant in violation of the insolvent laws, the latter cannot refuse to answer interrogatories put to him by the plaintiff relating to the matters set forth in the reply concerning the wrongful acts alleged on the ground that the facts sought for are not material to the support of the case. Hobbs *v.* Stone, 5 Allen (Mass.) 109. See also Robinson *v.* Hitchcock, 8 Metc. (Mass.) 64.

Where interrogatories to the plaintiff are allowed, and an order made that he answer them within a time specified after service of a copy, the court impliedly affirms their pertinency, and the defendant cannot be compelled to receive answers irregularly verified or insufficiently authenticated. Chandler *v.* Hudson, 8 Ala. 366.

80. Wilson *v.* Webber, 2 Gray (Mass.) 558; Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852. See also Burnett *v.* Garnett, 18 B. Mon. (Ky.) 68.

Although an interrogatory may be immaterial, exception does not lie to an order compelling a party to answer it where the answer shows the immateriality and does the party no harm. Todd *v.* Bishop, 136 Mass. 386.

facts not relevant to any disputed matters, nor relevant to the case of the interrogating party.[81]

Oral Examination. — It is also a general rule that the oral examination of a party before trial must be limited to inquiries material and relevant to the cause of action or defense, as the case may be.[82]

New Matter Set Up by Plaintiff in Answer to Defense. — Where a plaintiff in answer to or in avoidance of a defense sets up any new or distinct matter, it is competent for him to propound interrogatories to the defendant for the purpose of discovering facts in support of such new issue.[83]

81. *England.* — Kennedy *v.* Dodson, L. R. 1 Ch. Div. 334.

Alabama. — Culver *v.* Alabama M. R. Co., 108 Ala. 330, 18 So. 827.

Georgia. — Thornton *v.* Adkins, 19 Ga. 464.

Indiana. — Stevens *v.* Flanagan, 131 Ind. 122, 30 N. E. 898; Druley *v.* Hendricks, 13 Ind. 478.

Iowa. — McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233; Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43; Red Polled Cattle Club *v.* Red Polled Cattle Club, 108 Iowa 105, 98 N. W. 803; Mason *v.* Green, 32 Iowa 596.

Louisiana. — Butler *v.* Stewart, 18 La. Ann. 554.

Massachusetts. — Elliott *v.* Lyman, 3 Allen 110; Foss *v.* Nutting, 14 Gray 484.

Although an interrogatory may include matters not relevant to the issues as made up, the party interrogated is not bound to answer such portion, and may confine his answer to what is relevant. Hancock *v.* Franklin Ins. Co., 107 Mass. 113.

82. Young *v.* Eames, 24 Misc. 432, 53 N. Y. Supp. 678; Dudley *v.* New York Filter Mfg. Co., 80 App. Div. 164, 80 N. Y. Supp. 529; Lewisohn *v.* Muller, 6 App. Div. 459, 39 N. Y. Supp. 570.

"While it is true that an examination before trial is not allowed for the purpose of enabling a party to prepare for trial, the fact that such deposition is to be used for that purpose would not defeat the application where it appeared that the object of the examination was in good faith to procure evidence to be used upon the trial; and, while the courts have been careful to refuse an examination where, from all the circumstances, it was apparent that the object of the examination was, not to obtain testimony, but to ascertain in advance what testimony the party whose examination is sought would give upon the trial, still where it is evident that the evidence will be material, that there is no reason to doubt the good faith of the party making the application, and that it was intended to use the testimony taken upon the trial, the right given by the code should not be refused." Plant *v.* Harrison, 52 App. Div. 628, 65 N. Y. Supp. 236.

A party litigant may, in the discretion of the judge to whom an application has been made under the New York statute, have a general examination, before trial, of his adversary as a witness, and the examination is not, of course, to be limited to an affirmative cause of action or an affirmative defense set forth in favor of the party desiring the examination. Herbage *v.* Utica, 109 N. Y. 81, 16 N. E. 358, wherein it was further held that an order so limiting the examination, not according to the discretion of the court, but because the court was of the opinion that it had no power to so authorize, was reviewable, and the court in fact reversed the order.

Under a statute providing that in ejectment the damages recoverable shall include the rents and profits, or the value of the use and occupation of the premises, where either can be legally recovered by the plaintiff, the plaintiff is entitled to examine the defendants as to the amount of rents received by them. Ryan *v.* Reagan, 46 App. Div. 590, 62 N. Y. Supp. 39.

83. Todd *v.* Bishop, 136 Mass. 386; Wilson *v.* Webber, 2 Gray (Mass.) 558.

B. Anticipating Adversary's Case. — It is a well-settled rule that a party cannot, by interrogatories, be permitted to enforce disclosure respecting his adversary's evidence, or the manner in which he proposes to try his case.[84] And the same rule applies with equal force in the case of an oral examination in advance of trial.[85] But an oral examination is not to be denied in an otherwise proper case merely because it might incidentally disclose the case of the party to be examined.[86]

C. Existence of Cause of Action. — Nor can an oral examination of a defendant before action brought be had for the purpose of ascertaining whether or not the plaintiff has a cause of action,[87]

84. *Connecticut.* — Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977.

Massachusetts. — Wilson *v.* Webber, 2 Gray 558; Sheren *v.* Lowell, 104 Mass. 24; Wetherbee *v.* Winchester, 128 Mass. 293; Todd *v.* Bishop, 136 Mass. 386; Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265; Elliott *v.* Lyman, 3 Allen 110.

New Hampshire. — State *ex rel.* Eaton *v.* Farmer, 46 N. H. 200.

Oregon. — Wheeler *v.* Burckhardt, 34 Or. 504, 56 Pac. 644.

Interrogatories cannot be propounded for the purpose of asking what particular possible witnesses would testify to. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265.

An Alabama Statute of 1837, "more effectually to provide for discovery in suits at common law," authorized a party to propose to his adversary such questions only as he would be bound to answer upon a bill of discovery in equity; and it has been held accordingly that the defendant was not bound to answer interrogatories which called on him to state whether he had entered as credits on the note in suit all the moneys that had been paid thereon; but to make such interrogatories pertinent it should appear either from the interrogatories or affidavits accompanying them that other payments than those credited had in fact been made. Goodwin *v.* Wood, 5 Ala. 152.

Interrogatories propounded to the plaintiff under the statute are not in the nature of a fishing bill, where, in connection with the affidavit made previous to their being filed, they state the existence of a pertinent fact which the defendant believes to be within the plaintiff's knowledge and call upon him to answer in respect thereto. Chandler *v.* Hudson, 8 Ala. 366.

The taking of the deposition of a party in a pending cause merely to ascertain in advance what his testimony will be, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process, and a party committed for refusing to give his deposition in such a case will be released on *habeas corpus*. *In re* Cubberly, 39 Kan. 291, 18 Pac. 173; *In re* Davis, 38 Kan. 408, 16 Pac. 670.

85. Fourth Nat. Bank *v.* Boynton, 29 Hun (N. Y.) 441; Manhattan Elec. Light. Co. *v.* Consolidated Tel. & Elec. Subway Co., 59 Hun 624, 13 N. Y. Supp. 353; Dudley *v.* New York Filter Mfg. Co., 80 App. Div. 164, 80 N. Y. Supp. 529; Dobyns *v.* Commercial Trust Co., 31 Misc. 829, 64 N. Y. Supp. 554.

An examination of a proposed defendant should not be permitted where its purpose is merely to ascertain what the defendant will swear to. New York State Bkg. Co. *v.* Van Antwerp, 23 Misc. 38, 51 N. Y. Supp. 653.

86. Vial *v.* Jackson, 73 App. Div. 355, 76 N. Y. Supp. 668; Kramer *v.* Kramer, 70 App. Div. 615, 74 N. Y. Supp. 1,049.

87. Butler *v.* Duke, 39 Misc. 235, 79 N. Y. Supp. 419; Dobyns *v.* Commercial Trust Co., 31 Misc. 829, 64 N. Y. Supp. 554; Byrnes *v.* Ladew, 15 Misc. 413, 36 N. Y. Supp. 1,048. See also Kinney *v.* Roberts, 26 Hun (N. Y.) 166.

or for the purpose of ascertaining whether he has one or the other of two causes of action.[88]

D. Existence of Evidence. — A party is not entitled to examine an adverse party for the purpose of ascertaining whether evidence exists.[89]

E. Hypothetical Questions. — A party cannot be required to answer interrogatories which are mere hypothetical questions.[90] Nor is a plaintiff entitled to an oral examination of the defendant for the mere purpose of ascertaining whether an action can be successfully maintained against him upon a hypothetical case.[91]

F. Test of Relevancy or Materiality. — **The Relevancy of an Interrogatory** is not to be determined by a resort by the court to answers to other interrogatories; that fact depends in the first instance on the state of the case at the time when the right is questioned.[92]

Facts Are Material To the Plaintiff's Case none the less because the defendant's case may consist in pressing a different view as to what the facts were.[93]

G. Examination Likened to Cross-Examination. — It is held that the examination of a party before trial is in the nature of a cross-examination, and that the range and extent of it are to some extent discretionary with the judge.[94]

The New York Statute authorizing the examination of parties in advance of trial does not authorize an examination of a person for the purpose of ascertaining whether or not the plaintiff in a proposed action has a cause of action, and against whom that cause of action exists. *In re* Schoeller, 74 App. Div. 347, 77 N. Y. Supp. 614, where the court, quoting from *In re* E. & H. T. Anthony & Co., 42 App. Div. 66, 58 N. Y. Supp. 907, said that a "proposed defendant must be definitely and not tentatively named in the affidavit, and that it must also be made to appear that the applicant has a cause of action against such specific person."

88. Green *v.* Carey, 81 Hun 496, 31 N. Y. Supp. 8.

89. Douglas *v.* Meyers, 28 Jones & S. 369, 20 N. Y. Supp. 435, 21 N. Y. Supp. 1,091; Schepmoes *v.* Bowsson, 1 Abb. N. C. 481. See also Gilbert *v.* Third Ave. R. Co., 17 Jones & S. (N. Y.) 129. *Compare* Campbell *v.* Joseph H. Bauland Co., 41 App. Div. 474, 58 N. Y. Supp. 984.

90. Meyer *v.* Manhattan L. Ins. Co., 144 Ind. 439, 43 N. E. 448.

91. New York State Bkg. Co. *v.* Van Antwerp, 23 Misc. 38, 51 N. Y. Supp. 653.

92. Elliott *v.* Lyman, 3 Allen (Mass.) 110.

93. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265, a personal injury action in which the facts sought to be disclosed related to the conduct of the defendant corporation at the moment of the accident or just before.

94. Cleveland *v.* Burnham, 60 Wis. 16, 18 N. W. 190; *In re* Foster, 44 Vt. 570.

The Examination of a Party Under the Wisconsin Statute is not limited to cases in which a discovery might have been had in equity; nor after the issues are settled by the pleadings can the scope of such examination be narrowed by order of the court so as to prevent the disclosure of anything relevant to the controversy. Kelley *v.* Chicago & N. W. R. Co., 60 Wis. 480, 19 N. W. 521, where the court said: "It seems to us that the object of our statute, as it now stands, is to elicit a full and complete disclosure of whatever may be relevant to the controversy, to be ascertained, in case the pleadings are in, by the issues thereby

Fiduciaries. — Where a fiduciary relationship has existed between the parties greater latitude is allowed in the examination. The rule is flexible, and must be adapted to and controlled by the facts and circumstances of each case, and considered with reference to the relation existing between the parties, and that strictness which would be applied between ordinary suitors would necessarily yield when the relation of confidence and trust existed.[95]

made; and, in case the issues have not been joined, then by such order limiting the subjects to which such examination may extend. . . . In many cases a party may be forced to rely wholly upon the testimony of the adverse party to make out his case or defense, and hence there seems to be no more reason for limiting the scope of the examination of such adverse party, when taken as a deposition, than when taken in open court upon the trial. And since no one would contend that, in case such adverse party was examined at the instance of the opposite party upon the trial, the court could rightfully narrow the scope of the examination so as to exclude matters relevant to the controversy, so it seems to us equally improper to so narrow the scope of the inquiry where the examination is by way of deposition."

95. Rosenbaum *v.* Rice, 36 Misc. 410, 73 N. Y. Supp. 714; Dudley *v.* New York Mfg. Co., 80 App. Div. 164, 80 N. Y. Supp. 529; Carter *v.* Good, 57 Hun 116, 10 N. Y. Supp. 647; Skinner *v.* Steele, 88 Hun 307, 34 N. Y. Supp. 748.

The general rule is that, where the fiduciary relation of principal and agent exists, and the facts are peculiarly within the knowledge of the party to be examined, the technical rules which govern the granting of orders for the examination before trial are relaxed, and it is the duty of the party sought to be examined to make a full disclosure of what he has done. Whitman *v.* Keiley, 58 App. Div. 92, 68 N. Y. Supp. 551, where the court said: "This rule is a salutary one. No good reason can be suggested, where one party acts as the agent of another in the management of his property, why, when called upon by his principal, he should not make the fullest disclosure of what he has done with that property, and especially is this true where the principal absolutely surrenders the control and management of the property — as in the case before us — to the agent. Nor do we think the allegation in defendant's answer that he had settled with the plaintiff should be permitted to defeat the examination. If a settlement was had, no good reason can be suggested why the defendant should not show that there was a proper basis for it, that it was a fair settlement, that the plaintiff got all she was entitled to, that he did not take advantage of her by reason of the fiduciary relations existing between them. He could not, of course, take advantage of this relation to her prejudice and to his own advantage. A settlement, to be binding and effective, under the facts set out in this record, must have been fair, and each of the parties must have acted with full knowledge of what was being done."

In York *v.* Dick, 61 App. Div. 620, 70 N. Y. Supp. 614, plaintiff and defendant agreed to co-operate in an attempt to acquire and dispose of the European rights under a patent for the magnetic separation of iron ore. The plaintiff, who was an engineer, and skilled in the iron and steel business, agreed to assist the defendant by advice and instructions as to the business and the value of the patents, and by writing reports on the subject. The defendant was to have control of acquiring the rights and of disposing of them, and was to furnish the money necessary to complete the transaction, and agreed to pay plaintiff one-third of the net profits of the enterprise. It was held that the order setting aside an order for the examination of defendant before trial should be affirmed, providing that the defendant stipu-

H. Preliminary Showing of Materiality, etc. — a. *In General.* — Sometimes in the case of interrogatories the statute expressly requires a party submitting interrogatories to an adverse party to show by his oath the materiality of the matters sought to be disclosed.[96] And this is also required in the case of an application for an oral examination.[97]

b. *Existence of Matters Desired.* — Existence of the matters which are desired to be proved by the examination of a party before trial must be shown by moving papers.[98]

c. *Several Parties to Be Examined.* — And where there are several parties to be examined it must be shown what is expected to be proved by each of them.[99]

d. *Stating Cause of Action.* — The existence and nature of the cause of action must also be shown and stated in the moving papers;[1] although it is not necessary that a complete cause of action be stated, it is enough if the court can see that the party is entitled to some relief.[2]

6. Formal Requisites. — A. As Respects the Application and Affidavit. — a. *By Whom to Be Made.* — The affidavit and appli-

lated that there were profits resulting from the disposal of the said patent rights. See also Parks *v.* Gates, 54 App. Div. 512, 66 N. Y. Supp. 1,034.

In an action by a principal against his broker, who acted under a discretionary power to buy and sell, the plaintiff is entitled to examine the defendant as to everything in the business of the latter that would be of benefit to them in their particular transactions with the defendants. Haebler *v.* Hubbard, 36 Misc. 840, 74 N. Y. Supp. 932.

96. Bivens *v.* Brown, 37 Ala. 422; Foss *v.* Nutting, 14 Gray (Mass.) 484.

In State *ex inf.* Crow *v.* Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737, it was held that "the statement that the president and secretary of this corporation can furnish valuable and material testimony is not such a showing as would authorize either the commissioner or the court to put in motion the provisions of this statute. If, by merely giving the names of the parties and the statement that their testimony is valuable and material, the court must issue the process, then the terms, as applied to this statute, that it is 'unreasonable and oppressive,' are quite appropriate."

In Young *v.* McLemore, 3 Ala. 295, it was held that the oath required by the statute of 1837 as to the materiality of the testimony sought to be obtained by the interrogatories might be made by a stranger to the suit, and that it was sufficient if made by the attorney of record.

The affidavit of materiality required by statute as a requisite to the right to file interrogatories is not conclusive as to such materiality; it is simply a security against frivolous or vexatious examination of a party by his opponent. Foss *v.* Nutting, 14 Gray (Mass.) 484.

97. Robertson *v.* Russell, 20 Hun (N. Y.) 243; Britton *v.* Macdonald, 2 Misc. 514, 23 N. Y. Supp. 350; Colin *v.* Mooers, 54 Hun 639, 8 N. Y. Supp. 12.

98. Kirkland *v.* Moss, 11 Abb. N. C. (N. Y.) 421.

99. Simmons *v.* Hazard, 58 Hun 119, 11 N. Y. Supp. 511.

1. Boorman *v.* Pierce, 56 How. Pr. (N. Y.) 251; Duffy *v.* Lynch, 36 How. Pr. (N. Y.) 509; Hale *v.* Rogers, 22 Hun (N. Y.) 19.

2. Fatman *v.* Fatman, 45 N. Y. St. 859, 18 N. Y. Supp. 847.

cation for the oral examination of an adverse party should generally be made by the party himself who desires the examination.[3]

Affidavit by Attorney. — It is held, however, that the affidavit and application for such an examination may be made by the party's attorney, if he knows the facts of his own knowledge.[4] But an affidavit by an attorney is not sufficient where it does not disclose a sufficient reason why the party himself does not make it.[5]

b. *Form and Sufficiency.* — **(1.) Generally.** — The affidavit on an application for the oral examination of an adverse party before pleading must comply with the statute in all respects.[6]

(2.) Affidavit on Information and Belief. — An application to examine an adverse party is not to be denied merely because the allegations in the affidavit are made on information and belief, where the applicant discloses the sources and grounds of his information.[7] Otherwise, however, where it appears that the information

3. Ziegler *v.* Lamb, 5 App. Div. 47, 40 N. Y. Supp. 65; Simmons *v.* Hazard, 58 Hun 119, 11 N. Y. Supp. 511; Cross *v.* National Fire Ins. Co., 53 Hun 632, 6 N. Y. Supp. 84.

4. Hale *v.* Rogers, 22 Hun (N. Y.) 19.

5. *In re* Darling, 31 Misc. 543, 62 N. Y. Supp. 793, wherein it was held also that the affidavit in such case must show that the facts sought to be elicited by the examination are not within the knowledge of the party himself.

Absence. — A statement in an affidavit for the examination of a defendant which was made by the plaintiff's attorney, giving as an excuse why the plaintiff did not make the affidavit, that he was at the time absent in another state, is not of itself sufficient to excuse the non-production of the affidavit of the plaintiff himself. Orne *v.* Greene, 74 App. Div. 404, 77 N. Y. Supp. 475.

6. Dart *v.* Laimbeer, 15 Jones & S. (N. Y.) 490.

An affidavit on an application to examine a party, whose residence is unknown, must state an attempt and failure to ascertain it. Dennis *v.* Tebbetts, 29 Misc. 600, 61 N. Y. Supp. 503.

The Affidavit Required by the Wisconsin Statute of a party asking for the examination of his adversary before issue joined is to limit the scope of the inquiry to facts relevant to the points stated in it, and to enable the court or judge, in his discretion, to still further limit the subjects to which the examination shall extend. Schmidt *v.* Menasha Woodenware Co., 92 Wis. 529, 66 N. W. 695.

7. Rosenbaum *v.* Rice, 36 Misc. 410, 73 N. Y. Supp. 714; Leach *v.* Haight, 34 App. Div. 522, 54 N. Y. Supp. 550; McCready *v.* Haight, 22 App. Div. 632, 48 N. Y. Supp. 39; Drake *v.* Weinman & Co., 12 Misc. 65, 33 N. Y. Supp. 177; Talbot *v.* Doran & Wright Co., 30 N. Y. St. 558, 9 N. Y. Supp. 478.

Compare Koehler *v.* Sewards, 55 Hun 608, 8 N. Y. Supp. 504.

Contra. — Tilton *v.* United States Life Ins. Co., 52 How. Pr. (N. Y.) 179.

An Affidavit by the Plaintiff's Attorney on an application for the examination of the defendant which is objectionable for not sufficiently excusing the non-production of the affidavit of the plaintiff himself is not rendered sufficient by a statement that all of the allegations are within the personal knowledge of the attorney, where the matters set up therein show that the attorney could not have had personal knowledge thereof. Orne *v.* Greene, 74 App. Div. 404, 77 N. Y. Supp. 475.

In Blatchford *v.* Paine, 48 App. Div. 140, 48 N. Y. Supp. 783, an action to establish a lost will, the affidavit for the examination of the defendant stated every material fact or former statutory requirement, either upon positive knowledge, or upon information alleged to have been derived from the defendant, and it was

was not derived from any one who had personal knowledge,[8] or where it is fairly to be inferred that although persons who gave the information had no personal knowledge, yet they had means of information which, if followed up, would enable the applicant to obtain proof of the matters in question.[9]

(3.) Stating Name and Residence of Party to Be Examined. — The affidavit on an application for the oral examination must state the name and residence of the party to be examined,[10] and if a corporation, must state the name of the officer or director to be examined.[11]

c. *Service.* — In the case of an oral examination notice of an application therefor need not be given to the party to be examined.[12] Service of interrogatories may be made upon the attorney of record of the party interrogated,[13] and sometimes service of the interrogatories must be made in this manner.[14]

A Subpoena need not necessarily accompany an order for the examination.[15] A mere subpoena is not enough; a proper order for that purpose must be obtained and served.[16]

held that the fact that the additional averments were made on information and belief claimed to have been received from persons, whose affidavits are not presented, did not render the affidavit fatally defective because such further averments could be treated as surplusage.

8. Tanenbaum *v.* Lindheim, 54 App. Div. 188, 66 N. Y. Supp. 375.

9. Tanenbaum *v.* Lindheim, 54 App. Div. 188, 66 N. Y. Supp. 375.

10. Dennis *v.* Tebbetts, 29 Misc. 600, 61 N. Y. Supp. 503.

11. Williams *v.* Western Union Tel. Co., 15 Jones & S. (N. Y.) 380.

12. Jerrells *v.* Perkins, 25 App. Div. 348, 49 N. Y. Supp. 597. *Compare* Farrington *v.* Stone, 35 Neb. 456, 53 N. W. 389.

13. Illinois Central R. Co. *v.* Sanford, 75 Miss. 862, 23 So. 355; Jackson *v.* Hughes, 6 Ala. 257.

In Frosh *v.* Holmes, 8 Tex. 29, the defendant had amended his answer and propounded interrogatories to the plaintiff, who was a non-resident. A copy of the interrogatories was served on an attorney who was not at that time, nor previously, the plaintiff's attorney of record. At a subsequent time when the cause was called for trial the plaintiffs moved to reject the amended answer and the interrogatories annexed, which motion was sustained. In sustaining this rule the court said: "The interrogatories do not appear to have been served upon the plaintiffs or their attorney of record, nor does it appear that either had notice of them until the cause was called for trial. They were then rightly stricken out, for the reason that they would have operated a surprise upon the plaintiffs and a continuance of the cause. And the court rightly refused to permit them to be then refiled for the same reason. That would have been, in effect, to have reversed the decision by which they were stricken out. If, after the subsequent continuance of the cause, the defendant had asked leave to amend his answer and to propound interrogatories to the plaintiffs, there being then time to serve them before the next term, it would doubtless have been allowed him. But under the circumstances the interrogatories were rightly rejected."

Notice of the interrogatories may, in case of a non-resident party, be served on the attorney of record of such party. Huggins *v.* Carter, 7 Ala. 630.

14. Cain Lumb. Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882, so holding under the Alabama statute where the party to be examined is a non-resident.

15. Pake *v.* Proal, 2 Abb. N. C. (N. Y.) 418.

16. Hewlett *v.* Brown, 1 Bosw.

7. Time of the Examination. — The right of a party litigant given by statute to examine an adverse party before trial is held to be a substantial right, and an application therefor may be made out any reasonable time before trial.[17] But a party desiring answers to interrogatories to enable him to prepare for trial must file them seasonably in advance.[18]

Placing the Action Upon the Trial List does not waive the right to have interrogatories answered.[19]

III. THE SUBSTANCE OF THE EXAMINATION.

1. Legality, Competency, etc. — A. In General. — The statutes authorizing the examination of an adverse party in advance of trial, either by interrogatories or by an oral examination, contemplate the eliciting of legal evidence.[20] Thus a party cannot be required to answer interrogatories calling for opinions,[21] nor can

(N. Y.) 655; Bleecker *v.* Carroll, 2 Abb. Pr. (N. Y.) 82.

17. Haebler *v.* Hubbard, 36 Misc. 840, 74 N. Y. Supp. 932.

Under the Wisconsin Statute a party has the right to examine his adversary in advance of the trial as to any matter relevant to the controversy indicated in his affidavit, and is entitled to have the examination any time after the commencement of the action and before judgment. Schmidt *v.* Menasha Woodenware Co., 92 Wis. 529, 66 N. W. 695.

18. Wooley *v.* Railroad Co., L. R. 4 C. C. 602; Atkinson *v.* Foster, L. R. 1 Q. B. 628; Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 157, 9 So. 661; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1,109; Blossom *v.* Ludington, 32 Wis. 212.

It is not error to strike from the files interrogatories filed by the defendant to the plaintiff where the interrogatories were filed when the case was called for trial, and the action has been pending for several months. Jones *v.* Berryhill, 25 Iowa 289.

A plaintiff should not be permitted to propound interrogatories to the defendant at a term subsequent to the one at which the defendant answered and within a few days of the time when the trial is called, unless it is essential to the justice of the cause and the delay has been satisfactorily explained. MacMillan *v.* Croft, 2 Tex. 397.

19. Kennedy *v.* Gooding, 7 Gray (Mass.) 417.

20. Volusia Co. Bank *v.* Bigelow (Fla.), 33 So. 704.

Culver *v.* Alabama M. R. Co., 108 Ala. 330, 18 So. 827, an action against a railroad company to recover damages for the wrongful death of the plaintiff's intestate, wherein it was held that interrogatories propounded to the defendant's engineer and section foreman calling for unsworn *ex parte* reports of the accident in which the decedent was killed, made subsequent thereto by the persons interrogated, called for mere hearsay evidence.

Transactions With Deceased Person. — In an action by an administrator to recover from the defendant certain securities in the latter's possession, the ownership of which the latter claims, an examination of the defendant as to transactions between him and the decedent is not to be denied merely because the defendant could not be examined as a witness as to such transactions on his own behalf. Butler *v.* Richardson, 31 App. Div. 281, 52 N. Y. Supp. 756.

21. Meyer *v.* Manhattan Life Ins. Co., 144 Ind. 439, 43 N. E. 448.

In a personal injury action it is not error to refuse to compel an answer to an interrogatory as to what caused the accident. Robbins *v.*

he be required in answering interrogatories to set out copies of instruments.[22]

B. Separating Competent From Incompetent Matters. — If both competent and incompetent matters are embraced in a single interrogatory, the party is not required to take the risk of separating the competent from the incompetent.[23]

C. Waiver of Defects by Answering Improper Interrogatories. — The fact that a party interrogated has answered interrogatories which he could not have been compelled to answer does not have the effect of a waiver of his right to refuse to answer other improper interrogatories.[24]

2. Matters Privileged From Disclosure. — A. In General. — The rule of law protecting a witness in respect of disclosures tending to furnish evidence necessary to convict him of a crime or subject him to a penalty or forfeiture, or to effect a betrayal of professional confidence, operates in favor of a party called upon to answer interrogatories.[25] Nor can a party who has illegally extorted disclosure of privileged matters from his adversary be permitted to prove the contents of the answers by the testimony of third persons alleged to have read them.[26]

B. Matters Protected From Public Policy. — Nor can interrogatories be employed for the purpose of compelling disclosure of matters or information as to which the party addressed would, from

Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265, where the court said: "The right to interrogate is not a right to abridge the other party's right to try any fairly doubtful fact. Still less is it a right to require him to offer an opinion on the general issue of the case, or to state his view of it and to that extent to disclose his defense."

In Insurance Press Co. *v.* Montauk Fire Detect. Wire Co., 70 App. Div. 50, 74 N. Y. Supp. 1,093, the fact upon which the plaintiff's cause of action depended was that three millions of the stock of a corporation were originally issued to the defendants in consideration of the purchase of certain patents then owned or controlled by them, and that the patents did not exceed in value the sum of one million dollars; and it was held that as the plaintiffs must, in order to sustain their action, prove that the patent was worth much less than the amount of stock issued for it they were entitled to examine the defendants before trial to obtain their opinions as to the value of the patents.

22. Meyer *v.* Manhattan Life Ins. Co., 144 Ind. 439, 43 N. E. 448.

23. Wetherbee *v.* Winchester, 128 Mass. 293. See also Pritchett *v.* Munroe, 22 Ala. 501.

24. Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852. See also Fels *v.* Raymond, 139 Mass. 98, 28 N. E. 691.

25. Parr *v.* Johnston, 15 Tex. 294; Volusia Co. Bank *v.* Bigelow (Fla.), 33 So. 704; Horstman *v.* Kaufman, 97 Pa. St. 147, 39 Am. Rep. 802.

Damages Recoverable Under the Alabama Statute providing that a personal representative may maintain an action for the wrongful act or omission or negligence of any person whereby the death of his testator or intestate was caused are not in the nature of a penalty; and in Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168, an action against a railroad company under this statute, it was held that answers made by defendant's engineer to interrogatories propounded do not have any tendency to criminate or expose him to a penalty or forfeiture, and hence may be received in evidence against the defendant.

26. Marshall *v.* Riley, 7 Ga. 367.

considerations of public policy, be prevented from testifying upon the trial.[27]

C. Claim of Privilege. — A party who refuses to answer interrogatories on the ground that the interrogatories called for matters privileged from disclosure must make a statement to that effect under oath.[28]

In the Case of an Oral Examination the examination should not be denied on the ground that the matters privileged from disclosure might be asked on the examination. If the party to be examined has any question of privilege to assert, that should be left to the time of the examination and the judge before whom it takes place.[29]

27. Matters Protected from Public Policy. — Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142, an action on a note alleged to have been made by a decedent wherein answers by the plaintiff to interrogatories, filed by the defendant, of facts alleged to be material to the defense were held inadmissible in so far as they related to transactions with the decedent. The court said that if the matters embraced within the answers related to subjects which the law, from considerations of public policy, would have prevented the plaintiff from testifying to upon trial, it would require no argument to demonstrate that like considerations demanded that the answers should be excluded.

Information Furnished to Federal Government. — In Worthington *v.* Scribner, 109 Mass. 487, 12 Am. Rep. 736, an action to recover damages for maliciously and falsely representing to the federal treasury department that the plaintiff was intending to defraud the revenue, it was held that the defendants could not be compelled to answer interrogatories as to whether or not they had given or caused to be given to the department information of supposed or alleged frauds proposed to be perpetrated by the plaintiff.

In United States *v.* Moses, 4 Wash. O. C. 726, 27 Fed. Cas. No. 15,825, a trial of an indictment for counterfeiting, it was ruled that the officer who apprehended the defendant was not bound to disclose the name of the person from whom he received the information which led to the detection and arrest; Mr. Justice Worthington saying that such disclosure might be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crime which they know to have been committed.

28. Necessity for Substantiating Claim of Privilege. — Hobbs *v.* Stone, 5 Allen (Mass.) 109, wherein the court said: "It is not sufficient, therefore, for a party interrogated under the statute to say that he declines to answer the same because it would tend to criminate him. It must be shown affirmatively that they would do so. The party must answer under oath that such would be the effect. If he would avail himself of this statute provision as a justification for not making a direct answer to the interrogatories, he must at least take the responsibility of presenting this particular objection by averring the fact under the same solemnity of an oath as a full answer requires. It is to be his answer to the interrogatory."

The Privilege of Refusing to Answer Interrogatories on the ground that they tend to incriminate or expose to a penalty or forfeiture is purely a personal one and can be claimed only by the witness or by some one authorized to protect his interests, and unless so claimed will be deemed to be waived. Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168.

29. Rosenbaum *v.* Rice, 36 Misc. 410, 73 N. Y. Supp. 714; *In re* Porter Screen Mfg. Co., 70 App. Div. 329, 75 N. Y. Supp. 286; Ryan *v.* Reagan, 46 App. Div. 590, 62 N. Y. Supp. 39.

Compare People *ex rel.* Morse *v.* Nussbaum, 55 App. Div. 245, 67 N. Y. Supp. 492, wherein it was held

3. Answers to Interrogatories. — A. By Whom to be Made. — a. *In General.* — All natural persons to whom interrogatories are addressed must answer them personally under oath,[30] and it is not sufficient that the answer is made by his attorney, although accompanied by his own affidavit that his information came from the attorney.[31]

b. *Answers by Corporations.* — The statutes authorizing interrogatories usually provide for compelling answers from corporations through the medium of their executive officers, who for that purpose are deemed to stand in the place of the corporation.[32]

B. Requisites of Answers. — a. *Fullness, Fairness, Responsiveness, etc.* — Answers to all proper interrogatories must be made with the same fullness and fairness as was or may be required in answering a bill of discovery.[33] But evasions in answering inter-

that under the New York statute denouncing monopolies and authorizing the attorney-general, about to commence an action to restrain and prevent contracts for that purpose, to apply for an order to examine witnesses, etc., one who is named in the application need not wait until the question is put to him and then claim his right to refuse to answer on the ground that it would criminate him, but may plead that ground on the hearing on the application, where it is apparent that all the questions and answers sought for in the application would tend to criminate.

In an Action for Libel against a commercial agency consisting of delivering the alleged libelous matter to subscribers, the fact that the plaintiff knows the names of certain of the subscribers to the defendant's reports is no reason for refusing the plaintiff an examination of the defendant's officers, on the ground that the matters elicited might tend to incriminate them. If, upon the examination, any questions should be asked as to which the witness should be entitled to claim his privilege on this ground, he would then be at liberty to assert his privilege, and the judge before whom the examination was taken would be called upon to rule upon the question. Campbell *v.* Brock's Com. Agency, 38 App. Div. 137, 56 N. Y. Supp. 540.

30. Harding *v.* Noyes, 125 Mass. 572. *Compare* Jewett *v.* Rines, 39 Me. 9.

31. Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48, where interrogatories were attached to a pleading, as provided in §§ 2,693 and 2,694 of the code, and addressed to the opposite party, with an affidavit that the subject-matter of the interrogatories was within the personal knowledge of the opposite party or his agent or attorney; *held*, that the party propounding the interrogatories was entitled to have them answered by the opposite party to whom they were addressed, and that such right was not satisfied by answers by the attorney of the opposite party, with an affidavit by the latter that nearly all the information he possessed in regard to the case had been acquired from such attorney, and asking that they be permitted to stand as his answers, but not alleging that he believed the answers to be true.

32. See Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48.

33. Necessity of Fullness and Fairness of Answers.

Alabama. — Saltmarsh *v.* Bower, 22 Ala. 221.

Florida. — Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1,157, 9 So. 661.

Georgia. — Thompson *v.* Mapp, 6 Ga. 260.

Massachusetts. — Hancock *v.* Franklin Ins. Co., 107 Mass. 113; Foss *v.* Nutting, 14 Gray 484; Baxter *v.* Massasoit Ins. Co., 13 Allen 320.

Ohio. — Chapman *v.* Lee, 45 Ohio St. 356, 13 N. E. 736.

Texas. — Barnard *v.* Blum, 69 Tex. 608, 7 S. W. 98.

Washington. — Lowry *v.* Moore, 16

rogatories will not be regarded unless they are of such a character as to leave the response to some particular interrogatory actually imperfect as respects some material contention fairly within the issues of the case.[34] Nor are answers to interrogatories to be disregarded merely because they do not cover all of the points made in the interrogatories.[35]

A General Motion to exclude answers to interrogatories on the ground that they are evasive, irresponsive and contain improper

Wash. 476, 48 Pac. 238, 58 Am. St. Rep. 49; Du Clos *v.* Batcheller, 17 Wash. 389, 49 Pac. 483.

Answers to interrogatories are properly stricken out where they show on their face that no attempt had been made in good faith to fairly and candidly answer the interrogatories. Blair *v.* Sioux City & Pac. R. Co., 109 Iowa 369, 80 N. W. 673, where the court said: "The answers showed a studied attempt to avoid complying with the law by entering a disclaimer on part of the answering officers as to any personal knowledge as to the matters inquired about. Counsel for appellants admit in argument (and the fact would be apparent, if not admitted) that the information sought by the interrogatories was in the possession of the defendant corporation, was shown by its books and papers in the custody of the officers, and, for all that appears, was easily and speedily accessible to the answering officers. Studiously avoiding all these sources of information in their own possession as officers of the defendant, they answer that they have no personal knowledge as to the matters inquired about, and they know of no offer of the defendant having such personal knowledge. Under the circumstances, with the means of knowledge in their possession, these answers presented a very clear case of trifling with the court."

An answer to an interrogatory that the party interrogated is unable to ascertain what the facts are, is sufficient, if he can say this with truth after reasonable inquiry. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265.

In Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67, an action on a bill of exchange, it was held that an answer to an interrogatory as to whether or not the bill was ever presented for payment for acceptance, to the effect that it had been sent to the drawee for collection, but had been returned because the drawee had been instructed by letter from the drawer not to pay it, was responsive, because the answer showed both a presentation and an excuse for non-payment.

So Long as the Interrogatories are Substantially Answered it is not necessary that the answers should correspond numerically with the interrogatories, unless it can be perceived that the rights of the proponent are prejudiced thereby. Harrison *v.* Knight, 7 Tex. 47.

A Party May Answer One of Several Interrogatories to each of which the answer is responsive, notwithstanding the statute may provide that each interrogatory shall be answered separately and fully. Amherst & B. R. Co. *v.* Watson, 8 Gray (Mass.) 529.

If Answers to Interrogatories are Adjudged to Be Imperfect the interrogated party should have the opportunity to amend them after the particulars in which they are insufficient are pointed out. Fels *v.* Raymond, 139 Mass. 98, 28 N. E. 691.

34. Effect of Evasions.

Alabama. — Swinney *v.* Dorman, 25 Ala. 433.

Indiana. — Wheelock *v.* Barney, 27 Ind. 462.

Louisiana. — Bond *v.* Bishop, 18 La. Ann. 547; Wright-Blodgett Co. *v.* Elms, 106 La. 150, 30 So. 311.

Massachusetts. — Amherst & B. R. Co. *v.* Watson, 8 Gray 529.

Texas. — Church *v.* Waggoner, 78 Tex. 200, 14 S. W. 581; Meyer *v.* Claus, 15 Tex. 516; Teas *v.* McDonald, 13 Tex. 349, 65 Am. Dec. 65.

35. Meyer *v.* Claus, 15 Tex. 516.

matter should be overruled when some of the answers are full and correctly made.[36]

b. *Answers to be Made on Personal Knowledge.* — **(1.) Generally.** Answers to interrogatories must be confined to facts and matters within the knowledge of the party interrogated, or to such as may reasonably be obtained by inquiry from his servants, agents or attorneys.[37]

(2.) Answers of Corporate Officers on Information and Belief. — Answers to interrogatories by corporate officers may be made upon information and belief, which they may be required to obtain by inquiries from competent sources.[38]

c. *Competency of Substance of Answer.* — Answers to interrogatories must not embrace matters not competent as evidence, such as matters of rumor or otherwise of a hearsay character.[39]

d. *Explanations, New Matter, etc.* — Answers to interrogatories are not necessarily confined to mere affirmation or negation, but may embrace such explanations as are necessary to a full and fair understanding of the matters in respect of which the party is legally bound to answer.[40] Nor is the answer to be confined merely

36. Swinney *v.* Dorman, 25 Ala. 433; Blair *v.* Sioux City & Pac. R. Co., 109 Iowa 369, 80 N. W. 673; Volusia County Bank *v.* Bigelow (Fla.), 33 So. 704.

37. Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031; Toland *v.* Paine Furn. Co., 179 Mass. 501, 61 N. E. 52; Wolters *v.* Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627.

In Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220, it was held that answers by the plaintiff to interrogatories propounded by the defendant, made from books and papers in plaintiff's possession, should be accorded the same weight as if the facts stated were disclosed by the accounts offered on the trial.

"We do not think the right of discovery extends to all information, however acquired, in the possession of the officer interrogated, or of those subject to his direction or control. If he or they have become possessed of material information derived through other than official channels, or in other ways than in the course of their employment at the time of the transaction in question, we do not think that the party interrogating is entitled to a discovery of it. Possibly, also, if an agent has investigated the matter and has ascertained and reported the facts, the party interrogating may not be entitled to a discovery of them." Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031.

Under the Iowa Statute the party answering interrogatories must distinguish between what is stated from his personal knowledge and what is stated merely on information and belief. Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48.

38. Toland *v.* Paine Furn. Co., 179 Mass. 501, 61 N. E. 52.

39. Hearsay Matters. — Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031, where the court said that interrogatories are addressed to the conscience of the party and that they do not require him to set out mere rumors or simply to state what he has been told.

40. Railsback *v.* Koons, 18 Ind. 274; Quirk *v.* Haskins, 15 La. Ann. 656; Woodruff *v.* Dodd, 15 La. Ann. 644; Gusman *v.* Hearsey, 26 La. Ann. 251; Bradley *v.* Bradley, 13 Tex. 263.

See also Williams *v.* Cheney, 3 Gray (Mass.) 215, where the court in construing the Massachusetts statute governing interrogatories said said that the statute is intended to secure to parties the right to make complete answers of all facts in relation to which they may be inter-

to matters relevant to the issue raised by the interrogatory, but any new matter relevant to the issues raised by the pleadings, and to which the interrogatory relates, may be introduced.[41] And it is error for the court to strike out portions of answers embracing such matters;[42] and such an error cannot be cured by the subsequent admission of other evidence of the party interrogated on the same point.[43] The rule, however, that an interrogated party may be allowed to speak of anything which relates to the immediate subject upon which he is called upon to answer, and his answer must be taken entire or not at all, does not apply as to irrelevant matter.[44]

IV. ENFORCING ANSWERS TO INTERROGATORIES.

1. In General. — The statutes authorizing interrogatories to an adverse party usually provide for compelling answers from the party addressed by process of attachment for contempt, dismissal or continuance, default and the like.[45]

rogated, and guard them against being compelled to make partial and garbled disclosures in answer to artfully contrived questions.

If a Party Calls for an Admission by Interrogatories, under the statute the opposite party has the right to state all that was said at the time in relation to the same subject. Pritchett *v.* Munroe, 22 Ala. 501.

41. Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.) 320; Gwyer *v.* Figgins, 37 Iowa 517. See also Saltmarsh *v.* Bower, 22 Ala. 221.

If in answer to an interrogatory propounded by the defendant the plaintiff admits a fact closely connected with another concerning which he is not directly interrogated, but which tends to a defense against the fact admitted, he may state the latter fact in connection with the former and as a part of his answer. Foster *v.* Spear, 22 Tex. 226. See also Herbert *v.* Butterworth, 23 Tex. 250; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 48 S. W. 797.

Where the interrogatories are propounded to the defendant in an action at law under the Alabama statute, for the purpose of disproving the defense which he has set up, he may accompany his admission of the particular facts called for by the interrogatories with a statement of additional facts in avoidance of them. Crymes *v.* White, 37 Ala. 549, wherein it was held that where a defendant pleads payment in an action on an open account due to a partnership, and is asked if the payment was not made to one of the partners alone, in debts due to him from that partner individually, he might state, in connection with his admission of that fact, that the payment was made after the other partner had sold out his interest in the firm, and while the partner to whom it was made was the sole owner of the firm's assets.

A Party Interrogated for the Purpose of Proving a Liability or indebtedness who states facts tending to establish it may also in the same connection state other facts showing the liability to have been discharged. Broxton *v.* Bloom, 15 La. Ann. 618.

42. Herbert *v.* Butterworth, 23 Tex. 250.

43. Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.) 320.

44. Lake *v.* Gilchrist, 7 Ala. 955. See also Zeigler *v.* Scott, 10 Ga. 389, 54 Am. Dec. 395.

45. See for example the statutes referred to in Allen *v.* Lathrop-Hatton Lumber Co., 90 Ala. 490, 8 So. 129; *Ex parte* McLendon, 33 Ala. 276; Cleveland *v.* Hughes, 12 Ind. 512; Harding *v.* Morrill, 136 Mass. 291; Amherst & B. R. Co. *v.* Watson, 8 Gray (Mass.) 529; Robertson *v.* Melasky, 84 Tex. 559, 19 S. W. 776; Livesley *v.* O'Brien, 6 Wash. 553, 34 Pac. 134. And see other cases in subsequent notes.

A Party Accepting Overdue Answers to interrogatories without objection and retaining them until the trial, cannot then object to their sufficiency.[46]

Error Preventing Answers. — Error upon the part of the trial judge, the effect of which is to prevent the interrogator from compelling answers to interrogatories, is not cured by the introduction of or the ability to supply evidence of an import equivalent to the matters interrogated upon the trial,[47] although there is authority to the contrary.[48]

Non-Residents who fail to answer interrogatories are subject to substantially the same penalties incurred by resident parties under similar circumstances.[49] And the same rule has been held to apply to foreign corporations.[50]

Judgment on Merits Not Proper. — Power to order a default to be entered against a party for failure to answer interrogatories does not justify the rendition of the judgment on the merits.[51]

An order of court directing the plaintiff's action to stand dismissed if he fails to answer interrogatories propounded to him within a certain time is not final in its character, but may be modified or vacated at a subsequent term of court; nor does it become effectual until the default has been judicially ascertained at the next ensuing term of court. *Ex parte* McLendon, 33 Ala. 276.

Under the Washington Statute providing that if a party refuses to answer interrogatories his pleading may be stricken out and a judgment taken against him, the only judgment authorized is one of dismissal. Waite *v.* Wingate, 4 Wash. 324, 30 Pac. 81.

A defendant who attaches interrogatories to his answer, to which no response is required, is not entitled to a dismissal of the action for failure of the plaintiff to answer the interrogatories until the expiration of a reasonable time to be fixed by the court. Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43.

A plaintiff cannot be nonsuited under the Massachusetts statute for insufficiency of his answers to interrogatories filed by the defendant which substantially meet all the interrogatories, unless he has refused to comply with an order of the court pointing out the insufficiency and directing further answers. Amherst & B. R. Co. *v.* Watson, 8 Gray (Mass.) 529, where the court said: "It would expose parties to great peril if after a general order to make further answers and compliance with such order in good faith they could be nonsuited or defaulted because some imperfection could still be discovered in some of the answers made."

46. Smith *v.* McDonald, 3 Ind. App. 49, 28 N. E. 994. See also Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 157, 9 So. 661.

47. Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031. See also Blackman *v.* Green, 17 Tex. 322.

48. Smith *v.* McDonald, 3 Ind. App. 49, 28 N. E. 994; Aylesworth *v.* Brown, 31 Ind. 270. See also Sheren *v.* Lowell, 104 Mass. 24; Meyer *v.* Manhattan Life Ins. Co., 144 Ind. 439, 43 N. E. 448.

49. Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43; Blair *v.* Sioux City & Pac. R. Co., 109 Iowa 369, 80 N. W. 673; Gulf C. & S. F. R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358.

50. Illinois Cent. R. Co., *v.* Sanford, 75 Miss. 862, 23 So. 355; Cain Lumb. Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882.

51. Springfield J. & P. R. Co. *v.* Construction Co., 49 Ohio St. 681, 32 N. E. 961.

In Young *v.* McLemore, 3 Ala. 295, it was held that the failure of the defendant to answer interrogatories authorized a judgment by default against him and operated as an ad-

2. Concealment. — A party to whom interrogatories have been propounded cannot escape answering, nor the consequences of a contumacious dereliction, by concealing himself.[52]

3. Answers by Corporations. — And the statutes authorizing interrogatories usually empower the court to compel answers from corporations by means substantially the same as in the case of natural persons.[53]

4. Continuance to Enforce Answer. — A continuance of the cause may be granted for the purpose of compelling a party to answer interrogatories where it appears that he willfully absents himself to

mission that the plaintiff was entitled to some damages, but that final judgment could not be rendered without the intervention of a jury except for nominal damages, in a case where the clerk could not compute the damages as provided by statute.

In Construing the Iowa Statute providing that for failure to answer interrogatories the court may dismiss the petition or quash the answer of the party so failing, the court said that this statute "establishes a rule of evidence, and that the interrogatories unanswered, and the affidavit, constitute proof of the claim or defense, and on the trial, judgment shall be given accordingly. But it does not entitle the party to a judgment without trial, and immediately upon the filing of the affidavit and the failure to answer. To hold that the party would be thus immediately entitled to judgment, would override § 3,127 not only, but would practically nullify the right to a jury trial; and in causes involving several issues, to some of which the interrogatories were not directed, there would of necessity be two or more judgments — one, on motion, without trial, based on the affidavit and interrogatories, and another on the final trial of the cause." Perry *v.* Heighton, 26 Iowa 451.

52. Barnard *v.* Flinn, 8 Ind. 204.

53. Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 157, 9 So. 661; Illinois Cent. R. Co. *v.* Sandford, 75 Miss. 862, 23 So. 355; Wolters *v.* Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627.

The president of a corporation to whom interrogatories have been propounded, may be compelled to answer them as against the objection that he has no personal knowledge of the matters inquired about, where the interrogatories are otherwise unobjectionable, and the fact that testimony is subsequently adduced on the trial pertaining to the matters inquired about does not cure the error in refusing to order the interrogatories to be answered. Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031.

In Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265, the court, in holding it error to refuse to order the defendant's president to answer certain interrogatories, said: "The president stands in the place of the corporation (Pub. St. c. 167, § 53), and the corporation, being reputed to have done whatever its servants did in the course of their employment, is supposed to know what they did, and therefore cannot shelter itself under a general profession of personal ignorance on the part of its president. *Compare* Bolckow *v.* Fisher, 10 Q. B. Div. 161, 171; Attorney-General *v.* Rees, 12 Beav. 50, 54, 55. Of course the knowledge of the corporation is a fiction, and therefore its obligation to answer is not to be pressed beyond what is reasonable, as was explained in the case cited. But if in the case of an accident like the present the servants concerned are still in the employ of the company and within convenient reach, they must be inquired of concerning facts which the plaintiff has a right to know. If the result of inquiry is to satisfy the president's mind as to any of the material facts or circumstances, he must answer interrogatories in proper form which call for them."

avoid answering.[54] And a bond will not be required from the interrogating party in order to secure such continuance.[55] But a continuance or adjournment should not be granted where the interrogating party has himself omitted the proper means given him by the statute to compel answers.[56]

5. Necessity to Resort to Proper Means. — A party propounding interrogatories must seasonably and to a reasonable extent adopt such appropriate means as the statutes afford for enforcing answers, or abide the consequences of his laches.[57]

6. Objection Directed to but One Interrogatory. — An answer to an interrogatory cannot be refused upon the ground that there is some other interrogatory to which the party may object; he must take each question by itself.[58]

V. CONFESSION OF MATTERS BY FAILURE OR REFUSAL TO ANSWER.

1. In General. — Where a party interrogated admits that he has information on the subject matter of the interrogatory, but declines to answer, the question will be taken as confessed against him.[59]

54. Culver *v.* Alabama M. R. Co., 108 Ala. 330, 18 So. 827; Goodwin *v.* Harrison, 6 Ala. 438; Cleveland *v.* Hughes, 12 Ind. 512. See also Brown *v.* Mercier, 82 Ga. 550, 9 S. E. 471, where the party to be examined was a non-resident.

55. Barnard *v.* Flinn, 8 Ind. 204.

56. Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Cleveland *v.* Stanley, 13 Ind. 549; Boswell *v.* Travis, 12 Ind. 524; Rice *v.* Derby, 7 Ind. 649.

57. Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Reilay *v.* Whitcher, 18 Ind. 458; Lent *v.* Knott, 7 Ind. 230.

58. Dalgleish *v.* Lawther, L. R. 2 Q. B. 590.

Where a party objects to answering certain interrogatories his proper course is to answer such as are pertinent and take the ruling of the court upon such as he claims to be improper. Harding *v.* Morrill, 136 Mass. 291.

59. Smith *v.* Olsen, 92 Tex. 181, 46 S. W. 631; Harrell *v.* Kemper, 44 Tex. 421; Friend *v.* Miller, 62 Tex. 177.

In Wells *v.* Groesbeck, 22 Tex. 429, wherein the defendant had propounded to the plaintiff an interrogatory inquiring directly whether the note in suit was executed for certain considerations named, the question admitting of a categorical answer, to which the plaintiff answered that he had "been informed that the note was executed as mentioned in the interrogatory but has no definite knowledge upon the subject," and from another answer it was shown that he did know what was the consideration, it was held that upon his refusal to state affirmatively that the note was not given upon the consideration named in the interrogatory, or that he knew nothing about it, the interrogatory must be taken for confessed as against him, especially when there was other proof tending to support that conclusion.

In Knight *v.* Booth, 35 Tex. 11, an action on a promissory note, the plaintiff's title to which the defendant alleged was derived under a patented transfer for the purpose of depriving the defendant of an offset; the defendant filed interrogatories for the plaintiff to answer, by which he expected to substantiate his defense. The plaintiff omitted to answer the interrogatories, which were therefore taken as confessed and read in evidence by the defendant. The court, in holding that a judgment of nonsuit was error, said: "It is true in

A motion to reject answers to interrogatories and take the interrogatories as confessed for want of an answer comes too late where it is filed on the day the case is called for trial, and it appears that the answers have been filed more than a year before.[60]

2. Pertinency of Interrogatory. — This statutory provision, however, has reference only to failure to answer an interrogatory pertinent and relevant at the time when an answer was required.[61]

3. Presence of Party at Trial. — It has been held that interrogatories cannot be taken as confessed for failure to answer where the party interrogated appeared before the officer receiving the commission and declined to answer, stating that he intended to be present at the trial and testify as a witness, and was in fact present and ready and willing to be examined.[62]

4. Willfulness of Refusal. — A party to whom interrogatories have been propounded does not, by failing to answer, incur penalties in the absence of willfulness or bad faith.[63]

law that the failure of the plaintiff to answer the defendant's interrogatories was equivalent to an affirmative answer, if the matter were left unexplained; and it is also true that the law will not allow the fraudulent holder of a promissory note to maintain an action on it. But the only evidence we have that the plaintiff below is a fraudulent holder of the note sued on is furnished by his failure to answer the interrogatories propounded to him in the amended answer. This kind of confession is not that which the party freely makes, but is that which the law imposes on failure to answer, and may be the result of mistake, or bad practice on the part of an attorney. The affidavit of the plaintiff's attorney, in support of his motion for a new trial, came late, it is true, at that period of the proceedings; but especially in view of the fact that the plaintiff offered to allow the offset claimed by the defendant, of one hundred and sixty-seven dollars, we are of opinion that the court below should have granted the motion for new trial, or given the plaintiff judgment for the balance due on the note after allowing all proper credits and offsets."

In Gulf C. & S. F. R. Co. *v.* Nelson, 5 Tex. Civ. App. 387, 24 S. W. 588, it is held that the fact that there is no law by which a corporation can be required to answer interrogatories does not exempt others who are litigating with a corporation from the operation of the statutory rule just stated; and that error upon the part of the court in refusing to take interrogatories as confessed by a plaintiff to whom they have been propounded by the defendant corporation is not rendered harmless by the fact that the plaintiff was put upon the stand at the trial and subjected to a cross-examination by the defendant's counsel.

60. Dikes *v.* DeCordova, 17 Tex. 618.

61. Barnard *v.* Blum, 69 Tex. 608, 7 S. W. 98.

62. Dunham *v.* Simon, 1 Pos. Unrep. Cas. (Tex.) 548, where the court said: "The statutes which regulate this subject (arts. 3,748, 3,754-3,756, Pas. Dig.) were enacted before the privilege was conferred by law upon parties to testify in their own behalf, and were in the nature of statutory proceedings for discovery, where the party, interrogating his adversary, selected him as an involuntary witness. Under the law as it now exists, these defendants offered to testify in their own behalf, and, through their counsel, caused interrogatories to be propounded to themselves, which were crossed by the plaintiffs."

63. Rushing *v.* Willis (Tex. Civ. App.), 28 S. W. 921.

"If it be shown that he did not refuse, or that he declined under a mistake as to his rights, and not contumaciously, or that the notary in-

5. Conclusiveness of Officer's Return. — The return of an officer showing a refusal to answer interrogatories is not conclusive, and the party alleged to be in fault may justify his refusal.[64]

6. Stating Facts Expected to Be Proved. — Where a party filing interrogatories fails to state in his affidavit what facts he expects to prove thereby, no facts can be treated as admitted by a failure to answer.[65]

7. Answering After Expiration of Time. — It is discretionary with the court whether or not to permit a party to whom interrogatories have been propounded to answer after the expiration of the time permitted to him in which to answer, or to allow him to amend the answers filed by him on sufficient excuse being shown.[66]

duced him to believe that he need not answer, the interrogatories should not be taken as confessed; provided that at the trial he shows that he is willing to answer them. Even after the trial has begun, all the purposes of the law can be subserved by permitting him then to answer. The only reason that can be urged against such practice is the slight delay that may be thereby caused in proceeding with the case. If the party has once willfully refused he should be concluded; but we think, where there is a reasonable doubt about the question of his refusal, the better rule is to give him the benefit of it, and that the interrogatories should not be taken as confessed; provided, always, he be willing then to answer. This in every case he should be required to do, should the other party demand it. The statute was intended to promote the administration of justice, and we think that in some cases a different rule is calculated to work a manifest wrong." Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1,109.

In Robertson *v.* Melasky, 84 Tex. 559, 19 S. W. 776, the certificate of the officer recited "that the defendant 'declared he would not answer the interrogatories until he could have time to consult his lawyer in the case; whereupon he was told that time could not be given him to consult his lawyer, and that he must answer or refuse to answer then and there;' and having refused to answer, a certificate to that fact is accordingly made." On the trial the defendant moved to suppress the interrogatories on the ground that he did not refuse to answer them, but only declined to answer them until he had had time to consult his attorney. In holding that it was error to overrule this motion the court said that they did not think the statute under a fair interpretation contemplated an immediate compliance, on pain of being recusant. With reference to the interrogatories the defendant on the trial said that "as soon as he received notice from the notary to answer the interrogatories he told the notary he wanted time to consult his lawyer; that the notary refused to allow him time; that he immediately wrote to his attorneys, who lived about twenty miles distant, and early the next morning they telegraphed him to answer; he then at once went to the notary and offered to answer the interrogatories, when the notary told him it was too late; that he had returned the interrogatories."

See also Tyson *v.* Farm & Home Sav. & Loan Ass'n, 156 Mo. 558, 57 S. W. 740.

64. Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1,109; Robertson *v.* Melasky, 84 Tex. 559, 19 S. W. 776; Gulf C. & S. F. R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358; Texas & P. R. Co. *v.* Winder (Tex. Civ. App.), 31 S. W. 715. See also Harding *v.* Noyes, 125 Mass. 572; Stern *v.* Filene, 14 Allen (Mass.) 9.

65. Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43; Church *v.* Waggoner, 78 Tex. 200, 14 S. W. 581.

66. Pool *v.* Harrison, 18 Ala. 514.

VI. USE OF THE EXAMINATION AT THE TRIAL.

1. As Respects the Party Entitled to Its Use. — A. In General. In some jurisdictions it is held that the party procuring answers to interrogatories has exclusive control of them, and the sole right to introduce them on the trial;[67] and he may introduce them on the trial or not, at his own election.[68] And accordingly, unless they have been first introduced by him,[69] the answers cannot be used for any purpose whatever by the party who made them.[70] In other jurisdictions this rule of exclusive control is not recognized, and accordingly if the party causing the examination does not read it in evidence on the trial it may be introduced by the party examined.[71] And sometimes the statutes authorizing interrogatories provide also that the interrogatories and answers may be read by either party as a deposition.[72]

B. As an Entire Document. — Sometimes it is held that a party procuring answers to interrogatories cannot offer some of the answers to the exclusion of others, but that if he offers any he

67. *Alabama.* — Southern R. Co. *v.* Hubbard, 116 Ala. 387, 22 So. 541; Crocker *v.* Clements, 23 Ala. 296.

Arkansas. — Lanier *v.* Union Mortgage, Bkg. & T. Co., 64 Ark. 39, 40 S. W. 466.

Indiana. — Nelson *v.* Cain, 42 Ind. 563.

Louisiana. — Carter *v.* Taylor, 20 La. Ann. 421; Cincinnati I. St. L. & C. R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593.

In Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142, the court said that "The purpose of the statute was to enable the party to obtain from his opponent a disclosure of 'facts and documents material to the support or defense of the action,' (2 Hill's Code, § 1,661,) and, when the answers are so made and returned, they do not constitute a part of the pleadings, neither do they become evidence for the party so answering, unless they are offered by the adverse party, who is also permitted by statute to rebut them by adverse testimony. 2 Hill's Code, § 1,664."

68. Optional With Party Procuring Answers to Use Them as Evidence. — Saltmarsh *v.* Bower, 22 Ala. 221; Southern R. Co. *v.* Hubbard, 116 Ala. 387, 22 So. 541; Conway *v.* Turner, 8 Ark. 356; Mooney *v.* Musser, 34 Ind. 373; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328.

69. Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142.

70. Wells *v.* Bransford, 28 Ala. 200; Branch Bank *v.* Parker, 5 Ala. 731; Lanier *v.* Union Mortgage, Bkg. & T. Co., 64 Ark. 39, 40 S. W. 466.

If a party filing the petition for discovery declines to read the answer, the opposite party has no right to do so. The mere act of filing the petition and obtaining the answer does not any more make the opposite party his witness than if he had caused any other person to be summoned as a witness and declined to use him. Conway *v.* Turner, 8 Ark. 356.

71. Jordan *v.* Jordan, 3 T. & C. (N. Y.) 269; Barry *v.* Galvin, 37 How. Pr. (N. Y.) 310.

72. This is the rule under the Iowa statute. McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233; Clinton Nat. Bank *v.* Torry, 30 Iowa 85. See also Gwyer *v.* Figgins, 37 Iowa 517.

Answers to interrogatories may be read in evidence by either party if they have not been stricken out on exceptions; if the answers go beyond the questions, exception should be taken on that ground when they are taken into court, but cannot be taken when the party answering offers to

must read the whole of them.[73] Nor can he offer part of an answer.[74] Other courts hold that a party examining an adverse party before trial, either orally or by interrogatories, may read in evidence only such portions as he may desire.[75] But where the party at whose instance the examination was had reads only a portion of it, the party examined may read the residue.[76]

2. As Respects the Party Against Whom It May Be Used. — A. In General. — Answers to interrogatories, whether made in the action on trial, or in another action between the same parties, may be used against the party answering as admissions, in like manner as other admissions of a party to an action, fairly made, are ordinarily received against him.[77]

read the answers to the jury. Handley *v.* Leigh, 8 Tex. 129.

73. Farrow *v.* Nashville C. & St. L. R. Co., 109 Ala. 448, 20 So. 303; Pritchett *v.* Munroe, 22 Ala. 501; Carroll *v.* Succession of Carroll, 48 La. Ann. 956, 20 So. 210.

74. Saltmarsh *v.* Bower, 22 Ala. 221; Pritchett *v.* Munroe, 22 Ala. 501; Burnett *v.* Garnett, 18 B. Mon. (Ky.) 68; Williams *v.* Cheney, 3 Gray (Mass.) 215.

75. Smith *v.* Crocker, 3 App. Div. 471, 38 N. Y. Supp. 268.

"**The Object of the Statute** was to afford a litigant a simple and speedy method of obtaining evidence in possession of the adverse party material to the support or defense of his action. The evidence obtained may be, in form, either documents or admissions, or both; and we see no good reason why a part may not be offered in evidence, as well as the whole, when such part relates to a separate or disconnected fact. The party answering is, of course, entitled to have read all of the matter that he gives in answer to an interrogatory that is pertinent thereto. This would include, not only the answer directly given, but also all matter in explanation thereof; and if the interrogatories and answers are interwoven, or are so prepared that an understanding of one cannot be had without the reading of another or others, the party offering them would be compelled to read all that pertained to the particular matter inquired of. But where, as in this instance, the interrogatories read are complete in themselves, and the answers thereto have no connection with other answers, no error is committed by refusing to compel the party offering them to read them all. On the other hand, the answering party cannot be injured by the refusal to permit him to read the part omitted. If the matter omitted is pertinent as evidence, he has it within his power to offer it from its original source, it being within his control. If it is not pertinent, it should be refused in any event." Allend *v.* Spokane & N. R. Co., 21 Wash. 324, 58 Pac. 244.

Under the Washington Statute authorizing examination of an adverse party by written interrogatories, after the filing of the moving party's pleading in the case, only such portion of the interrogatories and answers as the party procuring them chooses may be read in evidence where they are complete in themselves and have no connection with the other answers. Allend *v.* Spokane Falls & N. R. Co., 21 Wash. 324, 58 Pac. 244.

Where the defendants had taken plaintiff's deposition they may be allowed, as against the plaintiff's objection to read a part of it without reading the whole, for the purpose of establishing an admission by the plaintiff. Van Horn *v.* Smith, 59 Iowa 142, 12 N. W. 789.

76. Van Horn *v.* Smith, 59 Iowa 142, 12 N. W. 789. See also Strawn *v.* Norris, 23 Ark. 542; Maxwell *v.* Guthrie, 23 Ark. 702; Hadley *v.* Upshaw, 27 Tex. 547, 87 Am. Dec. 654.

77. Answers to Interrogatories as Admissions. — Combs *v.* Union Trust Co., 146 Ind. 688, 46 N. E. 16; Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27

B. Answers on Information and Belief. — In any case where the answers to interrogatories are made on information and belief they are none the less binding as admissions because so made.[78]

C. Presence of Party at Trial. — The fact that the party to whom interrogatories have been addressed is present and willing to testify on the trial does not deprive the party propounding of the right to use, as evidence, his answers to the interrogatories.[79]

D. Nominal Plaintiff. — The answers of a nominal plaintiff to interrogatories addressed to him are not admissible in evidence against the party for whose use the suit is brought.[80]

Fla. 1, 157, 9 So. 661; Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031; Gulf C. & S. F. R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358.

Answers put to interrogatories filed as required by law are competent evidence against the party answering all the facts stated therein in another action, although the issues in the two actions be different. Williams *v.* Cheney, 3 Gray (Mass.) 215, where the court said: "By St. 1852, c. 312, § 67, all interrogatories are required to be answered fully, and the party interrogated is allowed to introduce into his answer any matter relevant to the issue to which the inquiry relates. These provisions secure to parties the right to make complete statements of all facts in relation to which they may be interrogated in any suit, and guard them against being compelled to make partial and garbled disclosures in answer to artfully contrived questions. There can therefore be no danger or hardship in allowing such statements to be used in evidence, in like manner as other admissions of a party to a suit, fairly made, are ordinarily admitted against him."

78. Answers on Information and Belief. — Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031. See also Nichols *v.* Allen, 112 Mass. 23.

79. Cannon *v.* Sweet (Tex. Civ. App.), 28 S. W. 718; Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301, where the court said: "If he can only use such examination as evidence against his opponent when such opponent absents himself from the trial of the action, then his right to use the examination depends upon the will of his opponent. The statute declares that this examination shall in all respects take the place of the old bill of discovery. The very object of the old bill of discovery was to procure evidence against the opposite party, to be used on the trial of an action; and it was never held that the answer of the party to the bill could not be used against him, if he appeared at the trial of the action, in aid of which it was taken, and was willing to submit himself to an examination in such action. The statute undoubtedly goes further than the bill of discovery, and not only allows an examination of the party as to those matters which the party seeking the examination cannot prove by other witnesses or testimony, but it allows an examination as to all the material issues in the action. . . . His examination is taken because he is a party to the action, and for no other reason, and that reason exists as much on the trial as at the time of taking it. The examination of a party is in the nature of an admission so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him." In this case it is also held that error upon the part of the court in rejecting the deposition of a party taken at the instance of his adversary under the Wisconsin statute, when offered by the party procuring the same, is not cured by the fact that the deponent was called and examined on the trial.

80. Vickars *v.* Mooney, 6 Ala. 97, where the court said: "It is clear that a bill of discovery cannot be exhibited by the defendant against one who is merely a plaintiff in name, for the purpose of obtaining his answer to defeat him who is the real suitor;

E. Several Parties. — The answers of one of several parties to whom interrogatories have been propounded are not admissible in evidence against his co-parties.[81] And there is authority to the effect that in such case the answers are not competent evidence as against parties who have the right to cross-examine the witness by whose testimony they are to be bound.[82]

F. Intervener. — Interrogatories addressed to a defendant and taken as confessed, on his refusal to answer, cannot be read in evidence against an intervener on an issue solely between the latter and the plaintiff.[83]

3. Competency, Relevancy, etc. — A. In General. — A party who has offered in evidence responsive answers to interrogatories propounded by him to an adverse party is not entitled to have the answers afterward excluded on motion, even though the testimony elicited, abstractly considered, may not be admissible.[84] Nor where a party has, without objection, answered interrogatories can he object to their use on the ground of irrelevancy.[85]

and it results from this conclusion, that interrogatories, under the statute, cannot be exhibited to such a party, or, in other words, that he is not a party within the meaning of the act. A decision, the reverse of this, would put it in the power of the nominal plaintiff to effect a dismissal of the action, by failing to answer the interrogatories."

81. "The deposition of a party to the suit taken by an adverse party without notice cannot be read against any other party to the suit than the one who gave it, when objected to by such other party on the trial, and that in such cases the objection upon this ground need not be in writing and filed before the trial commences, but may be made at any time. They are his admissions only, and do not affect any other party to the suit, and the court should have so instructed the jury, upon request of the other parties." Lumpkin *v.* Minor, (Tex. Civ. App.), 46 S. W. 66. See also Zerkel *v.* Wooldridge (Tex. Civ. App.), 36 S. W. 499, wherein it was held that the examination of one defendant taken without notice to or service of the interrogatories upon his codefendant are not admissible as against the latter, at whose instance the party examined was made a party, and who sought independent relief against the plaintiff and the party examined. *Compare* McGown *v.* Randolph, 26 Tex. 492.

82. Carter *v.* Taylor, 20 La. Ann. 421.

83. Carthwaite *v.* Hart, 24 Tex. 315, *holding* that if the defendant be competent to testify in respect to the matter which might affect the interest of the intervener, his testimony should be taken according to the usual mode of taking the testimony of any witness.

84. Farrow *v.* Nashville, C. & St. L. R. Co., 109 Ala. 448, 20 So. 303, where the court in so holding said that a party cannot thus speculate on the testimony of his adversary which he has elicited and laid before the jury.

In McLear *v.* Hunsiker, 29 La. Ann. 539, an action on promissory notes in which the defendant had propounded interrogatories to the plaintiff, the defendant moved to strike out certain answers with the exception of certain portions named, on the ground that the answers were not responsive to the interrogatories, and the motion was referred to the merits. This was held to be improper; that the motion was preliminary to the trial and should have been heard and decided before that began.

85. Cincinnati I. St. L. & C. R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593; Combs *v.* Union Trust Co., 146 Ind. 688, 46 N. E. 16. See also Jacksonville T. & K. W. R. Co. *v.*

B. Death of Examining Party. — It is held that the examination of an adverse party before trial is governed by entirely different rules from the examination of ordinary witnesses, and accordingly that a party so examined may, notwithstanding the death of the party at whose instance he was examined, introduce in evidence his examination.[86]

4. Conclusiveness. — A. In General. — The statutes authorizing interrogatories to be propounded to an adverse party usually provide in express terms that the answers thereto are not conclusive as against the party at whose instance they were procured, but that he may contradict them at the trial,[87] and that he may also examine the party as a witness.[88]

And Under the Statutes Permitting an Oral Examination of an adverse party before trial, it is held in New York that the examining party cannot impeach the party examined, although he may contradict the substance of the examination.[89]

Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 157, 9 So. 661.

86. Rice *v.* Motley, 24 Hun (N. Y.) 143.

87. Wilson *v.* Maria, 21 Ala. 359; Smith *v.* Olsen, 92 Tex. 181, 46 S. W. 631. See also Southern R. Co. *v.* Hubbard, 116 Ala. 387, 22 So. 541.

It is Expressly Provided by the Washington Statute that while a party calling for answers to interrogatories may put them in evidence for the admissions they contain, he is no more bound by their statements against his interest than he is bound by the statements of a witness he may call and who may testify in part against his interest; he can still introduce evidence contradictory of such statements and leave it to the jury to determine wherein the truth lies. Sawdey *v.* Spokane Falls & N. R. Co., 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880.

Under the Texas Statute answers to interrogatories can be destroyed only by written proof or by the oath of two witnesses, or by the oath of one witness corroborated by strong circumstantial evidence. Allen *v.* Atchison, 26 Tex. 616. See also Oliver *v.* Chapman, 15 Tex. 400, where it was held that the meaning of a statute which provides that the answers of a party to interrogatories propounded to him may be destroyed by written proof, or by the oath of two witnesses or of one single witness, corroborated by strong circumstantial evidence, is, "that the oath of one witness, if corroborated by 'strong circumstantial evidence,' shall be sufficient to disprove the answer; but not that no circumstances, however conclusive, shall have that effect, unless in corroboration of the oath of a witness directly to the fact. Such a principle would render the answer indisputable by evidence of the most satisfactory, conclusive, and even demonstrative character. The law recognizes no such principle."

Under the Wisconsin Statute it is expressly provided that the party calling for the examination of his adversary may, after making use of the examination on the trial, rebut the testimony of the party given in the examination as though he were a hostile witness. Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301.

In Louisiana, answers of an adversary to interrogatories on facts and articles propounded to him may be contradicted, and may be so contradicted by parol in cases where parol evidence is otherwise admissible, but not in cases where parol evidence is not otherwise admissible. Le Bleu *v.* Savoie, 109 La. 680, 33 So. 729. See also Goodwin *v.* Neustadtl, 42 La. Ann. 735, 7 So. 744.

88. Smith *v.* Rosenham, 19 Ind. 256.

89. Jordan *v.* Jordan, 3 T. & C. (N. Y.) 269.

B. Impeachment by Party Examined. — It is held that where the effect of a refusal to answer is that the interrogatory is taken as confessed, the party interrogated is not bound by such confessions, but may contradict them at the trial.[90]

90. Smith *v.* Olsen, 92 Tex. 181, 46 S. W. 631, where the court said: "To make his answers conclusive would be to make the procedure a means of injustice, which would probably, in the long run, counteract the benefits which might be expected to follow from it. If the legislature had intended to preclude the party by his answers, we should gravely doubt the wisdom of the measure. But in our opinion, such was not their purpose. The provision that the interrogatories are to be taken for confessed when the party refuses to answer is not at all inconsistent with the views here expressed. The purpose of that provision was merely to compel the party to answer by giving his adversary the benefit of an admission, upon his refusal to do so. It is a just requirement, and a most efficacious method of accomplishing the object in view. Neither does the provision which permits the party taking the deposition to contradict the answers as those of any other witness militate against our construction." *Compare* Gulf C. & S. F. R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358.

EXAMINATION OF WITNESSES.

By C. R. Mahan.

CROSS-REFERENCES:

Character; Competency; Cross-Examination;

Direct Examination;

Expert and Opinion Evidence;

Witnesses.

Scope Note. — This article deals exclusively with the relation of the court to the witness. For general and special rules as to the examination of witnesses by counsel see the articles enumerated in the preceding cross-references.

I. CONTROL OF COURT.

1. In General. — It is within the sound discretion of the trial judge to control the detailed examination of witnesses, and unless

an abuse of this discretion is shown his rulings should not be interfered with.[1]

Repeating Answer. — Whether or not a witness shall be required to answer a question which he has more than once already answered is a matter within the discretion of the trial judge.[2]

2. Protection of Witness. — It is likewise the duty of the trial judge to protect a witness under examination from being unfairly dealt with;[3] and accordingly it is held to be within the power of the judge to stop a confusing examination.[4] So also it is the duty of the judge to see that the witness understands the question put to him,[5] and that he has a fair opportunity to answer it.[6]

3. Reprimanding Witness. — It is a discretionary right and duty of a trial judge, in the interests of the orderly conduct of proceedings before him, to rebuke and reprimand over-zealous and over-willing witnesses.[7]

1. Townes *v.* Alford, 2 Ala. 378; Mathis *v.* State (Fla.), 34 So. 287; Brown *v.* Burrus, 8 Mo. 26.

Rule Stated. — "The limits of the examination of a witness, in matters of form, and the manner in which it shall be conducted, must always rest, to a considerable extent, in the discretion of the judge before whom the trial takes place; and, upon a revision of his ruling in these particulars, it ought to be affirmed, unless it is made to appear that it involved a positive violation of the rules of evidence, or that it may have materially affected the rights of a party against whose objection it was made." Com. *v.* Thrasher, 11 Gray (Mass.) 57.

Where a Witness is Unable to Speak Aloud, the judge may, in his discretion, appoint some suitable person to repeat the witness' whispers. Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184.

2. Gulf C. & S. F. R. Co. *v.* Pool, 70 Tex. 713, 8 S. W. 345.

3. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; Carney *v.* State, 79 Ala. 14; Harris *v.* Central R. & Bank. Co., 78 Ga. 525; Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193; State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

Duty of Court to Protect Witness from Indecent Questions. — People *v.* White, 53 Mich. 537, 19 N. W. 174. See also State *v.* Laxton, 78 N. C. 564, a prosecution for rape, where it was held proper for the judge to state, upon the prosecuting witness hesitating and weeping, that he would not require her in giving her evidence to use language that would shock her modesty; that "Judicial investigations often involve inquiries into matters of a delicate nature, and vulgar words should never be required of a witness where the truth can be conveyed with equal clearness and accuracy in proper and becoming language. It is the duty of the judge to preserve the dignity of the court, and to see that the decencies of life are not needlessly violated."

4. Weldon *v.* Third Ave. R. Co., 3 App. Div. 370, 38 N. Y. Supp. 206.

5. Scroggin *v.* Johnston, 45 Neb. 714, 64 N. W. 236.

6. Smalls *v.* State, 102 Ga. 31, 20 S. E. 153; Giffen *v.* Lewiston, 6 Idaho 231, 55 Pac. 545; State *v.* Scott, 80 N. C. 365.

In Birmingham R. & Elec. R. Co. *v.* Ellard, 135 Ala. 433, 33 So. 276, where the witness under examination said to counsel: "You are trying to cross me, so I will tell you something that is not so. If you will give me time — if I tell you a story," and the court said: "Give her time to answer it," and said to counsel, "Sometimes you don't," in response to a remark by him that he had given the witness plenty of time to answer, the court in holding that there was no error said: "It was the duty of the court to see that an orderly examination was conducted, and that the witness was not unduly hastened, which, so far as appears, was all the court attempted or intended to do."

7. State *v.* King, 88 Minn. 175, 92

4. Duration of Examination. — The trial judge has discretion as to the length of time during which a witness shall be examined.[8]

5. Curtailing Answers. — It is discretionary with the trial judge to direct witnesses to make their answers short and to the point.[9]

II. EXAMINATION OF WITNESSES BY COURT.

1. In General. — The judge presiding over the trial of an action is not a mere moderator between the contending parties; he is a sworn officer charged with grave public duties. In order to establish justice, maintain truth and prevent wrong he has much discretion in the application of the rules of practice, and it is proper for him to ask a witness any question, the answer to which would likely throw any light upon his testimony;[10] although it is declared

N. W. 965. See also Robinson *v.* State, 82 Ga. 535, 9 S. E. 528, where the court said to the witness, "You talk too much;" and it was held that the remark did not require a new trial, because it was made simply to check her volubility while she was rattling away, so that her evidence could with difficulty be separated from mere "talk."

In Ferguson *v.* Hirsch, 54 Ind. 337, complaint was made of the court interrupting witnesses by such remarks and questions as, "How do you know?" "Tell what you know?" "Don't tell what you suppose," etc. It was held that the court has judicial discretion in directing the conduct of a witness, the exercise of which depends very much on the character of the witness, his conduct, manner and intelligence, willingness or unwillingness, stubbornness, ignorance, youth, inexperience and the like, all of which the trial judge has a much better opportunity of knowing than the reviewing court, and this discretion must be very clearly exceeded before it can be revised by the reviewing court.

8. Mulhollin *v.* State, 7 Ind. 646.

9. State *v.* Carpenter (Iowa), 98 N. W. 775.

10. *Alabama.* — Beal *v.* State (Ala.), 35 So. 58; Sparks *v.* State, 59 Ala. 82.

Georgia. — Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151; Epps *v.* State, 19 Ga. 102; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254.

Indiana. — Long *v.* State, 95 Ind. 481; Huffman *v.* Cauble, 86 Ind. 591.

Iowa. — Pothast *v.* Chicago Gt. West. R. Co., 110 Iowa 458, 81 N. W. 693.

Mississippi. — Cobb *v.* State (Miss.), 23 So. 1,015.

Missouri. — State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; State *v.* Nickens, 122 Mo. 607, 27 S. W. 339; Schaefer *v.* St. Louis & S. F. R. Co., 128 Mo. 64, 30 S. W. 331.

Nebraska. — Omaha Brew. Ass'n *v.* Bullinheimer, 58 Neb. 38, 78 N. W. 387; Bartley *v.* State, 55 Neb. 294, 75 N. W. 832.

Oklahoma. — DeFord *v.* Painter, 3 Okla. 80, 41 Pac. 96, 30 L. R. A. 722.

South Carolina. — Wilson *v.* Ohio R. & C. R. Co., 52 S. C. 537, 30 S. E. 406.

Rule Stated. — In South Omaha *v.* Fennell (Neb.), 94 N. W. 632, the court said: "The trial judge is in a better position than the reviewing court to know when the circumstances warrant or require interrogation of witnesses from the bench. The power undoubtedly should be exercised sparingly, and in such a manner as to preclude prejudice to either party, but we see nothing in the case at bar to indicate prejudice, nor to make it appear that the questions asked had any other effect than to expedite the trial and cut short contentions between counsel over the admission of evidence."

Power of Court to Examine Reluctant Witness. — Lockhart *v.* State, 92 Ind. 452; State *v.* Spiers, 103 Iowa

by some courts that this right should be exercised sparingly and with great discretion.[11] But it is fatal error for the judge to ask improper questions.[12]

Discrediting Witness. — But the court should not, in examining witnesses, conduct the examination in such a way as would have a tendency to cast discredit upon the witnesses.[13]

Weight of Testimony. — Nor should the judge when interrogating witnesses intimate any opinion upon the facts or upon the testimony of the witness under examination.[14]

2. Calling Witnesses. — The trial judge may call and examine a person as a witness who has not been put upon the stand by either party.[15]

3. Recalling Witnesses. — It is also within the power of the trial judge to recall a witness and examine him further.[16]

4. Leading Questions. — It has been held that it is always within the discretion of the trial judge to put leading questions to a witness under examination.[17]

711, 73 N. W. 343; Varnedoe *v.* State, 75 Ga. 181, 58 Am. Rep. 465.

In Lefever *v.* Johnson, 79 Ind. 554, wherein a son of one of the parties had testified on behalf of the other, and at the conclusion of his testimony the court interrogated him as to the then existing state of feeling between him and his father.

In Lockhart *v.* State, 92 Ind. 452, a prosecution for assault with intent to commit a rape, it appeared that the prosecutrix had been attached for failure to obey a subpoena, and that when on the witness stand she refused to answer questions put to her by the prosecuting attorney, and that before the state had completed her examination the court interposed and asked her several direct and pointed questions as to why she had remained away, whether she had been hired to do so, who had so hired her, and the like.

It is no abuse of discretion by the court to ask pertinent questions calculated to impress a witness with the necessity of stating what was said rather than giving his conclusions. Rounds *v.* Alee, 116 Iowa 345, 89 N. W. 1,098.

11. Nightingale *v.* State, 62 Neb. 371, 87 N. W. 158; Fager *v.* State, 22 Neb. 332, 35 N. W. 195.

12. State *v.* Marshall, 105 Iowa 38, 74 N. W. 763; People *ex rel.* Lauchanten *v.* LaCoste, 37 N. Y. 192.

13. Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151.

It is error for the trial judge to interpose and ask a witness under examination whether he had talked with the counsel for the party calling him or any other person as to the answers that he should make to the questions. State *v.* Allen, 100 Iowa 7, 69 N. W. 274.

14. Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151; McDonald *v.* State, 89 Tenn. 161, 14 S. W. 487.

15. Coulson *v.* Disborough (1894), 2 Q. B. 316; Sheets *v.* Bray, 125 Ind. 33, 24 N. E. 357.

16. State *v.* Lee, 80 N. C. 483. See also Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

17. Hodge *v.* State, 26 Fla. 11, 7 So. 593; Huffman *v.* Cauble, 86 Ind. 591; Sessions *v.* Rice, 70 Iowa 306, 30 N. W. 735; State *v.* Marshall, 105 Iowa 38, 74 N. W. 763; Com. *v.* Gallavan, 9 Allen (Mass.) 271; Long *v.* State, 95 Ind. 481, where the court said: "For the purpose of testing the witness and getting at the truth we think that the court had the right to ask her what her impressions were at the time. . . . The question by the court was to throw light upon that disputed fact. It is the duty of the presiding judge to see that the truth is developed, and for this pur-

5. Examination of Witness After Private Conference. — It is not within the province of the trial judge to converse privately, either in or out of court, with a witness to ascertain if he has knowledge of particular facts, or to suggest to the witness after his examination that there are facts other than those to which he has testified within his knowledge.[18]

pose he has the right to propound proper questions to witnesses. Of course, he should scrupulously avoid all semblance of partiality." *Compare* Hopperstead *v.* State (Tex. Crim.), 44 S. W. 841.

18. The questions a judge propounds to a witness should be such as are suggested by the evidence given on the trial. Sparks *v.* State, 59 Ala. 82, where the court said they would hesitate to sustain any judgment of conviction supported by testimony elicited from a witness on an examination by the presiding judge after a private inquiry of the witness by the judge as to his knowledge of the facts of the case.

EXECUTORS AND ADMINISTRATORS.

By E. W. Tuttle.

I. REPRESENTATIVE CAPACITY AND AUTHORITY.

1. Appointment and Qualification. — A. Burden of Proof on Application for Letters of Administration. — a. *Generally.* The burden is upon the applicant for letters of administration to show, first, all the facts giving the court jurisdiction to appoint an administrator,[1] including the facts that the alleged decedent died intestate,[2] leaving some estate[3] upon which administration is neces-

1. Appeal of Beach (Conn.), 55 Atl. 596; Wright *v.* Smith, 19 Nev. 143, 7 Pac. 365; Owen *v.* Ward, 127 Mich. 693, 87 N. W. 70, *distinguishing* Buss *v.* Buss, 75 Mich. 163, 42 N. W. 688.

Judicial Notice of Previous Application. — On an application by a creditor for letters of administration the court will take judicial notice of whether or not an application for letters has been made by the widow or next of kin. Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841.

2. Grimes *v.* Talbert, 14 Md. 169.

Intestacy. — This fact is ordinarily established by showing that no will can be found. Bulkley *v.* Redmond, 2 Brad. (N. Y. Sur.) 281.

Existence of Will. — To defeat an application for the appointment of an administrator on the ground of the existence of a will, there must be sufficient proof of the existence and contents of such a will as to legally establish it as such. *In re* Ellis' Estate, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287. See article "Wills."

Destruction of Will. — Presumption. — Where the will is shown to have been in the possession of the deceased, if it cannot be found after a diligent search in the proper places, and inquiries of persons likely to know of its whereabouts, the presumption is that it has been destroyed by the testator *animo revocandi.* Bulkley *v.* Redmond, 2 Brad. (N. Y. Sur.) 281; Holland *v.* Ferris, 2 Brad. (N. Y. Sur.) 334.

Revocation of Will. — Sufficiency of Proof. — See, fully, article "Wills."

3. Grimes *v.* Talbert, 14 Md. 169.

sary; second, that the applicant or petitioner has such an interest in the assets of the estate and their distribution as entitles him to move in the matter.[4] If the applicant seeks to have himself appointed administrator he must offer sufficient proof of the facts entitling him to the office.[5]

b. *Relationship to Decedent.* — Where the right of representing an estate depends upon a particular relationship to the deceased, such relationship must be shown by the party claiming the appointment.[6] The exclusion of evidence tending to prove such relationship is error.[7]

c. *Prima Facie Showing of Assets Sufficient.* — The existence of some estate or property upon which administration is necessary need not be conclusively established; a *prima facie* showing is sufficient.[8]

d. *Existence of Estate Debts.* — Ordinarily there is no legal presumption on an application for letters of administration either for or against the existence of debts rendering administration necessary,

Administrator De Bonis Non. On an application for the appointment of an administrator *de bonis non*, on the ground that certain specific legacies had not been distributed by the deceased executor, it was held that possession by the legatees of the chattels in question for fifty years was conclusive proof of the assent of the executor, rendering further administration unnecessary. Haven *v.* Haven, 69 N. H. 204, 39 Atl. 972.

4. Williams *v.* Williams, 113 Ga. 1006, 39 S. E. 474.

5. *In re* Miller, 32 Neb. 480, 49 N. W. 427; Thompson *v.* Buckner, 2 Hill Eq. (S. C.) 499.

Application by Creditor. — Prima Facie Proof of Debt Sufficient. — On the application of a creditor for the appointment of an administrator of the estate of his deceased debtor he is required to make only *prima facie* proof of his debt, to authorize the appointment. Conyers *v.* Bruce, 109 Ga. 190, 34 S. E. 279.

In a contest between two creditors of an insolvent estate for the appointment of an administrator, one of whom presented claims for two thousand dollars, and the other a note for one hundred and fifty dollars, the exclusion of evidence by the latter as to a request from various creditors whose claims aggregated forty thousand dollars, asking him to administer, was held error under a statute providing that as a general rule the creditor having the greatest interest would be preferred, but that the persons entitled to an estate might select a disinterested person as administrator, who, if otherwise competent, should be appointed. Freeman *v.* Worrill, 42 Ga. 401.

6. *In re* Nereaux's Estate (112 La.) 36 So. 594; Thompson *v.* Buckner, 2 Hill Eq. (S. C.) 499.

Marriage. — Proved by Cohabitation and Repute. — Bowersox's Appeal, 100 Pa. St. 434, 45 Am. Rep. 387. And the declarations of the deceased to the contrary are not necessarily inconsistent therewith; Renholm *v.* Public Administrator, 2 Redf. (N. Y. Sur.) 456. But such cohabitation must not be illicit in its inception. Byrnes *v.* Dibble, 5 Redf. (N. Y. Sur.) 383; Stanley *v.* Stanley, 4 Dem. (N. Y. Sur.) 416. See, however, more fully, article "MARRIAGE."

7. Succession of Pratt, 11 La. Ann. 201.

8. Grimes *v.* Talbert, 14 Md. 169; *Ex parte* Jenkins, 25 Ind. App. 532, 58 N. E. 560, 81 Am. St. Rep. 114; Bowdoin *v.* Holland, 10 Cush. (Mass.) 19.

Administrator with the Will Annexed. — On an application for the appointment of an administrator with the will annexed, *prima facie*

but the burden of showing such fact rests upon the applicant.[9] But the lapse of a sufficient period of time may suffice to raise a presumption that the debts of the estate, if any existed, have all been paid.[10]

And in Case the Decedent Was an Infant there is a presumption that he was not indebted, arising from his legal disability.[11]

B. PROOF OF. — a. *When Necessary.* — **(1.) When Not Put in Issue.** Proof of representative capacity and authority is unnecessary in any case, whether a proceeding by or against the executor or administrator, when it is not properly or sufficiently put in issue by the pleadings.[12]

(2.) Actions by Personal Representative. — When a personal representative sues in his representative capacity, the burden is upon him to prove such capacity and authority.[13] But whenever the

evidence of assets remaining undistributed is sufficient. A general allegation in the verified petition that the executors died leaving certain assets undistributed, with a statement of the value thereof, is sufficient to warrant the issuance of such letters. Pumpelly *v.* Tinkham, 23 Barb. (N. Y.) 321.

9. Wright *v.* Smith, 19 Nev. 143, 7 Pac. 365.

10. Smith *v.* Lambert, 30 Me. 137; Murphy *v.* Menard, 14 Tex. 62.

A Lapse of Twenty Years subsequent to the death of an intestate creates a presumption that there are no claims against an estate requiring an administration. Anderson *v.* Smith, 3 Metc. (Ky.) 491. See also Succession of Sarrazin, 34 La. Ann. 1168.

11. Bethea *v.* McColl, 5 Ala. 308; Cobb *v.* Brown, Speers Eq. (S. C.) 564.

12. *Alabama.* — Espalla *v.* Richard, 94 Ala. 159, 10 So. 137.

California. — Liening *v.* Gould, 13 Cal. 598.

Colorado. — Denver, S. P. & P. R. Co. *v.* Woodward, 4 Colo. 1.

Georgia. — Bray *v.* Parker, 82 Ga. 234, 7 S. E. 922; Merritt *v.* Cotton States L. Ins. Co., 55 Ga. 103.

Illinois. — Union R. & Transit Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896; Chicago Legal News Co. *v.* Browne, 103 Ill. 317.

Louisiana. — Haggerty *v.* Powell, 6 La. Ann. 533.

Mississippi. — Stewart *v.* Richardson, 32 Miss. 313.

South Carolina. — Stoddard *v.* Aiken, 57 S. C. 134, 35 S. E. 501; Hartley *v.* Glover, 56 S. C. 69, 33 S. E. 796.

Texas. — Tobler *v.* Stubblefield, 32 Tex. 188; Toblert *v.* McBride, 75 Tex. 95, 12 S. W. 752.

Tennessee. — Cheek *v.* Wheatley, 11 Humph. 556.

West Virginia. — McDonald *v.* Cole, 46 W. Va. 186, 32 S. E. 1033.

Wisconsin. — Sanford *v.* McCreedy, 28 Wis. 103.

13. *Colorado.* — Denver S. P. & P. R. Co. *v.* Woodward, 4 Colo. 1; Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Georgia. — Macon & W. R. R. Co. *v.* Davis, 18 Ga. 679.

Kentucky. — Willis *v.* Willis, 36 Ky. 48; Howard *v.* Daniel, 29 Ky. 125.

North Carolina. — Kesler *v.* Roseman, 44 N. C. 389.

Tennessee. — Pitt *v.* Pool, 91 Tenn. 70, 17 S. W. 802.

Wisconsin. — Wittmann *v.* Watry, 37 Wis. 238.

"When an executor or administrator declares upon his own seisin, in that capacity he is bound, even under the general issue, to show his appointment as part of his title in order to make out his case," but where he declares upon the seisin of his testator or intestate he need not prove his representative capacity unless it is denied specially by a proper plea. Aldis *v.* Burdick, 8 Vt. 21; Austin *v.* Downer, 25 Vt. 559. See also Willis *v.* Willis, 36 Ky. 48, and article "TITLE."

action can be maintained equally well in his individual capacity, such proof is unnecessary.[14]

(3.) Actions Against Personal Representative. — In actions against an executor or administrator in his representative capacity, the burden of proving such capacity, when denied, is upon the plaintiff, and he must show not only the appointment but also the acceptance of the office.[15]

(4.) Actions by Public Administrator. — The public administrator in a suit by him need not show the existence of the facts which authorize him to take on himself the burden of administration.[16]

(5.) Title or Rights Derived Through Personal Representative. — A party claiming title or rights through the act of an executor or administrator must establish the latter's representative capacity and authority.[17]

b. *Method of Proof.* — **(1.) Letters.** — Letters testamentary,[18] or letters of administration,[19] and likewise a properly certified

Suit Commenced by Decedent. Where a suit commenced by the deceased in his lifetime is continued after his death by his personal representative, the latter, after his appearance, must, if required, prove his representative authority. Moore *v.* Rand, 1 Wis. 245.

Ejectment. — An executor cannot recover in ejectment without introducing the will. Horn *v.* Johnson, 87 Ga. 448, 13 S. E. 633; Sorrell *v.* Ham, 9 Ga. 55; Mays *v.* Killen, 56 Ga. 527. But see articles "EJECTMENT;" "TITLE."

14. Hazelhurst *v.* Morrison, 48 Ga. 397.

Cause of Action Accruing After Decedent's Death. — Where the action was based upon a note made to the executor after the death of his decedent, it was held the representative capacity and authority of the plaintiff, although alleged, need not be proved, since the action could have been brought either in his representative or individual character. Sears *v.* Daly, 43 Or. 346, 73 Pac. 5.

15. Witcher *v.* Wilson, 47 Miss. 663. See *infra* "Acceptance of Office of Executor."

Presumption of Continuance. Where representative capacity has been sufficiently shown to exist at a certain day it is presumed to continue until the estate has been properly administered. Barr *v.* Sullivan, 75 Miss. 536, 23 So. 772.

16. Wetzell *v.* Waters, 18 Mo. 396.

17. Weise *v.* Rich, 77 Mich. 325, 43 N. W. 979; Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665. See article "TITLE," and also *infra* this article "Sales and Conveyances."

Assignment. — Where the plaintiff claims title to the note sued upon by virtue of an assignment from the legal representative of the payee, the burden is upon him to establish by competent evidence the representative capacity and authority of his assignor. Erskine *v.* Wilson, 20 Tex. 78.

18. Tarver *v.* Boykin, 6 Ala. 353; Garthwaite *v.* Bank of Tulare, 134 Cal. 237, 66 Pac. 326; Mutual Benefit L. Ins. Co. *v.* Tisdale, 91 U. S. 238; Pendleton *v.* Dalton, 92 N. C. 185.

19. *United States.* — Mutual Benefit L. Ins. Co. *v.* Tisdale, 91 U. S. 238.

Colorado. — Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Florida. — Davis *v.* Shuler, 14 Fla. 438.

Iowa. — Milligan *v.* Bowman, 46 Iowa 55; Citizens' Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261.

Maryland. — Wilson *v.* Ireland, 4 Md. 444.

Michigan. — James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361; Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199.

copy thereof,[20] are competent and sufficient evidence of the representative capacity and authority of an executor and administrator respectively. Parol testimony is sufficient if not objected to.[21]

(2.) Record of Probate Proceedings. — The record[22] of the probate court showing the probate of the will and the appointment and qualification of the executor, is sufficient proof of executorship. So, also, the record of the appointment and qualification of the administrator is sufficient evidence of his authority as such.[23] The mere order of appointment, however, is not alone sufficient, because

New York. — Belden *v.* Meeker, 47 N. Y. 307.

Texas. — Werbiskie *v.* McManus, 31 Tex. 116.

Vermont. — Seymour *v.* Beach, 4 Vt. 493.

The Absence of a Seal from such letters does not impair their evidentiary effect where their authenticity and the authority of the administrator have been fully recognized by the court in all the proceedings before it. Estate of Fernandez, 119 Cal. 579, 51 Pac. 851. See also Ponder *v.* Shumans, 80 Ga. 505, 5 S. E. 502.

Letters of administration are not incompetent because the seal of the court is affixed thereto during the course of the trial. Maloney *v.* Woodin, 11 Hun (N. Y.) 202.

The Possession of Letters of administration by the person to whom they purport to be granted is *prima facie* evidence of their proper delivery. McNair *v.* Dodge, 7 Mo. 404.

20. Sands *v.* Hickey, 135 Ala. 322, 33 So. 827; Wilson *v.* Bothwell, 50 Ala. 378; Morgan *v.* Casey, 73 Ala. 222; Mangun *v.* Webster, 7 Gill (Md.) 78; Davis *v.* Williams, 13 East (Eng.) 232.

Certified Copies of letters testamentary and of a duly approved bond are sufficient *prima facie* proof of the authority of the executrix without producing the will and the probate thereof. Wittmann *v.* Watry, 45 Wis. 491.

In an action of ejectment by an administrator, a certified copy of his letters of administration is admissible in proof of his authority, although on their face they do not purport to give him the administration of the real estate. Lamar *v.* Sheffield, 66 Ga. 710.

21. Where the plaintiff, suing as the personal representative of a deceased person, has testified without objection to his representative capacity and authority, no further proof of this fact is necessary. Alabama G. S. R. Co. *v.* Blenins, 92 Ga. 522, 17 S. E. 836.

22. Smith *v.* Mabry, 7 Yerg. (Tenn.) 26.

The representative capacity of the executor is sufficiently shown by a copy of the will and the proceedings of the probate court admitting the will to probate and appointing the executor. Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234.

Where the records of the court contained no entry of the issuance of letters testamentary, but it was shown that it was not the custom of the court at that time to make any such entry, it was held that the issuance of the letters sufficiently appeared from the probate of the will wherein were named as executors the persons who acted as such, the filing and approval of their bond, the exhibition to and the passage by the proper court of their accounts, in one of which was the allowance of the register's fee for the issuance of such letters. Blaen-Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Dec. 560.

23. McRory *v.* Sellars, 46 Ga. 550; Moreland *v.* Lawrence, 23 Minn. 84; Williams *v.* Jarrott, 6 Ill. 120; Elden *v.* Keddell, 8 East (Eng.) 187.

The Records of the Probate Court, reciting the appointment of a person claiming to be the administrator, together with the record of the bond

dependent upon the contingency of a proper qualification.[24] In some jurisdictions the issuance of letters seems to be essential, and they must therefore be offered in evidence.[25]

(3.) **Proof of Acts Insufficient.** — The authority of an administrator cannot be proved as against any person besides himself by evidence that he acted in that capacity.[26]

(4.) **In Foreign State.** — A copy of the letters testamentary or of administration issued from a court of competent jurisdiction, properly certified,[27] or a properly certified copy of the record of such a court, showing the necessary facts,[28] is competent evidence in

filed by such person, coupled with the subsequent recognition by the court of this person as administrator, were held sufficient proof of representative capacity, notwithstanding the non-production of letters of administration, or certified copies. Davis *v.* Turner, 21 Kan. 131.

A Copy of a Judgment in a suit between a public administrator and a former administratrix of the deceased, ordering the latter to render an account, and appointing and confirming the former as administrator of the estate in question, is sufficient proof of representative capacity and authority to sue. Morse *v.* Griffith, 25 La. Ann. 213.

Action for Wrongful Death. The representative capacity and authority of an administrator in an action to recover damages for the wrongful death of his decedent may be established by an examined copy of the record of his appointment satisfactorily proved by oral testimony to be a true copy, the same as in any other action where this fact is in issue. Union R. & Transit Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896.

24. O'Neal *v.* Tisdale, 12 Tex. 40; and see following note.

25. Executors of ——— *v.* Oldham, 2 N. C. 190.

In Matter of Estate of Hamilton, 34 Cal. 464, it was held that evidence of the order directing the issuance of letters of administration to the person named, upon his properly qualifying, and of the orders appointing appraisers directing publication of notice to creditors was not sufficient proof of the administrator's authority, but that the statute required the production of his letters with the oath of office annexed or a certified copy of the record thereof. But this rule is inapplicable to public administrators. Abel *v.* Love, 17 Cal. 233.

26. Arbright *v.* Cobb, 30 Mich. 355. But see note 31, *infra*.

Proof of General Reputation Incompetent. — Middlesworth *v.* Nixon, 2 Mich. 425.

27. *United States.* — Kane *v.* Paul, 14 Pet. 33.

Arkansas. — Newton *v.* Cocke, 10 Ark. 169.

Florida. — Sullivan *v.* Honacker, 6 Fla. 372; Margarum *v.* Christie Orange Co., 37 Fla. 165, 19 So. 637.

Georgia. — Buck *v.* Johnson, 67 Ga. 82.

Illinois. — Spencer *v.* Langdon, 21 Ill. 192; Collins *v.* Ayers, 13 Ill. 358.

Indiana. — Upton *v.* Adams, 27 Ind. 432.

Mississippi. — Hope *v.* Hurt, 59 Miss. 174.

Pennsylvania. — M'Cullough *v.* Young, 1 Binn. 63.

Texas. — Abercrombie *v.* Stillman, 77 Tex. 589, 14 S. W. 196.

In an action in Nebraska to foreclose a mortgage brought by an executor appointed in Illinois to administer the estate of a decedent who died in New York, it was held that the letters testamentary were in themselves sufficient evidence of the executor's authority to collect the notes without production of the will, the burden being upon the defendants to show any provision in the will curtailing his authority in this respect. Cheney *v.* Stone, 29 Fed. 885.

28. Smith *v.* Roach, 46 Ky. 17.

In Smith *v.* Mabry, 7 Yerg. (Tenn.) 26, a transcript properly

another state of the representative authority of an executor or administrator.

c. *Presumptions in Favor of Appointment.* — **(1.) Generally.** All presumptions are in favor of the proceedings of a court appointing a personal representative, and the burden is always upon the party attacking them.[29] This is especially true after a long lapse of time,[30] when a valid appointment may be presumed from the recognition by the court in its official acts and by the interested parties of the person who has continuously acted as such.[31]

(2.) Administrator De Bonis Non. — In support of the appointment of an administrator *de bonis non* it will be presumed that there was

certified from the records of a court of another state, containing a will, together with its probate and the qualification of the executors, was held sufficient evidence of a grant of letters testamentary to authorize a suit by the executors under a statute permitting suits by foreign executors upon a production by them of a certified copy of their letters testamentary under seal.

A duly certified transcript from the record of a probate court in a sister state, of the orders granting to the plaintiff, as sheriff, letters of administration, and the certificate of the judge of such court that such letters of administration had been granted to him and that he was duly qualified, are sufficient *prima facie* evidence of his representative character without proof that he had taken an oath of office or given the administration bond. Carmichael *v.* Saint, 16 Ark. 28.

Jurisdiction of Court Must Be Shown. — A transcript of the record of a foreign court recognizing the representative capacity of a particular person is not competent evidence in the absence of proof that such court had jurisdiction to confer such authority. Shorter *v.* Urquhart, 28 Ala. 360.

29. *Alabama.* — Hosey *v.* Brasher, 8 Port. 559, 33 Am. Dec. 299; English *v.* McNair, 34 Ala. 40.

Georgia. — Barclay *v.* Kimsey, 72 Ga. 725.

Illinois. — Hobson *v.* Ewan, 62 Ill. 146; Judd *v.* Ross, 146 Ill. 40, 34 N. E. 631.

Iowa. — Milligan *v.* Bowman, 46 Iowa 55; Pickering *v.* Weitung, 47 Iowa 242; Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791; McFarland *v.* Stewart, 109 Iowa 561, 80 N. W. 657.

Texas. — Mills *v.* Herndon, 77 Tex. 89, 13 S. W. 854.

Utah. — Harris *v.* Chipman, 9 Utah 101, 33 Pac. 242.

Where the issuance of letters of administration was admitted by the defendant in an action by an administrator upon his intestate's insurance policy, but their legality denied, it was held that the grant of letters being established it would be presumed that they conformed to the legal requirements, and the burden was upon the defendant to show their illegality. Lancaster *v.* Washington Life Ins. Co., 62 Mo. 121.

An Order Placing a Public Administrator in charge of an estate over which the court had jurisdiction will be presumed to have been founded upon the proper preliminary steps. State *v.* Holman, 93 Mo. App. 611, 67 S. W. 747; Burke *v.* Mutch, 66 Ala. 568; Farley *v.* McConnell, 7 Lans. (N. Y.) 428.

30. Gantt *v.* Phillips, 23 Ala. 275; Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002; Battles *v.* Holley, 6 Me. 145.

31. Where an application for letters of administration was not granted, but the applicant was appointed administrator *pro tem.*, with limited powers, and continued to act as administrator for a period of eighteen years, being recognized by the court and all interested parties as administrator during this time, it was held that he would be conclusively presumed to be the legal administrator where his acts were collaterally attacked. Halbert *v.*

a vacancy in the administration, and that all the other facts existed necessary to make such appointment valid.[32]

(3.) Conclusiveness of Appointment. — The order of appointment is conclusive evidence on collateral attack of the proper appointment and qualification as administrator of the person therein named, and of all the facts upon which such appointment is based.[33] In some

Martin (Tex. Civ. App.), 30 S. W. 388; Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. 1011.

Where the record shows that the court in various official acts has recognized a person named in a will as executor, and the record is inconsistent with the non-existence of letters testamentary, such letters will be presumed to have been granted. Piatt *v.* McCullough, 1 McLean 69, 19 Fed. Cas. No. 11,113.

No Presumption from Lapse of Time. — The grant of letters of administration, being a judicial act, cannot be presumed from the mere lapse of time; it must be proved by the record where there is no showing of the loss of such record. Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665.

32. *Alabama.* — Allen *v.* Kellan, 69 Ala. 442; Bean *v.* Chapman, 73 Ala. 140; Sands *v.* Hickey, 135 Ala. 322, 33 So. 827.

California. — Jennings *v.* LeBreton, 80 Cal. 8, 21 Pac. 1127.

Georgia. — Jepson *v.* Martin, 116 Ga. 772, 43 S. E. 75.

Kentucky. — Warfield *v.* Brand, 13 Bush 77.

Mississippi. — Gray *v.* Harris, 43 Miss. 421.

Missouri. — Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

Texas. — Willis *v.* Ferguson, 59 Tex. 172.

Vermont. — Steen *v.* Bennett, 24 Vt. 303.

Wisconsin. — Finch *v.* Houghton, 19 Wis. 163.

In the absence of evidence to the contrary it will be presumed that the estate had not been fully administered, in support of such an appointment on collateral attack, even though an order had been made approving the final account of the original administrator. Rogers *v.* Johnson, 125 Mo. 202, 28 S. W. 635.

Where the record does not disclose the reason for the appointment of an administrator *de bonis non* it will be presumed that there were sufficient grounds for such an appointment. Oakes *v.* Estate of Buckley, 49 Wis. 592.

Where the record shows that the first administrator has made a final settlement and the new administrator has been appointed subsequent to the date of such settlement, in support of the regularity of the second appointment it will be presumed that the assets of the estate were delivered into the custody of the court, and that all the conditions existed which were necessary to the validity of the second appointment. An acceptance of the former administrator's resignation and the revocation of his letters will be presumed from the action of the court. Jennings *v.* LeBreton, 80 Cal. 8, 21 Pac. 1127.

The recital in the order of appointment of an administrator *de bonis non* that his predecessor died "without closing the business of the estate" is sufficient evidence of the existence of debts, warranting the continuance of the administration. Corley *v.* Goll, 8 Tex. Civ. App. 184, 27 S. W. 819.

33. *United States.* — Mutual Benefit L. Ins. Co. *v.* Tisdale, 91 U. S. 238; Hurlburt *v.* Van Wormer, 14 Fed. 709.

Alabama. — Johnson *v.* Kyser, 127 Ala. 309, 27 So. 784; Bean *v.* Chapman, 73 Ala. 140.

California. — Dennis *v.* Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17.

Louisiana. — Duson *v.* Dupre, 32 La. Ann. 896.

Maryland. — Wilson *v.* Ireland, 4 Md. 444.

Michigan. — Benjamin *v.* Early, 123 Mich. 93, 81 N. W. 973; Cook *v.* Stevenson, 30 Mich. 242; James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361.

jurisdictions, however, it is competent to show even on collateral attack that the deceased was not domiciled within the jurisdiction of the appointing court,[34] or left no property within the county.[35] But it is generally held that the issuance of letters is a finding of these jurisdictional facts, and therefore conclusive except on direct attack.[36]

d. *Judicial Notice.* — The court can not take judicial notice of its records containing the appointment of an executor.[37]

C. Acceptance of the Office of Executor may be shown by the acts and conduct of the appointees, such as proving the will or taking the oaths and giving bond.[38]

2. A Renunciation of Executorship may be shown by parol, such as the executor's declarations *in pais,* or his failure or refusal to

Minnesota. — Moreland *v.* Lawrence, 23 Minn. 84.

New York. — Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Parham *v.* Moran, 4 Hun 717, *affirmed* in 71 N. Y. 596.

New Jersey. — Quidorts *v.* Pergeaux, 18 N. J. Eq. 472.

Tennessee. — Ferrell *v.* Grigsby (Tenn.), 51 S. W. 114.

Texas. — Murchison *v.* White, 54 Tex. 78. See also cases in note 36, *infra.*

34. *Connecticut.* — Olmstead's Appeal, 43 Conn. 110.

Kentucky. — McChord *v.* Fisher, 13 B. Mon. 193; Miller *v.* Swan, 91 Ky. 36, 14 S. W. 964.

North Carolina. — Johnson *v.* Corpenning, 39 N. C. 216, 44 Am. Dec. 106.

Rhode Island. — Ellis *v.* Appleby, 4 R. I. 462; People's Sav. Bank *v.* Wilcox, 15 R. I. 258, 3 Atl. 211, 2 Am. St. Rep. 894.

35. Perry *v.* St. Joseph etc. R. R. Co., 29 Kan. 420.

36. *Alabama.* — Coltart *v.* Allen, 40 Ala. 155; Kling *v.* Connell, 105 Ala. 590, 17 So. 121, 53 Am. St. Rep. 144.

California. — *In re* Griffith, 84 Cal. 107, 23 Pac. 528.

District of Columbia. — Richmond & D. R. Co. *v.* Gorman, 7 App. D. C. 91.

Georgia. — Tant *v.* Wigfall, 65 Ga. 412.

Louisiana. — Duson *v.* Dupre, 32 La. Ann. 896.

Maine. — Record *v.* Howard, 58 Me. 225.

Maryland. — See Stanley *v.* Safe Deposit etc. Co., 87 Md. 450, 40 Atl. 53.

Massachusetts. — McFeely *v.* Scott, 128 Mass. 16.

Mississippi. — Ames *v.* Williams, 72 Miss. 760.

Missouri. — Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276.

Montana. — Ryan *v.* Kinney, 2 Mont. 454; but see State *v.* Benton, 12 Mont. 66, 29 Pac. 425.

Nebraska. — Missouri Pac. R. Co. *v.* Bradley, 51 Neb. 596, 71 N. W. 283; Bradley *v.* Missouri Pac. R. Co., 51 Neb. 653, 71 N. W. 282.

New York. — Bolton *v.* Schriever, 135 N. Y. 65, 31 N. E. 1001.

Tennessee. — Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650.

Texas. — Lyne *v.* Sandford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

37. Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243.

38. Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388; Worth *v.* McAden, 21 N. C. 199; Witcher *v.* Wilson, 47 Miss. 663.

The Silence of an Executor when presented with an order drawn on the estate by one of its creditors, and his refusal either to accept or reject the order, is not an admission of his representative capacity. Howard *v.* Daniel, 29 Ky. 125.

The Fact of Joining in a Conveyance of the property of the estate is strong, though not conclusive, evidence that all the executors who so joined have taken upon themselves the general execution of the will. Roseboom *v.* Mosher, 2 Denio (N. Y.) 61.

give the proper security, and other circumstances.[39] Record evidence of this fact, however, is required in some jurisdictions.[40]

3. Revocation of Letters of Administration. — A. GENERALLY. The burden of proof is upon the party seeking to have letters of administration revoked.[41] In such a proceeding it is competent to show any facts or circumstances tending to establish sufficient grounds[42] for a continuance or discontinuance of the administration.

B. METHOD OF PROOF. — After an executor has been duly appointed and qualified as such, and has assumed the trust, the revocation of his powers and his discharge cannot be proved by parol, but must be shown by the record of the proper court.[43]

II. ALLOWANCE TO SURVIVING WIFE, HUSBAND OR CHILDREN.

On an application for an allowance for the support of a surviving wife, husband or child, pending administration, the burden of proof is upon the petitioner to show the facts entitling him thereto.[44]

39. Thompson *v.* Meek, 7 Leigh (Va.) 419; Roseboom *v.* Mosher, 2 Denio (N. Y.) 61.

The Failure to Qualify, and the joining with the administrator in a conveyance of the estate realty by the person named as executor, in his character as heir rather than that of executor, is sufficient proof of renunciation. Burnley *v.* Duke, 1 Rand. (Va.) 108.

40. Anold *v.* Sabin, 1 Cush. (Mass.) 525.

41. Existence of Will. — The burden is upon the party seeking the revocation of letters of administration, on the grounds of existence of a will, to prove the existence of such will unrevoked at the time of the testator's death. Holland *v.* Ferris, 2 Brad. (N. Y. Sur.) 334.

Verified Petition Insufficient. Under a statute providing that in certain cases an executor may be cited to appear and show cause why his letters should not be revoked upon petition by a person interested in the estate, supported by satisfactory proof by affidavit or parol testimony, the verified petition is insufficient in the absence of other evidence to warrant the issuance of the citation. Moorhouse *v.* Hutchinson, 2 Dem. (N. Y. Sur.) 429.

42. Existence of Assets Unadministered. — In an action to remove an administrator it is competent to show that there remained several unsatisfied mortgages, held by the decedent in his lifetime, as a circumstance tending to show the necessity for an administration of the estate. Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

Wishes of Decedent. — Custom of Court. — Incompetent. — It is not competent to show the wish of the decedent that there should be no administration, upon an application for the removal of an administrator, nor the custom of the court in that county. Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

43. Wright *v.* Gilbert, 51 Md. 146.

44. Shannon *v.* White, 109 Mass. 146; Caldwell *v.* Caldwell, 54 Iowa 456, 6 N. W. 714.

Where a widow seeks to recover property pledged by the deceased she must show that her claim for an allowance of the same stands on an equal footing with the claim of the pledgee. Fulton *v.* National Bank, 26 Tex. Civ. App. 115, 62 S. W. 84.

Divorce. — When the administrator resists the application on the ground that the petitioning widow has been divorced, he must prove the divorce. *In re* Edwards, 58 Iowa 431, 10 N. W. 793.

The return of the commissioners or appraisers fixing the amount of such allowance is *prima facie* correct.[45]

III. CONVEYANCES AND SALES.

1. Conveyance of Realty. — A. Necessity of. — a. *Burden of Proof.* — On an application by the personal representative, or in a suit by a creditor to subject the realty to the payment of estate debts, the burden rests upon the moving party to show all the facts rendering a sale for this purpose necessary. He must satisfactorily establish the validity of the debt and the insufficiency of the personal assets, or the fund set aside for this purpose, to satisfy such debt or debts.[46]

45. On the trial of objections to the return of appraisers setting apart certain property for the support of a widow, the burden of proof is upon the objector, since the return is *prima facie* correct. Adkins *v.* Hetchings, 79 Ga. 260, 4 S. E. 887; Robson *v.* Harris, 82 Ga. 153, 7 S. E. 926.

The return of the commissioners appointed to set aside an allowance for the widow, endorsed upon the appraisement and of the same date, is competent and sufficient evidence of notice to the administrator of their appointment. Butts *v.* Pugh, 54 Ga. 465.

46. *Alabama.* — Garrett *v.* Garrett, 64 Ala. 263; Davis *v.* Tarver, 65 Ala. 98; Miller *v.* Mayer, 124 Ala. 434, 26 So. 892; May *v.* Parham, 68 Ala. 253.

Georgia. — Dixon *v.* Rogers, 110 Ga. 509, 35 S. E. 781; Green *v.* Underwood, 108 Ga. 354, 33 S. E. 1009.

Illinois. — Dorman *v.* Tost, 13 Ill. 127.

Indiana. — Newcomer *v.* Wallace, 30 Ind. 216.

Kentucky. — Hall *v.* Sayre, 10 B. Mon. 46.

Louisiana. — Phelan *v.* Bird, 20 La. Ann. 355.

Maine. — *In re* Snow, 96 Me. 570, 53 Atl. 116; Gross *v.* Howard, 52 Me. 192.

Maryland. — Hammond *v.* Hammond, 2 Bland 306.

Massachusetts. — Lamson *v.* Schutt, 4 Allen 359.

Mississippi. — Hargrove *v.* Baskin, 50 Miss. 194.

New Hampshire. — Tilton *v.* Tilton, 41 N. H. 479.

New York. — Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845; Sanford *v.* Granger, 12 Barb. 392.

North Carolina. — Thompson *v.* Joyner, 71 N. C. 369; Shields *v.* McDowell, 82 N. C. 137.

Tennessee. — See Curd *v.* Bonner, 4 Coldw. 632.

Texas. — Hamblin *v.* Warnecke, 31 Tex. 91.

Virginia. — Elliott *v.* George, 23 Gratt. 780.

Financial Condition of Estate. Disclosure by Representative. — A creditor seeking to subject the real estate to the payment of his debt may require the administrator to exhibit to the court a true condition of the estate as to personal and real property and debts. Grayson *v.* Weddle, 63 Mo. 523.

Inability to Collect Debt Need Not Be Shown. — In a suit by a judgment creditor to subject the real estate of the decedent's estate to the payment of the debt, it is enough for the plaintiff to show the insufficiency of the personal assets to discharge the debt, without showing his inability to collect the same by proceedings at law from the personal representative next of kin or the legatees. Blossom *v.* Hatfield, 24 Hun (N. Y.) 275.

Redemption of Mortgaged Lands. On a bill to redeem lands which have been mortgaged by the widow and heirs, where complainant's object was to subject them to sale for the payment of debts of the estate, it

A Guardian ad Litem's Admissions in his answer to an application or petition for such sale will not relieve the applicant of this burden of proof.[47]

b. *Nature and Sufficiency of Evidence.* — Statutes sometimes regulate the nature and sufficiency of the evidence on such an application.[48] Presumptions may arise under certain circumstances.[49] The record of the insolvency proceedings had upon the estate is *prima facie*,[50] but not conclusive,[51] evidence of its financial condition. The opinion of a witness as to the necessity for a sale is not competent.[52]

B. Confirmation of Sale. — There must be evidence that the property sold for its fair market value before a sale can be confirmed.[53]

C. Title Claimed Under Administrator's Conveyance. — a. *Burden of Proof.* — The burden of proof rests upon the party claiming under a conveyance by an administrator to prove all the facts the existence of which is necessary to its validity.[54]

was held that the same degree of proof would be required of him as would be necessary to warrant a decree for such a sale. Aiken *v.* Morse, 104 Mass. 277.

Diligence in Converting Personalty into Money. — By statute in New York, before the realty will be sold there must be proof that the personal representative has used reasonable diligence in converting the personalty into money and applying it to the payment of debts. Farrington *v.* King, 1 Bradf. Sur. (N. Y.) 182; *In re* Topping's Estate, 2 Con. Sur. 187, 18 Civ. Pro. 115, 9 N. Y. Supp. 447.

47. Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Fridley *v.* Murphy, 25 Ill. 131; Wood *v.* Butler, 23 Ohio St. 520; Martin *v.* Starr, 7 Ind. 224; Hooper *v.* Hardie, 80 Ala. 114.

48. Thompson *v.* Boswell, 97 Ala. 570, 12 So. 809.

Deposition of Disinterested Witnesses. — A statute requiring that "the applicant must show to the court that the personal property of the estate is insufficient for the payment of debts, and such proof must be made by the deposition of disinterested witnesses," does not require that the debts themselves should be proved by depositions; they may be established by any competent evidence. Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579 (*overruling* Quarles *v.* Campbell, 72 Ala. 64; Alford *v.* Alford, 96 Ala. 385, 11 So. 316); Miller *v.* Mayer, 124 Ala. 434, 26 So. 892. See also Garrett *v.* Bruner, 59 Ala. 513.

The agreement between an administrator and a creditor of the estate to refer the latter's claim to referees, together with their award thereon, under a statute rendering such procedure proper and making the record thereof a lawful voucher for the administrator, is competent evidence in proof of the indebtedness of the intestate on an application by the administrator for a sale of the real estate to pay debts. Lassiter *v.* Upchurch, 107 N. C. 411, 12 S. E. 63.

49. In an action by an administrator *de bonis non* against the heirs to subject the real property to the payment of judgments against himself and a former administrator, it will be presumed in the absence of contradictory proof that the personal assets are insufficient. Banks *v.* Speers, 97 Ala. 560, 11 So. 841.

50. Henley *v.* Johnston, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48; Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Erck *v.* Erck, 107 Tenn. 77, 63 S. W. 1122.

51. Aiken *v.* Morse, 104 Mass. 277.

52. Miller *v.* Mayer, 124 Ala. 434, 26 So. 892.

53. James *v.* Nease (Tex. Civ. App.), 69 S. W. 110.

54. Ury *v.* Houston, 36 Tex. 260;

b. *Administrator's Deed.* — When properly objected to, an administrator's deed is not admissible without preliminary proof of all the facts essential to its validity,[55] except where by statute a properly executed administrator's deed is itself *prima facie* evidence of title,[56] or its recitals are *prima facie* evidence of the facts therein contained.[57] The deed should be admitted after any competent evidence sufficient to sustain a verdict or finding of these essential facts.[58] Owing to the presumptions attaching to such proceedings, the order authorizing the sale and the confirmation thereof are sufficient to render admissible the administrator's deed.[59] The remainder of

Dawson *v.* Parham, 47 Ark. 215, 1 S. W. 72; Fell *v.* Young, 63 Ill. 106; Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483; Clements *v.* Henderson, 4 Ga. 148, 48 Am. Dec. 216; Jewett *v.* Jewett, 10 Gray (Mass.) 31; Chapman *v.* Crooks, 41 Mich. 595.

55. Everett *v.* Newton, 118 N. C. 919, 23 S. E. 961; City of El Paso *v.* Ft. Dearborn Nat. Bank (Tex.), 74 S. W. 21; Terrell *v.* Martin, 64 Tex. 121; Dorrance *v.* Raynsford, 67 Conn. 1, 34 Atl. 706.

56. Sypert *v.* McCowen, 28 Tex. 636; Chase *v.* Whiting, 30 Wis. 544; Chase *v.* Ross, 36 Wis. 267; Hoffman *v.* Wheelock, 62 Wis. 434, 22 N. W. 713, 716. See Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74; and more fully the article "TITLE."

57. Davie *v.* McDaniel, 47 Ga. 195; Clements *v.* Henderson, 4 Ga. 148; Cupp *v.* Welch, 50 Ark. 294, 7 S. W. 139; City of El Paso *v.* Ft. Dearborn Nat. Bank (Tex.), 74 S. W. 21; Camden *v.* Plain, 91 Mo. 117, 4 S. W. 86.

A recital in the administrator's deed of the decree authorizing the sale is by statute *prima facie* evidence of its binding force and validity against the parties to such decree. Everett *v.* Newton, 118 N. C. 919, 23 S. E. 961.

58. The exclusion of a deed from an administrator, on the ground that his appointment was a nullity because of the prior issuance of letters to an executrix and her continuance in the discharge of her duties as such when the administrator was appointed, was held error because these facts were in issue and the evidence was such that a finding of the removal or resignation of the executrix would have been justified, especially in view of the presumption of the legality of the second appointment. Willis *v.* Ferguson, 46 Tex. 496.

59. Zillmer *v.* Gerichten, 111 Cal. 73, 43 Pac. 408; Young *v.* Downey, 145 Mo. 250, 46 S. W. 1086, 68 Am. St. Rep. 568; Coggins *v.* Griswold, 64 Ga. 323; Hartshorn *v.* Wright, Pet. C. C. 64, 11 Fed. Cas. No. 6169.

"An administrator's deed, accompanied by the order of the ordinary granting leave to sell, is not mere color of title, although the letters of administration may not be produced. When the order of the court of ordinary granting leave to an administrator to sell the land belonging to the estate of his intestate has been shown, the law presumes that all has been done which was necessary to have been done before the same was granted. This includes not only a showing of the necessity of the sale, and that it would be for the benefit of the heirs and creditors, but also the fact that the applicant was the administrator and authorized to make the sale." Roberts *v.* Martin, 70 Ga. 196.

In an action of ejectment, where defendant claimed under a sale by an administrator, it appeared that he and his predecessor in interest had paid the taxes continuously since the sale and for twenty years prior to the commencement of the suit had exercised open acts of ownership over it. Defendant introduced in evidence the administrator's deed, the order of sale and the order approving of same. This was held sufficient proof to support his title, the presumption being, in the absence of contrary evidence, that all the requisite antecedent steps had been duly taken, although the statute required all such sales to be made at the court house

the record, however, is admissible to show a lack of jurisdiction.[60] A variance between the deed and the order of sale as to the description of the land will not serve to exclude the deed if the land can be identified by parol evidence.[61]

c. *Presumptions.* — **(1.) Generally.** — However, on collateral attack on the validity of a judicial sale of real property belonging to an estate, the same presumptions arise in favor of the regularity of the proceedings by which such sale is consummated as would attach to the judicial acts of any court of similar jurisdiction.[62]

(2.) Notice to the interested parties of the proposed sale will be

door on some day while the court was in session, and the deed recited a sale on a day on which it was shown that the court was in fact not in session. The presumption of validity, under these circumstances, was held sufficiently strong to overcome the effect of this recital, which recital, however, was not necessary to the validity of the deed. Price *v.* Springfield Real Estate Ass'n, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595.

Subsequent Order. — An order of the court authorizing an administrator to sell estate realty, made subsequent to the sale, is not competent evidence to support such sale. Lessee of Ludlow *v.* Park, 4 Ohio 5.

60. Gilmore *v.* Taylor, 5 Or. 90.

61. Where there is some indefiniteness in the description of the land sold, and some discrepancy between the deed of conveyance, the report of the sale, the order to the commissioners, and the petition, but enough appears to enable the court to see that the land sold by the commissioners was comprehended in the description in the application for sale and in the order of the court, the administrator's deed is admissible, together with parol evidence, to identify and fix the boundaries of the land described in such deed. Doe d. Saltonstall *v.* Riley, 28 Ala. 164.

The order of sale, though containing an imperfect description of the property, or no description at all, is admissible in evidence in support of an administrator's deed. Norwood *v.* Snell (Tex. Civ. App.), 69 S. W. 642.

62. *United States.* — Grignon *v.* Astor, 2 How. 319.

California. — Burris *v.* Kennedy (Cal.), 38 Pac. 971.

Illinois. — Schnell *v.* City of Chicago, 38 Ill. 382, 87 Am. Dec. 304; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303.

Indiana. — Sims *v.* Gay, 109 Ind. 501, 9 N. E. 120; Hawkins *v.* Ragan, 20 Ind. 193.

Iowa. — Little *v.* Sinnett, 7 Iowa 324; Long *v.* Barnett, 13 Iowa 28, 81 Am. Dec. 420; Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238; Brown *v.* Butters, 40 Iowa 544.

Louisiana. — Grevenberg *v.* Bradford, 44 La. Ann. 400, 10 So. 786.

Maine. — Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597; Fowle *v.* Coe, 63 Me. 245.

Massachusetts. — Leverett *v.* Harris, 7 Mass. 292.

Mississippi. — Harris *v.* Ransom, 24 Miss. 504; Hutchins *v.* Brooks, 31 Miss. 430.

Missouri. — Rowden *v.* Brown, 91 Mo. 429, 4 S. W. 129; Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853; Price *v.* Springfield Real Estate Ass'n, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595.

Ohio. — Sheldon *v.* Newton, 3 Ohio St. 494.

Tennessee. — Griffith *v.* Phillips, 9 Lea 417; Kindell *v.* Titus, 9 Heisk. 727.

Texas. — McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580; Harris *v.* Shafer (Tex. Civ. App.), 21 S. W. 110; Templeton *v.* Ferguson, 89 Tex. 47, 33 S. W. 329, *affirming* 32 S. W. 148; Rindge *v.* Oliphant, 62 Tex. 682; Guilford *v.* Love, 49 Tex. 715;

presumed in the absence of anything in the record to the contrary.[63] But it has been held that this presumption does not apply where the names of such persons nowhere appear in the record of the proceedings.[64] In some states, however, such notice will not be presumed.[65]

A Recital in the Order of Sale that due notice was given is conclusive on collateral attack in the absence of anything in the record to the contrary.[66]

(3.) An Order of Sale, being a judgment, is entitled to the same

Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

In Russell *v.* Lewis, 3 Or. 380, where the order to show cause was made returnable on the 5th of April, but the order of sale was dated the 4th of April, it was held that the discrepancy would be presumed to be a clerical error.

Mistake in Description. — Where an administrator's report of a sale recited that it was made "in pursuance of an order" of the court, but described the land as the S. E. ¼ of the S. W. ¼ of the N. W. ¼ of the S. W. ¼ of a certain section, whereas in the order of sale the land was described as the S. E. ¼ of the N. W. ¼, and the N. E. ¼ of the S. W. ¼, of such section, it was held that in support of the sale it would be presumed that the variance in description was a clerical mistake on the part of the administrator, and that he sold the land described in the order of sale. Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757.

The Execution of an Additional Bond required by the order of sale will be presumed. Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13.

The presumption is not sufficient, however, to exclude evidence that this bond does not appear in the records or is not mentioned therein. Babcock *v.* Cobb, 11 Minn. 247.

63. *Florida.* — Wilson *v.* Matheson, 17 Fla. 630.

Georgia. — Dixon *v.* Rogers, 110 Ga. 509, 55 S. E. 781.

Illinois. — Harris *v.* Lester, 80 Ill. 307.

Indiana. — Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13; Gerrard *v.* Johnson, 12 Ind. 636.

Iowa. — Little *v.* Sinnett, 7 Iowa 324; Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238.

Kansas. — Mickel *v.* Hicks, 19 Kan. 578, 27 Am. Rep. 161.

Kentucky. — Jones *v.* Edwards, 78 Ky. 6.

North Carolina. — Everett *v.* Newton, 118 N. C. 919, 23 S. E. 961.

Wisconsin. — Blodgett *v.* Hitt, 29 Wis. 169.

But see Gibbs *v.* Shaw, 17 Wis. 197, 84 Am. Dec. 737. And see note 62, *supra.*

64. Moore *v.* Smith, 24 S. C. 316.

65. Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603; Dorrance *v.* Raynsford, 67 Conn. 1, 34 Atl. 706.

A lapse of twenty-four years is not sufficient to raise a presumption that the notice to interested parties prerequisite to a valid sale was given in the absence of any record evidence of such notice. Thomas *v.* LeBaron, 8 Metc. (Mass.) 355.

66. *Alabama.* — Goodwin *v.* Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21.

California. — Zilmer *v.* Gerichton, 111 Cal. 73, 43 Pac. 408.

Florida. — Emerson *v.* Ross, 17 Fla. 122.

Illinois. — Barnett *v.* Wolf, 70 Ill. 76.

Indiana. — First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054.

New York. — Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

North Carolina. — Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797; Edwards *v.* Moore, 99 N. C. 1, 5 S. E. 13.

Ohio. — Richards *v.* Spiff, 8 Ohio St. 586.

Oregon. — Gilmore *v.* Taylor, 5 Or. 89.

See also cases in note 67, *infra.*

conclusiveness on collateral attack, and to the same presumptions as other judgments.[67] Hence it is conclusively presumed to have been founded upon the necessary proof.[68]

67. *United States.* — Comstock *v.* Crawford, 70 U. S. 396.

Alabama. — Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185; Saltonstall *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Cobb *v.* Garner, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136; Goodwin *v.* Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21.

Arkansas. — Montgomery *v.* Johnson, 31 Ark. 74; George *v.* Norris, 23 Ark. 121.

California. — Dennis *v.* Winter, 63 Cal. 16; Haynes *v.* Meeks, 20 Cal. 288; Ions *v.* Harbison, 112 Cal. 260, 44 Pac. 572; *In re* Sprigg's Estate, 20 Cal. 121.

Delaware. — Roach *v.* Martin, 1 Harr. 548, 27 Am. Dec. 746.

Georgia. — McDade *v.* Burch, 7 Ga. 559, 50 Am. Dec. 407.

Illinois. — Wimberley *v.* Hurst, 33 Ill. 166, 83 Am. Dec. 295; Bostwick *v.* Skinner, 80 Ill. 147; Myer *v.* McDougal, 47 Ill. 278; Andrews *v.* Bernhardi, 87 Ill. 365; Barnett *v.* Wolf, 70 Ill. 76.

Indiana. — Pepper *v.* Zahnsinger, 94 Ind. 88; Williams *v.* Sharp, 2 Ind. 101.

Iowa. — Cowins *v.* Tool, 36 Iowa 82.

Kentucky. — Johnson *v.* McDyer, 11 Ky. L. Rep. 29, 9 S. W. 778; Jones *v.* Edwards, 78 Ky. 6.

Michigan. — Griffin *v.* Johnson, 37 Mich. 87; Church *v.* Holcomb, 45 Mich. 29, 7 N. W. 167.

Minnesota. — Rumrill *v.* First Nat. Bank, 28 Minn. 202, 9 N. W. 731.

Mississippi. — Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

Missouri. — Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853.

Nebraska. — Schroeder *v.* Wilcox, 39 Neb. 136, 57 N. W. 1031.

New Hampshire. — Merrill *v.* Harris, 26 N. H. 142, 57 Am. Dec. 359.

New York. — Atkins *v.* Kinnan, 20 Wend. 241, 32 Am. Dec. 534.

North Carolina. — Edwards *v.* Moore, 99 N. C. 1, 5 S. E. 13; Coffin *v.* Cook, 106 N. C. 376, 11 S. E. 371.

Ohio. — Calkins *v.* Johnston, 20 Ohio St. 539.

Pennsylvania. — McPherson *v.* Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642.

South Carolina. — Hodge *v.* Fabian, 31 S. C. 212, 9 S. E. 820, 17 Am. St. Rep. 25.

Texas. — Burdett *v.* Silsbee, 15 Tex. 604; Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Flenner *v.* Walker, 5 Tex. Civ. App. 145, 23 S. W. 1029; Perry *v.* Blakey, 5 Tex. Civ. App. 331, 23 S. W. 804; Shirley *v.* Warfield, 12 Tex. Civ. App. 449, 34 S. W. 390.

Virginia. — Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189; Woodhouse *v.* Fillbates, 77 Va. 317.

68. *United States.* — Badger *v.* Badger, 2 Cliff. 137, 2 Fed. Cas. No. 718.

Alabama. — Ford *v.* Ford, 68 Ala. 141; Wyatt *v.* Steele, 26 Ala. 639; Foxworth *v.* White, 72 Ala. 224.

California. — Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146; McCauley *v.* Harvey, 49 Cal. 497.

Colorado. — Bateman *v.* Reitler, 19 Colo. 547, 36 Pac. 548.

Connecticut. — Brewster *v.* Denison, 1 Root 231.

Florida. — Brown *v.* Lanman, 1 Conn. 467; Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163.

Georgia. — Roberts *v.* Martin, 70 Ga. 196; Davis *v.* Howard, 56 Ga. 430.

Illinois. — Stow *v.* Kimball, 28 Ill. 93.

Iowa. — Little *v.* Sinnett, 7 Iowa 324.

Massachusetts. — Allen *v.* Trustees of Ashley School Fund, 102 Mass. 262.

Michigan. — King *v.* Nunn, 99 Mich. 590, 58 N. W. 636.

Minnesota. — Curran *v.* Kuby, 37 Minn. 330, 33 N. W. 907.

Mississippi. — Hutchins *v.* Brooks, 31 Miss. 430.

Missouri. — Overton *v.* Johnson, 17 Mo. 442; Macey *v.* Stark, 116 Mo.

d. *Approval of Sale.* — The approval of a conveyance of real estate by an administrator must be shown,[69] but it need not be proved by a formal order of the court; it is sufficient if such an approval can be gathered from the whole record,[70] or the subsequent acts of the court recognizing its validity.[71]

e. *Lapse of Time.* — A long lapse of time during which such a sale has never been questioned is a strong circumstance in support of its validity,[72] and especially when the records have been

481, 21 S. W. 1088; Murphy *v.* De France, 105 Mo. 53, 15 S. W. 549.

New Hampshire. — Merrill *v.* Harris, 26 N. H. 142, 57 Am. Dec. 359.

New York. — See Atkins *v.* Kinnan, 20 Wend. 241, 32 Am. Dec. 534.

Ohio. — Ludlow *v.* Johnston, 3 Ohio 553.

Texas. — Looney *v.* Linney (Tex. Civ. App.), 21 S. W. 409.

Virginia. — Lawson *v.* Moorman, 85 Va. 880, 9 S. E. 150.

69. Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Gowan *v.* Jones, 10 Smed. & M. (Miss.) 164; Walker *v.* Jessup, 43 Ark. 163.

70. Carey *v.* West, 139 Mo. 146, 40 S. W. 661; Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757; Neill *v.* Cody, 26 Tex. 286; Loyd *v.* Waller, 74 Fed. 601; Smith *v.* Wert, 64 Ala. 34.

71. Simmons *v.* Blanchard, 46 Tex. 266; Moody *v.* Butler, 63 Tex. 210; Livingston *v.* Cochran, 33 Ark. 294; Price *v.* Nesbit, 1 Hill Eq. (S. C.) 445.

Where the approval of a conveyance by an administrator appeared in the judge's minutes and was recited in the deed, the acknowledgment of which was taken in open court by the judge on the same day that the entry was made on his minutes, and the administrator in a subsequent annual account had charged himself with the amount of the purchase money, it was held that sufficient approval of the sale was shown even though there was no formal order in the record. Camden *v.* Plain, 91 Mo. 117, 4 S. W. 86.

Where the records fail to show any formal order approving the sale by an administrator, and it appeared that on the day the deed was made, on application by the administrator, an error in the description of the land was ordered to be corrected by the court, and the deed itself contained all the usual and necessary recitals and was acknowledged before the judge himself, it was held that the approval was sufficiently shown. Jones *v.* Manly, 58 Mo. 559.

Repeated annual settlements subsequent to a sale by an administrator, coupled with the final settlement, in which the proceeds of such sale were accounted for and charged against the representative, sufficiently show the approval of the sale by the court, in the absence of any formal order. Grayson *v.* Weddle, 63 Mo. 523; Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

72. *United States.* — Moore *v.* Greene, 19 How. 69; Massenburg *v.* Denison, 71 Fed. 618; Loyd *v.* Waller, 74 Fed. 601.

Alabama. — Collins *v.* Johnson, 45 Ala. 548; Baker *v.* Prewitt, 64 Ala. 551; Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Lay *v.* Lawson, 23 Ala. 377.

Georgia. — Woolfolk *v.* Beatly, 18 Ga. 520.

Missouri. — Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757.

Texas. — Templeton *v.* Ferguson, 89 Tex. 47, 33 S. W. 329; City of El Paso *v.* Ft. Dearborn Nat. Bank (Tex.), 74 S. W. 21; Webb *v.* Sellers, 27 Tex. 423; Baker *v.* Coe, 20 Tex. 430; Coleman *v.* Florey (Tex. Civ. App.), 61 S. W. 412; Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

See also Gowan *v.* Jones, 10 Smed. & M. (Miss.) 164.

Clear and satisfactory proof is required to justify setting aside the sale of land by an administrator after the lapse of several years, and when valuable improvements have

lost.[73] Where the record evidence of the facts is still available, and not produced, the mere lapse of time, even when coupled with other corroborating circumstances, is not sufficient to raise a presumption of a legal conveyance.[74] An apparently deficient record may, however, be supplemented by the presumptions arising from a long lapse of time, and other circumstances.[75]

been made upon it by the purchaser. Wilson *v.* Kellogg, 77 Ill. 147.

Where the order of sale made by the orphans' court does not, on its face, appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. Lay *v.* Lawson, 23 Ala. 377.

Where it appeared that an administrator made the sale of estate realty, gave a deed reciting that all the preliminary steps required by law had been taken, and placed the purchaser in possession, it was held that the latter's continued and undisturbed possession for thirty-four years raised a presumption that all the legal requisites of the sale had been complied with in the absence of contrary proof, although the records were deficient in some essential particulars; especially in view of the fact that the transactions occurred during the infancy of the government and when the records were carelessly kept. Stevenson *v.* McReary, 12 Smed. & M. 9, 51 Am. Dec. 102. See also Wyatt *v.* Scott, 33 Ala. 313.

Purchase by the Administrator. Where the administrator has purchased the property at his own sale, under a statute allowing this to be done in case his bid is three-fourths of the appraised valuation, in the absence of evidence to the contrary it will be presumed, after the lapse of twenty years, that his bid was sufficiently high. Price *v.* Springfield Real Estate Ass'n, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595.

73. Morris *v.* House, 125 N. C. 550, 34 S. E. 712. See "Loss of Record," *infra*.

74. In Tucker *v.* Murphy, 66 Tex. 355, no proof was made of the appointment of the administrator, or that the sale had been ordered or confirmed, and no showing was made that a transcript of the record of these facts could not have been procured. The court said: "It is true that, ordinarily, after the lapse of thirty years the power of a person who assumes to have executed a deed under power from another, or in a fiduciary capacity, will be presumed. This, however, is but a presumption of fact, which is indulged upon the idea that time has made it impracticable to make such proof of the actual existence of the power as may be made in regard to matters recently transpiring. Whether such a presumption will or may be indulged in a given case must depend on the facts presented." But in White *v.* Jones, 67 Tex. 638, where the records had been destroyed, similar evidence was held sufficient.

75. Austin *v.* Austin, 50 Me. 74; Gray *v.* Gardner, 3 Mass. 399.

Presumption of Confirmation. "After the lapse of over fifty years, every reasonable presumption should be indulged in to support titles acquired at administrators' sales made under orders of courts of competent jurisdiction; and where, as in this case, the record shows that the sales as made by the administrator were duly reported with accompanying accounts, showing the disposition of the proceeds, a confirmation of the sales should be presumed, if necessary, to show full title in the purchasers." Santana Live Stock & Land Co. *v.* Pendleton, 81 Fed. 784. And see Tipton *v.* Powell, 2 Coldw. (Tenn.) 19.

The Recital in an Administrator's Deed of the order of sale is in itself sufficient presumptive proof of such order, when coupled with the undisputed possession of the property therein described for the period of fifty years. Baeder *v.* Jennings, 40 Fed. 199.

f. *Loss of Record Evidence.* — The loss or destruction of the record evidence renders a resort to secondary evidence necessary.[76] Circumstantial evidence alone under such conditions will be sufficient to support an administrator's deed, especially after long-continued and undisputed possession.[77] In such case the existence of an order of sale and the other legal prerequisites may be inferred.[78]

D. Title Claimed Under Conveyance by Executor. — a. *Generally.* — The burden of proof is upon the party claiming under a sale by the executor of a will which does not contain an express power to sell, to show the existence of facts authorizing a sale.[79] And when the conveyance is made under an express power to sell for the payment of debts the existence of such debts must be shown,[80] unless by the will the matter is left to the discretion of the executor.[81]

b. *Executor's Deed.* — An executor's deed is not admissible as evidence of title without preliminary proof of compliance with the steps necessary to its validity, or a production of the will where it purports to have been executed in pursuance of a power therein contained.[82]

76. Davis *v.* Turner, 21 Kan. 131. Where the records of the proceedings authorizing and confirming a conveyance by an administrator, are shown to have been lost or destroyed, but a rough minute docket shows a petition for a sale was made, and the report of the sale confirmed, the presumption arises that all the necessary steps were taken and that the court acted upon the prescribed proof. Everett *v.* Newton, 118 N. C. 919, 23 S. E. 961.

The Recitals in the administrator's affidavit, the bond, the report of the sale, and the deed, in the absence of testimony to the contrary, are conclusive proof of the existence of the order or license to sell. Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74.

77. The facts that the purchasers went into immediate possession, and that the heirs yielded possession and failed to make any claim of title for a long period of years, and that the administrator drew an informal deed, are sufficient proof of the appointment of the administrator, the filing of the application for the order of sale, and that proper proof was made, justifying the sale, and that the sale was confirmed. Smith *v.* Wert, 64 Ala. 34.

78. Starr *v.* Brewer, 58 Vt. 24, 3 Atl. 479; Rowden *v.* Brown, 91 Mo. 429, 4 S. W. 129.

In Doolittle *v.* Holton, 28 Vt. 819, where it appeared that the probate records had been destroyed and there was no evidence of an order of sale, but there had been thirty years' undisturbed possession under the administrator's deed, Redfield, C. J., says: "The presumption, *omnia rite acta,* applies with especial force to the proceedings of courts of probate. And, after so great a lapse of time, although we cannot make any presumption against the plaintiffs, on the ground of possession merely, we certainly should be at liberty to take into account the enhanced difficulty of showing the true state of the facts, as they existed at the time, and the imperfect manner in which the business is known to have been transacted, at that early day, and the probability that if such an order had existed it might not have been recorded or preserved, and the extreme improbability that if such an order had existed and had not been recorded or preserved, its existence could now be shown."

79. Freeman *v.* Tinsley (Tex. Civ. App.), 40 S. W. 835.

80. Griffin *v.* Griffin, 141 Ill. 373, 31 N. E. 131.

81. Roseboom *v.* Mosher, 2 Denio (N. Y.) 61.

82. White *v.* Moses, 21 Cal. 43; Dowdy *v.* McArthur, 94 Ga. 577, 21

2. Sales of Personalty. — A sale of personalty, made in due course of administration, is presumed to have been regular and authorized by the statute, and the burden is upon the party impeaching such sale to show its invalidity.[83]

IV. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVE.

1. Rules of Evidence as Affected by Nature of Action. — A. GENERALLY. — Actions against administrators and executors are governed by the ordinary rules of evidence.[84] Owing, however, to the disadvantage under which they usually labor, because of their ignorance of the facts in question, certain exceptions are made in their favor.[85]

B. DENIAL OF EXECUTION OF WRITTEN INSTRUMENT. — Thus statutes and rules of court requiring a denial under oath within a specified time of the execution of the written instrument set out in pleadings as the basis of the action, are held[86] to have no application

S. E. 148; Lanfear *v.* Harper, 13 La. Ann. 548.

83. Sherman *v.* Willett, 42 N. Y. 146.

84. Necessity of Objection to Incompetent Evidence. — The fact that an action is brought by or against an executor or administrator in his representative capacity does not relieve him of the necessity of making proper and timely objections to the admission of incompetent evidence. The court is not compelled to exclude or disregard such evidence when not objected to. Barbier *v.* Young, 115 Mich. 100, 72 N. W. 1096, *distinguishing* McHugh *v.* Dowd, 86 Mich. 412, 49 N. W. 216.

Promissory Note. — A claim consisting of a promissory note, supported by the claimant's affidavit stating the facts required by the statute, is *prima facie* valid. Ponder *v.* Boaz, 23 Ky. L. Rep. 2429, 67 S. W. 833.

The fact that the maker of a promissory note is dead and the collection thereof must be enforced against his estate does not alter the rule that the production of the note and proof of its due execution make a *prima facie* case in favor of the holder. Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241; Hauxhurst *v.* Ritch, 53 Hun 632, 6 N. Y. Supp. 134.

But in a contest between the creditors of an insolvent succession the promissory notes of the deceased are not in themselves sufficient proof of the claim which they evidence, where their genuineness and *bona fides* are in issue, but they must be supported by such additional evidence as will satisfy the mind of the court of the fairness and justness of the claim. Succession of Warren, 4 La. Ann. 451.

85. Presumption from Failure to Introduce Available Evidence. "Usually the force of evidence, though slight, is greatly increased by the failure of the opposite party to rebut it, where it is obvious that the means to do so are readily accessible to the party. An administrator is often at fault in the want of a knowledge of facts necessary to make a full defense, and hence, this presumption does not hold so strongly against him as against his intestate, if living." Chandler *v.* Meckling, 22 Tex. 37.

86. Smith *v.* King, 88 Iowa 105, 55 N. W. 88. See also Neil *v.* Case, 25 Kan. 355.

Denial of Execution. — "A rule of court making the failure to deny execution of the instrument sued upon within the time prescribed for filing affidavits an admission of its

to actions against an administrator or executor in his representative capacity. The contrary is also held.[87]

2. Declarations and Admissions by Deceased. — A. GENERALLY. The declarations or admissions of a person, since deceased, in actions by or against his personal representative, are subject to the rules generally applicable to such testimony,[88] except in some jurisdictions, where by statutes a deceased person's self-serving declarations are made competent in favor of his legal representatives, either generally[89] or under particular circumstances.[90]

genuineness, has no application to actions against an executor or administrator, since the facts are not sufficiently within their knowledge. Every safeguard should be thrown around the estates of the dead, whose lips are sealed, and no statute or rule of court, unless by its express words, should ever be held to apply to an executor or administrator in its requirement of a denial, under oath, of liability in advance of legitimate proof of the same. No one representing the dead should be called upon to speak until first spoken to and confronted with proper proof of liability." Perkins *v.* Humes, 200 Pa. St. 235, 49 Atl. 934.

A statute providing that when a writing purporting to have been executed by one of the parties is the foundation of, or referred to in, any pleading, it may be read in evidence on the trial of the cause against such party without proving its execution unless its execution be denied under oath, has no application to writings signed by the deceased in actions against his representative, but such writings must be proved as at common law. Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 470; Wells *v.* Wells, 71 Ind. 509; Ruddell *v.* Tyner, 87 Ind. 529.

87. Knight *v.* Knight, 9 Fla. 283; Vincent *v.* Pitman, 1 Mo. 712.

88. Fellows *v.* Smith, 130 Mass. 378; Chandler *v.* Meckling, 22 Tex. 37. See fully article "DECLARATIONS."

Delivery in Escrow to Take Effect After Death. — In proof of the delivery of an instrument to a third party, to take effect after the maker's death, it is competent to show as against his executor the directions by the decedent to such third party. Daggett *v.* Simonds, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332; Ducker *v.* Whitson, 112 N. C. 44, 16 S. E. 854.

Admission of Fraud. — In an action by an administrator on a written contract made with his deceased intestate, the admission of the latter that he had committed a fraud in respect to such contract was held incompetent to sustain such a defense except in corroboration of other and direct evidence of fraud. Hard *v.* Ashley, 63 Hun 634, 18 N. Y. Supp. 413.

Declarations and Admissions of Deceased Against Interest Competent. — Clouser *v.* Ruckman, 104 Ind. 588, 4 N. E. 202; Ginders *v.* Ginders, 21 Ill. App. 522; Slade *v.* Leonard, 75 Ind. 171; Foster *v.* Honan, 22 Ind. App. 252, 53 N. E. 667; Milam *v.* Ragland, 25 Ala. 243; Weston *v.* Weston, 35 Me. 360; Harrington *v.* Hickman, 148 Pa. St. 401, 23 Atl. 1071.

Self-serving Declarations of Deceased Incompetent. — Treadway *v.* Treadway, 5 Ill. App. 478; Thayer *v.* Lombard, 165 Mass. 139, 42 N. E. 563; Schwartz *v.* Allen, 24 N. Y. St. 912, 7 N. Y. Supp. 5; Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505.

89. **By Statute in Connecticut,** the entries, memoranda and declarations of a deceased person are competent evidence in favor of his legal representatives. Chase *v.* Burritt (Conn.), 14 Atl. 212. Under this statute, however, written entries by the deceased are not presumptively correct but merely evidence. Setchel *v.* Keigwin, 57 Conn. 473, 18 Atl. 594.

90. **By Statute in Massachusetts,** in a proceeding against an executor

B. Papers Left by Deceased. — Papers and memoranda left by the deceased and found among his belongings are competent evidence of an alleged debt, as admissions or declarations against interest.[91] Nor does the fact that they were never delivered render them incompetent.[92] So also they may be competent circumstances in rebuttal of an alleged indebtedness.[93] Such written declarations that property therein mentioned belongs to a designated person may[94] or may not be sufficient evidence of this fact, depend-

where the cause of action is supported by oral testimony of a promise made by the testator, evidence of his statements, acts and habits, tending to show the improbability of the making of such promise, is admissible. Rev. Laws, c. 175, § 67; Cogswell *v.* Hall (Mass.), 70 N. E. 461; Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802.

In an action upon a promissory note, testimony in behalf of the plaintiff that it had loaned the decedent a certain sum of money was held not to be oral testimony of a promise or statement made by the deceased within the statute rendering the latter's declarations competent in his own favor in such case. National Granite Bank *v.* Tyndale, 179 Mass. 390, 60 N. E. 927.

Actions Begun in Deceased's Lifetime. — His Declarations Therein. This statute applies to actions begun against the decedent in his lifetime and continued against his executor, and declarations or statements made by the deceased during the course of such action come within its provisions. Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802.

Abated Action. — Under the statutes of California, where a defendant dies and the action is revived against his administrator, plaintiff must prove a proper presentation of the claim, although such fact is not denied in the answer. Derby *v.* Jackman, 89 Cal. 1, 26 Pac. 610.

91. Gallagher *v.* Brewster, 1 App. Div. 65, 36 N. Y. Supp. 1081; *In re* Young's Estate, 148 Pa. St. 573, 575, 24 Atl. 124.

Memorandum Directed to Executors. — Gallagher *v.* Brewster, 153 N. Y. 364, 47 N. E. 450.

92. Johnston *v.* McCain, 145 Pa. St. 531, 22 Atl. 979.

An Undelivered Promissory Note, found among the deceased's papers, which contains a promise to pay the plaintiff two thousand dollars "for value received and justly and truly due her, for services rendered me during my illness," is very slight evidence of indebtedness for such services. Robinson *v.* Cushman, 2 Denio (N. Y.) 149.

93. In proof of a claim for three hundred dollars, claimant testified that the obligation consisted in two promissory notes on one piece of paper, one for three hundred dollars to herself, and another for fifty dollars to her husband, and that these notes had been delivered to the deceased on his agreement to furnish new ones, owing to their dilapidated condition, and he further denied ever having any other note; it was held that a paper found among the papers of the deceased containing a note to the claimant for one hundred and fifty dollars and to her husband for fifty dollars, was admissible in evidence, and coupled with indorsements of payments thereon, checks of decedent to claimant, and other circumstances, was sufficient to rebut the claim. Taylor *v.* Greene, 129 Mich. 564, 89 N. W. 343.

94. On the death of a wife a paper in her handwriting was found among her papers to the effect that the money deposited in her name in a certain bank was the property of her husband. This paper had been signed by decedent and witnessed by one of her domestics, but when found after her death her signature was torn off. It was held competent evidence of the husband's ownership of the deposit, and coupled with

ing upon whether or not the circumstances indicate that they are testamentary in character.[95] Such papers, consisting of the declarations of third persons against interest, may be competent in favor of the deceased representative when otherwise relevant.[96]

C. Weight and Sufficiency. — Although declarations against interest by a person, since deceased, are competent evidence in support of a claim against his estate, they are usually regarded as the weakest sort of proof, because of their liability to be misunderstood and misapplied.[97] However, a clear, undisputed admission of

her declarations to the same effect during her life, sufficient to rebut any presumption of an intended testamentary gift. Gracie's Estate, 158 Pa. St. 521, 27 Atl. 1083. See also Govin *v.* De Miranda, 140 N. Y. 474, 35 N. E. 626.

95. In Gilmor's Estate, 158 Pa. St. 186, 27 Atl. 845, it appeared that at the testator's death there was found in his private desk a pocketbook labeled in his handwriting, "Eliza Gilmor," and also in the same writing, "Eliza Gilmor's money." In the same desk was also found a promissory note signed by the decedent to the order of his sister, Eliza Gilmor, on which was a memorandum in his writing, "This note is invested in government bonds at four per cent., belonging to Eliza Gilmor." On the note were receipts of interest indorsed by the sister. This memorandum was held insufficient proof that the bonds therein mentioned belonged to the sister, and also the label on the pocketbook was insufficient in the absence of any evidence that any of her money was invested in them and that the money and securities found within it were her property.

A paper left by the deceased to the effect that he desired that a person therein named should have a certain sum at his death because she had lived with him a number of years and received very little for it, is testamentary in character and not a sufficient admission of indebtedness to support a claim against the estate. Wilson *v.* Van Leer, 103 Pa. St. 600.

96. In an action against an administrator, where he pleads as an offset that money was advanced by his intestate for the benefit of the plaintiff, the accounts of third persons with the plaintiff, receipted by them but not showing by whom the payments were made, found among intestate's papers at his death, are not competent evidence because it does not appear that they were paid with the intestate's money, nor is it competent to show an indorsement upon one of such accounts that in payment the creditor had received the note of the intestate, since the note might have been given for another consideration than money from the plaintiff. Field's Adm'r *v.* Bevil, 12 Ala. 608.

97. *Kentucky.* — Middleton *v.* Carroll, 27 Ky. 144.

Louisiana. — Bodenheimer *v.* Ex'rs of Bodenheimer, 35 La. Ann. 1005.

Missouri. — Ringo *v.* Richardson, 53 Mo. 385; Carney *v.* Carney, 95 Mo. 353, 8 S. W. 729.

New Jersey. — Ely *v.* Ely (N. J. Eq.), 50 Atl. 657.

New York. — *In re* Child's Estate, 5 Misc. 560, 26 N. Y. Supp. 71; Ulrich *v.* Ulrich, 42 N. Y. St. 216, 17 N. Y. Supp. 721; Wood *v.* Rusco, 4 Redf. 380.

Wisconsin — Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

"It has passed into a maxim of the law of evidence that parol testimony as to the extrajudicial admissions made by a dead man, out of the presence of others, is the weakest kind of evidence." Calhoun *v.* McKnight, 44 La. Ann. 575, 10 So. 783.

Where the administrator makes a claim for money loaned to the deceased, the facts that there is no written evidence of such claim and that no demand was made during the lifetime of the decedent, and that the relative circumstances of the parties

indebtedness by the deceased is sufficient to support a claim against his estate,[98] although testimony of this character has been held insufficient to establish a special contract.[99] The undisputed declaration of the deceased that a debt due has been paid is sufficient evidence of this fact.[1]

3. Books of Account. — A. GENERALLY. — In actions by or against a personal representative, the competency of account books is governed by the usual rules applied to such evidence,[2] elsewhere

were such as to render the alleged loan improbable, are sufficient to overcome proof of declarations by the deceased admitting the existence of a debt without specifying the time when it was incurred. *In re* Child's Estate, 5 Misc. 560, 26 N. Y. Supp. 721.

Declarations in Support of Note Found in Decedent's Possession. In an action to establish a claim against decedent's estate, evidenced by a promissory note found among decedent's papers, the declarations of the decedent to the witness that he had left a note payable to the claimant, which in case of his death the witness would find among his papers, and that it represented what he owed claimant, and that if there was any estate he wished the witness to see that it was given to the claimant, is insufficient in the absence of corroborating evidence to support the claim, especially where the other circumstances are inconsistent with the existence of the alleged debt. McKowen's Estate, 198 Pa. St. 102, 47 Atl. 1113.

98. Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436; Crampton *v.* Newton's Estate (Mich.), 93 N. W. 250.

The Recital in the note sued upon that it was given for value received is sufficient proof of consideration, although the note by its terms was payable on the death of the decedent. Van Buskirk *v.* Hoy, 114 Mich. 425, 72 N. W. 246.

Where an accounting was sought from the administrator of a deceased trustee, and the trust was admitted, it was held that the declarations of the deceased, though ordinarily very weak evidence, were sufficient to charge the trustee, especially since he had failed to keep proper accounts. Hoffmann *v.* Hoffmann, 126 Mo. 486, 29 S. W. 603.

99. Pollock *v.* Ray, 85 Pa. St. 428.

See *infra*, "Claims Against Estate;" "Services Rendered Decedent;" "Declarations of Deceased."

1. Koontz *v.* Koontz, 79 Md. 357, 32 Atl. 1054.

2. *Alabama.* — Harrison *v.* Cordle, 22 Ala. 457.

Georgia. — Gaines *v.* Gaines, 39 Ga. 68.

Illinois. — Mark *v.* Miles, 59 Ill. App. 102; Treadway *v.* Treadway, 5 Ill. App. 478; Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628.

Louisiana. — Succession of Moise, 107 La. 717, 31 So. 990.

Maryland. — Ward *v.* Leitch, 30 Md. 326.

Massachusetts. — Watts *v.* Howard, 7 Metc. 478; Davis *v.* Sandford, 9 Allen 216.

Mississippi. — Bookout *v.* Shannon, 59 Miss. 378.

Missouri. — Hensgen *v.* Mullally, 23 Mo. App. 613; Jesse *v.* Davis, 34 Mo. App. 351.

Nevada. — Buckley *v.* Buckley, 12 Nev. 423.

New Hampshire. — Jones *v.* Jones, 21 N. H. 219.

New York. — Young *v.* Luce, 50 N. Y. St. 253, 21 N. Y. Supp. 225; McGoldrick *v.* Traphagen, 88 N. Y. 334; West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450; Dusenbury *v.* Hoadley, 49 N. Y. St. 560, 20 N. Y. Supp. 911; Rexford *v.* Comstock, 3 N. Y. Supp. 876; Lloyd *v.* Lloyd, 1 Redf. 399.

North Carolina. — Bland *v.* Warren, 65 N. C. 372.

Pennsylvania. — *In re* Huston's Estate, 167 Pa. St. 217, 31 Atl. 553; Yearsley's App., 48 Pa. St. 531.

discussed.[3] Such books, however, when otherwise incompetent, may be admissible as admissions[4] or circumstantial evidence.[5]

B. Testimony of Claimant in Support of His Books. — In some jurisdictions the plaintiff is not rendered incompetent to testify to the preliminary facts necessary to make his account books admissible, by the rule excluding his testimony as to transactions with the deceased.[6] In other states this rule serves to exclude his testimony as to such facts.[7]

4. Possession as Evidence of Title. — A. Generally. — Possession of property by the deceased at his death, or the discovery of such property among his effects, is *prima facie* evidence of his title thereto[8] in accordance with the general rule elsewhere discussed,[9]

Vermont. — Barnes *v.* Dow, 59 Vt. 530, 10 Atl. 258.

Separate, distinct and disconnected self-serving declarations of the decedent in his book of accounts are inadmissible. Doolittle *v.* Stone, 136 N. Y. 613, 32 N. E. 639.

The claimant's books are not incompetent under the statute excluding his testimony as to transactions with a deceased person. Young *v.* Luce, 50 N. Y. St. 253, 21 N. Y. Supp. 225.

3. See article "Books of Account."

4. **Claimant's Books in Handwriting of Deceased.** — Where claimant's books of account are in the handwriting of the deceased, and show that he had appropriated money beyond the amount due him for salary, they are admissible in support of his claim against the deceased's estate for the misappropriated funds. Appeal of Roberts, 126 Pa. St. 102, 17 Atl. 538. And see Spears *v.* Spears, 27 La. Ann. 537; Ward *v.* Leitch, 30 Md. 326.

Decedent's Books, when partly kept by the claimant, and to which he has had access at all times, are competent against such claimant. Lucas *v.* Thompson, 59 N. Y. St. 153, 27 N. Y. Supp. 659.

The decedent's books, though not otherwise admissible, become competent when they have been examined by the person therein charged, without any dissent on his part after such examination. Terry *v.* McNiel, 58 Barb. (N. Y.) 241.

5. **Circumstantial Evidence.** — On the question as to whether deceased was the owner of certain stock in his possession at the time of his death, a book account of his investments kept by him, which does not disclose an investment in such stock, is competent evidence. Van Winkle *v.* Blackford (W. Va.), 46 S. E. 589.

In an action for personal services rendered deceased, the books kept by deceased, containing his account with the claimant, showing the articles and money advanced by deceased, and also credits to claimant for services performed by him, are competent evidence as to whether the relations of the parties were contractual and the services to be paid for. Sherman *v.* Whiteside, 190 Ill. 576, 60 N. E. 870.

In Baker *v.* Halleck's Estate, 128 Mich. 180, 87 N. W. 100, the claimant's books of account were held admissible in evidence as a circumstance to show that the note sued upon was for the same amount as the books disclosed to be due, the evidence being accompanied by an instruction that it could be used for no other purpose.

6. Alling *v.* Brazee, 27 Ill. App. 595; Strickland *v.* Wynn, 51 Ga. 600; Bookout *v.* Shannon, 59 Miss. 378.

7. Dismukes *v.* Tolson, 67 Ala. 386; Davis *v.* Seaman, 46 N. Y. St. 810, 19 N. Y. Supp. 260. See article "Transactions With Decedents."

8. **Possession of Promissory Notes by the Deceased** is evidence that they are unpaid, and if payment is relied upon as a defense the evidence must be clear and satisfactory. Williams *v.* Young (Ark.), 71 S. W. 669.

9. See fully articles "Title" and "Bills and Notes."

unless it is shown that his possession was that of an agent or trustee.[10] Likewise the personal representative's possession has the same evidentiary value in actions involving or based upon the ownership of such property.[11] These presumptions are overcome by circumstantial evidence to the contrary.[12] On the other hand the defendant's possession of property claimed by the executor or administrator is presumptive evidence of his ownership.[13]

B. Property of Decedent in Possession of His Agent. Where property is shown to have been placed by the deceased in the hands of his agent, in an action against the latter by the personal representative to recover such property the agent's possession is not evidence of his ownership, but the burden is upon him to show that he has accounted for the same or disposed of it in accordance with the decedent's directions,[14] or that it was a gift.[15]

C. Property Received by Representative as Agent During Deceased's Life. — The personal representative cannot be charged with property received by him as his decedent's agent during the latter's life, without proof that he failed to account for it prior to his appointment, the presumption being that he has discharged his trust.[16] It has been held to the contrary, however.[17]

D. Representative's Possession of His Decedent's Obligation. — The mere fact that the executor or administrator has come

10. Adams *v.* Board of Trustees, 37 Fla. 266, 20 So. 266.

11. Cheek *v.* Wheatley, 11 Humph. (Tenn.) 556; Bobb *v.* Letcher, 30 Mo. App. 43; Tuskaloosa Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635.

12. **Circumstantial Evidence.** — In an action against an administrator for money of the claimant alleged to have been in his intestate's possession as bailee, testimony by a sheriff that at the intestate's death he found among his effects a bag labeled with claimant's name in the handwriting of the deceased, containing the exact sum claimed by the plaintiff, and that such bag was separate and apart from the other money of deceased, and that the witness had delivered the same to the administrator, is sufficient evidence to warrant a finding for plaintiff. Grimes *v.* Booth, 19 Ark. 224.

13. Miller's Estate, 151 Pa. St. 525, 25 Atl. 144; Garrigus *v.* Missionary Soc., 3 Ind. App. 91, 28 N. E. 1009.

14. *In re* Peaslee's Estate (Vt.), 57 Atl. 967.

In an action by an executor to recover certain shares of stock, alleged to belong to the estate, it was shown that defendant had received such stock as agent of the decedent and that it was not found among the latter's securities at the time of her death. This was held sufficient to throw the burden upon the defendant to show that he had properly accounted for the same, notwithstanding the fact that he himself was incompetent to testify to such fact, but as to certain other stock which he had redelivered to the deceased, but which he was shown to have been in possession of at the decedent's death, it was held that the burden was upon the plaintiff to show that the possession was obtained under such circumstances as to create an indebtedness to the deceased. *In re* Mitchell, 36 App. Div. 542, 55 N. Y. Supp. 725.

15. Adams *v.* Adams, 181 Ill. 210, 54 N. E. 958, *distinguishing* Martin *v.* Martin, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290.

16. Missionary Society *v.* Goheen, 84 Ill. App. 474; Eavenson's Appeal, 84 Pa. St. 172.

17. Hill *v.* Fly (Tenn.), 52 S. W. 731.

into possession and control of the personal effects and papers of his decedent does not destroy the evidentiary effect of his possession of the deceased's written obligation in his favor.[18]

5. Setting Aside Decedent's Fraudulent Conveyance. — In a suit by an executor or administrator to set aside a conveyance by his decedent in fraud of his creditors, the burden rests upon such representative to prove the elements of the fraud,[19] and that at the time of the conveyance there was an insufficiency of assets[20] to pay estate debts, and that the alleged creditors had valid and subsisting claims against the decedent.[21]

6. Debt Due From Sole or Residuary Distributee. — In an action against the sole or residuary distributee, on a debt due the estate, it has been held competent for him to prove to defeat the action that all the debts and claims against the estate except his have been satisfied, even though the time allowed by statute for their presentation has not expired, and the required notice to creditors has not been published.[22] But the contrary has likewise been held.[23]

7. Proof of Assets. — A. GENERALLY. — Where the right to recover against an executor or administrator depends upon the existence of assets in his hands, the burden of proving this fact rests

18. When Creditor Is Also Executrix. — Where a note and check drawn by a deceased husband in favor of his wife were found among her possessions at her death there is no presumption from the fact that the wife was her husband's executrix that the note had been paid, and that she had obtained possession of it after his death, nor will its payment be presumed from the fact that he was at all times able to pay it. *In re* Wilkinson's Estate, 192 Pa. St. 117, 43 Atl. 466. See also Love *v.* Dilley, 64 Md. 238, 610, 1 Atl. 59, 4 Atl. 290, 6 Atl. 168.

In Moore *v.* Brown, 51 N. C. 106, the production by the administrator of a bond in his own favor, and proof of its execution by the deceased, were held sufficient to support his plea of retainer and place the burden of proving payment upon the contesting party, notwithstanding the fact that the papers of the deceased came into the possession of such administrator.

19. See article "FRAUDULENT CONVEYANCES."

20. Ecklor *v.* Wolcott, 115 Wis. 19, 90 N. W. 1081.

Testimony by the administrator and deceased's son that they knew of no other property belonging to the estate, except the land alleged to have been fraudulently conveyed, is sufficient *prima facie* proof of a deficiency of assets. Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005.

The insolvency of the estate and insufficiency of assets may be proved by other evidence than the orders and decrees of the probate court. Andruss *v.* Doolittle, 11 Conn. 283.

21. Means *v.* Hick's Adm'r, 65 Ala. 241.

It is not sufficient for him to show that claims have been filed against the estate and are correct "so far as he can judge." Pitt *v.* Pool, 91 Tenn. 70, 17 S. W. 802.

22. Blood *v.* Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490. But see dissenting opinion by Bradley and Parker, J.J.

23. "From the nature of the case, the proposition that there are no debts provable against the estate of a deceased person is, therefore, a negative proposition, which is not susceptible of absolute proof. No evidence which could be offered in support of such a proposition could go further than to reach a strong degree of probability." Powell *v.* Palmer, 45 Mo. App. 236.

upon the plaintiff, whether he be a legatee[24] or distributee,[25] or a party seeking to enforce a claim against the estate.[26] A presumption of assets in certain cases, however, serves to shift this burden.[27]

B. Plea of Plene Administravit. — Under the plea of *plene administravit* the burden of proof is upon the party alleging assets.[28]

C. Insufficiency of Assets for Payment in Full. — When, in an action against the personal representative on a debt due from

24. Jay *v.* Mosely, 47 Ala. 227.

Property Owned by Testator Prior to His Death. — In proof of assets in the hands of the executor sufficient to pay a legacy, it is sufficient to show the property owned by the testator prior to his death. Knapp *v.* Hanford, 7 Conn. 132.

In an action by a residuary legatee against the executor to recover his portion of the residue after the payment of certain debts provided for in the will, the burden is upon him to prove the amount of the indebtedness, as a part of his affirmative case. Bush *v.* Cunningham, 37 Ala. 68.

Action by Remainder-man. — In an action by the remainder-man against the personal representative of a deceased executor to recover the property in which such executor had a life estate, with absolute power of disposal, the burden is upon the plaintiff to show not only the property coming into the hands of the executor, but also that remaining undisposed of at his death. *In re* Haney's Estate, 74 Hun 205, 26 N. Y. Supp. 815.

Action Against Joint Executors. In an action against joint executors for the payment of a legacy it is competent to show that assets came into the hands of one of them. Knapp *v.* Hanford, 7 Conn. 132.

25. See *infra*, "Accounting."

26. See *infra*, "Claims Against Estate."

27. **Presumption from Giving Note.** — In an action against a personal representative on a note executed by him for the debt of his intestate, such note is *prima facie* evidence of assets in his hand. Bank of Troy *v.* Topping, 13 Wend. (N. Y.) 557.

Where Realty as Well as Personalty Is an Estate Asset, a recovery by the administrator in an ejectment suit is *prima facie* evidence of assets. Blodgett *v.* Brinsmaid, 7 Vt. 9.

Where the executor neglects to ask leave to appeal without security, or to limit the amount of his security in accordance with the statute giving him this right, it will be presumed that he has sufficient assets applicable to the payment of the judgment appealed from to satisfy the same. Yates *v.* Burch, 13 Hun (N. Y.) 622.

Rule in Equity and at Law Different. — "The rule upon this subject is different in a court of equity from what it is at law. Where you seek to charge an executor or administrator in his representative character, before the latter tribunal, assets are presumed, unless as a fact it be put in issue by the pleadings; but before the former tribunal, assets in his hands must be alleged, and it denied or not admitted, must be proved." Evans *v.* Inglehart, 6 Gill & J. (Md.) 171; Dugan *v.* Gittings, 3 Gill (Md.) 138.

28. *Kentucky.* — Wallace *v.* Barlow, 4 Bibb 168.

Maryland. — Wilson *v.* Slade, 2 Har. & J. 281; Burgess *v.* Lloyd, 7 Md. 178; Seighman *v.* Marshall, 17 Md. 550; Morgan *v.* Slade, 2 Har. & J. 38.

New York. — Bentley *v.* Bentley, 7 Cow. 701; Fowler *v.* Sharp, 15 Johns. 323.

North Carolina. — McKeithan *v.* McGill, 83 N. C. 517.

South Carolina. — Shannon *v.* Dinkins, 2 Strob. 196.

Tennessee. — Gilpin *v.* Noe, 9 Heisk. 192.

Settlement by Representative as Evidence. — In a suit between a creditor and the personal representatives of his deceased debtor, on the issue of *plene administravit*, the set-

his decedent, the insufficiency of assets for payment in full of all of the estate debts is pleaded and denied, the burden of proof is upon the plaintiff.[29]

D. Failure to File Inventory. — The negligent failure of an executor or administrator to file the inventory required by law certainly creates an inference of bad faith on his part,[30] and has been held sufficient to raise a presumption of sufficient assets to satisfy all legacies and debts when the receipt by him of *any* property has been shown.[31] However, it has also been held that such delinquency raises no legal presumption of assets or their value.[32]

E. Bond Given to Avoid Accounting. — When an executor gives a bond conditioned on the payment of all debts and legacies, for the purpose of avoiding the necessity of accounting, as may be done by statute under some circumstances, such proceeding operates as a conclusive admission of assets sufficient to pay all debts and legacies.[33]

F. Action Against Joint Executor. — A receipt signed by two or more co-executors or co-administrators is *prima facie* evidence against each of them that the sum for which it was given came into

tlement made by the latter is *prima facie* evidence in their favor when relevant to the issue, but when the credits therein contained for payments made by the representative contain no dates and do not show that the debts paid were of an equal or superior rank to that sued upon, its rejection is not error. Cochran's Executor *v.* Davis, 15 Ky. 118. See *infra* "Inventory and Appraisal."

29. Seighman *v.* Marshall, 17 Md. 550.

30. The Failure to File an Inventory is a circumstance of some weight to charge the personal representative with assets. Ruggles *v.* Sherman, 14 Johns. (N. Y.) 446.

"The failure of an executor or guardian to make returns according to law is an omission of duty, and therefore a breach of trust, and throws upon him the burden of making such proof as shall be satisfactory to the court and jury, that he has discharged his trust in regard to the property with fidelity." Wellborn *v.* Rogers, 24 Ga. 558.

31. Knapp *v.* Hanford, 7 Conn. 132.

32. Hanson *v.* Cox, Hayw. & H. (D. C.) 167, 11 Fed. Cas. No. 6040; Leeke *v.* Beanes, 2 Har. & J. (Md.) 373. See also *In re* Palmer, 3 Dem. (N. Y. Sur.) 129.

Where the administrator omitted to insert in the inventory certain credits belonging to the estate it was held that he could not for that reason be charged with more than was shown to have been received by him or to have been lost by his negligence. McCall *v.* Peachy, 3 Munf. (Va.) 288.

33. Jones *v.* Richardson, 5 Metc. (Mass.) 247; Conant *v.* Stratton, 107 Mass. 474; Colwell *v.* Alger, 5 Gray (Mass.) 67; Duvall *v.* Snowden, 7 Gill & J. (Md.) 430; Batchelder *v.* Russell, 10 N. H. 39; Tarbell *v.* Whiting, 5 N. H. 63; Buell *v.* Dickey, 9 Neb. 285; Hatheway *v.* Weeks, 34 Mich. 237. But see Jenkins *v.* Wood, 140 Mass. 66, 2 N. E. 780.

Reason for Rule. — "It is not merely by force of the bond as a contract that the admission of assets is shown; it is rather the result arising from the fact of giving the bond, the provisions of law under which it is given, and the entire power which the executor thereby acquires over the estate, and the exemption which he thereby obtains from furnishing the usual proof of assets." Jones *v.* Richardson, 5 Metc. (Mass.) 247.

his possession or control.[34] It may be rebutted, however, by proof that the money was in fact received by one only, and that the other joined only as a matter of form.[35]

8. Claims Against Estate. — A. Burden of Proof. — a. *Generally.* — The burden of proof is upon the party seeking to establish a claim against the estate of a deceased person, to show not only its validity,[36] but also that he has complied with all the prerequisites to an action on his claim, such as proper presentation to the personal representative,[37] or approbation by a particular officer.[38]

b. *Presentment Within Statutory Time.* — **(1.) Generally.** — When the statute requiring the presentment of claims within a specified time is pleaded, the burden is upon the creditor to prove his compliance with the statute.[39] The contrary, however, is also held.[40] The admission[41] of the executor or administrator is competent evidence

34. Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298; O'Chitrie *v.* Wright, 21 N. C. 336; McKim *v.* Aulbach, 130 Mass. 481. See also Kimball *v.* Kimball, 16 Mich. 211.

35. McKim *v.* Aulbach, 130 Mass. 481.

36. North *v.* Lowe, 63 Miss. 31.

37. *Alabama.* — Rayburn *v.* Rayburn, 130 Ala. 217, 30 So. 365.

California. — Bank of Chico *v.* Spect (Cal.), 11 Pac. 740; Barthe *v.* Rogers, 127 Cal. 52, 59 Pac. 310.

Illinois. — Off *v.* Title G. A. & T. Co., 87 Ill. App. 472.

Massachusetts. — Johnson *v.* Kimball, 172 Mass. 398, 52 N. W. 386.

Mississippi. — North *v.* Lowe, 63 Miss. 31.

New Hampshire. — Kittredge *v.* Folsom, 8 N. H. 98.

New York. — Coale *v.* Coale, 63 App. Div. 32, 71 N. Y. Supp. 214.

Under a Plea of General Issue the exhibition of the claim to the personal representative must be proved. Mathes *v.* Jackson, 6 N. H. 105.

Request for Delay. — Where a creditor has delayed in pressing his claim because of a request by the personal representative for additional time, the creditor's demand for payment will be inferred from the circumstances. Buckett *v.* James, 2 Humph. (Tenn.) 565.

A Subsequent Statute, rendering competent otherwise hearsay declarations of a deceased person, if they appear to the satisfaction of the judge to have been made in good faith, before the beginning of the suit and upon the personal knowledge of the declarant, was not intended to limit the application of the previous statute. Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802.

38. Approbation of Claim. Where by statute a claim against an estate cannot be originally prosecuted in the district court without the approbation of the county judge, such approbation cannot be proved by the certificate of the judge to the effect that the claim had been properly presented and proved before him. The only competent evidence is a certified copy of the record. Goodrich *v.* Conrad, 24 Iowa 254.

39. Mitchell *v.* Lea, 57 Ala. 46. See Willingham *v.* Chick, 14 S. C. 93; Evans *v.* Norris, 1 Ala. 511; May *v.* Parham, 68 Ala. 253.

40. McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101; McDonald *v.* Bice, 113 Iowa 44, 84 N. W. 985.

41. May *v.* Parham, 68 Ala. 253; Starke *v.* Keenan, 5 Ala. 590.

The admission of the administrator, corroborated by payments on such claim, coupled with its inclusion as a subsisting debt in the administrator's report of insolvency, is sufficient proof of presentment within the proper time. Pharis *v.* Leachman, 20 Ala. 662.

Evidence of a Formal Exhibition of the claim is not required, but it is sufficient to show that when called

on this question. Parol evidence of this fact has been held incompetent.[42]

(2.) **Identity of Claim.** — The claim sued upon must be sufficiently shown to be the same claim presented to the personal representative or commissioners for allowance.[43]

c. *Notification of Appointment.* — The burden, however, is upon the personal representative to show that he gave the statutory notice of his appointment.[44]

Such Notice May Be Proved by other evidence than the executor's affidavit filed in accordance with the statute.[45]

d. *Statute of Limitations.* — The burden of proving that a claim against an estate is barred by the statute of limitations rests upon the personal representative,[46] unless the claim on its face is apparently within the statute, in which latter case a subsequent acknowledgment sufficient to renew the debt must be shown,[47] which may be done in some jurisdictions by acts or letters of the personal representative.[48]

on for payment the representative admitted the claim to be due and promised its payment. Mathes *v.* Jackson, 7 N. H. 259.

42. Parol Evidence that the claim sued upon was properly exhibited to the commissioners of an insolvent estate is not competent, the best evidence being the report of such commissioners to the court. Franklin Robinson & Co. *v.* Brownson, 2 Tyl. (Vt.) 103.

43. McDonald *v.* Webster, 71 Vt. 392, 45 Atl. 895.

A statute requiring the creditor to present his claim to the commissioners, and such proofs in support of it as he may be able, as a prerequisite to bringing suit upon it, "does not prescribe the kind or amount of evidence he shall present" to them; hence in an action upon a note the claimant need not show that the identical note on which the suit was brought was produced to the commissioners, nor is he confined to the same evidence on the trial as he produced before them. Cole *v.* Lightfoot, 4 Wis. 295.

44. Evans *v.* Norris, 1 Ala. 511; Gammon *v.* Johnson, 127 N. C. 53, 37 S. E. 75; Glover *v.* Flowers, 95 N. C. 57; Cox *v.* Cox, 84 N. C. 138.

That Notice of Appointment Was Published is not sufficient evidence to warrant the presumption that a proper order of publication was made by the court. McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101.

45. Green *v.* Gill, 8 Mass. 111; Dyer *v.* Walls, 84 Me. 143, 24 Atl. 801; Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064; Dingle *v.* Pollick, 49 Mo. App. 479.

46. Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663. See fully article "STATUTE OF LIMITATIONS."

47. Estate of Romero, 38 La. Ann. 947.

Under a statute providing that in actions against the representatives of deceased persons no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the party to be charged thereby, typewritten letters, written upon the letter heads of a corporation concerning its business, with deceased's signature "D., Treasurer," stamped thereon by his direction, are competent evidence against his personal representative of a renewal of the debt. *In re* Deep River Nat. Bank, 73 Conn. 341, 47 Atl. 675.

48. Acknowledgment of Decedent's Debt by Administrator. — In proof of an acknowledgment by the administrator of a debt due by his intestate, to take it out of the statute of limitations, letters signed by the

The Allowance of a Claim by the administrator and its approval by the court raise a presumption that the claim, though apparently barred by the statute of limitations, comes within one of the exceptions thereto.[49]

When the Rejection of the Claim by the representative necessitates the commencement of an action upon it within a limited time, to avail himself of this defense the executor or administrator must show clearly that the claim was rejected.[50]

e. *Payment.* — Where the debt has been sufficiently established, the burden of proving payment in accordance with the general rule rests upon the defendant,[51] even where the claimant is required to allege non-payment,[52] and the fact that the claim has been rejected by the personal representative,[53] or that by the terms of the contract payment was due at a date previous to the debtor's death,[54] does not change the rule.

f. *Trust Funds in Hands of Decedent.* — A person seeking to charge a decedent's estate with property or funds alleged to have been held by the latter as trustee must show affirmatively that such property was not accounted for during the decedent's life.[55]

g. *Obligations Incurred by Representative.* — It is not essential to a recovery on an obligation incurred by the executor or administrator in the administration of the estate to show that the estate received the consideration therefor, provided such representative acted within the scope of his authority.[56]

B. CHARACTER AND SUFFICIENCY OF EVIDENCE. — a. *Generally.*

defendant as administrator, recognizing and promising to pay the debt, are competent. Hewes *v.* Hurff (N. J. L.), 55 Atl. 275.

When a personal representative has requested a delay in the enforcement against the estate of a claim, the creditors' delay beyond the period of limitations will be presumed to have been in consequence of the request. Farmers' & Mer. Bank *v.* Leath, 11 Humph. (Tenn.) 515.

49. Cone *v.* Crumb, 52 Tex. 348.

50. *In re* Miller's Estate, 9 N. Y. Supp. 60. See also Lambert *v.* Craft, 98 N. Y. 342.

51. *Kentucky.* — Best *v.* Best, 25 Ky. L. Rep. 93, 74 S. W. 738.

Louisiana. — Succession of Conery, 106 La. 50, 30 So. 294.

Maryland. — Watson Adm'r *v.* Watson, 58 Md. 442.

New York. — Alixanian *v.* Walton (App. Div.), 43 N. Y. Supp. 541; *In re* Rowell, 45 App. Div. 323, 61 N. Y. Supp. 382; Ralley *v.* O'Connor, 71 App. Div. 328, 75 N. Y. Supp. 925; Lerche *v.* Brasher, 104 N. Y. 157, 10 N. E. 58; Schwartz *v.* Allen, 24 N. Y. St. 912, 7 N. Y. Supp. 5.

Texas. — Kartoghian *v.* Harboth (Tex. Civ. App.), 56 S. W. 79.

52. Hurley *v.* Ryan, 137 Cal. 461, 70 Pac. 292; Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127.

53. *In re* Rowell, 45 App. Div. 323, 61 N. Y. Supp. 382.

54. *In re* Neil's Estate, 35 Misc. 254, 71 N. Y. 840.

55. Breed *v.* Breed, 55 App. Div. 121, 67 N. Y. Supp. 162. But see Moore *v.* Moore, 32 Misc. 68, 66 N. Y. Supp. 167; and more fully article "TRUSTS AND TRUSTEES."

56. In an action against a representative of several estates, for goods furnished the representative for the benefit of such estates, it is not necessary for the plaintiff to show how much of the goods was for the use of each estate. The presumption is that such representative did his duty by applying the goods to the purposes for which they were purchased. Jones *v.* Linton, 34 Ga. 429.

Claims against the estates of deceased persons should be established by clear and satisfactory evidence,[57] especially when resting upon parol testimony.[58]

b. *Claims Withheld Until After Debtor's Death.* — This requirement is especially applicable to claims which were not presented until after the debtor's death, in which case they should be closely scrutinized.[59]

57. Taylor *v.* Coriell (N. J. Eq.), 57 Atl. 810; Davis *v.* Seaman, 46 N. Y. St. 810, 19 N. Y. Supp. 260; Winne *v.* Hills, 71 N. Y. St. 702, 36 N. Y. Supp. 683; Dougall *v.* Dougall, 61 App. Div. 282, 70 N. Y. Supp. 336; Coale *v.* Coale, 63 App. Div. 32, 71 N. Y. Supp. 214.

"**Public Policy** requires that claims against the estates of dead men should be established by very satisfactory evidence, and the courts should see to it that such estates are fairly protected against unfounded and rapacious raids." Van Slooten *v.* Wheeler, 140 N. Y. 624, 35 N. E. 583.

Positive Certainty Is Not Requisite to establish the claim — it is sufficient if the evidence, direct or circumstantial, reasonably satisfies the mind of the existence of facts constituting the indebtedness claimed. Woodruff *v.* Winston, 68 Ala. 412.

A Written Acknowledgment by Decedent of an existing debt is sufficient proof of the claim, although opposed by the executor's answer on information and belief that no such debt was owing. McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962.

A Check given by the claimant to the decedent, who collected the money thereon, is not in itself sufficient proof of an alleged loan. Bernard *v.* Fee, 129 Mich. 429, 88 N. W. 1052; Dickey *v.* Dickey, 8 Colo. App. 141, 45 Pac. 228.

The Testimony of One Witness, corroborated by the sworn account of the administrator, in which he recognizes its correctness, and other circumstances, are sufficient to sustain a claim for more than five hundred dollars. Succession of Moise, 107 La. 717, 31 So. 990.

The Uncorroborated Testimony of a Daughter, as to advances made by her to her parents in consideration of a promise to devise to her certain property, is insufficient to support her claim against the estate. Cochrane *v.* McEntee (N. J. Eq.), 51 Atl. 279. See also Matter of Marcellus, 165 N. Y. 70, 58 N. E. 796.

In an action to enforce an alleged contract to convey certain land by the personal representative of one party against the representative of the other, the fact that the defendant's decedent executed a will subsequent to the alleged contract in the presence of plaintiff's decedent inconsistent with such contract was held sufficient to overcome vague testimony to the contrary, many years having elapsed since the transaction occurred. Clancy *v.* Leach, 125 Mich. 630, 84 N. W. 1105.

Uncorroborated Testimony of Claimant. — The rule that claims against a dead man's estate should be supported by more than the claimant's uncorroborated testimony is not a rule of law binding upon a jury. Finch *v.* Finch, L. R. (Eng.) 23 Ch. Div. 267; Beckett *v.* Ramsdale, L. R. (Eng.) 31 Ch. Div. 177; Gandy *v.* McCauley, L. R. (Eng.) 31 Ch. Div. 1. But see Grant *v.* Grant, 34 Beav. (Eng.) 623.

Incompetency of Claimant. — "It may be that the failure to make greater proof results from the statutory inability of the plaintiff to testify in his own behalf, but this does not relieve him from the necessity of producing sufficient evidence to establish his cause of action." Lichtenberg *v.* McGlynn, 105 Cal. 45, 38 Pac. 541.

58. Graham *v.* Graham's Executors, 34 Pa. St. 475.

59. *Illinois.* — Seacord *v.* Matteson, 56 Ill. App. 439.

Louisiana. — Downey *v.* Succession of Henderson, 41 La. Ann. 489, 6 So. 811.

Long Delay in presenting a claim for payment is a strong circumstance against its justice and validity.[60]

c. *Gift by Decedent.* — Where a person with whom the deceased held confidential relations during his life claims title to property belonging to the estate, by virtue of an alleged gift from the testator to such claimant, the latter must prove the gift by very clear and satisfactory evidence.[61] So also when the personal representative claims that property in his possession which would otherwise be

New York. — *In re* Jones, 28 Misc. 338, 59 N. Y. Supp. 893; Porter *v.* Rhoades, 48 App. Div. 635, 63 N. Y. Supp. 112; Rowland *v.* Howard, 75 Hun 1, 26 N. Y. Supp. 1018; Yates *v.* Root, 4 App. Div. 439, 38 N. Y. Supp. 663; Ellis *v.* Filon, 85 Hun 485, 33 N. Y. Supp. 138; *In re* Pray, 40 Misc. 516, 82 N. Y. Supp. 807.

Pennsylvania. — Peter's Appeal, 106 Pa. St. 340; Mueller's Estate, 159 Pa. St. 590, 28 Atl. 491.

Tennessee. — Kernell *v.* Crutcher (Tenn.), 61 S. W. 1045.

"Claims withheld during the life of an alleged debtor, and sought to be enforced when death has silenced his knowledge and explanation, are always to be carefully scrutinized, and admitted only upon very satisfactory proof; and when it further appears that a subsequent dealing existed in which the pretended creditor was to some extent a debtor, never once presenting his claims in reduction of his debt, the weight of suspicion becomes very great, and justifies a demand for distinct and definite proof, and the clearest indication of honesty and fairness." Kearney *v.* McKeon, 85 N. Y. 136.

The Unsupported Testimony of Claimant's Sons is not such clear and satisfactory proof of an express contract by claimant's deceased uncle to pay for board and lodging as will support such a claim not presented until after such uncle is dead. *In re* Jones, 28 Misc. 338, 59 N. Y. Supp. 893.

60. Succession of Oubre, 109 La. 516, 33 So. 583; Wood *v.* Egan, 39 La. Ann. 684, 2 So. 191; Succession of Rice, 14 La. Ann. 317; Simpson *v.* Powell, 7 La. Ann. 555; Peter's Appeal, 106 Pa. St. 340; *In re* Hunter's Estate, 147 Pa. St. 549, 23 Atl. 973.

Coupled With Evidence of Payment. — The failure to present a claim for a long period is a circumstance to be considered in determining its validity, and where there is any evidence of payment or satisfaction prior to the deceased's death this circumstance becomes a very important one. Barnes *v.* Dunn, 19 App. Div. 326, 46 N. Y. Supp. 115.

Inference of Payment. — The failure to present a claim against a deceased person until after his death, where it accrued many years prior thereto, coupled with the fact that the parties lived during the whole time in close proximity, is sufficient to justify an inference by the jury of the payment of the debt, although a sufficient period has not elapsed to raise a legal presumption of this fact. Scott *v.* Penn, 68 Ark. 492, 60 S. W. 235.

In Carpenter *v.* Hays, 153 Pa. St. 432, 25 Atl. 1127, where the claimant had delayed presenting her claim for services until four years after decedent's death, the declarations of the decedent to two witnesses, one of whom had a similar claim then pending against the estate, to the effect that the claimant should be paid for her services, were held insufficient to support the claim.

61. Bliss *v.* Fosdick, 86 Hun 162, 33 N. Y. Supp. 317, *affirmed* in 151 N. Y. 625, 45 N. E. 1131; Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572; *In re* Taber's Estate, 30 Misc. 172, 63 N. Y. Supp. 728; Case *v.* Case, 49 Hun 83, 1 N. Y. Supp. 714; *In re* Manhardt, 17 App. Div. 1, 44 N. Y. Supp. 836; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; Ruth *v.* Owens, 2 Rand. (Va.) 507. See fully article "GIFTS."

estate assets was given to him by the decedent, a similar burden is upon him to establish such claim.[62]

d. *Claimant's Affidavit.* — A claim against an estate must ordinarily be supported by the affidavit of the claimant, both as to the justice and non-payment of the claim, and the absence of any security therefor.[63] Such affidavit, however, is not evidence of the facts therein contained,[64] but is designed merely to prevent the exhibition of fictitious claims.

e. *Pecuniary Condition of Parties.* — The pecuniary condition of both the decedent and his alleged creditor is a circumstance bearing upon the probability of an alleged loan.[65] In some courts, however, this evidence is held to be irrelevant.[66]

62. Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672.

63. Morgan *v.* McCausland, 96 Me. 449, 52 Atl. 931; Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62; Morris *v.* Mowatt, 4 Paige Ch. (N. Y.) 142.

64. Askew *v.* Weissinger, 6 Ala. 907; Woodruff *v.* Winston, 68 Ala. 412; Bass *v.* Gobert, 113 Ga. 262, 38 S. E. 834; *In re* Weeks, 23 App. Div. 151, 48 N. Y. Supp. 908; North *v.* Lowe, 63 Miss. 31; Keller *v.* Stuck, 4 Redf. (N. Y. Sur.) 294; Williams *v.* Purdy, 6 Paige Ch. (N. Y.) 166; Conrad's Adm'r *v.* Fuller (Va.), 44 S. E. 893.

"The Object of Requiring the Affidavit of the creditor in such cases is not to prove the existence of the debt, as it is not evidence for that purpose. But it is to prevent the exhibition of fictitious claims against the estate of the decedent, which have been discharged by him in his lifetime; and also to prevent the allowance of claims against which there existed a legal offset, known only to the party presenting such claim, and which those who are interested in the estate of the decedent may be unable to establish by legal proof." Morris *v.* Mowatt, 4 Paige Ch. (N. Y.) 142.

In Illinois a Statute provides that if no objection is made to a claim by the administrator or others interested in the estate, and the claimant shall swear that such claim is just and unpaid, after allowing all just credits the court may allow such claim without further evidence. Kingan *v.* Burns, 104 Ill. App. 661.

And Where Its Validity Is Not Contested the claimant's affidavit is conclusive. McNeil *v.* Macon's Adm'r, 20 Ala. 772.

65. Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Bernard *v.* Fee, 129 Mich. 429, 88 N. W. 1052; Simpson *v.* Scheutz, 31 Ind. App. 151, 67 N. E. 457; Watson *v.* Watson, 58 Md. 442; Olmstead *v.* Hoyt, 11 Conn. 376; Frost *v.* Adm'r of Frost, 33 Vt. 639. See Simmons *v.* Rust, 39 Iowa 241.

In an action against an executrix for money alleged to have been furnished to her testator for building a house, it was held competent to show that the deceased's bank account did not show a deposit of any such sum, on the ground that if it had been received by the deceased he would have been likely to deposit it on the account from which he made payment for the house. Wright *v.* Davis (N. H.), 57 Atl. 335.

The Reputation of either the claimant or the deceased for solvency or insolvency at the time the alleged debt was contracted is a relevant circumstance as to the validity of a claim against the estate. Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838.

66. In an action against an administrator for money loaned to his intestate during the last illness, prior to his death, the exclusion of evidence that the deceased had at the time four thousand dollars in the bank, and that he drew from this deposit sufficient money to pay all his expenses, offered for the purpose of showing the improbability of the alleged loan, was held not error on

f. *Habits and Relations of Parties.* — So also it is competent to show, as bearing upon the existence or non-existence of an alleged debt, the business habits and relations of the parties.[67]

g. *The Will* of the testator is not competent as direct evidence in disproof of a claim because self-serving.[68] The disposition of the property made by the will may, however, be a relevant circumstance in favor of the executor as showing the motive of the claimant.[69] So the will may be competent on the trial of a claim for services rendered decedent because impliedly recognizing such a

the ground that its admission might open the door to too wide a range of inquiry upon collateral issues. Burke *v.* Kaley, 138 Mass. 464.

In the absence of any allegation or proof of fraud in the execution of the note sued upon, it is proper to exclude evidence on the part of the deceased's representative, that at the time of the alleged loan plaintiff was financially embarrassed and that there were several judgments against him, together with evidence that the deceased was not engaged in any business requiring such a loan, but was old and feeble, and had a large sum of money in the bank at that time. Such evidence is objectionable on the ground that it introduces collateral issues and does not necessarily tend to disprove the alleged loan. Perkins *v.* Humes, 200 Pa. St. 235, 49 Atl. 934.

67. Bernard *v.* Fee, 129 Mich. 429, 88 N. W. 1052; Stone *v.* Stillwell, 23 Ark. 444; Seacord *v.* Matteson, 56 Ill. App. 439; Graham *v.* Graham, 111 N. Y. 502, 19 N. E. 53.

Remoteness. — In an action based on a promissory note, purporting to have been executed by deceased, it appeared that the latter at the date of the note was a very old man and was engaged in no business requiring so large a sum of money. Claimant introduced evidence to the effect that the note in question was executed in settlement or removal of prior debts, and further offered to show that eight years previous to the date of the note deceased owed her one thousand dollars for moneys advanced, and produced a series of checks to deceased, which had been cashed by him. This latter evidence was excluded as too remote, but on appeal this ruling was held error under the circumstances, considering the age of deceased and the probability that if an indebtedness existed it must have been of long standing. Such facts, while not proving the execution of the note, tended to show extensive transactions prior to its date, and a pre-existing indebtedness. Gandy *v.* Bissell's Estate (Neb.), 90 N. W. 883.

Punctuality in Payment. — In proof that the alleged debt was paid by decedent it is competent to show that as a rule he was punctual in making settlement, and also the business methods of the parties in other transactions of a similar nature. Shirts *v.* Rooker, 21 Ind. App. 420, 52 N. E. 629.

In disproof of the genuineness of the note alleged to have been executed by the deceased, it is competent to show the unfriendly relations existing between the parties, that the deceased was in the habit of lending money and was not known to have been a borrower, and that he left an estate of considerable value. Simpson *v.* Scheutz, 31 Ind. App. 151, 67 N. E. 457.

Where the deceased's books of account are introduced, in support of their correctness it is competent to show that he was prompt to pay his debts and was reputed to be a man of credit. Mark *v.* Miles, 59 Ill. App. 102.

68. Stevenson & Gunning's Estate, 64 Vt. 601, 25 Atl. 697. See also Godding *v.* Orcutt, 44 Vt. 54.

69. In an action against the administrator by his testator's son-in-law, for board furnished the deceased, the defendant was allowed to prove that plaintiff's wife received less property under the will than the testator's other child, as tending to

claim,[70] or as bearing on the question whether or not they were to be paid for,[71] and in what manner.[72]

h. *Bank Checks* drawn by one party and paid to the other may, under proper circumstances, be relevant circumstances bearing on the existence[73] or payment of an alleged debt.[74]

i. *The Claimant's Statement* of his claim when first presented is evidence against him,[75] but is not competent in his favor unless partially adopted by the representative of the estate.[76]

j. *Rejection of Claim by Representative.* — Stricter proof is sometimes required by statute of a claim which has been presented to and

show that the action originated in disappointment due to this inequality. Snow *v.* Moore, 107 Mass. 512.

70. Cunningham *v* Hewett, 84 App. Div. 114, 81 N. Y. Supp. 1102. **When Competent Against Estate.** "It is undoubtedly true that a man may acknowledge a debt in his dying moments, and that such acknowledgment, though found in his will, or in any testamentary declaration, may be used as evidence against his representatives, to establish the debt. But the mere bequest of money, though in a will regularly proved, is not evidence of a contract or debt against the testator. Nor, although it were expressed to be for a particular service or favor rendered by the legatee, should it be regarded as the acknowledgment of a debt, or as evidence of a previous contract to pay the amount of the legacy for the service, or as constituting in itself or creating such a contract." Montgomery's Adm'r *v.* Miller, 43 Ky. 470.

71. In an action by a member of decedent's family to recover for personal services rendered him, the representative may introduce in evidence deceased's will containing a provision in favor of the plaintiff but making no mention of the alleged debt, as a circumstance tending to show that the services were understood to be gratuitous. Cowell *v.* Roberts, 79 Mo. 218.

72. On the trial of a claim for services as nurse rendered the decedent the only evidence consisted in latter's declarations. It was held competent for the defendant to introduce in evidence deceased's will, containing a provision for the plaintiff, on the question as to whether such declarations meant a provision by will. Hughes *v.* Keichline, 168 Pa. St. 115, 31 Atl. 887.

73. Bernard *v.* Fee, 129 Mich. 429, 88 N. W. 1052; Dickey *v.* Dickey, 8 Colo. App. 141, 45 Pac. 228.

In re Havemeyer's Estate (App. Div.), 39 N. Y. Supp. 550, the executor put in a claim for services rendered the deceased, and as evidence of the indebtedness offered an undated check, the body of which was in his own handwriting, signed by the testator. The possession and production of the check were held insufficient to establish a debt, in view of the fact that the executor came into possession of all his testator's papers, that the check was in his own handwriting, and that the bank upon which it was drawn did not contain funds of decedent sufficient to meet it.

74. The Bank Checks of the decedent in favor of the claimant, indorsed by him and paid by the bank, dated within the period covered by the items of his account against the deceased, are competent evidence of payment in favor of the personal representative. Jesse *v.* Davis, 34 Mo. App. 351. See also Taylor *v.* Greene, 129 Mich. 564, 89 N. W. 343.

75. The fact that the amount of the claim when first presented was much less than that sought to be established on the trial is a competent circumstance in disproof of the claim. Ludlow *v.* Pearl, 55 Mich. 312, 21 N. W. 315.

76. The statement of a claim previously presented to an administrator by the claimant becomes *prima facie* evidence of the debits therein contained when the administrator claims the benefits of the credits. Yearsley's Appeal, 48 Pa. St. 531.

rejected by the personal representative.[77] The indorsements on a rejected or allowed claim are not evidence of the facts recited,[78] except by statute.[79]

C. Services Rendered Decedent. — a. *Generally.* — Claims against an estate for services rendered the decedent for the payment of which no demand was made during his lifetime require very clear and satisfactory evidence in their support,[80] especially when based upon parol testimony.[81]

b. *Contracts Within Statute of Frauds.* — An agreement by the deceased to pay for services rendered him, although unenforcible because of the statute of frauds, is admissible to rebut the presumption that the services were gratuitous.[82]

c. *Value.* — In an action on an implied contract the reasonable value of the services rendered may be shown,[83] and the estimate

77. **Testimony of Claimant Insufficient.** — In Oregon, by statute, when a claim has been rejected by a personal representative it cannot be allowed by the court except upon competent evidence other than the testimony of the claimant. This provision, however, does not render the claimant an incompetent witness. Quinn *v.* Gross, 24 Or. 147, 33 Pac. 535.

78. Bobb *v.* Letcher, 30 Mo. App. 43.

79. **By Statute,** in Texas, the memoranda in writing indorsed on or annexed to a rejected claim by an executor or administrator, are competent evidence of the facts therein stated without proof of the handwriting of such representative, unless the same be denied under oath. Tolbert *v.* McBride, 75 Tex. 95, 12 S. W. 752. See also Goss *v.* Dysant, 31 Tex. 186.

80. Gorton *v.* Johnson, 23 R. I. 138, 49 Atl. 499; Thompson *v.* Stevens, 71 Pa. St. 161.

Witness Having Similar Claim. In Hughes *v.* Davenport, 1 App. Div. 182, 37 N. Y. Supp. 243, two claims were presented against the estate, one by a nurse and the other by a doctor, who testified for each other. The nurse claimed for services during a period of five years previous to decedent's death, during all of which time he had resided with her and punctually paid for his board and room. The physician's claim was for services rendered every alternate day during the same period. It appeared that deceased, although suffering with a disease, had gone regularly to work during the whole period except during his last illness, and that his associates were ignorant of his affliction. It further appeared that he paid his bills promptly and left no other debts. In view of the circumstances it was held that the testimony of each claimant for the other was insufficient to establish the claims. The court, while recognizing the rule that a fact testified to by a disinterested witness, who is not discredited, which is not in conflict with other evidence, is to be taken as legally established and cannot be disregarded, held that it did not apply to this class of cases. It is also subject to the limitation that the evidence must not be improbable.

81. Steele *v.* Steele, 75 Md. 477, 23 Atl. 959; Hart *v.* Tuite, 78 N. Y. Supp. 154, 75 App. Div. 323.

82. Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55; Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666, 5 Am. Rep. 222.

A Parol Promise by an intestate to devise a dwelling house to the claimant in payment for his services, although unenforcible because of the statute of frauds, is nevertheless competent evidence in an action against his administrator to show that such services were not rendered gratuitously. Gay *v.* Mooney, 67 N. J. L. 27, 50 Atl. 596.

83. McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902.

which the deceased placed upon them,[84] but not what another person offered to perform the same services for.[85] In an action upon an express contract the value of the services may be proved as a circumstance tending to show the reasonableness of the alleged contract, and hence the probability of its having been made.[86]

d. *Declarations of Deceased.* — While the declarations of the deceased recognizing his obligation to pay for services rendered him,[87] or expressing his intention to make compensation for them by a provision in his will,[88] are competent, they are regarded as very weak evidence,[89] especially when not known to the grantee.[90] They are sufficient, however, when clear and uncontradicted.[91] Loose declarations of an intention to provide well for the claimant by will are not sufficient to prove an express contract.[92] Declarations

84. In Jack *v.* McKee, 9 Pa. St. 235, an action against an executor for services rendered his testator, parol testimony of a promissory note given to the claimant by the testator, payable after his death, was held competent, although the original was not accounted for, not as evidence in support of the money accounts, but as a circumstance showing the intimate relations of the parties and the value placed by the testator upon the claimant's services.

85. Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701.

86. Succession of Piffet, 37 La. Ann. 871.

87. Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396; Harrington *v.* Hickman, 148 Pa. St. 401, 23 Atl. 1071.

88. Harper's Estate, 196 Pa. St. 137, 46 Atl. 302.

89. Hewlett *v.* Jewesson, 46 N. Y. St. 144, 19 N. Y. Supp. 193; Grimm *v.* Taylor, 96 Mich. 5, 55 N. W. 447. In an action against the personal representative for work alleged to have been done for his decedent, the claimant produced two witnesses, who testified to verbal admissions of the debt made by the deceased, when a demand was made upon him by the claimant eight years after the performance of the alleged services. The inherent weakness of such evidence against the estate of a deceased person, coupled with the fact that the petition alleged the debt to be four hundred dollars, while the demand had been for eight hundred, was held sufficient to sustain the disallowance of the claim by the lower court, in spite of the fact that it was supported by two witnesses. Wilder *v.* Franklin, 10 La. Ann. 279.

90. The declarations by the deceased that she intended to pay her nephew, the claimant, for the services which he was rendering at her request, are not sufficient proof of a contract when it appears that they were not made in claimant's presence or known to him. *In re* Bryant's Estate, 73 Vt. 240, 50 Atl. 1065.

91. Harrington *v.* Hickman, 148 Pa. St. 401, 23 Atl. 1071.

92. In Pollock *v.* Ray, 85 Pa. St. 428, plaintiff presented a claim for services rendered the deceased without any definite arrangement as to compensation, or as to the time or terms of payment. It appeared that he had worked in the family of deceased for many years, but had quit his service ten years before the latter's death. Claimant relied wholly upon the declarations of decedent to the effect that he would do well by her at his death, as well as by his own child; that he would make her as good as an heir. These declarations were held insufficient as proof of a special contract, Sharwood, J., saying: "Claims of this character against the estates of decedents, resting on mere oral testimony of declarations or admissions, are very dangerous and ought certainly not to be favored by the courts."

made by the decedent which are testamentary in character will not support a claim for the services therein mentioned.[93]

e. *Circumstantial Evidence.* — Such claims, however, may be sufficiently proved by circumstantial evidence.[94]

f. *Services by Member of Family.* — (1.) **Generally.** — A claim for services rendered a deceased person during his lifetime by a member of his own family requires exceptionally clear proof, because ordinary services rendered each other by members of the same family are presumptively gratuitous.[95] There must, however, be some family tie between the deceased and the claimant to raise this presumption;[96] though it is not essential that they be related in any other way than as members of one household.[97] In some jurisdic-

93. A statement by the deceased made during his last sickness, and after he had declined to make a will, that he wanted the plaintiff to have five hundred dollars for waiting on him in his last illness, and that he also wanted two of his sisters to have certain amounts, was held insufficient proof of a claim by the plaintiff for the services mentioned in such declaration, on the ground that the statement was testamentary in character. Montgomery *v.* Miller, 43 Ky. 470.

94. Von Carlowitz *v.* Bernstein, 28 Tex. Civ. App. 8, 66 S. W. 464; Fuller *v.* Mowry, 18 R. I. 424, 28 Atl. 606; Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396; Harrison *v.* Lindley, 104 Ill. 245; Oates *v.* Erskine's Estate, 116 Wis. 586, 93 N. W. 444.

In proof that services rendered the deceased had not been paid for it is competent to show that a deed from the deceased to the claimant in payment for such services has been set aside in an action by the heirs brought for this purpose. Davis *v.* Duval, 111 N. C. 422, 16 S. E. 471.

95. *Illinois.* — Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315.

Michigan. — Decker *v.* Kanou, 129 Mich. 146, 88 N. W. 398.

Missouri. — Shannon *v.* Carter, 99 Mo. App. 134, 72 S. W. 498.

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

New York. — *In re* Pfohl Estate, 20 Misc. 627, 46 N. Y. Supp. 1086; *In re* Warner's Estate, 39 Misc. 432, 79 N. Y. Supp. 363.

Virginia. — Beale *v.* Hall, 97 Va. 383, 34 S. E. 53.

West Virginia. — Hanly *v.* Potts, 52 W. Va. 263, 43 S. E. 218. See article "MASTER AND SERVANT."

Second Cousin. — There is no presumption that decedent's second cousin, who acted as his housekeeper, gave her services gratuitously. Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074.

96. Where the deceased boarded with a family to whom he was in no way related, for many years prior to his death, it was held that the rendering and acceptance of the services was presumptive evidence of an obligation to pay for the same, and that the decedent was not a member of the family in such a sense that the services would be presumed to be voluntary and gratuitous. Wallace *v.* Schwab, 81 Md. 594, 32 Atl. 324.

97. Disbrow *v.* Durand, 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. Rep. 678; Tyler *v.* Burrington, 39 Wis. 376; Wilcox *v.* Wilcox, 48 Barb. (N. Y.) 329. See Bundy *v.* Hyde, 50 N. H. 116.

On the trial of a claim for board furnished the decedent, who lived with the claimant, evidence as to provisions furnished by the latter for the family use was held not incompetent merely because the nature and value of the items could not be particularly specified on the ground that such evidence tended to support the theory of common family interest among all the parties. Ludlow *v.* Pearl, 55 Mich. 312, 21 N. W. 315.

tions, however, this presumption is limited to the relation of parent and child.[98]

(2.) Proof of Contract. — In some jurisdictions there must be proof of an express contract to support the claim when this relation exists.[99] The general rule, however, is that proof of an implied contract is sufficient.[1]

(3.) Sufficiency of Evidence. — Even an express contract may, however, be established by circumstantial evidence,[2] and of course such evidence may sufficiently prove an implied contract.[3] But it must very clearly appear that the services were rendered with expectation and understanding that they were to be paid for in some manner.[4]

98. Curry *v.* Curry, 114 Pa. St. 367, 7 Atl. 61; Gerz *v.* Demarra, 162 Pa. St. 530, 29 Atl. 761; Griffith's Estate, 147 Pa. St. 274, 23 Atl. 556.

99. Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55; Tyler *v.* Burrington, 39 Wis. 376; Pellage *v.* Pellage, 32 Wis. 136; Hall *v.* Finch, 29 Wis. 278; Wilkes *v.* Cornelius, 21 Or. 348, 28 Pac. 135.

The Mere Unexpressed Expectation on the part of the deceased to pay, and on the part of the claimant to receive payment for the services, is not in itself sufficient evidence of an express contract, but is a competent circumstance tending to prove such a contract in connection with other facts. Tyler *v.* Burrington, 39 Wis. 376.

1. Cowan *v.* Musgrave, 73 Iowa 384, 35 N. W. 496; Mills *v.* Joiner, 20 Fla. 479; Bell *v.* Rive, 50 Neb. 547, 70 N. W. 25; Jessup *v.* Jessup, 17 Ind. App. 177, 46 N. E. 550; Guild *v.* Guild, 15 Pick. (Mass.) 129; Koch *v.* Hebel, 32 Mo. App. 103; Guenther *v.* Birkicht, 22 Mo. 439. See more fully article "MASTER AND SERVANT."

2. Leitgabel *v.* Belt, 108 Wis. 107, 83 N. W. 1111; Estate of Kessler, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74.

3. *Illinois.* — Killpatrick *v.* Helston, 25 Ill. App. 127.

Iowa. — Magarrell *v.* Magarrell, 74 Iowa 378, 37 N. W. 961.

Michigan. — Sammon *v.* Wood, 107 Mich. 506, 65 N. W. 529.

Missouri. — Guenther *v.* Birkicht, 22 Mo. 439; Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188.

New Jersey. — Disbrow *v.* Durand, 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. Rep. 678.

New York. — Jacobson *v.* La Grange, 3 Johns. 199.

Vermont. — Westcott *v.* Westcott, 69 Vt. 234, 39 Atl. 199; Fitch *v.* Peckham, 16 Vt. 150; Ashley *v.* Hendee, 56 Vt. 209.

4. Wright *v.* Senn, 85 Mich. 191, 48 N. W. 545; Phillips *v.* Sanchez, 35 Fla. 187, 17 So. 363; Brock *v.* Slaten, 82 Ill. 282; Bostwick *v.* Estate of Bostwick, 71 Wis. 273, 37 N. W. 405.

But see Riddler *v.* Riddler, 93 Iowa 350, 61 N. W. 994, *holding* that "where one child has sacrificed his own interests to promote the comfort and well-being of his parents while others have stood by and permitted him to do it without effort on their part to assist him, the claim of the child for compensation for what he has done should not be looked upon with disfavor."

Testimony of Claimant. — A claim by a son of the deceased for the latter's support is not sufficiently proved by the sole testimony of such son, where it appears that he was living on the farm of the deceased at the time the alleged support was furnished, and that the latter was drawing a pension of twenty-five dollars per month. Bratcher *v.* Bratcher (Tenn.), 62 S. W. 1108.

Prospective Heirs. — The fact that the claimant was a prospective and afterwards an actual heir to a part of the estate is a circumstance proper to be considered in determining the intentions and expectations of the parties. Ginders *v.* Ginders, 21 Ill. App. 522.

A Mere Expression of Intention to pay for such services is not sufficient proof of a contract.[5]

But the Decedent's Declarations, coupled with surrounding circumstances, may be sufficient to establish one.[6]

D. CLAIMS OF REPRESENTATIVE. — The personal representative must establish his claim against the estate by clear and satisfactory proof.[7] His own affidavit is not evidence in his favor.[8] His inventory and account may be evidence against his claim.[9]

9. Use of Word "Executor" or "Administrator" in Written Instrument. — When the word "executor" or "administrator" is appended to the name of a party to a written instrument, such word is presumptively merely *descriptio personae,* and the instrument is *prima facie* the agreement, obligation or property of such person as an individual.[10] Parol evidence, however, is admissible,

Presumption from Payment. Where the decedent for several years prior to his death lived with his son, under circumstances showing an intention on his part and an expectation by the latter that such services were to be paid for, the fact that during those years and a considerable time before the decedent's death he paid a sum of money to his son raises no presumption that this payment was intended to cover all the services rendered him up to the time of his death. Clark *v.* Bradley, 65 Hun 624, 20 N. Y. Supp. 452.

5. Graham *v.* Graham's Executors, 34 Pa. St. 475; Zimmerman *v.* Zimmerman, 129 Pa. St. 229, 18 Atl. 129; Reynolds *v.* Reynolds, 92 Ky. 556, 18 S. W. 517; Raynor *v.* Robinson, 36 Barb. (N. Y.) 128.

Where the deceased had resided in the family of the plaintiff, her son-in-law, for many years, and during the last four years the latter had occupied deceased's land and paid rent to her, it was held that the mere declaration of the deceased that she intended to reward the plaintiff for the services rendered her, and an expression of her intention to leave the property to him were not sufficient to support a claim for board. Clawson *v.* Moore, 29 Ill. App. 296.

6. Perkins *v.* Hasbrouck, 155 Pa. St. 494, 26 Atl. 695; Gerz *v.* Demarra, 162 Pa. St. 530, 29 Atl. 761; Hart *v.* Hart, 41 Mo. 441.

7. *In re* Rosell's Estate (App. Div.), 81 N. Y. Supp. 843; *In re* Nolan's Estate (App. Div.), 63 N. Y. Supp. 291; *In re* Child's Estate, 5 Misc. 560, 26 N. Y. Supp. 721; *In re* Arkenburgh's Estate, 58 App. Div. 583, 69 N. Y. Supp. 125; Jacques *v.* Elmore, 7 Hun (N. Y.) 675; Malone *v.* Malone, 106 Ala. 567, 17 So. 676.

A claim by the personal representative cannot be allowed on other proof in the case, when it is not supported by its own affidavit and such other proof as the statute requires. Hood *v.* Maxwell, 23 Ky. L. Rep. 1791, 66 S. W. 276.

The Testimony of the Personal Representative unobjected to, in support of his own claim against the estate that the claim is due, but which does not disclose whether anything has ever been paid upon it by the deceased, or whether there are offsets to it, is not sufficient. Wood *v.* Rusco, 4 Redf. (N. Y. Sur.) 380.

8. Wood *v.* Rusco, 4 Redf. (N. Y. Sur.) 380; Underhill *v.* Newberger, 4 Redf. (N. Y. Sur.) 499; *In re* Child's Estate, 5 Misc. 560, 26 N. Y. Supp. 721; Kyle *v.* Kyle, 67 N. Y. 400.

9. Where an administrator seeks to recover from the estate an alleged debt of the intestate to himself, the inventory and an account filed by him, showing disbursements prior to the filing of his claim which reduce the available assets much below the amount required to pay his claim, are competent evidence and a strong circumstance against him. Smythe's Estate *v.* Evans (Ill.), 70 N. E. 906.

10. A judgment in favor of "E. J. Dozier, executor of Mary Gibson," is *prima facie* the individual property of Dozier, but slight evidence is sufficient to rebut this presumption and

in accordance with the rules governing that class of evidence, to show that such word is intended to describe the title or limit the obligation.[11]

V. ACCOUNTING.

1. Nature of Evidence. — A. Generally. — On an accounting by a personal representative the proceeding is ordinarily governed by the same rules as are applied to trials generally, and the rules of evidence strictly followed.[12] Great latitude, however, will be permitted in the admission of circumstances in any way relevant, where the transactions are remote in point of time and better or more satisfactory evidence impossible to be obtained.[13]

B. Examination of Representative and Right of Parties to Offer Evidence. — The accounting party may be examined by the court touching the items of his account and the performance of his trust,[14] and the contesting parties may offer evidence in rebuttal of his answers.[15] Both parties to the accounting are entitled to be heard and to offer evidence.[16]

2. Contestant's Interest. — Persons contesting the personal representative's account must prove a pecuniary interest in the estate[17] by at least a *prima facie* showing.[18]

to show in the case of any instrument payable to "A., executor or administrator," that it is in fact the property of the estate. Dozier *v.* McWhorter, 117 Ga. 786, 45 S. E. 61.

11. Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127. See articles "Ambiguity;" "Bills and Notes," and "Parol Evidence."

12. On an accounting by a personal representative the rules of evidence should be strictly adhered to, and the case formally and properly tried. *In re* Myers, 36 App. Div. 625, 55 N. Y. Supp. 168. See also Duncan *v.* Tobin, Cheves Eq. (S. C.) 143.

In Surrogate's Court. — In adjusting the accounts of executors the surrogate's court is governed by principles of equity as well as of law, and it is at all times competent for the executor, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and the amount for which he should be held liable. *In re* Neil's Estate, 35 Misc. 254, 71 N. Y. 840.

13. In a suit by a legatee against an executor for an accounting and distribution, instituted forty years after the property came into his hands, where the record shows a failure on the part of executor to make returns required by law, it was held that great latitude in admitting evidence should be allowed. "This malfeasance and nonfeasance on his part imposes on the court charged with the quest after truth the necessity of admitting everything not in absolute violation of the rules of evidence that may tend, even remotely, to elucidate the case." Smith *v.* Griffin, 32 Ga. 81.

14. *In re* Rathbone's Estate, 44 Mich. 57, 6 N. W. 115; Higbee *v.* Bacon, 8 Pick. (Mass.) 484; Westervelt *v.* Gregg, 1 Barb. Ch. (N. Y.) 469.

15. Higbee *v.* Bacon, 8 Pick. (Mass.) 484; Sigourney *v.* Wetherell, 6 Metc. (Mass.) 553.

16. Collins *v.* Tilton, 58 Ind. 374; Clark *v.* Young, 24 Ky. L. Rep. 2395, 74 S. W. 245; Geesey *v.* Geesey, 94 Md. 371, 51 Atl. 36.

17. Tompkins *v.* Weeks, 26 Cal. 50.

18. Appeal of Beiler, 144 Pa. St. 273, 22 Atl. 808.

3. Property Coming Into Representative's Possession. — A. GENERALLY. — Where the property belonging to the estate is shown to have come into the hands of the personal representative, the burden is upon him to properly account for the same.[19]

When an Account is Suspicious on its face, or has been negligently kept, the presumptions are against the accounting party.[20] But when his conduct in the management of the estate evinces fidelity to his trust, the presumptions are in favor of his account.[21]

B. PRESUMPTIONS. — In the absence of evidence to the contrary it will be presumed that the personal representative took possession of the property belonging to the estate.[22]

4. Property Not Coming Into His Possession. — On the other hand, where an attempt is made to charge the representative with property not included in his inventory, or with a failure to take possession of property alleged to belong to the estate, the burden of proof rests upon those seeking to establish such charge.[23]

5. Debts Due the Estate. — A. FROM REPRESENTATIVE. — a. *Generally.* — Where a debt is due from the personal representative to his decedent's estate, the presumption is that it has been paid, and that the proceeds thereof form part of the estate assets.[24] The old

19. Taylor *v.* McArthur, 87 Iowa 155, 54 N. W. 228; Stillwell *v.* Stone, 23 Ark. 444; *In re* Taber's Estate, 30 Misc. 172, 63 N. Y. Supp. 728; *In re* Koch, 33 Misc. 153, 68 N. Y. Supp. 375; Nichols *v.* Dunn, 22 N. C. 287.

The Recital in a Deed of the estate realty, executed by the personal representative, is *prima facie* evidence of the sum received and to be accounted for by him; Bechtold *v.* Read (N. J. Eq.), 28 Atl. 264; and requires clear and convincing evidence on his part to overcome it. Hetfield *v.* Debaud, 54 N. J. Eq. 371, 34 Atl. 882.

Sales of Personalty. — Where a sale of personalty is made by the personal representative without an order of the court the burden is upon him to show that the thing sold brought its full market value. *Ex parte* Jones, 4 Cranch C. C. 185, 13 Fed. Cas. No. 7443.

20. Downie *v.* Knowles, 37 N. J. Eq. 513; Hetfield *v.* Debaud, 54 N. J. Eq. 371, 34 Atl. 882.

21. Succession of Bauman, 30 La. Ann. 1138.

22. Matter of Marcellus, 165 N. Y. 70, 58 N. E. 796.

23. *In re* Koch, 33 Misc. 153, 68 N. Y. Supp. 375; *In re* Baker, 42 App. Div. 370, 59 N. Y. Supp. 121; Matter of Polluck, 3 Redf. (N. Y. Sur.) 100; Carroll *v.* Hughes, 5 Redf. (N. Y. Sur.) 337; Marre *v.* Ginochio, 2 Brad. (N. Y. Sur.) 165; Bainbridge *v.* McCullough, 1 Hun (N. Y.) 488.

The fact that the decedent, a year prior to his death, came into possession of a certain sum of money is not sufficient, without any evidence connecting his executor with it, to charge the latter on his accounting with such money. *In re* Haney's Estate, 74 Hun 205, 26 N. Y. Supp. 815.

Administrator of Tenant for Life. Where a life tenant has the absolute power of disposal of the estate, on an accounting by his administrator the burden of showing the assets which came into the possession of the life tenant, and remain undisposed of by him, is upon the person contesting the account. *In re* Ryalls, 62 N. Y. St. 287, 30 N. Y. Supp. 455.

24. *United States.* — United States *v.* Eggleston, 4 Sawy. 199, 25 Fed. Cas. No. 15,027.

Alabama. — Duffee *v.* Buchanan, 8 Ala. 27; Cook *v.* Cook, 69 Ala. 294; Wright *v.* Lang, 66 Ala. 389.

Connecticut. — Davenport *v.* Richards, 16 Conn. 310.

common-law rule making the appointment of a debtor as executor an extinguishment of the debt is quite generally abolished. This presumption, however, does not apply to a mere conditional liability.[25]

b. *Insolvency of Representative.* — Where the personal representative on his accounting seeks to be absolved from his liability to account for a debt due from him to the estate, on the ground of his insolvency, the burden is on him to show this latter fact.[26]

B. Failure to Collect Debts. — Where debts due the deceased are inventoried as assets but not collected, the burden is upon the administrator or executor to show the insolvency of the debtor, and that the debt was not lost through his default or negligence,[27] and

District of Columbia. — Mitchell *v.* Thomson, 18 D. C. 130.

Iowa. — Savery *v.* Sypher, 39 Iowa 675.

Kentucky. — Hickman *v.* Kamp, 3 Bush 205.

Louisiana. — Boyce *v.* Davis, 13 La. Ann. 554.

Massachusetts. — Sigourney *v.* Wetherell, 6 Metc. 553; Leland *v.* Felton, 83 Mass. 531; Tarbell *v.* Jewett, 129 Mass. 457, and cases cited.

Michigan. — Crow *v.* Conant, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427.

New York. — Baucus *v.* Stover, 89 N. Y. 1; *In re* Consalus, 95 N. Y. 340.

Ohio. — Bigelow *v.* Bigelow, 4 Ohio 138, 19 Am. Dec. 591.

Pennsylvania. — Simon's Adm'r *v.* Albright, 12 Serg. & R. 429.

South Carolina. — Newman *v.* Clyburn, 41 S. C. 534, 19 S. E. 913; Chick *v.* Farr, 31 S. C. 463, 10 S. E. 176, 390; Jacobs *v.* Woodside, 6 S. C. 490.

But see McCarty *v.* Frazer, 62 Mo. 263.

25. Shields *v.* Odell, 27 Ohio St. 398.

Surety. — When the administrator is merely a surety on a debt due the estate this presumption of payment does not arise until a final settlement is made. Flinn *v.* Carter, 59 Ala. 364.

26. *In re* Howell's Estate (Neb.), 92 N. W. 760.

27. *Kentucky.* — Steel *v.* Morrison, 4 Dana 617; Scarce *v.* Page, 12 B. Mon. 311.

Louisiana. — Succession of Peytavin, 7 Rob. 477; Collins *v.* Andrews, 6 Mart. (N. S.) 190; Succession of Beeman, 47 La. Ann. 1355, 17 So. 820.

Maryland. — Daingerfield *v.* May, 31 Md. 340.

Mississippi. — Tell City Furniture Co. *v.* Stiles, 60 Miss. 849; Cole *v.* Leake, 27 Miss. 767. But see Smith *v.* Hurd, 8 Smed. & M. 682; Stone *v.* Morgan, 65 Miss. 247, 3 So. 580.

Missouri. — Williams *v.* Heirs of Petticrew, 62 Mo. 460; Julian *v.* Abbott, 73 Mo. 580.

North Carolina. — Graham *v.* Davidson, 22 N. C. 155. But see Worthy *v.* Brower, 93 N. C. 344.

Oregon. — Conser's Estate, 40 Or. 138, 66 Pac. 607.

South Carolina. — Gates *v.* Whetstone, 8 S. C. 244; Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917.

Vermont. — Walworth's Estate *v.* Bartholomew's Estate (Vt.), 56 Atl. 101.

West Virginia. — Estill *v.* McClintic's Adm'r, 11 W. Va. 399.

"The *onus* is upon the executor to show a fair reason why he did not commence proceedings to collect a debt, and it is only necessary, in the first instance, for him who insists upon a *devastavit* to show the existence of a debt, and that the executor has taken no steps to collect it. The presumption is that it could have been collected, as the usual course is for men to pay their debts, and solvency is presumed until the contrary is shown." O'Connor *v.* Gifford, 117 N. Y. 275, 22 N. E. 1036.

Inventory Prima Facie Evidence. "The inventory of the property, returned by an executor or administrator into the proper office as required by the statute, is *prima facie* evidence of the solvency of the per-

there are statutes to this effect in some states.[28] It has also been held to the contrary.[29] If such debts, however, are inventoried as desperate, the accounting party can not be charged with a failure to collect them without proof that they were collectible.[30] It is competent to show the estimate which the decedent placed upon the solvency of debts due him.[31]

sons owing debts mentioned and described therein, if nothing there be said to the contrary, as against the executor or the administrator and his sureties. The law requires such inventory to be made under oath, and it is the duty of an executor or administrator, incident to his office as such, to make proper inquiry as to the property — its nature and condition — with which he ought to be charged, and it is presumed when he notes it in the inventory that he describes it correctly, as the property of his testator or intestate, as the case may be, and as to debts due the estate, that the parties owing them are solvent, if nothing explanatory in that respect be said." Grant *v.* Reese, 94 N. C. 720.

When Insolvency Shown, a verdict against the defendant is held unwarranted. Prior *v.* Prior, 113 Ga. 1154, 39 S. E. 474.

The Oath of the Administrator is *prima facie* proof of the worthlessness or loss of assets contained in his inventory. Van Winkle *v.* Blackford (W. Va.), 46 S. E. 589.

Presumption of Collection.—Where there is nothing in the inventory to indicate that a debt therein contained is not solvent, after the lapse of a reasonable time for collection it will be presumed to have been collected. Anderson *v.* Piercy, 20 W. Va. 282.

Where an administrator has carried notes through several annual settlements, with no mention of their worthlessness, this fact is not conclusive on his final accounting of his negligence in failing to collect them, since this is a matter of fact to be determined upon the final accounting. Williams *v.* Heirs of Petticrew, 62 Mo. 460.

A judgment of the probate court allowing a schedule of desperate debts is *prima facie* evidence in favor of the executor or administrator. Smith *v.* Griffin, 32 Ga. 81.

28. *In re* Sanderson, 74 Cal. 199, 15 Pac. 753.

29. Adkins *v.* Hetchings, 79 Ga. 260, 4 S. E. 887; Tompkins *v.* Tompkins, 18 S. C. 1; Wilkinson *v.* Hunter, 37 Ala. 268; Pettus *v.* Clawson, 4 Rich. Eq. (S. C.) 92. And see Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937; Barclay *v.* Morrison, 16 Serg. & R. (Pa.) 129.

When No Value Placed on Inventoried Debt. — "*Prima facie* all debts which are inventoried as desperate, or to which no value is attached, are to be treated as uncollectible — hence it is incumbent upon those claiming that they were solvent and collectible to establish that fact." Estate of Millenovich, 5 Nev. 161.

30. Wrightson *v.* Tydings, 94 Md. 358, 51 Atl. 44; Finch *v.* Ragland, 17 N. C. 137; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 106.

Claim Inventoried as Doubtful. Where a note, the property of the estate, was inventoried as "doubtful," and the evidence at the accounting tended to show that it was still a doubtful claim, it was held that the burden was upon the contestants to show a lack of diligence on the part of the personal representative in failing to collect the same. The fact that the debtor was still alive and within reach, and that his evidence had not been produced by the administrator, was immaterial because it was the duty of the contestants to avail themselves of his evidence. Appeals of Fross & Loomis, 105 Pa. St. 258. But see Estill *v.* McClintic's Adm'r, 11 W. Va. 399.

31. In an action against an administrator for *devastavit* in failing to collect solvent debts due the estate, he may introduce in evidence the tax returns of his intestate for the preceding years in which said debts are not included, as admissions on the part of the intestate that the

6. Bank Deposits. — Money deposited to the credit of the estate by the executor or administrator is presumptively estate funds.[32]

7. Credits Claimed by Representative. — A. Payment of Claims Against Decedent. — a. *Generally.* — Where the personal representative in his account has credited himself with the amount of claims against his decedent, allowed and paid by him without order of court, it is generally held that the burden is upon him to establish not only the payment but also the validity of all the claims to which exception is taken,[33] and in some jurisdictions a *prima facie* showing of these facts must be made even in the absence of any opposition.[34]

b. *Effect of Allowance by Representative.* — In some jurisdictions, however, if the claim has been passed upon and allowed by the personal representative,[35] though not paid,[36] the burden is upon the objecting party to establish its invalidity, if a proper voucher is produced.[37]

c. *Allowance or Rejection by Court.* — Under a statute providing for the presentation of claims for approval by the court, the allow-

accounts were not solvent, and as showing the estimate which the latter placed upon their solvency. Adkins *v.* Hetchings, 79 Ga. 260, 4 S. E. 887.

32. Koontz *v.* Koontz, 79 Md. 357, 32 Atl. 1055; Getty *v.* Long, 82 Md. 643, 33 Atl. 639.

33. *Alabama.* — Pearson *v.* Darrington, 32 Ala. 227; Morgan's Adm'r *v.* Morgan's Distributees, 35 Ala. 303.

Illinois. — Millard *v.* Harris, 119 Ill. 185, 10 N. E. 387.

Indiana. — Wysong *v.* Nealis, 13 Ind. App. 165, 41 N. E. 388; Hamlyn *v.* Nesbit, 37 Ind. 284.

Louisiana. — Succession of Dougart, 30 La. Ann. 268.

Maine. — *In re* Eacott, 95 Me. 522, 50 Atl. 708.

Maryland. — Edelen *v.* Edelen, 11 Md. 415.

Mississippi. — Tell City Furn. Co. *v.* Stiles, 60 Miss. 849.

South Carolina. — Duncan *v.* Tobin, Cheves Eq. 143.

Texas. — Davenport *v.* Lawrence, 19 Tex. 317.

"In all matters of *charge* against the accountant the burden of proof is with his adversary; in matters of discharge the situation of the parties is reversed." Kirby *v.* Coles, 15 N. J. L. 441.

Where the contestant admits the validity of a claim paid by the administrator, but charges that it has been previously discharged, the burden of proof is upon him. Succession of Rhodes, 39 La. Ann. 473, 2 So. 36.

34. Succession of Dougart, 30 La. Ann. 268.

35. *In re* Everet's Estate, 86 Hun 325, 33 N. Y. Supp. 493; *In re* Myers, 36 App. Div. 625, 55 N. Y. Supp. 168; Matter of the Accounting of Frazier, 92 N. Y. 239.

Allowance Is in the Nature of a Judgment. — Where the claim has been presented to and allowed by an administrator his decision *prima facie* establishes its validity, since it is in the nature of a judicial determination, and the burden is upon the objecting party to show that the claim, or some part of it, did not exist in fact, or that the administrator acted fraudulently and corruptly. *In re* Warrin, 56 App. Div. 414, 67 N. Y. Supp. 763; Bellinger *v.* Potter, 36 N. Y. St. 601, 13 N. Y. Supp. 9.

36. *In re* Knab, 38 Misc. 717, 78 N. Y. Supp. 292.

It is the allowance of the claim which establishes *prima facie* its validity, and not its payment. *In re* Warrin, 56 App. Div. 414, 67 N. Y. Supp. 763.

37. Valentine *v* Valentine, 4 Redf. (N. Y. Sur.) 265.

ance of a claim is *prima facie* evidence of its validity in favor of the accounting party who has paid it;[38] though the contrary has also been held.[39] Similarly its rejection throws the burden of proof upon such person to show its validity and non-payment by the decedent.[40]

B. Claims and Expenses Incurred After Decedent's Death. a. *Generally.* — The representative will not be allowed credit for the payment of claims against the estate arising after his decedent's death, except upon competent proof of actual payment of the sum claimed; and in case of expenditures incurred by him without the approval of the court, he must prove their necessity and reasonableness.[41]

This rule is applied to taxes,[42] advancements[43] made to the distrib-

38. Estate of Loshe, 62 Cal. 413; Cutright *v.* Stanford, 81 Ill. 240. See Hillebrant *v.* Burton, 17 Tex. 138.

Probated Claim.— Credits Endorsed Thereon. — Where the executor claims credit for the payments endorsed on a probated claim he must prove that such payments were made by him. Haralson *v.* White, 38 Miss. 178.

39. The Approval by the Orphans' Court of a claim against the estate, for the payment of which the administrator claims credit, is not evidence of its correctness when its allowance is objected to, but it must be supported by testimony substantially sufficient to establish the facts before a jury. Edelen *v.* Edelen, 11 Md. 415.

40. Haralson *v.* White, 38 Miss. 178. See also Barthe *v.* Rogers, 127 Cal. 52, 59 Pac. 310.

41. Estate of Willard, 139 Cal. 501, 73 Pac. 240; Miller *v.* Simpson, 8 Ky. L. Rep. 518, 2 S. W. 171; Matter of Selleck, 111 N. Y. 284, 19 N. E. 66; Kaminer *v.* Hope, 9 S. C. 253; Matter of Rawland, 5 Dem. (N. Y. Sur.) 216; Williams *v.* Heirs of Petticrew, 62 Mo. 460.

Expense of Administration Distinguished from Debt of Deceased. "As to disbursements for expenses of administration, the statute authorizes the surrogate to allow credit for such only as are 'actual, necessary, just and reasonable.' Whenever such a disbursement, therefore, is objected to, the surrogate must be satisfied by competent proof that it has been made, and that it has been made justly, reasonably and necessarily." Journault *v.* Ferris, 2 Dem. (N. Y. Sur.) 320.

The Particular Items of expense must be proved. A claim for a gross sum, without specification and proof of the particulars, will not be allowed. Pearson *v.* Darrington, 32 Ala. 227.

Payments in Depreciated Currency. — In Stokes *v.* Wallace, 16 S. C. 619, it was held that credit would not be given an administrator on his accounting for disbursements made between the years 1862 and 1865, without proof on his part that payment was not made in the depreciated currency in use during that period.

42. Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55.

In support of a charge in his account for payment of taxes the administrator must produce or account for the tax receipt. Hall *v.* Hall, 1 Mass. 101.

Parol Evidence is competent when the loss of the receipts has been shown. *In re* Moore, 72 Cal. 335, 13 Pac. 880.

Where the receipts for taxes, which the administrator claims to have paid on the estate, include the taxes on his own as well as the lands held in his representative capacity, and it is not proved how much was paid for the benefit of the estate, credit for such claim cannot be allowed. Cox *v.* Doty, 20 Ky. L. Rep. 287, 45 S. W. 1044.

43. Hyland *v.* Baxter, 31 Hun (N. Y.) 354; Wright *v.* Wright, 2 McCord Eq. (S. C.) 443.

utees without leave of court, expense incurred in defending actions against the estate,[44] repairs to estate property,[45] and collector's fees.[46]

b. *Attorney's Fees.* — A credit for attorney's fees paid by the representative, if contested, should not be allowed except upon proof of the nature, necessity and value.[47] The burden is upon the representative to show that the services were necessary to the proper management of the estate, and a general charge without specifying and proving the particular items will not ordinarily be allowed.[48] In some jurisdictions the court cannot be guided by its personal knowledge, but is wholly governed by the evidence introduced.[49] In others, the court is not bound by the estimate placed upon such services by the witness, but may take judicial notice of their value.[50]

C. VOUCHERS. — a. *Necessity of Producing.* — (1.) **Generally.** Proper vouchers should be produced by the executor or adminis-

44. Expenses Incurred in Defending a Claim Against the Estate. Clement's Appeal, 49 Conn. 519.

Compare Pearson *v.* Darrington, 32 Ala. 227.

45. Henderson *v.* Simmons, 33 Ala. 291.

46. *In re* Rainforth's Estate, 40 Misc. 609, 83 N. Y. Supp. 57.

47. *Georgia.* — Davidson *v.* Story, 106 Ga. 799, 32 S. E. 867.

Kentucky. — Miller *v.* Simpson, 8 Ky. L. Rep. 518, 2 S. W. 171.

Massachusetts. — Blake *v.* Pegram, 109 Mass. 541.

New York. — *In re* Archer's Estate, 23 N. Y. Supp. 1041; *In re* Hosford, 27 App. Div. 427, 50 N. Y. Supp. 550; *In re* Van Nostrand's Estate, 3 Misc. 396, 24 N. Y. Supp. 850; *In re* Arkenburgh, 13 Misc. 744, 35 N. Y. Supp. 251; *In re* O'Brien's Estate, 5 Misc. 135, 25 N. Y. Supp. 704.

South Carolina. — Johnson *v.* Henagan, 11 S. C. 93.

Tennessee. — Hall *v.* Hall (Tenn.), 59 S. W. 203.

Evidence Necessary. — Both the accounting party and the contestant are entitled to offer evidence as to the reasonable value of an attorney's services to the estate, and the court cannot allow credit to the representative for the payment of such services in the absence of any evidence as to their value. Clarke *v.* Young, 24 Ky. L. Rep. 2395, 74 S. W. 245.

"The administrator must prove the services rendered, and their value; just as the attorney would be required to prove them, if he were suing the administrator for their recovery. If the account consist of more items than one, the various items should be set forth, with proof of their several values." Munden *v.* Bailey, 70 Ala. 63.

No Technical Rules governing the sufficiency of the evidence can be laid down except that from all the circumstances the allowance must appear just and reasonable to the court. St. John *v.* M'Kee, 2 Dem. (N. Y. Sur.), 236; Raymond *v.* Dayton, 4 Dem. (N. Y. Sur.) 333.

48. *In re* Peck, 79 App. Div. 296, 80 N. Y. Supp. 76.

Where the attorney's services for the executor extended over a period of six years, and it was shown that he was employed by the executor in many litigations, and during that period held many consultations with him, his bill for services in a lump sum was allowed, although the evidence was not entirely satisfactory as to the particular services rendered. *In re* Hosford, 27 App. Div. 427, 50 N. Y. Supp. 550.

49. Where the attorney hired by the executor testifies as to the reasonable value of services rendered by him to the estate, the court cannot be guided by its personal knowledge that the amount claimed and testified to as reasonable by such witness is much above the usual charges. *In re* Van Nostrand's Estate, 3 Misc. 396, 24 N. Y. Supp. 850. And see *In re* O'Brien's Estate, 5 Misc. 135, 25 N. Y. Supp. 704.

50. Estate of Dorland, 63 Cal. 281.

trator on his accounting for all disbursements of estate funds, or their non-production should be sufficiently explained,[51] unless the disbursement was made in compliance with an order of court.[52] The verification of the account does not dispense with this requirement,[53] nor render other evidence of the fact of payment unnecessary when no voucher can be produced.[54] If the accounting party never received a voucher the disbursement may be established by other evidence,[55] but in such case the parol proof must be very clear and satisfactory.[56]

(2.) Statutory Regulation. — The necessity of producing vouchers for the credits claimed by an accounting representative is frequently

51. *Alabama.* — Landreth's Adm'r *v.* Landreth's Distributees, 9 Ala. 430.
Louisiana. — Succession of Foulkes, 12 La. Ann. 537.
Maine. — Pearce *v.* Savage, 51 Me. 410.
Massachusetts. — Hall *v.* Hall, 1 Mass. 101.
New York. — Matter of Rowland, 5 Dem. 216.
South Carolina. — Wright *v.* Wright, 2 McCord Eq. 443; McGougan *v.* Hall, 21 S. C. 600.
Texas. — Davenport *v.* Lawrence, 19 Tex. 317.
See Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

52. *In re* Weringer, 100 Cal. 345, 34 Pac. 325.

53. McNulty *v.* De Saussure (S. C.), 19 S. E. 926; *s. c.* 20 S. E. 64.

54. *In re* Gerow's Estate, 23 N. Y. Supp. 847, *distinguishing In re* Langlois' Estate, 2 Con. Sur. 481, 26 App. N. C. 226, 14 N. Y. Supp. 146.

55. See McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Wright *v.* Wright, 64 Ala. 88; Succession of Wederstrandt, 19 La. Ann. 494; Matter of Pollock, 3 Redf. (N. Y. Sur.) 100; Fitzgerald *v.* Jones, 1 Munf. (Va.) 150. See Succession of Bougere, 29 La. Ann. 378.

56. On an accounting by an executor, he was allowed credit for $400 which he testified had been paid out in sundry small sums for expenses and small debts, of which he had kept no account and had no receipts or memoranda. No vouchers were produced. The allowance of this credit was held error on the ground that the evidence was too vague and insufficient. Woodward, J., says: "Receipts are not indispensable, but it is the imperative duty of registers, auditors and the judges of the orphans' courts to require some distinct and definite form of proof to establish the validity of demands against the dead man's estates. It may well happen that small sums may be expended for traveling bills, official fees, or the services of domestics, or even in the discharge of trifling debts, where it would be unreasonable to insist on the production of written evidence. But in some way the want of the written evidence must be supplied. Accounts should be kept, if for no other purpose, to indicate at least accuracy and good faith. . . . It was said by Mr. Justice Rogers, in Mylin's Estate, 7 Watts 64, that while cases may arise where the orphans' court, in the exercise of a reasonable discretion, may supply the want of a regular voucher by the oath of a guardian or administrator, yet 'it must be done with great caution. It is a kind of evidence on which little reliance should be placed; it should be resorted to with great delicacy, and even then should be sustained by some corroborating proof.'" Romig's Appeal, 84 Pa. St. 235.

Where the evidence and the circumstances showed that attorneys' fees of considerable value had been rendered the estate, and the parties having knowledge of the facts were dead, it was held that the accounting administrator was properly allowed credit for his payment for such services, although he produced no vouchers. The court recognizes the danger of allowing credits without vouchers, but justifies the allowance

regulated by statute.[57] A limit is sometimes placed upon the amount of individual and aggregate credits which can be allowed without the production of vouchers upon other competent proof.[58]

b. *Proof of Voucher.* — The voucher is not self-proving when its genuineness is attacked, but in such case the signature must be properly proved.[59]

c. *Effect of as Evidence.* — Such a voucher is *prima facie* but not conclusive proof of payment,[60] and in some jurisdictions is also *prima facie* evidence of the validity of the claim, where such claim is one which accrued before the representative took charge of the estate.[61] Where the voucher consists of an allowed claim the repre-

by the peculiar circumstances of the case. Billington's Appeal, 3 Rawle (Pa.) 48.

57. See Rose *v.* Rose, 6 Dem. (N. Y. Sur.) 26; *In re* Gerow's Estate, 23 N. Y. Supp. 847; *In re* Langlois' Estate, 2 Con. Sur. 481, 26 App. N. C. 226, 14 N. Y. Supp. 146.

By Statute in Some States, when a representative is unable to produce vouchers for the payment of sums of twenty dollars or under, he must specify in his accounting the times when, the persons to whom, and the purpose for which such payments were made, and must also swear positively that they have been actually paid by him as charged in the account. Williams *v.* Purdy, 6 Paige Ch. (N. Y.) 166; *In re* Rose's Estate, 80 Cal. 166, 22 Pac. 86; Gardner *v.* Gardner, 7 Paige 112.

Where there is no reason to doubt that the amount was actually paid, it may not be necessary that the representative should remember the name of the payee or be able to identify him, especially in the case of small traveling expenses. Matter of Nichols, 4 Redf. (N. Y. Sur.) 288.

Vouchers must be produced when in existence, even under this statute. Orser *v.* Orser, 5 Dem. (N. Y. Sur.) 21.

Lost Letter as Voucher. — *In re* Hilliard, 83 Cal. 423, 23 Pac. 393, on the final accounting, the executor testified without objection that he paid two claims against the estate, each for one hundred and fifty dollars, and received letters acknowledging the receipt of the same, the whereabouts of which was then unknown to him. It was held that the contents of these letters, as testified to, acknowledging payment, supplemented by the testimony of the executor that he actually made the payment, constituted sufficient vouchers in the absence of any other counter-evidence to justify the court in allowing them as proper charges, even under a statute requiring vouchers for all credits over twenty dollars.

58. Broome *v.* Van Hook, 1 Redf. (N. Y. Sur.) 444; Tickel *v.* Quinn, 1 Dem. (N. Y. Sur.) 425; *In re* Van Tassel (Cal.), 5 Pac. 611.

59. Wright *v.* Wright, 64 Ala. 88; Gaunt *v.* Tucker, 18 Ala. 27; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919. See also Birkholm *v.* Wardell, 42 N. J. Eq. 337; Moore *v.* Brown, 51 N. C. 106; Miller *v.* Miller, 12 Rob. (La.) 88.

Subscribing Witness. — Where a voucher or receipt bears the attestation of a subscribing witness, that witness must be produced or his absence accounted for. Jenks *v.* Terrell, 73 Ala. 238. See article "Subscribing Witnesses."

60. Boughton *v.* Flint, 74 N. Y. 476; Matter of White, 6 Dem. (N. Y. Sur.) 375; Fowler *v.* Lockwood, 3 Redf. (N. Y. Sur.) 465; McCreeliss' Distributees *v.* Hinkle, 17 Ala. 459; Miller *v.* Miller, 12 Rob. (La.) 88; Hendry *v.* Hurst, 22 Ga. 312.

The Internal Revenue Collector's receipt is proper evidence in favor of the administrator to show payment of the taxes receipted. Randall *v.* Kelsey, 46 Vt. 158.

61. *In re* Archer's Estate, 23 N. Y. Supp. 1041; *In re* Peck, 79 App. Div. 296, 80 N. Y. Supp. 76; Bainbridge *v.* McCullough, 1 Hun (N. Y.) 488; Matter of Accounting of

sentative is *prima facie* entitled to credit for its payment if it purports on its face to be a debt of the decedent, but not otherwise.[62]

It has been held that a mere receipt is hearsay and not evidence, if objected to, as against persons contesting the account.[63]

D. Sufficiency of Proof by Representative. — a. *Generally.* The representative is entitled to credit for claims paid by him upon proof which would be sufficient to warrant a recovery against him as administrator, in an action by his intestate's creditor.[64]

Frazer, 92 N. Y. 239; *In re* Hosford, 27 App. Div. 427, 50 N. Y. Supp. 550.

The Mere Production by an Executor of Notes Made by His Testator is not sufficient proof of payment by the executor where it does not appear that the notes were unsatisfied at the testator's death. Whitted *v.* Webb, 22 N. C. 442; Finch *v.* Ragland, 17 N. C. 137.

The Receipt of a Sheriff, given to an executor, showing on its face that an execution was in the sheriff's hands against the decedent, and that the amount of the judgment was paid to him by the executor, is *prima facie* evidence of the existence of the judgment, and is a sufficient voucher to authorize the allowance for the payment upon the executor's account. Haralson *v.* White, 38 Miss. 178.

62. **When Prima Facie Evidence.** "If the voucher, on its face, is *prima facie* for a debt or liability of the intestate, or such as was properly chargeable on the estate, and the holder and claimant has made the appropriate affidavit, and the claim has been allowed, then the administrator will be protected in its payment, and allowed credit for it. The *onus* is on the objector to overthrow this *prima facie* case in favor of the administrator. Although the claim may be sworn to and allowed, yet, if on its face it does not import a debt or liability on the estate, the administrator would not be justified in its payment, and would do so at its peril." Gray *v.* Harris, 43 Miss. 421.

63. Finch *v.* Ragland, 17 N. C. 137; Kirby *v.* Coles, 15 N. J. L. 441.

But in Birkholm *v.* Wardell, 42 N. J. Eq. 337, vouchers are said to be *prima facie* proof of disbursements "The rule in respect to the receipt of vouchers upon an accounting before a master is laid down to be that in all matters of account the party who produces them in support of the account does so at his peril and the master is bound to admit them in evidence, except the other side can lay a reasonable ground to show that the voucher in question can be impeached, of which the master is to judge, and then to require evidence in regard to it, if he thinks proper."

64. *Alabama.* — Jenks *v.* Terrell, 73 Ala. 238; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Gaunt *v.* Tucker, 18 Ala. 27; Pearson *v.* Darrington, 32 Ala. 227.

Missouri. — McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12; Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457.

New Jersey. — Middleton's Ex'rs *v.* Middleton, 35 N. J. Eq. 141.

See also Edelen *v.* Edelen, 11 Md. 415.

Register's Fees, accruing upon the administration of the estate, are sufficiently proved by the order of the court in which the administration was conducted, allowing them. Edelen *v.* Edelen, 11 Md. 415.

When Circumstances Show Diligence and Prudence. — "If the court are satisfied of the good faith of the accountant, they are not bound to reject a payment actually made, because of some doubt of the fairness of the claim; or because the evidence thereof is not as full and ample as in other cases may be required. If reasonable prudence and discretion are exhibited in the payment it is enough. A different rule might lead to illimitable and ruinous expense and litigation, by causing the executor or administrator to decline all payments, until sanctioned by the judgment or decree of a competent court." Kirby *v.* Coles, 15 N. J. L. 441.

Where an administrator's account consists in part of a schedule, showing a large number of items, of rents

b. *Lapse of Time.* — Where interested parties have negligently failed to call the representative to account for a long period of time, inferences unfavorable to them will be drawn from their delay.[65]

c. *Claimant's Affidavit.* — The *ex parte* affidavit attached to a claim which has been paid is not sufficient to entitle the personal representative to credit for its payment when the necessity therefor is contested.[66]

8. Management of Estate. — A. MALADMINISTRATION. — a. *Burden of Proof.* — The burden of proving maladministration is upon the complaining party,[67] both on a charge of negligent management[68]

collected and disbursements made, which latter have the appearance of being necessary and legitimate, and the opposition thereto is couched in general terms, general testimony as to the correctness of such items is sufficient. Succession of Conery, 106 La. Ann. 50, 30 So. 294.

The *ex parte* affidavit of the executor attached to his account is insufficient evidence to support a judgment homologating such account. Succession of Le Sage, 112 La., 36 So. 757.

65. Donaldson's Ex'rs *v.* Raborg, 28 Md. 34; Terrell *v.* Rowland, 86 Ky. 67, 4 S. W. 825; Fitzgerald *v.* Jones, 1 Munf. (Va.) 150; Wright *v.* Wright, 2 McCord Eq. (S. C.) 185.

In a Suit Brought More Than Sixteen Years after the approval of the administrator's account, against the surviving administrator, the heirs of a deceased administrator, and the heirs of the securities on his bond, on the ground of maladministration, it was held that although the record might show some irregularities the complainant should be required to make a strong case to overcome the presumption of regularity arising from the long delay. The court says: "Although we may suspect that this administration was not, in all respects, correct, yet we cannot, in any case, make decrees on mere suspicion or conjecture; and, certainly, before we can hold parties who are themselves innocent liable for the alleged delinquencies of their ancestors, at the suit of persons who have quietly reposed for nearly a score of years upon the wrongs they claim to have suffered, the probate records disclosing, during all that period, the state of the administrator's accounts, we must require proof sufficient to take us from the region of doubt into the 'daylight' of established fact. The law favors the vigilant, and whatever presumptions we indulge must be in behalf of the regularity of transactions of so old a date, and not of persons who have acquiesced in these transactions for a period long enough to have raised an absolute bar, in a court of law, to an action upon a bond or judgment for the payment of money." People *v.* Lott, 36 Ill. 447.

After the Lapse of Thirty Years, during which the distributees have taken no steps to require an accounting, it was held that payment of their claims would be presumed, although the presumption would not be conclusive. Hubley's App., 19 Pa. St. 138.

But where on his accounting the administrator claimed for the first time to have suffered a loss of estate assets accidentally by fire twelve years previous, it was held that the burden was upon him to establish this defense "if not beyond a reasonable doubt, at least clearly and satisfactorily and with convincing certainty." Montgomery *v.* Coldwell, 14 Lea (Tenn.) 29.

66. Pearson *v.* Darrington, 32 Ala. 227; Clark *v.* Guard, 73 Ala. 456; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Jackson *v.* Wood, 108 Ala. 209, 19 So. 312.

67. Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915. See Seighman *v.* Marshall, 17 Md. 550.

68. *In re* Wagner, 40 Misc. 490, 82 N. Y. Supp. 797.

Depreciation of Securities. — The burden of proof rests upon the party alleging that a depreciation in mort-

and of a failure to take possession and control of estate assets.[69] Owing, however, to the presumption attaching to the inventory and appraisement the executor or administrator must explain his failure to secure the appraised valuation on a sale of the property.[70]

b. *Nature of Evidence.* — On such an issue it is proper to show any relevant facts or circumstances tending to prove or disprove the alleged misconduct,[71] or bearing upon the value of the property.[72]

B. COMPROMISE. — Even where a compromise of debts due the estate made without an order of court can be subsequently approved, its necessity must be clearly established by the accounting party.[73]

gage securities was due to a lack of care and prudence on the part of the executor. *In re* Butler's Estate, 9 N. Y. Supp. 641.

But where it appears that notes and securities taken by the administrator in payment for property of the estate are worthless by reason of the insolvency of the principals and sureties, the administrator is *prima facie* guilty of a *devastavit*. Curry *v.* People, 54 Ill. 263.

Confederate Money Taken in Payment for debts due the estate. Administrator must show clearly and satisfactorily the facts and circumstances under which such money was received. Brandon *v.* Rowe, 58 Ga. 536.

69. Wheeler *v.* Bolton, 92 Cal. 159, 28 Pac. 558.

70. Warren *v.* Hendricks, 40 Or. 138, 66 Pac. 607; Wood *v.* Rusco, 4 Redf. (N. Y. Sur.) 380; Stewart *v.* Richardson, 32 Miss. 313.

71. **The Pecuniary Condition** of the representative at the time of entering upon his duties and subsequent thereto, may be competent in an action against him for mismanaging the estate, as tending to show an appropriation by him of the proceeds thereof. Smith *v.* Griffin, 32 Ga. 81.

Safety of Bank. — Where the executor is charged with negligently depositing the funds of the estate in an unsafe bank, he may testify that when he made the deposit he believed the bank was solvent and that he handled the trust funds as carefully as his own. Harding *v.* Canfield, 73 Minn. 244, 75 N. W. 1112.

Stolen Property. — Safety of Place of Deposit. — A personal representative who claims credit for funds which have been stolen from him, in proof that he was not negligent may offer the testimony of himself or other witnesses that the place where he kept the money was as safe as any other part of the county. Greenwell *v.* Crow, 73 Mo. 638.

The Failure to Make Complaint of the acts of an administrator for many years after his death is a strong circumstance against the complaining parties. People *v.* Lott, 36 Ill. 447. See also McNulty *v.* De Saussure (S. C.), 19 S. E. 926.

72. **The Opinion** of competent witnesses may be taken as to the reasonable value of property sold by the personal representative for which the distributees seek to surcharge his account. Semple's Estate, 189 Pa. St. 385, 42 Atl. 28.

Subsequent Value of Land Not Admissible. — Wheeler *v.* Bolton, 92 Cal. 159, 28 Pac. 558. See fully, however, article "VALUE."

73. Wyman's App., 13 N. H. 18; Fridge *v.* Buhler, 6 La. Ann. 272; Jeffries *v.* Mutual Insurance Co., 110 U. S. 305; Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766.

The Executor's Testimony, in the absence of evidence of the facts and circumstances attending the transaction, that it was the best settlement that could be effected at that time, and was made on the advice of his attorney, is insufficient to establish the necessity or propriety. *In re* Quinn's Estate, 30 N. Y. St. 210, 9 N. Y. Supp. 550.

When Sanctioned by Will. Where by the terms of the will the executors were given power to compromise debts due the deceased upon terms which in their judgment might be best for the interests of the estate, the mere showing that certain debts

But where such a compromise is made by virtue of a statute allowing it, after securing the approval of the court, the burden of proof is upon the party seeking to impeach it.[74]

C. Interest and Profits. — a. *Generally.* — The executor or administrator must explain his failure to invest funds retained by him beyond a reasonable time,[75] otherwise he will be charged with interest. There being no presumption, however, that he has made any profit from the use of estate funds or property, the burden is upon the complaining party to show alleged profits exceeding the interest allowed in such cases.[76]

b. *Retention of Funds for Emergency.* — Where a personal representative retains funds of the estate in his hands to meet certain emergencies, such as contested claims, the burden is upon him to show the necessity for such retention, and that he has made no personal use of the funds so retained,[77] unless they were retained with the approval of the court.[78]

9. Inventory and Appraisement. — A. Generally. — In matters connected with the administration of the estate the inventory[79]

were compromised in good faith is not sufficient proof that they were for the best interests of the estate, the burden being, even under such a provision in the will, upon the executor to show that the compromise was justified by the circumstances. McNulty *v.* De Saussure (S. C.), 19 S. E. 926.

74. Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766.

75. *In re* Munzor's Estate, 4 Misc. 374, 25 N. Y. Supp. 818; Lent. *v.* Howard, 89 N. Y. 169; Peyton *v.* Smith, 22 N. C. 325; Clark *v.* Knox, 70 Ala. 607. See fully article "Trusts and Trustees."

A Parol Agreement Between the Testator and His Executor that the latter might retain funds of the estate in his hands without investing them, is admissible in evidence on his accounting, but not an agreement that the executor should be entitled to any profit he might make out of the use of such funds. Chestnut *v.* Strong, 2 Hill Eq. (S. C.) 146.

There Is No Presumption, for the purpose of charging the executor interest, that debts due the estate were paid to him when due. Cavendish *v.* Fleming, 3 Munf. (Va.) 198.

76. *In re* Suess, 37 Misc. 459, 75 N. Y. Supp. 938; *In re* Munzor's Estate, 4 Misc. 374, 25 N. Y. Supp. 818; Chestnut *v.* Strong, 2 Hill Eq. (S. C.) 146. See Clark *v.* Knox, 70 Ala. 607.

77. Burnside *v.* Robertson, 28 S. C. 583, 6 S. E. 843; Doster *v.* Arnold, 60 Ga. 316; McCaw *v.* Blewett, Bail. Eq. (S. C.) 98; Morris *v.* Morris, 9 Heisk. (Tenn.) 814.

78. Mickle *v.* Cross, 10 Md. 352.

79. *Alabama.* — Dickie *v.* Dickie, 80 Ala. 57.

California. — Wheeler *v.* Bolton, 92 Cal. 159, 28 Pac. 558.

Mississippi. — McWillie *v.* Van Vacter, 35 Miss. 428.

New York. — Montgomery *v.* Dunning, 2 Brad. 220; *In re* Hodgman's Estate, 31 N. Y. St. 479, 10 N. Y. Supp. 491; *In re* Roger's Estate, 153 N. Y. 316, 47 N. E. 589.

South Carolina. — Wright *v.* Wright, 2 McCord. Eq. 443.

Texas. — Devine *v.* United States Mtg. Co. (Tex. Civ. App.), 48 S. W. 585.

West Virginia. — Van Winkle *v.* Blackford (W. Va.), 46 S. E. 589.

On a Plea of Plene Administravit the inventory is *prima facie* evidence of assets without further proof that the debts of the estate have been paid, and that assets remain in the hands of the representative. Fitch *v.* Randall, 163 Mass. 381, 40 N. E. 182.

Against Successor. — The inventory of a preceding personal representative is not even presump-

filed by the personal representative when he enters upon his trust, together with the appraisement,[80] is *prima facie* evidence of the amount and value of the estate coming into his hands, both in favor of[81] and against[82] such representative and his sureties.[83] Such

tive evidence against his successor. Solomons *v.* Kursheedt, 3 Dem. (N. Y. Sur.) 307. See also Grant *v.* Reese, 94 N. C. 720, and article "ADMISSIONS"—*By Former Representative*, Vol. I, p. 571.

Where the inventory of an administrator contained an entry of a note "not come to hand," but "supposed to be among the papers" of deceased's estate, which entry had been erased apparently before the inventory was completed, it was held that this was not sufficient evidence to charge the administrator with such note on his accounting, in the absence of any other evidence that it ever came into his hands, or was a subsisting debt in favor of the estate at the time he was qualified. Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617.

Property Not Specifically Described. — On the question of the value of a tract of land not specifically described or valued in the inventory, although forming part of an entire tract therein described and valued, such inventory is not even *prima facie* evidence. Wheeler *v.* Bolton, 92 Cal. 159, 28 Pac. 558.

80. *Alabama.* — Steele *v.* Knox, 10 Ala. 608; Craig *v.* McGehee, 16 Ala. 41.

Maine. — Williams *v.* Esty, 36 Me. 243.

Mississippi. — McWillie *v.* Van Vacter, 35 Miss. 428.

New York. — *In re* Maack's Estate, 13 Misc. 368, 35 N. Y. Supp. 109.

Oregon. — Warren *v.* Hendricks, 40 Or. 138, 66 Pac. 607.

Pennsylvania. — Appeal of Stewart, 110 Pa. St. 410; Semple's Estate, 189 Pa. St. 385, 42 Atl. 28.

Not Evidence Against Distributees. — An appraisement made by appraisers appointed by the personal representative is not evidence against the distributees, and is only *prima facie* evidence against the representative himself by virtue of the statute. Moffit *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

Action for Legacy. — In an action against an executor to recover the amount of a legacy, the inventory filed by him showing a sufficient amount of assets makes a *prima facie* case without further proof that the debts of the estate were all paid, and that assets remained in the hands of the executors, especially where the legacy is a very small one as compared with the amount of the inventory. Fitch *v.* Randall, 163 Mass. 381, 40 N. E. 182.

An Appraisement Made by Commissioners appointed by the court for this purpose is not evidence against the administrator, unless he connects himself with it in some way, as by adopting it in the petition for sale of personal property, in which case it becomes *prima facie* evidence against himself and his sureties of the assets of the estate. Glover *v.* Hill, 85 Ala. 41.

Not Signed by Representative. An appraisement returned to and approved by the proper court, although not signed by the personal representative, is *prima facie* evidence of the amount of the estate against him. Carrol *v.* Connet, 25 Ky. 195; Rogers *v.* Chandler, 3 Munf. (Va.) 65. But when unsigned and not shown to have been approved by the court and admitted to record, it is not competent evidence. Carr *v.* Anderson, 2 Hen. & M. (Va.) 361.

81. *In re* Shipman's Estate, 64 N. Y. St. 161, 31 N. Y. Supp. 571.

In an action against an administrator on a promissory note, executed by his intestate, in proof of a lack of consideration it was held no error to allow the administrator to read from his own inventory showing what assets he had been able to discover at the death of the decedent. Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14.

82. *In re* Jones, 25 Ga. 414; Hooper *v.* Hooper's Ex'rs, 29 W. Va. 276, 1 S. E. 280. See cases in note 79, *supra*.

83. Williams *v.* Esty, 36 Me. 243;

inventory presumptively contains all the property belonging to the estate.[84]

But in Actions Not Connected With the Administration of the estate the appraisement is not competent evidence of the value of the property enumerated therein.[85] The inventory, however, may be introduced in actions between third persons to show notice of the financial condition of the estate.[86]

B. An Inventory Filed Subsequent to the Commencement of the Action is not evidence in favor of the party making it because a self-serving declaration.[87]

C. Conclusiveness. — Neither the inventory[88] nor the appraisement,[89] however, is conclusive upon any person, and in actions by and against an executor or administrator it is competent to show

Wiemann *v.* Mainegra, 112 La., 36 So. 358.

84. *In re* Arkenburgh's Estate, 58 App. Div. 583, 69 N. Y. Supp. 125; *In re* Mullon's Estate, 74 Hun 358, 26 N. Y. Supp. 683, *affirmed* in 145 N. Y. 98, 39 N. E. 821; Forbes *v.* Halsey, 26 N. Y. 53; Reed *v.* Gilbert, 32 Me. 519.

85. Morrison *v.* Burlington, C. R. & N. R. Co., 84 Iowa 663, 51 N. W. 75, which was an action by the administrator against a railroad company for the negligent killing of stock belonging to the estate. The appraisement of such stock was held not competent evidence of their value in favor of the defendant.

86. Actions Between Third Persons. — In an action against the administrator of a creditor of an estate for failing to collect the debt the inventory filed by the representative of the debtor's estate is competent evidence as tending to show the defendant's means of information concerning the debtor's estate and his negligence in failing to avail himself of it. Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261.

87. Inventory Filed After Petition for Account. — The inventory of uncollectible claims, not filed until after a petition for a final settlement had been presented to the court, is not evidence in favor of the accounting party. Stone *v.* Morgan, 65 Miss. 247, 3 So. 580. But see Allender *v.* Riston, 2 Gill & J. (Md.) 86.

88. *Alabama.* — McDonald *v.* Jacobs, 77 Ala. 524.

California. — Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492.

Georgia. — Fulcher *v.* Mandell, 83 Ga. 715, 10 S. E. 582.

Louisiana. — Succession of Pipkin, 7 La. Ann. 617; Martin *v.* Boler, 13 La. Ann. 369.

Michigan. — Porter *v.* Long, 124 Mich. 584, 83 N. W. 601; Hilton *v.* Briggs, 54 Mich. 265, 20 N. W. 47.

Nevada. — McNab *v.* Wixom, 7 Nev. 163.

New York. — Willoughby *v.* McCleur, 2 Wend. 608; Place *v.* Hayward, 117 N. Y. 487, 23 N. E. 25.

North Carolina. — Hoover *v.* Miller, 51 N. C. 79; Grant *v.* Reese, 94 N. C. 720.

Tennessee. — Sanders *v.* Forgassen, 3 Baxt. 249.

Texas. — Haby *v.* Fuos (Tex. Civ. App.), 25 S. W. 1121.

West Virginia. — Kyles *v.* Kyle, 25 W. Va. 376.

Wisconsin. — Cameron *v.* Cameron, 15 Wis. 1.

The inventory does not estop the personal representative from claiming property therein contained as a gift from the deceased. Teal *v.* Sevier, 26 Tex. 516.

The fact that a husband, as executor of his wife's estate, has inventoried certain bank deposits as assets of her estate, will not prevent him or his personal representative from showing that such deposits belonged in fact to himself or to his estate. Dodge *v.* Lunt, 181 Mass. 320, 63 N. E. 891.

89. Weed *v.* Lermond, 33 Me. 492; Reese's Appeal, 116 Pa. St. 272, 9 Atl. 315; Succession of Dean, 33 La. Ann. 867.

that property belonging to the estate was improperly or inadvertently omitted therefrom; or that property therein contained was overvalued or undervalued, or was not the property of the deceased. Where, however, the representative himself attempts to prove a mistake in his own inventory for the purpose of exonerating himself from liabilities thereby imposed upon him, he must make a clear showing;[90] and he will not be permitted to show that he fraudulently omitted estate assets from his inventory.[91] But the fact that property was included therein by the representative when he knew that it did not belong to the estate will not of itself estop him from afterward showing that it was his own.[92]

10. Settlements. — A. Partial or Annual Settlements. — The value as evidence of partial or annual settlements or accounts of a personal representative depends somewhat upon the force and effect

Failure to Keep Account. — Life Tenancy. — Where an executrix who is a life tenant fails to keep an account of the proceeds of a sale of the property the inventory will be taken as conclusive evidence of its value, as against her. Hunt *v.* Smith, 58 N. J. Eq. 25, 43 Atl. 428.

90. Thorne *v.* Underhill, 1 Dem. (N. Y. Sur.) 306; Mesick *v.* Mesick, 7 Barb. (N. Y.) 120; Tichenor *v.* Tichenor, 45 N. J. Eq. 303, 17 Atl. 631; Lloyd *v.* Lloyd, 1 Redf. (N. Y. Sur.) 399; Middleton *v.* Carroll, 27 Ky. 144; McGinity *v.* McGinity, 19 R. I. 510, 34 Atl. 1114; Snodgrass *v.* Snodgrass, 1 Baxt. (Tenn.) 157.

In Stewart's Estate, 137 Pa. St. 175, 20 Atl. 554, the court said: "The inventory is *prima facie* evidence of the extent and value of the estate which has come to the administrator's hands, but he may still show that through inadvertence, ignorance, or mistake, property has been put into it which did not in fact belong there. This may well apply not only where property has been inventoried which is found to belong to a third party, but also where by mistake or inadvertence the administrator has inventoried that which belongs to himself. Of necessity, however, in the latter case a much more stringent rule of proof must be observed than in the former. It is so extraordinary a suggestion for the administrator to lay claim as his own to that which apparently he has voluntarily inventoried as part of the estate, that he can only be allowed to prevail in such claims upon the clearest and most satisfactory evidence."

Where the representative inventoried a certain sum of money as in his possession and belonging to the estate, the testimony of his executor that the entry was not in fact true, but was made upon his suggestion and advice, because such representative was morally, though not legally, liable to account for that sum, is not sufficient to overcome the recital in the inventory. Reiter *v.* Rothschild (Cal.), 33 Pac. 849.

Where the inventory of the executors contained an item consisting of money collected on a debt due the decedent, it was held that the subsequent denial by the executors that they collected any such amount, coupled with the facts that the debtor was at the time insolvent, and the executors during the course of a long and complicated administration of the estate had shown themselves to be prompt, faithful and fair at all times to the beneficiaries of the estate, was sufficient to sustain their contention that the entry was an error. Ashbrook *v.* Ashbrook, 16 Ky. L. Rep. 593, 28 S. W. 660.

91. Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505; Wattles *v.* Hyde, 9 Conn. 10.

92. In Little *v.* Birdwell, 21 Tex. 597, it was held that the widow and executrix was not estopped to show that property contained in the inventory was in reality her separate estate, although it appeared that she knew the facts respecting the title when she made the inventory. See also Haley

given them by the statute. Generally, however, they are regarded as *prima facie* but not conclusive evidence[93] of the correctness of all items therein contained. The fact that they were *ex parte* does not

v. Gatewood, 74 Tex. 281, 12 S. W. 25; Stewart's Estate, 137 Pa. St. 175, 20 Atl. 554.

93. *United States.* — Pulliam *v.* Pulliam, 10 Fed. 53.

Alabama. — Smith's Heirs *v.* Smith's Administrator, 13 Ala. 329; Dickie *v.* Dickie, 80 Ala. 57; Duke's Administrator *v.* Duke's Distributees, 26 Ala. 673.

California. — Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064.

Georgia. — Crawford *v.* Clark, 110 Ga. 729, 36 S. E. 404.

Illinois. — Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628; Bliss *v.* Seaman, 165 Ill. 422, 46 N. E. 279.

Indiana. — Goodwin *v.* Goodwin, 48 Ind. 584; State *v.* Wilson, 51 Ind. 96; Glessner *v.* Clark, 140 Ind. 427, 39 N. E. 544.

Iowa. — *In re* Heath's Estate, 58 Iowa 36, 11 N. W. 723.

Louisiana. — Succession of Caballero, 25 La. Ann. 646.

Maryland. — Gist's Adm'rs *v.* Cockey, 7 Har. & J. 134; Sewell *v.* Slingluff, 62 Md. 592; Scott *v.* Fox, 14 Md. 388; Seighman *v.* Marshall, 17 Md. 550.

Massachusetts. — Blake *v.* Pegram, 109 Mass. 541.

Michigan. — Cheever *v.* Ellis (Mich.), 96 N. W. 1067.

Mississippi. — Dement *v.* Heath, 45 Miss. 388.

Missouri. — Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617; North *v.* Priest, 81 Mo. 561; West *v.* West's Administrators, 75 Mo. 204; Seymour *v.* Seymour, 67 Mo. 303; Ritchey *v.* Withers, 72 Mo. 556; Clarke *v.* Sinks, 144 Mo. 448, 46 S. W. 199; Ansley *v.* Richardson, 95 Mo. App. 332, 68 S. W. 609.

Nebraska. — Bachelor *v.* Schmela, 49 Neb. 37, 68 N. W. 378.

New Jersey. — Jackson *v.* Reynolds, 39 N. J. Eq. 313.

North Carolina. — Bean *v.* Bean (N. C.), 47 S. E. 232.

South Carolina. — Wright *v.* Wright, 2 McCord Eq. 443; Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917.

Texas. — Thomas *v.* Hawpe (Tex. Civ. App.), 80 S. W. 129; Ingraham *v.* Rodgers, 2 Tex. 465.

Vouchers Presumed in Support of Partial Settlement. — On a final settlement it will be presumed, in the absence of contrary evidence, that the items allowed in the previous *ex parte* settlement were properly supported with vouchers. M'Call *v.* Peachy, 3 Munf. (Va.) 288; Campbell's Adm'r *v.* White, 14 W. Va. 122.

In Favor of Remainder-Man or Executory Legatee. — The annual account which has been approved is *prima facie* evidence in favor of a remainder-man or executory legatee of payment by the executor of a money bequest to the life tenant in a suit against the personal representative of the latter by such remainder-man or executory legatee. Crawford *v.* Clark, 110 Ga. 729, 36 S. E. 404.

Circumstances Affecting Evidentiary Value. — In determining the evidentiary value of the settlements made by a personal representative the regularity of the accounts, the death of witnesses, loss of vouchers and lapse of time are circumstances which must be taken into consideration. Wright *v.* Wright, 2 McCord. Eq. (S. C.) 443.

The court will judicially notice any illegal or exaggerated charges appearing on the face of the preliminary account and correct them on the final accounting. Curatorship of Beecroft, 28 La. Ann. 824.

Claim Apparently Barred by Statute of Limitations. — Where the payment by the personal representative of a claim against the estate has been approved by the court, the burden is upon the party seeking to set aside such an allowance on the ground that the claim was barred by the statute of limitations, to show not only that it appeared on its face to have been barred, but also that no fact existed which would have suspended the statute during the time of its apparent operation; Howard *v.* Johnson, 69 Tex. 655, 7 S. W. 522.

render them incompetent in favor of the accounting party;[94] although the contrary has been held.[95] However, such an *ex parte* settlement is not evidence in favor of the representative of the validity of his private claim against the estate not growing out of the proper administration thereof;[96] nor is it evidence against the heirs or devisees of the validity of a claim paid by the representative from his own funds because of the exhaustion of the personal assets.[97] In some jurisdictions partial accountings are conclusive in the absence of fraud upon all parties thereto as to all matters therein adjudicated.[98]

B. Final Settlement. — The final settlement or accounting of a personal representative is conclusive upon all interested persons who

By clear and convincing evidence; Hillebrant *v.* Burton, 17 Tex. 138; Henderson *v.* Ayres, 23 Tex. 96. See *supra*, "Statute of Limitations."

When Inadequate on Its Face. While the returns made by an executor on an accounting are *prima facie* evidence in his favor, where the record shows that they were made contrary to law and that they are totally inadequate considering the property which came into his hands, they are not only not *prima facie* evidence for him, but are to be taken strongly against him. Smith *v.* Griffin, 32 Ga. 81.

In Another Court of Concurrent Jurisdiction. — Where a suit for an accounting against an administrator is pending in a court of equity, having concurrent jurisdiction with the probate court over the administration of estates of deceased persons, the annual accounts approved by the probate court subsequent to the commencement of such suit are not *prima facie* evidence in the equity court. Sanderson's Adm'r *v.* Sanderson, 17 Fla. 820.

94. *Illinois.* — Goeppner *v.* Leitzelmann, 98 Ill. 409.

Kentucky. — Scott *v.* Kennedy, 12 B. Mon. 510; Saunders' Heirs *v.* Saunders' Executors, 2 Litt. 314; Wooldridge *v.* Watkins, 3 Bibb 349.

North Carolina. — Grant *v.* Hughes, 94 N. C. 231.

Tennessee. — Turney *v.* Williams, 7 Yerg. 172.

Virginia. — Newton *v.* Poole, 12 Leigh 112; Shearman *v.* Christian, 9 Leigh 571; Atwell's Adm'r *v.* Milton, 4 Hen. & M. 253; Nimmo's Ex'r *v.* Com., 1 Hen. & M. 470.

West Virginia. — Dearing *v.* Selvey, 50 W. Va. 4, 40 S. E. 478; Seabright *v.* Seabright, 28 W. Va. 412.

95. Willis *v.* Willis' Distributees, 16 Ala. 652; McCreelis' Distributees *v.* Hinkle, 17 Ala. 459; Pearson *v.* Darrington, 32 Ala. 227; Lehn *v.* Lehn, 9 Serg. & R. 57.

96. "Under such circumstances the executor stands in the position that he would if the settlement had not been made, and must establish his demand by proper proof. A contrary principle would place heirs and devisees at the mercy of executors and administrators." Scott *v.* Porter, 99 Va. 553, 39 S. E. 220.

97. In Leavell *v.* Smith's Executors, 99 Va. 374, 38 S. E. 202, the court says, quoting from Gist's Administrator *v.* Cockey, 7 Har. & J. (Md.) 134: "If, after exhausting the personal assets, an executor or administrator does pay debts of the deceased out of his own funds, he has a right only to be substituted in the place of the creditors whose debts he pays, and must establish his claim by the same kind of testimony which would be demanded of them."

98. Estate of Fernandez, 119 Cal. 579, 51 Pac. 851; Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376; Appeals of Fross & Loomis, 105 Pa. St. 285; Shindel's Appeal, 57 Pa. St. 43. See also Duke *v.* Duke, 26 Ala. 673; McFarlane *v.* Randle, 41 Miss. 411; Effinger *v.* Richards, 35 Miss. 540; Stone *v.* Morgan, 65 Miss. 247, 3 So. 580.

Claims Disallowed Because Insufficiently Proved. — An annual accounting is not conclusive on the executor or administrator as to claims

have been made parties[99] thereto, and their privies, as to all matters therein embraced.[1] In the absence of statute[2] such settlements, however, are governed by the same rule as other judgments;[3] hence they are not conclusive as to matters not directly in issue,[4] and may be

which were disallowed because unsupported by proper vouchers or proof. Walls *v.* Walker, 37 Cal. 424.

99. Not Competent Evidence against a person who was not properly made a party to the accounting. Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228.

A Final Settlement, Made Without Notice to certain interested parties, is as to them equivalent only to an annual account, and therefore but *prima facie* and not conclusive evidence. Crawford *v.* Redus, 54 Miss. 700; Sumrall *v.* Sumrall, 24 Miss. 256; Winborn *v.* King, 35 Miss. 157.

Presumption From Lapse of Time. Where the record of a final settlement fails to show that the proper notices were given, or that parties in interest were present, after a lapse of twenty years these necessary facts will be presumed. Barnett *v.* Tarrence, 23 Ala. 463.

The Recitals in a decree settling the final account of a personal representative of notice to all interested parties is *prima facie* evidence of the fact stated, but may be rebutted by other portions of the record inconsistent therewith. Dogan *v.* Brown, 44 Miss. 235; Monk *v.* Horn, 39 Miss. 103; Commercial Bank *v.* Martin, 9 Smed. & M. (Miss.) 613.

1. *Alabama.* — Waller *v.* Gray, 48 Ala. 468.

Arkansas. — Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Edrington *v.* Jefferson (Ark.), 14 S. W. 99.

California. — Estate of Marshall, 118 Cal. 379, 50 Pac. 540; Tobelman *v.* Hildebrandt, 72 Cal. 313, 14 Pac. 20; Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064.

Connecticut. — Sellew's App., 36 Conn. 186.

Georgia. — Tate *v.* Gairdner (Ga.), 46 S. E. 73.

Illinois. — People *v.* Lott, 36 Ill. 447; Stone *v.* Wood, 16 Ill. 179; Sherman *v.* Whiteside, 190 Ill. 576, 60 N. E. 870.

Indiana. — Carver *v.* Lewis, 104 Ind. 438, 2 N. E. 705.

Massachusetts. — Saxton *v.* Chamberlain, 6 Pick. 422; Field *v.* Hitchcock, 14 Pick. 405.

Missouri. — State *v.* Martin, 18 Mo. App. 468; Picot *v.* Bates, 47 Mo. 390; Sheetz *v.* Kirtley, 62 Mo. 417.

Nebraska. — Bachelor *v.* Schmela, 49 Neb. 37, 68 N. W. 378.

New York. — Matter of the Accounting of Tilden, 98 N. Y. 434.

Ohio. — McAfee *v.* Phillips, 25 Ohio St. 374; Watts *v.* Watts, 38 Ohio St. 480.

South Carolina. — McCaw *v.* Blewitt, Bailey Eq. 98.

Texas. — Herbert *v.* Herbert (Tex. Civ. App.), 59 S. W. 594; Sabrinos *v.* Chamberlain, 76 Tex. 624, 13 S. W. 634.

Wisconsin. — Wallber *v.* Wilmanns, 116 Wis. 246, 93 N. W. 47.

Where the amount found due from an executor on his final account is stated in dollars and cents, it is not competent for him to show that the money collected was in depreciated currency, there being a conclusive presumption of a debt in constitutional currency. McFarlane *v.* Randle, 41 Miss. 411; Bailey *v.* Dilworth, 10 Smed. & M. (Miss.) 404, 48 Am. Dec. 760.

2. By Statute. — Prima Facie Evidence Only. — Cross *v.* Baskett, 17 Or. 84, 21 Pac. 47.

3. See article "FORMER ADJUDICATION."

4. Dunham *v.* Williams, 32 La. Ann. 962; Sellew's App., 36 Conn. 186; Hartsell *v.* People, 21 Colo. 296, 40 Pac. 567; Sherman *v.* Chace, 9 R. I. 166.

A judgment rendered on an accounting by a representative is not conclusive as to the fact that no other assets were chargeable to him, or that no other debts are collectible than those mentioned in the accounting. President etc. of Bank of Poughkeepsie *v.* Hasbrouck, 6 N. Y. 216; Brown *v.* Brown, 53 Barb. (N. Y.) 217.

impeached for fraud[5] to the same extent and in the same manner as other similar judgments.

C. Settlement With Infant Distributee. — An extrajudicial settlement by an executor or administrator with an infant distributee, while not legally binding upon the latter, is competent evidence for the purpose of determining the amount due him upon an accounting.[6]

D. Delay in Settlement. — Where a settlement of the estate has not been made within the statutory time, the burden is upon the administrator to show facts justifying the delay.[7] But in the absence of statute or of anything in the record to explain a delay in the distribution of the estate, the burden of showing its unreasonableness is upon the complaining parties.[8]

E. Reopening Settlement. — The burden of proof is upon the party seeking to reopen and falsify or surcharge a final account for fraud,[9] and he must make a very clear showing to justify such action by the court.[10]

11. Compensation. — The compensation of an executor or administrator depends upon the provisions of the will and the statutes. Evidence as to the value of the estate,[11] and other circumstances affecting the nature and extent of the services,[12] may be competent. The amount of the allowance, when not otherwise fixed, is a matter resting largely in the discretion of the court.[13] There should, how-

Parol Evidence is admissible to show that certain matters, as to which the record is silent, were not passed upon. Nelson *v.* Barnett, 123 Mo. 564, 27 S. W. 520; Sweet *v.* Maupin, 65 Mo. 65.

5. Sherman *v.* Whiteside, 190 Ill. 576, 60 N. E. 870; Saxton *v.* Chamberlain, 6 Pick. (Mass.) 422; Watts *v.* Watts, 38 Ohio St. 480; Edrington *v.* Jefferson, 53 Ark. 545, 14 S. W. 99, 903; Griffith *v.* Godey, 113 U. S. 89.

An Accounting in the Orphans' Court should not be set aside or disturbed by a court of equity, except upon clear and unequivocal evidence of guilty knowledge, fraud or collusion on the part of the executor. Garrison *v.* Hill, 81 Md. 206, 31 Atl. 794.

6. Settlement With Infant Distributee. — After the administrator's death, and the lapse of many years, the fact of settlement, the complaining distributee's contemporaneous declaration and his subsequent admissions, are entitled to consideration and weight in determining the amount still due him from the estate or the administrator's sureties. Glover *v.* Hill, 85 Ala. 41, 4 So. 613.

7. Haskins *v.* Martin, 103 Ill. App 115; Clark *v.* Knox, 70 Ala. 607.

8. Walls *v.* Walker, 37 Cal. 424.

9. Terrill *v.* Rowland, 86 Ky. 67, 4 S. W. 825; Raison *v.* Williams, 19 Ky. L. Rep. 1142, 42 S. W. 1108; Shorter *v.* Hargroves, 1 Ga. 658; Walker *v.* Wooten, 18 Ga. 119; Stone *v.* Stillwell, 23 Ark. 444; Moore *v.* Felkel, 7 Fla. 44; Martin *v.* Jones, 86 Md. 43, 37 Atl. 102.

When the Executor is Also Guardian of the infant distributee the burden is upon him to show the fairness of his account, but is upon the petitioner to surcharge the same. Moore *v.* Felkel, 7 Fla. 44.

10. Soutter *v.* Porter, 105 N. Y. 514, 12 N. E. 34; Phillips *v.* Broughton, 30 Mo. App. 148; Johnson *v.* Eicke, 12 N. J. L. 316.

11. Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701.

12. Opinions of Witnesses as to what would be a fair and reasonable compensation are inadmissible. But any evidence as to the nature and extent of the services rendered is competent. Kenan *v.* Graham, 135 Ala. 585, 33 So. 699.

13. Kenan *v.* Graham, 135 Ala. 585, 33 So. 699.

ever, be some proof of the actual performance of the services and the necessity therefor.[14]

The Inventory and Appraisement are only *prima facie* evidence of the amount and value of the estate for the purpose of determining the commission of the administrator or executor.[15]

VI. CLOSE OF ADMINISTRATION.

1. Generally. — The best evidence of the close of an administration and a distribution of the assets is the record of the probate court.[16] But in the absence of such evidence it may be proved by parol.[17]

2. Presumption From Lapse of Time. — A settlement and distribution of the estate is presumed in favor of the executor or administrator after the lapse of sufficient time in analogy with the statute of limitations.[18]

VII. ASSENT TO LEGACY OR DEVISE.

1. Generally. — The assent of an executor or administrator to a legacy or devise need not be established by direct evidence, but may be inferred from his conduct and declarations, and the accompanying circumstances.[19]

2. Acquiescence in Possession of Legatee or Devisee. — The personal representative's assent to a legacy or devise may be presumed

14. James *v.* Craighead (Tex. Civ. App.), 69 S. W. 241.

15. Estate of Fernandez, 119 Cal. 579, 51 Pac. 851; Estate of Simons, 43 Cal. 453; Horton *v.* Barto, 17 Wash. 675, 50 Pac. 587.

16. Williams *v.* Davis, 56 Tex. 250; McKee *v.* McKee, 48 Ga. 332; Hay *v.* Bruere, 6 N. J. L. 212.

17. Cowan *v.* Corbett, 68 Ga. 66.

18. Cox *v.* Brower, 114 N. C. 422, 19 S. E. 365. See also Bass *v.* Bass, 88 Ala. 408, 7 So. 243.

A Settlement and Distribution of the estate will be presumed after the lapse of twenty years, where the interested parties have taken no steps to compel a settlement (Austin *v.* Jordan, 35 Ala. 642), and no disability on their part, as infancy or marriage, will avail to rebut the presumption (McCartney's Adm'r *v.* Bone, 40 Ala. 535); but any recognition or admission by the administrator within this period of the continuance of the trust, such as an annual settlement, overcomes the presumption; or the absence of the administrator of an estate a sufficient length of time during this period. Scruggs *v.* Orme, 46 Ala. 533.

In South Carolina this presumption arises after a lapse of twenty years when the distributee was under no disabilities, but it is not conclusive. Montgomery *v.* Cloud, 27 S. C. 188, 3 S. E. 196; Roberts *v.* Johns, 24 S. C. 580.

Where Fourteen Years Have Elapsed the legal presumption is that the debts have all been paid and the affairs of the estate finally settled. State Bank *v.* Williams, 6 Ark. 156.

After a Lapse of Ten Years there is a legal presumption that the administration was closed. Marks *v.* Hill, 46 Tex. 345.

19. *United States.* — McClanahan *v.* Davis, 8 How. 170.

Connecticut. — Johnson *v.* Connecticut Bank, 21 Conn. 148.

Georgia. — King *v.* Skellie, 79 Ga 147, 3 S. E. 614.

Kentucky. — Simrall's Adm'r *v.*

from his acquiescence in the legatee's or devisee's possession of the thing bequeathed or devised.[20]

VIII. JUDGMENTS.

1. Generally. — The conclusiveness of and the presumptions applicable to the judgments of a probate court depend upon whether such court is one of general or limited jurisdiction. While formerly regarded as courts of limited jurisdiction, they are now, except in a few states,[21] courts of general jurisdiction, and their judgments and decrees are entitled to all the presumptions which pertain to those of any other court of general jurisdiction.[22]

2. Against Personal Representative. — A. GENERALLY. — A judgment against an executor or administrator in his representative capacity is conclusive evidence against all persons claiming title through him. Since the title to estate personalty vests in him, such

Graham, 31 Ky. 574; Pirtle *v.* Cowan, 34 Ky. 302.

North Carolina. — Lewis *v.* Smith, 23 N. C. 145; Rea *v.* Rhodes, 40 N. C. 148; Propst *v.* Roseman, 49 N. C. 130.

Pennsylvania. — Appeal of Page, 71 Pa. St. 402.

South Carolina. — Green *v.* Iredell, 31 S. C. 588, 10 S. E. 545.

Virginia. — Lynch *v.* Thomas, 3 Leigh 682.

20. *United States.* — Schley *v.* Collis, 47 Fed. 250.

Georgia. — Jordan *v.* Thornton, 7 Ga. 517; Parker *v.* Chambers, 24 Ga. 518; Vaughn *v.* Howard, 75 Ga. 285.

Massachusetts. — Andrews *v.* Hunneman, 23 Mass. 125.

Mississippi. — Hall *v.* Hall, 27 Miss. 458.

North Carolina. — White *v.* White, 15 N. C. 257; White *v.* White, 20 N. C. 401; Gums *v.* Capehart, 58 N. C. 242.

Tennessee. — Squires *v.* Old, 7 Humph. 454.

21. Thayer *v.* Winchester, 133 Mass. 447; Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, *s. c.* 9 Pick. 259; People's Sav. Bank *v.* Wilcox, 15 R. I. 258, 3 Atl. 211, 2 Am. St. Rep. 894.

22. *United States.* — Grignon *v.* Astor, 2 How. 319; Cornett *v.* Williams, 20 Wall. 226.

Alabama. — Wyman *v.* Campbell, 6 Port. 219, 244; Knabe *v.* Rive, 106 Ala. 516, 17 So. 666.

Arkansas. — Montgomery *v.* Johnson, 31 Ark. 74; Rogers *v.* Wilson, 13 Ark. 507.

California. — Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; Hahn *v.* Kelly, 34 Cal. 391.

Colorado. — Denver, S. P. & P. R. Co., 4 Colo. 1.

Connecticut. — Dickinson *v.* Hayes, 31 Conn. 417.

Florida. — Epping *v.* Robinson, 21 Fla. 36.

Georgia. — Maybin *v.* Knighton, 67 Ga. 103; Patterson *v.* Lemon, 50 Ga. 231; McDade *v.* Burch, 7 Ga. 559.

Illinois. — Goodbody *v.* Goodbody, 95 Ill. 456; Logan *v.* Williams, 76 Ill. 175; Iverson *v.* Loberg, 26 Ill. 179, 79 Am. Dec. 364.

Indiana. — Dequindre *v.* Williams, 31 Ind. 444.

Iowa. — Read *v.* Howe, 39 Iowa 553; Myers *v.* Davis, 47 Iowa 325; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Kansas. — Higgins *v.* Reed, 48 Kan. 272, 29 Pac. 389.

Kentucky. — Masters *v.* Bienker, 87 Ky. 1, 7 S. W. 158.

Louisiana. — Wisdom *v.* Parker, 31 La. Ann. 52; Sizemore *v.* Wedge, 20 La. Ann. 124.

Maine. — Record *v.* Howard, 58 Me. 225; Bent *v.* Weeks, 44 Me. 45.

Michigan. — Coon *v.* Fry, 6 Mich. 506.

Minnesota. — Curran *v.* Kuby, 37 Minn. 330, 33 N. W. 907; Osman *v.* Traphagan, 23 Minn. 80.

a judgment is conclusive against the creditors of the estate and the legatees in so far as it involves this title.[23] But when a legacy has been assented to by the executor or administrator a subsequent judgment is at most only *prima facie* evidence against the legatee.[24] And as to matters in which there is no privity between the legatee and the personal representative, such as the validity of the legacy, a judgment against the latter is not conclusive against the former.[25] Where the management and control of the estate realty vests in the administrator by statute, a judgment against him involving the title to such land is conclusive upon the heirs;[26] otherwise it is not.[27]

B. On Application for Sale of Realty. — A judgment against an executor or administrator is generally regarded as *prima facie* evidence[28] of a debt in a proceeding to subject the land to the payment

Mississippi. — Ames *v.* Williams, 72 Miss. 760; Jones *v.* Coon, 5 Smed. & M. 751.

Missouri. — Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276.

Nebraska. — Missouri Pac. R. Co. *v.* Bradley, 51 Neb. 596, 71 N. W. 283.

New Jersey. — Clark *v.* Costello, 59 N. J. L. 234, 36 Atl. 271.

New Hampshire. — Gordon *v.* Gordon, 55 N. H. 399; Merrill *v.* Harris, 26 N. H. 142, 57 Am. Dec. 359.

New York. — See O'Connor *v.* Huggins, 113 N. Y. 511, 21 N. E. 184; Wood *v.* McChesney, 40 Barb. 417.

North Carolina. — Overton *v.* Cranford, 52 N. C. 415, 78 Am. Dec. 244.

Ohio. — Shroyer *v.* Richmond, 16 Ohio St. 455.

Pennsylvania. — West *v.* Cochran, 104 Pa. St. 482; McPherson *v.* Cunliff, 11 Serg. & R. 422.

South Carolina. — Turner *v.* Malone, 24 S. C. 398.

South Dakota. — See Matson *v.* Swenson, 5 S. D. 191, 58 N. W. 570.

Tennessee. — State *v.* Anderson, 16 Lea. 321.

Texas. — Martin *v.* Robinson, 67 Tex. 368, 3 S. W. 550; Lynch *v.* Baxter, 4 Tex. 431; Guilford *v.* Love, 49 Tex. 715.

Vermont. — Tryon *v.* Tryon, 16 Vt. 313; Doolittle *v.* Holton, 28 Vt. 819.

Virginia. — Fisher *v.* Bassett, 9 Leigh 119.

Wisconsin. — See Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249.

23. *Georgia.* — Castellaw *v.* Guilmartin, 54 Ga. 299.

Illinois. — Stone *v.* Wood, 16 Ill. 177.

North Carolina. — Redmond *v.* Coffin, 17 N. C. 437.

Pennsylvania. — Wathaur Heirs *v.* Gossar, 32 Pa. St. 259; Sergeant's Heirs *v.* Ewing, 36 Pa. St. 156.

South Carolina. — Fraser *v.* City Council, 19 S. C. 384; Mauldin *v.* Gossett, 15 S. C. 565; Bell *v.* Bell, 25 S. C. 149.

West Virginia. — Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937.

Pickens *v.* Yarborough, 30 Ala. 408, A judgment by one creditor against an administrator is no evidence of the debt as against other creditors where the assets are not sufficient to completely satisfy all the estate debts of the same rank. Overman *v.* Grier, 70 N. C. 693.

24. McMullin *v.* Brown, 2 Hill Eq. (S. C.) 457; Redmond *v.* Coffin, 17 N. C. 437.

25. Redmond *v.* Coffin, 17 N. C. 437; Valsain *v.* Cloutier, 3 La. 170, 22 Am. Dec. 179; Shipman *v.* Rollins, 98 N. Y. 311.

26. Under a statute allowing the administrator to maintain an action for the recovery of any property, real or personal, belonging to the estate, a judgment against him in an action of ejectment is conclusive against the heirs. Cunningham *v.* Ashley, 45 Cal. 485.

27. Gilliland *v.* Caldwell, 1 S. C. 194; and see following notes.

28. *California.* — *In re* Schroeder's Estate, 46 Cal. 304; Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

of estate debts, and in some jurisdictions is conclusive[29] against the heirs or devisees. In other states, however, such a judgment is not even *prima facie* evidence[30] in such a proceeding, or is only competent when the result of a trial upon the merits.[31] When, however, the heirs or devisees have appeared and contested the action,[32] the judgment therein rendered is conclusive upon them.

C. In Action to Set Aside Fraudulent Conveyance. — A judgment against a personal representative is not evidence of a debt as against the deceased's donee or grantee in an action to set aside a conveyance to him as fraudulent.[33] It has been held, however, to the contrary.[34]

D. Against Successor. — A judgment against a succeeding administrator *de bonis non* is not competent evidence to charge his preceding administrator in chief.[35]

E. Admission of Assets. — When an executor sued in his representative capacity permits a default judgment to be taken, or fails

Illinois. — Moline Water-Power & Mfg. Co. *v.* Webster, 26 Ill. 234; Marshall *v.* Rose, 86 Ill. 374; Mason *v.* Bair, 33 Ill. 194; McGarvey *v.* Darnell, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861.

Indiana. — O'Haleran *v.* O'Haleran, 115 Ind. 493, 17 N. E. 917; Scherer *v.* Ingerman, 110 Ind. 428, 11 N. E. 8; Smith *v.* Gorham, 119 Ind. 436, 21 N. E. 1096.

Iowa. — Willett *v.* Malli, 65 Iowa 675, 22 N. W. 922.

Kentucky. — Hopkins *v.* Stout, 6 Bush 375; Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210.

New Hampshire. — Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

Pennsylvania. — Steele *v.* Lineberger, 59 Pa. St. 308; Paul *v.* Grimm, 183 Pa. St. 330, 38 Atl. 1017.

Tennessee. — Woodfin *v.* Anderson, 2 Tenn. Ch. 531.

Wisconsin. — Hoffman *v.* Wheelock, 62 Wis. 434, 22 N. W. 713, 716.

29. Speer *v.* James, 94 N. C. 417; Long *v.* Oxford, 108 N. C. 280, 13 S. E. 112; Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604. But see Fenix *v.* Fenix, 80 Mo. 27. See also Tate *v.* Norton, 94 U. S. 746; Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483; Mays *v.* Rogers, 37 Ark. 155; Carter *v.* Engles, 35 Ark. 205.

30. *United States.* — Deneale *v.* Archer, 8 Pet. 528.

Alabama. — Boykin *v.* Cook, 61 Ala. 472; Scott *v.* Ware, 64 Ala. 174.

District of Columbia. — Hunt *v.* Russ, 7 Mack. 527; Groot *v.* Hitz, 3 Mack. 247.

Florida. — Davis *v.* Schuler, 14 Fla. 438.

Maryland. — Dorsey *v.* Hammond, 1 Bland 463.

New York. — See Baker *v.* Kingsland, 10 Paige 366; Wood *v.* Byington, 2 Barb. Ch. 387.

Virginia. — Staples *v.* Staples, 85 Va. 76, 7 S. E. 199; Watts *v.* Taylor, 80 Va. 627; Brewis *v.* Lawson, 76 Va. 36; Mason's Devisees *v.* Peter's Adm'r, 1 Munf. 437.

West Virginia. — Saddler *v.* Kennedy, 26 W. Va. 636.

31. Kavanagh *v.* Wilson, 5 Redf. (N. Y. Sur.) 43; O'Flynn *v.* Powers, 136 N. Y. 412, 32 N. E. 1085; Long *v.* Long, 142 N. Y. 545, 37 N. E. 486. See also Henry *v.* Mills, 1 Lea (Tenn.) 144; Smith *v.* Downey, 38 N. C. 268.

32. Stone *v.* Wood, 16 Ill. 177; Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358; Smith *v.* Gorham, 119 Ind. 436, 21 N. E. 1096.

33. Dozier *v.* Dozier, 21 N. C. 96; Sharpe *v.* Freeman, 45 N. Y. 802.

34. The Record of the Allowance of a Claim in insolvency proceedings against the estate is also competent. Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063.

35. Thomas *v.* Sterns, 33 Ala. 137; Anderson *v.* Irvine, 44 Ky. 488; Crouch *v.* Edwards, 52 Ark. 499, 12 S. W. 1070.

to plead a want of assets, the judgment rendered against him is conclusive evidence, as against him individually, of sufficient assets in his hands to satisfy such judgment,[36] except where the rule has been changed by statute.[37] The plaintiff, however, must have alleged that assets sufficient to satisfy the judgment were in the representative's possession.[38]

F. Judgment in Foreign State. — a. *Against Co-administrator.* A judgment against an administrator in his representative capacity in one state is not competent evidence in another state of an estate debt, either against the administrator appointed there, whether the same or a different person, or against any other person having assets of the deceased.[39]

b. *Against Co-executor.* — A judgment against one of several executors of the same estate is evidence, but not conclusive, against another executor qualified in a foreign state.[40] It has been held

36. *United States.* — Dickson *v.* Wilkinson, 3 How. 57.

Alabama. — Banks *v.* Speers, 97 Ala. 560, 11 So. 841.

Georgia. — Phipps *v.* Afford, 95 Ga. 215, 22 S. E. 152; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

New York. — People *v.* The Judges, 4 Cow. 445; Ruggles *v.* Sherman, 14 Johns. 446.

Pennsylvania. — Griffith *v.* Chew, 8 Serg. & R. 17, 11 Am. Dec. 556.

Virginia. — Mason's Devisees *v.* Peter, 1 Munf. 437.

Not an Admission of Assets When Entered by Agreement of the parties, and such agreement shows that it was not intended to be binding upon the administrator himself. Hussey *v.* White, 10 Serg. & R. (Pa.) 346.

A judgment against an administrator plaintiff in favor of the defendant is not an admission of assets by the administrator. Quigley *v.* Campbell, 12 Ala. 58, *s. c.* 5 Ala. 76.

Against Successor. — Not Competent Evidence. — Kearney *v.* Sascer, 37 Md. 264.

37. Mosier *v.* Zimmerman, 5 Humph. (Tenn.) 62; Ford *v.* Woltering, 10 Heisk. (Tenn.) 203; Jordan *v.* Maney, 10 Lea (Tenn.) 135; Loftus *v.* Locker, 24 Ky. 297; Choteau *v.* Hooe, 1 Pinn. (Wis.) 663; Goodwin *v.* Wilson, 1 Blackf. (Ind.) 344.

38. Sinclair *v.* Wilson, 3 Penn. & W. (Pa.) 167; Senescal *v.* Bolton, 7 N. M. 351, 34 Pac. 446.

39. Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800; McGarvey *v.* Darnell, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861; Rosenthal *v.* Renick, 44 Ill. 202.

In a Suit to Set Aside a Conveyance by a deceased person alleged to be in fraud of his creditors, a judgment in another state against the administrator is not competent evidence that plaintiff is a creditor of the estate. Johnson *v.* Powers, 139 U. S. 156. And see Johnson *v.* Johnson, 47 N. Y. St. 948, 17 N. Y. Supp. 570.

The Record of the Allowance of a Claim against an administrator in one state is not admissible in an action to establish the same claim against an auxiliary administrator in another state. Creswell *v.* Slack, 68 Iowa 110, 26 N. W. 42; Stacy *v.* Thrasher, 6 How. (U. S.) 44; McLean *v.* Meek, 18 How. (U. S.) 16. See also Hobson *v.* Payne, 45 Ill. 158; Brodie *v.* Bickley, 2 Rawle (Pa.) 431; Ela *v.* Edwards, 13 Allen (Mass.) 48, 90 Am. Dec. 174; Jones *v.* Jones, 15 Tex. 463, 65 Am. Dec. 174.

40. "Such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction for the purpose of showing that the demand had been carried into judgment in another jurisdiction against one of the testator's executors, and that the others were precluded by

that such a judgment is conclusive on the other executors or administrators with the will annexed in another state.[41]

IX. ACTIONS ON BOND.

1. **Generally.** — The general principles of evidence pertaining to actions on bonds are elsewhere discussed.[42]

2. **Assets.** — A. GENERALLY. — When the existence of estate assets is in issue the burden of proof is on the plaintiff.[43] But when assets are shown to have come into the possession of the executor or administrator, the defendant must explain their disposition or otherwise properly account for them,[44] unless the failure to account is itself the breach alleged.[45]

B. NATURE OF EVIDENCE. — a. *Generally.* — As evidence that assets came into the hands of the executor or administrator, it is competent to show the amount and kind of property owned by the deceased immediately preceding his death,[46] or that subsequent thereto property belonging to him was seen in the possession of his representative.[47]

The Return of Appraisers fixing the amount of the year's allowance to widow and children has been held incompetent against the sureties as evidence of assets in the hands of the administrator.[48]

b. *Evidence as to Property Received Prior to the Execution* of the bond is competent,[49] because such property is presumed to continue in the possession of the representative until his appointment is perfected by the giving of the bond.[50] But when a second bond is

it from pleading prescription or the statute of limitation upon the original cause of action." Hill *v.* Tucker, 13 How. (U. S.) 458, *citing* Jackson *v.* Tiernan, 15 La. 485.

41. Garland *v.* Garland, 84 Va. 181, 4 S. E. 334, *holding* that an administrator with the will annexed, being in effect an executor, is in privity with the executor, and therefore concluded by a judgment against the latter in another state.

42. See article "BONDS."

43. Morgan *v.* Slade, 2 Har. & J. (Md.) 38.

44. Johnston *v.* Maples, 49 Ill. 101; Succession of Johnston, 1 La. Ann. 75; White *v.* Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473; Choate *v.* Arrington, 116 Mass. 552.

45. In State *v.* Price, 17 Mo. 431, where the breach alleged was the failure to account for assets of the estate and their conversion, and the general issue was pleaded, it was held that proof that assets had come to the hands of the administrator did not make a *prima facie* case for the plaintiff. The court says that when the general issue is pleaded, "the plaintiff should give some evidence to show the default of the administrator. Slight evidence of a failure to account may throw the burden on the defendant."

46. Beal *v.* State, 77 Ind. 231.

47. Governor of Missouri *v.* Byrd, 2 Mo. 194.

48. King *v.* Johnson, 94 Ga. 665, 21 S. E. 895, *holding* such return incompetent for the reason that the statute makes no provision for objecting to it on the ground of a deficiency of assets. But see *supra*, "II. Allowance to Surviving Wife, Husband or Children."

49. Choate *v.* Arrington, 116 Mass. 552.

50. People *v.* Hascall, 22 N. Y. 188, 78 Am. Dec. 176; Gottsberger *v.* Taylor, 19 N. Y. 150.

given, the terms of which are not sufficient to cover property previously received, evidence regarding it is incompetent.[51]

c. *Proceeds of Sales.* — The records of sales made by the representative are competent evidence of the proceeds thereof,[52] and the actual amount received may be shown by parol.[53] Such evidence is competent, even though the sales were unauthorized.[54]

Where Promissory Notes Have Been Taken in payment for the property sold, they will be presumed to have been collected after the lapse of a proper time, and the burden is on the defendant to show the contrary.[55]

C. Inventory and Settlement. — The inventory filed by the representative is competent evidence against his sureties.[56] So also are any other reports by him to the court.[57] His partial[58] and final[59] accounts are at least *prima facie* evidence against the sureties. The conclusiveness of the latter as a judgment is elsewhere discussed.[60]

3. Judgment Against Principal. — A judgment against the executor or administrator establishing his liability to the plaintiff is at least *prima facie* evidence against his sureties,[61] and in many courts is conclusive, but the evidentiary effect of judgments against the principal in actions against his sureties is fully discussed elsewhere.[62]

4. Actions Against Second Set of Sureties. — In the absence of evidence to the contrary, it will be presumed that the executor or administrator properly performed his duty during the period covered by the first bond.[63]

The Partial or Annual Settlements of an executor or administrator are *prima facie* but not conclusive evidence of the assets in his hands at the time they were made, as against a second set of sureties, whether such accounting was taken during the operation of the first[64] or second bond.[65]

51. Scofield *v.* Churchill, 72 N. Y. 565, *distinguishing* Gottsberger *v.* Taylor, 19 N. Y. 150.

52. State *v.* Lindley, 98 Ind. 48.

53. State *v.* Lindley, 98 Ind. 48.

54. State *v.* Scholl, 47 Mo. 84.

55. Gordon *v.* Gibbs, 11 Miss. 473.

56. Choate *v.* Arrington, 116 Mass. 552. See *supra*, "Settlements; Inventory and Appraisement."

57. Beal *v.* State, 77 Ind. 231; Lane *v.* State, 27 Ind. 108.

58. Ruby & Longnecker *v.* State, 55 Md. 484; Slaughter *v.* Frohman, 18 Ky. 95. See *supra*, "Settlements; Partial or Annual Settlements."

59. Holley *v.* Acre, 23 Ala. 603; Lyles *v.* Caldwell, 3 McCord (S. C.) 225. See *supra*, "Settlements; Final Settlements."

60. See fully article "Principal and Surety."

61. McLaughlin *v.* Bank of Potomac, 48 U. S. 220; Kearney *v.* Sascer, 37 Md. 264; Woodward *v.* Fisher, 11 Smed. & M. 303; Lucas *v.* Guy, 2 Bail. (S. C.) 403.

62. See article "Principal and Surety."

63. Phillips *v.* Brazeal, 14 Ala. 746.

64. State *v.* Elliott, 157 Mo. 609, 57 S. W. 1087; United States *v.* Dudley, 21 D. C. 337.

65. In an action against the sureties on the second bond given by an administrator who has succeeded himself, settlements during the second administration are *prima facie* evidence of the estate that was in the

hands of the administrator after the second set of sureties became obligated for him, and that the defalcation occurred during the second administration. State *v.* Holman, 93 Mo. App. 611, 67 S. W. 747.

EXEMPLARY DAMAGES.—See Damages.

EXEMPTIONS.—See Homesteads and Exemptions.

EXHIBITS.

By Geo. P. Cook.

CROSS-REFERENCES:

Books of Account;

Certificates;

Demonstrative Evidence; Diagrams; Documentary Evidence;

Entries in Regular Course of Business; Experiments;

Maps;

Photographs;

Private Writings;

Public Documents.

I. WHAT EXHIBITS MAY GO TO THE JURY ROOM.

1. Old Rule. — According to the old English rule, writings and books in evidence and not under seal could not be delivered to the jury without the consent of both parties;[1] and some of the modern authorities still favor the old rule, holding that the jury should not be allowed to take out exhibits admitted in evidence unless the propriety of it is very obvious, and generally not when either party objects.[2]

2. Modern Rule. — A. In General. — The general rule now is that the jury may take out with them such exhibits, and only such, whether they are sealed or unsealed writings or other tangible objects, as have been properly put in evidence on the trial.[3]

B. Discretion of Trial Judge. — Many authorities hold that it

1. See Buller, N. P., p. 308, Thompson Trials, § 2574. Also Vicary *v.* Farthing, Cro. Eliz. 411.

2. Some Modern Authorities Favor the Old Rule. — Manufacturing Co. *v.* McAlister, 36 Mich. 327. To the same effect, Chadwick *v.* Chadwick, 52 Mich. 545, 18 N. W. 350; Outlaw *v.* Hurdle, 46 N. C. 150; Watson *v.* Davis, 52 N. C. 178; Burton *v.* Wilkes, 66 N. C. 604; Eden *v.* Lingenfelter, 39 Ind. 19.

Held reversible error for the jury to take out papers introduced in evidence over the objection of counsel. Lotz *v.* Briggs, 50 Ind. 346; Nichols *v.* Clark, 65 Ind. 512. But see Collins *v.* Frost, 54 Ind. 242.

It has been held bad practice in criminal cases to allow the jury to take out any of the written evidence. State *v.* Colbert, 29 La. Ann. 715.

And by some authorities held reversible error. People *v.* Dowdigan, 67 Mich. 92, 34 N. W. 411.

3. Jury May Take Out Such Exhibits as Are in Evidence.

Alabama. — Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857.

Arkansas. — Hurley *v.* State, 29 Ark. 17.

District of Columbia. — Brien *v.* Beck, 2 Mack. 82.

Illinois. — Nolan *v.* Vosburg, 3 Ill. App. 596.

Iowa. — Stewart *v.* Railway Co., 11 Iowa 62; Kruidenier *v.* Shields, 70 Iowa 428, 30 N. W. 681; McLeod *v.* Humeston & S. R. Co., 71 Iowa 138, 32 N. W. 246; State *v.* Walton, 92 Iowa 455, 61 N. W. 179.

Kansas. — State *v.* Clark, 34 Kan. 289, 8 Pac. 528.

Kentucky. — Lawless *v.* Reese, 3 Bibb 486.

Maine. — Benson *v.* Fish, 6 Me. 141.

Mississippi. — Taylor *v.* Sorsby, Walker 97.

Montana. — Sweeney *v.* Darcy, 21 Mont. 188, 53 Pac. 540.

Nebraska. — LaBonty *v.* Lundgren, 41 Neb. 312, 59 N. W. 904.

New Hampshire. — Flanders *v.* Davis, 19 N. H. 139; Kent *v.* Tyson, 20 N. H. 121.

New Jersey. — Jessup *v.* Eldridge, 1 N. J. L. 401.

New York. — Hewitt *v.* Morris, 5 Jones & S. 18.

North Carolina. — Watson *v.* Davis, 52 N. C. 178.

Ohio. — Farrer *v.* State, 2 Ohio St. 54.

Oregon. — State *v.* Baker, 23 Or. 441, 32 Pac. 161.

Pennsylvania. — Hamilton *v.* Glenn, 1 Pa. St. 340.

Tennessee. — Carter *v.* State, 9 Lea 440; Railroad Co. *v.* Lee, 95 Tenn. 388, 32 S. W. 249.

Texas. — Faver *v.* Bowers (Tex. Civ. App.), 33 S. W. 131; San Antonio & A. C. R. Co. *v.* Burnett, 12 Tex. Civ. App. 321, 34 S. W. 139; Goar *v.* Thompson, 19 Tex. Civ. App. 330, 47 S. W. 61.

Where only three pages of a book were in evidence, it was held error to allow the book to go to the jury room, even though the jury were instructed to disregard the parts not

rests largely in the discretion of the trial judge, and that he may, with or without the consent of counsel, allow the jury to take out any exhibits that are properly in evidence.[4] But the discretion of the trial judge is generally limited to those exhibits that are properly in evidence.[5]

C. Depositions in the Jury Room. — There is a difference of

in evidence. Manufacturing Co. *v.* McAlister, 36 Mich. 327.

4. Discretion of Court.

Alabama. — Campbell *v.* State, 23 Ala. 44.

Arkansas. — Humphries *v.* McCraw, 5 Ark. 61.

California. — Clark *v.* Insurance Co., 36 Cal. 168; People *v.* Cochran, 61 Cal. 548; McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596.

Connecticut. — State *v.* Stebbins, 29 Conn. 463.

District of Columbia. — Brien *v.* Beck, 2 Mack. 82.

Florida. — English *v.* State, 31 Fla. 340, 12 So. 689.

Georgia. — Davis *v.* State, 91 Ga. 167, 17 S. E. 292; Adams *v.* State, 93 Ga. 166, 18 S. E. 553.

Illinois. — Hovey *v.* Thompson, 37 Ill. 538; Dunn *v.* People, 172 Ill. 582, 50 N. E. 137; Williams *v.* City of Carterville, 97 Ill. App. 160.

Iowa. — Peterson *v.* Haugen, 34 Iowa 395; Miller *v.* Dickinson Co., 68 Iowa 102, 26 N. W. 31.

Kansas. — Wood *v.* Wood, 47 Kan. 617, 28 Pac. 709.

Kentucky. — Railroad Co. *v.* Berry, 96 Ky. 604, 29 S. W. 449; Newport News & M. R. Co. *v.* Mendell, 17 Ky. L. Rep. 1400, 34 S. W. 1081.

Maine. — State *v.* McCafferty, 63 Me. 223.

Maryland. — Hitchins *v.* Town of Frostburg, 68 Md. 100, 11 Atl. 826; Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117.

Massachusetts. — Com. *v.* Wingate, 6 Gray 485; Whitehead *v.* Keyes, 3 Allen 495; Burghardt *v.* Van Deusen, 4 Allen 374; Farnum *v.* Pitcher, 151 Mass. 470, 24 N. E. 590; Krauss *v.* Cope, 180 Mass. 22, 61 N. E. 220.

Michigan. — Canning *v.* Harlan, 50 Mich. 320, 15 N. W. 492; Bulen *v.* Granger, 63 Mich. 311, 29 N. W. 718; Tubbs *v.* Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 296.

Mississippi. — Powell *v.* State, 61 Miss. 319.

Missouri. — Cornelius *v.* Grant, 8 Mo. 59; Hanger *v.* Imboden, 12 Mo. 85; State *v.* Tompkins, 71 Mo. 613.

Montana. — Territory *v.* Doyle, 7 Mont. 245, 14 Pac. 671.

Nebraska. — Langworthy *v.* Connelly, 14 Neb. 340, 15 N. W. 737. (See this case for full discussion of doctrine.) Russell *v.* State, 92 N. W. 751.

New Hampshire. — Moore *v.* Davis, 49 N. H. 45.

New York. — Porter *v.* Mount, 45 Barb. 422; Schappner *v.* Railway Co., 55 Barb. 497; Harnett *v.* Garvey, 8 Jones & S. 96; People *v.* Formosa, 61 Hun 272, 16 N. Y. Supp. 753; Paige *v.* Chedsey, 4 Misc. 183, 23 N. Y. Supp. 879; Lycett *v.* Manhattan R. Co., 48 App. Div. 624, 62 N. Y. Supp. 848.

Pennsylvania. — Alexander *v.* Jameson, 5 Binn. 238; Coal Co. *v.* Richards, 57 Pa. St. 142; Ott *v.* Oyer, 106 Pa. St. 19; Kittanning Ins. Co. *v.* O'Neill, 110 Pa. St. 548, 1 Atl. 592; Whitehall Mfg. Co. *v.* Wise, 119 Pa. St. 484, 13 Atl. 208; Kline *v.* Nat. Bank (Pa.), 15 Atl. 433.

South Carolina. — Gable *v.* Ranch, 50 S. C. 95, 27 S. E. 555.

Texas. — Grayson *v.* State, 40 Tex. Crim. 573, 51 S. W. 246; Linch *v.* Paris Lumb. Co., 80 Tex. 23, 15 S. W. 208; Wardlow *v.* Harmon (Tex. Civ. App.), 45 S. W. 828.

Vermont. — State *v.* Wetherell, 70 Vt. 274, 4 Atl. 728; State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

Wisconsin. — Starke *v.* Wolf, 90 Wis. 434, 63 N. W. 755.

But it has been held error for the court to allow the jury to take out part of the evidence without taking all of it. Rainforth *v.* People, 61 Ill. 365.

5. Alger *v.* Thompson, 1 Allen (Mass.) 453; Nelson *v.* Humes, 12 Ill. App. 52; Parker *v.* State (Tex.

authority as to allowing depositions to go to the jury room.[6] The weight of authority seems to discountenance the practice.[7] In some jurisdictions it is proper for the jury to take out the depositions as well as the other written evidence.[8] In many states it is prohibited by statute.[9] Some cases hold that it rests in the discretion of the trial judge.[10]

D. Criminal Cases. — a. *Dying Declarations.* — It has been held improper in a criminal case to allow a dying declaration to go to the jury room.[11]

b. *Written Testimony.* — The same rule has been applied where the testimony of a witness is taken out after the jury have retired.[12]

E. Exhibits Attached to Depositions. — Exhibits attached to the depositions[13] have been allowed to be detached and sent out as

Crim. App.), 67 S. W. 121; Barney's Will, 71 Vt. 217, 44 Atl. 75.

Where the judge, after ruling a paper out as inadmissible, allowed it to go to the jury room, held error. Com. *v.* Edgerley, 10 Allen (Mass.) 184.

6. It is improper to allow depositions used on a trial to go to the jury room.

Illinois. — Rawson *v.* Curtiss, 19 Ill. 455.

Maryland. — Negroes Jerry *v.* Townshend, 9 Md. 145.

Pennsylvania. — White *v.* Bisbing, 1 Yeates 400; Hendel *v.* Turnpike Road, 16 Serg. & R. 92.

West Virginia. — State *v.* Cain, 20 W. Va. 679; Welch *v.* Ins. Co., 23 W. Va. 288; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561; Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

7. A paper introduced as evidence in the cause purporting to be the admission or statement of what one of the plaintiffs would testify to if before the jury, held to be the same as a deposition and not a proper document for the jury room. Smith *v.* Wise, 58 Ill. 141.

8. In some jurisdictions it is proper for the juror to take out depositions as well as the other written evidence. Kittredge *v.* Elliott, 16 N. H. 77; Gardner *v.* Kimball, 58 N. H. 202; Stites *v.* McKibben, 2 Ohio St. 588; Hansbrough *v.* Stinnett, 25 Gratt. (Va.) 495.

9. It is sometimes made improper by statute to allow depositions to go to the jury room. Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318; Coffin *v.* Gephart, 18 Iowa 256; Green *v.* Gresham, 21 Tex. Civ. App. 601, 53 S. W. 382. See also Abbott's Trial Brief (Civil), p. 477.

10. In some jurisdictions it rests in the discretion of the court to send out depositions. Baker *v.* Com., 13 Ky. L. Rep. 571, 17 S. W. 625; Newport News & M. R. Co. *v.* Mendell, 17 Ky. L. Rep. 1400, 34 S. W. 1081; Whitehead *v.* Keyes, 3 Allen (Mass.) 495; Howland *v.* Willetts, 9 N. Y. 170. But see *contra* H. & St. L. R. Co. *v.* Morgan, 23 Ky. L. Rep. 121, 62 S. W. 736.

11. It is bad practice in a criminal case to allow a dying declaration to go to the jury room. Dunn *v.* People, 172 Ill. 582, 50 N. E. 137. And it has even been held reversible error. State *v.* Moody, 18 Wash. 165, 51 Pac. 356; but see State *v.* Webster, 21 Wash. 63, 57 Pac. 361.

12. It is improper to allow the testimony of a witness to go out to the jury after they have retired. Com. *v.* Ware, 107 Pa. St. 465, 20 Atl. 806.

13. Exhibits attached to the depositions may be detached and sent out as independent evidence. Starch Co. *v.* McMullen, 100 Ill. App. 82. To the same effect Pridgen *v.* Hill, 12 Tex. 374; Sargent *v.* Lawrence, 11 Tex. Civ. App. 540, 40 S. W. 1075; Davis *v.* R. Co., 17 Tex. Civ. App. 199, 43 S. W. 44; Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318; Texas & P. R. Co. *v.* Robertson (Tex. Civ. App.), 35 S. W. 505.

independent evidence; but the practice has been discountenanced by other authorities.[14]

F. Depositions Taken Before Register. — In Pennsylvania, depositions taken before a register to prove a will are part of the record, and may go to the jury room.[15]

G. Items of Account and Memoranda. — a. *Made by Witness.* It has been held bad practice, though not necessarily grounds for a new trial, to allow a memorandum made by a witness while testifying to go to the jury room.[16]

b. *Used by Witness, but Not in Evidence.* — It has been held reversible error for the jury to take out memoranda used by a witness to refresh his memory when these memoranda were not in evidence.[17]

c. *Account Read Without Objection.* — An itemized account of the amount claimed, which has been read on the trial without objection, may go to the jury room.[18]

d. *Account Only Partly Proved.* — But when such an account has been admitted in evidence, a part of the items of which have been proved and a part not, it should not go to the jury room.[19]

e. *When Not Allowed, Though in Evidence.* — It has been held not error to refuse to allow scientific works to go to the jury room, even though they have been read in evidence.[20]

H. Criminal Cases. — a. *Indicia of Crime. — General Rule.* In criminal cases the *indicia* of the crime and instruments and arti-

14. Exhibits Cannot Be Detached from Depositions. — Gulf C. & S. F. R. Co. *v.* Hughes (Tex. Civ. App.), 31 S. W. 411; Oskaloosa College *v.* Western Union Fuel Co. (Iowa), 54 N. W. 152; Snow *v.* Starr, 75 Tex. 411, 12 S. W. 673; Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50.

Where a letter which was attached to a deposition had been inadvertently left in the jury room with other written evidence, and was read aloud by one of the jurors, held sufficient grounds for a new trial. Toohy *v.* Sarvis, 78 Ind. 474.

15. In Pennsylvania depositions taken before a register to prove a will are part of the record and may go out to the jury. Ottinger *v.* Ottinger, 17 Serg. & R. (Pa.) 142; Sholly *v.* Diller, 2 Rawle (Pa.) 177; Spence *v.* Spence, 4 Watts (Pa.) 165.

16. Memorandum Made by a Witness While Testifying. — Hatfield *v.* Cheaney, 76 Ill. 488.

A stated account, used by a witness in testifying and not objected to on the trial, may sometimes go to the jury room though not technically in evidence. Hirschfelder *v.* Levy, 69 Ala. 351; Mooney *v.* Hough, 84 Ala. 80, 4 So. 19.

And it has been held error for the court to refuse to allow such account to go to the jury room. Foster *v.* Smith, 104 Ala. 248, 16 So. 61.

17. Memoranda used by a witness to refresh his memory, but not in evidence. Faver *v.* Bowers (Tex.), 33 S. W. 131.

18. An itemized account of the amount claimed, which had been read on the trial without objection, may go to the jury room. Odd Fellows *v.* Masser, 24 Pa. St. 507.

19. A stated account admitted in evidence, part of the items of which have been proved and part not, should not be given to the jury. Morrison *v.* Moreland, 15 Serg. & R. (Pa.) 61.

20. It is not error to refuse to allow scientific works which have

cles used in connection with it, when properly identified and in evidence, may go to the jury room.[21]

b. *Doctrine Qualified.* — Some authorities seem to discountenance this practice, but hold that it is not ground for a new trial unless it appears that the jury, upon inspecting such articles, discover some new evidence not brought out at the trial.[22]

I. Statutory Regulations. — The whole question as to what evidence may go to the jury room is now regulated largely by statute.[23]

II. EFFECT OF IMPROPER ARTICLES GOING TO JURY ROOM.

1. General Rule. — The general rule is that when documents or articles not in evidence have been improperly in the jury room, it

been read in evidence, to go to the jury room. State *v.* Gillick, 10 Iowa 98.

21. The Evidence of the Crime and Instruments Used in Connection With It. — *Maine.* — State *v.* Cafferty, 63 Me. 223.

Mississippi. — Powell *v.* State, 61 Miss. 319.

Nebraska. — Russell *v.* State (Neb.), 92 N. W. 751.

New Jersey. — Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621.

Pennsylvania. — Udderzook *v.* Com., 76 Pa. St. 340.

Texas. — Chalk *v.* State, 35 Tex. Crim. 116.

Virginia. — Taylor *v.* Com., 90 Va. 109, 17 S. E. 812.

Washington. — Jack *v.* Territory, 2 Wash. Ter. 101; State *v.* Webster, 21 Wash. 63, 57 Pac. 361; State *v.* Cushing, 14 Wash. 527, 45 Pac. 145.

But see *contra,* Hansing *v.* Territory, 4 Okla. 443, 46 Pac. 509; McCoy *v.* State, 78 Ga. 490, 3 S. E. 768, Hendricks *v.* State, 28 Tex. App. 416, 13 S. W. 672.

Blood-stained garments used in evidence on a criminal trial are included among exhibits and may go to the jury room. People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092.

Photographs, when admitted in evidence, may go to the jury room, together with magnifying glasses to examine the same. Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100.

See Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621, where a magnifying glass was sent for by the jurors after retiring.

A revolver and bullet introduced in evidence on a criminal trial may go to the jury room. McCoy *v.* People, 175 Ill. 224, 51 N. E. 777.

Where a pistol which had not been put in evidence or been identified, although it had been exhibited to the jury during the trial, was allowed to go to the jury room, it was held reversible error. Yates *v.* People, 38 Ill. 527.

On a prosecution for grand larceny for stealing a pig, there was introduced in evidence against the defendant a piece of fresh pork found in his cabin. The identification of this piece of meat as a portion of the carcass of the stolen animal was the principal question in dispute. *Held* not error to send it to the jury room, it appearing that its condition, in the meantime, remained unchanged. Powell *v.* State, 61 Miss. 319.

22. When the jury take out the *indicia* of the crime in a criminal case, it is not ground for a new trial, unless it appears that upon inspecting them they discover some new evidence not brought out on the trial. Bell *v.* State, 32 Tex. Crim. 436, 24 S. W. 418; Spencer *v.* State, 34 Tex. Crim. 238, 30 S. W. 46, 32 S. W. 690; Gresser *v.* State (Tex. Crim.), 40 S. W. 595.

23. The Question Now Regulated by Statute. — See statutes of the different states, also Abbott's Trial Brief (Civil), p. 477.

will not avoid the verdict unless it appears that some substantial injustice has been done.[24]

24. When No Substantial Injustice Done. — *United States.* — Simms *v.* Templeman, 5 Cranch C. C. 163, 22 Fed. Cas. No. 12,872; United States *v.* Gilbert, 2 Sum. 19, 25 Fed. Cas. No. 15,204; United States *v.* Horn, 5 Blatchf. 102, 26 Fed. Cas. No. 15,389; Lonsdale *v.* Brown, 4 Wash. C. C. 148, 15 Fed. Cas. No. 8494; United States *v.* Reid, 12 How. 361.

Alabama. — Robinson *v.* Allison, 36 Ala. 525.

Arkansas. — Palmore *v.* State, 29 Ark. 248; Green *v.* State, 38 Ark. 304; St. Louis & M. S. R. Co. *v.* Higgins, 53 Ark. 458, 14 S. W. 653; Phillips *v.* State, 62 Ark. 119, 34 S. W. 539.

California. — Thrall *v.* Smiley, 9 Cal. 529; People *v.* Cummings, 57 Cal. 88.

Georgia. — Fulton Co. *v.* Phillips, 91 Ga. 65, 16 S. E. 260; Dawson *v.* Briscoe, 97 Ga. 408, 24 S. E. 157; Shuman *v.* Smith, 100 Ga. 415, 28 S. E. 448; Walker *v.* Liddell, 103 Ga. 574, 30 S. E. 294; Smalls *v.* State, 105 Ga. 669, 31 S. E. 571; Southern R. Co. *v.* Coursey, 115 Ga. 602, 41 S. E. 1013.

Idaho. — People *v.* Page, 1 Idaho 102.

Illinois. — City of Chicago *v.* Dermody, 61 Ill. 431; Hatfield *v.* Cneaney, 76 Ill. 488; Fein *v.* Mutual Benefit Ass'n, 60 Ill. App. 274.

Indiana. — Alexander *v.* Dunn, 5 Ind. 122; Bersch *v.* State, 13 Ind. 434; Wilds *v.* Bogan, 57 Ind. 453.

Iowa. — Greff *v.* Blake, 16 Iowa 222; Morris *v.* Howe, 36 Iowa 490; State Bank *v.* Brewer, 100 Iowa 576, 69 N. W. 1011.

Kansas. — State *v.* Taylor, 20 Kan. 643.

Kentucky. — Cargill *v.* Com., 14 Ky. L. Rep. 517, 20 S. W. 782; Moore *v.* Beale, 20 Ky. L. Rep. 2029, 50 S. W. 850.

Louisiana. — State *v.* Harris, 34 La. Ann. 118; State *v.* Williams, 34 La. Ann. 959; State *v.* Tanner, 38 La. Ann. 307; State *v.* Wilson, 40 La. Ann. 751, 5 So. 52, 1 L. R. A. 795.

Massachusetts. — Whitney *v.* Whitman, 5 Mass. 405; Hix *v.* Drury, 5 Pick. 296; Clapp *v.* Clapp, 137 Mass. 183.

Michigan. — Bulen *v.* Granger, 63 Mich. 311, 29 N. W. 718; Harroun *v.* Chicago & W. M. R. Co., 68 Mich. 208, 35 N. W. 914.

Mississippi. — Goode *v.* Linecum, 1 How. 281.

Missouri. — State *v.* Wilson, 121 Mo. 434, 26 S. W. 357.

Nebraska. — Mercer *v.* Harris, 4 Neb. 77; Langworthy *v.* Connelly, 14 Neb. 340, 15 N. W. 737.

New Hampshire. — Page *v.* Wheeler, 5 N. H. 91; Kittredge *v.* Elliott, 16 N. H. 77; Flanders *v.* Davis, 19 N. H. 139; Glidden *v.* Towle, 31 N. H. 147.

New Jersey. — State *v.* Cucuel, 31 N. J. L. 249.

New York. — People *v.* Wilson, 8 Abb. Pr. 137; Schappner *v.* Railway Co., 55 Barb. 497; O'Brien *v.* Insurance Co., 6 Jones & S. 482; Dolan *v.* Insurance Co., 22 Hun 396; People *v.* Gaffney, 14 Abb. Pr. (N. S.) 36; People *v.* Draper, 28 Hun 1.

North Carolina. — Posey *v.* Patton, 109 N. C. 455, 14 S. E. 64.

Ohio. — Tracy *v.* Card, 2 Ohio St. 451; Cleveland C. C. & I. R. Co. *v.* Schneider, 45 Ohio St. 678, 17 N. E. 321.

Oregon. — State *v.* Brown, 7 Or. 187.

Pennsylvania. — Hall *v.* Rupley, 10 Pa. St. 231.

South Carolina. — State *v.* Tindall, 10 Rich. L. 212; Lott *v.* Macon, 2 Strob. L. 178.

Tennessee. — Insurance Co. *v.* Underwood, 12 Heisk. 424; Scott *v.* State, 7 Lea 232; Brown *v.* State, 85 Tenn. 439, 2 S. W. 895.

Texas. — Hendricks *v.* State, 28 Tex. App. 416, 13 S. W. 672; Spencer *v.* State, 34 Tex. Crim. 238, 30 S. W. 46, 32 S. W. 690; Munos *v.* State, 34 Tex. Crim. 472, 31 S. W. 380; Moore *v.* State, 36 Tex. Crim. 88, 35 S. W. 668; Beeks *v.* Odom, 70 Tex. 183, 7 S. W. 702; Williams *v.* State, 33 Tex. Crim. 128, 25 S. W. 629; Lancaster *v.* State, 36 Tex. Crim. 16, 35 S. W. 165.

Vermont. — Hopkinson *v.* Steel, 12

A. Exhibit Retained Which Should Have Gone. — The same rule prevails where an exhibit which should have gone to the jury room is retained by one of the counsel, through mistake.[25]

B. When Prejudice Presumed. — In some cases it has been presumed from the nature of the evidence that the jury were improperly influenced.[26]

2. Exhibit Given to Jury by Party or His Counsel. — If either of the parties or his counsel give an exhibit to the jury, without permission from the judge, which has not been put in evidence, it will avoid the verdict, provided it is in favor of the party from whom the exhibit came.[27]

3. Duty of Counsel to Object. — When counsel learn of any improper evidence going to the jury room and fail to object promptly, they will be estopped from setting up the irregularity afterwards.[28]

Vt. 582; Peacham *v.* Carter, 21 Vt. 515; Winslow *v.* Campbell, 46 Vt. 746.

Washington. — State *v.* Webster, 21 Wash. 63, 57 Pac. 361.

Wisconsin. — Graves *v.* Gans, 25 Wis. 41; Chapman *v.* Railway Co., 26 Wis. 295.

Wyoming. — Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

25. State *v.* Pike, 20 N. H. 344; North River Boom Co. *v.* Smith, 15 Wash. 138, 45 Pac. 750; Smith *v.* Holcomb, 99 Mass. 552.

26. *United States.* — Ogden *v.* United States, 112 Fed. 523.

California. — People *v.* Stokes, 103 Cal. 193, 37 Pac. 207.

Connecticut. — Clark *v.* Whitaker, 18 Conn. 543.

Georgia. — Killen *v.* Sistrunk, 7 Ga. 294.

Iowa. — DeWulf *v.* Dix, 110 Iowa 553, 81 N. W. 779; Carlin *v.* Railway Co., 31 Iowa 370.

Kansas. — State *v.* Lantz, 23 Kan. 728.

New Hampshire. — State *v.* Hascall, 6 N. H. 352.

27. Exhibit Given to Jury by One of the Parties.

England. — Cope Litt. 227*b*.

United States. — Lonsdale *v.* Brown, 4 Wash. C. C. 148, 15 Fed. Cas. No. 8494.

Arkansas. — Atkins *v.* State, 16 Ark. 568, 591.

Georgia. — Killen *v.* Sistrunk, 7 Ga. 294; Walker *v.* Hunter, 17 Ga. 364.

Iowa. — Stewart *v.* Railway Co., 11 Iowa 62.

Maine. — Heffron *v.* Gallupe, 55 Me. 563.

New Hampshire. — Page *v.* Wheeler, 5 N. H. 91.

Pennsylvania. — Sheaff *v.* Gray, 2 Yeates 273.

Where one party gave a paper to the jury without the consent of the court, or of the opposing counsel, held reversible error. Sanderson *v.* Bowen, 2 Hun (N. Y.) 153.

And where a paper which is shown to the jury is marked or underscored by one of the parties or his counsel, without the knowledge of the other party, the verdict will be set aside. Watson *v.* Walker, 23 N. H. 471.

28. Duty of Counsel to Object.

United States. — Consolidated Ice Mach. Co. *v.* Ice Co., 57 Fed. 898.

Canada. — Tiffany *v.* McNee, 24 Ont. Rep. 551.

California. — People *v.* McCoy, 71 Cal. 395, 12 Pac. 272.

Connecticut. — State *v.* Tucker, 75 Conn. 201, 52 Atl. 741.

Georgia. — Hudspeth *v.* Mears, 92 Ga. 525, 17 S. E. 837.

Illinois. — Smith *v.* Wise, 58 Ill. 141; Stampofski *v.* Steffens, 79 Ill. 303; Bulliner *v.* People, 95 Ill. 394.

Indiana. — Cluck *v.* State, 40 Ind. 263.

Iowa. — Shields *v.* Guffey, 9 Iowa 322.

Kentucky. — Cargill *v.* Com., 14 Ky. L. Rep. 517, 20 S. W. 782.

4. Effect of Consenting. — When counsel consent to an irregularity of this nature it is a waiver of any objections.[29]

5. Duty of Counsel to Prevent Irregularities. — It is held by some authorities that it is the duty of counsel to see that no improper evidence goes to the jury room.[30]

III. USE OF EXHIBITS DURING TRIAL.

1. Submitting Exhibits to Inspection of Jury. — A. General Rule. — As a general rule, either party has the right to submit to the inspection of the jury during the trial any exhibits that are properly in evidence.[31]

B. Effect of Being Improperly in Hands of Jury. — When an exhibit not in evidence has improperly got into the hands of

Minnesota. — State *v.* Nichols, 29 Minn. 357, 13 N. W. 153.

Missouri. — Lewis *v.* McDaniel, 82 Mo. 577; State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066; Grove *v.* City of Kansas, 75 Mo. 672.

Nebraska. — Watson *v.* Roode, 43 Neb. 348, 61 N. W. 625.

New Hampshire. — Kent *v.* Tyson, 20 N. H. 121; Watson *v.* Walker, 23 N. H. 471; Tabor *v.* Judd, 62 N. H. 288.

North Carolina. — Posey *v.* Patton, 109 N. C. 455, 14 S. E. 64.

South Carolina. — Groesbeck *v.* Marshall, 44 S. E. 538, 22 S. E. 743.

Tennessee. — McDonald *v.* Hodge, 5 Hayw. 86.

Texas. — Cook *v.* State, 4 Tex. App. 265; Linch *v.* Lumber Co., 15 S. W. 208; Texas & P. R. Co. *v.* Robertson (Tex. Civ. App.), 35 S. W. 505.

Virginia. — Forbes *v.* Com., 90 Va. 550, 19 S. E. 164.

29. Consent of Counsel a Waiver of Any Subsequent Objections.

Georgia. — Durham *v.* State, 70 Ga. 264; Chattahoochee Brick Co. *v.* Sullivan, 86 Ga. 50, 12 S. E. 216.

Kansas. — State *v.* Taylor, 36 Kan. 329, 13 Pac. 550.

Michigan. — Chadwick *v.* Chadwick, 52 Mich. 545, 18 N. W. 350.

Texas. — National Bank *v.* Ragland (Tex. Civ. App.), 51 S. W. 661; Fields *v.* Haley (Tex. Civ. App.), 52 S. W. 115.

Vermont. — Warden *v.* Warden, 22 Vt. 563.

On a prosecution for murder, after the jury had retired to deliberate upon their verdict, they requested through the deputy sheriff that a certain coat, alleged to have been worn by the deceased at the time of the killing, should be sent into the jury room for their inspection. The coat had been produced and examined in open court during the examination of two witnesses and had been exhibited to the jury, but had never been formally offered in evidence. Counsel for the defendant, after a moment's reflection, and in presence of the defendant, in open court consented that the coat might be submitted to the jury. *Held*, that the consent of the counsel for the defendant, that the coat might be submitted to the jury, was a waiver of any subsequent objections. People *v.* Mahoney, 77 Cal. 529, 20 Pac. 73.

30. Maynard *v.* Fellows, 43 N. H. 255; Gardner *v.* Kimball, 58 N. H. 202; Tabor *v.* Judd, 62 N. H. 288; Flanders *v.* Davis, 19 N. H. 139.

31. Gable *v.* Rauch, 50 S. C. 957, 27 S. E. 555; Hubby *v.* State, 8 Tex. App. 597; Early *v.* State, 9 Tex. App. 476; King *v.* State, 13 Tex. App. 277; Hart *v.* State, 15 Tex. App. 202.

On a trial for murder, one of the jurors, during a recess of the trial, took up and examined a piece of the skull of the person alleged to have been murdered, which was lying on the district attorney's table. *Held*, not ground for a new trial, the circumstances of the case being such that the juror could not have been misled thereby, and the fact that he

the jurors, the same rule prevails as where it is sent to the jury room, and a new trial will not be granted unless some substantial injustice has been done.[32]

2. Using Exhibits During Argument. — A. Criminal Cases. It has been held that in criminal cases counsel may use the exhibits in his argument to the jury by way of illustration.[33]

B. Civil Cases. — In civil cases the rule has been laid down that it is only improper for the jury to inspect an exhibit during the trial, when there is such a defect in it as would call for expert testimony.[34]

IV. WHEN EXHIBITS ARE IN EVIDENCE.

1. General Rule. — A document or article is not in evidence when it is simply marked for identification; it must be formally offered in evidence, and the opposing counsel must have an opportunity of objecting to it or of cross-examining any witness called to prove or identify it.[35]

had examined the skull being known to the prisoner's counsel before they entered upon the defense. Wilson *v.* People, 4 Park. Crim. Rep. (N. Y.) 619.

32. *California.* — Thrall *v.* Smiley, 9 Cal. 529; People *v.* McCoy, 71 Cal. 395, 12 Pac. 272; People *v.* Tipton, 73 Cal. 405, 14 Pac. 894; People *v.* Leary, 105 Cal. 486, 39 Pac. 24.

New Jersey. — State *v.* Cucuel, 31 N. J. L. 249.

Oklahoma. — Kennon *v.* Territory, 5 Okla. 685, 50 Pac. 172.

Texas. — Williams *v.* State, 33 Tex. Crim. 128, 25 S. W. 629.

West Virginia. — State *v.* Robinson, 20 W. Va. 713.

Where certain balance sheets, which had been rejected as evidence, got into the hands of a jury, during the trial, it was held not to be sufficient grounds for reversal, when counsel failed to object at the time and it did not appear that the jury could have been improperly influenced. Littlefield *v.* Beamis, 5 Rob. (La.) 145.

33. In criminal cases, counsel may experiment with the articles in evidence, in his argument to the jury, by way of illustration. Russell *v.* State (Neb.), 92 N. W. 751.

34. It is improper for the jury to inspect an exhibit during the trial, only when there is such a defect in it as would call for expert testimony. Riley *v.* Hall, 119 N. C. 406, 26 S. E. 47.

35. When Exhibits Are in Evidence. — Kelley *v.* Weber, 9 Abb. N. C. (N. Y.) 62; DeWitt *v.* Prescott, 51 Mich. 298, 16 N. W. 656.

"When documentary evidence is offered, each piece should be presented by itself to the presiding justice, exhibited if desired to the opposing counsel, identified by the court or stenographer with suitable marks, and if objected to, its genuineness established by testimony." Virgie *v.* Stetson, 73 Me. 452.

It has been held that when a bail bond has not been filed in court, it cannot be considered as in evidence. State *v.* Wilson, 12 La. Ann. 189; but if it is actually filed, the failure of the clerk to indorse on it that he has actually filed it is of no consequence. State *v.* Badon, 14 La. Ann. 783.

In an action against a railway company to recover damages for personal injuries, the defendant's counsel having a paper, "Exhibit A," in his hands, handed it to the plaintiff, while on cross-examination as a witness, and asked him if he signed it. Plaintiff's counsel requested to see the paper, which request defendant's counsel refused, saying he had

2. Maps and Diagrams. — A map or diagram used during the trial to illustrate the testimony of a witness is not, by these acts alone, properly considered as being in evidence.[36]

3. Exhibits Put in Evidence During Argument. — But an exhibit used in this way during the progress of the trial may be formally put in evidence during the argument of counsel to enable him to use it in his address to the jury.[37]

4. Exhibits Produced Before Examiner. — It has been held that a party by the act of producing and proving a paper before an examiner thereby puts it in evidence, whether it is marked as an exhibit or not.[38]

V. MANNER OF GETTING EXHIBITS IN EVIDENCE.

1. Proving Execution. — General Rule. — Usually the party offering a document or article in evidence must prove its execution or identity before it can be admitted as an exhibit.[39]

2. Exhibits in Chancery. — A. General Rule. — Exhibits may be introduced before the examiner, commissioner or master, in the same manner as in a court of law.[40]

B. Subject to Use of Both Parties. — It has been held that exhibits introduced before an examiner are subject to the use of both parties, for the purpose of examining witnesses in respect thereto.[41]

not offered it in evidence. *Held*, that if defendant's counsel did not purpose to introduce the paper in evidence, the question to the witness was improper. If it was the intention to offer it in evidence, then it should have been submitted to the opposing counsel, so that, if he wished to object, the objection could be made in proper form. Richmond & D. R. R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276.

36. A map or diagram used during the trial, to illustrate the testimony of witnesses, is not, by those acts alone, properly considered as being in evidence. People *v.* Cochran, 61 Cal. 548.

37. But a map or diagram used in this way may be formally put in evidence during the argument of counsel, to enable him to use it in his argument to the jury. Meinzer *v.* City of Racine, 74 Wis. 166, 42 N. W. 230.

38. The production and proof of a paper at the trial make it evidence for both sides. Commercial Bank *v.* State Bank, 4 Hill (N. Y.) 516; Kelly *v.* Dutch Church, 2 Hill (N. Y.) 105; Bristol *v.* Warner, 19 Conn. 7.

39. Zuel *v.* Bowen, 78 Ill. 234; Smith *v.* Scantling, 4 Blackf. (Ind.) 443; Renn *v.* Samos, 33 Tex. 760; Robertson *v.* DuBose, 76 Tex. 1, 13 S. W. 300.

It is only necessary to make out a *prima facie* case of the execution of an instrument, in order to have it read to the jury as an exhibit, before the opposing counsel will be allowed to introduce counter proof. Verzan *v.* McGregor, 23 Cal. 339.

40. Fletcher Eq. Pr. § 595.

41. Commercial Bank *v.* State Bank, 4 Hill (N. Y.) 516; Hands *v.* Upper Canada Furniture Co., 12 P. R. (Ont.) 292.

EXPECTANCY OF LIFE.— See Books; Damages; Injury to Person.

EXPERIMENTS.

By Edward W. Tuttle.

I. ADMISSIBILITY A MATTER OF DISCRETION.

1. Generally. — Experiments both in and out of court are frequently resorted to[1] in certain classes of cases as a practical demonstration of the question in issue, and are often the very best evidence that could be offered. The performance of an experiment in the presence of the court and jury, or the admission of evidence of experiments performed out of court, is of necessity a matter resting largely in the discretion of the trial judge.[2]

2. Conclusiveness on Appeal. — The exercise of this discretion, either in excluding or admitting such evidence, will not be reviewed

1. Clark *v.* Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811.

2. *United States.* — West Publishing Co. *v.* Lawyers' Co-op. Pub. Co., 79 Fed. 756, 51 U. S. App. 216, 35 L. R. A. 400; United States *v.* Ball, 163 U. S. 662.

Alabama. — Campbell *v.* State, 55 Ala. 80.

California. — People *v.* Levine, 85 Cal. 39, 22 Pac. 969; People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833.

Connecticut. — State *v.* Smith, 49 Conn. 376.

Georgia. — Heath *v.* State, 93 Ga. 446, 21 S. E. 77.

Idaho. — State *v.* Hendel, 4 Idaho 88, 35 Pac. 836.

Iowa. — Homan *v.* Franklin Co., 98 Iowa 692, 68 N. W. 559. But see Hall *v.* Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207.

Massachusetts. — Com. *v.* Piper, 120 Mass. 185.

Minnesota. — Adams *v.* City, 84

on appeal, except in case of a palpable abuse thereof.[3] And a refusal to permit an experiment will be sustained even though a contrary ruling allowing its performance would not have been disturbed.[4]

3. Limitations. — When one party has been permitted to perform a test or experiment, or give evidence thereof, it is error for the court to refuse to allow similar evidence in rebuttal by the other party.[5] And it has been held that the court's discretion in admitting evidence of experiments performed out of court is limited to determining whether the experiment was made under such conditions as to fairly illustrate the point in issue.[6]

Minn. 426, 86 N. W. 767; Smith *v.* St. Paul City R. R. Co., 32 Minn. 1, 18 N. W. 827.

Nebraska. — City of Ord *v.* Nash, 50 Neb. 335, 69 N. W. 964.

New York. — Clark *v.* Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811.

Utah. — Konold *v.* Rio Grande W. R. R. Co., 21 Utah 379, 60 Pac. 1,021, 81 Am. St. Rep. 693.

3. People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; People *v.* Levine, 85 Cal. 39, 22 Pac. 969; Konold *v.* Rio Grande W. R. R. Co., 21 Utah 379, 60 Pac. 1,021, 81 Am. St. Rep. 693; Hatfield *v.* St. Paul & D. R. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14.

4. In City of Ord *v.* Nash, 50 Neb. 335, 69 N. W. 964, an action for personal injuries due to the alleged negligent construction of trenches close to the sidewalk, defendant (city) offered evidence of certain experiments made a year after the accident. The testimony of witnesses was offered, that on a cloudy night, with the assistance of a light in an adjoining house similarly situated to the light burning at the time of the accident, they were able to see plainly the foot-path and also the surface of the ground for a radius of several feet from the point where the injury was received. The rejection of this evidence was held no error. The court says: "There is, as all agree, some room for the exercise of discretion by the trial court in the receiving and rejecting of evidence of this character, and we are unable to say that there has, in this instance, been an abuse of such discretion. We must not be understood as intimating that it would have been reversible error to receive the evidence offered; but the rejecting of evidence tending to prove that the condition of the premises was, at a subsequent time, discernible by witnesses whose attention was specially directed to the subject, and under circumstances in some respects at least materially different from those surrounding the plaintiff below at the time of the accident, affords no ground of complaint."

5. In Cleveland C. C. & St. L. R. Co. *v.* Huddleston, 151 Ind. 540, 46 N. E. 678, 68 Am. St. Rep. 238, 36 L. R. A. 681, previous to the trial of an action for injuries due to the alleged negligence of defendant, the latter moved the court that plaintiff be required to produce a specimen of his urine for expert analysis in order that defendant might meet his claim that he was suffering from certain injuries to his kidneys. Plaintiff's own experts testified as to an analysis made by them of his urine. The refusal of the court to grant this motion was held error on the ground that such a proceeding was no violation of the plaintiff's rights, since it involved no examination of his person, and further that it was necessary to enable defendant to meet similar evidence on plaintiff's part.

6. In Starr *v.* People, 28 Colo. 184, 63 Pac. 299, witness for the prosecution testified to a certain conversation which he had overheard. To impeach this evidence, defendant offered proof of an experiment showing that it was impossible for the witness to have overheard such conversation from where he stood. This evidence was rejected, although de-

4. Test of Admissibility. — The important fact to have in view in passing upon the admissibility of such evidence is, will it aid rather than confuse the jury in reaching its conclusions.[7] If the experiment be too uncertain,[8] or would tend to confuse the jury by introducing collateral issues,[9] evidence of it should be excluded. If,

fendant further offered to show that the conditions at the time of the experiment were the same as those existing at the time of the conversation. On appeal this ruling was held erroneous, the court saying: "It is, we think, well settled by the authorities that the testimony of witnesses as to experiments made out of court is admissible in both civil and criminal cases for the purpose of illustrating or rebutting testimony given in the case, when it is shown that the conditions are the same. . . . We cannot accept the contention of the attorney-general that it is entirely within the discretion of the trial court to admit or exclude such evidence. While it is largely within its discretion to determine whether the testimony shows that the experiment was made under such conditions as to fairly illustrate the point in issue, . . . yet, when it is shown that the conditions were essentially the same in both instances, the testimony should be admitted, and its weight determined by the jury." See also Com. *v.* Piper, 120 Mass. 185.

7. Burg *v.* Chicago, R. I. & P. R. R. Co., 90 Iowa 106, 57 N. W. 680; State *v.* Fletcher, 24 Or. 295, 33 Pac. 575.

"Evidence of this kind should be received with caution, and only be admitted where it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful. In other cases, a principle may be established, by experiments made under circumstances quite different from the one under investigation, that will have an important and beneficial bearing upon the investigation." Chicago, St. L. & P. R. Co. *v.* Champion (Ind.), 32 N. E. 874.

8. Ulrich *v.* People, 39 Mich. 245.

Uncertainty of Test. — Trailing With Bloodhounds. — In Simpson *v.* State, 111 Ala. 6, 20 So. 572, the defendant offered to show that two bloodhounds of the same breed as those employed to track the supposed criminal, and trained by the same man, when put upon the trail of a human being had left it to follow the trail of a sheep. This comparative test was held not sufficiently certain to determine the reliability of the dogs used to track the defendant.

9. Tesney *v.* State, 77 Ala. 33.

In an action for injury caused by a falling barrel defendant called certain of its employes and sought to prove by them experiments with piles of barrels similar to the one from which the barrels fell upon plaintiff and from which the barrel, located relatively the same as the empty barrel in question, was entirely taken out without causing the pile to fall. The exclusion of this evidence was held proper. The court says: "We are clearly of the opinion that experiments of that character, and their results, and inferences drawn from them by witnesses, were mere collateral matters which could have no legitimate bearing upon the issues before the jury. Besides the impossibility of showing that the conditions under which these experiments were made were in all respects identical with those existing at the time the plaintiff was injured, and the multitude of collateral issues which an attempt to prove identity of conditions would raise, the fact that one experiment had been conducted to a successful issue would have little if any tendency to show that, in another case precisely like it, an accident might not happen. . . . The question is not whether a pile of barrels might not stand with an empty barrel situated as was the one in this case, but whether leaving such barrel in the condition shown rendered the support of the barrels above it less

however, it is relevant to the matter in issue, and tends to assist the jury in reaching a correct conclusion, its exclusion is reversible error.[10]

5. **Experiments Requiring Time.** — The court is not required to delay the trial to permit the performance of an experiment.[11]

II. PURPOSES FOR WHICH ADMISSIBLE.

1. **Facts Susceptible of Demonstration.** — A. GENERALLY. — When the truth or falsity of a fact is susceptible of direct physical demonstration the court may in its discretion permit a test or experiment[12]

secure, and that to such a degree as to constitute negligence, and whether the plaintiff's injury occurred as the result of such negligence." And it was further held that such witnesses could not be allowed to express an opinion as to whether an empty barrel, located as was the one in question, could be taken out of the pile without causing it to fall. Such evidence would be merely a means of getting before the jury indirectly the result of the experiments, which were themselves incompetent. Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191.

"A fact that illustrates, as by an experiment, the condition of the subject matter of the issue in controversy, is not collateral to that issue, but is direct evidence bearing upon it." Walker *v.* Westfield, 39 Vt. 246.

10. In an action on a promissory note containing defendant's and another signature, defendant claimed that his signature was forged, in support of which defense he introduced evidence tending to show that his signature was paler than the other, claiming that it was made with different ink. In rebuttal plaintiff introduced the testimony of an expert who had previously given his opinion that the signatures were made with different ink to show that by a subsequent experiment he found that writing made with the same ink differed as to apparent color. He accounted for this difference by the fact that a blotting pad had been used in one case. The exclusion of the evidence of this experiment was held error on the ground that it was well calculated to throw light upon the question in issue. Farmers' & Mer. Bank *v.* Young, 36 Iowa 44.

11. **Burning Train of Candles.** In People *v.* Levine, 85 Cal. 39, 22 Pac. 969, the court refused to stop the progress of the trial to allow the performance of an experiment consisting of the burning of a train of candles such as was alleged to have been used by defendant in setting the fire charged against him, on the ground that it would consume too much time. This ruling was held no error.

In Homan *v.* Franklin Co., 98 Iowa 692, 68 N. W. 559, an expert was permitted to experiment with plaintiff's eyes in the presence of the jury for the purpose of showing that their dilated condition was due to abnormal conditions of the heart. Defendant offered to show that the same results would be observed in similar experiments upon any person and requested permission to have such experiments made in the presence of the jury. The trial court refused his offer on the ground that it would consume too much time. This ruling was held no error upon the ground that the matter was discretionary with the court.

12. **Trying on Clothes in Presence of Jury.** — In Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463, which was an action for the price of clothes which defendant had refused to accept on the ground that they were not satisfactory, defendant, at plaintiff's request, tried the clothes on in the presence of the jury, and plaintiff was also permitted to call experts who testified that the clothes

to be made in the presence of the jury, or admit evidence of such experiments performed out of court.[13]

B. Operation of Machine. — a. *Generally.* — When the condition or operation of a particular machine or implement is the chief matter in issue, oftentimes the most satisfactory and convincing evidence is its actual use or operation under the proper conditions,

could be made to fit by certain alterations.

Trying on Boots. — In State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382, on a trial for murder it appeared that the murderer had worn a certain pair of boots. Defendant testified that he could not get these boots on his feet, and in the presence of the jury made apparently extraordinary efforts to put them on, but without effect. In rebuttal the state called a shoemaker to measure both the boots and defendant's feet, and he testified that a foot of that size could wear the boot. Other witnesses in the presence of the jury put the boot on, after which their feet were measured and found to be as large as defendant's. This evidence was held competent and the measurement of defendant's feet against his objection legitimate cross-examination.

Test of Supernatural Powers. Where defendant was indicted for using the mails for furtherance of a scheme to defraud by representing that by supernatural power he was able to answer sealed letters addressed to spirit friends, it was held that he would not be permitted to give a test or exhibition of his unknown power in open court. United States *v.* Ried, 42 Fed. 134.

In an action against a railway company for injuries due to its alleged negligence, defendant claimed that the accident was due to a rail wrongfully placed across its track by some third party, and in support of this claim introduced in evidence a rail which showed on its bottom flange a scar which defendant claimed was made by the pony truck wheel in front of the engine coming in contact with it as it lay across the track. Plaintiff in rebuttal introduced a section of rail similar in every respect to that shown by defendant, and also a wheel, somewhat smaller, but in other respects like the truck wheel of the engine. This section of rail was placed across the defendant's rail and the wheel was rolled on the latter toward it, demonstrating that the wheel under such circumstances would not touch the lower flange of the cross rail. It further appeared that the smaller the wheel the less likely it was to strike the lower part of the rail. The allowance of this experiment was held proper. "In all cases of this sort very much must necessarily be left to the discretion of the trial court, but when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with." Leonard *v.* Southern Pacific R. R. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221.

13. Possibility of Committing Rape in Certain Position. — In McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877, in a trial for rape, the prosecutrix testified as to the position of the parties when the alleged assault was committed. In rebuttal defendant offered the testimony of a physician as to experiments made by him to demonstrate the impossibility of committing the act in the position testified to by the prosecutrix. The rejection of this offer was sustained on the ground that the conditions were not sufficiently alike as to the size of the persons.

In a prosecution for larceny it was alleged that the prosecutor's coat had been cut open and his pocketbook extracted through the opening. Experiments made by the tailor by whom the coat was mended, with a pocket-book similar to the one stolen, were offered in support of his theory to show that it could have been thus extracted. The exclusion of these experiments was held error, especially in view of the fact that the

in the presence of the court and jury. Such an experiment or demonstration is permissible in the trial court's discretion.[14] So in an action for injury received while operating certain machinery, the machine may be operated by the plaintiff in the presence of the jury, to illustrate the manner in which the accident happened.[15]

b. *Similarity of Conditions.* — When the condition or method of operation of a machine at a particular time is in issue, the experiment must be performed under conditions substantially similar to those existing at the time in question.[16]

c. *Use of Models.* — A model of the machine in question may be exhibited and operated in the presence of the jury for the purpose of showing how such a machine would operate under certain conditions.[17]

C. Demonstrating Personal Condition and Capacity. — a. *Nature and Extent of Injury.* — **(1.) Generally.** — Where the question in issue is the nature and extent of an alleged physical

hole had been mended and its original condition could not be well determined. People *v.* Morrigan, 29 Mich. 4.

14. Probert *v.* Phipps, 149 Mass. 258, 21 N. E. 370.

Operation of Cash Register. — In an action for the failure to accept and pay for a cash register, defendant claimed that the machine did not work properly. Plaintiff, in order to show how the machine worked, operated it in the presence of the jury after giving evidence that it was in the same condition as when refused by the defendant. The action of the court in permitting this experiment was held proper. National Cash Register Co. *v.* Blumenthal, 85 Mich. 464, 48 N. W. 622.

Operation of Plating Machine. In Taylor *v.* United States, 89 Fed. 954, it was held no error to allow an expert to operate a plating machine found in defendant's possession to demonstrate that the coins alleged to have been counterfeited could have been plated with the machine.

15. Probert *v.* Phipps, 149 Mass. 258, 21 N. E. 370.

16. Kinney *v.* Folkerts, 84 Mich. 616, 48 N. W. 283.

In Woelfel Leather Co. *v.* Thomas, 68 Ill. App. 394, on the question as to whether the safety appliances of an elevator were in proper working order when the accident occurred, the testimony of experts as to their condition shortly after the accident, based upon experiments made by them, was held competent, after showing that the elevator and the appliances were in the same condition at the time of the experiment as when the accident occurred.

17. Use of Model for Illustration. In McMahon *v.* City of Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143, on the question of defendant's negligence for failure to use spark arresters in an engine for street rolling, experts were permitted to use the model of a locomotive engine to illustrate the use of a spark arrester, and to indicate how it could be applied on the roller engine. The court cautioned the witness that "in so far as the different parts of the model are shown to be similar in this model to the steam roller, you may call attention to them, but the other parts of the model you are not to mention." This ruling was held no error, especially when coupled with this instruction.

In an action for injuries received while working on a coal bucket, plaintiff offered in evidence a small wooden model of the bucket, which was operated in the presence of the jury. The court instructed the jury that while they must take into consideration the difference between the model and the original, both in material and size, they might consider

injury, the injured person may, in the discretion of the court, be permitted to give a physical demonstration of his condition either by moving the parts affected,[18] or subjecting them to other[19]

it simply as an illustration of how the accident could have happened. Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938.

18. Adams *v.* City, 84 Minn. 426, 86 N. W. 767.

Physical Demonstration of Extent of Injury. — Common Practice. — In Clark *v.* Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. W. Supp. 811, Bartlett, J., says: "Speaking from my own experience as a trial judge at the circuit, I may say that it has been a common practice, without objection, for injured persons to be asked to demonstrate by their physical movements the extent to which they claimed to have suffered impairment of bodily motion by reason of the injuries which they had received."

19. Sticking Pins in Paralyzed Limb. — In an action for personal injury plaintiff introduced evidence of tests made by the witness, a physician, a year after the accident and six months before the trial, and made expressly for the purposes of the trial. The witness testified that to determine whether portions of plaintiff's body had lost the sense of feeling because of the accident, he stuck pins into those parts, and also into the sound adjacent parts; that when he stuck pins into the alleged deadened portions plaintiff exhibited no signs of suffering pain, but when pins were stuck in other portions of his body plaintiff would flinch and complain a great deal. Objection was made to the witness testifying to anything plaintiff said or did while he was being examined by the physician for the purpose of testifying in the case and not for the purpose of treating the injuries, on the ground that such evidence would be self-serving, hearsay, immaterial and irrelevant. On appeal the admission of this evidence was held no error, the court saying: "Appellee had a right, even pending the litigation, to have all proper examinations and tests made to ascertain the nature and extent of his injuries, and the result thereof could be proven on the trial. This was the matter under investigation, and how appellee bore the tests applied was a part of the transaction and clearly admissible. It was a question for the jury to decide, in the light of circumstances shown to have attended the experiment, whether his indifference to pain was simulated. No statement of appellee that it did not hurt him to stick pins in his right leg was admitted. Only the negative fact that he did not flinch when the test was applied went to the jury, and it was not error to admit such evidence." Missouri, K. & T. R. Co. *v.* Johnson (Tex. Civ. App.), 67 S. W. 769.

In Osborne *v.* City of Detroit, 32 Fed. 36, for the purpose of demonstrating that one side of her body was paralyzed, plaintiff allowed her physician to stick a pin in the alleged paralyzed side. Defendant objected to this exhibition on the ground that plaintiff was not sworn to act naturally. The experiment was held competent, however.

In Clark *v.* Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811, for the purpose of showing the extent of his injuries plaintiff was permitted, over objection, to attempt to drink a glass of water, and to attempt to write his name, in the presence of the jury. The experiment indicated that his hand was unsteady. In sustaining this action of the trial court on appeal it is said this "evidence was admissible within the fair discretion of the trial court. The injured person could certainly be allowed to testify that since the injury he had not been able to write without experiencing a tremor of the hand, or to drink a glass of water without similar inconvenience. I am unable to perceive any good reason why he may not be allowed to illustrate the extent of this incapacity as well as to state it in words. Deception, of course, is possible in such an illustration, but it is equally pos-

appropriate tests. And it has been said that such a test may be compelled.[20]

(2.) **Right to Inspection.** — When such demonstration or test has been permitted, the adverse party is entitled to an inspection and examination of the affected parts.[21]

(3.) **Possibility of Deception.** — The fact that the witness is not sworn to act naturally, and that there is a possibility of deception, is no objection to the competency of such evidence, but goes only to its weight with the jury.[22]

sible in the oral statement. In either case the jury are to judge of the credibility of the witness." See also Homan *v.* Franklin Co., 98 Iowa 692, 68 N. W. 559.

Measurement of Leg. — In Hall *v.* Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207, plaintiff claimed that by reason of injuries due to defendant's negligence, her foot and the calf of her leg had been so injured as to make the former larger and the latter smaller. Certain medical experts testified that from measurements they found the injured leg and foot to be of the same size as the uninjured ones; others testified that the injured leg, six inches above the ankle, was smaller than the other. The trial court of its own motion refused defendant's request for a measurement in the presence of the court and jury, on the ground that there had been enough measuring already. Under these circumstances it was held error to refuse to allow an actual measurement in the court room.

20. Demonstrating Physical Condition. — In Hatfield *v.* St. Paul & D. R. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14, plaintiff contended that by reason of injuries due to the negligence of defendant, her thigh had been seriously injured and caused to shrink, making her lame. Defendant requested that she be required to walk across the court room in the presence of the jury. On appeal, the trial court's refusal to compel this act was held no error, on the ground that it would have furnished the jury little or no aid in determining the extent or character of her injuries, except as to the fact that she limped, as to which the evidence was already ample and uncontradicted. The court says: "As the object of all judicial investigations is, if possible, to do exact justice and obtain the truth in its entire fullness, we have no doubt of the power of the court, in a proper case, to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. This is in accordance with analogous cases in other branches of the law. . . . And we are by no means prepared to say that there may not be circumstances where the defendant would have a right to such an order."

21. In Winner *v.* Lathrop, 67 Hun 511, 22 N. Y. Supp. 516, in an action against a physician for malpractice, plaintiff exhibited her bare arm and moved it about for the purpose of showing the injuries due to its unskillful treatment. Defendant then asked that he be allowed to examine the arm in the presence of the jury, which request was refused. On appeal this ruling was held erroneous on the ground that after voluntarily exhibiting and using her arm before the jury plaintiff could not object to such an examination in order to detect the possible imposition on the court or jury.

22. Clark *v.* Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811; Missouri, K. & T. R. Co. *v.* Johnson (Tex. Crim.), 67 S. W. 769. See also Clark *v.* State, 38 Tex. Crim. 30, 40 S. W. 992.

Possibility of Deception. — In Arkansas River Pack. Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278, plaintiff in an action for personal injuries was permitted to exhibit and manipulate his injured limb in the presence of the jury to show the extent of his injuries. Defendant objected, not to the exhibition of the limb, but to its manipulation and use. "It produced

b. *Tests of Capacity.* — **(1.) Generally.** — So also the court may in its discretion permit or require a test of the capacity of the witness to do a particular act when his ability in this respect is in issue.[23] Thus the ability to read,[24] to estimate time,[25] and to identify certain persons,[26] may be put to a practical test in the presence of the court and jury.

(2.) Test by the Court. — The court may of its own motion subject the witness to such a test.[27]

a higher order of evidence than is usually attainable, in that it added physical illustration and demonstration to oral statement, and impressed the court and jury through the sense of sight as well as through that of hearing. It may be true that a designing witness can exaggerate the true condition of an injured limb by false and constrained movements, and yet that cannot render the performance of physical acts inadmissible as evidence, any more than the equally obvious fact that he may give undue and false coloring to his oral statements renders him incompetent to testify by word of mouth. That objection might be urged against all human testimony, but it goes only to the question of weight or credibility, and does not reach that of competency or admissibility." See also Clark *v.* Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811.

23. Speed in Digesting Cases. In West Publishing Co. *v.* Lawyers' Co-op. Pub. Co., 79 Fed. 756, 51 U. S. App. 216, 35 L. R. A. 400, on the question as to how fast defendant's editors could digest cases, defendant offered to have a test made in the presence of the court by selecting a variety of cases new to the editors and allowing them to digest the same in the usual way. The allowance of such a test was held to be a matter resting in the court's discretion and its exclusion no error.

Test of Strength. — See Probert *v.* Phipps, 149 Mass. 258, 21 N. E. 370. See article "Capacity."

24. Compelling Party to Read in Presence of Jury. — In Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501, on the question of the ability of defendant to read papers which he was charged with having negligently failed to read, it was held competent for the court to require him to read in the presence of the jury as an actual test of his ability.

25. Burke *v.* People, 148 Ill. 70, 35 N. E. 376.

26. In order to test the ability of the witness to identify a particular person it is competent to require him to designate such person among a number of those present. State *v.* Johnson, 67 N. C. 55.

In State *v.* Murphy, 118 Mo. 7, 25 S. W. 95, in a criminal case in order to test the ability of the witness to recognize the prosecutrix, different women were brought into the court room and the witness required to identify the women in question. This was held to be a legitimate and proper test.

Test of Eyesight. — In Heath *v.* State, 93 Ga. 446, 21 S. E. 77, in order to test the witness' power of vision for purposes of impeachment, defendant asked while cross-examining her that she be required to go to the window to see if she could recognize a person on the opposite side of the street. The person to be identified, however, was not within view of the court or jury. The request was refused. This ruling was held no error, on the ground that the matter was discretionary with the court.

Identification by the Voice. — In Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81, the witness testified that he could identify the defendant by his voice. The defendant, on request, said something aloud to make a test of the matter. The court interfered, ruling that it was not a proper proceeding. On appeal, the court's action was sustained on the ground that defendant, not being under oath, there was no way to determine the genuineness of the voice used.

27. Test of Witness by Court. In Burke *v.* People, 148 Ill. 70, 35 N. E. 376, a witness testified as to

2. Illustration. — A. GENERALLY. — Experiments in court may be permitted for the purpose of illustration,[28] but they must be more than mere exhibitions, which have no tendency to throw light upon the facts in issue or some testimony in the case.[29]

B. ILLUSTRATION OF USE OF IMPLEMENT. — A witness testifying to use to which a particular implement or tool might be put, may be permitted to illustrate the truth of his statement by using it in the manner described.[30]

3. As Basis for Inference. — A. GENERALLY. — Experiments, besides being competent as direct demonstration, may be used as a basis for inference in determining the truth or falsity of an alleged fact. It is permissible to show, first, in proof of an alleged fact,

the length of time which had elapsed between two occurrences. The court in order to test the witness required her to estimate time while he held his watch. This experiment was held to be no error.

28. McMahon *v.* City of Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143; Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938; Starr *v.* People, 28 Colo. 184, 63 Pac. 299.

Experimental Tests With Drugs in Court. — People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846, was a trial for murder alleged to have been committed by administering poison along with medicine which deceased was taking under prescription by her physician. Sometime after deceased's burial she was disinterred and a thorough examination made to detect the presence of certain poisons. On the trial the prosecution, in support of its testimony as to these examinations, had one of its experts perform before the jury experimental tests similar to those applied to the viscera of the body. An experienced apothecary was also permitted to make up a prescription which the deceased was taking at the time the poison was alleged to have been administered, and described its taste as being salt. He then mixed with the prescription a certain amount of morphine and described its taste as bitter. This evidence was held relevant in view of other testimony that when defendant gave to deceased certain liquid along with the regular prescription, she acted as though it were bitter. "As the theory of the prosecution was that morphine was then given, it was competent to show by one experienced in the art how the morphine could be combined with the prescription of a physician and that there would be no change in color, and that the taste would be bitter."

Singing as Illustration. — In State *v.* Linkhaw, 69 N. C. 214, 12 Am. Rep. 645, on an indictment for disturbing a religious meeting by loud singing, at the trial a witness was permitted to describe defendant's singing by singing a verse in imitation of his voice and manner. On appeal the case was reversed on other grounds, but no mention was made of his testimony.

29. On a trial for murder it appeared that deceased had been covered with turpentine, which was then set on fire, and that he died in consequence. In order to illustrate how deceased was burned, the state was permitted to saturate with turpentine a piece of woolen goods and set it on fire in the presence of the jury, an attempt being made to extinguish it. The court held that, "while some experiments under some circumstances were proper, this was not an experiment and it was not a transaction testified about by any witness, but merely a spectacular exhibition before the jury," and therefore not admissible. Faulkner *v.* State, 43 Tex. Crim. 311, 65 S. W. 1,093.

30. People *v.* Hope, 62 Cal. 291. See also Taylor *v.* United States, 89 Fed. 954.

that a result similar to the fact in question was obtained from an experiment performed under conditions substantially similar to those admitted or proved to exist;[31] second, in disproof thereof, that a result was obtained different from the alleged fact by an experiment performed under similar conditions;[32] and third, that a similar result was obtained from an experiment performed under totally different conditions.[33]

B. Similarity of Conditions. — a. *Generally.* — When evidence of experiments is offered for the first purposes mentioned in

31. Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Byers *v.* Nashville, C. & St. L. R. R. Co., 94 Tenn. 345, 29 S. W. 128; State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430; Brooke *v.* Chicago, R. I. & P. R. Co., 81 Iowa 504, 47 N. W. 74.

Probability. — Horse Following Certain Road. — In State *v.* Ward, 61 Vt. 153, 17 Atl. 483, on a trial for arson, it appeared that on the night of the crime a sleigh had been driven over an unfrequented road to the scene of the fire, leaving peculiar marks on the snow; that the defendant on the night in question had hired a certain horse and sleigh. The sleigh of defendant when fitted in the tracks left on the snow corresponded with them in several peculiar and unusual respects. The state was permitted to show that the horse hired by defendant, when tested at a later date, and given free rein, followed the same course as the tracks in the snow to the scene of the crime, and that this horse had not been in that vicinity for a long time, if ever before, unless when driven by defendant on the night in question.

Position of Parties to Homicide. In Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046, the testimony of the physicians who found deceased soon after he was shot, and had thoroughly examined his wounds, and were familiar with the condition under which the affray in which he was killed took place, as to experiments made by them to ascertain the relative positions of the deceased and defendant at the time of the shot, was held competent.

32. *Colorado.* — Starr *v.* People, 28 Colo. 184, 63 Pac. 299.

Florida. — Lawrence *v.* State (Fla.), 34 So. 87.

Georgia. — Sealy *v.* State, 1 Ga. 213, 44 Am. Dec. 641.

Ohio. — Smith *v.* State, 2 Ohio St. 511.

Oregon. — Leonard *v.* Southern Pacific R. R. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221.

Utah. — Hayes *v.* Southern Pacific R. R. Co., 17 Utah 99, 53 Pac. 1,001, for a statement of which see note 33 *infra.*

Washington. — State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 352.

In Gilbert *v.* Third Ave. R. Co., 22 Jones & S. (N. Y.) 270, plaintiff testified that he was thrown from the car by a sudden jerk as it started while he was standing on the steps. In rebuttal defendant company offered evidence of an experiment made by placing a person in the same position as the plaintiff occupied at the time of the accident and suddenly starting the car, whereby such person was thrown in an opposite direction from that testified to by the plaintiff. Although proper objection was not made so as to raise the question of the similarity of the conditions, yet the court held that such evidence was in its nature competent.

33. Farmers' & Mer. Bank *v.* Young, 36 Iowa 44. See Homan *v.* Franklin Co., 98 Iowa 692, 68 N. W. 559.

In Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181, on the question as to whether defendant's copper mill was injuriously affecting plaintiff's land on a stream below it, plaintiff introduced evidence of an experiment showing that vegetation taken from his premises contained copper. Defendant then offered to show by an expert witness that in experiments upon grasses procured elsewhere he also had ob-

the preceding paragraph, the fundamental requisite is that they must be performed under conditions similar to those governing the result to be proved or disproved.[34]

b. *Degree of Similarity.* — There is no fixed standard, however, for determining the degree of similarity required, since the circumstances of each case are usually different. The rule as generally

tained copper. The admission of this evidence was held proper.

34. *Alabama.* — Mayer *v.* Thompson-Hutchinson Bldg. Co., 116 Ala. 634, 22 So. 859.

California. — People *v.* Hill, 123 Cal. 571, 56 Pac. 443.

Illinois. — Chicago & A. R. R. Co. *v.* Logue, 47 Ill. App. 292.

Iowa. — McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877.

Louisiana. — Seibert *v.* McManus, 104 La. 404, 29 So. 108.

Maryland. — Keyser *v.* State, 95 Md. 96, 51 Atl. 1,057.

New York. — Yates *v.* People, 32 N. Y. 509.

Oregon. — State *v.* Fletcher, 24 Or. 295, 33 Pac. 575; State *v.* Justus, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470; Leonard *v.* Southern Pacific R. R. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221.

Tennessee. — Byers *v.* Nashville C. & St. L. R. R. Co., 94 Tenn. 345, 29 S. W. 128.

Texas. — Morton *v.* State (Tex. Crim.), 71 S. W. 28.

Vermont. — Hardwick Sav. Bank & Trust Co. *v.* Dreman, 72 Vt. 438, 48 Atl. 645.

Testing Sufficiency of Blow to Cause Death. — In Com. *v.* Piper, 120 Mass. 185, on a trial for murder defendant offered testimony of a witness, the manufacturer of the dynamometer, as to experiments made by him with a bat of substantially the same form and weight as that with which the state contended the murder had been committed. Defendant proposed to show by him the impossibility of striking a sufficiently hard blow with such a bat. The rejection of this testimony was held no error on the ground that the conditions were not sufficiently similar and that the court in its discretion might properly reject it.

Testing Effect of Chemical. — In Alabama G. S. R. R. Co. *v.* Collier, 112 Ala. 681, 14 So. 327, plaintiff contended that in a railway accident his clothes had been injured by the explosion of a bottle of fire-extinguisher; defendant offered to make a practical test in the presence of the court by pouring some of the extinguisher on some scraps of cloth to show that it would not injuriously affect the same. The exclusion of this testimony was held no error.

Amount of Hay Consumed by Horse. — Carlton *v.* Hescox, 107 Mass. 410, was an action for hay fed to defendant's horse. It appeared that the horse had been left with plaintiff to be doctored, and was therefore not in ordinary condition. Evidence of an experiment made with an ordinary horse to determine how much hay he would eat in a specified time was held incompetent because the conditions were not the same.

Falling Brick — Test of Other Parts of Wall. — Where the cause of action is injury received from a falling brick, evidence of an experiment made on another corner of the same building showing that it was sufficiently strong to support the weight of a man is incompetent. Mayer *v.* Thompson-Hutchinson Bldg. Co., 116 Ala. 634, 22 So. 859.

Method of Climbing Fence. — In People *v.* Hill, 123 Cal. 571, on the question as to how defendant climbed over a wire fence when attacking the deceased, evidence of an experiment made by the witness was offered to show that when he climbed over the fence in a certain manner in a place near to that over which the defendant must have passed, the effect upon the wire was the same. This evidence was held incompetent on the ground that the conditions were not shown to be the same. The relative weight of the two persons, the tension of the wire at the different posts, and the force with which each stepped upon the fence, were ele-

stated is that the conditions must be substantially[35] or approximately[36] similar; an absolute identity of conditions is unnecessary.[37]

c. *Similarity of Essential Conditions Only.* — This similarity need extend only to those conditions which govern or substantially affect the result.[38]

d. *When Same Opportunities Not Open to Both Parties.* — When one party has been permitted to give evidence of an experiment, a similar experiment in rebuttal by the other party should not be excluded because the conditions under which it was performed were

ments to be considered before the experiments could illustrate the supposed act of the defendant.

35. *Alabama.* — Decatur Car Wheel & Mfg. Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646.

Colorado. — Starr *v.* People, 28 Colo. 184, 63 Pac. 299.

Indiana. — Chicago St. L. & P. R. Co. *v.* Champion (Ind.), 32 N. E. 874.

Massachusetts. — Com. *v.* Piper, 120 Mass. 185.

Montana. — State *v.* Hurst, 23 Mont. 484, 59 Pac. 911.

Vermont. — Carpenter *v.* Corrinth, 58 Vt. 214.

Substantial Similarity. — "The requirement of this rule is that there shall be similar or nearly similar circumstances and conditions in order to admit this character of evidence; and it does not exact more than what is denominated 'substantial' or 'reasonable' similarity, and this means such a degree of similarity as that evidence of the experiments will accomplish the desideratum of assisting the jury to intelligently consider the issue of fact presented in regard to this matter." Morton *v.* State (Tex. Crim.), 71 S. W. 281.

36. Konold *v.* Rio Grande W. R. R., 21 Utah 379, 60 Pac. 1,021, 81 Am. St. Rep. 693; Clark *v.* State, 38 Tex. Crim 30, 40 S. W. 992, *s. c.* 39 Tex. Crim. 152, 45 S. W. 696.

37. *California.* — People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; County of Sonoma *v.* Stofen, 125 Cal. 32, 57 Pac. 681.

Illinois. — Fein *v.* Covenant Mut. Ben. Ass'n, 60 Ill. App. 274.

Iowa. — Burg *v.* Chicago R. I. & P. R. R. Co., 90 Iowa 106, 57 N. W. 680.

Kansas. — Missouri Pacific R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

Maryland. — Richardson *v.* State, 90 Md. 109, 44 Atl. 999.

Texas. — Clark *v.* State, 38 Tex. Crim. 30, 40 S. W. 992.

Absolute Identity of Conditions Not Essential. — In Eidt *v.* Cutter, 127 Mass. 522, the question in controversy was whether plaintiff's house had been injured by fumes and gases from defendant's copperas works or by gases from the sewer near the premises. Plaintiff's experts, as the basis for their opinion, testified as to experiments made in other places under circumstances and conditions as nearly like those of the case in question as was possible to make them in the absence of the sewer. The admission of this evidence was held proper on the ground that the circumstances and conditions were sufficiently similar to make the testimony valuable to the jury.

38. County of Sonoma *v.* Stofen, 125 Cal. 32, 57 Pac. 681; State *v.* Flint, 60 Vt. 304, 14 Atl. 178.

In Chicago St. L. & P. R. Co. *v.* Champion (Ind.), 32 N. E. 874, plaintiff brought action for injury due to the negligence of a fellow servant L. The car upon which L. was managing the brake had been "kicked" onto a side track for the purpose of coupling it to a standing car. When the two cars were close together, L. negligently released the brake, and it was alleged that the car leaped forward suddenly, crushing plaintiff's hand. To prove that under such circumstances a car would not spring forward when the brakes were loosened, defendant produced evidence of an experiment in which a similar car with the same brakeman, L., in similar weather, had been operated on the same track, in the

not precisely similar to the actual occurrence, where these conditions were under the exclusive control of the adverse party.[39]

e. *When the Persons or Things Are Before the Jury.* — When the persons or things involved in the experiment are before the jury,

same manner. The exclusion of this evidence was held error, on the ground that the conditions under which the experiment was made were substantially like those under which the accident happened. The court says:

"In the offer to prove in this case, many circumstances were included that were wholly unimportant, such as the fact that the same brakeman was on the car, and handled the brakes, in both instances. The important fact sought to be established by the experiment was whether or not a car moving at a slow rate of speed down a slight incline, with the brakes set, would, when the brakes were suddenly loosed, jump or spring forward. If it would do so in one instance, it would, under ordinary conditions, repeat it every time the experiment was tried; for it would be the result of the operation of the laws of motion. The rate at which the car was moving, the suddenness with which the brakes were loosened, the degree of the inclination of the track, might affect the celerity of the movement, but would not affect the nature of the movement. If the question for investigation was the distance which it would jump, or the celerity of the movement, all these things might be important; but in determining whether it would or would not jump they are comparatively unimportant."

But on a subsequent appeal of the same case to the appellate court, the exclusion of the evidence of this experiment which had been repeated under exactly the same circumstances, was sustained apparently on the ground that a proper question had not been put to the witness to get the matter in evidence. No reference is made to the previous decision, but it does not appear from the report wherein they differ, although the court says that the conditions were not sufficiently similar in that it was not shown whether the car was in the same condition, the brake tightly or loosely set, or the car "kicked" hard or easy. Chicago St. L. & P. R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221.

39. Byers *v.* Nashville C. & St. L. R. R. Co., 94 Tenn. 345, 29 S. W. 128.

In an action against a railway company for negligently running into and injuring plaintiff's horses, defendant's witnesses were allowed to testify as to the results of certain experiments made by placing a train in the position of the one causing the injury, to determine how far away the engineer could have seen the horses. In rebuttal, plaintiff was allowed to show a somewhat similar experiment in which a ladder was used instead of the locomotive to place the witness at about the same height as the engineer's cab. Defendant objected to the admission of this evidence on the ground that the conditions were not the same. The court held that although plaintiff's experiment had not been made under precisely the same conditions as in the actual occurrence, inasmuch as defendant had been allowed to introduce such testimony, plaintiff should not be barred of the privilege merely because it was impossible for him to experiment with the train. Illinois C. R. R. Co. *v.* Burns, 32 Ill. App. 196.

In a similar case plaintiff was allowed to testify as to his range of vision while standing in a ditch at the side of the track and looking toward the place where the accident happened. The court held that while such evidence may not have had much weight with the jury because the witness did not occupy the same position as the engineer, and because the latter was moving rapidly with the cars and the responsibility of his station required his attention, yet such circumstances bore only upon the weight of such evidence and not upon its competency. Chicago & A. R. Co. *v.* Legg, 32 Ill. App. 218.

and the points of similarity or dissimilarity can be easily seen by them, greater latitude in the use of such evidence is permissible.[40]

f. *Lapse of Time and Method of Handling.* — Where the condition of a document at a particular time in the past is in issue, an experiment designed to show such condition would not ordinarily be competent, because its condition would depend so largely upon the lapse of time, and the manner in which it had been handled.[41]

g. *Condition of Weather and Atmosphere.* — When the result of the experiment would be substantially affected by the condition of the weather or of the atmosphere, a similarity in these respects should be shown.[42] The degree of similarity required depends upon

40. Catching Foot Between Rails. Size of Shoe. — In an action for the death of plaintiff's intestate alleged to have been caused while coupling cars, by his foot catching between the rails of a switch negligently constructed, plaintiff introduced evidence of an experiment made by the witness, who had placed his foot between the rails, showing where the foot would be caught, and where not. The admission of this evidence was sustained on the ground that the witness who made the experiment, and deceased's shoe, both being before the jury, the relative size of the shoes worn by each could be known. Brooke *v.* Chicago, R. I. & P. R. R. Co., 81 Iowa 504, 47 N. W. 74.

Size of Person. — In Hayes *v.* Southern Pacific R. R. Co., 17 Utah 99, 53 Pac. 1,001, it appeared that plaintiff was injured by a passing engine while standing between the track and the coal-bin. In disproof of its alleged negligence, and to show that the space was wide enough for safety, defendant was permitted to show an experiment made by running a similar engine past the witness while standing in the same place. On appeal it was held that while the engines were not run at the same rate of speed they were both run at a low rate and were of equal width, and there was not sufficient dissimilarity to make this experiment improper evidence, since both the defendant and the person with whom the experiment was made were before the jury, who could see their relative size.

41. Lapse of Time and Method of Handling. — In Hardwick Sav. Bank & Trust Co. *v.* Dreman, 72 Vt. 438, 48 Atl. 645, in an action on a bond from which the seal was missing, the evidence tended to show that it was originally sealed with paper taken from the gummed margin of postage stamps. Defendant contended that the bond was unsealed when signed by him, and to prove that such a seal as described was not likely to have become detached, offered to adhere the margin taken from a sheet of postage stamps to a piece of paper and when dried to let the jury remove it. This experiment was held properly excluded because of dissimilarity of conditions, in that it did not appear how such stamp would be affected by time and the manner in which kept or handled. "If such testimony is ever admissible, which we do not decide, the test or experiment must be under similar conditions and circumstances."

42. Lake Erie & W. R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564, was an action for injury to plaintiff caused by his foot catching while coupling cars on the rail and his being run over. Defendant offered a witness to prove that on the same day, after the accident had occurred, he had experimented and found that his boot froze to the rail when placed upon it, just as defendant alleged had occurred in the case of the plaintiff. This experiment was held incompetent on the ground that it was not shown that the conditions of the weather and of the boot as to warmth and moisture were the same in the two cases.

the extent to which the result would be changed by a difference in these conditions.[43]

C. Particular Instances. — a. *Railway Accidents.* — **(1.) Stopping Train.** — On the question as to the distance within which a particular train could have been stopped, evidence may be permitted of experiments with the same[44] or similar[45] trains at the same place.

The Time Required by the Train and by the person injured to reach the place of collision after first becoming visible to each other may be shown by experiment.[46]

(2.) Limits of Vision. — (A.) Engineer. — It is competent to show by experiments performed under proper conditions the engineer's ability or inability to see or identify the person or thing injured in a collision. In some jurisdictions it is essential that the witness should have experimented from a moving train;[47] in others this is not required.[48]

(B.) Injured Party. — So also the distance at which the injured party could have seen the train may be shown by a proper experiment.[49]

b. *Possibility of Identification.* — The possibility or impossibility

43. Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; Lawrence *v.* State (Fla.), 34 So. 87. See "Possibility of Hearing," *infra.*

44. Byers *v.* Nashville, C. & St. L. R. R. Co., 94 Tenn. 345, 29 S. W. 128.

45. Burg *v.* Chicago R. I. & P. R. Co., 90 Iowa 106, 57 N. W. 680.

46. In Nosler *v.* Chicago, B. & Q. R. R. Co., 73 Iowa 268, 34 N. W. 850, in an action against a railroad company for negligently colliding with plaintiff's team, evidence showed that at one point plaintiff could have seen a certain distance up the track, but that between this point and the crossing his view was obstructed. An experiment made by timing the train between the points where it could be seen and the place where the accident occurred, and also a team of horses walking from this point to the crossing, was held competent on the question of negligence, since it appeared that the experiment was carefully made, and there was no doubt as to the point where the train could last have been seen by plaintiff.

47. Alabama G. S. R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913.

In Chicago & A. R. R. Co. *v.* Logue, 47 Ill. App. 292, defendant was charged with negligently running over an infant sitting on its track. On the question as to how far away the engineer could have seen that it was a child, plaintiff offered witnesses to prove the distance at which they had been able by experiment made by walking down the track, to distinguish a coal bucket placed on the track at the same place. The admission of this evidence was held error on the ground that the circumstances and surroundings in the experiment were wholly different from those attending the engineer in the discharge of his duty.

48. Cox *v.* Norfolk & C. R. Co., 126 N. C. 103, 35 S. E. 237.

In Young *v.* Clark, 16 Utah 42, 50 Pac. 832, it appeared that plaintiff, a child, was run into and injured while crossing defendant's bridge, by a train. On the question of the negligence of the engineer in failing to see plaintiff, evidence of an experiment was offered to show that small objects or children could be seen on the bridge from the nearest curve in the railway. The admission of this evidence was held proper.

49. Elgin, J. & E. R. R. Co. *v.* Reese, 70 Ill. App. 463.

of identifying a particular person under certain circumstances may be shown by experiment,[50] but such test must be performed under conditions substantially similar[51] to those governing the identification in question, as respects light, distance and eyesight.

c. *Possibility of Hearing.* — On the question as to the possibility or impossibility of hearing certain words or sounds, evidence of experiments is competent to show that similar words and sounds

50. People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833. But see Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Possibility of Identification. — In Smith *v.* State, 2 Ohio St. 511, on a trial for malicious shooting, the prosecuting witness testified that he was fired upon in the night while standing within the parlor of a tavern near a "common glass window." That just before the shot he saw a man outside whom he thought was defendant, pointing a pistol toward him; that by the flash of the pistol he clearly recognized this person as defendant. In support of this testimony the prosecution's witnesses testified as to experiments made by them under similar circumstances at the same place which showed that it was possible to thus recognize a person firing a pistol. In rebuttal defendant offered to prove similar experiments made in the same manner and under the same conditions, but in a different place and before a different window, to show that it was impossible to identify a person by the flash of the pistol. The admission of this latter testimony was objected to and ruled out, the witnesses being allowed, however, to testify as to their opinion upon such a state of facts. Thurman, J., said: "We are unanimously of opinion that, in rejecting the testimony offered as above, the court erred. Holcomb had sworn that he distinctly recognized the prisoner by the flash of the discharge of the pistol. This was a most material statement. Without it, there was no pretense of sufficient evidence to convict. Now, it was certainly lawful to disprove this statement, by showing the impossibility, or natural improbability, of its being true. This is not denied, but it is said that it could not be done by proof of experiments. If not, how could the proof be made? No one but Holcomb was looking through the window when the crime was committed. No one but he saw the pistol fired, or the person who fired it. Direct contradiction, by eye-witnesses of the transaction, was therefore impossible, and would perhaps be equally impossible in a large majority of like cases. Unless, then, proof of experiments is receivable, a man is very much at the mercy of another, who swears against him, and perjury or mistake, however great, instead of incurring punishment, or being rectified, may answer to produce conviction. But it is said that the proper rebutting proof would be the opinions of 'experts.' . . . Proof that a number of men, of ordinary powers of vision, have tried the experiment, and found themselves unable thus to distinguish countenances — found that their vision was not thereby aided at all — is evidence entitled to as much, if not more, weight than the opinions of scientific men can be; for the question whether a face can be thus told is merely one of fact, and not one of science; and any man, whether learned or unlearned, after hearing the proofs, can decide with reasonable certainty upon its probability."

51. City of Ord *v.* Nash, 50 Neb. 335, 69 N. W. 964; Yates *v.* People, 32 N. Y. 509; Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Identifying Other Persons Under Similar Conditions. — In Richardson *v.* State, 90 Md. 109, 44 Atl. 999, certain witnesses testified that they recognized defendant as he passed under a particular street lamp. In rebuttal witnesses were offered who had tested their ability to recognize persons with whom they were well acquainted while the latter were

could or could not be heard under similar conditions.[52] While there must be substantial similarity[53] as to all conditions affecting the

passing under this same street lamp, and while the witnesses themselves occupied the same seat as the state's witnesses on the night of the crime. The admission of this testimony was held proper on the ground that the conditions of the experiment and of the actual occurrence were as nearly identical as it was possible to make them.

In Sealy *v.* State, 1 Ga. 213, 44 Am. Dec. 641, witnesses for the state testified that they had seen the murder committed and recognized the murderer, although the night was dark and they were some distance from the parties. In rebuttal of this testimony, defendant offered a witness who had experimented between the same hours of a similar starlight night, and found that persons could not be distinctly seen at the distance the witnesses for the state were situated from the scene of the crime. The exclusion of this evidence was held no error, on the ground that it was not shown that conditions were sufficiently similar owing to the difference in men's visions and the uncertainty as to the exact quantity of light on both nights, it appearing that on the night of the crime some light came from lamps in the vicinity.

In Keyser *v.* State, 95 Md. 96, 51 Atl. 1,057, on the question as to whether it was possible to identify defendant while committing the crime, a witness was offered who was familiar with the scene of the crime and had passed there under all sorts of conditions in both day and night time. The testimony of this witness as to the possibility of identifying defendant was held incompetent on the ground that it was not based upon any experiment performed under precisely similar conditions and circumstances.

52. Starr *v.* People, 28 Colo. 184, 63 Pac. 299; Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Testing the Voice. — In Wilson *v.* State (Tex. Crim.), 36 S. W. 587, on a trial for murder a witness for the state testified to having overheard defendant use certain words at the time of the shooting. He was standing 100 yards from the parties, and the wind was blowing the sound away from him. In rebuttal defendant offered evidence of an experiment made in the same place when the conditions as to wind and positions of the parties making the experiment were the same. The words alleged to have been overheard were repeated at different ranges of voice from the lowest to the highest, but could not be heard. The exclusion of this evidence was held error.

Distance at Which Signals May Be Heard. — Atmospheric Conditions. In an action against a railway for injuries due to a negligent collision with plaintiff, it appeared that a high bluff interfered with the view of the track. Plaintiff, against defendant's objection, introduced evidence of an experiment showing that the witness, while standing near the crossing, was unable to hear signals made by passing trains given 80 rods away. On appeal the admission of this evidence was held proper. The court says: "If the test is made at the place and under substantially similar circumstances, it is difficult to see how better proof upon that question can be obtained. The testimony might be weakened to some extent by reason of the differing conditions of the atmosphere when the test was made, but this would affect its weight rather than its competency." Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

53. Conditions Must Be Similar. In Lawrence *v.* State (Fla.), 34 So. 87, witness for the state testified to having heard a person running in the direction of the shooting. In rebuttal defendant offered to show that by means of experiment he had found that it was impossible for the state's witness to have heard the sounds he described. The exclusion of this evidence was held no error. The court says, "In order that experimental evidence of this nature should be valuable, or even admis-

result, it is not essential that the atmospheric conditions be precisely the same.[54]

d. *Tasting.* — A witness may be permitted to testify as to the nature of a particular substance which he has tasted, either in or out of court, for this purpose.[55] Such a test by the jury, however, is improper.[56]

e. *Identifying Footprints.* — In proof of the identity of footprints it is competent to show a comparison made by placing a shoe of the alleged maker over the tracks in question.[57] So footprints may be artificially made with the shoes of such person,[58] or he may himself make footprints for the inspection of the jury.[59]

f. *Experiments With Guns.* — **(1.) Generally.** — The trial court may, in its discretion, permit or refuse to allow experiments to be

sible, it must appear that the experiment was performed under conditions similar to those existing at the time of the event to be tested thereby. Whether the runner making the experiment was, as compared with the defendant, large or small, a light runner or a heavy one, whether the atmospheric conditions and the general conditions as to noise or quiet were similar to those existing when Johnson was shot, and whether the sense of hearing in the two men was equally keen, the court was not informed. Evidence of the test was therefore properly excluded."

In the County of Sonoma *v.* Stofen, 125 Cal. 32, 57 Pac. 681, defendant testified that while locked in a bank vault he kicked upon the iron door and made a great racket, but that he did not strike or kick the sheet-iron lining of the sides of the vault. It was shown that he was familiar with the construction of the vault and knew that there was a hollow space between the sheet-iron sides and the outer wall. Evidence was admitted of experiments made by striking upon the sheet-iron sides and also by kicking upon the door to show that the noise made by the first method was much louder than that made in the latter way. The admission of this evidence was urged as error, because the atmospheric and climatic conditions upon the days in question were not shown to be the same, and because of certain changes in the interior of the building made between the two acts, and further that the blows were not shown to have been struck with the same amount of force in both cases. The trial court's ruling was held to be no error.

54. Missouri Pac. R. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607.

Atmospheric Conditions. — In People *v.* Phelan, 123 Cal. 551, 56 Pac. 424, evidence as to experiments relating to sounds heard in the night at the place where the crime was committed was held admissible, although such experiments were conducted in the day. The fact that the atmospheric conditions were not shown to be identical was held to affect the weight but not the competency of the evidence, since the principal conditions were the same.

55. State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430; Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699; Parker *v.* State (Tex. Crim.), 75 S. W. 30.

56. See "Experiments by Jury," *infra* this article.

57. State *v.* Graham, 74 N. C. 646; McLain *v.* State, 30 Tex. App. 482, 17 S. W. 1,092, 28 Am. St. Rep. 934.

58. Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 38 L. R. A. 373; People *v.* Searcey, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157.

59. Discretion of Court. — In Campbell *v.* State, 55 Ala. 80, the defendant was permitted to walk in sawdust with his bare feet in the presence of the jury, but the court refused to permit the same experiment to be made on mellow earth, either within or without the court house. This ruling was held to be no error, on the ground that it was

made with guns or pistols, to show that they could or could not have been the weapons used in the case in question.[60]

(2.) **Powder Stains.** — (A.) GENERALLY. — In case of a gunshot wound it is sometimes important, as bearing upon the question of self-defense, to determine the distance between the body and the muzzle of the gun at the time it was discharged. Evidence of experiments or tests showing the distance at which powder stains are produced, if made under similar conditions, is generally held to be competent on this question,[61] though in some jurisdictions it seems to be inadmissible under any circumstances.[62]

(B.) SIMILARITY OF GUN AND CHARGE. — It is not necessary that the identical gun or pistol which caused the wound be used in the experiment, but it should be one of the same make and caliber,[63] and a similar charge or cartridge should be used.[64]

a matter resting in the discretion of the court.

60. In State *v.* Fletcher, 24 Or. 295, 33 Pac. 575, it appeared that the murderer had entered deceased's room and fired several shots, some of them taking effect in the logs of the walls. In order to show that these shots could not have been fired by defendant, evidence of experiments made with the pistol and cartridges taken from his possession was offered. Shots were fired with this pistol into the same logs, with the result that they were more deeply imbedded than those fired at the time of the murder. These experiments were excluded because it was not shown that the cartridges in the two cases were the same or that the shots were fired from the same distances.

In United States *v.* Ball, 163 U. S. 662, on a trial for murder it appeared that deceased had been killed with a gun which scattered its shot very much. Defendant in rebuttal requested permission of the court to take his shotgun and shoot it off in the presence of the deputy marshal in order to test how it threw such shot as were found in deceased's body. The refusal to grant the request was held no error on the ground that it was a matter resting in the court's discretion.

Size of Hole Made by Bullet. — On the question as to the caliber of the gun by which deceased was killed, as determined by the size of the wound, evidence of an experiment made by shooting a hole through a plank was held incompetent. Evans *v.* State, 109 Ala. 11, 19 So. 535.

Scattering of Shot. — The distance a charge of shot will go before scattering may be shown by experiment. State *v.* Jones, 41 Kan. 309, 21 Pac. 265.

61. People *v.* Clark, 84 Cal. 573, 24 Pac. 313; Fein *v.* Covenant Mut. Ben. Ass'n, 60 Ill. App. 274; Sullivan *v.* Com., 93 Pa. St. 284.

62. Tesney *v.* State, 77 Ala. 33; Timothy *v.* State, 130 Ala. 68, 30 So. 339. See also Miller *v.* State, 107 Ala. 40, 19 So. 37.

63. Fein *v.* Covenant Mut. Ben. Ass'n, 60 Ill. App. 274; State *v.* Nagle (R. I.), 54 Atl. 1,063.

Same Weapon Unnecessary. — In State *v.* Cater, 100 Iowa 501, 69 N. W. 880, on the question as to the distance at which a pistol would leave powder-stains on the body of the deceased, evidence of an experiment was offered and objected to because the weapon experimented with was not shown to be the one with which the deceased was killed. The court held that, if the objection had been made on the ground that the weapon used by the witness was not shown to be of the same caliber, it might have been good, but to limit inquiry to the particular revolver found by the side of the deceased was clearly error.

64. See State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; People *v.* Clark, 84 Cal. 573, 24 Pac. 313; Beckett *v.* Northwestern Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923.

(C.) Similarity of Materials. — Where the ball or shot entered through the wounded person's clothing, the experiment should be made with cloth of a similar texture.[65] Where the flesh is the part immediately affected some courts refuse to allow evidence of experiments with a target, such as pasteboard;[66] others, however, allow the use of such materials because of the impossibility of procuring anything similar to the human flesh.[67]

(D.) Qualifications of Witness. — The witness must have some knowledge of and experience in the use of firearms,[68] but need not

65. People *v.* Fitzgerald, 138 Cal. 39, 70 Pac. 1,014. But see People *v.* Clark, 84 Cal. 573, 24 Pac. 313.

66. Morton *v.* State (Tex. Crim.), 71 S. W. 281.

Pasteboard Target. — On a trial for murder defendant testified that while about six feet distant from the deceased, defendant's gun was accidentally discharged into deceased's body. The prosecution, in order to show that the shot was fired at a greater distance from deceased's body, introduced the testimony of a witness to the effect that he had seen defendant's gun tested at different distances when loaded with the same charges used by defendant. The state also introduced the pasteboard targets used in these tests. The admission of this evidence and the targets was held error on the ground that the conditions of the experiment were not sufficiently like the actual occurrence. The fact that both the targets and the flesh of the wound exhibited powder-stains was held not to be sufficient similarity. The court says: "When it is considered how much other marked characteristics in conjunction with powder-burns aid in determining the fact of near wounds — what seemingly immaterial circumstances — even the kind or compound of the wadding used, may affect the appearance of gunshot wounds, how fundamentally different is the human body in nature and texture from the substance upon which the experiments were made; and when it is considered how important it is that experiments should be based on conditions and circumstances as nearly as possible like the matter they are intended to illustrate, to avoid the liability to misconception, or error from some supposed agreement or resemblance, we should certainly hesitate to admit such experiments as evidence unless supported by reason or sanctioned by authority." State *v.* Justus, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470.

67. Paper Target. — In Fein *v.* Covenant Mut. Ben. Ass'n, 60 Ill. App. 274, on an issue as to whether deceased committed suicide or was murdered, evidence of experiment on white paper made by the same pistol or one of the same make and caliber with which the deceased had been killed was offered, to show at what distance powder stains would be left on such paper. The witness had testified as to the distance at which powder would burn the human skin, and stated that his opinion was based upon experiments with the pistol in question. The court refused to permit the particulars of the experiment to be given. This ruling was held error on the ground that the conditions of the experiments were substantially the same as those of the occurrence itself, except that paper was used instead of the skin of the living man. "The difficulty of obtaining the latter substance for such an experiment is manifest without argument to show the substitution of paper was the best that could be done under the circumstances."

Experiments With Blotting Paper were held competent in Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95.

Experiments With Hair. — See State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; Beckett *v.* Northwestern Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923.

68. State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; State *v.* Nagle (R. I.), 54 Atl. 1,063. See Miller *v.* State, 107 Ala. 40, 19 So. 37.

Mere Experience and Skill in the

be a physician.[69] If, however, he attempt to draw conclusions from the results of the experiment by comparing them with the wound in question, he must also be an expert on the appearance of gunshot wounds.[70]

g. *Death by Poison.* — Where the alleged cause of death is poison, it is competent to show the result of a test made by feeding the contents of the stomach to other animals.[71]

h. *Time Required to Perform an Act.* — Where an act is alleged or testified to have been done, or a fact to have transpired within a specified time, evidence of an experiment may be permitted to show that such act could or could not have been performed, or such fact could or could not have happened within the time stated.[72]

use of firearms was held insufficient in Tesney *v.* State, 77 Ala. 33.

69. Fein *v.* Covenant Mut. Ben. Ass'n, 60 Ill. App. 274; Timothy *v.* State, 130 Ala. 68, 30 So. 339; State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

70. In State *v.* Justus, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470, testimony of a witness who was not shown to be familiar with the appearance of gunshot wounds, as to experiments made by him with the gun in question, was held incompetent, on the ground that he was unable to express an opinion as to whether the phenomena of the wound on the human body would correspond with those of the experiments, thereby connecting the similarity of the fact offered to be proved with the fact in issue. The court says that it would hardly "be safe to permit non-professional witnesses to prove through instrumentality of experiments, matters not within the range of their observations and experience, and of which they are supposed to be incompetent to deal."

71. In State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430, on a trial of indictment for maliciously poisoning a horse, witnesses were permitted to testify over objection that as soon as the horse died they fed the contents of his stomach to chickens, which died almost immediately. This ruling was sustained on appeal.

72. In State *v.* Flint, 60 Vt. 304, 14 Atl. 178, on a trial for burglary defendant's accomplice testified to the route taken by himself and defendant both going to and from the scene of the crime and the time of their departure and return, and also to certain delays in going and returning. Defendant contended that he could not have done the acts and returned to his home, where he was shown to have been at a particular hour, in the time testified to by the accomplice. In support of its position the state was permitted to prove experiments made by its witnesses, who walked over the route as nearly as they could determine it from the description, without stopping, showing the possibility of defendant's having done all the acts testified to within the given time. Defendant contended that the experiments had not been made under the same circumstances and conditions. On appeal it was held that an "experiment showing that it was practicable to make the trip in that time would furnish aid" in determining whether the time intervening between the departure and the return was adequate. "The distance was the same in both cases; dissimilarity in other conditions would go to the weight of the evidence, but would not render it wholly irrelevant." Since defendant could have shown by experiment the impossibility of making the trip within the given time, the state had the right to show the converse.

In Clarke *v.* State, 38 Tex. Crim. 30, 40 S. W. 992, on the trial for indictment for assault, the state's evidence showed that defendant started from a certain point in the road in his wagon in company with persons in other wagons; that he stopped near the scene of the assault, walked some distance, committed the assault, returned to his wagon, and caught up with the other wagons, which had not

i. *Strength Required for an Act.* — For the purpose of showing that a certain person did or did not have sufficient strength to do the act imputed to him, evidence of experiments performed under proper conditions may be allowed to show the strength required for the act in question.[73]

j. *Testing Chemical.* — Experiments made either in or out of court to illustrate the use and effect of a particular chemical may be given in evidence if performed under proper conditions.[74]

4. As Basis for Expert Testimony. — A. GENERALLY. — Where testimony of an expert is competent he may be permitted to give the details of the experiments on which his testimony is based.[75] Although it is largely a matter of discretion with the court to allow or refuse to allow the details of such experiments to be brought out, it has been held error to exclude them where the opinion of

stopped during this procedure, at a specified point. Defendant offered to prove by three experiments performed under similar conditions that it was impossible for him to have stopped, committed the assault, and to have overtaken the other wagons within the distance testified to by the prosecution's witnesses. This evidence was excluded. On appeal this ruling was held error on the ground that it sufficiently appeared that the experiments had been carefully made under circumstances and conditions sufficiently like the actual occurrence as testified to by the state's witnesses. But see Klanowski *v.* Grand Trunk R. R. Co., 64 Mich. 279, 31 N. W. 275.

73. In Collins *v.* People, 194 Ill. 506, 62 N. E. 902, on an issue as to whether defendant, who was alleged to have been drunk at the time the crime was committed, could have pulled the trigger of the pistol with which the crime was committed, evidence of an experiment to show the number of pounds pressure required to pull the tripper was held competent. See also Com. *v.* Piper, 120 Mass. 185.

Unreliability of Experiments. — In Ulrich *v.* People, 39 Mich. 245, on a trial for rape, the prosecutrix testified that she was dragged over a fence by defendant. In rebuttal the latter offered evidence of experiments made by the witness, showing the impossibility of dragging girls as heavy as the prosecutrix, over the fence in question. This evidence was held properly excluded on the ground that it was of slight consequence whether she was dragged over the fence or got over voluntarily through fear, and that such a test was too unreliable. The court says, "manufactured evidence is not the most reliable, and the cases are few where it should ever be admitted. This is not one of them."

74. Destroying Writing. — On a trial for forgery committed by extracting writing from a check and inserting new words in place thereof, the witness was allowed to testify as to the effect of a chemical found in defendant's possession on a similar check. And such check was exhibited to the jury. People *v.* Brotherton, 47 Cal. 388.

See also Alabama, G. S. R. Co. *v.* Collier, 112 Ala. 681, 14 So. 327.

75. *Illinois.* — Fein *v.* Covenant Mut. Ben. Ass'n, 60 Ill. App. 274.

Indiana. — Cleveland, C. C. & St. L. R. Co. *v.* Huddleston, 151 Ind. 540, 46 N. E. 678, 68 Am. St. Rep. 238, 36 L. R. A. 681.

Iowa. — Farmers' and Mer. Bank *v.* Young, 36 Iowa 44.

Kansas. — State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; State *v.* Jones, 41 Kan. 309, 21 Pac. 265.

Kentucky. — Champ *v.* Com., 2 Metc. 17, 74 Am. Dec. 388.

Massachusetts. — Eidt *v.* Cutter, 127 Mass. 522; Williams *v.* Taunton, 125 Mass. 34; Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen 181.

Tennessee. — Boyd *v.* State, 14 Lea 161.

the witness is based wholly upon the experiments.[76] Some courts make a distinction in this respect between direct and cross-examination.[77]

B. Similarity of Conditions Unnecessary. — When evidence of such experiments is given merely to show the qualifications of the expert, and not as an independent basis of inference, it is not necessary that the conditions under which they were performed should have been similar to those governing the result in question.[78]

III. GENERAL PRINCIPLES.

1. Relevancy and Materiality. — This class of evidence is no exception to the general rules of evidence as to relevancy and materiality. Evidence of or by experiments which are not relevant and material to the facts in issue will be excluded.[79] But the admission of such irrelevant and immaterial evidence, when it does not prejudice the adverse party, is not reversible error.[80]

See also article "Expert and Opinion Evidence."

76. Fein *v.* Covenant Mut. Ben. Ass'n, 60 Ill. App. 274.

77. In Ingledew *v.* Northern Railroad, 7 Gray (Mass.) 86, on the question as to the temperature at which ink would freeze, a witness testified as to experiments made by himself. The trial court refused to allow the details and results of each of these experiments to be shown, but permitted the witness to state the opinion which he had formed from the results of the experiments as a whole. This ruling was held no error, but it was suggested that on cross-examination the court in its discretion might have allowed inquiry as to the nature and character of these tests. See articles "Cross-Examination" and "Expert and Opinion Evidence" for a full discussion of whether the basis of an opinion may be shown on direct or cross-examination.

78. In a trial for manslaughter due to defendant's alleged negligent management of steam boilers heated with oil as fuel, expert testimony was given as to the length of time required to raise the steam to a certain pressure with oil as fuel. In connection with this testimony, evidence of experiments made by the expert upon which his opinion was based, was held competent, although it was objected to on the ground that the conditions under which the experiment was made were not shown to be the same as in the case in question. The court says: "The record does not show that it was contended or argued that, because steam could, by the use of oil as fuel under one boiler, be raised in a given time, therefore it would have a like effect under the boiler which was in charge of Mr. Thompson. The results of the experiments were given as showing the qualifications of the witnesses who testified as to the probable effect of the firing of the boiler in question in the manner in which it was fired." People *v.* Thompson, 122 Mich. 411, 81 N. W. 344.

79. Ulrich *v.* People, 39 Mich. 245; Mayer *v.* Thompson-Hutchinson Bldg. Co., 116 Ala. 634, 22 So. 859.

On a trial for the sale of intoxicating liquor, defendant offered to show by the persons from whom he purchased the beverage in question, by means of an experiment in the presence of the jury, the nature and composition of such beverage by having the witness combine its ingredients. This evidence was held incompetent on the ground that it had no tendency to show the non-intoxicating nature of the beverage. State *v.* Lindoen, 87 Iowa 702, 54 N. W. 1,075.

80. People *v.* Hill, 123 Cal. 571, 56 Pac. 443. See Miller *v.* State, 107 Ala. 40, 19 So. 37.

2. Ex Parte Experiments. — The fact that an experiment was made out of court in the absence of and without notice to the adverse party, for the express purpose of being used as evidence, does not render it incompetent, but goes only to its weight and sufficiency.[81] It has been held, however, that an experiment made under such circumstances is objectionable as hearsay.[82]

81. Burg *v.* Chicago, R. I. & P. R. R. Co., 90 Iowa 106, 57 N. W. 68; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046; M. K. & T. R. Co. *v.* Johnson (Tex. Crim), 67 S. W. 769.

Ex Parte Experiments. — In Byers *v.* Nashville C. & St. L. R. R. Co., 94 Tenn. 345, 29 S. W. 128, it appeared that plaintiff's husband had been killed by defendant's train while crossing a bridge. On the question as to whether the engineer could have stopped the train after coming in view of deceased, plaintiff was allowed to introduce evidence of experiments showing the distance at which a man could be seen standing where deceased was killed. In rebuttal defendant proposed to show experiments made by the witness, one of their engineers. The offer to show that witness had run the same train on a different day after the accident, over the same place and bridge; that he had the same number of coaches; that in making the test, as soon as he could see an object standing in the center of the bridge, he applied every means known to him or other skillful engineers and used every endeavor to stop his train. This test was made for the purpose of using it in evidence. The refusal to admit this evidence was held error, the court on appeal saying: "The authorities in other states are conflicting upon the admissibility of such evidence, and we have been cited to many cases, all of which we have examined. In our own state it has been held that the evidence of an expert is not incompetent because of an *ex parte* examination, investigation, or experiment made by him. Nor is such evidence inadmissible because the experiments are made after the suit and trial has begun, and with a view to being used as testimony in the case. The objection in such cases goes not to the competency or admissibility of the testimony, which is a matter for the court to determine, but to its weight and sufficiency before the jury; and especially is this the case where the experiment is made *ex parte*, and is such that it lies wholly within the power of one party, and wholly beyond the power of another party, to make such experiment. We have been cited to quite a number of authorities to sustain the contention that such evidence is incompetent and inadmissible in cases where the experiment is not equally within the reach of both parties, but we have not been able to find this doctrine sustained."

82. In Sibert *v.* McManus, 104 La. 404, 29 So. 108, the issue was whether defendant's copper furnaces had been so negligently constructed as to cause them to catch fire and thus destroy also plaintiff's adjoining factory. Plaintiff contended that defendant had so used wood in the construction of his furnaces that they were liable to catch fire at any time, and in fact did burn because of this defect. To sustain this contention he offered to show the results of an experiment made in his own copper furnace, which was similar to that of defendant, by means of a pyrometer showing the degree of heat at which wood would catch fire when exposed to a fire like that used in defendant's furnace, without coming directly in contact with flame. On appeal this evidence was held incompetent. The court says: "The experiments were made in the absence of defendants. Evidence of that character is of the nature of hearsay evidence, and it has been often rejected on that ground. If admissible at all, it should have been shown affirmatively to have been made under the precise condition of things which it had been also shown defendants occupied at the time of the fire. The furnaces in this case were not alike, and the pyrometer was inserted in plaintiff's furnace after a fire had been made

3. Single Experiment. — While generally it is not required that more than one such test be made, the circumstances or nature of the case may be such that the results of a single experiment would be too uncertain and unreliable to have any probative value, but would rather tend to confuse and mislead.[83] If, however, in such case the witness be an expert, he may give an opinion and describe the experiment as one of the facts on which his opinion is based.[84]

4. Destruction of Evidence. — A. GENERALLY. — When an experiment or test may result in the destruction of evidence or exhibits already before the jury, the trial court may in its discretion refuse to allow the proposed test to be made.[85]

therein, and had been kept up steadily for a number of hours, with direct reference to the experiment which was to be made subsequently."

In Wynne *v.* State, 56 Ga. 113, on a prosecution for homicide, it was held that an experiment by firing the pistol with which the alleged crime was committed is inadmissible if made without defendant's consent, because it might result in the improper manufacture of testimony.

83. In Tesney *v.* State, 77 Ala. 33, witness was offered to show that he had discharged pistol at a coat similar to that worn by defendant and within a few inches of it, and that no powder stains could afterwards be seen upon it. The admission of this testimony was held error. Clopton, J., says: "The court erred in permitting evidence of the result of a solitary experiment of firing at a coat similar to the one worn by defendant, and the exhibition of the coat to the jury. Such evidence superinduces the mischief of trying a collateral controverted matter by proving separate and distinct experiments, with results as variant as the manner of loading the pistols, and the modes of making the experiments, dependent more or less on the wishes and feeling of the person making them, and tends to confuse the jury, and withdraw their minds from the consideration of the main issue. The witness, if an expert, may give his opinion, and detail generally the facts on which it is based; whereby the value of the opinion, and of the evidence on which it is founded, is submitted to the jury."

84. In State *v.* Nagle (R. I.), 54 Atl. 1,063, on a trial for murder, defendant contended that deceased had committed suicide. To rebut this theory the state offered the evidence of a physician as to experiments made by him with revolvers of the same caliber, and also with the identical revolver with which deceased was apparently killed. The witness also gave his opinion, based on his experience and the experiments as to the possibility of the wound being self-inflicted. The evidence was objected to as *ex parte* and manufactured. On appeal the court says: "Had the experiments been made by a person not an expert in such matters, and had they been limited to the particular pistol which caused the injury, a very different question would arise. For in such a case, the entire value of the testimony would depend upon the accuracy, skill and honesty of a particular person regarding a particular and isolated transaction, with no opportunity on the part of the defendant to contradict it. But such is not the case here. The *ex parte* experiments, if such they may be called, which were made by Dr. Perkins, were not necessary in the establishment of the fact sought to be shown by the prosecution, as that existed independently thereof, as was fully shown in evidence. There was no occasion, therefore, to introduce the particular testimony objected to. But still we see no good reason why it was not admissible, as it tended to corroborate the position taken by the expert. And it is a well-settled rule that, whenever the opinion of a person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant."

85. In State *v.* Smith, 49 Conn.

B. Evidence Valuable to Third Parties. — So where permission is requested to perform an experiment which would destroy evidence valuable to persons not parties to the case on trial, it is not error to allow such persons to interpose an objection on these grounds, and the court may in its discretion refuse to allow the test for this reason.[86] The mere fact, however, that in the future evidence which would be destroyed by an experiment may possibly be useful or valuable to other persons, should not deprive the litigant parties of the right to have a test made which would be of material assistance to them in the case on trial.[87]

376, defendant offered to have an expert examine the pistols of defendant and deceased, which were exhibits in case, and make experiments with them in order to determine from which pistol the fatal bullet was discharged. The trial court refused to allow such experiment, because it would change the condition of the pistols. This ruling was held no error, on the ground that the matter was one which lay wholly within the discretion of the trial court.

86. Right of Third Parties to Object. — In State *v.* Hendel, 4 Idaho 88, 35 Pac. 836, H. and R. were jointly indicted for homicide, and a separate trial was granted. On the trial of H. the evidence showed that three bullets had been found on the scene of the murder, one taken from the wall evidently coming from codefendant R.'s pistol, another on the floor where deceased fell evidently coming from defendant H.'s pistol, and a third found in the clothes of deceased apparently coming from R.'s pistol. Defendant requested that a microscopical and chemical examination be made of the latter bullet for the purpose of determining the nature of the substances adhering thereto. The attorney for his codefendant R., who had not yet been tried, objected to such a proceeding on the ground that it would destroy evidence valuable to his trial. It further appeared that such an examination would require from one to two weeks' delay, nor was there any evidence to show that such substances adhering to the bullet were of such nature as to require such an examination. The court held, (1) that it was no error to allow R.'s counsel to interpose such an objection, even though R. was not on trial; (2) and that the action of the court in refusing the request was not erroneous, because it was a matter resting in the trial court's discretion.

87. Chemical Tests. — In Monroe's Estate, 1 Connolly's Surrogate 496, 23 Abb. N. C. (N. Y.) 83, on the probate of a will the contestant asked that the alleged will be subjected to chemical tests for the purpose of disclosing the nature of the composition of the ink, and the process or processes to which it had been subjected. The court said: "The most obvious argument to be urged against allowing a chemical test to be made on a will, and one that was suggested by the court on the argument of this motion, is that, inasmuch as the paper may be the subject of future controversy in this or some other tribunal, future litigants should not be prejudiced by any alteration or manipulation of the instrument. I do not think, however, that this objection is sound. . . .

"Because the subject matter of the controversy may be litigated hereafter, should not deprive parties in this proceeding of any rights which they would otherwise have. They certainly are entitled to all rights in this proceeding that the parties to any future proceedings would have. Besides, all the parties whose presence would be necessary to an adjudication in, for example, an ejectment proceeding, are (or their privies are) parties here. It certainly can not be that the law, seeking the truth, will not avail itself of this scientific method of ascertaining the genuineness of the instrument because of some problematical effect upon the rights or opportunities of parties to future litigations respecting the same instrument. The possibilities of liti-

5. Matters as Well Determinable Otherwise. — It has been held that where the fact sought to be illustrated or proved by an experiment is one which the jury are well qualified to infer from other evidence, the results of an experiment are not competent.[88]

6. The Possibility of Fabrication goes only to its weight as evidence, and not to the competency of an experiment.[89]

7. Experiment Impossible to Adverse Party. — The fact that an experiment is possible only to the party offering it does not affect its competency.[90]

8. Proper Offer Necessary. — An experiment performed in court can not be considered as a test of the capacity of the person performing it, unless it was offered for that particular purpose.[91]

9. Compelling Witness to Perform Experiment. — A. GENERALLY. The court may compel a witness to submit to certain tests, as has been previously stated,[92] but to what extent and under what circumstances a disinterested witness may be required to perform an experiment does not seem to have been definitely settled.[93] It has

gation over a will are almost infinite, and if such a rule should obtain, this important channel of investigation would be closed. . . .

"By not availing itself of this method of ascertaining the truth as to the character of the ink, the court deprives itself of a species of evidence which amounts to practical demonstration."

88. In Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275, plaintiff claimed damages for injury received in a collision due to the alleged negligence of defendant's train men. On the question of contributory negligence, plaintiff offered evidence of an experiment. The witness testified that he had approached the crossing in a wagon like plaintiff's, and about the same time of night, and stopped where plaintiff had stopped before reaching the crossing; that as soon as he saw the headlight of the approaching train he walked rapidly toward the crossing, which he reached as the train passed by; that it required 55 seconds to cover the distance of 65 feet; that the train was running about 45 miles an hour, the same as on the night of the accident. On appeal the admission of this evidence was held error. Campbell, J., says: "It is never proper to leave to witnesses the determination of matters which can be determined by the jury. With the facts established in regard to the various elements of plaintiff's story, their effect would be within the estimate of any intelligent jury. The facts themselves must be determined before any conclusion could be drawn from them."

89. "It has been urged, as it is urged in this case, that the evidence was properly excluded; that such evidence was not admissible, on account of the danger of fabrication. But in our opinion this furnishes no good reason for its exclusion. All evidence, we might say, can, under circumstances, be fabricated; but the liability of fabrication rarely, if ever, alone, furnishes a good reason for the exclusion of evidence." Clark *v.* State, 38 Tex. Crim. 30, 40 S. W. 992; *s. c.* 39 Tex. Crim. 152, 45 S. W. 696.

90. Byers *v.* Nashville, C. & St. L. R. R. Co., 94 Tenn. 345, 29 S. W. 128.

91. Probert *v.* Phipps, 149 Mass. 258, 21 N. E. 370, in which the plaintiff, who had been injured while operating certain machinery, was allowed to operate the same in the presence of the court for the purpose of showing how the accident happened. It was held that this demonstration could not be considered as evidence of the witness' lack of strength to safely manage the machine, because no offer or request had been made to use it for this purpose.

92. See note 27, *supra*.

93. In Cole *v.* Fallbrook Coal Co.,

been held that a physician can not be compelled to make more than a superficial examination of a dead body,[94] and that a sheriff can not be compelled to discharge a pistol.[95]

B. Self-Incriminating Experiments. — In a criminal case the defendant cannot be compelled to perform experiments which would in effect require him to give evidence against himself.[96] Requiring the defendant to make footprints in court for purposes of comparison is a violation of his rights,[97] but an officer may testify as to results of such a comparison made at his request.[98] This privilege, however, may be waived.[99]

10. Where Performed. — A. Generally. — As apparent from the foregoing discussion and cases, experiments may be performed for purposes of evidence both in and out of court. When an experiment is made in the courtroom, however, during the progress of the trial, it should be conducted under the immediate supervision of the court.[1]

B. During View. — a. *Generally.* — The general rule is that the jury should receive no evidence except in court, and subject to the proper tests. Hence it is not permissible to allow the jury to

159 N. Y. 59, 53 N. E. 670, in an action for personal injuries, defendant requested that plaintiff be required to step upon a model of a machine by which he was injured, in order to demonstrate to the jury that his testimony as to how the accident occurred was incorrect. The refusal of the trial court to require this exhibition was held no error. "Even if we assume that the court had authority to require the plaintiff to do so, it was at most discretionary whether it would require it, and its refusal presents no question which we can review."

94. Allegheny Co. *v.* Watt, 3 Pa. St. 462; St. Francis Co. *v.* Cummings, 55 Ark. 419, 18 S. W. 461.

95. In Polin *v.* State, 14 Neb. 540, 16 N. W. 898, on a trial for murder, defendant requested that the sheriff be ordered to discharge some of the cartridges remaining in the revolver with which deceased was killed to show that the pistol could be discharged at half-cock. The refusal to grant this request was held no error on the ground that the court had no authority to require the sheriff to make the experiment, and that the possibility of a discharge at half-cock could have been demonstrated without the use of any cartridges.

96. People *v.* Mead, 50 Mich. 228, 15 N. W. 95. See article "Privilege."

97. Stokes *v.* State, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72.

98. State *v.* Graham, 74 N. C. 646, 21 Am. Rep. 493; Walker *v.* State, 7 Tex. App. 245, 32 Am. Rep. 595.

99. Trying on Shoe. — Waiver of Privilege. — In People *v.* Mead, 50 Mich. 228, 15 N. W. 95, in a prosecution for arson, a rubber shoe found on the scene of the crime was produced, which the defendant upon request voluntarily tried on. He was then asked to measure it, to which objection was made by his counsel, but this objection was overruled. On appeal the court says: "Had there been any objection to the respondent trying on the shoe the court would have had no authority to require it, and even the simple matter of the measurement the respondent might have declined had he seen fit." But the court further held that, "inasmuch as defendant had voluntarily tried the shoe on, he could not object to measuring it, an act which could have been done by any other witness." See also State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

1. Probert *v.* Phipps, 149 Mass. 258, 21 N. E. 370. See also Heath *v.* State, 93 Ga. 446, 21 S. E. 77.

witness an experiment bearing upon the issues of the case, made for their benefit during a view.[2] It is equally improper for a juror to experiment on such an occasion.[3]

b. *By Consent.* — When, however, such experiments are made with the consent or acquiescence of the complaining party, no exception can be taken to them,[4] and in some jurisdictions they may then be considered by the jury as evidence.[5]

2. Hayward *v.* Knapp, 22 Minn. 5.

Discretion of Court. — In an action for injuries due to a rear-end collision between defendant's horse-cars, defendant requested that the jury be allowed to proceed to the car-house and witness experiments with these cars to determine the nature of the alleged collision. The trial court's refusal to grant the request was sustained on appeal. "The case was not within the provisions of the statute allowing a view by the jury, and, if such procedure were authorized or proper in any case, the question would be one resting in the discretion of the court." Smith *v.* St. Paul City R. R. Co., 32 Minn. 1, 18 N. W. 827.

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

Operation of Machinery. — In Kinney *v.* Folkerts, 84 Mich. 616, 48 N. W. 283, plaintiff sought to recover for injuries received while working on defendant's machinery. During the view of the premises by the jury, the court refused to allow the "blower" on which the injuries had been received, to be operated in their presence. On appeal it was held that inasmuch as there had been some changes made in the blower since the accident, it was no abuse of the court's discretion to refuse to allow it to be thus operated. But there was no suggestion that making such tests during a view by the jury would be improper.

3. Experiments During the View by Jury.—In an action for injury due to collision between defendant's train and plaintiff's wagon, the jury were taken to view the scene of the accident, and while there were permitted to view the running of an engine over the track for the purpose of observing how the accident occurred, and whether plaintiff could have seen the train. This action was held error on the ground that it was giving evidence to the jury out of court. Moore *v.* Chicago, St. P. & K. C. R. R., 93 Iowa 484, 61 N. W. 992. But see Stockwell *v.* Chicago C. & D. R. Co., 43 Iowa 470.

Testing Length of Chain. — During a trial for injuries due to being bitten by defendant's dog, one of the jurymen, after viewing the scene of the injury, took hold of the chain with which the dog had been tied and stretched it to show how far it would reach. This was held sufficient misconduct to justify a new trial. Wooldridge *v.* White, 105 Ky. 247, 48 S. W. 1,081.

4. In Jones *v.* State, 51 Ohio St. 331, 38 N. E. 79, the prosecution secured an order for a view by the jury over defendant's objection. During this view experiments were made to illustrate and explain the manner in which the shooting occurred. Defendant contended that it was accidental. These tests were made with defendant's acquiescence. On appeal it was held by his conduct he had waived all right to objection. But see Jim *v.* State, 4 Humph. (Tenn.) 289.

5. In Schweinfurth *v.* Cleveland C. C. & St. L. R. Co., 60 Ohio St. 215, 54 N. E. 89, after one view of the premises by the jury, the defendant, without objection by plaintiff, secured an order for the second view. On the latter occasion certain experiments were performed with a train and horse and buggy to illustrate how the accident happened. The court instructed the jury not to consider as evidence what they saw the first view, but that which they saw on the second view should be considered as evidence because done by the agreement of the parties.

c. *When Experiment Not Prejudicial.* — Where experiments are made during a view, if they could not have been prejudicial to the party objecting, their performance is not reversible error.[6]

11. Experiments by Jury. — A. Out of Court. — It is misconduct sufficient to require a verdict to be set aside for the jury themselves to experiment out of court,[7] unless no prejudice has resulted

Plaintiff secured a verdict and defendant appealed, contending that the court's instruction to consider as evidence what they saw on the second view was improper. The court held that under the circumstances such instruction was proper. Williams, J., said: "'A particularly cogent method of proving a fact is to test its existence by experiments in open court.' True, the experiments in this case were not made in court. It was impractical to do so. Nor, without the consent of the parties, could they have been ordered to be made elsewhere. But they were made out of court, at the request of the defendant, in pursuance of an order procured by it, and under conditions which, to its satisfaction, constituted a sufficiently accurate representation of the occurrence that resulted in the death of the plaintiff's intestate; and they were necessarily of the same probative character as if made in open court. They were intended to furnish information which the jury might use in determining the issues in the case, and which, indeed, might conclusively settle them in the minds of the jury. It would be a vain thing to attempt to require the jury to disregard the evidence so made manifest to their own senses."

But for a Full Discussion of whether knowledge acquired during a view can be considered by the jury as evidence, see article "View by Jury."

6. Champ *v.* Com., 2 Metc. (Ky.) 17, 74 Am. Dec. 388.

Non-Prejudicial Error. — In Stockwell *v.* Chicago C. & D. R. Co., 43 Iowa 470, plaintiff sought recovery for damages caused by fire negligently communicated to his premises by sparks from defendant's engine. Defendant contended that while passing plaintiff's premises the train in question used no steam and therefore it was impossible or unlikely that it was the cause of the fire. The jury were taken to view the premises on defendant's train. This train was run past the premises without the use of steam for the purpose of demonstrating its possibility. The fact that some of the jurors were cognizant of this experiment was held no sufficient ground for granting a new trial, inasmuch as plaintiff had admitted that it was possible to run trains at that place without the use of steam and was therefore not prejudiced.

7. People *v.* Conklin, 111 Cal. 616, 44 Pac. 314; Forehand *v.* State, 51 Ark. 553, 11 S. W. 766.

Experiments by Jury. — In Jim *v.* State, 4 Humph. (Tenn.) 289, on a trial for murder it appeared that the shoes of the defendant were longer than the tracks left at the place where the crime was committed. The jury, believing the tracks of a man made while running would be shorter than those made while walking, themselves made a practical test of the matter during the trial of the case. This was held sufficient misconduct to justify a new trial.

In the same case defendant's witnesses testified that he was in an adjoining cabin at the time of the murder because they could hear him talking. In order to test the ability of the witnesses to hear a voice under the circumstances described the jury placed themselves in a room with a constable outside and talked in a loud voice. They then asked the constable whether or not he could hear them. This was also held misconduct sufficient to warrant a new trial on the ground that the circumstances and conditions were too uncertain and dissimilar, and that they were compelled to rely upon the word of the constable.

In People *v.* Conkling, 111 Cal. 616, 44 Pac. 314, a new trial was granted for misconduct of jurors in experimenting out of court to determine at what distance powder marks upon clothing would be produced.

to the complaining party.[8] But an experiment by the jury outside of the courtroom in the presence of the judge and the complaining party has been held proper.[9]

12. Qualifications of Witness. — A. Personal Knowledge. The witness must of course have personal knowledge of the experiment to which he testifies.[10]

B. Necessity of Being Expert. — When the experiment is one, the performance or proper description of which requires special knowledge, the witness must be an expert on the matters involved.[11] But when no expression of opinion is involved, and the facts are such

Experiments Made on Invitation of Complaining Party. — In State *v.* Sanders, 68 Mo. 202, 30 Am. Rep. 782, defendant's attorney in his argument told the jury "to just try worn-out boots and see for themselves whether they would make imprints in dust or sand as claimed by the prosecutor," and further that the jury had a right to make the experiment for themselves to satisfy their own minds on the point. In accordance with this invitation some of the jurymen did make such an experiment. Defendant then asked for a new trial for this misconduct of the jury. On appeal it was held that a new trial should have been granted in spite of the fact that the defendant himself had invited the misconduct.

Improper Experiments in Jury Room. — In Yates *v.* People, 38 Ill. 527, the theory of the defense was that the deceased came to his death by his own hand. After the retirement of the jury, the pistol alleged, but not proved, to have been the one used by the prisoner was given to them and they experimented with it in the jury room. The judgment was reversed for this action because the pistol had not been put in evidence or identified.

8. In City of Indianapolis *v.* Scott, 72 Ind. 196, during a view by the jury in an action for failure to repair the foot-bridge, one of the jurors tested one of the timbers with his knife to determine its decayed condition. The court held, in the absence of anything showing that the verdict was influenced by this misconduct, it was not sufficient to justify a new trial.

9. In Dillard *v.* State, 58 Miss. 368, it appeared that defendant was standing upon the ground while deceased was riding a horse at the time the fatal blow was struck. The jury were permitted to inspect the horse and also make experiments with a view of ascertaining whether it was possible for the wounds sustained by deceased to have been inflicted by a knife in the hands of a person standing on the ground. The court held that inasmuch as "the very meager entry on the subject in the bill of exceptions seems to indicate that the production of the horse and the test by experiments were a part of the proof offered by the state," and were in the presence of both the court and the accused, no error had been committed.

10. In Parrott *v.* Johnson, 61 Ga. 475, the testimony of the chemist to the department of agriculture was held incompetent to show the results of tests made by the department as to the value of a certain fertilizer in the absence of anything to show that he himself made the tests or was present when they were made.

11. State *v.* Justus, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470.

Chemical Test of Ink. — In Otey *v.* Hoyt, 47 N. C. 70, defendant claimed that a portion of the instrument sued upon had been forged by extracting the original writing by means of chemicals. To prove this he offered the testimony of a drug clerk who professed no knowledge of chemistry and was incompetent to give an opinion on such subjects. The witness testified to having seen writing on a paper which he exhibited, extracted by the use of chemicals. The admission of this evidence was held error because the witness did not and could not describe the conditions

as are within the knowledge and comprehension of the witness, he need not be an expert.[12]

13. Materials Used in Experiments as Exhibits. — Materials used in an experiment made by the witness out of court may be shown in connection with the experimenter's testimony, and may be made exhibits in the case.[13]

of the experiment, the nature or age of the ink.

12. State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430.

Experiment by Non-Expert Witness. — In Arrowood *v.* South Carolina & G. E. R. R. Co., 126 N. C. 629, 36 S. E. 151, in an action for negligently colliding with and killing plaintiff's intestate, evidence was offered of observations and experiments made by non-expert witnesses at the place of the accident on a dark night similar to the one when deceased was killed, as to the light cast by the headlight of one of defendant's engines. This testimony was held competent, the court saying, "It was not necessary on such matters of fact depending on ordinary powers of observation requiring no special training that the witness should be expert."

13. Eidt *v.* Cutter, 127 Mass. 522; People *v.* Brotherton, 47 Cal. 388; Sullivan *v.* Com., 93 Pa. St. 284; Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95.

EXPERT AND OPINION EVIDENCE.

CROSS-REFERENCES:

Direct Examination;
Foreign Laws;
Handwriting; Highways;
Witnesses.

I. DEFINITION AND NATURE OF EXPERT TESTIMONY.

1. Definitions. — Expert testimony is such as is given on questions of science, skill or trade by persons learned or experienced therein, and it may consist of either opinions of the witness, or facts within his knowledge;[1] although it has been declared that expert testimony, in the main, is matter of opinion, and not of personal knowledge of the facts of the particular case on trial.[2] It is difficult, if not impossible, to lay down any rule which is applicable to all cases, as to what is or is not expert evidence.[3] Experts, according to Lord Mansfield, are persons professionally acquainted with science, or men of science,[4] which is broader than the strict sense of the Latin derivation of the word expert, which is a person instructed by experience;[5] and this definition has often been quoted and has received the almost universal approbation of the courts, although some of them have seemingly attempted to enlarge the definition by saying that experts are men of science or skill, or persons of science or experience.[6] An expert's opinion upon a matter of science and the

1. Caleb *v.* State, 39 Miss. 721, in which case the court declared that on questions of science, skill or trade, or others of the like kind, "persons of skill" may not only testify to facts, but may give their opinions in evidence, and that such persons are called experts. See also Kelley *v.* Richardson, 69 Mich. 430, 37 N. W. 514.

2. Baltimore & P. R. Co. *v.* Elliott, 9 App. Cas. (D. C.) 341. See also Whitfield *v.* Whitfield, 40 Miss. 352, wherein it was declared that as a general rule an expert is one who gives an opinion based on facts testified to by others, and that one who testifies as of his own knowledge is not an expert.

Opinion Defined. — "An opinion is the judgment which the mind forms." *Per* Horton, C. J., in Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

3. Funston *v.* Chicago, R. I. & P. R. Co., 61 Iowa 452, 16 N. W. 518.

Necessity to Consider Nature of Question Involved. — In Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146, the court said: "An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked. There are some matters of which every man with ordinary opportunities of observation is able to form a reliable opinion." *Quoted* with approval in St. Louis & S. F. R. Co. *v.* Bradley, 54 Fed. 630.

4. Folkes *v.* Chadd, 3 Doug. 157, 26 E. C. L. 63. In this, which may be regarded as the principal case on the admissibility of matter of opinion, an engineer who understood the construction of harbors, the causes of their destruction, etc., was permitted, upon the question whether an embankment, which had been erected for the purpose of preventing the overflow of the sea, was the cause of the choking up of a harbor, to give his opinion.

5. Bryan *v.* Branford, 50 Conn. 246.

6. *England.* — Carter *v.* Boehm, 1 Smith Lead Cas. 286*n*, *cited* in Nelson *v.* Sun Mutual Ins. Co., 71 N. Y. 453.

Alabama. — Mobile Life Ins. Co. *v.* Walker, 58 Ala. 290.

California. — Estate of Toomes, 54 Cal. 509.

Georgia. — Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153.

Illinois. — Linn *v.* Sigsbee, 67 Ill. 75.

Indiana. — Louisville E. & St. L. R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153.

Iowa. — Pelamourges *v.* Clark, 9

observed relation of things may amount to certainty.[7]

2. What Constitutes Art or Trade. — Every business or employment requiring peculiar knowledge or experience, and which has a particular class of persons devoted to its pursuit, is an art or trade, and any person who, by study or experience, has acquired this peculiar knowledge or practical skill, may be allowed to give in

Iowa 1; Hyde *v.* Woolfolk, 1 Iowa 159.

Maine. — Heald *v.* Thing, 45 Me. 392.

Massachusetts. — Dickenson *v.* Fitchbury, 13 Gray 546.

Minnesota. — Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51, 24 N. W. 324.

Missouri. — Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192; Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737; Gavisk *v.* Pacific R. Co., 49 Mo. 274.

New Hampshire. — Jones *v.* Tucker, 41 N. H. 546.

New Jersey. — Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800; Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833.

New York. — Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453.

North Carolina. — State *v.* Jacobs, 51 N. C. 284.

Pennsylvania. — Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146.

Rhode Island. — Buffum *v.* Harris, 5 R. I. 250.

Texas. — Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; Continental Ins. Co. *v.* Pruitt, 65 Tex. 125.

Vermont. — State *v.* Phair, 48 Vt. 366.

Virginia. — Bird *v.* Com., 21 Gratt. 800.

Pothier's Definition. — In Dole *v.* Johnson, 50 N. H. 452, Foster, J., said: "Pothier in his 'Treatise on Civil Procedure' (part 1, chap. 3, art. 3, § 1) speaks of the experts appointed by the French courts as 'men peculiarly fitted for the duty by a course of studies expressly directed to this end.'"

"Ancillary Counsellors." — "Those ancillary counsellors called experts" in Steam Gauge & Lantern Co. *v.* Ham. Mfg. Co., 28 Fed. 618.

"Man of Experience." — "An expert is nothing more than a man of experience in the particular business to which the inquiry relates." *Per* McDonald, J., in Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153.

Judicial Collection of Definitions. In Jones *v.* Tucker, 41 N. H. 546, Doe, J., collected the following definitions of the term experts: "'Men of science,' Folkes *v.* Chadd, 3 Doug. 157; 'persons professionally acquainted with the science or practice,' Strickland on Ev. 408; 'conversant with the subject-matter,' Best's Principles of Ev. 346; 'persons of skill,' Rochester *v.* Chester, 3 N. H. 349; 'experienced persons,' Peterborough *v.* Jaffrey, 6 N. H. 462; 'possessed of some peculiar science or skill respecting the matter in question,' Beard *v.* Kirk, 11 N. H. 397," and Mr. Justice Doe's own description of an expert is, he "must have made the subject upon which he gives his opinion a matter of particular study, practice or observation, and he must have particular and special knowledge on the subject." And questions upon which the opinions are admissible are, he says, "questions of science, skill or trade," or when the subject-matter "so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it."

7. Where the question is purely one of skill, or of science, the skillful or scientific witness gives his opinion; not a mere speculative opinion, but an opinion which, in some cases, may amount to absolute or certain knowledge; in other cases to knowledge not amounting to absolute certainty, but supported by facts — by observation — by knowledge of the properties of things, of the effects of one thing upon another, of the relations of things, by the known and established laws of physics, or the like." Cooper *v.* State, 23 Tex. 331.

evidence his opinions upon such matters of technical knowledge and skill.[8]

3. Grades of Expert Testimony. — There are branches of business or occupations where some intelligence is requisite for judgment, but opportunities and habits of observation must be combined with some practical experience. This seems to be the beginning or lower grade of what may be properly termed "experts," a word meaning only the acquisition of certain habits of judgment, based on experience or special observation. And the scale rises as the qualifications become nicer, and require greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training.[9]

4. Object of Expert Testimony. — The object of such testimony is to elicit facts, reasons and conclusions which science and the experience of the witness enable him to develop.[10]

II. DISTINCTION BETWEEN EXPERT TESTIMONY AND OPINIONS OF NON-EXPERTS.

In General. — The phrase "expert testimony" is not sufficiently broad to include all testimony which consists of the opinions of witnesses.[11]

Two Classes of Opinion Evidence. — The opinions of witnesses are receivable in evidence in two classes of cases, to wit: (1) Where experts in a particular science or calling are permitted, with or without acquaintance with the special matter in hand, to state the opinions

8. Chandler *v.* Thompson, 30 Fed. 38; Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742.

9. Kelley *v.* Richardson, 69 Mich. 430, 37 N. W. 514, in which case Campbell, J., said: "In several of the grades or kinds of what may be classed as expert testimony, there may be witnesses whose testimony is only received in regard to their conclusions, based on their own observation of facts relevant to the cause at issue, and others who can lawfully give conclusions on facts described by others. So there may be cases where a safe opinion may be drawn from a few leading facts, and others where the variation of a single fact, as in a chemical mixture, changes the entire result."

10. State *v.* Ward, 39 Vt. 225.

11. Kelley *v.* Richardson, 69 Mich. 430, 37 N. W. 514, in which case Campbell, J., said: "The phrase 'expert testimony' is not entirely fortunate as designed to cover all cases where a witness may give his opinions. This is done, in a multitude of cases, by witnesses who have no more personal fitness than any one else, but who have been so placed as to have seen or heard things which can only be described to any one else by giving the impression produced on the mind or senses of the witness. These cases are so common that few persons ever think that what are rightly called facts are at the same time no more nor less than conclusions. Thus, impressions of cold and heat, light and darkness, size, shape, distance, speed, and many personal qualities, physical and mental, are constantly acted on as facts, although not uniformly judged by all observers, for the simple reason that the facts cannot be otherwise communicated. Any person can give such impressions, without special experience or special intelligence."

formed from such acquaintance or from hypothetical statements of facts propounded to them; and, (2) where persons, not experts, are permitted to testify as to the opinions formed by themselves in regard to the common transactions of life, at the time of their occurrence, and concerning things which cannot be reproduced before the jury.[12]

It is important to observe the distinction between these two classes of evidence, otherwise the practitioner may fall into the error of offering an ordinary witness to give an opinion calling for special knowledge merely because he has had actual observation of the facts, or of attempting to prove an opinion upon a matter of ordinary knowledge, arising from assumed facts, by a witness who has not himself observed them, upon the ground that he is an expert upon the subject involved.[13]

III. GENERAL RULES AS TO ADMISSIBILITY OF EXPERT TESTIMONY.

1. In General. — It is well settled that the testimony of experts is admissible upon questions and as to subjects within the range of

12. Dillard *v.* State, 58 Miss. 368, in which case it was said: "Under the first head would come the familiar cases of opinions of men of science, testifying as to the peculiar learning connected therewith, or of the practical man who details the result of long observation in the particular calling to which he has devoted himself. Under the second would fall those instances in which the common observer is permitted to testify as to the direction from which a particular sound seemed to come, or as to the apparent size or weight of a stationary object or the speed of a moving one, as to whether a person appeared to be sick or well, or drunk or sober, or sane or insane, as well as countless other instances, more easily imagined than enumerated." See also Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800, in which case Garrison, J., said: "The expert witness is one whose possession of special knowledge renders his opinion admissible upon a state of facts within his specialty, without regard to the manner in which the facts are established, and without requiring that they should have come, in whole or in part, under the personal observation of the witness; whereas, the sole ground upon which a witness may give an opinion as to matters of ordinary knowledge is that they not only came within his personal observation, but that they come into proof so blended with the opinion to which they give rise that it is receivable in proof as a substitute for a specification of the host of circumstances that called it forth." See further State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833; Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559; McKelvey *v.* Chesapeake & O. R. Co., 35 W. Va. 500, 14 S. E. 261. In the last case it was said: "The non-expert testifies as to conclusions which may be verified by the court or jury; the expert to conclusions which cannot be. The non-expert gives results of a process of reasoning familiar to everyday life; the expert gives the results of a process of reasoning which can be mastered only by special scientists."

13. Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800, in which case Garrison, J., after pointing out the liability of falling into one or the other of the two errors pointed out in the text, said: "In either of these classes of cases the proof must be rejected; the rule being that mere opportunity will not change an or-

their specialties which are too recondite to be properly comprehended and weighed by ordinary observers and reasoners.[14]

Exceptional Rule of Evidence. — Ordinarily a witness is called for the purpose of deposing to facts only, and is not permitted to express his opinion upon a particular question, whether it arises upon a fact stated, or a combination of facts admitted or proved, and the rule which permits experts to give their opinions in evidence is an exception to this general rule.[15]

Necessity for Expert Testimony. — Not only is expert testimony admissible, as has just been seen, but in a great variety of cases it is necessary or indispensable;[16] thus, upon many questions of medical

dinary observer into an expert, and that special skill will not entitle a witness to give an expert opinion when the subject is one where the opinion of an ordinary observer is admissible, or where the jury is capable of forming its own conclusion from facts susceptible of proof in common form."

14. *England.* — Rex *v.* Harvey, 2 B. & C. 268; Sells *v.* Brown, 9 Car. & P. 601.

United States. — United States *v.* Ortig, 176 U. S. 422; St. Louis, I. M. & S. R. Co. *v.* Edwards, 78 Fed. 745.

Alabama. — Birmingham R. & Elec. Co. *v.* Ellard, 135 Ala. 433, 30 So. 276.

California. — People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Connecticut. — Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780.

District of Columbia. — United States *v.* Guiteau, 1 Mack. 498.

Massachusetts. — Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276.

New Hampshire. — State *v.* Wood, 53 N. H. 484.

New York. — Filer *v.* New York C. R. R. Co., 49 N. Y. 42.

Pennsylvania. — Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514.

Virginia. — Mendum's Case, 6 Rand. 709.

Of course this list might be indefinitely extended, for almost every case cited in this article is authority expressly or by necessary implication for the rule stated in the text.

15. Out of the multitude of cases which support the text, the following have been selected as being peculiarly instructive:

United States. — Hopt *v.* Utah, 120 U. S. 430; Transportation Line *v.* Hope, 95 U. S. 297; Union Pac. R. Co. *v.* Novak, 61 Fed. 573.

California. — Hastings *v.* Steamer Uncle Sam, 10 Cal. 341.

Connecticut. — Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780.

Iowa. — Pelamourges *v.* Clark, 9 Iowa 1.

Kansas. — Parsons *v.* Lindsay, 26 Kan. 426.

Michigan. — People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28; People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

Minnesota. — Elfelt *v.* Smith, 1 Minn. 125.

Mississippi. — Caleb *v.* State, 39 Miss. 721; Jones *v.* Finch, 37 Miss. 461, 75 Am. Dec. 73.

New Hampshire. — Spear *v.* Richardson, 34 N. H. 428; Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 316; Patterson *v.* Colebrook, 29 N. H. 94; Robertson *v.* Stark, 15 N. H. 109.

New Jersey. — Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833.

New York. — People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635.

North Carolina. — Bailey *v.* Poole, 35 N. C. 404.

Pennsylvania. — Dooner *v.* Delaware & H. C. Co., 164 Pa. St. 17, 30 Atl. 269; McNerney *v.* Reading, 150 Pa. St. 611, 25 Atl. 57.

South Carolina. — Couch *v.* Charlotte C. & A. R. Co., 22 S. C. 557; Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761.

16. Folkes *v.* Chadd, 3 Doug. 157, 26 E. C. L. 63, in which case Lord Mansfield said: "In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskillfully navi-

jurisprudence the court must of necessity resort to expert testimony.[17]

Expert's Source of Knowledge and Reasons. — It is proper to allow a witness to state the reasons for his opinion,[18] and to testify as to the source of his knowledge, such as his previous experience and observation;[19] and it has been held that he may testify as to what he knows to have actually happened under circumstances similar to those concerning which he is questioned.[20]

gating ships. The question then depends upon the evidence of those who understand such matters, and when such matters come before me, I always send for some of the brethren of the Trinity House." *Quoted* in Ohio & M. R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527. See also as to the importance of and necessity for expert testimony, State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498; Patterson *v.* State, 86 Ga. 70, 12 S. E. 174; State *v.* Perry, 41 W. Va. 641, 24 S. E. 634; Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

Question as to Machinery. — In Chandler *v.* Thompson, 30 Fed. 38, which was a case involving the quality, capacity and proper operation of complicated machinery, the court said: "The reasonable and legal way of obtaining such necessary information is the hearing of opinions of witnesses who, by the usual methods of acquiring such knowledge and skill, have made themselves capable of forming and expressing intelligent and rational views upon such subjects."

Question as to Mining. — Clark *v.* Willett, 35 Cal. 534. See also *infra*, "Invading Province of Jury."

17. Tefft *v.* Wilcox, 6 Kan. 46; Olmsted *v.* Gere, 100 Pa. St. 127; Wilson *v.* State, 41 Tex. 320, in which case it was sought to show whether a skeleton was that of a man or of a woman.

18. Williams *v.* Taunton, 125 Mass. 34, in which case the court cited Dickenson *v.* Fitchbury, 13 Gray (Mass.) 546.

19. Chicago C. R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796, in which case some of the witnesses were allowed to state in what distance a cable car could be stopped, going at a certain rate of speed. It was claimed that it was error to permit these witnesses to state that they had theretofore seen such cars stopped within a certain distance at the point of intersection between the cable-car tracks and the horse-car tracks, where the accident happened. The court said: "It was competent to show, as bearing upon the question of negligence, that the grip car was not so near the point where the horse car was crossing the cable track as to make it impossible to stop it before it should come in contact with the horse car. A witness who testified as to the possibility of stopping within a stated distance could answer as to the source and basis of his knowledge. The witnesses referred to had been in the service of street-car companies, and a reference to previous experience and observation was not improper, because it tended to show that they were qualified to give evidence as to the distance within which it was possible to stop such car."

20. Donahoe *v.* New York & N. E. R. Co., 159 Mass. 125, 34 N. E. 87. In this case the defendant sought to show that the accident of which the plaintiff complained could be accounted for otherwise than by reason of a defect in a car. He introduced a witness who testified that the car might be in perfectly good order, and still fly back by reason of the fault of the men who were handling it, and he added that he had seen such a thing happen. It was held that such testimony was admissible, and that his statement of what he had seen went to show more clearly the value and weight of his opinion.

Testimony as to Observation and Experiments. — When an expert testifies to a matter of opinion it is competent for him to give the reason upon which his opinion is founded and to state that it is the result of observation and experiment in order

Facts Which Are Results of Scientific Knowledge. — One who is an expert may not only give opinions, but may state facts ascertained by scientific knowledge or professional skill;[21] and it has been held that medical experts may testify to learning which they have gained from the study of standard medical works, rather than from experience in actual practice, such evidence not being open to the objection that may be made to the introduction of the books themselves.[22]

Uncertain and Speculative Opinions. — The court will not admit the opinion of an expert which is uncertain and purely speculative.[23]

2. Upon What Theory Admitted. — A. In General. — Expert testimony is admitted because the witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts, and of basing opinions upon them, than jurors generally are presumed to be.[24]

B. Necessity. — Hence it is that it has been frequently declared

to confirm his testimony. Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163.

21. Jones *v.* Angell, 95 Ind. 376; Emerson *v.* Lowell, 6 Allen (Mass.) 146, 83 Am. Dec. 621.

22. Fordyce *v.* Moore (Tex. Civ. App.), 22 S. W. 235. See also article "Books," vol. II, p. 582.

Opinion Based on Teachings of Standard Authors.— After a medical witness, in an action for breach of warranty on the sale of a horse, has stated that he has read various standard authors on the subject of disease, and has given his own opinion in respect to the character of the disease of which the animal died, it is proper to ask the witness for his best medical opinion, according to the best authority. Pierson *v.* Hoag, 47 Barb. (N. Y.) 243.

23. Tullis *v.* Rankin, 6 N. D. 44, 8 N. W. 187; Frankfort *v.* Manhattan R. Co., 12 Misc. 13, 33 N. Y. Supp. 36; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Brandt *v.* City of Lyons, 60 Iowa 172, 17 N. W. 227; Noonan *v.* State, 55 Wis. 258, 12 N. W. 379; Spear *v.* Hiles, 67 Wis. 361, 30 N. W. 511; Missouri P. R. Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590, in which case it was held that the opinion of a medical expert as to the condition of a person at one time based on her physical condition a year and a half afterwards is too uncertain and speculative to be of value.

As to Which One of Two or More Employments Is More Profitable. A witness will not be allowed to testify, as an expert, to the abstract proposition that it is more profitable to discount mercantile paper on private account, with borrowed money, than to act as a bank agent. Storey *v.* Union Bank, 34 Ala. 687, in which case the court said: "Our opinion is that, in matters of this sort, no general rule can exist capable of affording a test by which to determine which one of two or more employments will yield the largest profit. This was, therefore, not a case for the application of the rule which allows experts to give their opinions upon questions of science or trade."

24. Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544. *Quoted* with approval in Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363. See also New England Glass Co. *v.* Lovell, 7 Cush. (Mass.) 319. in which case Shaw, C. J., said that the opinion of a witness is admissible, "Because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, when men of common experience, after all the facts proved, would be left in doubt." *Quoted* with approval in White *v.* Ballou, 8 Allen (Mass.) 408. See further For-

that expert evidence is admitted as a matter of necessity;[25] and it would seem that the opinions of experts are competent evidence whenever such testimony is reasonably necessary to give the court and jury a fair and intelligible understanding of the subject-matter in controversy, and that the necessity need not be an absolute one.[26]

3. Discretion of Court. — The admissibility of expert testimony rests, to a large extent, in the discretion of the court, but this does not mean that the court may arbitrarily admit or exclude such testimony, but merely that the court may exercise a sound judicial discretion in each case in applying rules of law governing the admissibility of such testimony.[27] The court will exclude testimony which is manifestly unreliable;[28] and will not allow an expert to answer absurd and useless questions.[29]

dyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255; Green *v.* State, 64 Ark. 523, 43 S. W. 973; De Witt *v.* Bailey, 9 N. Y. 371.

25. Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293, in which case the court said: "As necessity is the ground of admissibility, the moment the necessity ceases the exception to the general rule that requires of a witness facts and not opinions ceases also. Hence, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible." *Quoted* with approval in Dooner *v.* Delaware & H. C. Co., 164 Pa. St. 17, 30 Atl. 269. See also Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340; St. Louis, I. M. & S. R. Co. *v.* Edwards, 78 Fed. 745; Union Pac. R. Co. *v.* Novak, 61 Fed. 573; Missouri P. R. Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590; People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28; People *v.* Millard, 53 Mich. 63, 18 N. W. 562. *Compare* Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532.

26. Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553.

27. *United States.* — Davis *v.* United States, 165 U. S. 373; Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945.

Illinois. — Gunlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348.

Maryland. — Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

Missouri. — Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

New Hampshire. — Dole *v.* Johnson, 50 N. H. 452.

New Jersey. — Martin *v.* Franklin Fire Ins. Co., 42 N. J. L. 46.

Wisconsin. — Cornell *v.* State, 104 Wis. 527, 80 N. W. 745; Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

28. Haviland *v.* Kansas P. & G. R. Co., 172 Mo. 106, 72 S. W. 515. In this case one who was offered as an expert testified in effect that an ordinary man can lift 200 pounds, but can only shove 75 pounds up an inclined plane, and that while an ordinary man can lift 200 pounds it takes sixteen section hands to lift 600 pounds. Or in other words that while an ordinary man can lift 200 pounds a section hand can lift only one-sixteenth of 600 pounds, equal to 37½ pounds. In holding that this testimony was properly stricken out the court said: "Is any court obliged to believe any such absurd testimony, or to allow such manifest nonsense to go to a jury? Is it not an insult to common intelligence to be asked to believe that a section hand can only lift 37½ pounds, or that such a section hand can only push a 75-pound weight up a greased inclined plane of about 40°? It is too obvious for debate that such testimony shows conclusively that the witness was not an expert, or else that he was playing upon the credibility or gullibility of the jury."

29. Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458. In this case it was

Where Better Evidence is Obtainable. — Expert testimony may be admitted, although other witnesses are able to testify from their own knowledge.[30]

4. Requisite Care and Caution. — The courts are disposed to exercise great care and caution in admitting expert testimony, and to confine it within its true and rational limits;[31] and, mindful of the fact that the cases in which the opinions of witnesses are allowable constitute exceptions to the general rule, they have declared that the exceptions are not to be extended or enlarged so as to include new cases, except as a necessity to prevent failure of justice, and when better evidence cannot be had.[32]

5. Statutory Provisions. — In General. — In some states statutes have been enacted expressly authorizing the admission of expert testimony;[33] but such statutes, it has been declared, are merely

said: "We do not think the court erred in sustaining the objection to the question, 'Now, in your opinion, as an expert, would that plastering be in the condition that you found it had the building since the plastering was placed there settled six or seven inches?' It must be apparent to any one that the plaster of a building which was settled six or seven inches cannot be in the condition that it was before it settled."

30. Ilfrey *v.* Sabine & E. T. R. Co., 76 Tex. 63, 13 S. W. 165, in which case a sailor was allowed to testify what would be the size of waves created by a wind of sixty miles an hour, although there were other witnesses who were enabled to testify from their own knowledge as to the height of the waves.

Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532. This was an action involving conflicting claims to the waters of a creek. An expert was permitted to testify as to the grade of the water ditch at a certain point and it was moved to strike out this testimony because the grade of the ditch was ascertainable with absolute certainty, and that therefore the judgment of the witness was not admissible. The court said: "This position is not tenable; the judgment of the witness as to such matter is always admissible — subject, of course, to be overcome, by the other side, by more accurate information, if such can be produced." *Compare* Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553.

31. Polk *v.* State, 36 Ark. 117.

32. Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544, in which case Earl, J., said: "Where witnesses testify to facts they may be specifically contradicted, and if they testify falsely they are liable to punishment for perjury. But they may give false opinions without fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts. A long time ago in Tracy Peerage (10 Cl. & Fin. 154, 191) Lord Campbell said that skilled witnesses came with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence. Without indorsing this strong language, which is, however, countenanced by the utterances of other judges and of some text writers, and believing that opinion evidence is in many cases absolutely essential in the administration of justice, yet we think it should not be much encouraged and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgment of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted." See also Teerpenning *v.* Corn Exchange Ins. Co., 43 N. Y. 279.

33. See the statutes of the various states and territories, particularly of

declaratory of the common-law rule admitting expert testimony.[34]

6. Limitations as Regards Subject-matter. — A. In General. It has been declared to be of the greatest importance to confine expert testimony to matters beyond the scope of the common knowledge of the jury and ordinary witnesses;[35] and it is well settled that the rule which admits such evidence is limited in its application to those cases where the question at issue is one involving some particular matter connected with a special art, trade or science.[36]

B. Invading Province of Jury. — The opinion of an expert, when he is confined to the proper limits, is not regarded as an

California, Georgia and Oregon; and for decisions under such statutes see Sowden *v.* Idaho Quartz Mining Co., 55 Cal. 443; Estate of Toomes, 54 Cal. 509; Wylly *v.* Gazen, 69 Ga. 506; Farmers' Nat. Bank *v.* Woodell, 38 Or. 294, 61 Pac. 837; Pendleton *v.* Saunders, 19 Or. 9, 24 Pac. 506; Green *v.* Terwilliger, 56 Fed. 384, which was decided under a statute of Oregon.

34. Estate of Toomes, 54 Cal. 509; Pendleton *v.* Saunders, 19 Or. 9, 24 Pac. 506.

35. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

Test for Excluding Expert Evidence. — "To require the exclusion of expert evidence it is not necessary that the jurors should be able to see the facts as they appear to eye-witnesses, or be as capable of drawing conclusions from the facts as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgment upon them, and can comprehend them sufficiently for the ordinary administration of justice." Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544.

Age of Paper. — The age or date of the actual execution of a paper is not a question of science, skill or trade, nor one of the like kind upon which a witness may testify and give his opinion as an expert. Cheney *v.* Dunlap, 20 Neb. 265, 29 N. W. 925, 57 Am. Rep. 828.

36. *United States.* — Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551; Transportation Line *v.* Hope, 95 U. S. 297; New York E. E. Co. *v.* Blair, 79 Fed. 896.

Alabama. — Louisville & N. R. Co. *v.* Landus, 135 Ala. 504, 33 So. 482.

Arkansas. — Little Rock Traction & Elec. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

California. — People *v.* Hill, 116 Cal. 562, 48 Pac. 711; Kauffmann *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

Colorado. — Smuggler U. M. Co. *v.* Broderick, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106.

Georgia. — Georgia R. & Bkg. Co. *v.* Hicks, 95 Ga. 301, 22 S. E. 613.

Illinois. — Illinois C. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119.

Indiana. — Board of Com'rs of Clay Co. *v.* Redifer (Ind. App.), 69 N. E. 305.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 140.

Maine. — Mahew *v.* Sullivan Min. Co., 76 Me. 100.

Maryland. — Baltimore & Yorktown Tpk. Rd. *v.* Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156.

Massachusetts. — Connelly *v.* Hamilton Woolen Co., 163 Mass. 156, 39 N. E. 787.

Michigan. — Smith *v.* Sherwood, 62 Mich. 159, 28 N. W. 806.

Minnesota. — Morris *v.* Farmers' Mut. Fire Ins. Co., 63 Minn. 420, 65 N. W. 655.

Missouri. — Gutridge *v.* Missouri P. R. Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392.

Nebraska. — Missouri P. R. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130.

New Hampshire. — Woods *v.* Allen, 18 N. H. 28.

invasion of the office and province of the jury;[37] but in determining the admissibility of this class of evidence it is always important to observe the distinction between the province of the jury and that of the expert, because generally an expert will not be permitted to give an opinion upon a question which it is the duty and province of the jury to determine.[38] However, it has been held that an expert

New Jersey. — Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800.

New York. — Harley *v.* Mfg. Co., 142 N. Y. 31, 36 N. E. 813; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 22 Am. Dec. 567.

North Carolina. — Codgell *v.* Wilmington & W. R. Co., 132 N. C. 852, 44 S. E. 618.

North Dakota. — Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

Ohio. — Seville *v.* State, 49 Ohio 117, 30 N. E. 621, 15 L. R. A. 516.

Pennsylvania. — Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382.

Rhode Island. — Yeaw *v.* Williams, 15 R. I. 20.

Tennessee. — Nashville & C. R. Co. *v.* Carroll, 6 Heisk. 347.

Texas. — Radam *v.* Capitol Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Utah. — Kahn *v.* Old Telegraph Min. Co., 2 Utah 174.

Vermont. — Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569.

West Virginia. — Overby *v.* Chesapeake & O. R. Co., 37 W. Va. 524, 16 S. E. 813.

Wisconsin. — Noonan *v.* State, 55 Wis. 258, 12 N. W. 379.

37. United States *v.* Guiteau, 1 Mack. (D. C.) 498.

38. *England.* — Sills *v.* Brown, 9 Car. & P. 604; Jameson *v.* Trinkald, 12 Moore 148.

United States. — Shauer *v.* Alterton, 151 U. S. 607; Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551; Schmieder *v.* Barney, 113 U. S. 645; Milwaukee R. Co. *v.* Kellogg, 94 U. S. 469; Motey *v.* Pickle Marble & Granite Co., 74 Fed. 155; Crane Co. *v.* Columbus Construction Co., 73 Fed. 984; Atchison, T. & S. F. R. Co. *v.* Myers, 63 Fed. 793; Union Pac. R. Co. *v.* Novak, 61 Fed. 573.

Alabama. — Tullis *v.* Kidd, 12 Ala. 648; Louisville & N. R. Co. *v.* Landus, 135 Ala. 504, 33 So. 482; Birmingham R. & Elec. Co. *v.* Butler, 135 Ala. 388, 33 So. 33.

Arkansas. — Fordyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Ringlehaupt *v.* Young, 36 Ark. 128; Little Rock & F. S. R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363.

California. — Pacheco *v.* Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833; People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709; Sappenfield *v.* Main St. & A. R. Co., 91 Cal. 48, 27 Pac. 590; Enright *v.* San Francisco & S. J. R. Co., 33 Cal. 230.

Colorado. — Smuggler U. M. Co. *v.* Broderick, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106; Old *v.* Keener, 22 Colo. 6, 43 Pac. 127.

Georgia. — Southern Mut. Ins. Co. *v.* Hudson, 115 Ga. 638, 42 S. E. 60; Georgia R. & Bkg. Co. *v.* Hicks, 95 Ga. 301, 22 S. E. 613; Central R. *v.* De Bray, 71 Ga. 406; Hudson *v.* Georgia P. R. Co., 85 Ga. 203, 11 S. E. 605; Central R. & Bkg. Co. *v.* Ryels, 84 Ga. 420, 11 S. E. 499.

Illinois. — People *v.* Lehr, 196 Ill. 361, 63 N. E. 725; Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267; Pennsylvania Co. *v.* Stoelke, 104 Ill. 201; Hoener *v.* Koch, 84 Ill. 408; Chicago & A. R. Co. *v.* Springfield & N. W. R. Co., 67 Ill. 142; Springfield Consol. R. Co. *v.* Puntenney, 200 Ill. 9, 65 N. E. 442; Treat *v.* Merchants' Life Ass'n, 198 Ill. 431, 64 N. E. 992.

Indiana. — Board of Commissioners of Clay Co. *v.* Redifer (Ind. App.), 69 N. E. 305.

Iowa. — Swanson *v.* Keokuk & W. R. R. Co., 116 Iowa 304, 89 N. W. 1088; Marshall *v.* Hanby, 115 Iowa 318, 88 N. W. 861; Betts *v.* Betts, 113 Iowa 111, 84 N. W. 975; Cahow *v.* Chicago, R. I. & P. R. Co., 113 Iowa 224, 84 N. W. 1056; Furlong *v.* Carraher, 108 Iowa 492, 79 N. W. 277; Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682; Burns *v.* Chicago, M. & St. P. R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227; Cooper *v.* Mills, 69 Iowa 350, 28 N. W. 633.

may express an opinion upon the precise question which the jury is to determine when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable the

Kansas. — Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308; State *v.* Myers, 54 Kan. 206, 38 Pac. 296; Cherokee & P. C. & M. Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691; Murray *v.* Woodson, 58 Kan. 1, 48 Pac. 554.

Kentucky. — Aetna Life Ins. Co. *v.* Kaiser (Ky.), 74 S. W. 203; Manhattan Life Ins. Co. *v.* Beard, 112 Ky. 455, 66 S. W. 35.

Louisiana. — Brabo *v.* Martin, 5 La. 275.

Maine. — Mahew *v.* Sullivan Min. Co., 76 Me. 100; Cannell *v.* Phoenix Ins. Co., 59 Me. 582; Hill *v.* Portland & R. R. Co., 55 Me. 438, 92 Am. Dec. 601.

Maryland. — Williams *v.* State, 64 Md. 384; Davis *v.* State, 38 Md. 15.

Massachusetts. — Chalmers *v.* Whitmore Mfg. Co., 164 Mass. 532, 42 N. E. 98; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Simmons *v.* New Bedford Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

Michigan. — Cole *v.* Lakeshore & M. S. R. Co., 95 Mich. 77, 54 N. W. 638; Jones *v.* Lee, 77 Mich. 35, 43 N. W. 855; Harris *v.* Clinton, 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842; Smith *v.* Sherwood, 62 Mich. 159, 28 N. W. 806; Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

Minnesota. — Blondel *v.* St. Paul & C. R. Co., 66 Minn. 284, 68 N. W. 1079; Merchants' & Mech. Sav. Bank *v.* Cross, 65 Minn. 154, 67 N. W. 1147; Elfelt *v.* Smith, 1 Minn. 125; Wilson *v.* Reedy, 33 Minn. 503, 24 N. W. 191.

Mississippi. — Foster *v.* State, 70 Miss. 755, 12 So. 822; Dillard *v.* State, 58 Miss. 368.

Missouri. — Brown *v.* Cape Girardeau M. & P. R. Co., 89 Mo. 152, 1 S. W. 129; Gavisk *v.* Pacific R. Co., 49 Mo. 274; Tingley *v.* Cowgill, 48 Mo. 291.

Montana. — Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; Story *v.* Maclay, 3 Mont. 480.

Nebraska. — Missouri P. R. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130; Lincoln & B. H. R. Co. *v.* Sutherland, 44 Neb. 526, 62 N. W. 859; Atchison, T. & S. F. R. Co. *v.* Lawlor, 40 Neb. 356, 58 N. W. 968.

New Hampshire. — *Compare* Gault *v.* Concord R. Co., 63 N. H. 356; Leighton *v.* Sargent, 31 N. H. 119.

New Jersey. — Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Cook *v.* State, 24 N. J. L. 843; Bergen Co. Trac. Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837.

New York. — People *v.* Tuczkewitz, 149 N. Y. 240, 43 N. E. 548; People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820; People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544.

North Dakota. — Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

Ohio. — Seville *v.* State, 49 Ohio 117, 30 N. E. 621, 15 L. R. A. 516.

Oregon. — First Nat. Bank *v.* Fire Ass'n of Philadelphia, 33 Or. 172, 50 Pac. 568; Nutt *v.* Southern Pac. Co., 25 Or. 291, 35 Pac. 653; Hahn *v.* Guardian Assurance Co., 23 Or. 576, 32 Pac. 683.

Pennsylvania. — Woeckner *v.* Erie Elec. Motor Co., 187 Pa. St. 206, 41 Atl. 28; Franklin Fire Ins. Co. *v.* Gruver, 100 Pa. St. 266.

Rhode Island. — Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33.

South Carolina. — Mead *v.* Car. Nat. Bank, 26 S. C. 608; Couch *v.* Charlotte C. & A. R. Co., 22 S. C. 557.

Tennessee. — Nashville & C. R. Co. *v.* Carroll, 6 Heisk. 347; Gibson *v.* Gibson, 9 Yerg. 329.

Texas. — Von Diest *v.* San Antonio Traction Co. (Tex. Civ. App.), 77 S. W. 632; Dallas Elec. Co. *v.* Mitchell (Tex. Civ. App.), 76 S. W. 935; Southern Kan. R. Co. *v.* Cooper (Tex. Civ. App.), 75 S. W. 328; International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

Utah. — Murray *v.* Salt Lake C. R. Co., 16 Utah 356, 52 Pac. 596; Kahn *v.* Old Tel. Mining Co., 2 Utah 174.

Vermont. — Brown *v.* Doubleday,

jury to form an accurate judgment thereon, and no better evidence than such opinion is attainable.[39]

C. Invading Province of Court. — Another important consideration to be observed in determining the admissibility of expert testimony is that a witness who is called as an expert will not be permitted to give opinions upon questions which it is the province of the court to determine;[40] and where the court is trying a case without a jury it is not proper to allow the witness to express an opinion upon the very fact to be determined by the court.[41]

Hearsay. — Under the guise of giving expert testimony, a witness will not be permitted to testify to mere hearsay.[42]

IV. QUALIFICATIONS OF EXPERTS.

1. In General. — Aside from the peculiar qualifications which a witness must possess as an expert, his competency is governed by

61 Vt. 523, 17 Atl. 135; Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725; Bemis *v.* Central Vt. R. Co., 58 Vt. 636, 3 Atl. 531.

Washington. — State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

West Virginia. — State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; Overby *v.* Chesapeake & O. R. Co., 37 W. Va. 524, 16 S. E. 813; Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996.

Wisconsin. — Noonan *v.* State, 55 Wis. 258, 12 N. W. 379; Knoll *v.* State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704.

Usurpation of Province of Jury. In Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7, Bosworth, J., said: "When the opinions and inferences of a witness are inquired into as matters proper for the consideration of a jury, their province is in a measure usurped, and the judgment of witnesses is substituted for that of the jury."

39. Van Wyckln *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179, wherein Brown, J., said: "Familiar examples of the admission of evidence of this character are cases involving questions of medical practice and skill, and cases involving genuineness of handwriting. Within the same principle, the question whether a vessel was unseaworthy was held admissible, because it involved the result of an examination which could not be fully communicated to a jury." *Citing* Transportation Line *v.* Hope, 95 U. S. 297; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Cornish *v.* F. B. F. Ins. Co., 74 N. Y. 295; Bellinger *v.* N. Y. C. R. Co., 23 N. Y. 42; Baird *v.* Daly, 68 N. Y. 547; and Schwander *v.* Birge, 46 Hun (N. Y.) 66, and the court after reviewing several cases said: "Opinions were held admissible in the cases cited, for the reason that the controlling issue in the case involved questions of skill and experience, which the witness' practical knowledge enabled him to speak upon, and because the facts which impressed the mind of the witness could not be placed before the jury, and no better evidence was available."

40. *Connecticut.* — Rowland *v.* Fowler, 47 Conn. 347.

Georgia. — Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80; Freeman *v.* Exchange B. of M., 87 Ga. 45, 13 S. E. 160.

Illinois. — Illinois C. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173.

Indiana. — Hamrick *v.* State, 134 Ind. 324, 34 N. E. 3.

Minnesota. — Merchants' & Mech. Sav. Bank *v.* Cross, 65 Minn. 154, 67 N. W. 1147.

Texas. — Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64.

41. Illinois C. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173.

42. Albany & Renssalaer Iron & Steel Co. *v.* Lundberg, 121 U. S. 451,

ordinary rules. Thus, the fact that he is interested in the claim of the party by whom he is called does not affect his competency, but goes merely to his credibility;[43] and the same is true of the fact that the witness is employed by the party who calls him.[44]

2. Requisite Knowledge, Skill and Experience. — A. In General. While undoubtedly it must appear that a witness called as an expert has enjoyed some means of special knowledge or experience upon the subject as to which he proposes to testify, no hard and fast rule can be laid down as to the extent of such knowledge or experience;[45] The reason for allowing an expert to testify, and the object of his testimony, indicate to some extent the qualifications he should possess in order to make him a competent witness. His competency depends upon either his actual experience with respect to the subject under investigation, or his previous study and scientific research concerning the same, and sometimes on both combined.[46] A witness should not be permitted to testify as an expert unless he has such knowledge or experience with reference to the science, art or trade as to which he is called to testify, as will enable him to speak intelligently and enlighten the court.[47] Where a witness is not called

in which case it was held that the statements of witnesses as to the proportion of phosphorus in certain iron were inadmissible, as their testimony was based on analyses made in previous years by other persons, none of which were produced. Hinds *v.* Kieth, 57 Fed. 10; State *v.* Myers, 54 Kan. 206, 38 Pac. 296. See also Williams *v.* Hersey, 17 Kan. 18.

43. New Jersey Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. L. 189, 35 Atl. 915.

44. Lion Fire Ins. Co. *v.* Starr, 71 Tex. 733, 12 S. W. 45; Chicago, R. I. & T. R. Co. *v.* Langston, 92 Tex. 709, 50 S. W. 574, 51 S. W. 331.

45. Castner *v.* Sliker, 33 N. J. L. 95; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146; Dane *v.* State, 36 Tex. Crim. 84, 35 S. W. 661.

Experts Not Necessarily Persons of Experience. — In Bryan *v.* Branford, 50 Conn. 246, it was insisted that one who had had experience in making plans and estimates for the building of bridges and who had superintended their construction was not qualified to testify as an expert with regard to the probable cost of a bridge because he had had no experience as a practical bridge builder, but it was held that there was no force in such contention. The court said: "To give plausibility to the objection it was claimed that the meaning of the term 'expert' was limited by the strict sense of its Latin derivation — that is, to 'a person instructed by experience.' But the legal sense of the term has always been much broader. Lord Mansfield in Folkes *v.* Chadd, 3 Doug. 157, extended it to 'all persons professionally acquainted with the science or practice in question.'"

Ability to Form Opinions Worthy of Consideration. — The asking of a hypothetical question upon a presumed state of facts for the purpose of eliciting the opinion of a witness, can be justified only upon the theory that he is so familiar with the general characteristics of the subject under discussion as to be able to form an opinion worthy of consideration, even though he is wholly ignorant of the particular transaction in controversy. Russell *v.* State, 53 Miss. 367; State *v.* Webb, 18 Utah 441, 56 Pac. 159. See also Green *v.* State, 64 Ark. 523, 43 S. W. 973.

46. Green *v.* State, 64 Ark. 523, 43 S. W. 973.

47. *United States.* — Shauer *v.* Alterton, 151 U. S. 607; Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551; Railroad Co. *v.* Warren, 137 U. S. 348; New York & C. Min.

Co. *v.* Fraser, 130 U. S. 611; Manufacturing Co. *v.* Phelps, 130 U. S. 520; Empire Spring Co. *v.* Edgar, 99 U. S. 645.

Alabama. — Alabama G. S. R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943; Birmingham Nat. Bank *v.* Bradley, 116 Ala. 142, 23 So. 53; Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28.

Arkansas. — Kansas City, F. S. & M. R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066; McClintock *v.* Lary, 23 Ark. 215.

California. — Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197; People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709, Central P. R. Co. *v.* Pearson, 35 Cal. 247.

Colorado. — Denver, T. & F. T. W. R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

Connecticut. — Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 434; Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

Georgia. — Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126; Central R. & Bkg. Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965.

Illinois. — Chicago & A. R. Co. *v.* Springfield & N. W. R. Co., 67 Ill. 142; Cooper *v.* Randall, 59 Ill. 317; Chicago & M. E. R. Co. *v.* Mawman, 206 Ill. 182, 69 N. E. 66.

Iowa. — Allison *v.* Parkinson, 108 Iowa 154, 78 N. W. 845; Brody *v.* Chittenden, 106 Iowa 524, 76 N. W. 1009.

Kansas. — Chicago, K. & W. R. Co. *v.* Stewart, 50 Kan. 33, 31 Pac. 668; Atchison, T. & S. F. R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 140; Chicago, K. & W. R. Co. *v.* Easley, 46 Kan. 337, 26 Pac. 731.

Louisiana. — Budge *v.* Morgan's L. & T. R. R. Co., 108 La. 349, 32 So. 535. 58 L. R. A. 333.

Massachusetts. — Perkins *v.* Stickney, 132 Mass, 217; Tucker *v.* Mass. C. R. R., 118 Mass. 546; Hawks *v.* Charlemont, 110 Mass. 110.

Michigan. — Lewis *v.* Bell, 109 Mich. 189, 66 N. W. 1091; McEwen *v.* Bigelow, 40 Mich. 215.

Minnesota. — Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1; Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283.

Missouri. — Campbell *v.* St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86; Lorts *v.* Washington, 175 Mo. 487, 75 S. W. 95.

Montana. — Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

Nebraska. — Smith *v.* First Nat. Bank of Chadron, 45 Neb. 444, 63 N. W. 796; Piper *v.* Woolman, 43 Neb. 280, 61 N. W. 588.

New Hampshire. — Boardman *v.* Woodman, 47 N. H. 120; Page *v.* Parker, 40 N. H. 47.

New Jersey. — Bergen Neck R. Co. *v.* Point Breeze Ferry & Imp. Co., 57 N. J. L. 163, 30 Atl. 584; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506.

New York. — Slocovich *v.* Ins. Co., 108 N. Y. 56, 14 N. E. 802; Hoyt *v.* Long Island R. Co., 57 N. Y. 678; Bedell *v.* Long Island R. R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Slater *v.* Wilcox, 57 Barb. 604; Van Dusen *v.* Young, 29 Barb. 9.

North Carolina. — Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389.

Oregon. — State *v.* Barrett, 33 Or. 194, 54 Pac. 807; Townley *v.* Or. R. Co., 33 Or. 323, 54 Pac. 150; Oregon Pottery Co. *v.* Kern, 30 Or. 328, 47 Pac. 917.

Pennsylvania. — Pennock *v.* Crescent Pipe Line Co., 170 Pa. St. 372, 32 Atl. 1085; Lancaster Silver Plate Co. *v.* Nat. Fire Ins. Co., 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. Rep. 753; Towboat Co. *v.* Starrs, 69 Pa. St. 36.

South Carolina. — Wilson *v.* Southern R. R. Co., 65 S. C. 421, 43 S. E. 964.

Tennessee. — Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559; Allen *v.* State, 3 Humph. 367.

Texas. — Wilson *v.* State, 41 Tex. 320; Bearden *v.* State (Tex. Crim.), 73 S. W. 17.

Utah. — Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853; Murray *v.* Salt Lake C. R. Co., 16 Utah 356, 52 Pac. 596; Wright *v.* Southern Pacific R. Co., 15 Utah 421, 49 Pac. 309.

Vermont. — Carpenter *v.* Corinth, 58 Vt. 214, 2 Atl. 170; State *v.* Ward, 39 Vt. 225.

Virginia. — Norfolk R. & L. Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740.

West Virginia. — Overby *v.* Chesa-

upon for an opinion, but simply for a statement of a fact — *e. g.*, whether such and such a thing was done — this rule is not applicable, and there is no necessity to show the qualifications of the witness as an expert, even though he may happen to be a professional man.[48]

Inferior Skill, Knowledge, Etc. — A person who is skilled or experienced or has knowledge in a trade or art or calling may be qualified to testify as an expert, notwithstanding the fact that he is of mediocre or inferior ability.[49]

peake & O. R. Co., 37 W. Va. 524, 16 S. E. 813; Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996.

Wisconsin. — Soquet *v.* State, 72 Wis. 659, 40 N. W. 391.

48. People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730. This was a prosecution for murder. Objection was made to the testimony of a physician as to his treatment of the defendant while he was in a hospital and in jail. The witness was asked: "Did you give quinine for chills? During the seven years you have been there in the Tombs do you know whether or not you gave quinine for chills?" Whereupon the witness testified that he had given the defendant whisky as well as quinine. It was held that it was immaterial that before such testimony was received the witness did not qualify as a medical expert. The court said: "These questions, when examined, disclose that they did not call for any opinion of the witness as an expert, but simply for what was done upon that occasion, and incidentally for the usual practice in that hospital."

49. *England.* — Malton *v.* Nesbit, 1 Car. & P. 70.

United States. — Montana R. Co. *v.* Warren, 137 U. S. 348; McGowan *v.* American Pressed Tan Bark Co., 121 U. S. 575; Empire Spring Co. *v.* Edgar, 99 U. S. 645.

Alabama. — Louisville & N. R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40; McNamara *v.* Logan, 100 Ala. 187, 14 So. 175.

Arkansas. — Green *v.* State, 64 Ark. 523, 43 S. W. 973.

California. — People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Gibson, 106 Cal. 458, 39 Pac. 864; Barnum *v.* Bridges, 81 Cal. 604, 22 Pac. 924.

Colorado. — Germania Life Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215; Denver T. & F. W. R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

Connecticut. — Bryan *v.* Branford, 50 Conn. 246.

Georgia. — Boswell *v.* State, 114 Ga. 40, 39 S. E. 897; Crawford *v.* Georgia P. R. Co., 86 Ga. 5, 12 S. E. 176; Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153.

Illinois. — Webster Mfg. Co. *v.* Mulvanny, 168 Ill. 311, 48 N. E. 168, *affirming* 68 Ill. App. 607; Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

Indiana. — House *v.* Fort, 4 Blackf. 293.

Iowa. — Tuttle *v.* Cone, 108 Iowa 468, 79 N. W. 267; Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Kansas. — Latham *v.* Brown, 48 Kan. 190, 29 Pac. 400; Chicago, K. & W. R. Co. *v.* Mouriquand, 45 Kan. 170, 25 Pac. 567.

Maryland. — Davis *v.* State, 38 Md. 15.

Massachusetts. — Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127; Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192; Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

Michigan. — Andre *v.* Hardin, 32 Mich. 324.

Minnesota. — Gilmore *v.* Brost, 39 Minn. 190, 39 N. W. 139.

New Hampshire. — State *v.* Wood, 53 N. H. 484; Dole *v.* Johnson, 50 N. H. 452.

New Jersey. — New Jersey Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. L. 189, 35 Atl. 915.

New York. — Roberts *v.* Johnson, 58 N. Y. 613; Price *v.* Lowell, 3 N. Y. 322; Murphy *v.* N. Y. Central R. R. Co., 66 Barb. 125; Slater *v.* Wilcox, 57 Barb. 604.

North Carolina. — Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389.

Matters Pertaining to Special Knowledge. — The competency of a witness to give testimony as an expert is confined to matters pertaining to his special skill or profession.[50]

Sufficiency of Knowledge Derived From Any Reliable Source. — The general rule seems to be that where a witness exhibits such a degree of knowledge, gained from experience, observation, standard books or other reliable source, as to make it appear that his opinion is of some value, he is entitled to testify, it being left to the trial court, in the exercise of sound discretion, to say when such knowledge is shown, and to the jury to say what the opinion is worth.[51]

Previous Habit or Study. — Where previous habit or study is essential to the formation of an opinion sought to be put in evidence, only such persons are competent to express an opinion as have, by experience, special learning or training, gained a knowledge of the subject-matter upon which an opinion is to be given superior to that of an ordinary person.[52]

B. Particular, Special Knowledge. — An expert must have made the subject upon which he gives his opinion a matter of particular study, practice or observation; and he must have particular, special knowledge on the subject;[53] and in a matter of science, no individual can be a fit expert who does not understand the science involved.[54]

C. Reputation in Profession. — The competency of a witness to testify as an expert is to be determined, not by his reputation for

South Carolina. — State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

South Dakota. — Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1007.

Texas. — Albright *v.* Corley, 40 Tex. 105; International & G. N. R. Co. *v.* Collins (Tex. Civ. App.), 75 S. W. 814.

Utah. — Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853; State *v.* Webb, 18 Utah 441, 56 Pac. 159.

Vermont. — Hathaway *v.* National Life Ins. Co., 48 Vt. 335; James *v.* Hodgsden, 47 Vt. 127.

Wisconsin. — Baxter *v.* Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644.

Distinction Between Nurseryman and Farmer. — In Latham *v.* Brown, 48 Kan. 190, 29 Pac. 400, the court said: "The man who labors or cares for his fruit or shade or ornamental trees for years becomes possessed of a practical knowledge about trees that qualifies him to express an opinion as to their value. An expert nurseryman may be better, but the man who has successfully planted, cultivated and cared for an orchard is good enough. These witnesses were well enough qualified under this rule to render their evidence competent."

50. Green *v.* State, 64 Ark. 523, 43 S. W. 973; Dole *v.* Johnson, 50 N. H. 452.

Painter. — House Building. — A painter cannot testify as an expert in regard to the workmanship exhibited in the framing and construction of a building. Kilbourne *v.* Jennings, 38 Iowa 533.

51. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

52. West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447.

53. Jones *v.* Tucker, 41 N. H. 546. See also Nelson *v.* Sun Mutual Ins. Co., 71 N. Y. 453; Pendleton *v.* Saunders, 19 Or. 9, 24 Pac. 506.

54. Allen *v.* Hunter, 6 McLean 303, 1 Fed. Cas. No. 225, which was a suit for the infringement of a patent. The question arose as to the meaning of the words "known fluxes" out of which a cement was formed. McLean, J., said: "The words, 'known fluxes,' belong to

skill or the want of it in his trade or profession, but by his capacity therein.[55]

D. Presumption Arising From Profession. — Where the witness has been educated in a particular profession, as a physician, surgeon or veterinary, he is presumed to understand thoroughly the questions pertaining to his profession, and to be qualified as an expert.[56]

E. Retirement From Profession or Business. — Ordinarily a witness is none the less qualified to testify as an expert because he has ceased to practice the profession, or engage in the business as to which he is offered as an expert, but this is merely a circumstance which affects the weight which is to be given to his testimony;[57] and *a fortiori* it is immaterial as respects the qualification of a witness that he is engaged in a pursuit other than the one as to which he is called to testify.[58]

F. Knowledge Derived From Reading and Study. — A witness may be competent to testify as an expert, although he has had no practical experience in the subject of inquiry, but has derived his

chemistry, and none but those who understand the science of chemistry should have weight as expert on this subject. A dentist who extracts and fills teeth, or who sets teeth, may be expert in what he professes, and yet be ignorant of chemistry. This has been verified in the present case. As the invention is claimed to be a new and useful mode of setting teeth, etc., it seems to be supposed that dentists are proper experts to define the meaning of chemical terms. But if they have not a scientific knowledge of chemistry they are not experts in the application of chemical terms. The law says the description shall be such as to enable any person, skilled in the art or science of which it is a branch or with which it is most nearly connected, to make, compose, and use the same. If the person called be not skilled in chemistry he cannot be considered as an expert in regard to chemical affinities. A mechanic may as well be called as an expert on this subject as a practical dentist who has no knowledge of chemistry. The same may be said in regard to the term 'borax.' The making up of the compound or the manufacture of teeth is not necessarily connected with dentistry."

55. Birmingham Electric Co. *v.* Ellard, 135 Ala. 433, 30 So. 276. See also De Phue *v.* State, 44 Ala. 32.

56. Missouri P. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951.

57. Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76, *holding* that a female physician who had attended a regular medical school, and had practiced her profession, but who had since abandoned the regular practice of medicine and adopted Christian Science as the proper method of healing the sick, is competent to testify as an expert as to the result of her examination of the plaintiff, and to state the symptoms complained of by her; Roberts *v.* Johnson, 58 N. Y. 613; Robertson *v.* Knapp, 35 N. Y. 91, *holding* that one who has formerly been a farmer, but has changed his occupation to that of a mechanic, is, nevertheless, a competent witness to testify to the value of land in his neighborhood; Bearss *v.* Copley, 10 N. Y. 93, in which case the witness at the time of the trial was a student at law, but had been engaged in the tanning business over four years, and had done all kinds of work in the process of tanning and was held to be qualified to testify upon a question involving the art of tanning.

58. Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832. See also Buffum *v.* Harris, 5 R. I. 243, in which case it was held that a farmer was competent to testify as to the matters

knowledge and information solely from study and reading of books dealing with the subject under investigation.[59]

G. Knowledge Acquired by Experience and Observation. It frequently happens that a witness is qualified to testify as an expert because of his experience and observation with reference to the matters under investigation, even though he is not a professional man, or has not acquired his knowledge from the study of books;[60] but it would seem that he is not qualified merely by his personal experience, though his own experience may properly form part of

pertaining to farming, although in addition to being a farmer he was a scythe-maker.

59. *England.* — Collier *v.* Simpson, 5 Car. & P. 73.

Alabama. — Tullis *v.* Kidd, 12 Ala. 648.

Arkansas. — Green *v.* State, 64 Ark. 523, 43 S. W. 973.

Connecticut. — Bryan *v.* Branford, 50 Conn. 246.

Georgia. — Boswell *v.* State, 114 Ga. 40, 39 S. E. 897; Central R. Co. *v.* Mitchell, 63 Ga. 173.

Indiana. — Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St Rep. 228.

Illinois. — Citizens' Gas Light & Heating Co. *v.* O'Brien, 19 Ill. App. 231.

Kansas. — Missouri P. R. Co. *v.* Finley, 38 Kan. 550, 61 Pac. 951; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Massachusetts. — Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192; Finnegan *v.* Fall River Gas Wks. Co., 159 Mass. 311, 34 N. E. 523; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan. — Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

New Hampshire. — State *v.* Wood, 53 N. H. 484; Dole *v.* Johnson, 50 N. H. 122; Taylor *v.* Railway, 48 N. H. 304.

New York. — Pierson *v.* Hoag, 46 Barb. 243.

South Carolina. — State *v.* Terrell, 12 Rich. L. 321.

Gunshot Wound. — In People *v.* Phelan, 123 Cal. 551, 56 Pac. 424, a witness, who was allowed to give his opinion as an expert upon the question of exit and entrance of a bullet with which a person was killed, had been a practicing physician and surgeon for fifteen years, but had never had but one case of gunshot wound, and in that case there was only a wound of entrance, but he had taken a regular course of lectures on medical jurisprudence, had studied the standard authorities on the subject of gunshot wounds, had read the reports of our army surgeons on the subject, and had himself conducted the autopsy in this case, so that he was not only able to express a general opinion in answer to a hypothetical question, but was able to state the particular grounds upon which his opinion in this case was founded. It was held that a sufficient foundation was laid to warrant the court in admitting his testimony, its value being a question for the jury.

60. Sowden *v.* Idaho Quartz Mining Co., 55 Cal. 443. In this case it was held that a miner who had had twenty-two years' experience in the use of blasting powders, even though he was not a scientist or chemist, was qualified to answer the following question: "In the light of your experience, what do you say as to the safety of the Excelsior powder for blasting purposes?" See also Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382. See further Baxter *v.* Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644, in which case the question was whether proper care had been taken in the inspection of an engine to discover defects, if any existed. A witness of twenty-five years' experience in handling engines and machinery, and in observing the tendency of iron to become crystallized by age, was permitted, against objection, to give his opinion upon that point. It was objected that the witness was not competent to give such evidence, because he was not schooled as a me-

the observations by which he may have acquired such knowledge as will render him competent.[61]

H. Employers of Skilled Persons. — It has been held that a person who is engaged in a business which necessitates the employment of skilled persons may, by reason of engaging in such business, and the employment and superintendence of such skilled persons, acquire such knowledge and experience as will enable him to testify as an expert, even though he does not personally follow the trade as an artisan.[62]

1. Public Officers. — Any witness who possesses the requisite knowledge may testify, even where there are officers whose business it is to be cognizant of the matters concerned.[63]

chanic or experienced as a manufacturer, but it was held that such objection was without force.

Knowledge Gained in Course of Business. — "Knowledge of any kind gained for and in the course of one's business, as pertaining thereto, is precisely that which entitles one to be considered an expert, so as to render his opinion founded on such knowledge admissible in evidence." Buffum *v.* Harris, 5 R. I. 250.

61. New Jersey Traction Co. *v.* Brabban, 57 N. J. L. 691, 32 Atl. 217, in which case the court said: "Brabban had proved that the amputation of his foot had disabled him from working at his trade, which was that of upholsterer. Evidence properly tending to show that, by the use of an artificial leg, he could resume working at his trade or could do other work, was clearly admissible, and, as the capacity of a man thus maimed to do various kinds of work by the use of an artificial leg is not a matter of common and universal knowledge, evidence from those who, by observation and otherwise, had acquired special knowledge on the subject would likewise have been admissible. Had it appeared that Dietz was accustomed to fit and adjust to maimed legs artificial substitutes and to observe how persons thus treated were enabled thereby to use their powers, I think he would have been shown to be possessed of special knowledge on the subject. His own experience might properly form a part of the observations by which he acquired such knowledge."

Experiments as Basis for Qualification. — In Brownell *v.* People, 38 Mich. 732, which was a prosecution for murder, the court said: "It appears to us that the testimony of one called as an expert upon the effect of a pistol shot upon the clothing when fired at a certain distance was based on too small an experience. A single pistol shot through his own clothing without any proof of the comparative amounts or kinds of loading, and without ever seeing further experiments at greater or less distances or at the same distance, with pistols of the same or different make or caliber, is too small a foundation for generalizing."

62. Nelson *v.* Wood, 62 Ala. 175. In this case the owner of a tan-yard, whose occupation was not that of a tanner, but who had been engaged in the business of tanning, and was the employer of tanners, was permitted to testify as an expert on the subject of tanning. The court said: "The long acquaintance and ownership of a tan-yard carrying on the business of tanning, entitles the witness, Barnes, to testify as an expert, though his occupation was not that of a tanner, and he had not, with his own hands, worked in tanning. He had ample opportunities of acquiring superior knowledge in reference to the value of this particular process of tanning, accompanied with practical experience, and this we understand is all that the term expert implies."

63. Downey *v.* State, 66 Ga. 110, in which case it was held that on a prosecution for selling kerosene oil of a fire test of less than 110 degrees Fahrenheit, experts in kerosene oil are competent witnesses concerning the tests thereof, although they are not

J. Officers of Corporation. — It would seem that as a general proposition officers of a corporation who are charged with the conduct of the business of such corporation are qualified to testify as experts upon questions relating to such business.[64]

K. Qualifications Confined to Matters Arising in Particular Locality. — It sometimes happens that the pursuit of the witness is such that he is not qualified to testify as an expert except as to matters concerning his trade or calling in a particular locality in which he has acquired his knowledge and experience.[65]

inspectors authorized by statute. To the same effect, see Mineke *v.* Skinner, 44 Mo. 92, wherein it was held that it is not necessary that one who made surveys should be a county or government surveyor to enable him to testify in reference to such surveys or to the correctness of any plat of them.

64. Webber *v.* Eastern R. R. Co., 2 Metc. (Mass.) 147. A witness was called to give his opinion upon the question whether the proximity of a railroad to the insured property would be likely to increase the rate of premium of insurance against fire. He did not profess to be an expert, but his means of knowledge on that subject resulted from his having been for a long time secretary of a fire insurance company, and as such "charged with the duty of examining buildings and taking into consideration all circumstances bearing upon the risk and rate of premium." The court held that these facts rendered him competent to give his opinion as evidence to the jury upon that subject. See also to the same effect, Kern *v.* St. Louis Mut. Ins. Co., 40 Mo. 19.

Capacity of Crushing Mill. — In Chateaugay Iron Co. *v.* Blake, 144 U. S. 476, the general manager of a corporation which was operating an iron mill was asked what in his judgment was the daily capacity of a crushing machine. He testified that he had been general manager of the corporation for six years and that he was at the mill as often as twice a month and usually went there once a week. He did not appear to have been a practical machinist or to have had any special knowledge of mining or crushing machinery. He was not superintendent of the workings of the mine or of the machinery, and apparently was more employed in the financial and outside affairs of the company than in the details of the mining or the practical workings of the machinery. It was held that there was no abuse of discretion in holding that he was not qualified to answer the question.

65. Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197. In this case it was held that there was no error in excluding the testimony of the witness, who was requested to give his opinion as an expert as to the effect of irrigation upon certain land owned by the defendant, on the ground that the witness was not shown to be competent to testify, because it appeared that the experience of the witness had been confined to land situated in another county than that in which the defendant's land was located, and that he had never been upon the defendant's land except for a period of one day in the winter prior to the time of the trial. The court declared that to entitle the witness to testify it ought to have been shown that the conditions as to climate, soil, topography and rainfall were the same in the two counties. See also San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; Jones *v.* Mechanics Fire Ins. Co., 36 N. J. L. 29, 13 Am. Rep. 405. *Compare* Lawton *v.* Chase, 108 Mass. 238.

Railroad Man. — Lack of Experience as to Railroad in Question. In the absence of testimony that the duties of a brakeman upon any railroad are to attend to the brakes upon the train and do not require him to aid in or supervise the loading of the cars nor to inspect said cars after they are loaded, a witness knowing nothing of the duties of a brakeman on the defendant's railroad was incompetent to testify to the duties of brakemen generally or upon other railroads. McCray *v.* Galveston H.

L. With Reference to Particular Avocation. — a. *In General.* — Having shown the general rules as to the knowledge, skill and experience which a witness must have to enable him to qualify as an expert, it is here proposed to elucidate and apply such rules by showing specifically the qualifications which the witness must possess in particular cases. In addition to experts upon the more familiar subjects hereinafter discussed, there are numerous experts upon miscellaneous questions whose qualifications have been the subject of judicial determination, as appears in the note hereto.[66]

& S. A. R. Co., 89 Tex. 168, 34 S. W. 95.

Insufficient Knowledge of Local Conditions. — Question of Navigation. — In Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996, a witness was asked as to whether it would be good steamboating to fail to put out a line in making a landing to put off a passenger, or whether it would be bad steamboating not to put out a line in order to land a passenger. The court said: "Both of these questions are general, while investigation in this case was in regard to the landing of a steamer of small size, at a certain landing on the Kanawha river; and, while it is true that said witness stated that he had steamboated on the Ohio and Mississippi rivers for twenty years, he failed to state that he had any acquaintance with the Kanawha river, the character of its current, the peculiarities of Sebrell's landing, or the dimensions of the steamboat Claribell. What might be regarded as good steamboating with a large, heavy boat on the Ohio or Mississippi river might not be so considered with reference to a light boat of small size on the Kanawha river."

66. **Machinists. — Question as to Capacity of Machine.** — Sheldon *v.* Booth, 50 Iowa 209.

Machinist. — Question as to Elevators. — In McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390, the plaintiff called as a witness the person who repaired an elevator where the cable was shifted. He had been familiar with wire cables — worked about and with them for many years. He had never constructed an elevator, though he had repaired cables on elevators. He was examined as an expert as to the cable in question. It was held that he was shown to be qualified as an expert.

Bookkeeper in Iron Foundry. Quality of Iron. — In Pope *v.* Filley, 9 Fed. 65, the court said: "A clerk or bookkeeper, although he may have been long employed in an iron foundry, and may have seen the business conducted, is not competent to testify as an expert unless he shows by his testimony that he has given the subject of examining and testing iron special attention and study, and has had experience in that art."

Undertaker. — When Rigor Mortis Sets In cannot be answered by an undertaker's assistant, who has no medical knowledge and whose only experience has been in preparing dead bodies for burial without attention being specially directed to the subject. Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382.

Carpenter. — Opinion as to Masonry. — In Pullman *v.* Corning, 9 N. Y. 93, a witness who had been a carpenter and house-joiner by trade for twenty-two years, and had worked some on stone buildings, some on brick and some on cobblestone, but mostly on wooden buildings, was allowed to express the opinion that a certain wall was not worth covering and that the materials in it were worth more than the wall. This expression of opinion was objected to upon the ground that the witness was not a mason; it was held that such objection was without force.

Contractor and Builder. — Opinion as to Strength of Wood. — In Thompson *v.* Worcester (Mass.), 68 N. E. 833, it was held that there was no error in refusing to allow a witness who had been a contractor and builder for fourteen years, but who had never made any study with reference to the bearing strength of wood, to testify to the weight which a spruce plank would bear which was

b. *Chemists and Toxicologists.* — A chemist and toxicologist will be allowed to testify as to the effects of poison upon the human system, although he is not a physician or surgeon.[67]

c. *Insurance Agents.* — It has been held that an insurance agent cannot be called as an expert to prove what, in his opinion, would or would not be an increase of risk merely because he is an insurance agent, and that it must appear that in the course of his business he has acquired special knowledge upon that branch of the insurance business;[68] and likewise it has been held that experience for a short time as agent of a life insurance company will not qualify a witness to testify as an expert as to the expectation of life at a certain age.[69]

d. *Medical Experts.* — **(1.) In General.** — The principle is well settled that physicians and surgeons of practice and experience are experts, and that their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice; and it is not necessary that a witness of this class should have made the particular disease involved in any inquiry a specialty to make his testimony admissible as an expert.[70]

twenty feet long, twelve inches wide and two inches thick, and which had a knot as long as a man's hand in the middle of it. *Distinguishing* Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675, in which case an engineer was allowed to testify as to whether a staging erected in a specified way could be safely trusted to carry a particular weight, but no question was raised as to his being qualified as an expert.

Millwright. — Question as to Ice in Streams. — One who is a millwright and a tender of mills is not, for that reason, an expert so as to render his opinions as to course of anchor ice in a particular channel evidence, if it does not appear that he has observed the ice in that channel, or has had his attention particularly and habitually directed to the flow of ice in streams. Woods *v.* Allen, 18 N. H. 28.

Agriculturist. — Injury to Timothy Meadow. — Thompson *v.* Keokuk & W. R. R. Co., 116 Iowa 215, 89 N. W. 975; Merkle *v.* State, 37 Ala. 39.

Terms of Art, Trade Terms, etc. Where expert evidence is admissible for the purpose of showing the meaning of terms of art, or trade terms, the expert need not be selected from among those who are engaged in the particular business out of which the litigation in question arose, but anyone who is so connected with the art or trade as to give him knowledge as to the meaning of the words in controversy is qualified to testify. Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47.

67. State *v.* Cook, 17 Kan. 392. See also Hartung *v.* People, 4 Park. Crim. Rep. (N. Y.) 319.

68. Schmidt *v.* Peoria Marine Ins. Co., 41 Ill. 295; Stennett *v.* Pennsylvania Fire Ins. Co., 68 Iowa 674, 28 N. W. 12.

69. Donaldson *v.* Mississippi & Mo. R. Co., 18 Iowa 280, 87 Am. Dec. 391.

70. Von Pollintz *v.* State, 92 Ga. 16, 18 So. 301, 44 Am. St. Rep. 72, in which case it was held that a practicing physician is presumptively competent to give evidence as an expert touching the probable effects of wounds, such as other witnesses have described, with reference to their adequacy and tendency to produce death. See also Kelly *v.* United States, 27 Fed. 616, *holding* that a medical expert is qualified to testify as to gunshot wounds without showing any special study or experience on his part of gunshot wounds. *Compare* Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28, wherein it was held that a medical expert who has seen a few cases of gunshot wounds, but who testifies that he cannot by looking at the wound tell

Testimony by Other Than Medical Men as to Wounds. — Where it is sought to introduce expert testimony as to the character of a wound there is no rule that requires that the expert shall belong to the medical profession, as this is not a class of knowledge which in its nature is so particularly confined to men engaged in the science of medical surgery as to preclude its acquisition by others.[71]

whether it was made by a rifle or a pistol ball, is not qualified to testify that the wound was caused by a rifle ball, but must be confined to testimony in which he describes the character of the wound.

Qualification of Physician to Testify as to Effects of Gas. — In Emerson *v.* Lowell Gas Light Co., 6 Allen (Mass.) 146, 83 Am. Dec. 621, which was an action to recover damages for an injury to the plaintiff's health caused by an accidental escape of gas, a witness was called as an expert, but it appeared that he had no experience as to the effects upon the health of breathing illuminating gas, but was merely a physician who had been in practice several years; and it was held that he was not qualified to testify. The court said: "The mere fact that he was a physician would not prove that he had any knowledge of gas, without further proof as to his experience; for it is notorious that many persons practice medicine who are without learning, and a physician may have much professional learning without being acquainted with the properties of gas or its effect on health." *Distinguished* in Siebert *v.* People, 143 Ill. 571, 32 N. E. 431, in which latter case the court said: "An ordinary physician might not be acquainted with the properties of gas or its effect on health, but a physician of but slight experience would have no difficulty in telling the effects likely to result from taking into the stomach a deadly poison." *Compare* Finnegan *v.* Fall River Gas Wks., 159 Mass. 311, 34 N. E. 523, in which case it was held that a medical witness was competent to testify that one who died of asphyxiation had a period of conscious suffering before death, although he had not had any experience personally, or with patients, in regard to asphyxiation.

Hathaway *v.* National Life Ins. Co., 48 Vt. 335, in which case it was held that an ordinary physician and surgeon is competent to testify upon the question of sanity.

Physician's Competency to Testify as to Eyes. — In Castner *v.* Sliker, 33 N. J. L. 95, an ordinary practicing physician who had examined an injured person's eyes was allowed to testify that permanent blindness was produced "by gouging." It was objected that such testimony was incompetent, because it did not appear that the witness was a surgeon or an oculist; but it was held that the court did not abuse its discretion in allowing him to express his opinion in regard to the injury, since he had treated the injured person professionally.

71. People *v.* Gibson, 106 Cal. 458, 39 Pac. 864. This was a prosecution for murder. The witness who discovered the body of the decedent was permitted to testify as to the character of a wound which he found upon the decedent's body. The witness was shown to have had experience, not only in the observation but in the treatment of, gunshot and other wounds on the frontier, among the Indians, and otherwise. Although the witness did not belong to the medical profession he was held to be competent.

One Who Was a Soldier in the Civil war "saw the range of balls in a good many gunshot wounds, but was not a physician or a surgeon, or an expert, cannot be permitted to testify as to" how the balls range. Rash *v.* State, 61 Ala. 89.

Qualifications to Testify as to the Use of Firearms. — In Bearden *v.* State (Tex. Crim.), 73 S. W. 17, which was a prosecution for murder, it was held that the witness was sufficiently qualified to testify as to the use of firearms and as to how gunshot wounds were made, because he had loaded and fired shotguns a great deal, and had had a great deal

(2.) Distinction Between Chemical and Medical Experts. — An expert in chemistry is not necessarily an expert in the science of medicine.[72] The extent of a witness' knowledge of a particular branch of medical science only goes to the credibility of his testimony.[73]

(3.) Diploma or License to Practice Medicine. — In the discretion of the court a witness may be permitted to testify as an expert concerning matters pertaining to ordinary medical learning where it appears that the witness has studied the science of medicine, and possesses the requisite knowledge and experience therein, even though he has not received a diploma from a medical college,[74] or is not licensed to practice medicine.[75] And a witness who has studied medicine

of experience in the use of shotguns, although he had never made hunting a business. See Brownell *v.* People, 38 Mich. 732, in which case it was held that firing a bullet once into a suit of clothes does not qualify one to testify as an expert as to the effect of a pistol shot upon clothing at a certain distance; that the style and caliber of the weapon, and the strength of the charge, need to be considered; and that the witness should know of similar experiments at greater or less distances.

72. People *v.* Millard, 53 Mich. 63, 18 N. W. 562, in which case it was declared that the distinction did not seem to have been drawn as closely as it should have been in examining the experts.

73. State *v.* Reddick, 7 Kan. 143, in which case a medical expert was testifying as to a person's insanity, and it was held immaterial that it was not shown that he had made diseases of the mind a special study.

Testimony of Physician as to His First Autopsy. — In State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625, which was a prosecution for murder, a medical expert testified that he had had no experience before this in examining the body of a person alleged to have been drowned, and that this was the first autopsy that he had made in such a case, but that he had studied Reese and Taylor, authorities on medical jurisprudence, and that from an examination of these authors he was prepared to express an opinion. It was held that there was no error in holding that he possessed the requisite qualifications to testify as to the autopsy. See also Mendum *v.* Com., 6 Rand. (Va.) 709.

74. State *v.* Dixon, 47 La. Ann. 1, 16 So. 589.

75. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619. See also State *v.* Dixon, 47 La. Ann. 1, 16 So. 589.

Examination by State Board of Medical Examiners. — There is no rule of evidence that will exclude the testimony of a physician because he has not been examined by the state board of examiners. State *v.* Speaks, 94 N. C. 865.

Where License of Medical Man Is Not Recorded. — In Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924, it was held that a medical expert who had a diploma was qualified to testify although his license was not recorded pursuant to the statute requiring a license in order to enable the physician to practice.

Student of Medicine. — In Fairchild *v.* Bascomb, 35 Vt. 398, it was said that one who has not engaged in the practice of physic may, nevertheless, be competent to testify if he shows that he had studied the science of medicine, and felt competent to express a medical opinion upon a particular disease. The fact that he was not a practicing physician would go to his credit.

Competency of Priest as Medical Expert. — In Estate of Toomes, 54 Cal. 509, it was sought to prove the mental condition of a person by a priest. He testified that he was regularly educated in a college in Spain, and had officiated as a priest for ten years, that it was a part of his preparatory education to become competent to pass upon the mental condition of communicants in his church, and for that purpose physiology and psychology were branches of his

and has a license to practice as a physician may be qualified as an expert, even though he does not so practice.[76]

(4.) **In Poisoning Cases.** — According to the weight of authority an ordinary practicing physician who has been authorized by law to practice medicine, and to prescribe remedies for persons who have been poisoned, is competent to testify as an expert in poisoning cases which involve the use of ordinary poisons with which members of the medical profession are familiar, even though the witness in his practice has not had opportunity to observe cases of such poisoning;[77] and it has been held that even where a case arises in which a new poison has been used, a witness who has had extended study and experience in toxicology, but who has had no actual experience with such new poison, and who has never attended

studies. That previous to officiating as a priest it was requisite that he should be skilled in determining the mental condition of those who sought the sacraments; and that the sacrament could only be administered after such a preliminary examination, and that therefore as a priest he was daily required to exercise and pass his judgment on the mental condition of persons. It was held that the competency of the witness was sufficiently shown.

76. Tullis *v.* Kidd, 12 Ala. 648, in which case a witness was permitted to testify as an expert upon the diseases of women. He testified that he attended a course of medical lectures, had obtained a license to practice physic, had practiced as a physician for a year, but had then abandoned the profession of medicine for that of law, and had been practicing law for some sixteen years. He further testified that he had examined the woman in question and knew the character of her disease. The court, in holding that he was qualified to testify as an expert, said: "If one asserts an ability to give correct opinions upon an art, or science, from an acquaintance with the subject, acquired by observation and study, we cannot perceive on what ground he can be rejected because he has not been in the actual practice of his profession."

77. Mitchell *v.* State, 58 Ala. 417; Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; State *v.* Cole, 63 Iowa 695, 17 N. W. 183; State *v.* Terrell, 12 Rich. L. (S. C.) 321. See also People *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

In Soquet *v.* State, 72 Wis. 659, 40 N. W. 391, it was held that a physician cannot testify as an expert as to symptoms of arsenical poisoning if his knowledge of the subject has been obtained wholly from medical books or medical instruction, and not from personal observation or experience. Upon looking into the case, however, it will be found that neither of the witnesses was a graduate of a medical college. There was no *post-mortem* of the deceased. There was no chemical analysis of the stomach or any of the organs of the deceased. The death had occurred fifteen years before the trial, and the cause of death was a question in dispute. Under such circumstances it was held that the two physicians could not testify as experts to the symptoms of arsenical poisoning. *Distinguished* in Siebert *v.* People, 143 Ill. 571, 32 N. E. 431.

Where Physician Has Analyzed Contents of Stomach. — A physician who is not a professional chemist, but who understands some of the practical details of chemistry, and who has no practical experience in the analysis of poisons, but who has conducted experiments upon a small scale, and who is acquainted with the means of detecting poisons, is qualified to testify as to tests applied by him in the chemical analysis made by him on the stomach of the deceased person, and as to poisons found in such stomach. State *v.* Hinkle, 6 Iowa 380.

a patient suffering from such poison, is nevertheless qualified to testify.[78]

e. *Nautical Men.* — In determining whether or not a witness is qualified to testify upon a question of navigation or seamanship, the court will consider the nature of the experience which the witness has had and the particular waters upon which he has served.[79] Thus, a witness may not be qualified to testify upon a nautical question by reason of having served as a fireman on a steamboat.[80]

f. *Railroad Men.* — Where a witness is called to testify as an expert upon a question pertaining to railroading, his qualifications are determined by considering the particular branch of the business in which he has been engaged, the length of time that he has served in a particular capacity, his opportunities for obtaining the requisite knowledge, skill and experience, and the relationship between the branch of the service in which he has been engaged and the question upon which he is called to give testimony, as is illustrated in the note hereto;[81] and what is here said applies also to the qualifications

Properties of Bluestone. — Boswell *v.* State, 114 Ga. 40, 39 S. E. 897.

78. Germania Life Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215, in which case the court said: "New poisons are constantly being discovered by scientists, and under the rule announced by the district court, all inquiry as to the result of such new poisons upon the human system from experts would be excluded. In fact, under the rule announced, expert evidence would be excluded in all except those cases in which some of the usual and well-known poisons were resorted to. We think this rule would offer a premium to the ingenuity of criminals and others in the selection of rare and unusual poisons to destroy human life. It is entirely too technical, and not supported by reason or authority. The evidence shows that cyanide of potassium acts almost instantaneously, and that if sufficient is administered death follows immediately; hence the chance of finding a physician qualified to testify under the rule announced by the district court is slight, indeed."

79. Union Ins. Co. *v.* Smith, 124 U. S. 405, which was an action on a policy of marine insurance to recover for the loss of a vessel on the Great Lakes. It was held that witnesses who had followed the lakes for from twenty to thirty-six years, and who had served as firemen and second-mates and masters, were qualified to testify as experts as to what constitutes good seamanship in navigating Lake Erie.

Nautical Men Who Were Not Steersmen. — In Malton *v.* Nesbit, 1 Car. & P. (Eng.) 70, which was an action for negligently steering a ship, whereby she was wrecked, nautical men who were not steersmen were called and allowed to give their opinion whether upon the facts in proof there was negligence.

80. Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996.

81. Whether Defect in Brake Could Have Been Discovered. — In International & G. N. R. Co. *v.* Collins (Tex. Civ. App.), 75 S. W. 814, the plaintiff testified that he had been in the railroad business for more than twenty years as brakeman and conductor and was inspector of cars on the New York Central Railroad for four years, and it was held that he was qualified to give his opinion as an expert upon the question whether the defect in a brake could have been discovered by a proper inspection.

Effect of Setting Train of Cars in Motion. — In Williams *v.* Louisville & N. R. Co., 103 Ky. 298, 45 S. W. 71, it was held that the experience of a witness in the management of a stationary engine could not possibly afford information which would enable him to give an opinion as to the

of experts to testify as to street cars, electric roads and like subjects.[82]

g. Veterinarians, etc. — In General. — A witness will not be permitted to testify as an expert concerning domestic animals, their nature or habits, unless by reason of his previous study or experience with reference to such animals he has knowledge concerning them which is greater than that possessed by ordinary men.[83] But it has been held that, from the necessity of the case, a liberal rule should be

effect a locomotive would have in setting a train of cars in motion.

Effect of Broken Stay-bolts. — A locomotive engineer, without any experience or skill in the construction or repair of boilers, is not an expert as to the effect of broken stay-bolts or of mud packed therein. McKelvey *v.* Chesapeake & O. R. Co., 35 W. Va. 500, 14 S. E. 261, in which case the court distinguished Chicago & A. R. Co. *v.* Shannon, 43 Ill. 338, where it was held that "the opinions of a locomotive engineer are admissible on the question whether the boiler of an engine was safe." Reference to that case shows in the syllabus and opinion that such evidence was held admissible to prove, not that the engine was in fact unsafe, a matter that was proven by makers of boilers, but to prove that among the employes the engine was regarded unsafe and had a bad reputation, for the purpose, as an item of evidence, of bringing home to the company knowledge that such engine was unsafe, or putting them on inquiry as to its condition.

Running Off of Cars on Inside of Curve. — Railroad engineers or constructors are not the only persons competent to give an opinion in answer to the question how the running off of cars on the inside of a curve, instead of the outside, can be accounted for. *Prima facie,* that question can be answered by any person acquainted with the elementary principles of mechanism, and claiming only to be an expert in that branch of science. Murphy *v.* New York C. R. Co., 66 Barb. (N. Y.) 125.

Effectiveness of Brakes. — Mott *v.* Hudson R. R. Co., 8 Bosw. (N. Y.) 345.

Speed of Train. — Locomotive engineers, firemen, switchmen and a foreman of the yard engine are *prima facie* experts and competent to give their opinions as to the speed of engines and trains. Brown *v.* Rosedale St. R. Co. (Tex. App.), 15 S. W. 120.

82. Watson *v.* Minnesota St. R. Co., 53 Minn. 551, 55 N. W. 742. In this case it was held that a witness who had been a street-car conductor for two months was competent to state within what distance an electric car, going at the rate of fourteen miles per hour, can be stopped. See also Blondel *v.* St. Paul & C. R. Co., 66 Minn. 284, 68 N. W. 1079. In this latter case a witness testified that he had been a street-car conductor for nineteen months, and knew what would happen if the car ran a curve at a speed stated. It did not appear that he had ever witnessed any facts or experiments which would qualify him to give an opinion, or that he had any special or greater knowledge of the law of mechanics than the jury or men in general possessed. It was held that there was no error in refusing to allow the following question: "Do you know what would happen in case a car will approach that curve, in going west, at the rate of ten or fifteen miles an hour?"

83. St. Louis & S. F. R. Co. *v.* Edwards, 26 Kan. 72, in which case it was held that one who shows no other qualifications as an expert than that he has been in the employment of a railroad company for about eight years, and that during that time he has put in a great many cattle guards for such railroads, and who does not appear from the evidence to know anything about cattle or their nature or habits, is not qualified to answer the following question: "I will ask you if it is not a fact that cattle get breachy with reference to these cattle guards, the same as they do as to

applied in regard to qualifications of experts called to testify as to diseases in domestic animals.[84]

Professors of Veterinary Medicine, Governmental Investigators, etc. Witnesses who are professors of veterinary medicine, and who have been employed by the government in investigating contagious, infectious and epizootic diseases are qualified to testify concerning such diseases.[85]

fences, and then is it not almost impossible for a cattle guard to stop them?"

84. Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113, in which case the court said: "We are not prepared to hold that no one but a veterinary surgeon can properly testify in respect to the appearance and symptoms of diseased horses, and give an opinion upon the question of the existence or non-existence of a particular disease or malady in such horses. It would seem that farmers and other persons who for many years have had the personal care and management of horses, both sick and well, and have had an extensive practical experience with such animals, and with some particular disease to which they are subject, and ample opportunity to observe and know the characteristics and symptoms of such disease, are qualified to state whether in a particular case such characteristics and symptoms do or do not exist. And it would also seem that they, after detailing facts which show that they have a practical and personal knowledge and experience in respect thereto, may properly venture an opinion in regard to the existence or non-existence of a disease with which observation has made them familiar." See also Slater *v.* Wilcox, 57 Barb. (N. Y.) 604, in which case the court said: "The best skill and science that can be expected — all that can be practically admitted in such cases — will be the evidence of persons who have had much experience, and have been for years made acquainted with such diseases, and with their treatment. They may give their opinions, upon such experience, and on statements of fact upon which their opinions are based, as some evidence to be considered and weighed. The evidence of such witnesses may be slight and weak, but is the evidence of some experience and judgment, which may not be entirely excluded." To the same effect see House *v.* Fort, 4 Blackf. (Ind.) 293; Nations *v.* Love (Tex. Civ. App.), 26 S. W. 232.

Spavined Horse. — Testimony of Farmer and Blacksmith. — Rogers *v.* Ferris, 107 Mich. 126, 64 N. W. 1048.

Death of Horse From Overdose of Medicine. — Testimony of Stableman. — In Lewis *v.* Bell, 109 Mich. 189, 66 N. W. 1091, where the plaintiff insisted that the defendant had failed to properly drive and take due and proper care of the plaintiff's horses, and that their death resulted in consequence, the defendant insisted that they had died from an overdose of medicine administered a day or two before he had hired the horses, and he called a witness to testify as an expert as to the cause of their death. It appeared that the witness had been employed in a stable for two years and six months, where he had the superintendency of forty horses, and he said that he had "watched the symptoms of horses." It was held that this opinion was properly excluded.

Horse With Blind Staggers. People *v.* Bane, 88 Mich. 453, 50 N. W. 324.

Negligence in Service of Mare. Peer *v.* Ryan, 54 Mich. 224, 19 N. W. 961.

85. Grayson *v.* Lynch, 163 U. S. 468. In this case witnesses were called to testify as to Texas fever; one of the witnesses was a professor of veterinary medicine, chief of the United States Bureau of Animal Industry, and, at the time of testifying, in the service of the United States government. He had held this position for more than ten years; had been chief of the veterinary division of the Department of Agriculture; and had been in the employ of the Department of Agri-

3. Proof of Qualifications. — A. In General. — The competency of an expert as respects his particular qualifications as an expert must be proved.[86]

Necessity for Medical Expert to Produce Diploma. — The fact that a witness offered as a medical expert is a graduate of an incorporated medical college or a member of a medical society may be proved by oral testimony without the production of his diploma or record evidence of the incorporation of the institution or society which granted him a license.[87]

Physician by "Profession." — It has been held that the testimony of a witness that he is a physician by "profession" is sufficient to show that he is qualified to testify as a medical expert.[88]

culture investigating the diseases of animals for over fifteen years. Another witness was a veterinary surgeon, and had been in the employ of the Department of Agriculture for the purpose of investigating contagious, infectious and epizootic diseases of horses, cattle and swine and had investigated the disease known as Texas fever and was acquainted with its symptoms and diagnosis; and had made a good many *post-mortem* examinations of cattle that had died with it, and was familiar with the disease. In holding that these witnesses were qualified the court said: "If these gentlemen, who were connected with the Department of Agriculture and made a specialty of investigating animal diseases, were not competent to speak upon the subject as experts, it would probably be impossible to obtain the testimony of witnesses who were. The fact that they spoke of certain districts of Texas as being infected with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the correspondence of the department and in the investigation of such diseases, they would naturally become much better acquainted with the districts where such diseases originated or were prevalent, than if they had been merely local physicians and testified as to what came within their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent, and how they became disseminated throughout the country."

86. Stillwell Mfg. Co. *v.* Phelps, 130 U. S. 520; Empire Spring Co. *v.* Edgar, 99 U. S. 645; Fairbank *v.* Hughson, 58 Cal. 314; Neal *v.* Neal, 58 Cal. 287; Tyler *v.* Todd, 36 Conn. 218; Jones *v.* Tucker, 41 N. H. 546; D. & C. Steamboat Co. *v.* Starrs, 69 Pa. St. 36; State *v.* Ward, 39 Vt. 225.

Even though the witness is well known to the court, jury and attorneys and is of high standing in his profession or calling, and that fact is well known, nevertheless his qualifications must be proven. Polk *v.* State, 36 Ala. 117.

87. McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434; in this case the court, after announcing the rule stated in the text, said: "Any other rule might lead to great hardship in particular cases by excluding the professional testimony of competent and even eminent practitioners. We can not think it was the intention of the legislature, in the enactment of the statute, to expose suitors to any such hardships. Besides, it would be a great injustice to the members of the medical profession to require them always to be provided with record and statutory evidence of their qualifications to give professional testimony. Moreover, we understand it to be the universal practice in the trial courts of the state to permit such qualifications to be proved by parol testimony. We recall no case which has reached this court in which any other practice has been pursued."

88. Thompson *v.* Bertrand, 23 Ark. 730, in which case the court

Sufficiency of Evidence as to Business in Which Expert is Engaged. Witnesses who are shown to have been engaged in a certain business for a number of years are presumed to have acquired special knowledge of such business, and in the absence of any showing to the contrary they are *prima facie* qualified to give their opinion on any question in respect to such business.[89]

B. Range of Preliminary Examination. — Questions regarding the age, antecedents, business and experience of one called as an expert are largely within the discretion of the court, and unless it manifestly appears that interrogatories were put for an improper purpose, the range and extent of the examination will not be reviewed on appeal.[90]

Preliminary Cross-Examination as to Qualifications. — Though the court may, in its discretion, allow the opposing party to cross-examine an expert witness as to his qualifications before permitting him to give his opinion, such preliminary cross-examination is not a matter of right.[91]

said: "In the sense in which the witness used the word 'profession' it means a 'calling' — an 'employment,' and this is one of the legitimate meanings of the word."

89. Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737.

Presumption as to Understanding of Profession. — "Persons are supposed to understand questions appertaining to their own profession, and hence their opinion in reference thereto is evidence." Per Green, J., in Jones *v.* White, 11 Humph. (Tenn.) 268.

90. Cochran *v.* United States, 157 U. S. 286; Stillwell Mfg. Co. *v.* Phelps, 130 U. S. 520; Farmers' Nat. Bank *v.* Woodell, 38 Or. 294, 61 Pac. 837. See also City of Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741; Perkins *v.* Stickney, 132 Mass, 217; Oregon Pottery Co. *v.* Kern, 30 Or. 328, 47 Pac. 917.

Questions Asked by Party Calling Witness. — One who calls a witness as an expert is entitled to ask him preliminarily his residence, his occupation, the length of time he has been engaged in such occupation, and as to his actual exerience in such matters as are to be inquired into. Tyler *v.* Todd, 36 Conn. 218, in which case the court said: "Moreover it tended to show the estimation in which he was held by those who knew him best, and was admissible upon the same principle that we sometimes allow a party in the first instance to show that a stranger witness sustains a good character for truth and veracity at home." See also Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

91. Finch *v.* Chicago, M. & St. P. R. Co., 46 Minn. 250, 48 N. W. 915, in which case the court said: "Whether a witness is qualified to give an opinion is to be decided by the court, as a question of fact, before the witness shall be permitted to state his opinion. It would seem, logically, that, before deciding it, all the evidence bearing on the question, whether brought out by direct or cross-examination, should be taken. That would certainly be so if the decision permitting the opinion to be given were final and conclusive that the witness is qualified, so that the jury are bound to take the opinion as that of an expert. The general practice is for the opposing party to exercise his right of cross-examination on the matter of qualification after the witness has been examined in full by the party offering him. That is the more convenient practice. And we think it is the understanding of the judges and the bar that while the court may, in its discretion, permit a preliminary

Matters Affecting Credibility. — When being examined as to his qualifications as an expert, the party against whom he is offered is not entitled to ask him questions which go to his credibility.[92]

C. Testimony of Witness Offered as Expert. — In General. The qualifications of a witness may be, and most frequently are, proved by his own testimony.[93]

Opinion of Witness That He is Not an Expert. — A witness may be an expert, although he may not consider himself one, and if he testifies to facts which show that he is an expert, he may be held by the court to be qualified, although he testifies that he is not an expert;[94] and in strictness the opinion of the witness as to his competency is irrelevant and inadmissible, the question of his competency being one upon which the court will not receive his opinion.[95]

D. Testimony of Other Witnesses. — However, the court is not confined to the examination of the witness himself, but may receive the testimony of others;[96] but it has been held that after a

cross-examination, it is not bound to do so, but may allow the opinion to be given when the direct examination shows *prima facie* that the witness is qualified. We are referred to but two decisions directly on the question (Sarle *v.* Arnold, 7 R. I. 582; City of Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. Rep. 743), in which the preliminary cross-examination as a right was denied."

92. Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848.

93. *Alabama.* — Tullis *v.* Kidd, 12 Ala. 648.

Kansas. — Missouri, K. & T. R. Co. *v.* Bagley, 60 Kan. 424, 56 Pac. 759.

Missouri. — Langston *v.* Southern Elec. R. Co., 147 Mo. 457, 48 S. W. 835.

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Texas. — Crow *v.* State, 33 Tex. Crim. 264, 26 S. W. 209.

Wisconsin. — Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924; McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434.

94. Louisville N. R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40. In this case a witness was asked the following question: "How many braces ought to be put on a rail in a curve like this?" He stated that he was not an expert, but he also swore that he had worked on a railroad for three years, off and on, doing section work, keeping up the track on the roadbed; that he had worked on this road as a section hand three years ago; that he had acted as section foreman for fifteen days at one time on the A. G. S. Railroad, and was trusted to put braces where he thought they were needed. It was held that there was no error in holding that he was competent to answer the question. See also to the same effect Montgomery *v.* Com., 88 Ky. 509, 11 S. W. 475; Hall *v.* State, 6 Baxt. (Tenn.) 522; Crow *v.* State, 33 Tex. Crim. 264, 26 S. W. 209.

95. Boardman *v.* Woodman, 47 N. H. 120, in which case the court said: "What Green's own opinion was upon the subject of his qualifications as an expert was entirely immaterial. That question was for the court alone. The witness might state his acquaintance with the subject, what he had done to qualify himself, etc., but whether he had the qualifications of an expert was a question of fact for the court to settle, and when the court had ruled that he was competent, the opinion of the witness on his own competency was in law entirely immaterial. See also Langston *v.* Southern Elec. R. Co., 147 Mo. 457, 48 S. W. 835.

96. Tullis *v.* Kidd, 12 Ala. 648; Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579. In the latter case, which was one involving an expert upon handwriting, the court limited

medical man has been accepted as an expert and permitted to testify as such, it is not proper to take the opinions of other medical experts as to his skill and standing.[97]

E. Qualifications Shown on Cross-Examination. — In case of an omission to lay a proper foundation for expert or opinion evidence upon the examination in chief, if it be supplied by evidence drawn out on cross-examination, the error in admitting it is cured.[98]

F. Objections Waived. — If the party against whom an expert witness is offered does not seasonably object to the sufficiency of the evidence of his qualifications, the court will ordinarily be justified in assuming that such party regards the witness as qualified, or intends to show his want of qualifications at another stage of the trial.[99]

4. Question for Court. — The question whether or not one offered as an expert possesses the general qualifications of a witness, and the peculiar qualifications which render him competent to testify as an expert, is one which affords no exception to the ordinary rule that it is the province and duty of the trial court to determine the qualifications of a witness.[1]

People *v.* Murphy, 135 N. Y. 450, 32 N. E. 138, and Van Wyck *v.* McIntosh, 14 N. Y. 439.

97. Birmingham R. & Elec. Co. *v.* Ellard, 135 Ala. 433, 33 So. 276, in which case a medical expert having been examined, the following questions were asked of another medical expert: "Is he a skilled physician? How does he stand?" It was held that the court properly overruled such questions. The court said: "If evidence of other witnesses be allowed to sustain the reputation of the expert, it would seem necessarily to follow that counter-evidence might be adduced by the party against whom the evidence was allowed, and new side issues thereby injected into the case."

98. Crich *v.* Williamsburg City Fire Ins. Co., 45 Minn. 441, 48 N. W. 198; Chicago, B. & Q. R. Co. *v.* Shafer, 49 Neb. 25, 68 N. W. 342; Hough *v.* Grant's Pass Power Co., 41 Or. 531, 69 Pac. 655.

99. State *v.* Cole, 63 Iowa 695, 17 N. W. 183, in which case the court said: "While the matter of passing upon expert qualifications is not one that is subject to very well-defined rules, and something must be left to the discretion of the trial court, to be exercised with caution in cases of gravity, and while the appellate court will, in such cases, when satisfied that injustice has been done through a want of caution in this respect by the trial court, feel justified in reversing the judgment of conviction, yet where, as in this case, the defendant made no objection on the trial to the sufficiency of the evidence of the qualifications of the expert witnesses, the trial court was justified in presuming that he was satisfied with the evidence, and no manifest injustice appearing, a reversal on this ground is refused." See also Ah Tong *v.* Earle Fruit Co., 112 Cal. 679, 45 Pac. 7; Cooper *v.* State, 53 Miss. 393.

1. *United States.* — Coasting Co. *v.* Tolson, 139 U. S. 559; Railroad Co. *v.* Warren, 137 U. S. 348.

Alabama. — Louisville & N. R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40; Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121.

California. — Neal *v.* Neal, 58 Cal. 287.

Colorado. — Germania Life Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

Connecticut. — Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 434.

Florida. — Davis *v.* State (Fla.), 32 So. 822.

Indiana. — Jenney Elec. Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

Question of Mixed Law and Fact. — The question whether the witness possesses the requisite qualifications is one of mixed law and fact.[2]

5. Discretion of Court. — In determining this question, whether one proffered as an expert has the requisite degree of knowledge, skill and experience, the court must of necessity be permitted to exercise a large judicial discretion.[3]

Iowa. — State *v.* Cole, 63 Iowa 695, 17 N. W. 183.

Maine. — Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741; Berry *v.* Reed, 53 Me. 487.

Massachusetts. — Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276; Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

Minnesota. — Peterson *v.* John Wentworth Co., 70 Minn. 538, 73 N. W. 510; Beckett *v.* Northwest Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923; Blondel *v.* St. P. & C. R. Co., 66 Minn. 284, 68 N. W. 1079.

Missouri. — Campbell *v.* St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86; Langston *v.* Southern Elec. R. Co., 147 Mo. 457, 48 S. W. 835.

New Hampshire. — Dole *v.* Johnson, 50 N. H. 452.

New Jersey. — Convery *v.* Conger, 53 N. J. L. 468, 22 Atl. 43, 549.

New York. — Slocovich *v.* Insurance Co., 108 N. Y. 56, 14 N. E. 802; Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453.

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Pennsylvania. — Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382.

Rhode Island. — Howard *v.* Providence, 6 R. I. 514.

Tennessee. — Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Texas. — Gulf C. & S. F. R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703.

Utah. — Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853.

Vermont. — Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583.

2. Bemis *v.* Central Vt. R. Co., 58 Vt. 636, 3 Atl. 531.

3. *United States.* — Coasting Co. *v.* Tolson, 139 U. S. 559; Stillwell & Bierce Mfg. Co. *v.* Phelps, 130 U. S. 520.

Alabama. — White *v.* State, 133 Ala. 122, 32 So. 139.

Florida. — Davis *v.* State (Fla.), 32 So. 822.

Indiana. — Jenney Elec. Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

Iowa. — State *v.* Cole, 63 Iowa 695, 17 N. W. 183; Sheldon *v.* Booth, 50 Iowa 209.

Kansas. — Missouri P. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951; Central B. U. P. R. Co. *v.* Andrews, 37 Kan. 162, 16 Pac. 338.

Maine. — Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741.

Maryland. — Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

Massachusetts. — Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276.

Minnesota. — Peterson *v.* John Wentworth Co., 70 Minn. 538, 73 N. W. 510.

Missouri. — Campbell *v.* St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86.

New Hampshire. — Dole *v.* Johnson, 50 N. H. 452.

New Jersey. — New Jersey Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. L. 189, 35 Atl. 915.

New York. — Slocovich *v.* Insurance Co., 108 N. Y. 56, 14 N. E. 802; Slater *v.* Wilcox, 57 Barb. 604.

Pennsylvania. — Towboat *v.* Starrs, 69 Pa. St. 36; Sorg *v.* German Congregation, 63 Pa. St. 156; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146; Delaware & Chesapeake Steamboat Co. *v.* Starrs, 9 Pa. St. 36.

Rhode Island. — Howard *v.* Providence, 6 R. I. 514.

Tennessee. — Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Texas. — Gulf C. & S. F. R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703.

Utah. — Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853.

Wisconsin. — Allen *v.* Voje, 114

6. Review on Appeal. — Accordingly the courts are unanimous in holding that the decision of a trial court upon the question is not reviewable on appeal except to the extent that the appellate court will review an ordinary finding of fact by a court or a jury, and without weighing conflicting evidence, inquire whether there is sufficient evidence to justify the trial court's decision;[4] but an appellate court will unhesitatingly correct an arbitrary ruling of the trial court and prevent a miscarriage of justice where the trial court has abused its discretion,[5] for the qualifications necessary to enable a witness to give expert testimony are prescribed and ascer-

Wis. 1, 89 N. W. 924; Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

Lack of Intelligence. — Where a witness is offered as an expert, but it appears upon his examination that he possesses little general intelligence, it is in the discretion of the court to refuse to allow him to give opinion testimony, even though it may appear that he has had some experience in the matter about which he was offered as a witness. Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227.

4. *United States.* — Chateaugay Iron Co. *v.* Blake, 144 U. S. 476; Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551.

California. — Sowden *v.* Idaho Quartz Min. Co., 55 Cal. 443.

Connecticut. — Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 434.

Indiana. — Jenney Elec. Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Fort Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

Louisiana. — State *v.* Dixon, 47 La. Ann. 1, 16 So. 589.

Maine. — Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741; Berry *v.* Reed, 53 Me. 487.

Massachusetts. — Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; Perkins *v.* Sticknet, 132 Mass. 217.

Michigan. — Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150.

Minnesota. — Beckett *v.* Northwestern Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923; Blondel *v.* St. Paul & C. R. Co., 66 Minn. 284, 68 N. W. 1079.

Nebraska. — Heffernan *v.* O'Neill, 1 Neb. Unofficial Rep. 363, 96 N. W. 244; Omaha Loan & Trust Co. *v.* Douglas Co., 62 Neb. 1, 86 N. W. 936.

New Jersey. — New Jersey Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. L. 189, 35 Atl. 915.

New York. — Slocovich *v.* Insurance Co., 108 N. Y. 56, 14 N. E. 802.

North Carolina. — State *v.* Cole, 94 N. C. 958; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Pennsylvania. — Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101; Towboat *v.* Starrs, 69 Pa. St. 36.

Tennessee. — Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Texas. — Gulf C. & S. F. R. Co. *v.* Norfleet, 78 Tex. 34, 14 S. W. 703.

Vermont. — Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583.

5. *United States.* — Stillwell & Bierce Mfg. Co. *v.* Phelps, 130 U. S. 520.

Arkansas. — Little Rock & F. S. R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363, *holding* that where a witness is permitted to state his opinions with nothing tending to show that he is competent, such action will not be sustained.

Colorado. — Germania Life Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

Maine. — Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741.

Michigan. — McEwen *v.* Bigelow, 40 Mich. 215.

New Jersey. — Bergen Neck R. Co. *v.* Point Breeze Ferry & Imp. Co., 57 N. J. L. 163, 30 Atl. 584.

New York. — Wiggins *v.* Wallace, 19 Barb. 338; Dane *v.* State, 36 Tex. Crim. 84, 35 S. W. 661.

"An Arbitrary Ruling, without evidence, or against conclusive showing, would leave the question of revisability the same as it would stand

tained by rules of law, and do not rest in the mere caprice of the trial court.[6]

Presumptions. — It has been declared that all reasonable presumptions will be indulged to sustain the decision of the trial court.[7]

Error Not Apparent of Record. — Of course, errors of the trial court in admitting or excluding expert evidence are not available unless they appear in the record.[8]

Review on Certiorari. — The rules laid down in this section are applicable to cases where the qualifications of a witness are passed upon by an inferior tribunal or board, such as county commissioners, and a decision of such tribunal or board will not be disturbed on *certiorari* unless it clearly appears that there has been wrongful exercise of discretion.[9]

7. Objections Waived. — The objection that one who is offered as an expert is not qualified must be seasonably made, and if it is not raised at the trial it cannot be taken on appeal.[10]

V. DEMONSTRATIONS AND ILLUSTRATIONS BY EXPERTS.

The court, in the exercise of its discretion, and in the furtherance of justice, will permit an expert to use a blackboard or model or plates, or other things with which to explain, illustrate or demonstrate his testimony and render the same intelligible to the court or jury.[11]

on similar rulings on other questions of fact." Bemis *v.* Central V. R. Co., 58 Vt. 636, 3 Atl. 531.

Where Serious Mistake Has Been Made. — In Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741, it was said: "In extreme cases, where a serious mistake has been committed through some accident, inadvertence, or misconception, his action may be reviewed."

6. Davis *v.* State (Fla.), 32 So. 822.

7. Melendy *v.* Spaulding, 54 Vt. 517, in which case the court said: "It does not appear whether these witnesses were professional experts on the subject in regard to which they were inquired of. It is to be presumed that they were such experts so long as nothing is shown to the contrary. It is incumbent upon the excepting party to have every fact appear, necessary to show error in the ruling excepted to. Error will not be presumed." See also Little Rock & Ft. S. R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363.

8. Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331, in which case it was declared that the decision of the trial court upon this question "is not a matter of exception, unless a report of the entire evidence upon the point presents a question of law."

9. Lowell *v.* County Com'rs, 146 Mass. 403, 16 N. E. 8.

10. Little Rock & M. R. Co. *v.* Shoecraft, 56 Ark. 465, 20 S. W. 272, in which case it was held that an objection on the ground that the testimony is the expression of an opinion is merely an objection to the character of the evidence and not to the witness' competency to give it. See also Brumley *v.* Flint, 87 Cal. 471, 25 Pac. 863; Reed *v.* Drais, 67 Cal. 491, 8 Pac. 20.

11. McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711, in which case an expert witness was permitted to make illustrations upon a blackboard.

Explanation of Machines, Models, Etc. — Experts may explain to the court and jury the machines, models or drawings exhibited, and may, where such evidence is relevant, point out the difference or identity of the

VI. EXPERTS AND QUESTIONS FOR EXPERT TESTIMONY CLASSIFIED.

1. In General. — The courts have given a wide range to expert testimony. But each question as to the admissibility of this class of evidence must be determined by applying the general principles which have been hereinbefore stated.[12]

2. Accounting, Bookkeeping, etc. — Meaning of Entry. — A duly qualified expert may testify as to the meaning of an entry in books concerning business transactions, where the meaning of such entry is not apparent to the average jury.[13]

3. Agriculture. — In General. — Expert testimony upon questions relating to agriculture and all of its various branches is admissible.[14]

mechanical devices involved in their construction. Winans *v.* New York & E. R. Co., 21 How. (N. Y.) 88.

Exhibition of Engraved Plates to Illustrate Testimony. — In State *v.* Knight, 43 Me. 11, which was a prosecution for murder, a medical expert who was present at a *post-mortem* examination of the body of the decedent was permitted, over objection, to exhibit to the jury certain engraved plates of the human neck, and of the bones of the neck, and also a skeleton of the human neck, in order to illustrate his testimony in describing the wounds, and especially that upon the vertebrae of the spinal column. In holding that no error was committed the court said: "The object of the exhibition of these plates and bones was to render the testimony of the witness intelligible and not to make them evidence of themselves. Maps and diagrams not claimed to be strictly accurate are permitted to be used as chalk for purposes of illustration, and to make more clear a verbal description."

Use of Model. — Expert witnesses in testifying on the question of the alleged negligence of a municipal corporation for failure to use a device to prevent the escape of sparks from the steam roller are properly allowed to use the model of a locomotive to illustrate the use of a spark arrester and to indicate how it could be applied to the roller engine where the court cautioned them that "in so far as the different parts of this model are similar to those shown in this model of the steam roller you may call attention to them, but the other parts you are not to mention." McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143.

12. Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179.

In applying such general principles the court will be mindful of that maxim of the general law of evidence that the rules of evidence must be adapted to every variety of case or question which may arise for investigation in a court of justice. Moye *v.* Herndon, 30 Miss. 110.

13. Paxton *v.* State, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689, in which case it was held that one who had been state treasurer for more than two years was properly allowed to give an opinion as to the meaning of an entry of the business transactions in the treasurer's office. See also Cochran *v.* United States, 157 U. S. 286, in which case a witness was called to explain to the jury the significance of certain entries and the manner in which reports to the comptroller were made up.

Effect of Entry of Cash Item. In Iowa State Savings Bank *v.* Black, 91 Iowa 490, 59 N. W. 283, it was held that the cashier was competent to testify with reference to the meaning and effect of a "cash item" in the bank's book and to state "that the effect of it would be that it represents just that much cash that ought to be there in the bank."

14. *United States.* — St. Louis, I. M. & S. R. Co. *v.* Edwards, 78 Fed. 745; Missouri P. R. Co. *v.* Hall, 66 Fed. 868.

Thus, agriculturists will be permitted to give expert testimony as to the culture of specified products;[15] as to what is required to render the land cultivatable;[16] as to the qualities and uses of fertilizers;[17] as to the supplies required on a plantation;[18] and as to whether or not an overseer performed his services well;[19] but a farmer will not be permitted to give an opinion as to the sufficiency of a fence to restrain cattle.[20]

Alabama. — See Wilkinson *v.* Moseley, 30 Ala. 562.

Illinois. — Jacksonville A. & St. L. R. Co. *v.* Caldwell, 21 Ill. 75.

Iowa. — Cathcart *v.* Rogers, 115 Iowa 30, 87 N. W. 738; Hunter *v.* Burlington, C. R. & N. R. Co., 84 Iowa 605, 51 N. W. 64.

Kansas. — Latham *v.* Brown, 48 Kan. 190, 29 Pac. 400; Chicago, K. & W. R. Co. *v.* Mouriquand, 45 Kan. 170, 25 Pac. 567.

Massachusetts. — Tucker *v.* Massachusetts C. R. Co., 118 Mass. 546.

Michigan. — Browne *v.* Moore, 32 Mich. 254.

Minnesota. — McLennan *v.* Minneapolis N. El. Co., 57 Minn. 317, 59 N. W. 628; Finch *v.* Chicago, M. & St. P. R. Co., 46 Minn. 250, 48 N. W. 915.

Montana. — Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183.

New Jersey. — Pennsylvania & P. R. Co. *v.* Root, 53 N. J. L. 253, 21 Atl. 285.

New York. — Seamans *v.* Smith, 46 Barb. 320.

Rhode Island. — Brown *v.* Providence & S. R. Co., 12 R. I. 1238.

15. Farmers' & Traders' Nat. Bank *v.* Woodell, 38 Or. 294, 61 Pac. 837, *holding* that questions as to the stage of development at which the cultivation of sugar beets should be commenced and the effect of a failure to thin, weed and hoe such plants within a certain time after the leaves appear above the surface of the ground, are beyond the common intelligence of ordinary men and such as will make expert testimony admissible.

16. Buffum *v.* Harris, 5 R. I. 243, in which case it was held that a farmer who testified that he had been engaged in draining lands for the purpose of rendering them cultivatable was competent as an expert, and might express an opinion that the land in controversy required draining to fit it for cultivation.

17. Young *v.* O'Neal, 57 Ala. 566. In this case a farmer on his preliminary examination touching his qualifications as an expert, testified that he had used "soluble Pacific guano," a fertilizer for which the defendant gave a promissory note, upon which the action was instituted; and that he had experimented with it on all kinds of garden and field plants and crops, and had closely and critically watched its effects and results; and it was held that it was error not to permit him to express an opinion concerning the proper methods of using it or what would prevent it from acting beneficially.

18. Rembert *v.* Brown, 14 Ala. 360, *holding* that it is competent to ask a witness, who professes to know the number of persons and animals employed on a plantation, how much grain per month it would require to supply the wants of the plantation. See also Cheek *v.* State, 38 Ala. 227, *holding* that an expert may give his opinion as such in reference to the amount of food which is sufficient for laborers on a plantation.

19. Spiva *v.* Stapleton, 38 Ala. 171, *holding* that in an action by an overseer to recover stipulated wages, the question being how he performed his duty as an overseer, a witness who frequently saw the defendant's plantation while the plaintiff was in charge of it, and who was shown to have been an overseer for five or six years, may state that in his opinion the plaintiff "manages pretty well."

20. Enright *v.* San Francisco & S. J. R. Co., 33 Cal. 230, in which case Shafter, J., said: "We are satisfied that the point was not one upon which the opinion of experts was admissible. The facts of the fence, bars and barway included, were

Yield of Land. — An expert may testify as to what crop specified land will yield under proper cultivation;[21] likewise he may give an estimate as to what land yielded, when no other evidence is obtainable;[22] and where growing crops are injured by trespassing animals he may testify as to the extent of the injury or the proportion of the crop that was destroyed.[23]

4. Animals. — A. In General. — The nature, habits and peculiarities of animals and the proper care of them are not known to all men, and hence it is that expert testimony as to animals, particularly domestic animals, is admissible where such testimony is given by witnesses who have handled, observed or studied them, and have acquired such knowledge and experience as will enable them to

to be testified to by the witnesses; but the question of sufficiency, assuming it to have been in the case, was with the jury, and not with them. The point was not one of science nor of peculiar or educated skill. The habits and instincts of domestic animals, and the kind of fence necessary to restrain them, are so far matters of general observation and experience that a jury coming from the body of a county may be relied on to deal with questions like the one in hand with all desirable accuracy, though unaided by the opinion of persons claimed to be experts."

21. Farmers' & Traders' Nat. Bank *v.* Woodell, 38 Or. 294, 61 Pac. 837, in which case it was held that it was proper to introduce expert testimony upon the question, how many tons of sugar beets could be raised on an acre, if land were given the greatest care and the plants the closest attention. See also Phillips *v.* Terry, 3 Abb. Dec. (N. Y.) 607. In this case an action was brought to recover damages for injuries resulting from backing water on a meadow, and the plaintiff, having testified in regard to the injury sustained thereby, was asked: "Taking that hay as it stood there, what would it yield to the acre?" and, having been permitted to answer the question, it was held that no error was thus committed, the court saying: "The farmer, acquainted with the subject-matter of such an inquiry as this under consideration, is an expert, and unless the witness has the peculiar knowledge which constitutes him an expert his opinion would be excluded."

22. Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2, which was an action of trover for a quantity of hay which had been cut from a given acreage, but not weighed at the time of the conversion. It was held that a witness who had shown himself competent might be asked to state the average crop per acre for that season upon the premises in question. See also Townsend *v.* Bonwill, 5 Har. (Del.) 474, where land was rented for two-fifths of the corn to be raised thereon, and the question was whether the full amount had been delivered. A witness who had examined the field for that purpose was allowed to give an estimate of the amount of corn raised. See further Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270.

23. Seamans *v.* Smith, 46 Barb. (N. Y.) 320.

Injury to Land by Cattle. — In Woodbeck *v.* Wilders, 18 Cal. 131, which was an action for damages for injuries to land caused by driving cattle upon such land, a witness was asked the following question: "What would have been the injury to the land by turning in two hundred head of cattle on the 12th, 13th and 14th of April, and letting them remain six or seven days?" He testified that he thought it would injure the wet land to the amount of one hundred dollars to turn cattle on it. It was held that such testimony was admissible as it amounted to little, if anything, more than an estimate of the value of the pasturage or of the grass.

enlighten the court and jury as to matters pertaining to animals which are not within the knowledge of ordinary observers.[24]

B. AGE. — In addition to testifying as to the age of horses,[25] it has been held that expert testimony is admissible as to the age of sheep.[26]

C. PROPENSITIES. — Witnesses will be permitted to testify as to the vicious propensities of horses and other animals.[27]

D. BREEDING. — In an action involving the breeding qualities of an animal resort may be had to expert testimony,[28] and experts will be allowed to testify whether or not a mare was with foal.[29]

24. *United States.* — St. Louis I. M. & S. R. Co. *v.* Edwards, 78 Fed. 745.

Alabama. — Johnson *v.* State, 37 Ala. 457.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Philpot (Ark.), 77 S. W. 901.

California. — Polk *v.* Coffin, 9 Cal. 56.

Illinois. — Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

Indian Territory. — Perry *v.* Cobb (Ind. Ter.), 76 S. W. 289.

Indiana. — Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682; Cincinnati, H. & I. R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113.

Iowa. — Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026; Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Dunham *v.* Rix, 86 Iowa 300, 53 N. W. 252.

Kansas. — Missouri P. R. Co. *v.* Shumaker, 46 Kan. 769, 27 Pac. 126.

Maryland. — Baltimore & O. R. Co. *v.* Thompson, 10 Md. 76.

Massachusetts. — Miller *v.* Smith, 112 Mass. 470.

Michigan. — Laird *v.* Snyder, 59 Mich. 404, 26 N. W. 654; Peer *v.* Ryan, 54 Mich. 224, 19 N. W. 961.

Minnesota. — Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143; Gilmore *v.* Brost, 39 Minn. 190, 39 N. W. 139.

Missouri. — Branson *v.* Turner, 77 Mo. 489; Cantling *v.* Hannibal & St. J. R. Co., 54 Mo. 385, 14 Am. Rep. 476.

Oklahoma. — Coyle *v.* Baum, 3 Okl. 695, 41 Pac. 389.

South Dakota. — Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070.

Texas. — St. Louis, I. M. & S. R. Co. *v.* White (Tex. Civ. App.), 76 S. W. 947; Munroe *v.* Schwartz (Tex. App.), 16 S. W. 539.

Vermont. — Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725.

25. See article "AGE," Vol. I, p. 738.

26. Clague *v.* Hodgson, 16 Minn. 329, *holding* that one who has had experience as a shepherd, and owner of sheep, and who swears that he can tell the age of a sheep by its teeth, until it is four years old, may be asked his opinion of the age of a sheep.

27. Safety of Horse Which Has Previously Been Frightened. — In Donnelly *v.* Fitch, 136 Mass. 558, it was held that it was competent to ask experts whether a horse, which had been frightened and had run, and had not run again for more than a year and a half, required any more care than it otherwise would.

As to Dangerous Character of Bucks at Certain Seasons of the Year. — In Spring Co. *v.* Edgar, 99 U. S. 645, which was an action for personal injuries inflicted by a buck, expert witnesses were called by the plaintiff to testify that the male deer in the fall of the year is a dangerous animal.

28. Dunham *v.* Rix, 86 Iowa 300, 53 N. W. 252.

29. Boyer *v.* Chicago, R. I. & P. R. Co. (Iowa), 98 N. W. 764. In this case farmers and stockmen, each one of whom testified that he was familiar with the handling and care of mares while with foal and their appearance during the period of gestation, testified that a certain mare in their opinion was with foal. The court said: "We think it fair to conclude that the question whether the mare in question, judging from her appearance, was or was not with

E. Diseases. — It is well settled that experts may testify as to the diseases of animals.[30]

F. Injuries to Animals. — An expert will be permitted to testify as to injuries sustained by animals, provided he is properly confined to matters which are not within the realm of ordinary understanding.[31]

foal, was one to be determined not alone from such appearance — that being all that could be described to the jury — but by contrast thereof with conditions arising in past experience. This the jury could not be expected to do, and it was not error, therefore, to receive the testimony of men whose experience had given them practical familiarity with the subject."

30. Diseases of Cattle. — Slater *v.* Wilcox, 57 Barb. (N. Y.) 604.

Diseases of Horses. — Burnham *v.* Sherwood, 56 Conn. 229, 14 Atl. 715; Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; House *v.* Fort, 4 Blackf. (Ind.) 293, wherein an expert was allowed to testify that the eyes of a certain horse were diseased and that he believed that such disease had been of long standing; People *v.* Bane, 88 Mich. 453, 50 N. W. 324, in which case one who was familiar with horses and who had seen the horse was permitted to testify that the horse was afflicted with the disease known as blind staggers; Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143, wherein an expert was permitted to testify that a disease known as bog spavin is one which a horse may inherit. Burden *v.* Pratt, 1 Thomp. & C. (N. Y.) 554; Nations *v.* Love (Tex. Civ. App.), 26 S. W. 232; Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725, wherein it was held proper to allow a veterinary surgeon to testify whether or not a horse had shown any indications of "whistling."

Diseases of Sheep. — Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227; Dole *v.* Johnson, 50 N. H. 452, in which latter case a witness was allowed to testify as to footrot in sheep.

Texas Fever. — Veterinary surgeons and professors of veterinary medicine who have investigated the diseases of animals, and particularly the disease known as the Texas fever, may testify as to whether or not certain cattle and certain districts of country were afflicted with such disease. Grayson *v.* Linch, 163 U. S. 468.

What Constitutes Unsoundness in Horse. — Expert testimony is not admissible to show that whistling is or is not an unsoundness in a horse, that being a question for the court and jury. Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725. But see Spear *v.* Richardson, 34 N. H. 428.

31. Polk *v.* Coffin, 9 Cal. 56, *holding* that a stock-raiser may give testimony as to the injuries sustained by cattle in consequence of the falling of a wharf. Schaeffer *v.* Philadelphia & R. R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. Rep. 884.

Permanency of Injury to Horses. When a veterinary surgeon has treated certain horses for disease caused by eating castor beans, and gives the effect of the poison on the stomach and digestion of the horses, and is acquainted with the general effects of such poison on horses, he may give his opinion as to the permanency of the injury. Coyle *v.* Baum, 3 Okl. 695, 41 Pac. 389.

Injury to Cattle by Escape and Wandering About. — In Schermerhorn *v.* Tyler, 11 Hun (N. Y.) 549, an action was brought to recover damages alleged to have been occasioned to fattened cattle by their escape from the lot of the defendant, in whose care they were claimed to have been placed. A witness, who had been in the business of buying fat cattle, and carrying them to the city, was asked if he knew the effect upon fat cattle of getting out and wandering about; he was further asked how much cattle weighing 1500 pounds would shrink if they were to get out of control in the streets for twenty-four hours. It was held that such evidence was inadmissible. The court said: "If they had shrunk in weight, or had been injured in appearance, these facts could have been

G. Frightening Horses. — Whether or not a given object is calculated to frighten horses of ordinary gentleness is not a question for expert testimony.[32]

H. Brands. — Experts may be permitted to give their opinions with reference to the brands on animals.[33]

I. Number and Weight. —Stock men will be permitted to estimate the number of stock running in a range.[34]

proved by those who saw them. For these were plain and conspicuous results. To prove what is the usual effect of such an escape on such cattle is to substitute conjecture for certainty. It is like asking, in an action for assault and battery, for the purpose of proving the plaintiff's injury, what would be the usual effect of knocking down a man of the size of the plaintiff."

Damage per Head. — In St. Louis, I. M. & S. R. Co. *v.* Edwards, 78 Fed. 745, which was an action to recover damages for negligently delaying the transportation of cattle, an expert was allowed to testify as to the amount of damage per head that the plaintiff had sustained, although the defendant objected that such testimony constituted "an opinion as to values, which was wholly within the province of the jury." Caldwell, J., said: "The poverty of the English language makes it absolutely impossible for a witness to present to the minds of the jurors the appearance of cattle, and what that appearance denotes, as it is presented to his practiced and experienced eyes. The experience of the witness and the appearance of the cattle cannot be photographed on the minds of the jurors. The knowledge of the condition of these cattle, and how that condition affected their value, must of necessity have existed in the mind of the witness who had had such a large and extended experience in shipping cattle with far greater clearness and certainty than it could have been communicated to the minds of the jurors by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. It is obvious that, if witnesses were to be permitted to state to a jury those facts only of which they have absolute knowledge, not only the range of inquiry, but the province of remedial justice, would be very materially contracted."

32. Smith *v.* Sherwood, 62 Mich. 159, 28 N. W. 806; Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676. See *contra,* Moreland *v.* Mitchell Co., 40 Iowa 394, in which case the court said: "The nature, habits and peculiarities of horses are not known to all men. Persons who are in the habit of handling and driving horses, from this experience learn their habits, nature, etc., and are therefore better able to state the probable conduct of a horse under a given state of circumstances, where they have in their experience witnessed their conduct under similar circumstances, than persons having no experience whatever with horses."

33. Askew *v.* People, 23 Colo. 446, 48 Pac. 524, which was a prosecution for the larceny of cattle. The court said: "The exact nature of the testimony will be understood when it is remembered that one of the brands was only partially removed, the claim of the state being that in these circumstances the opinions of experts were competent for the purpose of showing that the part of the brands remaining was a part of the D. T. brand of the D. T. Cattle Company, the contention of plaintiff in error being that this related to a matter that does not require any particular experience or peculiar skill; that the jury was as capable of forming a correct judgment as the so-called experts."

34. Albright *v.* Corley, 40 Tex. 106, *holding* that it is competent to prove the number of stock of a particular brand running in a range by the opinion of stockmen accustomed to ride in quest of other stock through the same range, if it be the best evidence within reach of the party offering it, though the witnesses may have had no interests

J. Herding, Driving and Shipment. — An expert may testify as to the effect of driving and herding cattle,[35] or upon questions pertaining to the shipment of cattle.[36]

K. Pastures and Stables. — Experts may give their opinion as to the sufficiency of,[37] and as to other matters pertaining to, the pasture of animals;[38] and expert testimony as to stables is admitted.[39]

5. Architecture, Building, etc. — In General. — Architects and builders may testify as experts upon matters pertaining to their business which are not within the knowledge of men generally.[40]

in nor charge of the stock inquired about.

35. Proctor *v.* Irvin, *22* Mont. 547, 57 Pac. 183.

36. St. Louis, I. M. & S. R. Co. *v.* White (Tex. Civ. App.), 76 S. W. 947, *holding* that in an action against a carrier for damages arising out of a contract for the shipment of cattle, an expert in the handling of cattle will be allowed to testify as to what caused their bad condition upon their arrival at their destination. See also Gulf C. & S. F. R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540, wherein a witness who was shown to be an expert in shipping cattle was allowed to express an opinion as to whether it would have been necessary to feed certain cattle at a designated place if they had been promptly shipped and expeditiously transported.

Shrinkage of Live Stock During Transportation. — The opinion of an expert may be had as to the shrinkage of live stock during transportation. Michigan S. & N. I. R. Co. *v.* McDonough, 21 Mich. 165. See also Missouri P. R. Co. *v.* Hall, 66 Fed. 868.

Effect of Injuries in Train Wreck. — A witness may give his opinion as to the loss of weight of cattle caused by injuries received in a wreck of the train on which such cattle were shipped, and by the resulting delay in their shipment, the witness having qualified himself as an expert by showing that he had had experience in handling stock under like circumstances and conditions. Fort Worth & D. C. R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834.

37. Wolscheid *v.* Thome, 76 Mich. 265, 43 N. W. 12.

38. Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026, *holding* that on an issue as to the probable gain of cattle in weight, if kept on good pasture during a specified season, the testimony of experts was admissible. See also Cornell *v.* Dean, 105 Mass. 435, wherein persons acquainted with the business of pasturing cattle were permitted to testify as to the price or value of pasturing, and as to its being worth more to pasture them transiently than by the season.

39. Armstrong *v.* Chicago, M. & St. P. R. Co., 45 Minn. 85, 47 N. W. 459, in which case the plaintiff brought an action against a railroad company, as a common carrier, for negligently putting the plaintiff's horse into an unsuitable and unsafe stable, where she was exposed to cold and wind, and whereby she became sick with a disease of which she died. It was held that it was proper to allow a witness, having special knowledge on the subject derived from experience in the business of keeping horses and cattle, to testify whether such stable was of the character in which farmers and others in the neighborhood were accustomed to keep horses and cattle. It was also held that it was proper to allow a witness who was acquainted with the stable in question, and with the stables in which the people of the country usually kept their horses, to testify that in his judgment the stable in which the defendant put the horse was a suitable place in which to keep the horse.

40. Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710; O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325; Missouri P. R. Co. *v.* Shumaker, 46 Kan. 769, 27 Pac. 126; Tebbetts *v.* Haskins, 16 Me. 283; Hills *v.* Home Ins. Co., 129 Mass.

Construction, Strength and Sufficiency of Building. — Thus, architects and builders may give their opinions in respect to the construction, strength and sufficiency of a building.[41]

Life of Timbers. — Such witnesses may testify as to the life of timbers, and the effect of decay thereupon.[42]

6. Banks and Banking. — Bankers may testify as to matters pertaining to the business of banking, subject to the general limitations

345; Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737; Woodruff *v.* Imperial Fire Ins. Co., 83 N. Y. 133; Linch *v.* Paris Lumber & G. El. Co., 80 Tex. 23, 15 S. W. 208; Stanwick *v.* Butler-Ryan Co., 93 Wis. 430, 67 N. W. 723.

Estimate of Expense of Erecting House. — Tebbetts *v.* Haskins, 16 Me. 283. See also article "VALUE."

Foreman of Crew of Carpenters. In Bunnell *v.* St. Paul, M. & M. R. Co., 29 Minn. 305, 13 N. W. 129, it appeared that the plaintiff was injured while he was engaged in shingling a roof and while acting under the directions of one who, it was alleged, was incompetent and unfit to superintend the work and was not a carpenter. An expert was asked the following question: "Should a foreman of a crew of carpenters engaged in such work as this be a practical carpenter?" It was held that if the matter was one that would require proof at all, the question was a proper one to ask of an expert.

Which of Two Buildings Was Constructed First. — Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061.

Construction of Party Walls. Gorham *v.* Gross, 125 Mass. 232, 28 Am. Rep. 224.

Method of Placing Building Materials in Street. — In Magee *v.* Troy, 48 Hun (N. Y.) 383, it was held that the court properly refused to allow a carpenter who was erecting a building to testify whether the building materials deposited in the street were placed as they usually are in such cases, because the witness should have been confined to a statement of facts.

Defects in Construction of Cellar. Moulton *v.* McOwen, 103 Mass. 587.

41. Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737.

Sufficiency of Walls to Sustain Building. — Continental Ins. Co. *v.* Pruitt, 65 Tex. 125; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Dec. 544.

Cause of Settling of Foundation. In Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737, architects and builders were permitted to give the jury their opinion that the settling of a foundation, or defective construction of walls, was what caused a crack between the walls of two buildings; that the effect of running machinery used to run shafting connected with a lot of sewing machines in the third story would be to cause vibration; that vibrations "would shake and weaken the walls, loosen the floor joists and everything that would have a tendency to strengthen the building;" and, if the vibrations were strong enough, they would shake the building down. It was held that this was error. The court said: "The opinion asked of these expert witnesses, as to what produced the crack between the walls, would have been proper enough in an issue involving the effect upon the wall a sinking of the foundation would have produced; but in the issue here the condition of the walls, and the sufficiency or insufficiency of the foundation, were facts susceptible to direct proof; and it was improper to get before the jury, as proof that the wall was defective, or the foundation had given way, an opinion that the separation of the walls may have resulted from these facts and conditions." But see Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710, *holding* that a contractor and builder is qualified to give expert testimony as to the cause of the fall of a building.

Safety in Staging. — Bourbonnais *v.* West Boylston Mfg. Co. (Mass.), 68 N. E. 232; Pendible *v.* Conn. R. M. Co., 160 Mass. 131, 35 N. E. 675.

42. Morgan *v.* Freemont Co., 92 Iowa 644, 61 N. W. 231; Blank *v.* Livonia, 79 Mich. 1, 44 N. W. 157.

that govern the admission of expert testimony.[43] A banker will not be permitted to give an opinion as to the meaning of an indorsement,[44] or upon questions which are within the province of the jury.[45]

7. Blood and Blood Stains. — A. In General. — Medical men and others who have the requisite knowledge and experience are allowed to testify as to blood stains.[46]

B. Blood in Dead Body. — Likewise it has been held that a

43. Memphis *v.* Brown, 20 Wall. (U. S.) 289. In State *v.* Boomer, 103 Iowa 106, 72 N. W. 424, bankers were permitted to testify as to the solvency of the defendant, their opinions being based on their knowledge of books, which they had examined.

Dishonored Paper. — In McLaren *v.* Cochran, 44 Minn. 255, 46 N. W. 408, it was held that expert testimony was admissible to show that the dishonor of a promissory note by the maker will depreciate the market value of other notes made by him, and given for the same consideration, but not yet mature.

Negotiability of Note. — In an action by a holder against the maker of a promissory note, where the defendant claims that he was induced to give the note by fraud and that its appearance was such as to put the plaintiff on inquiry before taking it, a broker who for many years has discounted notes as a banker or broker will not be permitted to testify that a banker or broker would not discount a note of that appearance without a willful failure to inquire into the circumstances under which it was obtained. Rowland *v.* Fowler, 47 Conn. 347, in which case the court said: "The defendant had furnished to the jury such information as he was able or desired to give them concerning the circumstances attending the making and transfer of the note; they had informed themselves as to the appearance of the paper by inspection, and they had learned from the plaintiff that he had discounted notes for twenty years. The import of the question is, what degree of caution would an honest man, with such an experience, have exercised in the purchase of the note? — a question concerning a transaction quite within the range of common knowledge, not involving any matter of science or unusual skill; a question which it is the office and duty of jurors to answer upon the facts proven without the intervention of experts."

Usual Mode of Transferring Paper From One Bank to Another. — Commercial Bank of Pennsylvania *v.* Union Bank of New York, 19 Barb. (N. Y.) 391.

44. Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160.

45. Mead *v.* Carolina Nat. Bank, 26 S. C. 608, 1 S. E. 419.

46. White *v.* State, 133 Ala. 122, 32 So. 139; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636, which was a prosecution for murder, the witness being permitted to state as a fact and not as an opinion that a substance on a stone constituted blood. State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

Diagram Exhibiting Blood, as shown by microscope under various conditions. State *v.* Knight, 43 Me. 11.

Where Witness Examined Stains With Lens. — In White *v.* State, 133 Ala. 122, 32 So. 139, which was a prosecution for murder, a physician testified that he had had considerable experience in examining blood spots, and had examined the defendant's leggings with a low-power lens, and it was proposed to show by the witness that he found on such leggings stains that looked like blood. His opinion was objected to because it was not shown that he had made a sufficient examination to enable him to testify as to what was on the leggings with a lowe-power lens, and court did not abuse its discretion in allowing him to testify. See also article "Blood Stains," Vol. II.

Age of Blood Stains. — State *v.* Warren, 41 Or. 348, 69 Pac. 679.

medical expert may give testimony as to the condition of a dead body with reference to the blood as found therein.[47]

C. Distinction Between Human Blood and Other Blood. A qualified witness may be asked whether there is a distinction, chemical, physical or microscopic, between human and other blood.[48]

8. Bridges and Highways. — See also *supra* "Architecture, Building, etc." Experts in the building of bridges and highways are allowed to testify as to matters pertaining to bridges and highways and the building and repair thereof.[49] They may testify as to the sufficiency of a bridge stringer,[50] and to the effect of failing to keep a bridge in repair.[51]

47. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

48. State *v.* Knight, 43 Me. 11.

49. Taylor *v.* Monroe, 43 Conn. 36, *holding* that professional road-builders, of experience in the business, who have examined a road may, in connection with facts sworn to by them, give their opinions as to the necessity for a railing. See also Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963, in which case the court cited Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309; Taylor *v.* Monroe, 43 Conn. 36; and Sydleman *v.* Beckwith, 43 Conn. 9. A bridge-builder is not by virtue of his business qualified to testify as an expert as to the effect which a given log, in a given place, would have in changing the current of a stream. Cooper *v.* Mills Co., 69 Iowa 350, 28 N. W. 633.

Damages Sustained by Laying Out of Road. — Siskiyou *v.* Gamlich, 110 Cal. 94, 42 Pac. 468.

50. Stanwick *v.* Butler-Ryan Co., 93 Wis. 430, 67 N. W. 723.

51. Bonebrake *v.* Huntington Co., 141 Ind. 62, 40 N. E. 141, which was an action for damages for injuries alleged to be caused by the breaking down of a bridge. It was held that the court erred in excluding expert testimony, the object of which was to show that if the bridge had been kept in repair as originally built, it would have safely sustained a much larger load than that under which it broke down. The court said: "The witnesses were experienced bridge builders and had made examination of the bridge immediately after the accident. First detailing to the jury their observation and describing the kind of bridge they found, and its plan of construction, they might certainly be allowed to state whether, in their opinion, if the bridge so made had been kept in repair, it would have safely borne the load placed upon it. That would have tended to show its condition at the time of the accident."

Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753. In this case it was held that expert testimony was not admissible to prove that a bridge at a point where the plaintiff was injured was improperly constructed because it was not built entirely across the street and there was left at one end of the bridge a hole in the street which rendered the crossing dangerous. Hughes *v.* Muscatine Co., 44 Iowa 672. See also Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33, wherein it was held that opinion evidence as to the safety of a highway was inadmissible. To same effect, Brown *v.* Cape Girardeau Macadamized & Plank Road Co., 89 Mo. 152, 1 S. W. 129.

Capacity to Carry Load. — In McDonald *v.* State, 127 N. Y. 18, 27 N. E. 358, it was held that the opinion of a civil engineer and bridge-builder as to whether a certain weight or load was excessive for the bridge was not competent, the issue being whether the bridge was sufficient to bear the traffic which might reasonably be expected to pass over it; but the court declared that it was competent for experts in the art of bridge-building and having knowledge of the strength of timber used in such work to testify to the supporting power of the bridge, or any one of its panels, or any one of its stringers, and that had they not gone beyond this no error would have been committed.

9. Brokers and Factors. — In not a few cases it has been held that brokers and factors, particularly real estate agents, may give expert testimony as to their business.[52]

10. Chemistry. — Chemists may testify as to matters within their sphere of knowledge, particularly as to the results of analyses and the constituents of compounds.[53]

11. Clothiers. — An experienced clothier may testify as to the deteriorating effect generally of wetting custom-made clothes.[54]

12. Counterfeiting. — In cases involving the genuineness of money or commercial paper the testimony of bankers who are shown to have the requisite qualifications is competent;[55] and upon an issue as to the genuineness of a bank bill the opinion of an engraver who is skilled in detecting counterfeit bank notes is admissible, and may be received for stronger reasons than the testimony of experts in handwriting.[56]

52. Elting *v.* Sturtevant, 41 Conn. 176, in which case a real estate broker was permitted to testify as to the proper commission to be charged by the plaintiff for his services in purchasing a mill for the defendant. See also Nelson *v.* First Nat. Bank of Killingley, 69 Fed. 798.

Duty of Broker to Require Inspection of Goods Bought. — Kershaw *v.* Wright, 115 Mass. 361.

53. Long *v.* Travelers' Ins. Co., 113 Iowa 259, 85 N. W. 24; Wilcox *v.* Hall, 53 Ga. 635, *holding* that where fertilizers had been sold and warranted to be of a certain quality, it was proper to allow a chemist to testify as to his opinion of them, based on an analysis. See also Bergen Co. Traction Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 836; Howard *v.* Great Western Ins. Co., 109 Mass. 384.

Safety of Lamp. — In Bierce *v.* Stockirg, 11 Gray (Mass.) 174, which was a case involving a question as to the safety of a "patent non-explosive camphene and fluid lamp," it was held that the opinion of a witness who was a chemist, and who had experimented with gases, was admissible.

54. Sonneborn *v.* Southern R. W. Co., 65 S. C. 502, 44 S. E. 77, in which case one witness had been a clerk in a dry-goods store, handling custom-made clothes for about ten years, and another witness had been in the mercantile business and handled such clothing for about thirty years.

55. May *v.* Dorsett, 30 Ga. 116; Keating *v.* People, 160 Ill. 480, 43 N. E. 724, in which case it was held that on a prosecution for the larceny of paper money the paying-teller of a bank may testify as to the genuineness of the bills which were stolen, he having made the subject a matter of study. Atwood *v.* Cornwall, 28 Mich. 173, 15 Am. Rep. 336; State *v.* Harris, 27 N. C. 287. See also Crawford *v.* State, 2 Ind. 132. See further the article "HANDWRITING."

56. Jones *v.* Finch, 37 Miss. 461, 75 Am. Dec. 73, in which case the court said: "We can well conceive that the rules observed by regular artisans in engraving such instruments may be such as to enable one skilled in them to detect such as are counterfeits with reasonable certainty; and, indeed, such skill appears to bear a strong analogy to that of the painter, and to be admissible upon the same reason. Besides this, a witness may be acquainted with the peculiarities of engraving and marks from the face of genuine bills of a particular bank, apart from the signatures of the officers, and thereby be enabled the more certainly to apply his knowledge of the general rules of engraving genuine bills, and to form a correct opinion as to the genuineness of a bill. These means of knowledge upon the subject appear to be amply sufficient to entitle a witness possessed of them to testify upon the question; and this has been held in several cases."

13. Dairymen. — Dairymen and cheese manufacturers may give expert evidence as to milk, cheese and such like subjects pertaining to the dairy business.[57]

14. Drainage and Sewage. — Upon questions as to drainage which are not within the knowledge of men of ordinary experience and observation the testimony of experts is admissible;[58] and such evidence is also received in cases involving questions of sewage.[59]

15. Electricity. — Electricians, it has been held, may testify upon numerous questions pertaining to electricity and electrical appliances.[60]

16. Engineering. — The testimony of engineers upon questions pertaining to engineering is admissible.[61]

57. Lane *v.* Wilcox, 55 Barb. (N. Y.) 615.

58. Osten *v.* Jerome, 93 Mich. 196, 53 N. W. 7.

Necessity of Drainage. — Buffum *v.* Harris, 5 R. I. 243.

59. Stead *v.* Worcester, 150 Mass. 241, 22 N. E. 893.

60. Kraatz *v.* Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787, *holding* that evidence is admissible as to the effect of certain conditions of wires as respects the transfer of electricity. See also Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448; Dallas Electric Co. *v.* Mitchell (Tex. Civ. App.), 76 S. W. 935.

"Ground" on Circuit. — In Bergen Co. Traction Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837, an electrician was asked what, in his experience as an electrician, was his opinion as to how the accident occurred. The court said: "In the answer to the question objected to, and now under consideration, the witness gave his unqualified opinion to the jury that there was a ground, thus determining in his own mind the existence of certain facts and conditions which had not been either proved or admitted, and drawing a conclusion which the jury alone should draw from all the evidence in the case at the close of the trial. The question asked witness was not based on any hypothesis, and the categorical opinion of this witness assumed as true not only contact between the tree and wire, but also a sufficient chafing to destroy the insulation of the wire, and also a damp surface and sufficient leakage to derange the signals. Much of the evidence of this witness was scientific and valuable, and calculated to greatly aid the jury and the court in a correct understanding of the construction and operation of the electrical appliances used in the signal system of this trolley road, and under what circumstances a ground might be made; but with the statement of these scientific facts his evidence should have ended."

Elcelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553. In this case it was held that in a suit against an electric company for damages occasioned by the fall of an electric lamp, it being alleged that the rope, pulley and wire by which the lamp was suspended were insufficient and defective, an electrical engineer and a mechanical engineer who had had experience in putting up electric lamps of the kind in question were competent to testify as experts and describe the imperfections in the appliance by which the lamp was suspended.

61. United States *v.* Duluth, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,001, wherein the testimony of engineers based on surveys was taken as to the best mode of improving the entrance to a bay. See also McDonald *v.* Dodge Co., 41 Neb. 905, 60 N. W. 366; St. Louis, I. M. & S. R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675; St. Louis A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553.

Civil Engineers. — In Cross *v.* Lake Shore & M. S. R. R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399, it was held that a civil

17. Ethnology. — One who testifies that he has studied ethnology may give his opinion as an expert on a question of race.[62]

18. Explosives. — Expert testimony as to the manufacture, use and handling of explosives may be given.[63]

19. Fire. — Nature and Properties of Fire. — It has been held that it is not proper to show by one called as an expert the distance to which, or the direction in which, fire will be carried by the wind;[64] and it may be stated broadly that as the properties and

engineer may testify that a hole near a highway and upon the station grounds of the defendant railway company was a dangerous place and needed protection.

Sufficiency of Structure Used in Constructing Breakwater. — In Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017, which was an action for personal injuries sustained by the plaintiff while engaged in constructing a breakwater, it was held that it was proper to allow the plaintiff to show by experts that the structure to which the mat was suspended was not properly constructed to sustain the weight of the mat, and also to show what weight a cap of the dimensions of the one in question would sustain. These questions were objected to by the defendant upon the ground that it was for the jury to determine, from the facts that may be shown in the case, whether the structure was properly made; but the court said: "These objections were properly overruled. The matters sought to be shown by these witnesses — the weight of timber, the amount of strain to which a given piece of timber can be subjected before breaking, the difference of resistance to such strain between a cylindrical and a square piece of timber and between different kinds of timber, the amount of weight that would be concentrated at the different points of the stringers at which the cables suspending the mat were attached — were matters not presumably within the common knowledge of men, and were eminently proper to be shown by those who had made these subjects a matter of special study."

62. Daniel *v.* Guy, 19 Ark. 121. See also Commissioners *v.* Whistelo, 3 Wheel. Crim. Cas. 194, in which case the question was whether a negro or a white man was the father of a bastard child which was born of a negress; White *v.* Clements, 39 Ga. 232, in which case it was held that it was proper to allow a physician who had studied the science of ethnology to testify whether or not a person had negro blood in his veins.

63. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718.

64. Atchison, T. & S. F. R. Co. *v.* Lawler, 40 Neb. 356, 58 N. W. 968. But see Krippner *v.* Biebl, 28 Minn. 139, 9 N. W. 671, in which case the question arose as to how far a fire in stubble-land would be likely to "jump" under certain conditions of wind and vegetation, and it was held that it was competent to take the testimony upon this question, of a witness who was shown to have had actual knowledge of such conditions, and to have had experience with fires under similar conditions. See also Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51, 24 N. W. 324.

Communication of Fire From One Building to Another. — In State *v.* Watson, 65 Me. 74, which was a prosecution for arson, it being a material question whether fire was communicated from one building to another, it was held that the opinions of experienced city firemen upon the question whether under all the circumstances the fire would thus be communicated was not competent evidence. In this case it was further held that the defendant had no cause of complaint because he was not allowed to ask the witness whether or not it is a common occurrence for fires to be communicated from leeward to windward across a space greater than that which separated the buildings burned. But see First Nat. Bank *v.* Fire Association of Philadelphia, 33 Or. 172, 50 Pac. 568, 53 Pac. 8, wherein it was held that members of a city fire department who saw a store on fire might give their

nature of this element are familiar to all men, the testimony of experts is rarely admissible upon questions relating to the same.[65]

Clearing Land With Fire. — Where the subject of inquiry relates to matters of common knowledge, as fire, wind, dry wood, brush and timber, and the question is whether under the circumstances it was a prudent or proper act to set fire for the purpose of clearing land, the opinions of experts are not admissible, the question being one for the jury.[66]

20. Food. — Adulteration and Substitution. — Upon questions arising as to the adulteration of food products and substitutes therefor, expert testimony has been held to be admissible.[67]

Analysis of Milk. — On a prosecution for selling milk which was not of good, standard quality, the testimony of any person who had sufficient skill to analyze milk, and who had analyzed some of the

opinions as experts upon the question whether fire could have spread to the upper floor of a house in the short time that it did, and whether it would have generated sufficient explosive power to blow out the doors.

65. White *v.* Ballou, 8 Allen (Mass.) 408.

Means Requisite to Prevent Spread of Fire. — McNally *v.* Colwell, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494.

Current Made by Fires. — State *v.* Watson, 65 Me. 74.

Whether Fire Was Burning Naturally. — Firemen — *i. e.*, members of a city fire department — who saw a store on fire may give their opinions as experts touching the question whether the fire was burning naturally and alone upon the combustibles known to have been contained in the store. First Nat. Bank *v.* Fire Ass'n of Philadelphia, 33 Or. 172, 50 Pac. 568, 53 Pac. 8.

Combustibility of Cotton. — Seals *v.* Edmondson, 71 Ala. 509.

66. Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544. See also Fraser *v.* Tupper, 29 Vt. 409, in which case the court said: "There could be no difficulty in this case in the witnesses stating to the jury the position of the fires which were set by the defendant, their number and magnitude, the direction and course of the wind, the position, distance and character of plaintiff's property and its exposure to injury from that source. The jurors, upon the question whether the defendant exercised proper care, could form as definite opinion, from the facts stated by the witnesses, as the witnesses themselves. The subject-matter is not one of science or skill, but is susceptible of direct proof, and in most cases the triers themselves are qualified, from experience in the ordinary affairs of life, duly to appreciate the material facts when found." See further Higgins *v.* Dewey, 107 Mass. 494.

67. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40. This was a prosecution for adulterating milk with formaldehyde. It was held that it was proper to ask a chemist the following question: "What is the effect of formaldehyde on milk as a substance of food?"

Adulteration of Tea. — In Health Department *v.* Purdon, 99 N. Y. 237, 1 N. E. 687, 52 Am. Rep. 22, which was a suit to restrain the sale of adulterated teas, the case on the part of the plaintiff was said to be made out by the introduction of expert evidence to the effect that the use of the teas in question as a beverage was, in the opinion of the witness, injurious and unwholesome. These opinions were based wholly upon theoretical knowledge of the nature and character of the substance used in adulteration and its supposed effect upon the human system when used in connection with tea as a beverage. It was held that such opinions were undoubtedly competent to prove the effect of the use, but that they were of no greater value as evidence than the testimony of witnesses who had used the teas as to their practical effect upon the

milk which was shown to have been sold by the defendant, is admissible.[68]

Fitness of Diseased Animals for Meat. — It has been held that expert testimony is admissible upon the question whether a certain disease will render an animal unfit for meat.[69]

21. Gas. — Qualified witnesses may testify concerning the qualities of gas and the use thereof.[70]

22. Gunnery. — One versed in the science of gunnery will be permitted to testify as to matters pertaining to such science.[71]

23. Irrigation. — Expert testimony may be given upon the subject of irrigation by persons who are skilled therein.[72]

24. Jewelers. — Matters pertaining to the manufacture and sale of jewelry which are not within the knowledge and comprehension of men of ordinary intelligence have been held to be proper subjects of expert testimony.[73]

25. Legal Conclusions. — In General. — No witness will be permitted to testify to a legal conclusion.[74]

human system when imbibed as a beverage.

68. Com. *v.* Holt, 146 Mass. 38, 14 N. E. 930.

Substitute for Butter. — On the trial of one charged with selling oleomargarine containing coloring matter, it is not error to permit a chemist experienced in the analysis of food products to testify that the article sold resembles, is a substitute for, or imitation of, butter. State *v.* Ehinger, 67 Ohio St. 51, 65 N. E. 148.

69. Branson *v.* Turner, 77 Mo. 489, which was a case involving an ox with a sore on his neck.

70. Logansport & W. V. N. G. Co. *v.* Coate, 29 Ind. App. 299, 64 N. E. 638, in which case the witnesses were permitted to testify among other things that natural gas may pass through, or come in contact with, earth without discoloring the earth except in the neighborhood of the place where the gas escapes.

71. Com. *v.* Best, 180 Mass. 492, 62 N. E. 748. An expert was allowed to testify that bullets were marked by rust in the same way that they would have been if they had been fired through a certain rifle which was found, and that it took at least several months for the rust which he saw in the rifle to form.

Distance at Which Powder-marks Will Be Made. — People *v.* Clark, 84 Cal. 573, 24 Pac. 313, in which case the witness was not a medical expert, but one who was familiar with the use of firearms.

Singeing Hair, etc. — State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

How Shot Scatter. — State *v.* Jones, 41 Kan. 309, 21 Pac. 265.

72. Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197. This was a proceeding to condemn land. It was held that it was proper to exclude the testimony of a witness as to his opinion, as an expert, of the effect of irrigation upon the land owned by the defendant, because it appeared that the experience of the witness had been confined to another county and he had only occasionally been upon the land in question. The court intimated that such testimony would have been admissible if the witness had possessed the requisite qualifications. It was said: "To entitle the witness to testify it ought to have been shown that the conditions as to climate, soil, topography and rainfall were the same in the mountains of Santa Cruz as they were in the southern part of Santa Clara county where the witness resided."

73. Baden *v.* State (Tex. Crim.), 74 S. W. 769.

74. *United States.* — Pope *v.* Filley, 9 Fed. 65.

Alabama. — Walker *v.* Walker, 34 Ala. 469.

California. — See also Lowrie *v.* Salz, 75 Cal. 349, 17 Pac. 232.

Connecticut. — Fuller *v.* Metropoli-

Lawyers will not under any circumstances be permitted to invade the province of the court by giving opinions upon questions of law which are submitted to them, or which they have investigated.[75] Accordingly it has been held that the legal sufficiency of documents

tan Life Ins. Co., 70 Conn. 647, 41 Atl. 4.

Illinois. — Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267; Rankin *v.* Sharples, 206 Ill. 301, 69 N. E. 9; Chicago & A. R. Co. *v.* Springfield & N. W. R. Co., 67 Ill. 142.

Michigan. — White *v.* Bailey, 10 Mich. 155; Phelps *v.* Toun, 14 Mich. 374.

Missouri. — Farrell *v.* Brennan, 32 Mo. 328, 82 Am. Dec. 137.

New York. — Trenton Potteries Co. *v.* Title G. & T. Co., 176 N. Y. 575, 68 N. E. 132; Hewlett *v.* Wood, 55 N. Y. 634; Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Allen *v.* Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289.

Ohio. — Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459.

Tennessee. — Gibson *v.* Gibson, 9 Yerg. 329.

Texas. — Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64.

Vermont. — Melendy *v.* Spaulding, 54 Vt. 517; Fairchild *v.* Bascomb, 35 Vt. 398; *In re* Blood's Estate, 62 Vt. 359, 19 Atl. 770.

Assumption of Risk by Servant. Central Railroad *v.* De Bray, 71 Georgia 406, in which case the court said: "To allow testimony of this kind would be to allow a witness to testify what the law is. Witnesses may testify to facts, and the court is responsible for the law."

Capacity to Make Will. — Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. Hence it is improper to ask and obtain the opinion of even a physician as to the capacity of any one to make a will. Walker *v.* Walker, 34 Ala. 469. See also, for a full discussion of this question, article "Wills."

Practice of Land Office. — The deposition of an officer of the general land office as to the opinions and practice prevailing in that office cannot be read to the jury as proof of the law, although it might have influence with the court in explaining the law to the jury. Roberts *v.* Cooper, 20 How. (U. S.) 467; Clark *v.* Detroit Locomotive Works, 32 Mich. 348.

75. Gaylor's Appeal, 43 Conn. 82, in which case it was held that the construction of a statute is a matter for the court, and that, although the court may call to its aid the wisdom and experience of eminent counsel, the testimony of counsel as to the construction that has been put upon a statute is not admissible in evidence. In this case the question was whether or not a will was properly executed. It was proposed to show by a lawyer of long experience what had been the practice as to requiring the witnesses to a will to subscribe their names in the presence of each other, and it was held that such evidence was properly rejected; it having been offered as bearing upon a question of law, and not upon any question of fact which the jury were to pass upon.

That Plaintiff Had No Case. — In an action by an attorney against a client to recover for professional services rendered in a suit in which the client was plaintiff, and which was settled without a trial, the opinion of the counsel of the defendant in such suit that the plaintiff therein had no case is competent evidence in order that the jury may be able to judge correctly of the nature of the services rendered by the attorney. Aldrich *v.* Brown, 103 Mass. 527.

Sufficiency of Legal Proceedings. Massure *v.* Noble, 11 Ill. 531.

Result of Examination of Title. The opinion of one who has examined the title will not be taken as to whether it was good or bad. Winter *v.* Stock, 29 Cal. 407, 89 Am. Dec. 57, in which case the court said that whether the title was good or bad was a question to be passed upon by the court. To the same effect Mead *v.* Altgeld, 136 Ill. 298, 26 N. E. 388.

in evidence is for the court, and it cannot be testified to by witnesses, however learned in the law.[76]

26. Logs and Logging. — It has been held that witnesses who have had such experience in the lumber and logging business as will render them competent to testify as experts may enlighten the court and jury by giving testimony upon various questions pertaining to logs and logging.[77]

27. Machinery. — A. In General. — Persons who are skilled in the making or repairing of machines, or who are versed in their design or construction, or in the use and management thereof, are permitted to testify upon almost innumerable questions relating to

76. Rankin *v.* Sharples, 206 Ill. 301, 69 N. E. 9.

77. Moore *v.* Lea, 32 Ala. 375; Lewiston S. M. Co. *v.* Androscoggin W. P. Co., 78 Me. 274, 4 Atl. 555; Skeels *v.* Starrett, 57 Mich. 350, 24 N. W. 98; People *v.* Hare, 57 Mich 505, 24 N. W. 843.

Cost of Clearing Land. — Barnus *v.* Bridges, 81 Cal. 604, 22 Pac. 924.

Safety of Place Where Raft Was Moored. — Hayward *v.* Knapp, 23 Minn. 430.

Proper Method of Floating Logs Through Dam and Flume. — Dean *v.* McLean, 48 Vt. 412, 21 Am. Rep. 130.

Practicability of Manufacturing Timber Profitably. — In Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800, a witness who testified that he had been in the lumber and timber business for thirty-five years, that he had worked in lumber in all capacities, having been scaler, foreman and superintendent, and that he had tried to keep posted in every location where there was timber manufactured and for sale, and that he took the best lumber journals, etc., testified that he took charge of certain property with a view of making a sale of it for the defendant and that he became acquainted with the timber thereon, the rivers, the roads, the general character of the country, etc. He was thereupon asked whether it would have been practicable for the defendants to undertake to have the timber manufactured and whether they could have sold it profitably, to which he answered in the negative. It was held that this evidence was properly admitted, even though the witness might not be treated as an expert, but as an ordinary witness who was entitled to give his opinion. The court said: "There are so many contingencies and difficulties, inherent and extraneous, about the timber business, especially in mountainous sections lacking facilities for transportation, nearness of markets, etc., that it would be almost impossible for the ordinary jury to arrive at a just estimate of the expense attending such a business without the aid of the judgment and opinion of those persons who have experience in the same."

Whether Log-driving Was Properly Done. — Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198, in which case the court said: "It is true, it involved an opinion upon one of the main facts in the case which was to be found by the jury, but their judgment in nearly all cases may be aided in this way when the witness is shown to be sufficiently qualified to give an intelligent opinion upon the subject."

Meaning of Words Used in Contract. — In Jones *v.* Anderson, 82 Ala. 302, 2 So. 911, it was held that parol evidence was properly admitted to explain the signification attached, among persons engaged in the timber business, to the words "hewn timber, to average one hundred and twenty feet, and to class B, No. 1 good." See also Wagar Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949, *holding* that an expert who has been in the logging business for a number of years may testify as to the physical characteristics of "merchantable timber" within the meaning of those words as employed in a logging contract.

machines — *e. g.*, as to their quality, capacity, proper operation and state of repair.[78]

B. Capacity, Quality and Safety of Machinery. — In General. — A duly qualified expert may testify as to whether a machine was reasonably adapted for the purpose for which it was intended and used;[79] and likewise such witnesses may testify as to the horse-power of engines, and the capacity of machinery in general.[80]

78. *United States.* — McGowan *v.* American Pressed Tan Bark Co., 121 U. S. 575; Transportation Line *v.* Hope, 95 U. S. 297; N. Y. Biscuit Co. *v.* Rouss, 74 Fed. 608. See also Hunt Bros. Fruit Packing Co. *v.* Cassidy, 53 Fed. 257; Chandler *v.* Thompson, 30 Fed. 38.

Alabama. — Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268.

Illinois. — Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348; Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417.

Iowa. — McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390; Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841; Latham *v.* Schipley, 86 Iowa 543, 53 N. W. 342; Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756.

Massachusetts. — Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074; McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Moulton *v.* McOwen, 103 Mass. 587.

Michigan. — Lau *v.* Fletcher, 104 Mich. 295, 62 N. W. 357; McCormick Harvesting Machine Co. *v.* Cochran, 64 Mich. 636, 32 N. W. 561; Andre *v.* Hardin, 32 Mich. 324.

Minnesota. — Olmscheid *v.* Nelson-Tenney Lumber Co., 66 Minn. 61, 68 N. W. 605; Wilson *v.* Reedy, 33 Minn. 503, 24 N. W. 191; Johnston Harvester Co. *v.* Clark, 31 Minn. 165, 17 N. W. 111.

Missouri. — Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484.

New Jersey. — See Bergen Co. Traction Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837; Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553.

New Mexico. — Ruhe *v.* Abren, 1 N. M. 247.

New York. — King *v.* New York C. & H. R. R. Co., 72 N. Y. 607; Murphy *v.* N. Y. C. & H. R. R. Co., 66 Barb. 125; Curtis *v.* Gano, 26 N. Y. 426; Tyng *v.* Fields, 3 Hun 75.

Texas. — Stark *v.* Alford, 49 Tex. 260; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

Wisconsin. — Baxter *v.* Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644.

79. Alabama C. C. & C. Co. *v.* Pitts, 98 Ala. 285, 13 So. 135. See also Sprout *v.* Newton, 48 Hun (N. Y.) 209; Sheldon *v.* Booth, 50 Iowa 209, in which latter case a machinist was permitted to testify in an action for breach of warranty as to the kind of work that a machine would perform.

Strength of Appliances. — McDonald *v.* Michigan C. R. Co., 108 Mich. 7, 65 N. W. 597.

Strength of Iron Stiles. — Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146.

Suitableness and Safety of Saw. Lau *v.* Fletcher, 104 Mich. 295, 62 N. W. 257. See also Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756.

Particulars of Improper Construction. — Evidence by an expert that a machine was not constructed in a workmanlike manner is admissible, though the party offering the evidence declines to follow it by proof of the particulars in which the machine was defective. Curtis *v.* Gano, 26 N. Y. 426.

Suitableness of Apparatus. — Skinner *v.* Kerwin Ornamental Glass Co. (Mo. App.), 77 S. W. 1011.

80. Chandler *v.* Thompson, 30 Fed. 38. See also Sisson *v.* Cleveland & T. C. R. Co., 14 Mich. 489, 90 Am. Dec. 252, in which case it was held that experts may testify as to whether a certain engine is capable of drawing a certain train. Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548, in which case it was held that as the power of an engine with which the plaintiff had tried to run his mill was material, it was competent for a witness who had been engaged in operating the mill to testify to its

Discretion of Court. — In some cases it may be difficult to say whether or not the construction of a machine is so intricate that a jury cannot be made to fully understand it and determine whether or not it is dangerous without admitting the opinions of experts, and the court must therefore often exercise a discretion to determine when such evidence can be heard.[81]

Safety of Elevator. — It has been held that witnesses skilled and experienced in the construction of elevators may give testimony as to the proper method of constructing an elevator and the devices which are requisite to its safety.[82]

C. Defects and State of Repair. — Witnesses may give expert testimony as to the conditions of machinery as respects its state of repair or defectiveness.[83]

D. Adjustment and Operation. — Furthermore, experts may

power as compared with that of three water-wheels of known power by which the mill had been run.

81. Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348. This was an action by a servant against his master for personal injuries. It was contended that the court improperly admitted the testimony of certain witnesses who undertook to give their opinions as to whether the manner of constructing a belt around a pulley was reasonably safe for the plaintiff who was operating a machine. The court said, in holding that there was no abuse of discretion in admitting such evidence: "Whether this machinery, operated, as it was, with the twisted belt, was dangerous, clearly was not a matter of common knowledge and therefore plain and open to the jury. When the facts upon which opinions are founded cannot be ascertained and made intelligible to the court and jury the opinions of witnesses may be received."

82. Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150. In this case it was held that a witness who is shown to have some knowledge of and to have had some experience with elevators and safety devices may testify as an expert in an action for injuries caused by the fall of an elevator, although he has never had any experience with an elevator with a safety device similar to that used in the elevator in question, and may testify that there are other devices that are better than the one which was used by the defendant, and that if the cable parted in a certain place the device used by the defendant could not work. See also McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367; McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390.

83. Ice Tongs. — Neubauer *v.* Northern P. R. Co., 60 Minn. 130, 61 N. W. 912. See also Alabama C. C. & C. Co. *v.* Pitts, 98 Ala. 285, 13 So. 135; Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342.

Time of Examination Made by Experts. — In Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484, which was an action to recover the purchase price of an engine, exception was taken to the testimony of experts who examined the engine a long time after the sale, and gave statements as witnesses for the defendant concerning the physical facts they saw from which it might be inferred that the machine was not a new one when it was delivered to the defendant. The court said: "The facts they attested concerned the condition of the machine in particulars which tended to show its permanent construction when bought. The lateness of their examination did not necessarily weaken or disqualify the testimony. The facts they stated tended to show that the machine was not a new one at the time of the contract of sale, and we think their testimony was rightly admitted."

Whether Sawmill Was in Working Order. — Chandler *v.* Thompson, 30 Fed. 38.

testify as to the methods of adjusting and operating machinery.[84]

E. Inspection. — Likewise such evidence is admissible upon questions as to the necessity for and the sufficiency of the inspection of machinery.[85]

F. Duties of Operators. — It has been held that a witness should not be permitted to testify as to what were the duties of a servant in operating a machine, this being a question for the jury.[86]

G. Explosions. — It has been held that machinists may give expert testimony as to the cause of explosions.[87]

84. McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390.

Mechanism and Working of Knitting Machine. — James *v.* Hodsden, 47 Vt. 127.

Operation of "Bolting Saw." Olmscheid *v.* Nelson-Tenney Lumber Co., 66 Minn. 61, 68 N. W. 605.

Manner of Using Derrick. — Lang *v.* Terry, 163 Mass. 138, 39 N. E. 802.

Operation of Pile Driver. — In St. Louis & T. R. Co. *v.* Jones (Tex.), 14 S. W. 309, it was held that it was not proper to allow a so-called expert to testify that it would not be proper to leave anything lying around loose on the platform of the pile-driver while operating it. The court remarked: "The inquiry was about a very simple matter, not requiring an expert to explain, about which the jury were as capable to judge as a professional machinist or mechanic."

85. **Defect in Welding.** — St. Louis & S. F. R. Co. *v.* Farr, 56 Fed. 994. This was an action which was brought for personal injuries alleged to have been caused by a defect in the welding of a brake-staff on a freight-car. A machinist of twenty years' experience testified as follows: "In my judgment such a defect as this could not have been discovered by inspection, as the iron had been well swaged; that is to say, the outside of the iron appeared smooth, and would indicate that the weld was perfect before it was broken." It was held that such evidence was admissible. The court said: "In the absence of eye-witnesses of the staff before the break, what could be more pertinent or persuasive of what the eye could then have seen than the description of that which the eye did see immediately after the break? Nothing, unless the opinion of an experienced man, skilled in the art of welding, would have been; and this brings us to a consideration of the first part of the rejected sentence, where this machinist expressed his opinion that the defect could not have been discovered before the break. The jury cannot be presumed to have been machinists or blacksmiths. We cannot suppose that they were familiar with the process of swaging, or its effect upon the appearance of an iron rod perfectly welded. This was not a matter of common knowledge. It seems plain that the jury would not have been as competent as this experienced machinist to decide whether or not this defect could have been seen before the break, if they had examined the broken staff. They were wanting in the knowledge, skill and experience that best fits men to determine this question — the knowledge, skill and experience that this witness had — that of the machinist familiar with the process of welding, and its defects and dangers, patent and latent." To same effect, St. Louis & S. F. R. Co. *v.* Farr, 56 Fed. 994. But see Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673, wherein it was held that the question whether the appearance of machinery would suggest to a prudent man the necessity of an inspection is not one for an expert, but is for the jury to determine.

Proper Method of Inspecting Boilers. — Baxter *v.* Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644.

86. Blanchard-Hamilton F. Co. *v.* Colvin (Ind. App.), 69 N. E. 1032.

87. Webster Mfg. Co. *v.* Mulvanny, 168 Ill. 311, 48 N. E. 168, which was an action to recover damages for the death of a person who was killed by an explosion, which occurred because of a defect in a

28. Masonry. — Upon matters pertaining to masonry persons who are skilled in that craft will be permitted to give testimony where the question involved is one which is not solvable by men of ordinary experience and observation.[88]

29. Mechanics. — Upon various questions, such as will be readily understood by the illustrations which are given in the notes, mechanics or artisans will be permitted to give expert testimony.[89]

steam-pipe. It was held that it was proper to allow steam-fitters who had had experience in running engines to give their opinions as to the cause of the explosion, they having been present at the time the accident occurred. *Affirming* 68 Ill. App. 607. See also Sioux City P. R. Co. *v.* Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724, wherein the testimony of boiler-makers was received upon questions which arose as to the explosion of an engine.

Cause of Bursting of Emery Stone. Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417.

88. Tremblay *v.* Mapes-Reeve Construction Co., 169 Mass. 284, 47 N. E. 1010, in which case it was held that it was proper to allow an expert to testify as to whether an arch would have fallen under certain conditions. See also Sneda *v.* Libera, 65 Minn. 337, 68 N. W. 36; Fletcher *v.* Seekell, 1 R. I. 267. See further Pendleton *v.* Saunders, 19 Or. 9, 24 Pac. 506, in which case a witness who was a brick-mason, and had had experience in building cisterns and walls, was permitted to give his opinion as to the kind of wall that would be water-tight and reasonably durable.

Time Required for Walls to Dry. Smith *v.* Gugerty, 4 Barb. (N. Y.) 614.

Strength of Brick Wall. — Sneda *v.* Libera, 65 Minn. 337, 68 N. W. 36.

Proper Construction of Wall. Pullman *v.* Corning, 5 Seld. (N. Y.) 93.

Quantity of Sand Used in Making Mortar. — Miller *v.* Shay, 142 Mass. 598, 8 N. E. 419.

89. Swain *v.* Naglee, 17 Cal. 416, holding that a gas-fitter may testify as to the length of time that would be required to put gas fixtures into a theater; Walker *v.* Fields, 28 Ga. 237, *holding* that a millwright may give his opinion as to the skillfulness of work done on a mill. See also Moulton *v.* McOwen, 103 Mass. 587.

Character of Weld. — In Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342, Braley, J., said: "It cannot be said that whether an iron crank or handle is properly welded so as to preserve its tensile strength is a matter of common knowledge, and the testimony of the experts called by the plaintiff, who gave their opinion as to the character of the weld and whether it was properly done, was competent."

Condition of Water Pipe. — Hand *v.* Brookline, 126 Mass. 324.

A witness who has worked in iron furnaces four or five years is properly allowed to state that in his opinion some men can stand more gas than others. Birmingham Furnace & Mfg. Co. *v.* Gross, 97 Ala. 220, 12 So. 36.

Quality of Carpentry. — Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674.

In State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318, carpenters with large experience as pattern-makers and workers in wood were allowed to testify that a panel which was one-sixteenth of an inch in thickness had been cut from a door with a knife and could have been cut by the knife produced; that the blade of the knife exactly fitted the place where the panel had been pierced; that the cut was done by a person skilled in the use of tools, and after explaining the peculiar manner in which the door was constructed, stated that the panel was evidently taken out by one who understood the construction of a door, and also that it was cut from the outside. The court sustained the admission of this evidence.

Cost of Lumber in House. — Simmons *v.* Carrier, 68 Mo. 416.

Proper Way to Put Tile in a Kiln for Burning, and what would be the

30. Medical Testimony. — A. In General. — Medical men are permitted to give expert testimony upon innumerable questions pertaining to the science and practice of medicine; and, indeed, their testimony in many cases is indispensable.[90]

Character of Examination Made by Witness. — It is competent to ask a medical expert the condition of a patient whom he was called upon to examine, and the character of his examination.[91] Where the witness has not made a sufficient examination of the person in question, and no sufficient hypothetical facts are stated to him, his conclusions as to the cause of an existing condition are without value, and are immaterial.[92]

effect of laying them flatwise instead of on end. Wiggins *v.* Wallace, 19 Barb. (N. Y.) 338.

Shoemakers. — In State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382, defendant made apparently every effort to put on, in the presence of the jury, a pair of rubber boots, but apparently was unable to do so. Thereupon a shoemaker was permitted to measure the boots and the prisoner's feet and to testify that the boots could be worn on feet which were of the size of the defendant's.

90. *United States.* — Bram *v.* United States, 168 U. S. 532.

Alabama. — Gunter *v.* State, 84 Ala. 96, 3 So. 600.

Connecticut. — State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

Illinois. — Illinois C. R. Co *v.* Latimer, 128 Ill. 163, 21 N. E. 7.

Indiana. — Railroad Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450.

Iowa. — Allison *v.* Parkinson, 108 Iowa 154, 78 N. W. 845; Erickson *v.* Barber, 83 Iowa 367, 49 N. W. 838.

Louisiana. — State *v.* Dixon, 47 La. Ann. 1, 16 So. 589.

Maine. — Powers *v.* Mitchell, 77 Me. 361.

Massachusetts. — Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192.

Michigan. — Cole *v.* Lake Shore & M. S. R. Co., 95 Mich. 77, 54 N. W. 638.

Minnesota. — Johnson *v.* Northern P. R. Co., 47 Minn. 430, 50 N. W. 473.

New Jersey. — Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100; State *v.* Powell, 7 N. J. L. 244.

New York. — Stouter *v.* Manhattan R. Co., 127 N. Y. 661, 27 N. E. 805; McCain *v.* Brooklyn R. Co., 116 N. Y. 459, 22 N. E. 1062.

North Carolina. — State *v.* Speaks, 94 N. C. 865.

North Dakota. — Tullis *v.* Rankin, 6 N. D. 44, 68 N. W. 187, 66 Am. St. Rep. 586, 35 L. R. A. 449.

Texas. — See also Crockett *v.* State (Tex. Crim), 77 S. W. 4. See also Poling *v.* San Antonio & A. P. R. Co. (Tex. Civ. App.), 75 S. W. 69; McGrew *v.* St. Louis S. F. & T. R. Co. (Tex. Civ. App.), 74 S. W. 816.

91. Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

As to Character of Examination Made by Medical Expert. — In Pacific R. Co. *v.* Urlin, 158 U. S. 271, medical experts were asked on their examination in chief as to whether examinations made by them "were made in a superficial or in a careful and thorough manner." It was objected that such questions called for the opinion of the witnesses as to the manner in which the physical examinations were made and thus supplanted the judgment of the jury in that particular. In holding that such objections were not well founded, Shiras, J., said: "The obvious purpose of the question was to disclose whether the judgment of the physicians as to the plaintiff's condition was based on a superficial or on a thorough examination, and we think it was competent for the witnesses, who were experts, to characterize the manner of the examination."

92. Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321. See also article "Injuries to Persons."

Scientific Deductions. — It has been held that medical testimony should be confined to scientific deductions.[93]

Teachings of Medical Authorities. — It is not competent to ask a physician as an expert on direct examination what medical authorities teach, but on cross-examination such questions may be asked to test the accuracy of the witness' knowledge.[94]

B. ABORTION. — It is well settled that medical experts may testify as to the causes for the miscarriage of a woman, and also as to the effects of an abortion.[95]

C. DEATH AND DEAD BODIES. — a. *In General.* — In a variety of cases which involve questions arising as to the death of human

93. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

94. State *v.* Winter, 72 Iowa 627, 34 N. W. 475. See also article "BOOKS."

95. Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446. This was an action for personal injuries sustained by a woman. A medical expert was asked the following questions: "If a woman was with child and met with an accident so that she was thrown over the footboard of a wagon by a runaway horse, thrown to the ground on her stomach or side, went home and soon after went to bed, and if she was confined to the bed for ten or twelve days, and if at the end of that time she suffered a miscarriage, would the facts, if true, be an adequate cause for a miscarriage?" To which witness answered: "It would be considered an adequate cause for the miscarriage." It was held that such evidence was admissible. See also McKeon *v.* Chicago, M. & St. P. R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 909, 35 L. R. A. 252, which was an action for personal injuries. The court said: "We perceive no error in allowing the medical experts, who had heard the plaintiff give a part of her testimony in court, and then heard the balance of her testimony read to them by the court reporter, to testify what, in their opinions, was the cause of the miscarriage, assuming the testimony of the plaintiff to be true." See further article "ABORTION," Vol. I, pp. 62, 63.

Use of Instrument Without Leaving Marks. — In State *v.* Wood, 53 N. H. 484, which was a prosecution for murder perpetrated in an attempt to commit abortion, a medical expert testified that the woman had been pregnant and that she had been delivered by some artificial means; that she had not taken any kind of poisons to produce this result, for the reason that, if taken, they would leave their marks in the stomach and other parts of the body, and that he found no such marks here. He found no marks of instruments, but he described the manner of using them in procuring abortions, and testified that, if skillfully used, he should not expect they would leave any marks. It was held that such evidence was competent, so that the jury might properly find that the defendant produced an abortion with a "certain instrument to the jurors unknown," as alleged in the indictment.

Means by Which Offense Was Committed. — In Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465, two physicians testified in behalf of the state in regard to a *post-mortem* examination made upon the body of a woman. One of the witnesses "after detailing to the jury fully what he had observed upon this examination relative to the condition of the womb and the afterbirth, etc., gave it as his opinion that there had been a miscarriage. He was then asked to state 'whether, from the conditions found, the miscarriage occurred from some natural physical difficulty, or whether by some foreign interference.' In response to this question, the witness said that in his judgment the miscarriage was brought about by some foreign interference." It was held that such evi-

beings, medical experts are allowed to testify as to matters which are peculiarly within the domain of medical science.[96] And they may be allowed to say, upon a state of facts testified to, either by themselves or other witnesses, whether in their opinion a particular wound or blow described would be adequate to cause death, or even whether such wound was, in their opinion, the cause of death.[97]

Necessity for Expert Testimony.— Indeed, on prosecutions for murder the testimony of medical experts as to the cause and manner of decedent's death may be indispensable.[98]

Distinction Between Stating Cause and Probable Cause of Death. — In some cases it has been held that on a prosecution for murder a

dence was competent, its weight being a question for the jury.

Evidence as to Effect of Abortion. Where a personal injury resulted in an abortion, evidence touching the consequences of the abortion upon the woman's future health is evidence relating to past injury and not to future injuries. Powell *v.* Augusta & S. R. Co., 77 Ga. 192.

96. Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382.

97. *United States.* — Hopt *v.* Utah, 120 U. S. 430; Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945.

Alabama. — Simon *v.* State, 108 Ala. 27, 18 So. 731; Page *v.* State, 61 Ala. 16.

Arkansas. — Ebos *v.* State, 34 Ark. 520.

Colorado. — Herren *v.* People, 28 Colo. 23, 62 Pac. 833; Germania Life Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

Dakota. — Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Florida. — Baker *v.* State, 30 Fla. 41, 11 So. 492; Newton *v.* State, 21 Fla. 53.

Illinois. — Siebert *v.* People, 143 Ill. 571, 32 N. E. 431.

Iowa. — State *v.* Cole, 63 Iowa 695, 17 N. W. 183; Miller *v.* Mutual Benefit Life Ins. Co., 31 Iowa 216, 7 Am. Rep. 122.

Maryland. — Williams *v.* State, 64 Md. 384.

Massachusetts. — Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

Michigan. — People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; People *v.* Foley, 64 Mich. 148, 34 N. W. 94.

New Hampshire. — State *v.* Wood, 53 N. H. 484.

New Jersey. — State *v.* Powell, 7 N. J. L. 244.

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Oregon. — State *v.* Glass, 5 Or. 73.

South Carolina. — State *v.* Clark, 15 S. C. 403.

Texas. — See Smith *v.* State, 43 Tex. 643.

Wisconsin. — Boyle *v.* State, 61 Wis. 440, 21 N. W. 289.

Curry *v.* State, 5 Neb. 412, which was a prosecution for assault with intent to murder. The court said: "In a prosecution for murder, the object of such evidence relates to the inquiry of fact, whether the killing was or was not with a felonious or malicious *intent.* And why shall not the rule apply to prosecutions like the one under consideration? In either case the fact sought to be proved is the *intent;* and we find no reason why all evidence which legitimately reflects light upon the subject of inquiry should not be admitted."

Number of Blows Required to Produce Death. — In People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907, which was a prosecution for murder, it was held that it was proper to allow the physician who made the autopsy on the body of the deceased to testify that the injury on the head from which he died could not have been produced by a single blow, because the matter was one of medical science and skill involving technical knowledge and therefore properly the subject of expert evidence.

98. Shelton *v.* State, 34 Tex. 662.

medical expert cannot testify as to what caused the injury from which the decedent died, although he may give his opinion as to what might have caused it.[99]

b. *Abortion.* — On a prosecution for murder perpetrated in the attempt to procure the miscarriage of a woman, medical experts may testify as to the cause of her death;[1] and likewise in such a case expert testimony is receivable upon the question whether the injuries of which the woman died were inflicted by herself or not.[2]

c. *Drowning.* — Of especial importance in many cases is the testimony of medical experts upon the question whether the death of a person was caused by drowning or not.[3]

99. People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

1. Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111. See also State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578, which was a prosecution for murder, it being held that it was proper to allow a medical expert who had made a *post-mortem* examination to give his opinion as to the cause of the woman's death.

2. Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163. The theory of the prosecution was that the death was caused by the introduction of a seatangle tent into the uterus and it was sought to show by the testimony of physicians that it was impossible for the decedent to have inserted the tent herself, and that it would be impossible for a woman unaided to insert a tent into her own uterus. It was held that this being a matter outside of the range of common knowledge it was proper to call expert witnesses to testify to their opinions. The court said: "Had the physicians testified merely that in their opinion the deceased could not have done this thing herself, such opinion might have rested on reasons applicable only to that particular woman; but they went further, and made their testimony applicable to all women, or at least to women in general."

3. People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. In this case the following question was asked: "Doctor, from the nature of the examination that you made of the heart, lungs, eyes, mouth, neck and general appearance, together with the mutilation you have testified to, have you come to any conclusion as to whether the death occurred by drowning or by other means?" To which he answered: "Yes; my opinion was that the man did not come to his death by drowning; that he was dead before he was put into the water." It was held that such testimony was competent.

Absence of Water in Stomach. On a prosecution for murder, the question being whether or not the decedent was drowned, a medical expert may be asked as to what was indicated by the absence of water in the decedent's stomach. State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Whether Wounds on Drowned Person Were Made by Striking Rocks. In State *v.* Johnson, 66 S. C. 23, 44 S. E. 58, which was a prosecution for murder, the deceased person having been found in the water, a medical expert who made an examination of the wounds of the decedent, testified that they could not have been made by the face striking against rocks in the water after death, and that if the water was ten or fifteen feet deep it was not reasonable to suppose they could have been made by the decedent falling or being thrown from a boat and striking the rocks. It was held that such evidence was admissible.

Condition of Lungs Where Person Was Stunned in Shallow Water. In Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945, a medical expert who had performed an autopsy upon the body of one who had been found dead in water was asked the following question: "Supposing a person to have fallen and been stunned in shallow water, where he made very little struggle,

d. *Strangulation.* — Where the question is whether or not a person died from strangulation, testimony of medical experts may be taken.[4]

e. *Time of Death.* — Medical testimony is admissible upon such questions as may arise as to the length of time that a person has been dead.[5] Likewise a medical expert may testify as to whether the condition in which a dead body was found preceded or followed death, as where the question is whether the decedent's neck was broken before or after death.[6]

f. *Autopsies and Post-Mortem Examinations. — In General.* — It is well settled that medical men who have made autopsies or *post-mortem* examinations, or who have assisted therein, may give testimony, based upon the results of such examinations, as to the cause of a person's death.[7]

state whether what you found to be the condition of the lungs would be what would be expected where a man came to his death in that manner?" His answer was as follows: "I say yes. It was precisely what we would have expected under all the circumstances. We all agreed to that." It was held that such evidence was admissible.

4. Effect of Violent Pressure Upon Neck With Foot. — On a prosecution for murder, where the proposed testimony is relevant, a physician may express an opinion as to what would be the result of pressing violently with the foot upon the neck of a man lying on the ground. Williams *v.* State, 64 Md. 384.

5. State *v.* Warren, 41 Or. 348, 69 Pac. 679; State *v.* Clark, 15 S. C. 403.

6. Shelton *v.* State, 34 Tex. 662. See also People *v.* Barker, 60 Mich. 277, 27 N. W. 539.

Whether Wounds Were Inflicted Before or After Death. — In People *v.* Hare, 57 Mich. 505, 24 N. W. 843, it was held that it was proper, on a prosecution for murder, to ask the following question of a physician who made an examination of the decedent's body: "From the appearance of this wound [referring to that upon the shoulder] would you say it was inflicted in his lifetime or after death?"

Whether Death Preceded Action of Fire on Body. — In People *v.* Bodine, 1 Denio (N. Y.) 281, which was a prosecution for murder, it was held that objection to a question put to one of the physicians on his cross-examination as to whether death had preceded the action of fire on the body of the decedent was properly overruled. The court said: "These physicians reasoned, as other men would, that the body of a living person could hardly remain quiet under the action of fire, and that its convulsed and violent movements would be apt to displace any covering which might be upon different parts of it; and that to suppose life, in this instance, had been destroyed by the fire was wholly inconsistent with the condition of the body when found, certain parts of it, protected by covering, not having been at all affected by the fire. Hence the opinion which was expressed, that death must have preceded the fire, and was not caused by it."

7. *United States.* — Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945.

Florida. — Baker *v.* State, 30 Fla. 41, 11 So. 492.

Iowa. — State *v.* Van Tassell, 103 Iowa 6, 72 N. W. 497; State *v.* Tippett, 94 Iowa 646, 63 N. W. 445.

Maine. — State *v.* Pike, 65 Me. 111.

Massachusetts. — Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan. — People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

South Carolina. — State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

Necessity for, Requisites and Sufficiency of Autopsy.— It is not necessary that a physician or surgeon, learned and experienced in his science or profession, should have actually seen or made an autopsy or *post-mortem* examination in order to enable him to give expert testimony as to the cause of a person's death;[8] and it has been

Utah. — State *v.* McCoy, 15 Utah 136, 49 Pac. 420.

Wisconsin. — Boyle *v.* State, 61 Wis. 440, 21 N. W. 289.

Testimony of One Witness Who Saw Another Physician Operate. Two physicians, S. and L., made an autopsy upon the body. S. did most of the cutting. He was not called as a witness. L. was called for the prosecution and testified as to what was done at the autopsy. Among other things, he was permitted to testify that he saw S. introduce his finger into the trachea and up into the larynx and glottis. This was offered for the purpose of showing that there were no obstructions in the trachea or larynx, and was objected to on the ground that S. should have been called and that L. could not say that the finger met with no obstructions. It was held that, as the evidence was confined to what was done and what appeared, its reception was proper. People *v.* Willson, 109 N. Y. 345, 16 N. E. 540.

Opinion Based Upon Pathological Condition of Internal Organs. — On a prosecution for murder, a medical expert who attended a *post-mortem* examination of the decedent may testify as to the pathological condition of the internal organs, their congested appearance, the convulsed state of the muscular system, etc. Boyle *v.* State, 61 Wis. 440, 21 N. W. 289.

8. State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625, *citing* State *v.* Clark, 34 N. C. 152, in which latter case Ruffin, J., said: "That circumstance does not touch the question of competency, though it may lessen the credit given to the testimony of the party. . . . It is a point for the man of science to consider, whether in a particular state of facts he can or cannot form a sound opinion which would satisfy his own judgment as to the matter of fact."

Sufficiency of Examination Made by Expert. — In Ebos *v.* State, 34 Ark. 520, which was a prosecution for murder, a medical witness had examined a wound upon the head of the deceased, its character, extent, and dangerous location, and was aware of the length of time that had transpired between the giving of the blow and the death of the decedent; and he testified that the wound caused the death and that the decedent died from concussion of the brain. It was held that such testimony was admissible and that it was not necessary that he should have opened the skull and examined the brain in order to enable him to express such opinion to the jury.

In People *v.* Barker, 60 Mich. 277, 27 N. W. 539, which was a prosecution for murder, a practicing physician and surgeon who was present at the *post-mortem* examination of the body of the deceased stated the examination which he made of the body, and described it as bloated considerably, and livid, purple, dark purple — particularly the upper part of the body more than the lower part; made examination to ascertain cause of death, if he could do so, but did not make a very extended examination of the body from the fact that it was very decomposed, very offensive, and even dangerous, to work over; examined the lungs and heart in particular, found the lungs somewhat collapsed, not very much filled out with air. Both cavities of the heart were entirely empty of blood — no blood in them, nor in the first portion of the vessels — the aorta and other large vessels. He described the appearance of other parts of the body, and the condition of the heart, and also the usual condition of the heart where death ensued from drowning. Thereupon he was asked whether he had come to any conclusion as to how death occurred and as to whether it was by drowning or by other means, which question was objected to on the ground that the witness had not

held that such witnesses may give testimony as to the results of their investigations, although in making an autopsy they proceeded without authority, and did not follow the course prescribed by a statute,[9] and although the defendant was not given notice of such examination.[10] It is competent to show by expert testimony whether an autopsy was made with the requisite care and skill, or in the usual way.[11]

Time at Which Post-Mortem Examination Was Made.— On a prosecution for murder the mere fact that a *post-mortem* examination was made some time after death is not in itself a reason why the opinions of experts as to the results of such examination should be excluded, unless the interval was so great and the condition of the body was such that the jury cannot reasonably find whether the condition of the body was to be attributed to *ante-mortem* or *post-mortem* causes.[12]

D. Diseases. — a. *In General.* — Medical experts may give testimony upon various questions as to the health or sickness of persons and as to the cause, effect and treatment of diseases.[13]

made an examination which was sufficient to base an opinion upon. It was held that the witness was properly allowed to answer that the decedent was dead before he was put into the water.

9. Com. *v.* Taylor, 132 Mass. 261.

10. State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

11. State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, in which case Sherwood, J., said: "If experts in medicine and surgery were not competent witnesses on this point, who were? Was the autopsy, and the manner it was made, to stand as conclusive evidence that it was properly made, and thus forbid all challenge and all investigation? It would certainly be a novelty in the law if such a question were to receive an affirmative answer. This is a matter which seems so plain as to require no further discussion." *Citing* Davis *v.* State, 38 Md. 15, in which case it was said: "If the purpose was to show that the examination of the wounds and fracture was not made in a proper and skillful manner, this could only be done through the testimony of witnesses competent to testify on the subject." *Compare* State *v.* Pike, 65 Me. 111, in which case a witness called by the defendant as a medical expert was asked this question: "For the purpose of arriving at a correct conclusion in the case of the death of a person, where you don't know to your own satisfaction what caused the death, how long a time should two men give to a *post-mortem* examination?" And the witness was further asked whether four hours would be sufficient. In holding that these questions were properly excluded the court said: "It does not appear that the witness was present at the *post-mortem* examination of the deceased; or that he had any knowledge of the case, or the kind, or extent of the examination needed; and it is not to be assumed that every *post-mortem* examination will require the same length of time. The questions were too general; and if the witness was willing to answer them, his answers would have been entitled to no weight whatever. They would have been no more than the opinion of one who, so far as appeared, had no knowledge on which to base it."

12. Williams *v.* State, 64 Md. 384.

13. *Alabama.* — Bennett *v.* Fail, 26 Ala. 605; Mosely *v.* Wilkinson, 14 Ala. 812.

Arkansas. — Thompson *v.* Bertrand, 23 Ark. 730; Tatum *v.* Mohr, 21 Ark. 349.

Kansas. — Missouri P. R. Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590.

South Carolina. — Oliver *v.* Colum-

Person's Knowledge of Disease.— Where a person has testified that he was ignorant that he was affected with a disease, medical experts will not be permitted to testify whether he would be likely to understand that he had such disease, the truth of the testimony of the witness as to his ignorance that he was so affected being a question for the jury.[14]

bia N. L. R. Co. (S. C.), 43 S. E. 307.

Tennessee. — Jones *v.* White, 11 Humph. 268.

West Virginia. — Barker *v.* Ohio R. R. Co., 51 W. Va. 423, 41 S. E. 148, 90 Am. St. Rep. 808.

Cause of Hemorrhage. — A medical expert may give his opinion as to the cause of a hemorrhage. Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227.

Whether Paralysis Was Caused by Personal Injuries or Otherwise. Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217, in which case the question was whether the plaintiff's paralysis was due to a personal injury or to a latent disease from which he was suffering.

When and Where Disease Was Contracted. — In Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67, 59 Am. St. Rep. 900, 35 L. R. A. 249, an action was brought to recover damages resulting to the plaintiff from an attack of typhoid fever, which she contracted while employed as a domestic servant in the defendant's family; it being alleged that the defendant's daughter was ill of typhoid fever and that the defendant negligently allowed the plaintiff to contract the disease. Certain medical experts were called, and were allowed to answer hypothetical questions, stating the facts as testified to by the plaintiff, and they were asked upon these facts when and where, in their opinion, the plaintiff contracted the disease.

Diseases of the Eye. — The opinions of eminent and learned physicians and surgeons and oculists as to diseases of the eye, the causes thereof, etc., are admissible and are entitled to great consideration, at least where the witnesses have made a personal examination of the subject. Atchison, T. & S. F. R. Co. *v.* Thul, 32 Kan. 255, 4 Pac. 352.

Cause of Spinal Difficulty. — Positiveness of Opinion. — In Matteson *v.* New York C. R. Co., 62 Barb. (N. Y.) 364, a medical expert was asked what was his opinion as to the cause of a person's spinal difficulty. This evidence was objected to as incompetent, it being urged that the rule is that a physician may state what might or would have caused the difficulty which he discovered, but that he cannot give an opinion as to what did cause the difficulty in a particular case. It was held that there was no error, the court citing Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 75, in which case the rule was stated as follows: A physician, in many cases, cannot explain to a jury the cause of the death or other serious injury to an individual, so as to make the jury distinctly perceive the connection between the cause and the effect. He may, therefore, express an opinion that the wound given, or the poison administered, produced the death of the deceased, but in such a case the physician must state the facts on which his opinion is founded.

14. Crowley *v.* Appleton, 148 Mass. 98, 18 N. E. 675; in this case it was an important inquiry whether the plaintiff knew that he was liable to epileptic fits, and medical experts had been permitted to testify that unconsciousness on the part of the subject of such attacks that he had had them was one of their ordinary symptoms. The experts had also testified that they had made an examination with a view of ascertaining whether the plaintiff would be likely to understand that he had these fits on the fact being communicated to him. The plaintiff's counsel then desired to put the question, "From your examination of the plaintiff, what do you say as to whether he is a man who could be convinced that he had epilepsy?" It was held that this question was properly excluded, because to put the question whether he would be likely

Effects of Fright, Imprisonment, Lack of Food, etc. — It has been held that a medical expert may testify as to the effect of imprisonment upon the health;[15] as to whether fright has a tendency to produce heart trouble;[16] and as to whether the emaciated condition of a person was caused by lack of food or inability to assimilate food;[17] but it has been held that such testimony is not admissible where the question is as to the effects of provoking language and vexation upon the health.[18]

b. *Treatment and Care. — Medical Treatment.* — In actions for malpractice and in similar cases, where the question may properly arise, medical experts will be allowed to testify as to whether certain treatment was proper and sanctioned by physicians and surgeons possessing and exercising ordinary skill and intelligence.[19]

to understand that he had epilepsy, was to submit to the experts whether, so far as their examination went, the plaintiff's assertion that he did not know that he had epilepsy was likely to be true.

15. Spear *v.* Hiles, 67 Wis. 361, 30 N. W. 511, which was an action for malicious prosecution.

16. Illinois C. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 71. This was an action by a six-year-old child against a railroad company to recover for injury sustained by ejecting her from a train. The plaintiff endeavored to prove that she was suffering from heart disease, produced by the fright she received when put off the train, and asked physicians whether fright would produce heart trouble. It was held that the question was proper. *Distinguishing* Chicago & A. R. Co. *v.* S. & N. W. R. Co., 67 Ill. 142; and Hoener *v.* Koch, 84 Ill. 408. In the first case a witness was asked what would be the damages if certain work should be done. In the second a witness was asked whether, taking the facts as he understood them, he saw any evidence of malpractice.

17. Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464, which was a prosecution for neglecting to provide a child with proper and sufficient food.

18. Hufford *v.* Grand Rapids & I. R. Co., 53 Mich. 118, 18 N. W. 580, which was an action for assault and battery. The court said: "The medical evidence which was given in the case respecting the effect of the alleged assault upon the plaintiff's health seems to call for some comment. As the assault was a battery only in a technical sense, and there was no pretense of injury except such as might come from mere words — from the mere expression on part of the conductor of a determination to put the plaintiff off the car unless he paid his fare — the proposition that it was proper to call expert witnesses to show the possibility of injurious consequences from such words to the plaintiff's health is suggestive of possibilities in the trial of causes which the trial judge may well contemplate with some solicitude. If expert evidence of the sort was admissible in this case, it is difficult to conceive of a case of assault and battery, or of any other case, in which vexing or provoking words are made use of, where the expert witness may not become an important factor in determining the result."

19. Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

Necessity for Abortion. — On a prosecution for an abortion, the testimony of a medical expert as to the necessity of bringing about an abortion is competent. State *v.* McCoy, 15 Utah 136, 49 Pac. 420, in which case the witness testified with reference to a woman who had died, that about the time of her death she appeared to be in good health; that he had made a *post-mortem* examination; that a miscarriage had been produced upon the deceased by artificial means. He gave it as his opinion, from an examination of the body, and his previous knowledge of the de-

Permanancy of Disease or Cure. — It has been declared that there is no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has been or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future.[20]

c. *Malingering.* — Upon questions which not infrequently arise as to whether a person's sickness or injury was real or simulated, the testimony of experts who have had such person under observation is admissible.[21]

ceased, that it was not necessary to produce an abortion in order to save the life of the deceased. The last testimony was objected to as incompetent on the ground that the witness' knowledge of the deceased was not sufficient for him to give an answer intelligently. In holding that this evidence was admissible the court said: "We are of the opinion that the testimony was proper. The reasons for the opinion were given with great detail. The witness was an expert, and the weight of his testimony was for the jury to consider."

Opinion as to How Other Physicians Would Have Treated Disease. Mosely *v.* Wilkinson, 14 Ala. 812, in which case the court said: "He could not be permitted to testify how other physicians would have treated the disease, or how they might have treated it, owing to the doubtful nature of the disease, when at the same time he would have condemned such treatment. Whether they would, or would not, is matter purely of opinion and not the result of scientific skill, from given facts."

Injury by Medical Treatment. In an action for personal injuries a medical expert who has attended the plaintiff may testify as to the nature of medical treatment which had been previously given him by another physician, and as to whether such medical treatment was injurious. Barber *v.* Merriam, 11 Allen (Mass.) 322. In this case the court said: "It does not appear that the witness testified to any fact which was not derived from his own personal observation and examination of the patient. For aught that is disclosed in the exceptions, the knowledge which he had of the previous treatment of the female plaintiff by the physician who first attended her was derived entirely from his own diagnosis, unaided by any statements of other persons."

20. *Per* Allen, J., in Filer *v.* New York C. R. Co., 49 N. Y. 42.

Percentage of Cures in Similar Cases. — Cole *v.* Lake Shore & M. S. R. Co., 95 Mich. 77, 54 N. W. 638.

21. Harrold *v.* Winona & St. P. R. Co., 47 Minn. 17, 49 N. W. 389. In this case the principal injury complained of by the plaintiff was a fracture and dislocation of the shoulder, which, as he claimed, had impaired his power to use his arm. The defense claimed that these injuries were feigned, and it was held that it was not prejudicial error to permit an expert witness, who had testified to a shrunken condition of the arm, which could not have been caused by mere disuse, to give his opinion that the plaintiff was not simulating. See also Missouri, K. & T. R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56.

In Chicago U. T. Co. *v.* Fortier, 205 Ill. 305, 68 N. E. 948, which was an action for personal injuries, it appeared from the evidence that on flexing the plaintiff's right leg there was a sudden jump at the hip joint, which assumed somewhat the characteristics of a dislocation at the hip joint, but which apparent dislocation proved to be fallacious; and that a close examination disclosed not a true dislocation of the joint, but rather a dislocation of the large muscle which covers the outside of the thigh bone. The defendant rested its defense upon the theory that the plaintiff was feigning to a large extent the injury complained of, and on the examination of the experts a number of questions were asked them seeking to establish this

E. Intoxication and Drug Addictions. — It has been held that the testimony of medical experts is admissible upon questions which arise as to the effects of the intemperate use of intoxicating liquors and drug addictions.[22]

F. Pregnancy, Childbirth, etc. — Medical testimony upon

theory. These questions were objected to on the ground that they were "directed to a mental process, as to which the witnesses could not know," but it was held there was no error in admitting the opinion of the experts. The court said: "As we understand the record, these opinions were not based on the mental process of the appellee, but were founded upon their opinions as expert surgeons and examinations made on the person of the appellee. From the testimony of these experts it appears that from their examinations they were able to state with more or less certainty whether or not it was possible for the appellee to simulate this condition, and it is plainly apparent that, on this matter, and from the conditions described, one who was not an expert could not form an intelligent opinion, and there was therefore no error in admitting this testimony."

That Plaintiff Is Shamming Before Jury. — In an action for personal injuries the testimony of a physician, who has known the plaintiff for some years, that, in his opinion, she is "shamming before the jury," is incompetent, the jury being as well qualified as the witness to give an opinion on that subject. Cole *v.* Lake Shore & M. S. R. Co., 95 Mich. 77, 54 N. W. 638.

Opinion Based on Confidence in Patient. — In Austin *v.* McElmurry (Tex. Civ. App.), 33 S. W. 249, it was held that a medical expert could give his opinion as to whether the complaints of a sick or injured person were feigned or real, but he could not give as a reason for such opinion that he had known such person for a long time. The court said: "He could give any reason within the range of expert testimony for his opinion as to the reality of the plaintiff's complaints; but he could not, as an expert, base his opinion on his confidence in the integrity of the man. Such evidence would not be expert testimony, because any other person who had known the plaintiff the same length of time would be as well qualified to speak concerning his honesty. Besides, this testimony tended to support the plaintiff's character for honesty, which had not been attacked by appellant."

Simulation of Absence of Pain. In McGrew *v.* St. Louis, S. F. & T. R. Co. (Tex. Civ. App.), 74 S. W. 816, it was held competent for a medical expert to testify that the plaintiff was not simulating the absence of pain upon the application of certain tests by him to the plaintiff; he having previously testified that he had made such tests and that they showed that the plaintiff had no feeling in her limbs.

22. Poffenbarger *v.* Smith, 27 Neb. 788, 43 N. W. 1150, in which case it was held that the following testimony was properly admitted. "Q. Supposing a man thirty years of age, had been drinking hard for two weeks' time, and had been irregular about his meals and his going to bed during that time, what would be his natural mental and physical condition? A. I should think a man's mental condition would be very much impaired by a debauch of that character. Q. Doctor, would a man in that condition be more liable to commit suicide than a man who had for the past two weeks been regular in his habits, and had not been drinking to excess? A. He most surely would. Q. Why, doctor? A. From the fact of the weakened and debilitated state of his mind. It is usually the case that men when they commit suicide do it after a debauch of that kind and character."

Effect of Laudanum. — In an action by a husband against a druggist for clandestinely selling laudanum to the plaintiff's wife, a physician may be asked, "what would the natural result of three of these bottles of opium, called laudanum, be upon the plaintiff's wife, as you know the

questions as to pregnancy is admissible;[23] and courts also have recourse to this species of evidence in cases involving questions of childbirth, etc.[24]

G. RAPE. — On prosecutions for rape questions frequently arise upon which the expert testimony of medical men is admissible, and is highly important, as where such witnesses are called to give the results of their peculiar knowledge and experience respecting the physical differences between men and women, and the results of such physical examination of the prosecutrix as may have been made.[25]

woman, and her situation and constitution," etc. Hoard *v.* Peck, 56 Barb. (N. Y.) 202.

Hallucination Produced by Chloroform and Ether. — Whether charges of rape preferred by a woman patient against a physician are the result of hallucination, while under the influence of chloroform and ether, is a question that may be determined by expert medical evidence as it is not a matter of ordinary human experience or knowledge. State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

23. State *v.* Gedicke, 43 N. J. L. 86. In this case the opinion of a physician as to a woman's pregnancy was held to be admissible, although such opinion was in part founded upon her statement of her feelings; and it was further held that it was proper to allow the witness to say what such statements were.

Opinion Based Upon Examination of Dead Body of Woman. — An experienced physician, after having made a *post-mortem* examination of the body of a female, may, as an expert, offer his opinion whether she had been pregnant. State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578. This was a prosecution for murder, the theory of the prosecution being that the offense had been committed in the attempt to procure an abortion.

24. Young *v.* Makepeace, 103 Mass. 50.

Why Child Was Not Born Alive. In Western Union Telegraph Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728, it was held that a physician, shown to be an expert, may give in evidence his opinion whether a still-born child could have been born alive if it had received medical assistance in time.

Premature Birth of a Child. — A woman who has had experience as nurse in childbirth, and, as such, been in attendance at premature births, may testify as an expert to her opinion as to whether the birth of a child was premature. Mason *v.* Fuller, 45 Vt. 29.

Injury to Unborn Child by Imprisonment of Mother. — Spear *v.* Hiles, 67 Wis. 361, 30 N. W. 511.

25. People *v.* Clark, 33 Mich. 112, in which case it was held that the opinions of medical experts that sexual intercourse under the circumstances described by the complainant — *i. e.*, in a buggy — was highly improbable, if not impossible, and also as to the pain and suffering the complainant would have experienced had such an act taken place, was admissible. See also Oakley *v.* State, 135 Ala. 29, 33 So. 693. *Compare* Dillard *v.* State, 58 Miss. 368; Cook *v.* State, 24 N. J. L. 843.

Whether Person With Wooden Leg Was Incapacitated From Kneeling. — Whether a person with a wooden leg is incapacitated from kneeling, and thereby rendered incapable of committing the offense in the manner charged, is a subject-matter of inquiry, justifying the introduction of expert medical testimony to assist the jury in arriving at a correct conclusion. State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

Possibility of Penetration. — The prosecutrix being but twelve years old and the defendant fifty-one, a physician might properly be asked whether the privates of a well-developed man could have penetrated hers. Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

Examination of Prosecutrix Made After Lapse of Twelve Days. — On a

H. Wounds. — a. *In General.* — It has been held that expert testimony is admissible upon questions which arise as to wounds, their nature, cause and effect.[26]

b. *Infliction.* — **(1.) Means and Instrumentalities.** — According to the weight of authority a medical expert who has examined a wounded person, or who has made a *post-mortem* examination of a person who has been killed, may give his opinion not only as to the nature and effect of the wound, but also as to the manner in which and the instrument with which it might have been inflicted.[27]

prosecution for rape, the prosecution may show the results of a medical examination of the person of the prosecutrix, made twelve days after the alleged commission of the offense. State *v.* Teipner, 36 Minn. 535, 32 N. W. 678.

Cause of Abnormal Condition of Parts. — In Com. *v.* Lynes, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709, which was a prosecution for incest, it appeared that the girl with whom the offense was alleged to have been committed was thirteen years old. Medical experts who examined the girl six weeks after the time of the alleged offense were permitted to testify to the abnormal condition of the girl's private parts at the time they examined her, and to the causes which would produce such condition, and it was held that such testimony was admissible.

Pregnancy Resulting From Rape. Young *v.* Johnson, 46 Hun (N. Y.) 164.

26. *United States.* — Kelly *v.* United States, 27 Fed. 616.

Alabama. — Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Page *v.* State, 61 Ala. 16.

Arkansas. — Ebos *v.* State, 34 Ark. 520.

California. — People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Connecticut. — State *v.* Lee, 65 Conn. 205, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

Georgia. — Vonpollnitz *v.* State, 92 Ga. 16, 18 So. 301, 44 Am. St. Rep. 72.

Kansas. — State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

Maryland. — Davis *v.* State, 38 Md. 15.

Michigan. — People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

Nebraska. — Schlencker *v.* State, 9 Neb. 241.

As to How Wounds Heal. — In People *v.* Conroy, 153 N. Y. 174, 47 N. E. 258, which was a prosecution for murder, a surgeon was permitted to testify that a wound made by an instrument not excessively sharp would close up somewhat after the wound had been inflicted and the instrument withdrawn. It was held that such evidence was proper for the jury to consider.

Difference Between Direct and Glancing Blows. — In Powers *v.* Mitchell, 77 Me. 361, medical experts testified in substance that they should expect a greater injury from a direct blow than from a glancing one, and it was held that the subject was within the range of the experience of medical experts, accustomed to observe the effect of blows upon the human body, and that the evidence was competent.

Whether Murderer Would Be Spattered With Blood. — In Bram *v.* United States, 168 U. S. 532, which was a prosecution for murder, it was held that there was no objection to a question asked of a medical witness, whether, in his opinion, a man standing at the head of a recumbent person and striking blows on that person's head and forehead with an ax, would necessarily be spattered, or covered with, some of the blood. The court declared that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness.

Whether Fracture Was Recent or Not. — Lindsay *v.* People, 63 N. Y. 143.

Exit and Entrance of Bullet. People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

27. State *v.* Knight, 43 Me. 11.

Bruises Made by Hand. — But it has been held in cases which do not seem to be in accord with the general trend of the authorities that it is not proper to allow an expert to say that bruises impressed

This was a prosecution for murder. The court said: "The form and appearance of the wounds upon the deceased having been ascertained by an expert, it was a proper inquiry to the same, when a witness, whether a razor before him, independent of the place where it was found, and the dust upon it, in his opinion could have produced the wound, and proper to be answered. The most obvious object was to ascertain if the wound examined corresponded in form with that which could be caused by that particular instrument. If his intention was to base his opinion upon other circumstances than the form and properties of the razor, such intention could have been ascertained on further examination, and if the opinion was founded upon facts of which the jury could judge as well as an expert, it could have been excluded." See also the following cases:

United States. — Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945.

Arkansas. — Fort *v.* State, 52 Ark. 180, 11 S. W. 159, 20 Am. St. Rep. 163.

Iowa. — State *v.* Seymour, 94 Iowa 699, 63 N. W. 661, in which case the court *followed* State *v.* Porter, 34 Iowa 131, and State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Maine. — State *v.* Pike, 65 Me. 111.

Maryland. — Williams *v.* State, 64 Md. 384.

Michigan. — People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625; State *v.* Harris, 63 N. C. 1.

Virginia. — Mendum *v.* Com., 6 Rand. 704.

Wisconsin. — Carthaus *v.* State, 78 Wis. 560, 42 N. W. 629.

Contra. — In Wilson *v.* People, 4 Park. Crim. Rep. (N. Y.) 619, where it was held error to allow a physician who had made a *post-mortem* examination to describe with particularity a wound found on the head of the decedent and thereupon to testify that such a wound was caused by a blow from some blunt instrument, the court said: "To answer properly whether the wound discovered on McCarty's head was produced by a sharp or blunt weapon required no peculiar knowledge, and after the physician described minutely the character of the wound and the indentation of the skull bone, and expressed the opinion that concussion of the brain was produced by the blow, the jury were just as competent as these professional experts to find or guess what kind of weapon caused the skull bone to be pressed in as described, and whether it was blunt or otherwise. It is obvious that a great variety of weapons would produce such an injury as was found on the head of the deceased; and if there was to be any guessing on the subject, the jury, and not the witness, was alone competent to do it."

As to How Brakeman Was Injured. — In Missouri P. R. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130, which was an action to recover damages for the death of a brakeman on a railroad train, a question of fact was presented by reason of certain proof of the undue projection of a bolt from the end of a car and certain bruises on the body of the deceased. It was held that in order to establish the fact that the negligent construction of the car was the proximate cause of the injury, it was not proper to ask medical witnesses questions of which the following was a type: "Assuming that a man about thirty-four years of age engaged as a brakeman on a railway train, entered between two cars for the purpose of making a coupling, upon the end of which there appeared to be a stake pocket, being a piece of iron about three or four inches long by three inches wide, and around which there was an iron groove and a band of iron, and adjacent to that a bolt protruded beyond the nut, which has a flat surface and is about an inch in diameter; that upon the body of the man was found a spot the size of a silver dollar, discolored, dark, and

him with the idea or belief that they were made with a person's hand.[28]

Gunshot Wounds. — It has been held not only that an expert may testify as to the nature of gunshot wounds and as to how they were inflicted,[29] but also that he may testify as to the caliber of the bullet which was used.[30]

(2.) Position of Wounded Person and Assailant. — According to the overwhelming weight of authority the opinions of medical experts are not admissible to show the position of an injured person at the time the wound was received, or the position of the person who inflicted it, because, as has been said, surgeons are not presumed to be experts in the matter of giving or receiving wounds, and the jury are equally capable of drawing the proper inferences from the facts proved.[31]

still susceptible to pressure by manipulation, which one of these two instruments, that is, the stake pocket or the bolt, could produce the wound I have described?"

28. State *v.* Senn, 32 S. C. 392, 11 S. E. 292; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813. In the latter case, which was a prosecution for murder, the question was whether the decedent had been choked to death or had been drowned, and it was held that it was improper to allow a medical expert who had assisted in the autopsy to testify that when he looked at the marks on the decedent's neck "the idea seemed to come to him that they were made by hands." It was further held that it was error to allow another medical expert to testify that the wounds looked like finger-marks. *Compare* Castner *v.* Sliker, 33 N. J. L. 95, wherein a physician who had been called upon to prescribe for the defendant and who had examined his eyes, and who had described the injuries which they had received by which the defendant was rendered permanently blind, was asked how such injury could be produced, to which he answered: "By gouging." It was held that such evidence was admissible.

29. Rash *v.* State, 61 Ala. 89; Bearden *v.* State (Tex. Crim.), 73 S. W. 17. In the latter case a witness who showed that he was qualified to testify as an expert in the use of firearms was permitted to testify that the decedent was killed with a double-barreled muzzle-loader, which was loaded with squirrel-shot, and that the shot which struck the deceased in the face was fired from a distance of about twenty steps, and that the shot which made a hole in his head was fired from a distance of about ten inches.

30. People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833. In this case the witness had not only the knowledge and experience of ordinary physicians, but also possessed peculiar knowledge as to gunshot wounds, the size of bullets, the caliber of firearms, etc.

31. Kennedy *v.* People, 39 N. Y. 245. See also the following cases:

Arkansas. — Brown *v.* State, 55 Ark. 593, 18 S. W. 1051.

California. — People *v.* Hill, 116 Cal. 562, 48 Pac. 711.

Iowa. — State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

Maryland. — Davis *v.* State, 38 Md. 15.

Mississippi. — Foster *v.* State, 70 Miss. 755, 12 So. 822; Dillard *v.* State, 58 Miss. 368.

New Jersey. — Cook *v.* State, 24 N. J. L. 843.

New York. — Manke *v.* People, 17 Hun 401.

Texas. — Blain *v.* State, 33 Tex. Crim. 236, 26 S. W. 63; Thompson *v.* State, 30 Tex. App. 325, 17 S. W. 448.

As to Whether Decedent Was Shot by Man on Horseback. — In Cooper *v.* State, 23 Tex. 331, it was held that it was not proper to allow a medical man who assisted in the examination of the body of a dead

(3.) Direction From Which Injury Was Inflicted. — It has been held that a medical expert, after describing a wound and its location and giving his opinion as to the character of the weapon by which it was caused, may give his opinion as to the direction from which the wounded person was assailed.[32] It has been further held that such a witness is competent to testify relative to the elevation at which a pistol must have been held in order to have inflicted the wound.[33]

(4.) Distance at Which Shot Was Fired. — In cases of gunshot wounds it is held that medical experts who are qualified by special experience as to gunshot wounds, powder-marks, etc., may testify with respect to the distance at which a firearm was discharged when it inflicted a wound.[34]

(5.) Force. — The question as to the amount of force which was required to inflict the wound with the instrument which was used is, it has been held, one proper for medical expert testimony.[35]

man to testify that he had been shot by someone who was on horseback, or some other elevation.

Position of Body When Bullet Entered It. — In Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071, which was a prosecution for murder, a medical expert, who had examined the wounds of the decedent, was permitted to testify that from the appearance of the wounds he should judge that at the time the decedent was shot he was in somewhat of an upright position. It was held that such testimony was inadmissible.

32. Hopt *v.* Utah, 120 U. S. 430; Perry *v.* State, 110 Ga. 234, 36 S. E. 781; Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568; People *v.* Hopt, 4 Utah 247, 9 Pac. 407. *Compare* People *v.* Westlake, 62 Cal. 303, which was a prosecution for murder. It was held that whether the wound of which the decedent died could have been inflicted by a pistol-shot fired by the defendant from a certain direction was a fact to be found by the jury from the evidence of the circumstances attending the homicide, or to be inferred from the relative position of the parties at the time the shot was fired, and that it was not a matter of science or skill such as required the opinion of a medical expert. See last preceding note.

33. Kelly *v.* United States, 27 Fed. 616.

34. State *v.* Asbell, 57 Kan. 398, 46 Pac. 770, in which case the court said: "These symptoms and characteristics do not lie within the range of common experience or common knowledge, and inexperienced persons are not as liable to reach a correct conclusion as persons who have been instructed by study and experience. The characteristics of the wound, such as the color and condition of the skin around it, the coagulation of the blood mixed with powder, the depth of the wound, and the disturbance of the tissues throughout, cannot be easily communicated; and some of the indications which would mean much to the expert could not well be described to an inexperienced person. It is well settled that medical experts may give an opinion as to the means by which a wound was inflicted." See also to the same effect People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; State *v.* Justus, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470. *Compare* People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709, where it was held that a medical witness is not as such qualified as an expert to testify as to his opinion, based upon his examination of a person who had been shot, as to the distance of such person from the muzzle of the gun at the time of its discharge.

35. People *v.* Fish, 125 N. Y. 136, 26 N. E. 319. In this case, which was a prosecution for murder, it appeared that the deceased had been killed by a blow on the neck with a narrow blade used for opening cigar boxes. A physician and surgeon, called as a witness for the

(6.) **Self-Infliction. — Suicide. — In General.** — Upon the question whether or not a wound was self-inflicted, or whether a person who died from a wound committed suicide, expert testimony is not admissible,[36] except in rare cases, and where the wound was of an extraordinary nature, or on a portion of the body as to which ordinary men have little or no knowledge.[37]

(7.) **Accidental Infliction.** — It is not proper to allow an expert to express an opinion as to whether a self-inflicted wound was accidental or not.[38]

31. Merchants, Manufacturers and Traders. — A. In General. It is held that merchants, manufacturers and traders may enlighten the court and jury by giving testimony as to matters pertaining peculiarly to their business, and which are not within the knowledge and comprehension of men of ordinary experience.[39]

prosecution, after testifying that he had examined the wound and made a *post-mortem* examination, was asked and permitted to answer, under objection and exception, this question: "Taking the instrument as it now is, how much force would be necessary to drive it through the tissues you have described and into the vertebrae?" The answer was: "I should think it would take a great deal of force." It was held that the question and answer were competent, as the evidence called for was in the nature of expert evidence.

36. Ætna Life Ins. Co. *v.* Kaiser, 24 Ky. L. Rep. 2454, 74 S. W. 203.

37. State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. Rep. 202, 27 L. R. A. 498. In this case which was a prosecution for murder, the victim of the crime charged was a woman whose death was caused by a lacerated wound in the uterus made by some instrument used in the production of an abortion. It was held that it was proper to allow a medical expert who had made a *post-mortem* examination and had examined the woman's uterus and described its condition to state whether or not in his opinion the wound was self-inflicted. The court said: "It is true that a wound may be so situated that the practicability of self-infliction is an inference which all men are competent to draw, requiring no peculiar knowledge or experience, and therefore not a proper subject of expert testimony. But to draw such an inference from this particular wound on the interior surface of the womb of the deceased, plainly required peculiar knowledge and experience not common to the world." See also Beckett *v.* North Western Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923, in which case expert evidence was introduced tending to show that it is very rarely that a suicide inflicts a wound on himself on the back of his person.

Wound Inflicted on Neck With Razor. — In State *v.* Knight, 43 Me. 11, it was held that it was proper to allow a medical expert to testify that in his opinion a wound described in the neck of the decedent could not have been inflicted by her own right hand.

38. Treat *v.* Merchants' Life Ass'n, 198 Ill. 431, 64 N. E. 992.

39. Erhardt *v.* Ballin, 55 Fed. 968; Alfonso *v.* United States, 2 Story (U. S.) 421, 1 Fed. Cas. No. 188; Reed *v.* New, 35 Kan. 727, 12 Pac. 139; Sexton *v.* Lamb, 27 Kan. 426. See also Forcheimer *v.* Stewart, 73 Iowa 216, 32 N. W. 665, 35 N. W. 148, *holding* that a grocer may testify as to the soundness of hams, etc.; Ah Tong *v.* Earle Fruit Co., 112 Cal. 679, 45 Pac. 7, in which case it was held that witnesses engaged in the business of packing fruit, and who are sufficiently skilled to justify the reception of their opinions, may give an estimate as to the weight of fruit packed in boxes and shipped without being weighed. *Compare* Boire *v.* McGinn, 8 Or. 467, in which case the books of a partnership failed to show the true state of its busi-

32. Milling. — Upon questions pertaining to mills and the business of milling the testimony of millers and millwrights is admissible.[40]

33. Mines and Mining. — In General. — Experienced miners are allowed to testify in relation to matters of skill in their department of labor which involve special training, and which only those skilled in such work are capable of comprehending.[41] Thus, one who is duly

ness, and it was held that while resort may be had to a calculation of the profits from the amount of merchandise shown to have been sold by the firm at the rate of profit proven to have been made on said merchandise in that particular business, resort cannot be had to expert testimony of witnesses engaged in a similar business, to prove what profit was made by the firm in their business, for the purpose of charging one of the partners therewith, in a settlement of their accounts.

Ability of Merchant to Identify Goods From Color and Quality. Buchanan *v.* State, 109 Ala. 7, 19 So. 410. It was held that the defendant should have been permitted to show by an experienced merchant that in his opinion a merchant cannot identify his goods from their color and quality only.

Fairness of Test to Which Manufactured Article Was Subjected. Chicago *v.* Greer, 9 Wall. (U. S.) 726.

Amount of Damages to Safe. Diebold Safe & Lock Co. *v.* Holt, 4 Okl. 479, 46 Pac. 512, in which case it was held that it was proper to allow the witnesses to state the amount of damages in dollars.

Loss of Ice in Handling and Selling. — Sexton *v.* Lamb, 27 Kan. 426.

Meat Packers. — In Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906, it was held that witnesses experienced in working in a pork-house are competent to testify as to the capacity of such house.

Infringement of Trade-mark. — In Williams *v.* Brooks, 50 Conn. 278, 47 Am. Rep. 642, it was held that it was permissible for the plaintiff to show by the testimony of witnesses, who were or had been wholesale dealers in hairpins in New York and Philadelphia, that the defendant's ounce packages of hairpins so closely resembled those of the plaintiff as to mislead an ordinary purchaser and customer. See also *In re* Worthington Co., 14 L. R. Ch. Div. 8, where brewers deposed that in their opinion a proposed trade-mark for ale would be calculated to deceive "as the two marks might, and probably would, be exhibited together in houses where fermented liquors are sold." See further Gorham Co. *v.* White, 14 Wall. (U. S.) 511, where the testimony of die-sinkers, designers, editors of scientific publications, solicitors of patents and dealers, was received upon the question whether ordinary purchasers would be misled by the similarity between two designs for forks and spoons.

40. Edward P. Allis Co. *v.* Columbia Mill Co., 65 Fed. 52; Hammond *v.* Woodman, 41 Me. 177, 66 Am. Dec. 219; Cook *v.* England, 27 Md. 14, 92 Am. Dec. 618.

Necessity for Repairs and Additions to Mill. — Taylor *v.* French Lumbering Co., 47 Iowa 662.

Capacity of Mill. — Read *v.* Barker, 32 N. J. L. 477, *s. c.* 30 N. J. L. 378; and see Burns *v.* Welsh, 8 Yerg. (Tenn.) 117.

41. Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771, in which case witnesses for the plaintiff were permitted, over the defendant's objection, to state, in substance, what was the proper method of timbering a drift run. The court said: "They spoke only as to the proper way to timber it. We think there was no error in this. These witnesses qualified as experienced miners. The questions related to matters of skill in a department of labor that requires special training, and to which only those skilled in such work were competent to give intelligent answers." See also Montana Railway Co. *v.* Warren, 137 U. S. 348; Sowden *v.* Idaho Quartz Mining Co., 55 Cal. 443; Chambers

qualified to testify on the question may give his opinion as to whether the superintendent or boss in a mine was a competent man to be entrusted with its superintendence;[42] and a witness may testify as an expert as to the feasibility of reducing a certain ore, and extracting a certain mineral therefrom, when it appears that his knowledge and experience are such as to qualify him to express an opinion.[43]

34. Nautical Matters. — A. In General. — Upon a great variety of questions relating to nautical matters it has been held that expert evidence is admissible, and it is worthy of remark that in cases where such questions have arisen the courts have been unusually liberal in resorting to expert testimony.[44]

B. Seaworthiness. — Upon the question whether a boat was seaworthy or not it is well settled that the testimony of experts is admissible.[45]

v. Brown, 69 Iowa 213, 28 N. W. 561; Blake *v.* Griswold, 103 N. Y. 429, 9 N. E. 434; Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799; Wells *v.* Davis, 22 Utah 322, 62 Pac. 3.

Existence of Coal Seams. — Stanbaugh *v.* Smith, 23 Ohio St. 584.

Number of Props Required in Mine. — Donk Bros. C. & C. Co. *v.* Stroff, 200 Ill. 483, 66 N. E. 29.

Construction of Cross-entries. McNamara *v.* Logan, 100 Ala. 187, 14 So. 175.

Ladder-holes in Mine. — In Mayhew *v.* Sullivan Mining Co., 76 Me. 100, which was an action to recover damages for injuries sustained by the negligence of the defendants, a witness was asked the following questions: "Have you ever known ladder-holes at a lower level to be railed or fenced round?" "As a miner, is it feasible, in your opinion, to use a ladder-hole with a railing round it?" "Have you ever seen a ladder-hole in a mine, below the surface, with a railing round it?" And another witness was asked to testify whether from his experience "this ladder-hole," as it was left, was constructed in the usual and ordinary manner of ladder-holes in mines, and in a proper way. It was held that these questions were properly excluded.

42. Buckalew *v.* Tennessee Coal I. & R. Co., 112 Ala. 146, 20 So. 606.

43. New Jersey Zinc & Iron Co. *v.* Lehigh Zinc & Iron Co., 59 N. J. L. 189, 35 Atl. 915.

44. Folkes *v.* Chadd, 3 Doug. 157, in which case Lord Mansfield called particular attention to the necessity for such evidence in actions involving the unskillful navigation of ships, and declared that in such cases he always sent for nautical experts. See also McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, which was an action on a policy of marine insurance. In that case Story, J., said: "What is a competent crew for the voyage; at what time such crew should be on board; what is proper pilot ground; what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage, are questions of fact dependent upon nautical testimony." See further the following cases:

United States. — The Alaska, 33 Fed. 107; The Iberia, 40 Fed. 893; Western Assurance Co. *v.* Weed, 40 Fed. 844.

Alabama. — McCreary *v.* Turk, 29 Ala. 244.

Massachusetts. — Eldredge *v.* Smith, 13 Allen 140.

Missouri. — Patrick *v.* The John Quincy Adams, 19 Mo. 73.

New York. — Walsh *v.* Washington Ins. Co., 32 N. Y. 427.

Pennsylvania. — Reed *v.* Dick, 8 Watts 479.

As to Settling of Boat at Stern. Clark *v.* Detroit Locomotive Works, 32 Mich. 348.

45. Baird *v.* Daly, 68 N. Y. 547; State *v.* Jacobs, 51 N. C. 284. See

C. Collisions. — It has been declared, and is settled by numerous cases, that in collision cases the parties may call persons of nautical skill and experience as expert witnesses, and that they may show by such witnesses what the general usage is in respect to disputed questions of navigation not controlled by the sailing rules prescribed by congress, and that in certain cases where better guides are not furnished by law, such witnesses may be allowed to testify as to what is and what is not good seamanship.[46]

D. Seamanship. — Moreover, according to numerous well-considered cases expert testimony is admissible upon various questions as to what is or is not good seamanship.[47] On the other hand, however, authority is not wanting in support of the proposition that the opinions of skilled navigators are not admissible upon questions of negligence, where such opinions would be an invasion of the province of the jury.[48]

E. Jettison, Mooring, Stowage. — The opinion of an expert is competent upon the question whether jettison was necessary and

also Thornton *v.* Royal Exchange Assurance Co., 1 Peake (Eng.) 25; Moore *v.* Westerfelt, 27 N. Y. 234.

46. City of Washington, 92 U. S. 31. See also The Alaska, 33 Fed. 107, which was a libel to recover damages for the loss of a boat and the personal effects of her crew. In the latter case the court said: "Whether such care and good judgment had been exercised under the circumstances of a particular case, is a question which may depend upon a usage of navigation, and may be ascertained by the opinion of experts."

Whether Collision Could Have Been Avoided. — Fenwick *v.* Bell, 1 Car. & K. (Eng.) 312, which case was followed in Spickerman *v.* Clark, 9 Hun (N. Y.) 133.

Direction From Which Boat Was Struck. — Steamboat Clipper *v.* Logan, 18 Ohio 375.

47. Malton *v.* Nesbit, 1 Car. & P. 70, where it was held by Lord Chief Justice Abbot that it is proper to call experienced nautical men and ask them whether in their judgment particular facts which have been proved amounted to gross negligence on the part of the captain of a vessel. Likewise in Fenwick *v.* Bell, 1 Car. & K. (Eng.) 312, it was held that in an action for running down the plaintiff's ship a nautical witness may be asked whether, having heard the evidence, and admitting the facts to be true, he is of the opinion that the collision could have been avoided by proper care. See further Union Ins. Co. *v.* Smith, 124 U. S. 405. And see Cook *v.* Parham, 24 Ala. 21.

Competency of Pilot. — Hill *v.* Sturgeon, 28 Mo. 323.

Whether Vessel Was Skillfully or Negligently Brought to Pier. Baltimore Elevator Co. *v.* Neal, 65 Md. 438.

48. Crofut *v.* Brooklyn Ferry Co., 36 Barb. (N. Y.) 201, in which case it was held that in an action to recover damages for the injury to the plaintiff's boat caused by a collision it was erroneous to ask the pilot of the defendant's boat the following questions: "Was the collision caused by any negligence of yours?" "From what you discovered of the tug coming down, was she in fault?" The court said: "The purpose of these inquiries was nothing less than to elicit the opinion of the witness upon the questions put in issue by the pleadings, and which were to be determined by the jury from all the facts disclosed in the course of the trial. The evidence was properly rejected." See also Carpenter *v.* Eastern Transportation Co., 71 N. Y. 574.

proper or not;[49] and upon questions arising as to the mooring of vessels,[50] and as to the proper method of loading and stowing cargoes,[51] or of towing vessels.[52]

F. Wrecks. — Upon the value of a wrecked vessel the testimony of experts may be admissible.[53]

35. Photography. — Expert testimony is admissible upon the question whether photographs were well executed.[54]

36. Railroading. — A. In General. — It is well settled that experts may testify upon questions as to the business of railroading which are not comprehensible by men of average intelligence.[55]

49. Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645.

50. Moore *v.* Westervelt, 27 N. Y. 234.

51. A. J. Tower Co. *v.* Southern Pacific R. Co. (Mass.), 69 N. E. 348. See also Price *v.* Powell, 3 N. Y. 322, in which case it was held that expert evidence was admissible upon the question whether marble was properly stowed in a vessel. *Compare* New England Glass Co. *v.* Lovell, 7 Cush. (Mass.) 319.

Covering Deck Loads. — Schwinger *v.* Raymond, 105 N. Y. 648, 11 N. E. 952.

52. Transportation Line *v.* Hope, 96 U. S. 297.

53. Blanchard *v.* New Jersey Steamboat Co., 59 N. Y. 292, in which case it was held that in an action to recover damages where a vessel had been sunk by a collision, it is competent, as bearing upon the question of damages, to prove by experts that the vessel could not be raised or that it would cost more to raise her than she would be worth when raised.

Expenses of Raising and Repairing Sunken Boat. — Paige *v.* Hazard, 5 Hill (N. Y.) 603.

54. Barnes *v.* Ingalls, 39 Ala. 193. In this case it was held that an ambrotypist and daguerreotypist whose business, as the courts must judicially know, is closely connected with that of the photograph painter, is competent to give his opinion, as an expert, on the question whether photographs are well executed, especially where it appears that he has also been employed in a photograph gallery, and has practiced, to a limited extent, the art of painting photographs.

55. Fort Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742. See also Little Rock & F. S. R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363, wherein it was held that it was proper to allow an expert in the adjustment of freight charges to give his opinion as to the reasonableness of a given charge. See likewise Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64; Quinlan *v.* Rock Island & P. R. Co., 113 Iowa 89, 84 N. W. 960; Brownfield *v.* Chicago R. I. & P. R. Co., 107 Iowa 254, 77 N. W. 1038; Grimwell *v.* Chicago & N. W. R. Co., 73 Iowa 93, 34 N. W. 758; Whitsett *v.* Chicago, R. I. & P. R. Co., 67 Iowa 150, 25 N. W. 104; Crawford *v.* Wolf, 29 Iowa 567; Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737; Price *v.* Richmond & D. R. Co., 38 S. C. 199, 17 S. E. 732; Olson *v.* Oregon S. L. R. Co., 24 Utah 460, 68 Pac. 148.

Distance at Which to Stand From Passing Train. — In Culver *v.* Alabama M. R. Co., 108 Ala. 330, 18 So. 827, the defendant averred that the decedent, a section hand, was guilty of contributory negligence, because he stood in dangerous proximity to a moving train. It was held that it was error to refuse to allow an expert witness to answer that a distance of ten feet from a passing train was a safe distance for a section hand to stand while the train was passing.

What Constitutes "Regular Passenger Train." — In Illinois C. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119, which was a petition for mandamus to compel a railroad company to cause, in compliance with a statute, all of its regular passenger trains to be stopped at a certain station, etc., the question arose whether

B. Roadbed, etc. — In General. — It has been held in numerous cases that expert testimony is admissible upon questions as to the construction of roadbeds, crossings, switches, and stationary appliances and structures which are used in connection with railroads.[56] Thus, it has been held that engineers who are experienced in the building of railroads may testify as to their safety,[57] and as to the safety and sufficiency of embankments and bridges;[58] and mail catchers;[59] and it has been held that experts may testify as to the proper method of constructing crossings,[60] and as to the construction of culverts;[61] but upon questions which are within the province of the court and jury experts will not be allowed to express opinions.[62]

a certain fast mail train was a regular passenger train and it was held that the opinion of the defendant's vice-president upon this question was not admissible because this was the very question which the court trying the case without a jury was called upon to decide.

56. Louisville N. R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40, in which case it was held that it was proper to ask an expert the following question: "How many braces ought to be put on a rail in a curve like this?" See also Missouri P. R. Co. *v.* Fox, 60 Neb. 531, 83 N. W. 744; Fort Worth & D. C. R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686.

Completion of Railroad. — Whether a railroad was finished at a certain date is a question of fact involving science and skill, and not a mixed question of law and fact, and upon such question the testimony of experts is admissible. Hilton *v.* Mason, 92 Ind. 157, which was a case involving the taxation of a railroad.

Condition of Track After Rains. Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 74.

Effect of Sand Washed Onto Track. St. Louis A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

Construction of Roadbed at Switches. — Galveston, H. & S. A. R. Co. *v.* Pitts (Tex. Civ. App.), 42 S. W. 255.

57. Colorado M. R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701.

58. Bellinger *v.* New York C. R. Co., 23 N. Y. 42, in which case it was held that it was competent for an engineer familiar with the locality and with the structures to state whether embankments and bridges were skillfully constructed with reference to a creek.

Cuts, Embankments, etc. — Central R. Co. *v.* Mitchell, 63 Ga. 173.

59. Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272, where witnesses were allowed to testify that when mail-catchers are placed at the proper and usual distance from the track, they are not dangerous to the employes of the railroad, as they can be readily seen at a considerable distance, and with the use of ordinary care and prudence all danger can be avoided. The court did not pass upon the admissibility of such evidence.

60. St. Louis A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

61. Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305.

62. Louisville & N. R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

Duty to Keep Crossing and Bridge in Repair. — In Chicago & A. R. Co. *v.* Springfield & N. W. R. Co., 67 Ill. 142, which was a prosecution to assess damages for the right of way by one railroad company through the right of way of another railroad company, it was held that the following question called for an opinion upon a mere question of law, and was improper: "Whose duty would it be to keep the crossing and bridge in repair after the work you have described is put in?"

Whether Railroad Could Be Properly Fenced. — Indiana B. & W. R. Co. *v.* Hale, 93 Ind. 79.

Cattle Guards. — It has been held that expert testimony is not admissible upon questions as to the propriety or necessity of cattle guards;[63] and it would seem that such evidence is not admissible upon questions as to the sufficiency of a cattle guard.[64]

C. EMPLOYES. — a. *In General.* — In not a few cases questions have arisen as to the duties, authority and competency of railroad employes which have made it necessary to resort to expert testimony, but as has been so often said and shown throughout this article, the witness must not be permitted to invade the province of the jury.[65]

Comparison With Other Tracks. Where it is alleged that a railroad company was negligent in allowing the surface of its track to be so uneven as to endanger its servants who were walking thereon in discharge of their duties, an expert will not be permitted to give his opinion as to how the defendant's track compared with those of other well-conducted railroads in the state. Louisville & N. R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

63. Pennsylvania R. Co. *v.* Mitchell, 124 Ind. 473, 24 N. E. 1065. In Amstein *v.* Gardner, 134 Mass. 4, the plaintiff's horse had escaped onto a railroad bridge and been injured, and it was held that it was not competent for the plaintiff to introduce the testimony of an expert to show his opinion that a cattle-guard or barrier was necessary at a particular point, because the question involved a consideration of the amount of travel on the highway, and other things, suitable to be judged of by the jury.

64. Swartout *v.* New York C. & H. R. R. Co., 7 Hun (N. Y.) 571, in which case the court said: "When the manner of its construction was shown the jury was competent to speak of its fitness for use, as was any person engaged in its construction, or in the construction of such guards, however numerous. It does not require experience in the construction of cattle-guards to know that if the timbers composing the superstructure are so near each other that the feet of horses or cows will not pass between them the guard furnishes no obstruction to cattle desiring to pass over." *Compare* Johnson *v.* Detroit & M. R. Co. (Mich.), 97 N. W. 760, where it was held that it was error to refuse to allow the defendant's roadmaster to answer the following question: "From your knowledge of the operation of cattle-guards in deterring cattle and turning back stock, I ask you to state what condition this cattle-guard was in when you examined it after these cattle were killed — what condition this cattle-guard was in, so far as being in a condition to turn cattle away and prevent cattle from passing over it?"

65. Butler *v.* Chicago, Burmingham & I. R. Co., 87 Iowa 206, 54 N. W. 208, in which case it was held that it was proper to allow an expert to testify that it is customary for a clinker man to help the hostlers in moving locomotive tanks. See also Galveston H. & S. A. R. Co. *v.* Davis (Tex. Civ. App.), 45 S. W. 956, *holding* that it was permissible to allow a railroad man to testify as to the recklessness of an engineer. See further Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 228.

Orders Which Conductor May Give. — It is not matter for expert testimony to show that no railroad employe is required to get on and off a train while in motion; that neither the conductor nor any other officer can require an employe to get on and off a moving train, and that if such order is given, the employe it not required to obey it. Central R. Co. *v.* Debray, 71 Ga. 406.

Authority of Station Agent. — A witness familiar with the subject may testify as to the powers habitually exercised by station agents, as bearing on the extent of the authority conferred on them by usage, but cannot give his opinion from what he had seen, as to the possession of powers he had not known them to exercise. Lipscomb *v.* Houston & T.

b. *Requisite Number of Men.* — The better considered view seems to be that expert testimony is admissible upon questions as to the number of men necessary to handle rolling stock, although the cases are not in harmony.[66]

c. *Position of Employes.* — It has been held that persons skilled in the running of railroad trains may testify as to the proper place or position for employes to take at a given time and under certain circumstances.[67]

C. R. & Ex. Co., 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L. R. A. 869.

Qualifications of Brakeman. Louisville & N. R. Co. *v.* Davis, 99 Ala. 593, 12 So. 786.

Whether Inexperienced Man Can Couple Cars. — In an action against a railroad company by a brakeman to recover damages for personal injuries alleged to have been sustained while attempting to couple cars, a witness cannot testify as to whether an inexperienced man, who never had been instructed, could the first time he attempted it have made the coupling of the cars the plaintiff was attempting to couple when injured, such testimony not being of a fact, but of a matter of deduction or inference to be drawn by the jury from all the facts and circumstances of the case. Boland *v.* Louisville & N. R. Co., 106 Ala. 641, 18 So. 99.

Duties of Flagman. — Whether or not a train flagman who was injured while giving signals to the engineer was acting in the line of his duty or was assuming to act for the conductor is a question for the jury and one on which the opinions of experts will not be taken. Hudson *v.* Georgia P. R. Co., 85 Ga. 203, 11 S. E. 605.

Duties of Brakeman. — In Schlaff *v.* Louisville & N. R. Co., 100 Ala. 377, 14 So. 105, it was held that it is proper to receive expert testimony as to the duties of brakemen, their proper position, and the danger of riding on the edge of cars with their feet hanging over the sides of the cars. See also Quinlan *v.* Chicago, R. I. & P. R. Co., 113 Iowa 89, 84 N. W. 960.

Contributory Negligence of Brakeman. — In Allen *v.* Burlington C. R. & N. R. R. Co., 57 Iowa 623, 11 N. W. 614, the question was whether or not a brakeman had been guilty of negligence, and it was held that it was not proper to allow a witness who was familiar with the operations of railroad trains, and who knew the rules of the defendant company, to testify as to whether or not the plaintiff was acting in the line of his duty.

66. Union P. R. Co. *v.* Novak, 61 Fed. 573, in which case it was held that it was proper to allow an expert to testify that it was necessary to have two brakemen to set the brakes on a train like the one upon which the plaintiff was employed. On the other hand, in Cahow *v.* Chicago, R. I. & P. R. Co., 113 Iowa 224, 84 N. W. 1056, a witness who testified to a knowledge of the place where an accident had happened and to experience in moving cars, etc., with pinch-bars, was asked, "How many men are necessary to safely remove a tender with pinch-bars?" The court held that expert testimony on this question was not admissible, because the jury were capable to form an opinion for themselves, and the question was not one which involved special skill or study.

67. Helton *v.* Alabama M. R. Co., 97 Ala. 275, 12 So. 276, in which case it was held that in an action by a brakeman for injuries received by him while engaged in giving signals to an approaching train it is permissible for him to show that his proper position at such time was on the railroad track. Cincinnati & Z. R. Co. *v.* Smith, 22 Ohio St. 227, 10 Am. Rep. 729. *Compare* Fordyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255, where the question was whether a brakeman who had been injured had assumed the risk of riding on a flat car pushed in front of an engine. It was held that such question was not

D. Rolling Stock, Appliances, etc. — Expert testimony is admissible in many cases as to the construction, nature and operation of rolling stock and appliances which are used on railroads.[68] Thus it has been held that expert testimony is admissible to explain appliances for coupling cars, and how the same are used, but that the court should take proper care to confine such evidence within the proper bounds, and should not allow the witness to testify as to matters which are within the comprehension of men of ordinary knowledge and understanding.[69]

one that called for expert testimony. The court said: "To determine this question no special experience, knowledge, study or skill is required. All that was necessary to enable the jury to decide it correctly was proof of all the facts that shed light upon the subject."

Dangerous Position on Hand-car. Western R. of Ala. *v.* Arnett, 137 Ala. 414, 34 So. 997.

As to How Railroad Men Climb Ladder of Box-car. — In Southern Kan. R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113, which was an action against a railroad company to recover damages for the death of a passenger conductor, it was held that testimony of a railroad man as to how railroad men should and do ascend the ladder of a box-car was not competent upon the question whether or not the decedent was guilty of contributory negligence. The court said: "It is not claimed that the opinions of experts are necessary in the case; and to allow testimony as to how others climbed the ladder would be to create collateral issues as to the prudence of their conduct and to unnecessarily protract the trial. The question of whether Patterson was guilty of such negligence as would preclude a recovery was an issue before the jury, and the practice or usage of others would not tend to prove care on his part; and such testimony should not have been received."

68. Louisville & M. R. Co. *v.* Marbury Lumb. Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917, in which case expert testimony was given as to the spark-arresters in locomotives. See also Birmingham R. & Elec. Co. *v.* Baylor, 101 Ala. 488, 13 So. 793, which was an action involving the safety of a switch; International & G. N. R. Co. *v.* Collins (Tex. Civ. App.), 75 S. W. 814, in which latter case a car inspector was permitted to testify as to the condition of a brake, and as to whether defects therein could have been found out by proper inspection.

Construction of Truss-rod. — Missouri P. R. Co. *v.* Fox, 60 Neb. 531, 83 N. W. 744. See also Denver T. & F. W. R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

Double Deadwoods. — Baldwin *v.* Chicago, R. I. & P. R. Co., 50 Iowa 680. See also Muldowney *v.* Illinois C. R. Co., 36 Iowa 462.

"Whipping-straps" Over Railroad Bridge. — Louisville & N. R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

Whether Car Safe for Live Stock. Betts *v.* Chicago, R. I. & P. R. Co., 92 Iowa 343, 60 N. W. 623, 54 Am. St. Rep. 558, 26 L. R. A. 248.

Emission of Sparks by Locomotive. Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51, 24 N. W. 324.

Sufficiency of Spark-arresters. Bowen *v.* Boston & A. R. Co., 179 Mass. 524, 61 N. E. 141.

69. Missouri P. R. Co. *v.* Fox, 60 Neb. 531, 83 N. W. 744. See also Way *v.* Illinois C. R. Co., 40 Iowa 341.

Difference in Height of Cars. — In Gulf, C. & S. F. R. Co. *v.* Colbert (Tex. Civ. App.), 31 S. W. 332, a witness testified that if certain cars which the plaintiff had attempted to couple had been uniform in height and in good order the plaintiff would not have sustained injury, and it was held that this evidence was inadmissible. It was declared that it was permissible for the witness to state

E. Running and Management of Trains, etc. — a. *In General.* — That the running and management of railroad locomotives, trains and other rolling stock is so far an art outside of the experience and knowledge of ordinary jurors as to render the opinions of persons acquainted with the running and management thereof admissible and competent testimony in proper cases has been recognized in numerous cases.[70]

Propriety of Cutting Train While in Motion. — It has been held that the conclusion or judgment of a railroad conductor as to the propriety of cutting a train in two while in motion is not proper as expert testimony.[71]

Making Up Trains. — It has been held a duly qualified witness may testify as to how freight trains are made up, as to when the duty of the yardmaster ceases and the conductor's commences, and as to putting cars in sidings.[72]

b. *Derailment.* — Upon the question what caused the derailment of a train it has been held that expert testimony is admissible.[73]

c. *Braking.* — The operation and management of brakes may present a proper subject for expert testimony, but only where the question is one which is not readily comprehensible by the jury.[74]

the facts and then his opinion based upon those facts as to whether the cars were defective, but that it was not proper to allow the witness to state the cause of the injury.

70. *United States.* — Atchison, T. & S. F. R. Co. *v.* Myers, 63 Fed. 793; Union P. R. Co. *v.* Novak, 61 Fed. 573.

California. — Howland *v.* Oakland Consol. S. R. Co., 110 Cal. 513, 42 Pac. 983.

Georgia. — Railroad Co. *v.* Johnson, 38 Ga. 409.

Illinois. — Railroad Co. *v.* Reedy, 17 Ill. 580.

Michigan. — Lau *v.* Fletcher, 104 Mich. 295, 62 N. W. 357.

Missouri. — Mammerberg *v.* Railway Co., 62 Mo. App. 563.

New York. — Frace *v.* N. Y., L. E. & W. R. Co., 52 N. Y. St. 102, 22 N. Y. Supp. 958.

Ohio. — Railroad Co. *v.* Bailey, 11 Ohio St. 333; Cincinnati & Z. R. Co. *v.* Smith, 22 Ohio St. 227, 10 Am. Rep. 729.

Tennessee. — Byers *v.* Nashville C. & St. L. R. Co., 94 Tenn. 345, 29 S. W. 128.

Texas. — Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742.

Utah. — Olson *v.* Oregon S. L. R. Co., 24 Utah 460, 68 Pac. 148.

Vermont. — Quimby *v.* Railroad Co., 23 Vt. 387.

71. Jeffrey *v.* Kansas City & D. M. R. Co., 56 Iowa 546, 9 N. W. 884.

72. Price *v.* Richmond & D. R. Co., 38 S. C. 199, 17 S. E. 732.

73. Brownfield *v.* Chicago, R. I. & P. R. Co., 107 Iowa 254, 77 N. W. 1038, where it was held that it is proper to prove by an expert whether the peculiar action of a railroad locomotive indicated a broken axle and whether a broken axle might have derailed the train. But, of course, the witness must be duly qualified to speak upon the subject. Budge *v.* Morgan's L. & T. R. & S. S. Co., 108 La. 349, 32 So. 535, 58 L. R. A. 333.

74. Louisville N. R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75.

Separation of Train. — In Burns *v.* Chicago, M. & St. P. R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227, a brakeman on one of the defendant's freight trains was killed on account of the separation of the train. The train was passing over a portion of the track where there was a sag, then a rise or "hog's back," then a down grade, and the separation took place when the front end of the train was

And so upon questions as to the proper methods of coupling and uncoupling cars.[75]

d. *Switching.* — In an action involving the question whether a switch was negligently managed, it is competent to introduce expert testimony as to the methods generally adopted by prudent railroad men under similar circumstances.[76]

e. *Speed of Trains.* — Railroad men, such as locomotive engineers, conductors, firemen, etc., will be permitted to give their opinions as to the speed of engines and trains which they have observed;[77] and as to what speed is proper in the running of a train under given circumstances.[78]

f. *Stopping of Train.* — Expert evidence is admissible as to the distance within which a train can be stopped, this not being a subject within the range of common observation, but involving technical knowledge.[79]

on the down grade and the central portion was on the "hog's back." It was held that the opinion of an expert was not admissible to show how the brake should have been applied to prevent the accident, as the question was one for the jury.

75. Railroad Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050. See also Galveston H. & S. A. R. Co. *v.* Henning, 90 Tex. 656, 4 S. W. 392, in which latter case it was held that a duly qualified witness may state what is the proper and general rule governing an engineer with reference to awaiting signals from a brakeman engaged in coupling cars.

Coupling Cars While in Motion. Jeffrey *v.* Kansas & D. M. R. Co., 56 Iowa 546, 9 N. W. 884.

Use of Road Engine in Coupling and Uncoupling Cars. — Mobile & O. R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

76. Houston & T. C. R. Co. *v.* Cowser, 57 Tex. 293. See also Price *v.* Richmond & D. R. Co., 38 S. C. 199, 17 S. E. 732.

77. Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64; Kansas City M. & B. R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888; Louisville N. A. & C. R. Co. *v.* Shiras, 108 Ill. 617; Brown *v.* Rosedale Street R. Co. (Tex. App.), 15 S. W. 120; Riley *v.* Salt Lake R. & T. Co., 10 Utah 428, 37 Pac. 681.

78. Galveston H. & S. A. R. Co. *v.* Davis (Tex. Civ. App.), 45 S. W. 956.

Safe Rate of Speed at Which to Run Backing Engine. — In Cooper *v.* Central R. R. of Iowa, 44 Iowa 134, a locomotive engineer was permitted to testify that it was customary in "backing" an engine drawing a train after night, to run very slowly and carefully on account of danger in running trains in that way, and that those operating trains were instructed to exercise care when "backing." He testified as to the speed that is usual and considered safe under such circumstances. It was held that such evidence was competent.

79. Norfolk R. & L. Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740; New York C. & S. L. R. Co. *v.* Grand Rapids & I. R. Co., 116 Ind. 60, 18 N. E. 182, which was a controversy between two railroad companies whose roads crossed. It was held that a competent expert may give his opinion as to the distance at which it is safe to stop trains before going upon the crossing. See further Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; Maher *v.* Atlantic & P. R. Co., 64 Mo. 267; Schlereth *v.* Missouri P. R. R. Co., 115 Mo. 87, 21 S. W. 1110; Mott *v.* Hudson R. R. Co., 8 Bosw. (N. Y.) 345; Ward *v.* Chicago, St. P. M. & O. R. Co., 85 Wis. 601, 55 N. W. 771; Grimmell *v.* Chicago & N. W. R. Co., 73 Iowa 93, 34 N. W. 758; Mobile & M. R. Co. *v.* Blakely, 59 Ala. 471.

As to Means Taken to Stop Train. An engineer in charge of a train at

Time Allowed Passengers to Alight. — Experts in the running of trains have not been permitted to give opinions as to whether the time allowed for the passengers to alight from the train was sufficient.[80]

F. Street and Electric Railroads. — Likewise it has been held that experts may testify as to the operation and management of street and electric railroads;[81] but the court will not allow the witness to express opinions upon questions which are within the province of the jury.[82]

37. Ship-building. — Upon questions pertaining to ship-building which are not within the range of ordinary knowledge and experience it has been held that expert testimony is admissible.[83]

38. Surveying. — A. In General. — In admitting the testimony of surveyors the courts have been careful to confine them within the proper bounds, and to exclude opinions upon questions which are within the province of the court or jury.[84]

the time that an accident happened will not be allowed to testify that he used "all the means he had to stop the train," but will be confined to a statement of the means he did use. Tanner *v.* Louisville & N. R. Co., 60 Ala. 621.

Whether Train Was Stopped as Soon as Possible may be asked of competent witness. Alabama G. S. R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508.

An expert may testify as to how fast a train should be moving at a certain point in order to stop it at the usual place. Detroit R. Co. *v.* Von Steinburg, 17 Mich. 99.

80. Keller *v.* Railroad Co., 2 Abb. Dec. (N. Y.) 480. *Cited* with approval in Dillard *v.* State, 58 Miss. 368.

81. Riley *v.* Salt Lake R. T. Co., 10 Utah 428, 37 Pac. 681. See also Chicago St. R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796, *holding* that experts may testify as to the distance within which a street car can be stopped.

Proper Position of Driver When Operating Street Car. — In Czezewzka *v.* Benton-Belfontaine R. Co., 121 Mo. 201, 25 S. W. 911, witnesses who had experience as street-car drivers, and were familiar with the manner in which such cars should be driven, were allowed to testify as to the position in which the driver should be when operating a street car.

Operation of Cable Car at Intersection of Streets. — Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

82. Birmingham R. & Elec. Co. *v.* Jackson, 136 Ala. 279, 34 So. 994, in which case it was held that the testimony of a motorman that he was doing all that he could to stop his car was not admissible.

Competency of Motorman. — Langston *v.* Southern Elec. R. Co., 147 Mo. 457, 48 S. W. 835.

83. Clark *v.* Locomotive Works, 32 Mich. 348, in which case it was held that an expert may give his opinion as to whether a boat was fit to receive machinery. See also Thornton *v.* Royal Ex. A. Co., Peake N. P. 25, where Lord Kenyon admitted the testimony of a ship-builder on a question of seaworthiness. This latter case is cited in a note to Folkes *v.* Chadd, 3 Doug. 157, 26 E. C. L. 63. See also *supra*, "Nautical Matters."

84. Brantly *v.* Swift, 24 Ala. 390, *holding* that a surveyor who testifies that he is familiar with the peculiar marks used by United States surveyors in their government surveys, may give his opinion as an expert whether a particular line was marked by them.

Whether Line Was Run Before Field Notes Were Made may not be asked of expert. Reast *v.* Donald, 84 Tex. 648, 19 S. W. 795.

Whether Vacant Land Has Been Surveyed and Taken Up. — It has been held that a surveyor who had made a survey and plat of land alleged to be vacant under the headright laws may testify as to whether the land had been previously surveyed and taken up.[85]

B. Correctness of Surveys. — In numerous well-considered cases it has been held that surveyors may testify as to the correctness of plats or surveys.[86]

C. Monuments. — It is permissible to show by a surveyor whether piles of stones and marks on trees are monuments.[87]

D. Lappages. — A surveyor who is acquainted with certain land and who has done surveying with reference thereto may testify as to the lappages of other surveys and to the extent of them.[88]

E. Estimate of Distance. — It has been held that a surveyor who has been upon the ground may give an estimate of distance, although he has not actually measured it.[89]

39. Trade-marks. — Authority is not wanting in support of the proposition that in a suit for the infringement of a trade-mark, expert testimony is admissible upon the question whether the two trade-marks in question are so similar that persons of ordinary intelligence and care would be deceived into the belief that they were the same;[90] but it has been ably insisted that the admission

Conflicting Surveys, question for jury; not for witness. Bugbee Land and Cattle Co. *v.* Brents (Tex. Civ. App.), 31 S. W. 695.

Limitations Upon Opinions of Surveyors. — "A surveyor cannot be allowed, under any circumstances, to fix private right or lines by any theory of his own. Before a surveyor's evidence can be received at all it must be connected with the starting points and other places or lines called for by the grants under which the parties claim. His duty is neither more nor less than to measure geometrically in accordance with those *data,* and his science goes no further. It is not his business to decide questions of law, or to pass upon facts that belong to the tribunal dealing with the decision of facts. His testimony, as a man of science, is never receivable except in connection with the *data* from which he surveys, and if he runs lines they are of no value unless the *data* are established from which they are run, and those must be distinctly proven, or there is nothing to enable any one to judge what is the proper result." Jones *v.* Lee, 77 Mich. 35, 43 N. W. 855.

85. Pritchett *v.* Ballard, 102 Ga. 20, 29 S. E. 210. "The question as to whether or not the land had ever been surveyed was a question finally of fact. In was such a question, however, as the opinions of witnesses might be well calculated to throw light upon, the weight of the opinion being dependent necessarily upon the extent of the witness's information. We think it was competent testimony, even though it invoked an opinion, the witness undertaking to state the facts upon which that opinion was predicated."

86. Chicago St. R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796; Mincke *v.* Skinner, 44 Mo. 92; La Rue *v.* Smith, 153 N. Y. 428, 47 N. E. 796. *Compare* Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680.

87. Davis *v.* Mason, 4 Pick. (Mass.) 156. See also St. Louis Public Schools *v.* Risley, 40 Mo. 356.

Ancient Monuments. — Knox *v.* Clark, 123 Mass. 216.

88. Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800.

89. People *v.* Alviso, 55 Cal. 230.

90. McLean *v.* Flemming, 90 U. S. 245, where it is said that "Witnesses in great numbers were called by the complainant to testify that exhibits L and K of the respondent were calculated to deceive purchasers," the

of such evidence is in violation of the rule that it is improper to admit the opinions of experts or other persons where the inquiry is of such a nature that it appeals to the common understanding and ordinary intelligence.[91]

40. Waters and Watercourses. — In General. — Upon many questions pertaining to water and watercourses it has been held that expert testimony is admissible,[92] as to the laws of alluvial streams, the cause and manner of growth of deposits or sediments, and the effect of such deposits upon such streams;[93] as to the capacity of a water ditch;[94] and upon other similar questions illustrations of which are given in the note hereto.[95]

Diversion of Water by Wells and Drains. — The question whether a well diverts water from a stream is one as to which expert testimony is admissible.[96]

41. Weather. — It would seem that where such evidence is relevant and material experts will be allowed to testify as to the weather and the effects thereof.[97]

42. Words and Phrases. — In General. — It is well settled that words and phrases—*e. g.*, such as are used in a contract or statute—are to be construed by the court unless they are technical, and that a witness cannot, as an expert or otherwise, give his opinion as to the meaning of an instrument.[98] But where terms of art or science or technical phrases and local words are used in a contract or other

evidence apparently having been admitted without objection.

91. Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990.

92. Posachane Water Co. *v.* Standardt, 97 Cal. 476, 32 Pac. 532, in which case it was held that in a suit involving conflicting claims to water, an expert may be permitted to testify as to what was the grade of a water ditch at a certain point.

93. Ohio & M. R. Co. *v.* Neutzel, 143 Ill. 46, 32 N. E. 529.

94. Frey *v.* Lowden, 70 Cal. 550, 11 Pac. 838.

95. Effect of Dam. — Blood *v.* Light, 31 Cal. 115.

Characteristics of River. — Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Whether Overflow Resulted From Embankment. — Ohio & M. R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527.

Obstruction of River by Bridge. Gault *v.* Concord R. Co., 63 N. H. 356.

Determination of Level at Which Water Stands Under Soil. — Williams *v.* Taunton, 125 Mass. 34.

Quantity of Water Discharged. Vermillion Artesian Well etc. Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802.

96. Van Wycklen *v.* Brooklyn, 41 Hun (N. Y.) 418.

97. Ingledew *v.* Northern R. Co., 7 Gray (Mass.) 86. This was an action to recover damages for the loss of certain boxes of ink which, as the plaintiff alleged, were not carried by the defendant with reasonable dispatch and were frozen. It was held that an expert should be permitted to state the opinion which he had formed from the result of his experiments in freezing ink, without proving the details and results of each experiment. See also article "EXPERIMENTS."

98. *Georgia.* — Elliott *v.* Western & A. R. Co., 113 Ga. 301, 38 S. E. 821; Hill *v.* John P. King Mfg. Co., 79 Ga. 105.

Indiana. — Goodwin *v.* State, 96 Ind. 550.

Massachusetts. — Jackson *v.* Allen, 120 Mass. 64.

Minnesota. — Cargill *v.* Thompson, 57 Minn. 534, 59 N. W. 638.

writing, or where the general words in particular trades and branches of business are used in a new and peculiar or technical sense, those conversant with such use of the words or terms may explain the meaning of the same.[99]

Construction of Pleadings. — In an action for malpractice it was held that the opinion of a medical expert may be taken upon the meaning of technical words used in a pleading, but not on the construction of a pleading.[1]

Contracts Involving Article Not in Existence. — It has been held that where an ambiguity exists in a contract which describes an article which is not in existence the testimony of an expert is admissible to show how the article mentioned is ordinarily spoken of in trade and commerce.[2]

Words Used in Statutes. — Although ordinarily the construction of a statute is for the court, yet where commercial or technical terms are used which are not within the understanding of ordinary men, expert testimony may be resorted to.[3]

Missouri. — Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

New Jersey. — Smith *v.* Lunger, 64 N. J. L. 539, 46 Atl. 623.

New York. — First Baptist Church *v.* Brooklyn Fire Ins. Co., 28 N. Y. 153.

Tennessee. — Nashville & C. R. Co. *v.* Carroll, 6 Heisk. 347.

Texas. — Ginnuth *v.* Blankenship (Tex. Civ. App.), 28 S. W. 828.

99. Erhardt *v.* Ballin, 55 Fed. 968; Pope *v.* Filley, 9 Fed. 65; Myers *v.* Tibbals, 72 Cal. 278, 13 Pac. 695; Fuller *v.* Metropolitan Life Ins. Co., 70 Conn. 647, 41 Atl. 4; Hygeia Distilled Water Co. *v.* Hygeia Distilled Ice Co., 70 Conn. 516, 40 Atl. 534; Hill *v.* John P. King Mfg. Co., 79 Ga. 105; Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090; Myers *v.* Walker, 24 Ill. 133; Brown *v.* Brown, 8 Metc. (Mass.) 573. See also Smith *v.* Aikin, 75 Ala. 209; Nelson *v.* Sun Mutual Ins. Co., 71 N. Y. 453; Pollen *v.* Le Roy, 30 N. Y. 549; Western Ins. Co. *v.* Tobin, 32 Ohio St. 77; Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47.

"**Mason Work.**" — Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090.

"**Excavation.**" — Reed *v.* Hobbs, 3 Ill. 297.

"**Hewn Timber,**" etc. — Jones *v.* Anderson, 82 Ala. 302, 2 So. 911.

"**No. 1 Shotts Scotch Pig Iron.**" Pope *v.* Filley, 9 Fed. 65.

Marble "Finished and Ready for Setting." — Myers *v.* Tibbals, 72 Cal. 278, 13 Pac. 695.

1. Williams *v.* Poppleton, 3 Or. 139.

2. Pollen *v.* Le Roy, 30 N. Y. 549.

3. Schmieder *v.* Barney, 113 U. S. 645. This was an action to recover back duties, which had been paid to the United States. It was held that it was competent to inquire of the witness whether the words "of similar description" as used in the clause of the tariff act was a commerical term, and if so what was its commercial meaning; but that it was not competent to allow the witness to answer the question whether the particular property upon which the duty had been paid was dutiable. The court cited Swan *v.* Arthur, 103 U. S. 597. See also Erhardt *v.* Ballin, 55 Fed. 968, where the question was whether or not certain goods should be classified as "hemmed handkerchiefs" and dutiable at 40% *ad valorem* under Act Con. March 3, 1883. A manufacturer and seller at wholesale of handkerchiefs and articles similar to those in controversy was asked the following question: "By what name were the articles before you [specimens of the importations being shown to him], known in trade and commerce in this country in 1883?" It was held that such question was a proper one.

VII. BASIS OF EXPERT TESTIMONY.

1. In General. — When the opinions of experts are given without personal knowledge or observation, they must be based either upon facts observed and stated by other witnesses, or upon a state of facts assumed for the purpose.[4] Such testimony should consist of the judgment of the witness, and should be given in the abstract rather than in the concrete upon the facts proved, and not upon the general merits of the case, though he may give an opinion upon a similar case, hypothetically stated.[5]

2. Teachings of Science. — It has been declared that it is not objectionable to ask an expert to state generally such facts of science depending upon the course of nature as are applicable to the particular case and leave it to the jury to compare such scientific facts with the other facts proven, but such a course of examination is unsatisfactory and liable to mislead;[6] but an eminent authority has declared that after a witness has once qualified himself as an expert and given his own professional opinion in reference to that which he has seen or heard, or upon hypothetical questions, it is ordinarily opening the door to too wide an inquiry to interrogate him as to

4. Kempsey *v.* McGinniss, 21 Mich. 123. See also Wilkinson *v.* Mosley, 30 Ala. 562, in which case a doctor was asked to give his opinion as to the condition of a girl as described by certain witnesses; and it was held that this was error and that he should not have been permitted to testify, except upon his personal knowledge or in answer to a question stating facts hypothetically. The court said: "If it was desirable to obtain Dr. Ames' opinion of the case of which he had no personal knowledge, the proper question would be to ask his opinion on a supposed or hypothetical state of facts. The question might be varied, either in the direct or cross-examination, so as to obtain his opinion on each phase of the case which any part of the testimony tended to establish. This form of question will leave with the jury the undisturbed right of weighing the evidence, and determining what it proves." *Following* Sells *v.* Brown, 8 Car. & P. (Eng.) 601. See further Poling *v.* San Antonio & A. P. R. Co. (Tex. Civ. App.), 75 S. W. 69.

5. State *v.* Coleman, 20 S. C. 441, *per* McGowan, J.

Witness Need Know Nothing of Facts in Particular Case. — In Clark *v.* Baird, 5 Seld. (N. Y.) 194, the court said: "In all these cases of inquiry as to scientific opinion, without exception I believe, the witness need know nothing of his own knowledge, as to the facts of the particular case. His opinion may be given as to hypothetical cases, or upon any view of the facts in evidence as established or supposed to be established by other witnesses, though, of course, so given, its weight may be much less than where he can speak both to the particular facts and to the proper scientific interpretation of them." *Quoted* in Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7.

6. In Polk *v.* State, 36 Ark. 117, the court said: "It would not have been objectionable to have asked him to describe generally the symptoms of strychnine in the human system, because these are facts of science, depending upon the course of nature, although coming seldom under the observations of others than experts in medicine. And if it had stopped there it would have been competent for the jury to have compared the symptoms testified to by the witnesses with those given by the expert, as to the usual effects of strychnine, as affording some tendency to prove the manner of the death."

what other scientific men have said upon such matters, or in respect to the general teachings of science thereon, or to permit books of science to be offered in evidence.[7]

3. Hearsay. — Subject to the exception that a medical witness will be permitted to base his opinion in part upon the clinical history of a case given to him by his patient, an expert will not be allowed to testify to an opinion formed upon information derived by him from private conversations with persons who are suppositively familiar with the facts in the case.[8]

4. Testimony of Other Witnesses. — Although where the opinion of a witness upon a hypothetical case is sought it is necessary to refer to the evidence, it is well settled that it is no part of the province of the witness to weigh such other evidence or to find the facts upon which his opinion is asked.[9]

7. *Per* Brewer, J., in Davis *v.* United States, 165 U. S. 573. See also article "Books."

8. Hurst *v.* Chicago, R. I. & P. R. Co., 49 Iowa 76; Louisville, N. A. & C. R. Co. *v.* Shires, 108 Ill. 617. See also Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80, which was a prosecution for murder. The defense was that the defendant was insane. The following question was propounded to an expert witness: "State whether, in your opinion, from your examination of [the defendant] from all you know of him, have observed of him or heard of him, he was laboring, at the time this crime was committed, under any overmastering delusion." It was held that this question was not in proper form. The court said: "In the present case the witness gave an opinion which may have been based in whole or in part upon *what he had heard* of the defendant, and we think it should not have been received. Suppose another expert witness had testified that from what *he* had heard the homicide *was* committed under an overmastering delusion; how could the jury have possibly derived any assistance from this evidence?"

9. *England.* — Sills *v.* Brown, 9 Car. & P. 604.

United States. — Chandler *v.* Thompson, 30 Fed. 38.

Georgia. — Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80; Southern Mut. Ins. Co. *v.* Hudson, 115 Ga. 638, 42 S. E. 60.

Illinois. — Hoener *v.* Koch, 84 Ill. 408.

Indiana. — Elliott *v.* Russell, 92 Ind. 526; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Iowa. — State *v.* Felter, 25 Iowa 67.

Kansas. — Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444.

Kentucky. — Brown *v.* Com., 14 Bush 398; McCarty *v.* Com., 14 Ky. L. Rep. 285, 20 S. W. 229.

Maryland. — Williams *v.* State, 64 Md. 384, 1 Atl. 887.

Massachusetts. — McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; Woodbury *v.* Obear, 7 Gray 467; Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan. — Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437; Hitchcock *v.* Burgett, 38 Mich. 501.

Missouri. — State *v.* Klinger, 46 Mo. 224.

New Jersey. — Bergen Co. Traction Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837.

New York. — People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820; People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; Guiterman *v.* Liverpool S. S. Co., 83 N. Y. 358; Dolz *v.* Morris, 10 Hun 201.

Texas. — Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742.

Utah. — Wells *v.* Davis, 22 Utah 322, 62 Pac. 3.

West Virginia. — Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996;

Where Witness Has Read Deposition, — Experts will not be allowed to read depositions and base their opinions upon the same,[10] although it has been held that a deposition may be read to a witness, and that the truth of the statements made by the deponent may be assumed, and the opinion of the expert asked.[11]

Failure of Witness to Hear Testimony. — It is immaterial that an expert did not hear the testimony of other witnesses bearing upon the question as to which his opinion is asked.[12]

Counsel's Minutes of Testimony. — It has been held that the opinion of an expert upon a set of facts appearing on the minutes of the testimony taken by counsel, and not of the testimony as actually given, is not admissible.[13]

5. Opinions of Other Witnesses. — The opinions of other witnesses do not constitute a legitimate element of the basis of the opinion of an expert witness.[14]

6. Ocular Demonstrations, Personal Inspection, etc. — The opinion of an expert may be based upon ocular demonstrations or his personal inspection.[15]

Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217; Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Wisconsin. — Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26. See also Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

10. The Clement, 2 Curt. (U. S.) 363, 5 Fed. Cas. No. 2879.

11. Gilman *v.* Strafford, 50 Vt. 723. In this case it was held that in an action for personal injuries received by the plaintiff on a highway medical experts who have read a deposition which the plaintiff has given, wherein he relates the circumstances of the injury and minutely details the injuries and the bodily conditions claimed to have resulted therefrom, may be asked what "from the knowledge gained by reading the deposition" their opinion is as to the plaintiff's condition at the time he gave such deposition, and as to the cause of that condition. *Cited* with approval in Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

12. Swanson *v.* Mellen, 66 Minn. 486, 69 N. W. 620.

13. Thayer *v.* Davis, 38 Vt. 163.

14. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90. In this case a medical expert was asked the following question: "Assuming that the testimony of Dr. Whiton, in connection with those other propositions and facts I have named, were true, and that the jury find them to be true, can you form an opinion whether the testator was of sound and disposing mind at the time of making his will?" The court said: "Whether it would have been admissible to have asked Dr. Stearns simply if he had heard the testimony of Dr. Whiton, and if so, then, assuming it to be true, what was his opinion, we need not consider, except to say that if Dr. Whiton testified as an expert, or as to matters of opinion so that the question called for an opinion from Dr. Stearns, based on the opinion of Dr. Whiton, it clearly would not be." See also Walker *v.* Fields, 28 Ga. 237; Fox *v.* Peninsula White Lead Works, 92 Mich. 243, 52 N. W. 623.

15. Bergen Co. Traction Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837, *per* Nixon, J. See also O'Keefe *v.* St. Francis Church, 59 Conn. 551, 22 Atl. 325. In the latter case it was sought to show by an experienced builder what it would be worth to build a certain church, it appearing that he had examined the exterior of the church, but had been refused admission to the interior, and it was held that it was proper to allow him to give his opinion founded upon such observation as he had been able to

Necessity for Personal Observation by Witness. — But it is well settled that the opinion of experts may be introduced in answer to hypothetical questions which assume facts shown by the evidence, and that it is not necessary that their opinions should be founded upon their own personal observations of the facts in the particular case.[16]

7. Basis of Medical Expert's Opinion. — A. In General. — The opinion of a medical expert may be based, (1) on his acquaintance with the party who is under investigation; (2) on a medical examination of him which he has made; or (3) upon a hypothetical case stated.[17]

B. Clinical History of Case. — A medical expert may base his opinion upon a clinical history of the case under consideration, and in order to make his testimony intelligible he may testify to the observations that he made and also as to what his patient said to him in describing his bodily condition and the character and manifestations of his sickness, pains, etc.[18] The reason for this rule is that the

make. See also *In re* Flint, 100 Cal. 391, 34 Pac. 863, where a medical witness was asked a hypothetical question based upon a statement of facts describing the physical condition of a person as testified to by the witness himself, and it was held that there was no objection to such question. The court said: "The fact that the condition of the patient, as described in the question, was personally known to the witness is not material. He was questioned as an expert upon matters presented to him in the abstract, and his opinion in either case would necessarily be the same, for the statement of facts was the same." See further Wells *v.* Davis, 22 Utah 322, 62 Pac. 3.

16. Kempsey *v.* McGinniss, 21 Mich. 123. See also Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72, *holding* that a medical expert may be permitted to give his opinion as to the adequacy and tendency of wounds to produce death although he has not seen or examined the wounds himself.

17. Omaha & R. V. R. Co. *v.* Brady, 39 Neb. 27, 57 N. W. 767. See also Grand Rapids R. Co. *v.* Huntley, 38 Mich. 537, *holding* that a physician cannot testify to his opinion as to what ails a patient when it is not the result of his own examination or based on facts in proof, or given in answer to hypothetical questions based on facts. See further Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80; Potts *v.* House, 6 Ga. 324; Robinson *v.* St. Louis & S. R. Co. (Mo.), 77 S. W. 493.

18. Union P. R. Co. *v.* Novak, 61 Fed. 573; People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315. See also Cleveland C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Yeatman *v.* Hart, 6 Humph. (Tenn.) 375; Jones *v.* Chicago & St. P. M. & O. R. Co., 43 Minn. 279, 45 N. W. 444; Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76; Fort *v.* Brown, 46 Barb. (N. Y.) 366; Pierson *v.* People, 18 Hun (N. Y.) 239; Johnson *v.* Northern P. R. Co., 47 Minn. 430, 50 N. W. 473; Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 617; Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215.

Judicial Statement of Rule. — In Barber *v.* Merriam, 11 Allen (Mass.) 322, the court said: "The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms and the causes which have led to the injury

physician must oftentimes of necessity take into consideration such statements in reaching a conclusion as to the physical condition of the patient, and the nature and extent of his malady or injury; and hence the rule being founded on such necessity, it has been declared that it must be applied with caution, and not extended beyond the reason of necessity upon which it rests.[19] It has been declared, however, that the mere statements made by a person as to his sufferings, pain, etc., which statement was made for the sole purpose of furnishing the expert with information on which to base an opinion, is not admissible, and that the witness in testifying to what he has heard and observed is confined to exclamations, shrinkings and other expressions which appear instinctive, intuitive and spontaneous.[20]

How Injury Was Received. — The rule which allows a medical expert to give a clinical history of the case, including what was told him by his patient, does not extend so far as to allow the witness to repeat what he was told as to how personal injuries were caused.[21]

or disease under which he appears to be suffering. This opinion is clearly competent as coming from an expert. But it is obvious that it would be unreasonable, if not absurd, to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. Such a course of practice would take from the consideration of a court and jury the means of determining whether the judgment of the expert was sound and his opinions well founded and satisfactory. Certainly it ought not to be left to the option of the adverse party to determine whether the elements on which the conclusions of a medical witness are based should be drawn out on cross-examination. The party producing the witness and who relies on his opinion should be allowed the privilege of showing that his testimony as an expert is the result of due inquiry and investigation into the condition and symptoms of the patient, both past and present."

Statement as to Past and Present Symptoms. — Evidence of opinion in respect to the probable duration of physical suffering or disability given by medical experts is admissible although based in part upon statements made by the suffering or disabled person relating to his past or present symptoms. Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100. See also State *v.* Gedicke, 43 N. J. L. 86.

19. Miller *v.* St. Paul C. R. Co., 62 Minn. 216, 64 N. W. 390.

20. Missouri, K. & T. R. Co. *v.* Johnson, 95 Tex. 409, 67 S. W. 768. See also United States *v.* Faulkner, 35 Fed. 730, in which latter case, which was a criminal prosecution, insanity was the defense, and McCormick, J., in charging the jury, said: "The physician, Dr. Brown, whose opinions were excluded because he showed he had based his opinion on the family history, with which he was himself wholly unacquainted until called to see him after his arrest, testified as to his examination of the defendant, and as to his physical condition at that time, and that much of his testimony you are to consider; but his opinions based in part at least on the representations made to him by the defendant or others prior to this trial, or any trial in this case, you cannot consider.

21. Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437.

Distinction Between History of Case and Statement as to Cause of Injury. — It is competent for a medical man to testify not merely to the appearance of a wound as he saw it, but also to all statements made by the wounded person as to his bodily condition, and to give to the jury

Information Obtained From Nurses, Attendants, etc. — A medical expert who has attended a sick person will not be permitted to give in evidence declarations made to the witness as to such person's symptoms or condition by a consulting physician, nurses, attendants and friends of the patient.[22]

8. Necessity to Disclose Facts Known Personally to Witness. Where experts are called upon to give opinions based upon their own personal observation or examination, the facts upon which such opinions are founded must be stated.[23]

his opinion, based upon such examination and statements, as to the nature and effects of the injury; but it is not competent for such witnesses to testify to the jury as to the injured person's statements in respect to the cause of the injury, his past experience in connection with the injury or any statements of a member of the injured person's family in his presence of like character. Atchison, T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463. See also Heald *v.* Thing, 45 Me. 392, where a physician who had made an examination and who had also received from the patient a history of the case, was permitted to give to the jury his opinion so far as it was based upon his personal examination, but was not permitted to state what the patient had given as the history of the case, or to give to the jury an opinion based partially or wholly upon such history. And see Bacon *v.* Charlton, 7 Cush. (Mass.) 581, in which case it was held that anything in the nature of assertion or statement is to be carefully excluded and the testimony confined strictly to such complaints, exclamations, expressions or groans as usually and naturally accompany and furnish evidence of a present existing pain or malady. See further Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397; Railroad Co. *v.* Sutton, 42 Ill. 438; Rowell *v.* Lowell, 11 Gray (Mass.) 420; Towle *v.* Blake, 48 N. H. 92; Earl *v.* Tupper, 45 Vt. 275.

22. Heald *v.* Thing, 45 Me. 392. See also Wetherbee *v.* Wetherbee, 38 Vt. 454; Miller *v.* St. Paul C. R. Co., 62 Minn. 216, 64 N. W. 390.

23. Hitchcock *v.* Burgett, 38 Mich. 501, in which case Marston, J., said: "The value of the opinion, in other words, must depend very largely upon the facts on which it is based. And there is or may be, I suppose, such a thing as a difference of opinion among experts, arising upon the same state of facts. The facts therefore should always be stated, so that others may not only be able to determine the correctness of the opinions given, but that the jury may ultimately determine the truth or falsity of the facts stated, and thereby be enabled to give to the opinion the importance it is justly entitled to." See also Raub *v.* Carpenter, 187 U. S. 159, which was a case involving a question of testamentary capacity. An objection was sustained to the following question, which was asked of a medical expert: "Doctor, have you formed any opinion, from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, and from all you know about him yourself, what his condition of mind was?" In holding that this ruling was correct, Fuller, C. J., said: "We agree with the court of appeals that the trial court did not err in holding that portion of the question objectionable, and, if so, the question as framed could not properly have been allowed to be propounded, though caveators were left free to put it with the objectionable words omitted. Clearly the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. In that particular the question assumed the existence of facts for which there was no foundation in the evidence." See

VIII. EXAMINATION OF EXPERTS.

1. Direct Examination. — A. Application of General Rules. a. *In General.* — In the examination of expert witnesses the general rules which govern the examination of witnesses are to be resorted to so far as they are applicable.[24]

Extent of Examination. — In General. — As respects the length and latitude of the examination, the court, as in the examination of ordinary witnesses, may exercise its discretion and confine the examination within proper bounds.[25]

Examination During Trial. — Where an expert witness is on the stand, the court may or may not in its discretion suspend the trial of the cause to enable such witness to make an examination of persons or things for the purpose of enabling him to testify.[26]

further Van Deusen *v.* Newcomber, 40 Mich. 90; Kempsey *v.* McGinniss, 21 Mich. 123; People *v.* Nino, 149 N. Y. 317, 43 N. E. 853; Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217; Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 408; Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075.

Illustrations. — *Opinion as to Insanity.* — Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80.

Personal Injuries. — In Van Winkle *v.* Chicago, M. & S. P. R. Co., 93 Iowa 509, 61 N. W. 929, a medical witness was permitted to testify that the condition of deceased "might readily have followed such an injury as he then complained of, and claimed he had received;" also, that "no symptoms appeared during the progress of the disease that would lead me to change the diagnosis at all." It was not asked, nor did he state, what the deceased said as to how he was injured or the extent of the injury. It was held that it was error to receive the opinion of the doctor without the statements upon which he based it and upon the truth or falsity of which its value depended.

Reason for Rule. — In Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80, the court said: "It was not competent for the expert to give in evidence an opinion based upon what he knew of the accused, without stating what he knew of him. The opinion may have been based upon facts known to the witness but altogether unknown to the jury; or the jury, had they known such facts, might have attached to them so little importance as to disregard an opinion known to be based upon them, and to lose faith in an expert who regarded them as sufficient foundation for a positive opinion as to such a weighty matter." See also Burns *v.* Barenfield, 84 Ind. 43.

24. Pacific R. Co. *v.* Urlin, 158 U. S. 271; St. Louis & S. F. R. Co. *v.* Edwards, 26 Kan. 72.

25. Forsythe *v.* Doolittle, 120 U. S. 73. See also Pacific R. Co. *v.* Urlin, 158 U. S. 271; Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887; Melendy *v.* Spaulding, 54 Vt. 517; Fairchild *v.* Bascomb, 35 Vt. 398.

26. Herndon *v.* State, 111 Ga. 178, 36 S. E. 634. This was a prosecution for murder. The court refused to allow a medical expert, who had been introduced by the defendant and who was upon the stand testifying as a witness, to examine an indentation or depression in the skull of the defendant and then testify to the effect that it would produce upon the defendant's mind; he having, in his statement to the jury, said that the depression had been made in his early youth by a falling stone, that he had subsequently had a severe case of typhoid fever, and that since then he had been at times ignorant or unconscious of what he said and did. In holding that there was no error, the court, through Simmons, C. J., said: "We think this was a matter entirely within the

Formula. — The question must be put in such shape that it will be possible for the witness to give an intelligent answer to it;[27] but there is no exclusive formula of question, and all that is necessary is that the question be framed so that it will elicit the opinion of the witness as to the matter of skill or science which is in controversy without obtaining his opinion as to the effect of the evidence in establishing controverted facts.[28]

Over-technical Objections. — An over-technical objection to a question will not be allowed where no effort was made to modify the expert's testimony by cross-examination.[29]

Discretion of Court as to Form of Question. — The better opinion seems to be that the form of the interrogatory is a question addressed to the discretion of the court, subject to such considerations as the nature of the particular matter under investigation and the character and ability of the witness.[30]

discretion of the trial court. The court may or may not suspend a trial for this purpose, according to the circumstances of each particular case. Where a matter of practice is within the discretion of the trial court, this court will not interfere unless such discretion is manifestly abused. We can not establish any fixed rules to govern courts in this respect. In some cases an examination of an injury might be made in a few minutes; in others, hours might be consumed before the expert could come to any definite conclusion as to the nature and character of the injuries. Then, too, this appears to have been the second trial of the present case, and the accused and his counsel had abundant opportunity to have the examination made before the trial."

27. Turner *v.* Ridgeway, 105 Mich. 409, 63 N. W. 406, in which case it was held that it was proper to exclude the question: "In cases where there is simply a physical shock — as a fall upon the side — and there is no warning, no apprehension preceding the shock, would you expect a case of railroad spine or concussion of the spine to follow?" It was declared that the question was objectionable because it contained an assumption that railroad spine and concussion of the spine mean the same thing, and that as the question was put it would be impossible for any expert to give an intelligent answer as to whether a fall upon the side would occasion concussion of the spine, as it would depend, of course, upon the nature of the fall.

28. Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, in which case it was declared that the form of question stated by Shaw, C. J., in Woodbury *v.* Obear, 7 Gray (Mass.) 467, is not to be regarded as an exclusive formula, but merely one which was put by way of example, and is well adapted to all cases where the evidence is conflicting or complicated.

Proper Form. — "The proper form of the question is: If certain facts assumed in the question to be established by the evidence should be found by the jury, what would be the witness' opinion upon the facts thus found true, of the matter involved, and to which the inquiry is directed." Summerlin *v.* Carolina & N. W. R. R. Co., 133 N. C. 550, 45 S. E. 898; Walker, J., *citing* Woodbury *v.* Obear, 7 Gray (Mass.) 467; Com. *v.* Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458.

29. People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328; Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; Meeker *v.* Meeker, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489. See also Missouri P. R. Co. *v.* Fox, 60 Neb. 531, 83 N. W. 744, in which case the court said: "While the form of the question may be improved it was not so seriously objectionable as to require its exclusion."

30. State *v.* Glass, 5 Or. 73. See

b. *Questions Propounded by Court.* — As in the examination of ordinary witnesses, the court may, in its discretion, when an expert witness is on the stand, exercise its right to ask questions of the witness.[31]

c. *Leading Questions.* — As in the examination of other witnesses, it is as a general proposition improper to ask an expert leading questions;[32] but some latitude must necessarily be given in the examination of experts and in the propounding of hypothetical questions, and unless it is apparent that counsel has abused the privilege accorded to him by the court the asking of leading questions will not be regarded as reversible error.[33]

B. Reduction of Question to Writing. — The court in its discretion may require a hypothetical question to be reduced to writing, and it would seem that where it is of considerable length and embraces a long history of the case this course should be resorted to in order the better to enable the witness to answer intelligently, and enable opposing counsel to cross-examine and offer testimony in rebuttal.[34]

C. Reasons for Opinion. — a. *In General.* — It is proper on the examination of an expert, even on his examination in chief, to require him to state the reasons for his opinion, so that the jury will be enabled to estimate the value of his testimony.[35]

also Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237.

31. Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254, in which case the court said: "It seems that numerous instances occurred during the trial when the presiding judge exercised his right to ask questions of the witnesses. In so doing there was, of course, no impropriety, unless he so framed his questions as to intimate an opinion of his own upon the facts, or used some expression calculated to prejudice the rights of either party."

32. St. Louis & S. F. R. Co. *v.* Edwards, 26 Kan. 72, in which case the question was whether cattle-guards were adequate for the purposes for which they were intended. A witness called as an expert was asked the following question: "I will ask you if it is not a fact that cattle get breachy with reference to these cattle-guards, the same as they do as to fences, and then is it not almost impossible for a cattle-guard to stop them?" It was held that such question was objectionable on the ground that it was leading, but that as the plaintiff did not object to it for that reason, its leading character could not on appeal be considered objectionable. See also in support of the proposition that ordinarily leading questions should not be asked. Springfield C. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1034, *affirming* 56 Ill. App. 196; Perry *v.* Cobb (Ind. Ter.), 76 S. W. 289; Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680.

33. Hilton *v.* Mason, 92 Ind. 157; Pacific R. Co. *v.* Urlin, 158 U. S. 271; Filer *v.* New York C. R. Co., 49 N. Y. 42.

Nature of Examination Made by Witness. — A party calling a medical witness may ask him whether the examinations made by him "were made in a superficial or in a careful and thorough manner;" and an appellate court will not interfere on the ground that such question was leading and took from the jury the determination of the inquiry whether the examination was thorough or otherwise, unless it is apparent that there has been an abuse of discretion. Pacific R. Co. *v.* Urlin, 158 U. S. 271.

34. Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832.

35. People *v.* Shattuck, 109 Cal.

b. *Experience and Reading.* — An expert witness may be asked what he has met with in his experience or in his reading;[36] but the contrary has been held.[37]

673, 42 Pac. 315; Lewiston S. M. Co. *v.* Androscoggin W. P. Co., 78 Me. 274, 4 Atl. 555.

36. Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 228.

State *v.* White, 76 Mo. 96. This was an indictment against a woman for endeavoring to conceal the birth of a child, of which she had been delivered, by secretly burying the same. The defendant, who was an unmarried woman, did not deny that she had secreted the body of the child, but claimed that she was delivered unexpectedly while in a standing position, that the child fell to the floor and was either born dead or was killed by the fall, and that she had concealed it under a pile of hot ashes to hide her shame. A medical expert who testified to having found a round hole, about the size of a half-dollar, in the child's skull, was asked this question: "I will ask you as a medical man, if in your experience as a physician, or in your reading, you ever met with a case where such a condition of affairs existed as you found in this child's head, produced by the woman giving birth to the child while standing?" The defendant objected to this question as not calling for medical testimony, and not asking if the thing was possible, but if the witness ever knew of such a case. The objection was overruled, and the witness allowed to answer. It was held that no material error was committed.

37. In Clark *v.* Willett, 35 Cal. 534, suit was brought to enjoin the defendant from mining underneath the plaintiff's water ditch on the ground that such operations would cause the earth beneath the ditch to become cracked and to give way. It was held that the testimony of experts in relation to the effect of tunneling in another but similar location was properly rejected and that the court should have taken the opinion of witnesses who had examined the plaintiff's premises and who were qualified by learning, observation and experience to judge intelligently of the cause. The court said: "The reason of this rule is obvious. Different witnesses might have different theories. These opinions might be founded upon the observance of several and distinct instances. If allowed to adduce one, they may adduce all. The opposite party would have a legal right to controvert each particular case mentioned by the witnesses, and yet be unable to avail himself of the right because of his inability to anticipate the cases mentioned and prepare for their investigation. Moreover, such a course, in addition to the objection just mentioned, would lead to innumerable side issues, and render the trial of a cause interminable, distractive and enormously expensive." See also Parker *v.* Johnson, 25 Ga. 576, which was an action for breach of warranty of the soundness of a slave. In the opinion of the majority, a medical expert was properly allowed to testify as to a case which he had observed, but this view was strongly and ably combated by McDonald, J., who said: "It was a verbal report of a single case which had occurred in his practice, which it was proposed he should testify to. Medical books, of authority in that profession, cannot be read. Collier *v.* Simpson, 5 Car. & P. 73. If Dr. Harrison had reported his case in a medical journal it could not have been read. There is a good reason for excluding particular cases. There may have been an idiosyncrasy in the subject of the treatment; the symptoms may have been fallacious; the causes producing the disease may have been different from those superinducing the disease in the case under examination, and numerous other reasons might be assigned for excluding evidence of particular cases, to influence the decision of a cause depending, often, on its own peculiar facts. The rule which admits professional opinions to be received as evidence, a kind of evidence so little reliable, and so fraught with danger to those whose rights and interests it is to affect or control, ought not to be extended. My brethren are, however,

D. Hypothetical Questions. — a. *Propriety and Necessity of Hypothetical Questions. — In General.* — The usual and proper method of examining an expert where it is sought to obtain his opinion is to propound to him a hypothetical question, *i. e.*, one which assumes the truth of facts which the evidence tends to support, and which are stated in accordance with the theory of the examiner;[38] and not only is it held that such questions are admissible and proper, but where the witness is not testifying to his own knowledge the only proper course is to ask him a hypothetical question, and that it is important that the form of the question should be such as not to require or permit him to draw conclusions of fact from the evidence in the case, and that where the evidence is conflicting or relates to many details, or where inferences of fact must be drawn from the evidence, in order to be reasonably certain of the grounds on which an opinion is based, it is usually necessary that the facts should be stated hypothetically.[39]

clear that the evidence was admissible and ought to have been received."

38. *Arkansas.* — Polk *v.* State, 36 Ark. 117; Green *v.* State, 64 Ark. 523, 43 S. W. 973; Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710.

Connecticut. — Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237.

Georgia. — Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80.

Illinois. — Economy L. & P. Co. *v.* Sheridan, 200 Ill. 439, 65 N. E. 1070; Chicago & A. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 617.

Kansas. — Central Branch Union Pac. R. Co. *v.* Nichols, 24 Kan. 242; Tefft *v.* Wilcox, 6 Kan. 46.

Massachusetts. — Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

Michigan. — Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

Missouri. — State *v.* Wright, 134 Mo. 404, 35 S. W. 1145; Turney *v.* Baker (Mo. App.), 77 S. W. 479. See also Neudeck *v.* Grand Lodge, 61 Mo. App. 106; Benjamin *v.* Railroad Co., 50 Mo. App. 609; Tingley *v.* Cowgill, 48 Mo. 291.

New Hampshire. — Boardman *v.* Woodman, 47 N. H. 120.

New Jersey. — State *v.* Powell, 7 N. J. L. 244.

New York. — Whiton *v.* Snyder, 88 N. Y. 299; Stearns *v.* Field, 90 N. Y. 640; Guiterman *v.* Liverpool S. S. Co., 83 N. Y. 358; Clark *v.* Baird, 5 Seld. 194.

North Carolina. — State *v.* Cole, 94 N. C. 958; State *v.* Bowman, 78 N. C. 509.

Utah. — Palmquist *v.* Mine & Smelter Supp. Co., 25 Utah 257, 70 Pac. 994.

Vermont. — Hathaway *v.* National Life Ins. Co., 48 Vt. 335.

West Virginia. — Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996; Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217; Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Wisconsin. — Proper *v.* State, 85 Wis. 615, 55 N. W. 1035; Moore *v.* Chicago, M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273.

39. McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568, in which case the following question was propounded to an expert: "You saw this machine, and you heard the testimony here today of Mr. O'Connor about the way this belt was fastened, with this Talcott plate. What do you say, taking into account all the circumstances, its size, the shipper, the way it ran, the size of the upper pulley, and the way it was fastened, what do you say whether or not that was a proper fastening?" The court said: "It is impossible to lay down an absolute rule for all cases, and some discretion must undoubtedly be left to the justice presiding at the trial. In the present case we think that the form of the question was

Objection Waived. — Where error is committed in not asking hypothetical questions and the witness is examined on the actual

such that it was properly excluded." See also the following cases:

England. — Sills *v.* Brown, 9 Car. & P. 601.

United States. — Dexter *v.* Hall, 15 Wall. 9.

Alabama. — Gunter *v.* State, 83 Ala. 96, 3 So. 600; Page *v.* State, 61 Ala. 16.

Arkansas. — Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710.

Georgia. — Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80.

Illinois. — Chicago & A. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999.

Indiana. — Elliott *v.* Russell, 92 Ind. 526.

Kansas. — Tefft *v.* Wilcox, 6 Kan. 46.

New York. — People *v.* Harris, 136 N. Y. 423, 33 N. E. 65.

Southern Bell Tel. & Tel. Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202, in which latter case the court said: "A scientific expert who has observed none of the facts for himself should give his opinion on a hypothetical case similar to that before the jury, and not on the actual case as if he were a juror instead of a witness."

Dickenson *v.* Fitchburg, 13 Gray. (Mass.) 546, in which case Shaw, C. J., said: "In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued: either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified to are true, he can form an opinion, and what that opinion is."

Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 918, in which case the court said: "In other words, questions must be so framed that the witness will not be called upon to give an answer involving his opinion on disputed questions of fact which are not proper subjects for the testimony of an expert, nor to intimate to the jury his opinion as to the credibility of any of the witnesses."

Illustration. — In Gutwillig *v.* Zuberbier, 41 Hun (N. Y.) 361, where the question was whether certain cherry bounce was merchantable when it was shipped, an expert was asked the following questions: "Assuming that this cherry bounce, which you have heard described, was manufactured in the manner stated by the last witness, was it, in your opinion, a merchantable article, and fit to stand the journey from here to New Orleans?" "Then, as I understand you, if these beverages contained a percentage of twenty-five of spirits, when they left New York, they were perfectly merchantable and capable of sustaining the test of the journey to New Orleans, and would be merchantable when they arrived in New Orleans." It was held that these questions were improper because they included and extended over the ground of the controversy between the plaintiff and the defendants and required the witnesses to determine by their judgment and opinions what it was in part the province of the jury to decide.

Compound of Positive Assertions and Conclusions. — In Haish *v.* Payson, 107 Ill. 365, the question was characterized by the court as "a compound of positive assertions of facts and conclusions." The hypothetical feature of the question was hardly discernible. The question covered two and one-half pages, and contained no appearance of hypothesis except in the last sentence, wherein appeared the words "on this supposed state of facts." The court said: "The reading over of this lengthy paper, filled with partial statements of facts, containing conclusions drawn from them many times, in the hearing of the jury, was calculated to possess them most fully with the plaintiff's side of the case, and not leave their minds open to an unbiased consideration of the whole of the facts of the case. Opportunity should not be given for doing this, through the medium of a question put to witnesses. The question is an anomaly, and must receive condemnation."

case, the error will be deemed to have been waived, unless objection is seasonably and properly made.[40]

Weakness of Evidence Upon Which Question Is Based. — A hypothetical question may assume anything that the evidence tends to prove, it being well settled that clear and satisfactory proof is not essential.[41]

Distinction Between Calling for Opinion as to Possibilities and as to Probabilities. — Where hypothetical questions are aptly framed they call for the opinions of experts as to probabilities rather than possibilities, but inartificiality in this respect will not be regarded as prejudical error unless it is seasonably objected to.[42]

Opinions of Other Experts. — It is not proper in asking hypothetical questions to incorporate in them the opinions of other expert witnesses.[43]

40. Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72.

41. Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655. See also State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; Meeker *v.* Meeker, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489.

Illustration. — In Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202, it was held that a hypothetical question assuming that the plaintiff in an action for personal injuries was suffering from no displacement of the womb before the injury, is not objectionable, on the ground that it is not based on the evidence, where the plaintiff has testified that her general health was good before the accident, that she had no soreness or lameness, or injury to the internal organs, and that before that time she did all her household work, and a physician has testified that the patient is usually the first to discover any displacement.

42. Omaha & R. V. R. Co. *v.* Brady, 39 Neb. 27, 57 N. W. 767, in which case a question, the form of which was criticised, was as follows: "State whether the condition in which you found him at that time — summer of 1889 — might be the result of an injury received in June, 1888."

Hypothetical Question Dealing With Probabilities. — In People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9, where insanity was set up as a defense on a prosecution for murder, the court, speaking of a hypothetical question which was asked of a medical expert, said: "The hypothetical question did not state the exact case of the prisoner, as developed by all of the evidence respecting his life and habits and by those circumstances which give truthful color and semblance to human life and conduct. It dealt with probabilities and not realities. Expert evidence is only, it seems to me, entitled to much importance in arriving at a judgment when fairly given by one properly accredited to give it, through his experience, study and scientific eminence and upon an hypothesis which shall be true in the relation of its parts to the whole case which is the subject of inquiry."

43. Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908. *Compare* Howland *v.* Oakland C. S. R. Co., 110 Cal. 513, 42 Pac. 983. In the latter case a medical expert was asked the following question: "Now, assuming again that Dr. Huntington's statement was true as to the character of the injuries which were inflicted, as I have stated, what, in your judgment, was the cause of the miscarriage, if there was a miscarriage?" It was objected that this was not a proper question, because the "statement" of Dr. Huntington to which the attention of the witness was directed included not only the facts testified to by him, but also his opinion based thereon, and that the question, therefore, called for the opinion of one expert based upon that of another. In holding that there was no force in these objections the court said: "We do not

Reference to Matters Personally Known to Witness. — It is always proper to incorporate in the question addressed to a medical expert the result of knowledge obtained by an examination made by him.[44]

Assuming Facts Which Are Not Subjects of Expert Testimony. Hypothetical questions may, and often must, in order to convey any meaning whatever, embrace facts assumed or proved which are not, standing alone, subjects of expert testimony.[45]

b. *Reading Testimony to Witness.* — Where it is sought to obtain a purely theoretical opinion from an expert which is to be applied by the jury to the evidence, it is never necessary and often improper to read over to him the testimony of the other witnesses.[46]

c. *Where Expert Has Heard Testimony of Other Witnesses. In General.* — It is not a proper practice to ask of a witness called as an expert a question which calls upon him to put himself in the place of the jury, and, in view of the evidence, pass upon the whole issue.[47]

think appellant's construction of the question a fair one, or that the language used would so strike the apprehension of the jury. The question may not be as free from ambiguity as it could have been made, but we think it sufficiently appears therefrom, and would be so understood, that what the witness was asked to base his opinion on was the facts stated by Dr. Huntington as to the injuries to plaintiff."

44. Louisville, N. A. & C. R. Co., 104 Ind. 409, 3 N. E. 389, 4 N. E. 908, in which case the court said: "A medical expert who has obtained knowledge of the facts of the case, and has stated the facts to the jury, may take them into consideration in giving his opinion. It seems quite clear to us that knowledge obtained from actual observation is as important and weighty as knowledge communicated in an assumption made in a hypothetical question. The physician who examines and treats a case is in a situation to know as much, if not more, of the real condition of his patient than those who have not seen the patient at all, or have seen him but once. We can perceive of no reason that would require a physician in stating his opinion to the jury to exclude the result of his actual observation and knowledge." See *supra*, VII, 8 B. Clinical History of Case.

45. Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

46. Choice *v.* State, 31 Ga. 424.

47. Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999. And see the following cases:

United States. — Association *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392.

Alabama. — Birmingham R. & Electric Co. *v.* Butler, 135 Ala. 388, 33 So. 33.

California. — Redfield *v.* Oakland Consolidated St. R. Co., 112 Cal. 220, 43 Pac. 1117. See also Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125; Dopman *v.* Hoberlin, 5 Cal. 413.

Connecticut. — State *v.* Smith, 49 Conn. 376.

Florida. — Baker *v.* State, 30 Fla. 41, 11 So. 492.

Georgia. — Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80.

Idaho. — Kelly *v.* Perrault, 5 Idaho 221, 48 Pac. 45.

Illinois. — Haish *v.* Payson, 107 Ill. 365; Levinson *v.* Sands, 81 Ill. App. 578.

Indiana. — Deig *v.* Morehead, 110 Ind. 451, 11 N. E. 458; Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Craig *v.* Noblesville & G. R. Co., 98 Ind. 109; Elliott *v.* Russell, 92 Ind. 526; Burns *v.* Barenfield, 84 Ind. 43; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Iowa. —*In re* Fentor, 97 Iowa 192, 66 N. W. 99; Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; Meeker

Where Evidence Is Not Conflicting. — It seems to be well settled that an expert may be asked for his opinion based upon the facts testified to by several witnesses, which testimony he has heard, without a hypothetical statement of such facts, if there is no material conflict in the testimony, and the question is so framed that the jury understand the exact facts upon which he is required to base his opinion.[48] But under no circumstances should the expert be

v. Meeker, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489; *In re* Norman, 72 Iowa 84, 33 N. W. 374; State *v.* Cross, 68 Iowa 180, 26 N. W. 62; *In re* Ames, 51 Iowa 596; Hurst *v.* Chicago, R. I. & P. R. Co., 49 Iowa 76; Muldowney *v.* Railroad Co., 39 Iowa 615; State *v.* Carpenter (Iowa), 98 N. W. 775.

Kansas. — Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655.

Kentucky. — Champ *v.* Com., 2 Metc. 17.

Maine. — Holden *v.* Robinson Mfg. Co., 65 Me. 215; Hovey *v.* Chase, 52 Me. 304.

Maryland. — Cooke *v.* England, 27 Md. 14.

Massachusetts. — Chalmers *v.* Whitmore Mfg. Co., 164 Mass. 532, 42 N. E. 98; Jewett *v.* Brooks, 134 Mass. 505; Williams *v.* Williams, 132 Mass. 304.

Michigan. — People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28; Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499; People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, which was a prosecution for manslaughter; People *v.* Foley, 64 Mich. 148, 31 N. W. 94; People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

Minnesota. — State *v.* Hanley, 34 Minn. 430, 26 N. W. 397; Loucks *v.* Chicago, M. & St. P. R. Co., 31 Minn. 526, 18 N. W. 651; State *v.* Stokely, 16 Minn. 282.

Missouri. — Smith *v.* Chicago & A. R. Co., 119 Mo. 246, 23 S. W. 784; Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737; Russ *v.* Wabash W. R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823.

New York. — Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942, *affirming* 13 Misc. 773, 34 N. Y. Supp. 1151; People *v.* Tuczkewitz, 149 N. Y. 240, 43 N. W. 548; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; People *v.* Smiler, 125 N. Y. 717, 26 N. E. 312; People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9; Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179; People *v.* Augsbury, 97 N. Y. 501.

North Carolina. — Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

Ohio. — Williams *v.* Brown, 28 Ohio St. 547.

Pennsylvania. — Reber *v.* Herring, 115 Pa. St. 599, 8 Atl. 830.

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

Texas. — Prather *v.* McClelland, 76 Tex. 574, 13 S. W. 543; Gulf C. & S. F. R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667; Galveston *v.* H. & S. A. R. Co. (Tex. Civ. App.), 72 S. W. 78; Galveston H. & S. A. R. Co. *v.* Pitts (Tex. Civ. App.), 42 S. W. 255.

Utah. — Nichols *v.* Oregon S. L. R. Co., 25 Utah 240, 70 Pac. 996.

Vermont. — Fairchild *v.* Bascomb, 35 Vt. 398.

West Virginia. — Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

Wisconsin. — Baxter *v.* Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644; Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342; Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.

48. Matter of Storer's Will, 28 Minn. 9, 8 N. W. 827.

Gates *v.* Fleischer, 67 Wis. 504, 30 N. W. 674. See also State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, wherein it was declared that a vain repetition of the evidence under the circumstances stated in the text would be but an idle ceremony. *Compare* Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996; Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Approved Question. — In Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, the plaintiff called three physicians who had heard the testimony on the part of the plaintiffs, which was not conflicting, and asked

allowed to draw his own inferences from conflicting testimony, or to say what weight should be attached to the testimony of other witnesses.[49] On the other hand, it has been held that it is not competent to predicate a hypothetical question to a medical expert upon all the evidence given in the case, although he has heard it all, as it would be impossible for the jury to determine the facts upon which the witness based his opinion.[50]

Where Expert Has Heard Part of Testimony. — Where an expert has heard a portion of the testimony given by other witnesses, he may be asked what his opinion is, assuming that such testimony heard by him is true.[51]

each of them this question: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what in your opinion was their sickness, and do you see any adequate cause for the same?" In holding that this question was under the circumstances in proper form, the court said: "Where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not required to draw a conclusion of fact. In the present case, the question allowed to be put does not seem to us to require of the witnesses anything more than a scientific opinion; and we do not understand the answer to include anything more than this." See also Jones *v.* Chicago, St. P. M. & O. R. Co., 43 Minn. 279, 45 N. W. 444, in which case the court said: "The rule is that for purpose of a question to an expert witness, to call out his opinion, the party may assume as facts what the evidence tends to prove, and we do not see that the plaintiff was permitted in any instance to depart from this rule. The question in such a case usually states the facts assumed to be proved. Strictly, perhaps, it ought to. But for convenience the court may, and often does, permit the hypotheses to be put by referring the witness to the testimony if he has heard it, instead of stating the facts."

49. Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945, in which case it was held that a physician cannot be asked whether in his judgment, from the testimony that he has heard, an autopsy was such as to enable a physician to state the cause of death with any degree of certainty, and that the question ought to recite the scope and character of the autopsy. The court said: "This question was clearly incompetent, because it asked the witness, who was a physician, to make his own inference as to what the evidence of the other witness tended to show, and then, upon such inference, to give his opinion. To properly elicit his opinion as to the character of the autopsy, and its usefulness in showing the cause of the death, counsel should have stated the scope and character of the autopsy as he understood it, so that the jury, in weighing the answer of the witness, could know exactly upon what facts it was based." See also State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813. See further Rafferty *v.* Nawn, 182 Mass. 503, 65 N. E. 830; Summerlin *v.* Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898; State *v.* Maier, 36 W. Va. 757, 15 S. E. 991; Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; State *v.* Klinger, 46 Mo. 224.

50. People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820.

51. State *v.* Hayden, 51 Vt. 296, in which case the court cited Gilman *v.* Strafford, 50 Vt. 723, and referring to that case said: "In that case the deposition of the plaintiff was read to or by the experts, and they were asked to give an opinion on the supposition of the truth of the facts deposed to. There was a large amount of testimony in the case upon the same subject-matters testified to in the deposition, and it was claimed

Form of Question. — Where the witness has heard the testimony of the other witnesses not conflicting, his opinion may be requested by a question framed as follows: "Supposing all these facts you have heard testified to are true, what is your opinion?" etc.[52]

d. *Assumption of Facts Not Proved or Admitted.* —**(1.) In General.** The question should include only such facts as are admitted or established, or which there is evidence tending to establish.[53] But to admit a question based upon a hypothesis no element of which is supported by evidence may be error without prejudice.[54]

that it was not permissible to put in evidence the testimony of an expert based upon the testimony of any one witness; but the court held otherwise."

52. State *v.* Hayden, 51 Vt. 296. See also Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, in which case this hypothetical question was approved: "Having heard the evidence, and assuming the statement made by the plaintiff to be true, what in your opinion was their sickness, and do you see any adequate cause for the same?" To the same effect are Getchell *v.* Hill, 21 Minn. 464; Omaha & R. V. R. Co. *v.* Brady, 39 Neb. 27, 57 N. W. 767; Wright *v.* Hardy, 22 Wis. 334. In the last-mentioned case the following question was approved: "Suppose his statements relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment of the patient proper or improper?" *Compare* Jones *v.* Chicago, St. P. M. & O. R. Co., 43 Minn. 279, 45 N. W. 444, where it was held that where the question refers the witness to the evidence heard by him, instead of stating the facts assumed by proof, the question must require the witness to assume the testimony to be true and not leave it to him to determine whether any of it be true or not.

Approved Form of Question. Where the issue is whether the treatment of a broken arm was proper treatment, the court may, in its discretion, as a matter of convenience, permit to be put to a surgeon, who has heard the testimony, the question: "Having heard the testimony in this case and assuming it to be true, what, in your opinion as a surgeon, was the necessity of this arm remaining in the position described by plaintiff, for the first twelve or thirteen days of the treatment?" Getchell *v.* Hill, 21 Minn. 464. See also Howland *v.* Oakland, C. S. R. Co., 110 Cal. 513, 42 Pac. 983, in which case it was held that a witness who had heard the testimony was properly asked the following question: "Now assuming that Dr. Huntington's statement was true as to the character of the injuries which were inflicted, as I have stated, what, in your judgment, was the cause of the miscarriage, if there was a miscarriage?" See further State *v.* Clark, 15 S. C. 403, *holding* that a medical expert, having heard the testimony in regard to the death of a person, and having made an autopsy, may give his opinion as to how long the deceased had been dead. Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

53. *In re* Norman, 72 Iowa 84, 33 N. W. 374.

Reason Why Question Must Be Supported by Evidence. — In North American Accident Ass'n *v.* Woodson, 64 Fed. 689, the court said: "If counsel can, in advance of knowing what he will be able to prove on the trial, frame his questions as he pleases, putting into them supposititious statements from his own invention and ingenuity, wholly unsupported by evidence, then the danger of this rather unreliable kind of testimony will be increased a hundredfold."

54. Hewitt *v.* Eisenbart, 36 Neb. 794, 55 N. W. 252, in which case a witness was asked: "Can a limb be extended in the kind of a fracture we speak of and properly set without the assistance of some other than the surgeon?" This question was not founded upon any evidence in the case, as all the witnesses agreed that

Supposititious Case Stated to Elucidate Subject. — In the examination of a medical expert it is sometimes proper to state a supposed case and ask what would have happened under different conditions than those which the evidence tends to show.[55]

Assumption of Facts Admitted in Pleading. — Where facts are admitted by the pleadings, either party may in examining an expert assume them as true.[56]

Assumption Based on Statement Made by Adverse Counsel. — It has been said that the examiner is not justified in assuming unproved facts merely because adverse counsel in his opening statement declared that he expected to prove them.[57]

General Principles and Matters of Common Knowledge. — In the examination of an expert it is proper to assume as a fact matters of common knowledge and general principles that are supposed to govern the subject of inquiry, regardless of whether such matters or principles are supported by the evidence.[58]

the doctor who had extended it should have had some assistance. It was held that an objection to the question should have been sustained, but that the failure of the court to do so was error without prejudice.

55. Schlenker *v.* State, 9 Neb. 241, 1 N. W. 857. This was a prosecution for murder. One of the witnesses for the prosecution, in explaining to the jury the comparative size of a bullet and the wound of which she died, having testified that "the wound looked smaller than the ball," was asked by the district attorney to explain why this was so, and "whether that would have been the case had the ball gone through the body — on the other side, how it would have looked?" This was objected to by the prisoner's counsel "as immaterial and irrelevant." In holding there was no error in ruling out this question the court said: "The object of the question evidently was to have the jury understand that it was not at all remarkable or unusual that in this case the orifice appeared to be considerably smaller than the missile that they were asked to believe produced it. And this testimony was very proper, for it rested upon the prosecutor to convince the jury that the wound in question was made by the identical bullet then exhibited to them. Nor was it at all improper to state a supposed case, and thus show what, under different conditions, the appearance of a wound made by the same agency might or would have been. There is no just ground of complaint in this particular."

56. Coonan *v.* Loewenthal, 129 Cal. 197, 61 Pac. 940, in which case the plaintiff was permitted to assume facts which were not denied in the answer.

57. Russ *v.* Wabash W. R. Co., 112 Mo. 4, 20 S. W. 472, 18 L. R. A. 823, in which case the court said: "Statements made by an attorney, at the opening of the trial, as to what he expects to prove, do not amount to admission. They bind no one."

58. Kratz *v.* Brush Elec. Light Co., 82 Mich. 457, 46 N. W. 787. In this case the court, speaking on the questions objected to, said: "They were all directed to the effect of certain conditions of the wires as to the transfer of electricity, and although some of the qualities inquired into were not shown to exist in this particular case, yet they were all shown to be caused by the same general principles that are supposed to govern electricity, and were therefore analogous to the case in hand. Take for instance this question: 'Supposing that a live wire should come in contact, for instance, with a telephone wire, by the telephone wire settling down upon the electric-light wire, what effect would that have upon the telephone wire?' This question was entirely proper and competent. The telephone wire was used as an illus-

Assumption Based on Inference From Evidence. — In forming a hypothetical question, one may assume not only facts testified to directly, but any facts that may fairly be inferred therefrom.[59]

(2.) Anticipation of Evidence. — In General. — Although it is true that there must be evidence tending to support the facts assumed by counsel in a hypothetical question, yet the court may, in the exercise of its discretion, allow counsel to anticipate the introduction of evidence in support of the hypothesis upon assurance that such evidence will afterward be introduced;[60] but it has been declared that the usual and better practice is first to introduce all the evidence to support the assumed facts stated in the case.[61]

Striking Out Answer. — Unless before the case is finally submitted to the jury there is some testimony given tending to establish the facts assumed in the question, it is the duty of the court on motion to strike out the answer thereto.[62]

Presumption That Evidence Was Given or Opinion Stricken Out. Unless the contrary appears, it will be assumed on appeal that evidence was given in support of the hypothesis upon which the

tration, and although there was no claim or evidence of a telephone wire having anything to do with the plaintiff's injury, yet the effect upon a telephone wire would be the same as upon an electric wire, and therefore the illustration used could not only do no harm, but was directly in line with and corresponding to the question at issue." See also Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237. In the latter case, which was an action for personal injuries, a medical expert was asked whether the tissue of the lungs can be broken by outside pressure, if at the time the lungs are inflated with air, so as to produce hemorrhage. It was objected that there was no evidence that the lungs of the person in question were inflated with air; but it was held that there was no force in such objection, because "as a matter of common knowledge it was proper to assume as a fact that the lungs must have been so inflated at intervals of a few seconds only."

59. Economy L. & P. Co. *v.* Sheridan, 200 Ill. 439, 65 N. E. 1070. See also Smith *v.* Chicago & A. R. Co., 119 Mo. 246, 23 S. W. 784, in which case the question asked of a medical expert assumed as a fact, among others, that the plaintiff was "violently thrown" from the platform of a passenger coach on a railroad track, to the rocks of the roadbed, and there was no direct evidence that she fell upon a rock or rocks. The physician to whose office she was taken, in speaking of a wound on her hip, testified that it appeared to have been made by some blunt instrument, probably a rock. It was held that it was to be inferred from the evidence that the plaintiff fell upon rocks, and that the question was free from objection.

60. Deig *v.* Morehead, 110 Ind. 451, 11 N. E. 458; Cincinnati H. & I. R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113. See also Harnett *v.* Garvey, 66 N. Y. 641; Galveston H. & S. A. R. Co. *v.* Pitts (Tex. Civ. App.), 42 S. W. 255; Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742.

See particularly as supporting the proposition that this question of procedure is one which rests in the discretion of the court, Delaware, L. & W. R. Co. *v.* Roalefs, 70 Fed. 21; People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

61. Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

62. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291. See also Cincinnati H. & I. R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113.

question addressed to the expert rested, or that his testimony was withdrawn from the jury.[63]

e. *Assumption of Facts in Accordance With Theory of Examiner. In General.* — While a hypothetical question propounded to an expert should have for its basis some probable, or at least possible, theory which is deducible from the evidence, it is well settled that the examiner has a right so to frame his question as to embody a fair theory of what the material facts are as shown by the evidence, and in so doing he may omit facts which from his point of view have no material bearing upon the subject; and it is sufficient if the question contains the facts materially and fairly within the range of the evidence as claimed by the examiner.[64]

Slight Discrepancy Between Assumptions and Evidence. — If the dis-

63. Cincinnati H. & I. R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113.

64. Meeker *v.* Meeker, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489, in which case the court said: "It is a general rule that the hypothetical questions put to experts should be based upon facts which the evidence tends to prove. In this case a careful examination of the evidence leads us to the conclusion that the questions under consideration were not objectionable. It is not required that the questions should be based upon conceded facts, nor is technical accuracy required in framing the questions. If they are entirely without the support of evidence, they should be excluded. Ordinarily, opposing counsel will not be slow, in the re-examination of the witness, to correct the hypothesis upon which the question is based, if it be incorrect." See also the following cases:

United States. — Missouri P. R. Co. *v.* Hall, 66 Fed. 868.

Alabama. — Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127.

California. — People *v.* Hill, 116 Cal. 562, 48 Pac. 711; People *v.* Durrant, 116 Cal. 779, 48 Pac. 75; People *v.* Moan, 65 Cal. 532, 4 Pac. 545.

Colorado. — Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284; Jordan *v.* People, 19 Colo. 417, 36 Pac. 218.

Connecticut. — See *in re* Barber, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Florida. — Baker *v.* State, 30 Fla. 41, 11 So. 492; Williams *v.* State, 34 So. 279.

Iowa. — Brooks *v.* Sioux City, 114 Iowa 641, 87 N. W. 682; Allison *v.* Parkinson, 108 Iowa 154, 78 N. W. 845; Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; Meeker *v.* Meeker, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489.

Illinois. — Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Riverton Coal Co. *v.* Shepherd, 207 Ill. 395, 69 N. E. 921; Chicago & E. I. R. Co. *v.* Wallace, 202 Ill. 129, 66 N. E. 1096.

Indiana. — Railroad *v.* Wood, 113 Ind. 544, 14 N. E. 572; Dieg *v.* Morehead, 110 Ind. 451, 11 N. E. 458; Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Nave *v.* Tucker, 70 Ind. 15; Bishop *v.* Spining, 38 Ind. 143; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Kansas. — Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655; Medill *v.* Snyder, 61 Kan. 15, 58 Pac. 962.

Maryland. — Williams *v.* State, 64 Md. 384, 1 Atl. 887.

Massachusetts. — Bourbannais *v.* West Boylston Mfg. Co., 68 N. E. 232; Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

Minnesota. — Peterson *v.* Chicago, M. & St. P. R. Co., 38 Minn. 511, 39 N. W. 485.

Missouri. — State *v.* Baber, 74 Mo. 292; Neudeck *v.* Grand Lodge, 61 Mo. App. 106; Benjamin *v.* Railroad Co., 50 Mo. App. 609; Turney *v.* Baker (Mo. App.), 77 S. W. 479;

O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64; Russ *v.* Wabash W. R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823.

Montana. — Prosser *v.* Mont. C. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

Nebraska. — Schulz *v.* Modisett, 96 N. W. 338.

New York. — Finn *v.* Cassidy, 165 N. Y. 584, 59 N. E. 311; Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670; Stearns *v.* Field, 90 N. Y. 640; Dilleber *v.* Home Life Ins. Co., 87 N. Y. 79; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464; Guiterman *v.* Liverpool S. S. Co., 83 N. Y. 358; Seymour *v.* Fellows, 77 N. Y. 178; Mercer *v.* Vose, 67 N. Y. 56; Harnett *v.* Garvey, 66 N. Y. 641; Filer *v.* New York C. R. Co., 49 N. Y. 42; People *v.* Lake, 12 N. Y. 358; Hoard *v.* Peck, 56 Barb. 202. *Compare* Lake *v.* People, 1 Park. Crim. 495; People *v.* Thurston, 2 Park. Crim. 49, which latter case was disapproved in Goodwin *v.* State, 96 Ind. 550.

Pennsylvania. — Yardley *v.* Cuthbertson, 108 Pa. St. 395, 1 Atl. 765, 56 Am. Rep. 218.

Texas. — Ft. Worth D. C. R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Gulf, C. & S. F. R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Galveston *v.* H. & S. R. Co. (Tex. Civ. App.), 72 S. W. 78.

Utah. — Palmquist *v.* Mine & Smelter Supp. Co., 25 Utah 257, 70 Pac. 994; Mangum *v.* Bullion B. & C. Min. Co., 15 Utah 534, 50 Pac. 834.

Vermont. — State *v.* Hayden, 51 Vt. 296; Gilman *v.* Strafford, 50 Vt. 723; Hathaway *v.* National Life Ins. Co., 48 Vt. 335.

West Virginia. — Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217; State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

Wisconsin. — Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924; Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67, 59 Am. St. Rep. 900, 35 L. R. A. 249; Quinn *v.* Higgins, 63 Wis. 664, 24 N. W. 482.

Comparison of Question to Instructions Given Jury. — In Goodwin *v.* State, 96 Ind. 550, the court said: "The principal position taken by counsel is that hypothetical questions asked an expert witness must embody all of the facts of which there is any evidence. It is assumed, as the chief support of this argument, that the analogue of such questions is found in the instructions of the court to the jury. It is not difficult to perceive that this assumption can not be made good either practically or theoretically. The argument from analogy is forcible only when the resemblance is close; if there are marked points of difference between the conclusion deduced and the examples taken as leading by analogy to it, the argument fails. The resemblance between the analogue assumed as a just one by counsel, and the real case, fades away upon close inspection. There is one point of difference so plain and so material that no valid train of analogical reason can be pursued, and that point of difference is the situation of court and counsel. The court sits as an impartial arbiter of the law, charged with the duty of presenting the case for both parties; while counsel are charged with the duty of maintaining the theory which in their judgment is the true one. From the judge a different statement of facts, made in a different form and for a different purpose, is required from that which is expected or required of counsel. Counsel assume the facts which they think the evidence tends to prove, and the jury decide whether the facts assumed by counsel are established by the evidence."

Partisan Recital of Evidence. — In Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342, Braley, J., said: "Ordinarily such opinions are based on hypothetical questions, which recite, so far as necessary, the evidence in the case; and that such a recital is partisan makes no difference, if true and sufficiently full to call for the opinion of the expert on the issues in the case."

Otherwise There Could Be No Hypothetical Questions. — In Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464, Folger, J., said: "The claim is that an hypothetical question may not be put to an expert unless it

crepancy between the facts assumed and those which the evidence tends to establish is slight, the error will not be regarded as prejudicial.[65]

Weight of Evidence Not Involved. — It is not a question as to the weight of the evidence, but whether there is any evidence tending to prove the fact assumed.[66]

In Criminal Cases. — Authority is not wanting in support of the proposition that on a criminal prosecution a more strict rule should be enforced against the examiner, and that he should be required to lay the whole case before the witness.[67]

Remedy by Cross-Examination. — If the theory upon which a question proceeds does not agree with that of adverse counsel as to the effect of the evidence, it is the privilege of the latter on cross-examination to put to the witness questions formulated upon his theory of the case, and take the opinion of the witness thereon, leaving to the jury all questions as to which theory, if either, is warranted by the evidence, and thereby to rectify any harm that may have been done by an improper assumption of facts on the direct examination.[68]

Propriety of Full Statement. — It is always safer in asking questions of an expert to enunciate all the particulars upon which his

states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can only be settled by the jury, there would be no room for an hypothetical question. The very meaning of the word is that it supposes or assumes something for the time being. Each side in an issue of fact has its theory of what is the true state of facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly; and such is the correct practice." *Quoted* with approval in Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

Judicial Statement of Rule. — In Barbers' Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90, it was said: "A question to an expert witness, testifying as to a person's mental condition, about which he has no personal knowledge, should contain such assumptions of facts and such only as counsel may fairly claim that the evidence in the case tends to justify, and that, while such a question may not be improper because it included only a part of the facts in evidence, it would be so if, by reason of omission, it manifestly failed to present facts which it did include in their just and true relation, and caused them to appear in one that was untrue and unjust."

65. People *v.* Aiken, 66 Mich. 460, 33 N. W. 821.

66. *In re* Norman, 72 Iowa 84, 33 N. W. 374.

67. People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28, which was a prosecution for murder. The court said: "It was the duty of the prosecution to lay the whole case of this man's sickness and death, as they had made it, before these experts, or so much of it as had an important bearing upon his death, instead of picking out detached portions of it to suit their theories of the case. The whole of the undisputed important facts of the last sickness, and those developed at the *post-mortem*, should have been embraced or summarized in the hypothetical questions leading to and inquiring as to the cause of death."

68. People *v.* Hill, 116 Cal. 562, 48 Pac. 711; Chicago & E. I. R. Co. *v.* Wallace, 202 Ill. 129, 66 N. E. 1096; Goodwin *v.* State, 96 Ind. 550. See also Morrill *v.* Hershfield, 19 Mont. 345, 47 Pac. 997.

opinion is sought;[69] but the hypothetical case stated by the examiner should not include matter altogether unnecessary for the forming of an opinion;[70] and mere fanciful questions, which assume facts wholly irrelevant to the matters under investigation, should be excluded.[71] And it has been held that it is not error for the court to refuse to permit all the testimony given in a case to be read as a hypothetical question.[72]

Immaterial Circumstances. — The question should not include immaterial circumstances, which will have a tendency to mislead the jury into the belief that such immaterial matters are of some value.[73]

Necessity for Fair Reflection of Facts. — Where hypothetical questions are resorted to in the examination of expert witnesses they must be so framed as to fairly reflect facts either admitted or proved, otherwise the testimony drawn out by them can have no real value, but may do much harm in the decision of the case;[74] it being held

69. Roraback *v.* Pennsylvania Co., 58 Conn. 292, 20 Atl. 465, in which case the court said: "If this is done, the witness will have distinctly in mind all the elements which are to enter into the opinions he gives, and the jury will also know what these elements are, and so be able properly to weigh the opinion when given. A prudent lawyer would be quite likely to ask such questions in this way. In most cases the court would probably require this kind of questions to be put in the form indicated."

70. Birmingham R. & Elec. Co. *v.* Butler, 135 Ala. 388, 33 So. 33.

71. Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908, in which case, however, the court remarked that where there is evidence either directly proving the facts assumed, or evidence from which such facts may be inferred, the court cannot invade the province of the jury and decide upon the facts. It is only where there is no evidence at all in support of the facts assumed, or where the question is clearly irrelevant, or where it is merely speculative, or where it is improperly framed, that the court can interfere.

72. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161, in which case it was held that it was proper for the court to tell counsel that they might assume certain facts and put the usual hypothetical question.

73. Russ *v.* Wabash W. R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823.

74. Nichols *v.* Oregon S. L. R. Co., 25 Utah 240, 70 Pac. 996. This was a case in which the question arose as to the cause of a miscarriage. In holding that a certain question was improper the court said: "The question omitted to make any mention of plaintiff's walk of a mile and a half, or of the fact that, notwithstanding her known pregnancy, she was menstruating on the evening of the accident, and that the same was daily getting worse, and accompanied with increasing pain, or that she concealed the fact, not even permitting her husband to be informed, although he was in her presence all the time, or of the fact that she was so weak that two or three days after the accident, and two or three days before her miscarriage, she could hardly sit up in the wagon in which she then took a drive of fifty miles. We think that all these circumstances were very material ingredients of a hypothetical question, the purpose of which was to ascertain from a medical expert the causes which had produced plaintiff's then very serious condition." Ballard *v.* State, 19 Neb. 609, 28 N. W. 271; O'Hara *v.* Wells, 14 Neb. 403, 15 N. W. 722.

Necessity to Include All Undisputed Pertinent Facts. — In Schulz *v.* Modisett (Neb.), 96 N. W. 338, it was said: "It is true that all the undisputed pertinent facts of the case

that before a witness will be allowed to give his opinion as an expert upon a state of facts, knowledge of which he derives from other witnesses, he must be put in possession of all the facts, as ascertained or supposed, on the question about which the inquiry is made, and that an opinion given upon a partial statement of the facts is inadmissible and of no value.[75]

Discretion of Court. — To a large extent the matter is one which rests with the sound and legal discretion of the court.[76]

Facts Not Admitted or Absolutely Proved. — In framing such questions counsel are not confined to facts admitted or absolutely proved, but facts may be assumed which evidence on either side tends to establish, and which are pertinent to the theories which they are attempting to uphold.[77]

Effect Upon Weight of Testimony. — Failure to make an accurate statement of all the facts in the case in propounding a hypothetical question may affect the weight of the testimony of the witness in response to such question.[78]

Repetition of Hypotheses in Subsequent Questions. — Where a witness is asked a hypothetical question which properly states the hypotheses upon which his opinion is desired, he may be asked further questions relative to such hypotheses without restating them.[79]

Use of Exact Words of Witness. — In propounding hypothetical questions to an expert the examiner is not required to use the exact words of the other witnesses.[80]

Objections Waived. — Objection that a hypothetical question does not contain all the elements necessary to a proper answer will be deemed to have been waived unless it is seasonably and properly made in the trial court.[81] Thus, if hypothetical questions are asked before all the evidence to support the assumed facts has been introduced, and after the close of the testimony it is found that such questions contain assumed facts which there is no evidence to support, opposing counsel should move to have the answers stricken

must be included in hypothetical questions."

75. Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737.

76. Roraback *v.* Pennsylvania Co., 58 Conn. 292, 20 Atl. 465.

77. Dilleber *v.* Home Life Ins. Co., 87 N. Y. 79, in which case Earl, J., said: "In the direct examination of their own witnesses it would tend to confusion if facts were assumed in hypothetical questions which did not bear upon the matters under inquiry, or which were not fairly within the scope of any of the evidence." See also Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655.

78. Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499. The court observed: "The value and weight of the answer or opinion will depend very much upon whether the question contains a full or only partial statement of facts. This is for the jury to determine, and is a proper subject of argument before them." See also to the same effect Ft. Worth & D. C. R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834.

79. Gates *v.* Fleischer, 67 Wis. 504, 30 N. W. 674.

80. Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655.

81. Riverton Coal Co. *v.* Shepherd, 207 Ill. 395, 69 N. E. 921; O'Neill *v.* State, 178 Mo. 91, 77 S. W. 64; Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

out and excluded from the consideration of the jury, otherwise it would seem the objection will be taken to have been waived.[82]

f. *Use of Books.* — In examining a medical expert it has been held that the works of medical writers may be used for the purpose of framing proper questions, but it is not permissible on the direct examination to read what medical authorities have written and ask the witness whether or not he concurs in the view of such writers.[83]

g. *Harmless Errors.* — Failure properly to restrict hypothetical questions will be regarded as harmless where it is apparent that no prejudice resulted.[84]

h. *Objection Waived.* — Unless an objection to a question on the ground that it contains a hypothesis which is not founded on the evidence is seasonably and properly made in the trial court it cannot be raised for the first time on appeal.[85]

Commission of Like Error by Adversary. — It has been held that an error in propounding hypothetical questions which are based on the evidence is none the less ground for reversal because the other party in putting in his evidence committed a like error.[86]

2. Cross-Examination. — A. Right of Cross-Examination. Experts, like other witnesses, are of course subject to cross-examination;[87] and it is right and in fact necessary that expert testimony be subjected to every legitimate test on cross-examination in order properly to weigh it.[88]

B. Application of General Rules. — The cross-examination of an expert witness should proceed in accordance with rules applicable to the cross-examination of witnesses generally.[89]

82. Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566. See also Wilkinson *v.* Detroit Steel & Spring Co., 73 Mich. 405, 41 N. W. 490.

83. State *v.* Coleman, 20 S. C. 441, in which case the court said: "We understand that an expert may be examined as to how far standard works sustain or conflict with his opinion, but we do not see that such indulgence dispenses with the necessity of reaching his own opinion in the regular way." See Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237; People *v.* Wheeler, 60 Cal. 581; People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477. See further article "Books."

84. Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023, in which case it was held that failure expressly to restrict hypothetical questions as to the value of an attorney's services to their value in the county in which they were performed, was immaterial, because the question showed that the services for which recovery was sought were rendered in connection with litigation in the named county and the answers were necessarily based upon that fact. The court said: "We think the omission of the interrogative part of the question, as asked some witnesses, to refer specifically to Harden county, did not render the answer immaterial nor incompetent."

85. Healy *v.* Visalia T. P. R. Co., 101 Cal. 585, 36 Pac. 125; Bland *v.* Southern Pacific R. Co., 65 Cal. 626, 4 Pac. 672; People *v.* Moan, 65 Cal. 532, 4 Pac. 545.

86. Russ *v.* Wabash W. R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823.

87. City of Washington, 92 U. S. 31; Chicago *v.* Greer, 9 Wall. (U. S.) 726; People *v.* Hill, 116 Cal. 562, 48 Pac. 711.

88. Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791.

89. Chicago *v.* Greer, 9 Wall. (U. S.) 726; Baker *v.* Borello, 136

Latitude Allowed.— The court to expedite business may curtail the cross-examination and exclude questions upon immaterial matters;[90] but nevertheless there is another rule which is applicable, viz., that the cross-examiner should be allowed a liberal range, and that it is proper to interrogate the witness touching all matters testified to by him on his examination in chief, and to ask him all questions which are reasonably necessary and proper to test his temper, bias, motives, intelligence, accuracy, credibility or means of knowledge.[91]

Explanation of Testimony in Chief. — On the cross-examination of an expert it is proper to ask him to explain what he meant by what he said on his direct examination in chief;[92] and it has been held that where a long and involved hypothetical question has been put and answered in favor of the party calling the witness, it is proper and allowable, in the discretion of the court, in cross-examination to bring out clearly to the jury that the answer rested simply on a one-sided statement of assumed facts, and that no facts which might

Cal. 160, 68 Pac. 591; Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Chicago, K. & N. R. Co. *v.* Stewart, 47 Kan. 704, 28 Pac. 1017; Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248, 26 Pac. 698; Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566. See also article "CROSS-EXAMINATION OF WITNESSES."

90. People *v.* Rader, 136 Cal. 253, 68 Pac. 707, which was a prosecution for murder. The examination in chief of the medical witness who attended the decedent after he was shot occupied eight folios of the transcription. The cross-examination consumed seventy-six folios, when a recess was granted at the request of the defendant's counsel, to enable him to consult physicians in order to frame his questions. After recess the cross-examination was resumed, covering forty-four more folios, making in all one hundred and twenty. The re-direct examination covered thirty-eight folios, making on direct examination, in all, forty-six folios. The recross-examination covered one hundred and twelve, making in all two hundred and thirty-two folios on cross-examination. After endless repetitions the court remarked to counsel: "I don't wish to interfere, but I will have to if this is continued. I have certainly given you great latitude in asking questions here, and I think you have gone as far as the court should permit you to do. You can take your exception. I will allow no more questions on that subject." It was held that there was no error. See also Missouri P. R. Co. *v.* Fox, 60 Neb. 531, 83 N. W. 744, *holding* that the latitude to be given in the cross-examination of an expert rests largely in the discretion of the trial court, and should always be restricted to facts and circumstances brought out on direct examination.

91. McFadden *v.* Santa Ana O. & T. R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252. See also State *v.* Porter, 34 Iowa 131; State *v.* Reddick, 7 Kan. 143; Johnston Harvester Co. *v.* Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536, in which case it was declared that the courts are not disposed to limit or confine the opportunities for testing and determining by cross-examination the accuracy and value of expert evidence. See further Garfield *v.* Kirk, 65 Barb. (N. Y.) 464.

92. Kelly *v.* Erie T. & T. Co., 34 Minn. 321, 25 N. W. 706. In this case, where a medical expert had testified on his examination in chief that the plaintiff would recover "very permanently" from the injury which he had sustained, except a slight lameness, it was held that, as affecting the value of this opinion as evidence, it was proper to bring out, on cross-examination, that the in-

have been proved to the satisfaction of the jury on the other side were or could have been taken into account by the witness.[93]

Questions Not Proper for Expert Testimony. — It would seem that it is not proper cross-examination of a witness to ask him to state his opinion upon questions which are for the jury or which are not proper subjects for expert testimony.[94]

C. Discretion of Court. — The cross-examination of an expert witness, like the cross-examination of other witnesses, is under the guidance and control of the court, and is a matter as to which the court may exercise sound judicial discretion.[95]

D. Relevancy of Questions to Examination in Chief. — The cross-examination of the witness will as a general proposition be confined to matters which were brought out on his direct examination, and it is not permissible to ask him questions which in no manner relate to the subjects upon which he was examined in chief, and which are calculated and intended to elicit evidence of independent facts which the cross-examiner deems material to his case.[96]

Where Witness Did Not Originally Testify as Expert. — Where a witness is not called or examined in chief as an expert, or asked to give a professional opinion on the facts to which he testifies, it is not proper cross-examination to propound questions to him with the view of eliciting expert testimony, but if his opinion as an expert

jury was likely to produce and be followed by certain diseases, such, for instance, as rheumatism, neuralgia and sciatica.

93. Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125.

94. *In re* Betts, 113 Iowa 111, 84 N. W. 975. In this case upon the cross-examination of an expert who had testified as to the condition of a testator's mind, he was asked to say whether, upon a certain assumed state of facts, he would say that the testator was capable of "transacting ordinary business intelligently." It was held that this was practically equivalent to asking him whether the testator was competent to make a will, which was the ultimate fact for the jury to find, and that an objection to the question should have been sustained. See also Lay *v.* Adrian, 75 Mich. 438, 42 N. W. 959, in which case it was held that it is not proper cross-examination of a physician, who has testified to the nature of injuries sustained by a plaintiff and the prospect of a full recovery, to ask him if he would be able to say from an examination of the plaintiff, if he had never seen him, that he was unable to do manual labor, said question being hardly proper for a medical expert.

95. Baker *v.* Borello, 136 Cal. 160, 68 Pac. 591; Andre *v.* Hardin, 32 Mich. 324. See also Davis *v.* United States, 165 U. S. 373.

96. Whitsett *v.* Chicago, R. I. & P. R. Co., 67 Iowa 150, 25 N. W. 104. See also Gridley *v.* Boggs, 62 Cal. 190; State *v.* Smith, 49 Conn. 376; Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

Application of Rule. — In Baker *v.* Borello, 136 Cal. 160, 68 Pac. 591, which was an action for personal injuries, a medical witness for the plaintiff had testified that he thought there had been a partial dislocation of the plaintiff's shoulder joint, and that the injury to the shoulder was permanent. It was held that it was not proper to ask him on cross-examination if the permanent injury to which he had testified was "the necessary result of such a partial dislocation of the shoulder," because he had not testified in chief as to the cause of the injury.

is desired he should be called as an expert and made the witness of the party who desired his opinion.[97]

E. Hypothetical Questions. — a. *Propriety of Hypothetical Questions.* — When an expert has given an opinion in answer to hypothetical questions asked him on his direct examination, it is proper and permissible to cross-examine him by asking him other hypothetical questions.[98]

b. *Assumptions.* — *In General.* — The cross-examiner may base his questions upon such portion of the evidence as he may see fit to select;[99] and it is well settled that counsel has the right to assume any state of facts in reason which he believes is supported by the evidence, and to ask the opinion of the witness upon the facts so assumed.[1]

Assuming Facts Not in Evidence. — It is well settled that experts may be cross-examined on purely imaginary and abstract questions, assuming facts and theories which have no foundation in the evidence;[2] but the practice in this regard is under the control of the trial court in the exercise of its sound judicial discretion;[3] and the

97. Olmsted *v.* Gere, 100 Pa. St. 127.

98. People *v.* Sutton, 73 Cal. 243, 15 Pac. 86; People *v.* Hill, 116 Cal. 562, 48 Pac. 711; Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

99. People *v.* Sutton, 73 Cal. 243, 15 Pac. 86; State *v.* Reddick, 7 Kan. 143.

1. Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908, in which case the court said: "An examination in chief can not be so conducted as to compel the cross-examining counsel to merely follow the line of questions there asked; but, when a general subject is opened by an examination in chief, the cross-examining counsel may go fully into details, and may put the case before the expert witness in various phases. Each side has a right to take the opinion of the witness upon its theory of the facts established by the evidence. While it is true that a cross-examination must be confined to the subject of the examination in chief, it is not true that the cross-examining party is confined to any particular part of the subject. He has a right in such a case as this to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved, and he also has the right to add to the question such facts as he thinks the evidence establishes." See also Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

2. Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; State *v.* Reddick, 7 Kan. 143; Bathrick *v.* Detroit P. & T. R. Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63, in which case it was held that a physician testifying as an expert that he has discovered no traces of an abortion in a certain case, may properly be asked whether such traces would exist under certain circumstances, even though no proof of such circumstances has been made; People *v.* Augsbury, 97 N. Y. 501; Garfield *v.* Kirk, 65 Barb. (N. Y.) 464. See also Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Uinacke *v.* Chicago, M. & St. P. R. Co., 67 Wis. 108, 29 N. W. 899.

3. Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; People *v.* Augsbury, 97 N. Y. 501.

Harmless Error in Excluding Question. — Hayward *v.* Knapp, 23 Minn. 430, in which case it was held

court will confine the examination within proper limits and not allow the witness or itself to be trifled with by the asking of questions which are contrary to the state of facts shown by the evidence, and which are not devised to test the skill, accuracy or knowledge of the witness.[4]

F. As to Prior Conflicting Opinions. — It is proper in cross-examining him, if possible, to make him admit that he has previously entertained and expressed opinions other than those which he gave on his direct examination.[5]

G. As to Prior Conflicting Testimony. — Likewise it is proper to examine him touching contradictory statements which he made on a former trial of the case.[6]

H. As to Prior Inconsistent Acts. — Furthermore, he may be asked whether or not he has done acts which are inconsistent with the opinion which he has given as a witness.[7]

I. As to Remuneration of Witness. — It is proper to bring out the fact, if it is a fact, that the witness was employed by the

that error, if any, in excluding a question asked on cross-examination because it improperly assumed facts which were not in evidence was harmless.

4. State *v.* Hanley, 34 Minn. 430, 26 N. W. 397, *following* State *v.* Stokely, 16 Minn. 282. See also Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; People *v.* Augsbury, 97 N. Y. 501; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328. See also Nichols *v.* Oregon S. L. R. Co., 25 Utah 240, 70 Pac. 996, in which latter case the court cited Association *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392, in which case the court said: "It is a proposition too simple to require any citation of authorities that the material facts assumed in a hypothetical question must be proven on the trial, or, rather, that there must be evidence on the trial to prove them; otherwise it is error to allow them to be answered. How can we say that either the answers to the questions or the verdict of the jury would have been the same if the statement contained in the question, and not proved, had been omitted?"

Examination of Medical Experts. In Bostic *v.* State, 94 Ala. 45, 10 So. 602, a medical expert who attended the deceased after he had been wounded testified that he died of concussion of the brain, caused, as he believed, by the wound he had received. He testified that, after being wounded, he had been twice removed from one place to another, and "that it was drizzling at the time he was moved." On cross-examination the doctor was asked two questions substantially the same, namely: "If it was not possible that removing deceased in his condition about in bad weather over a rough country caused his death?" The second question was: "Might not the moving deceased in inclement weather over rough roads, deceased being exposed while he was in a condition of mental excitement resulting from the wound, have caused his death?" It was held that objections to these questions were properly sustained, because there was no evidence that the removal was over "a rough country."

5. San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 29 Pac. 977, 11 L. R. A. 604; Montgomery *v.* Com., 88 Ky. 509, 11 S. W. 475; Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227; Patchin *v.* Astor Mut. Ins. Co., 13 N. Y. 268.

6. Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579.

7. Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33. In this case a surveyor of highways testified that he did not think that the position of a post in a highway made the highway dangerous; and it was held that it was proper to ask him on cross-examination if he did not remove the post after an accident had happened.

party who called him to investigate the case, and to serve as an expert witness.[8]

J. As to Views of Others. — It has been held that it is not proper to ask the witness to state what are the views of others who are skilled in the science or art as to which he is called to testify, and to say whether such others differ in opinion from him.[9]

K. As to Results of Consultation With Others. — It is proper to ask the witness to state what conclusion was arrived at by him and others who held a consultation concerning the subject under consideration.[10]

L. As to Capacity, Experience and Knowledge of Witness. In cross-examining an expert witness it is permissible, and indeed necessary, fully to inquire of him as to his skill, knowledge and experience in his trade, art or profession.[11]

Opinion of Witness as to Value of His Own Testimony.— It has been held that an expert witness cannot be asked whether, in his opinion, the jury would be justified in basing a verdict upon his testimony.[12]

Discretion of Court as to Latitude Allowed. — Where a witness has been questioned to bring out his skill as an expert, considerable latitude ought to be allowed on cross-examination to bring out the facts as to his competency to give evidence in that character; yet no definite limit can be prescribed as a rule of law, but a large discretion must be left in the trial court.[13]

8. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818.

9. Root *v.* Boston E. R. Co., 183 Mass. 418, 67 N. E. 365.

10. McFadden *v.* Santa Ana O. & T. R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252, which was an action for personal injuries. A medical expert testified in chief that he visited the plaintiff and that he had a consultation with the plaintiff's attending physician. It was held that it was proper to ask him on cross-examination what was the determination at such consultation as to what was the serious thing to attend to, and as to what treatment was advised at such consultation.

11. De Phue *v.* State, 44 Ala. 32; *In re* Mullin, 110 Cal. 252, 42 Pac. 645; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; Sheldon *v.* Booth, 50 Iowa 209; Central Branch Union Pac. R. Co. *v.* Nichols, 24 Kan. 242; Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070.

Nature of Witness' Practice. Where evidence has been introduced that a witness is a physician it is proper on cross-examination to inquire fully as to the kind of practice he has had, and as to the means adopted to establish a practice, either in the publication of hand-bills or otherwise. Van Deusen *v.* Newcomer, 40 Mich. 90.

12. Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616, in which case it was held that the court properly excluded the following question, which was asked of a medical expert: "In other words, as a surgeon, you would hardly ask us business men here, these gentlemen over at my right, to find a verdict based upon your opinion as to that boy's arm, without a full examination, would you, doctor?" The court said: "It was not for the witness to determine what evidence the jury should act upon."

13. Andre *v.* Hardin, 32 Mich. 324, in which case Cooley, J., said: "In determining how far the cross-examination should go in its inquiry into particular transactions, the circuit court should, I think, be allowed large liberty. There must be some limit to such an inquiry, and from the nature of the case no definite limit can be

M. Reasons for and Basis of Opinion. — It is well settled that an expert who has given an opinion upon a question submitted to him may be asked on cross-examination to state the reasons for his opinion;[14] and to disclose fully the basis of his opinion and the data to which he resorted in forming his conclusion.[15]

N. Use of Books. — On the cross-examination of an expert greater latitude is allowed as respects the use of books than is given on his direct examination. It is competent to inquire of him as to the extent of his knowledge of and his familiarity with accredited standard authors;[16] but since books are not admissible as original

prescribed as a rule of law. The court ought to permit the inquiry to proceed far enough to enable the jury to judge of the reasonableness of the witness' pretensions to skill, so far as such an inquiry can afford the means."

14. Williams *v.* State (Fla.), 34 So. 279.

15. Root *v.* Boston E. R. Co., 183 Mass. 418, 67 N. E. 365, where a medical expert testified as to personal injuries. The court said: "It was proper to ask him on cross-examination as to how far he required from a patient a full disclosure of symptoms and history of the case. This would be necessary to furnish *data* on which to base an opinion. And it cannot be said that the further question as to whether he disclosed the information thus obtained to other persons was outside the limits of a reasonable cross-examination." See also Pittsburg C. C. & S. L. R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499, *affirming* 107 Ill. App. 254; State *v.* Felter, 25 Iowa 67; Lay *v.* Adrian, 75 Mich. 438, 42 N. W. 959, in which last case it was held that in cross-examining a medical expert it is proper to inquire whether his opinion is based entirely on what he saw himself or also upon what was said to him by the person concerning whom he testified.

16. Hutchinson *v.* State, 19 Neb. 262, 27 N. W. 113, wherein upon the cross-examination of a medical expert the following occurred: "I will ask you to state, doctor, if the testimony that you have given in reference to women becoming pregnant in case of rape or when sexual intercourse is had by force, is not based upon medical authorities rather than upon your own experience. A. Yes, the testimony is all based upon medical authorities. Q. I will ask you to state what the medical authorities hold upon the question now." In holding that this was proper cross-examination the court said: "Aside from the fact that the testimony was given in chief upon the teachings of medical authorities to a great extent, we think the proper and legitimate scope of cross-examination would permit the interrogatory. If the witness had been testifying from his experience and observation from a long course of practice, it was yet proper, for the purpose of ascertaining his means of knowledge by a reference to the teachings of text-books of his profession and the scientific works from which he had drawn the theories and principles to which he had testified. Again, we cannot conceive that it would be possible, by any rule of evidence, to base the testimony in chief of the witness upon his experience in obstetrics. For instance, the normal period of gestation; the probability of conception in the first act of intercourse; the length of the period of gestation in case of the first, as compared with subsequent children; the number of days that ill-health, caused by uterine disorders, would shorten the period of gestation, if at all; and many other prominent elements in the case presented by the defense — would naturally and inevitably require the witness to go outside of the domain of experience as an obstetrician; and it seems to us that he very properly and truthfully answered that this testimony was based upon medical authorities. For the purpose, therefore, of testing his recollection as well as his knowledge,

evidence, they should not be admitted on cross-examination where their introduction is sought not for the contradiction of something maintained by the witness, but simply to prove a contrary theory.[17]

Agreement or Disagreement With Authorities. — It has been held that it is proper to read or for the witness to read extracts from standard authorities upon the subject-matter involved, and thereupon to ask him whether or not he agrees with such authorities, and to compare his opinion with those of the writers.[18]

it was proper to interrogate him as to the teachings of those authorities; and, in case his testimony was incorrect, to confront him with them, in order that he might be corrected, and the jury thus be rendered able to judge of the weight to which his testimony was entitled."

Distinction Between Reading Books to Witness and to Jury. — In Byers *v.* Nashville C. & St. L. R. Co., 94 Tenn. 345, 29 S. W. 128, the court, speaking of the method of cross-examination that had been pursued in that case, said: "We think it, therefore, admissible for the attorney to use the book in shaping his questions, and it was not error for him to require the witness to examine and read portions of the book, with a view of testing his knowledge by proper questions, and this, so far as the record shows, is all that was attempted to be done in the first examination, when the objection was made. But reading the book to the jury as evidence of the facts therein stated, and as a general rebuttal of the testimony of the expert, stands on a different basis. It does not appear that this was done during the examination and cross-examination of the defendant's witnesses, but after they were through, then the book was introduced again by the plaintiff's counsel and several pages read to the jury, and no objection was at this time made. In the absence of such objection, made when the book was thus offered and read for this purpose and in this way, there is no reversible error."

17. Bloomington *v.* Shrock, 110 Ill. 219, in which case the witness was a medical expert. He gave no opinion which he based upon the authority of books, and it was held that it was error to allow him to be cross-examined by first obtaining from him a statement that he was acquainted with certain treatises and then reading from the same and asking whether he agreed with the authors as to the parts so read. The court said: "Where the witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory." *Distinguishing* Conn. M. L. Ins. Co. *v.* Ellis, 89 Ill. 516, in which case the expert assumed to base his opinion upon the work of a particular author. See also Marshall *v.* Brown, 50 Mich. 148, 15 N. W. 55; Pinney *v.* Cahill, 48 Mich. 584, 12 N. W. 862; Davis *v.* State, 38 Md. 15; Com. *v.* Sturtivant, 117 Mass. 122; Huffman *v.* Click, 77 N. C. 55; State *v.* O'Brien, 7 R. I. 336; Ripon *v.* Bittel, 30 Wis. 614.

18. Byers *v.* Nashville, C. & St. L. R. Co., 94 Tenn. 345, 29 S. W. 128. *Compare* People *v.* Sutton, 73 Cal. 243, 15 Pac. 86, in which case it was held that while it is proper to ask a witness questions with a view to ascertain his familiarity with authors upon the subject as to which he testified, it is not proper to ask him what his opinion is of a certain authority.

Misquotation of Book. — If the expert has quoted a book it may be read to him to show that he has misquoted it.[19]

Teachings of Authorities. — Where an expert upon being examined in chief refers to what he has learned from books and reading, it is proper on cross-examination to ask him what such books teach.[20]

IX. WEIGHT OF EXPERT TESTIMONY.

1. Province of Court and Jury. — A. In Jury Cases. — a. *In General.* — It is well settled that in cases tried before a jury in which expert testimony is introduced, the credibility of the witness and the weight to be attached to his testimony are within the sole province of the jury;[21] the rule being the same as that which applies to other evidence, viz., that it is the competency and not the

The witness in that case was called upon a question of insanity, and he testified that he was familiar with Maudsley's "Responsibility in Mental Diseases." He was thereupon asked if he knew whether or not it was a standard work. It was held that an objection to this question was properly sustained, because his opinion of the work would not tend to prove his great familiarity with authors upon that subject.

19. *Per* Wilkes, J., in Byers *v.* Nashville C. & St. L. R. Co., 94 Tenn. 345, 29 S. W. 128.

20. Cronk *v.* Wabash R. Co. (Iowa), 98 N. W. 884, *distinguishing* Bixby *v.* Omaha & C. B. R. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533.

21. Out of the multitude of cases which support the text the following have been selected as being peculiarly instructive:

United States. — Bram *v.* United States, 168 U. S. 552; The Conqueror, 166 U. S. 110; Ætna Life Ins. Co. *v.* Ward, 140 U. S. 76; Union Ins. Co. *v.* Smith, 124 U. S. 405; Transportation Line *v.* Hope, 95 U. S. 297; Hinds *v.* Keith, 57 Fed. 10; Erhardt *v.* Ballin, 55 Fed. 968; United States *v.* Mathias, 36 Fed. 892; United States *v.* Faulkner, 35 Fed. 730; United States *v.* Pendergast, 32 Fed. 198.

Alabama. — Birmingham R. & Elec. Co. *v.* Ellard, 135 Ala. 433, 33 So. 276; Birmingham Natl. Bank *v.* Bradley, 108 Ala. 205; Birmingham R. & Elec. Co. *v.* Baylor, 101 Ala. 488, 13 So. 793; Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Wilkinson *v.* Mosley, 30 Ala. 562; Bennett *v.* Fail, 26 Ala. 605; Dixon *v.* Barclay, 22 Ala. 370; Tullis *v.* Kidd, 12 Ala. 648.

Arkansas. — St. Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225; St. Louis & S. F. R. Co. *v.* Thomason, 59 Ark. 140, 26 S. W. 598; Tatum *v.* Mohr, 21 Ark. 349.

California. — People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175.

Colorado. — Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771; Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172; Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37.

Georgia. — Wall *v.* State, 112 Ga. 336, 37 S. E. 371; Merritt *v.* State, 107 Ga. 675, 34 S. E. 361; Baker *v.* Richmond C. M. Works, 105 Ga. 225, 31 S. E. 426; Pritchett *v.* Ballard, 102 Ga. 20, 29 S. E. 210; Anderson *v.* Barksdale, 77 Ga. 86; Choice *v.* State, 31 Ga. 424.

Illinois. — Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272.

Indiana. — Sanders *v.* State, 94 Ind. 147; Forgey *v.* First Natl. Bank, 66 Ind. 123; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Iowa. — Long *v.* Travelers' Ins. Co., 113 Iowa 259, 85 N. W. 24; Howe *v.* Richards, 112 Iowa 220, 83 N. W. 909; Meeker *v.* Meeker, 74 Iowa 352, 37 N. W. 773, 7 Am. St.

sufficiency of the evidence upon which the court is called to decide.[22]

Truth of Facts Assumed. — Where an expert is asked to give his opinion upon facts assumed hypothetically he must take such facts as true, it being within the sole province of the jury to weigh the conflicting testimony of other witnesses, and to say whether or not the facts assumed are true.[23]

Rep. 489; Little *v.* McGuire, 43 Iowa 447; McGregor *v.* Armill, 2 Iowa 30.

Kansas. — State *v.* Grubb, 55 Kan. 678, 41 Pac. 951; Chicago, K. & W. R. Co. *v.* Drake, 46 Kan. 568, 26 Pac. 1039; Bentley *v.* Brown, 37 Kan. 14, 14 Pac. 434; Atchison, T. & S. F. R. Co. *v.* Thul, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; Anthony *v.* Stinson, 4 Kan. 180. See also State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

Louisiana. — Chandler *v.* Barrett, 21 La. Ann. 58; State *v.* Bailey, 4 La. Ann. 376.

Maine. — Hovey *v.* Chase, 52 Me. 304.

Maryland. — Davis *v.* State, 38 Md. 15.

Massachusetts. — Tucker *v.* Massachusetts R. Co., 118 Mass. 546; Nunes *v.* Perry, 113 Mass. 274.

Michigan. — Olson *v.* Mainstique, 110 Mich. 656, 68 N. W. 986; Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198; People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28; Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276; People *v.* Millard, 53 Mich. 63, 18 N. W. 562; Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728; Hitchcock *v.* Burgett, 38 Mich. 501; Treat *v.* Bates, 27 Mich. 390.

Minnesota. — Stevens *v.* Minneapolis, 42 Minn. 136, 43 N. W. 842; Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447.

Missouri. — St. Louis *v.* Ranken, 95 Mo. 189, 8 S. W. 249; Kansas *v.* Butterfield, 89 Mo. 646, 1 S. W. 831; Kansas *v.* Hill, 80 Mo. 534; Rose *v.* Spies, 44 Mo. 20; Hull *v.* St. Louis, 138 Mo. 618, 40 S. W. 89, 42 L. R. A. 753.

Montana. — Kelley *v.* Cable Co., 8 Mont. 440, 20 Pac. 669.

Nebraska. — Lincoln Land Co. *v.* Phelps Co., 59 Neb. 249, 80 N. W. 818; Hayden *v.* Frederickson, 59 Neb. 141, 80 N. W. 494; Sioux City & P. R. Co. *v.* Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724; Curry *v.* State, 5 Neb. 412; Heffernan *v.* O'Neill (Neb.), 96 N. W. 244.

New Hampshire. — Page *v.* Parker, 40 N. H. 47.

New Mexico. — Ruhe *v.* Abren, 1 N. M. 247.

New York. — Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464; Bedell *v.* Railroad Co., 44 N. Y. 367; Templeton *v.* People, 3 Hun 357.

North Carolina. — Flynt *v.* Bodenhamer, 80 N. C. 205; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

North Dakota. — Tullis *v.* Rankin, 6 N. D. 44, 68 N. W. 187, 66 Am. St. Rep. 586, 35 L. R. A. 449.

Oregon. — Langford *v.* Jones, 18 Or. 307, 22 Pac. 1064.

Pennsylvania. — Schaeffer *v.* Philadelphia & R. R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. Rep. 884; Delaware & Chesapeake Steam Towboat Co. *v.* Starrs, 69 Pa. St. 36; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146.

Rhode Island. — Howard *v.* Providence, 6 R. I. 514; Fletcher *v.* Seekell, 1 R. I. 267.

South Carolina. — State *v.* Johnson, 66 S. C. 23, 44 S. E. 58.

Utah. — State *v.* McCoy, 15 Utah 136, 49 Pac. 420.

Vermont. — Fulsome *v.* Concord, 46 Vt. 135; Whitney *v.* Clarendon, 18 Vt. 252.

West Virginia. — Ward *v.* Brown, 53 W. Va. 227, 44 S. E. 488; Stutz *v.* Chicago & M. W. R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769.

22. Moye *v.* Herndon, 30 Miss. 110.

23. Kempsey *v.* McGinniss, 21 Mich. 123.

Assumption of Facts by Witness. — Experts should not assume facts which are not embraced in the hypothetical question and which they have culled from the evidence heard by themselves during the trial.[24] Their answers should be given upon the basis of the facts stated in the hypothetical question, and without recourse to other facts within their knowledge.[25]

b. *Withdrawal of Case From Jury by Court.* — Where expert or opinion evidence is relied upon, and it is wholly insufficient to authorize a finding in favor of the party who offered it, the court may and should instruct the jury to that effect, and withdraw from the jury the question upon which such evidence was introduced.[26]

B. In Trials by Court. — Where a case depending on expert testimony is tried by the court without a jury, and such testimony is conflicting, the credibility of the witness and the weight of the testimony are to be determined by the trial court, and its findings of fact will not be disturbed on appeal merely because the appellate court has not entire confidence in them and might have arrived at different conclusions.[27]

2. Exceptions to Referee's Report. — Where a question is referred to an auditor and the evidence which he takes consists largely of the testimony of expert witnesses, the report of the auditor upon exceptions thereto will not be disturbed where the evidence is sufficient to support his findings.[28]

3. Rules for Weighing Expert Testimony. — A. In General. The credibility of an expert and the weight which should be attached to his testimony may be tested by the rules applicable to other

24. People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

25. Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075, in which case the court said: "When a witness is speaking of his own professional knowledge of the condition of his patient, the opposing counsel has the opportunity to cross-examine him as to the details of that knowledge; but when a hypothetical question is put to him he should be confined to the facts as stated in such question, the same as if he had never seen the patient. If he is permitted to inject facts into the question out of his own knowledge, and which he does without knowledge of the court or jury, the answer is misleading, and a hindrance rather than an aid to justice. It cannot always be known when an expert witness does a thing of this kind, but when it appears, as it did here, from his own frank statement, the answer to the question should be excluded at once, and any further answer of the witness to hypothetical questions taken with caution, if not rejected altogether, unless it can be made clearly to appear that in such answer he acts upon the facts stated in such questions alone, and without recourse to facts within his knowledge not embraced in such questions."

26. Buys *v.* Buys, 99 Mich. 354, 58 N. W. 331.

27. Frey *v.* Lowden, 70 Cal. 550, 11 Pac. 838; Lay *v.* Wissman, 36 Iowa 305; Wilson *v.* Beauchamp, 50 Miss. 24. See also Sexton *v.* Lamb, 27 Kan. 426; Bentley *v.* Brown, 37 Kan. 14, 14 Pac. 434, in which case the court said: "A finding made by the trial court upon conflicting [expert] testimony is as conclusive when attacked in this court as is the verdict of the jury."

28. Brown *v.* Georgia M., M. & I. Co., 106 Ga. 516, 32 S. E. 601.

witnesses, and the value of such testimony greatly depends upon the knowledge, experience, opportunity and capacity of the witness and the soundness of the reasons upon which his opinions are founded.[29]

Consideration of Surrounding Circumstances. — The weight of expert testimony must be judged by all other circumstances of the case.[30]

Corroborating Testimony. — It has been declared that expert testimony is most used and it is most useful in cases of conflict between other witnesses for the purpose of corroborating or impeaching their testimony.[31]

Considered as Other Evidence. — The testimony of expert witnesses is to be considered and canvassed as that of other witnesses; so far as such testimony appeals to the jury's judgment and convinces them of its truth it may be adopted and acted upon; but the mere fact that witnesses are called as experts does not obligate the jury to accept their opinions as to what the facts are in the face of testimony of other witnesses who claimed to have actual knowledge of the facts.[32]

Sufficiency of Strong Probability. — It has been declared that it is difficult for any evidence resting mainly upon the opinions of witnesses to establish a fact beyond controversy, and that the most that can be attained by such evidence is strong probability that a fact is so.[33]

B. Conclusiveness of Expert Testimony. — Although great respect should be paid to the opinions of scientific witnesses, yet when they are speaking upon subjects which lie within the range of common observation and experience their opinions are not controlling upon the jury.[34] Upon the jury rests the responsibility of

29. *Per* Dick, J., in Chandler *v.* Thompson, 30 Fed. 38.

Application of General Rules. The value of expert testimony depends to some extent upon the conduct and actions of the witness on the stand, his partiality or impartiality, and other relevant circumstances. Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

30. Barrett *v.* Hall, 1 Mason (U. S.) 447, 2 Fed. Cas. No. 1047, *per* Story, J.

31. Borland *v.* Walrath, 33 Iowa 130.

32. Olson *v.* Manistique, 110 Mich. 656, 68 N. W. 986. See further Anthony *v.* Stinson, 4 Kan. 180, in which case the court said: "The testimony of experts or professional witnesses is often very important, and justly entitled to great weight in a cause; but it must have its legitimate influence by enlightening, convincing and governing the judgment of the jury, and must be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony. The jury cannot be required by the court to accept, as matter of law, the conclusions of the witnesses instead of their own." And see Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Atchison, T. & S. F. R. Co. *v.* Thul, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; Kelley *v.* Cable Co., 8 Mont. 440, 20 Pac. 669.

33. Moye *v.* Herndon, 30 Miss. 110.

34. Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256. See also Jones *v.* White, 11 Humph. (Tenn.) 268, in which case it was said: "Persons are supposed to understand questions appertaining to their own profession, and hence their opinion in reference thereto is evidence. It is not conclusive of the facts stated, and may be shown to be incorrect."

Opinions Regarded as Aids to Jury. In Choice *v.* State, 31 Ga. 424, the court said: "The opinions of ex-

returning a correct verdict, and if the opinions of experts are opposed to the conviction of the jury, the latter may reject such opinions.[35]

perts are competent testimony; and when the experience, honesty and impartiality of the witnesses are undoubted, their testimony is entitled to great weight and consideration. Not that it is so authoritative that the jury are bound to be governed by it. It is intended to aid them in coming to a correct conclusion in the case."

Where Expert Testimony Is Best Evidence Obtainable. — "In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence. There can be no other guide, and where want of skill or attention is not thus shown by expert evidence applied to the facts there is no evidence of it proper to be submitted to the jury." Ewing *v.* Goode, 78 Fed. 442.

35. Williams *v.* State, 50 Ark. 511, 9 S. W. 5; Anthony *v.* Stinson, 4 Kan. 180, *per* Bailey, J.

Right of Jury to Rely Upon Their Own General Knowledge and Ideas. So far from laying aside their own general knowledge and ideas the jury should apply such knowledge and ideas to the matters of fact in evidence in determining the weight to be given to the opinions of experts; and it is only in that way that they can arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of expert testimony by their own general knowledge of the subject of inquiry. Head *v.* Hargrave, 105 U. S. 45, *per* Field, J., who said: "If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable."

Surrender of Judgment by Jury. While there are doubtless authorities holding that a jury has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts, and that a willful disregard of such testimony will be ground for a new trial, no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate. The Conqueror, 166 U. S. 110, *per* Brown, J. See also Baker *v.* Richmond C. M. Works, 105 Ga. 225, 31 S. E. 426.

C. Reason for Opinion. — In weighing expert testimony it is always proper to consider the reasons given by the witness for his opinions and to attach importance to the testimony in accordance with whether it seems to be reasonable or not.[36]

D. Observation and Study of Particular Case. — The opinions of expert witnesses, *e. g.*, medical men, are entitled to greater consideration than they otherwise would be where it appears that the witness has observed and studied the particular case under consideration.[37]

E. Experience, Knowledge, Education, etc., of Witness. — It is proper to consider the knowledge, experience, education, intelligence and opportunities for observation of the witness.[38]

Distinction Between Results of Experience and Theory. — A witness who has acquired knowledge in a particular art by long experience can generally give a more intelligent, intelligible and satisfactory opinion about his vocation than can be given by scientific experts upon questions of science, upon which opinions are often formed by means of theories, conjectures and abstract reasonings.[39]

F. Prior Conflicting Opinions. — It is proper to consider as

36. Jordan *v.* Dobson, 2 Abb. (U. S.) 398, 13 Fed. Cas. No. 7519; Chandler *v.* Thompson, 30 Fed. 38; Knowlton *v.* Oliver, 28 Fed. 516.

37. Atchison, T. & S. F. R. Co. *v.* Thul, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; Laughlin *v.* St. R. Co., 62 Mich. 220, 28 N. W. 813. See also Anthony *v.* Stinson, 4 Kan. 180.

38. Com. *v.* Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, wherein Shaw, C. J., declared that the opinion of a medical man of small experience or of one who had crude and visionary opinions, or who had some favorite theory to support, was entitled to very little consideration. See also State *v.* Hinkle, 6 Iowa 380; People *v.* Millard, 53 Mich. 63, 18 N. W. 562, in which case it was declared that upon medical questions, while persons may testify whose knowledge is chiefly theoretical, there can be no question of the superior value of practical knowledge, combined with theoretical, especially on such matters as involve the interpretation of symptoms and actions of the sick. See also Heath *v.* Glisan, 3 Or. 64. See further, United States *v.* Molloy, 31 Fed. 19; Knowlton *v.* Oliver, 28 Fed. 516; Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268; Tullis *v.* Kiss, 12 Ala. 648; Washington *v.* Cole, 6 Ala. 212; Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447; Com. *v.* Mendurn, 6 Rand. (Va.) 704.

Instructing Jury to Consider Experience and Knowledge of Witness. In Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415, the court instructed the jury as follows: "The value of opinions given by experts depends upon the experience and knowledge which such witnesses have had and evince concerning the matters about which they testify."

39. *Per* Dick, J., Chandler *v.* Thompson, 30 Fed. 38.

Distinction Between Opinions Based on Knowledge and Experience and Assertions of Theories. — In Béné *v.* Jeantet, 129 U. S. 683, which was a suit in equity to restrain the infringement of a patent, two experts testified, one who related facts declared to be within his knowledge and experience, and another whose testimony consisted largely of the assertion of a theory and a presentation of arguments to show that the facts testified to by the other witness could not exist, and it was held that a decree was properly rendered in favor of the party whose expert testified to facts.

militating against such testimony prior conflicting opinions which the witness has expressed.[40]

G. Bias, Candor, etc., of Witness. — In weighing expert testimony it is proper to consider the bias or impartiality of the witness and his demeanor on the stand as evincing candor or want of candor.[41] The evidence of witnesses who are brought upon the stand to support a theory by their opinions is justly exposed to a reasonable degree of suspicion.[42]

H. Answers to Hypothetical Questions. — Where expert testimony is given in answer to hypothetical questions the weight given to it by the jury is dependent upon the jury's finding the facts assumed in the questions to be true.[43]

I. Conflict Between Expert and Other Testimony. — a. *Prevalence of Other Testimony.* — Generally the testimony of an expert will not be allowed to overthrow positive and direct evidence of credible witnesses who testified from their personal knowledge.[44]

40. Montgomery *v.* Com., 88 Ky. 509, 11 S. W. 475.

41. Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415.

Where Expert Is Detective and Biased. — United States *v.* Mathias, 36 Fed. 892, which was a prosecution for sending obscene matter through the mail, a postoffice inspector and other detectives were called as experts. Simonton, J., said, in holding that this testimony was not admissible: "This testimony is only to aid the jury, showing them the opinion of experienced and skillful men. It can in no sense control them. Where the person called to testify as an expert is one occupying the relation to the case which this witness does — saturated with bias against the defendant, honestly convinced of his guilt, and, in the conscientious discharge of his duty, seeking to bring him to punishment — he can afford the jury no efficient aid in coming to a fair and impartial conclusion. His evidence as an expert to the point indicated will not be admitted."

42. "They are produced not to swear to facts observed by them, but to express their judgment as to the effect of those detailed by others, and they are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is, in many instances, the result alone of employment and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict, and it forms a very proper subject for the expression of a reasonable, guarded opinion by the court." *Per* Daniels, J., in Templeton *v.* People, 3 Hun (N. Y.) 357.

43. People *v.* Foley, 64 Mich. 148, 34 N. W. 94.

44. Laughlin *v.* Street R. Co., 62 Mich. 220, 28 N. W. 873, in which case Campbell, C. J., said: "No opinion of an expert can prevail over actual facts. The opinions of experts are admissible concerning the scientific probability of certain consequences from particular facts, and the scientific probability of their concurrence. But neither science nor witnesses can be held infallible; and when facts are shown to the satisfaction of a jury to exist, they must act upon them." See also the following cases:

United States. — The Scythian, 83 Fed. 1016; The Iberia, 40 Fed. 893; Jordan *v.* Dobson, 2 Abb. 398, 13 Fed. Cas. No. 7519; Cox *v.* Griggs, 1 Biss. 362, 6 Fed. Cas. No. 3302; Anunciator & B. T. Mfg. Co. *v.* Sanderson, 3 Blatchf. 184; United States *v.* Duluth, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,001; Barrett *v.* Hall, 1 Mason (U. S.) 447, 2 Fed. Cas. No. 1047, *per* Story, J. See also U. S. *v.* Pendergast, 32 Fed. 198.

Arkansas. — Williams *v.* State, 50 Ark. 511, 9 S. W. 5.

Georgia. — East Tennessee V. & G.

Where Medical Witnesses Disagree in opinion and theory, the undisputed history of the case is often the most satisfactory and controlling fact.[45]

Contradiction of Experts by Experiments. — So, too, the opinions of experts will not be allowed to prevail against positive testimony of other witnesses who state the results of experiments.[46]

b. *Prevalence of Expert Testimony.* — But cases are not wanting in which the perjury of witnesses testifying to matters alleged to

R. Co. *v.* Wright, 76 Ga. 532; Wilcox *v.* Hall, 53 Ga. 635. See also Anderson *v.* Barksdale, 77 Ga. 86.

Iowa. — Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023; State *v.* Hockett, 70 Iowa 442, 30 N. W. 742. See also State *v.* Felter, 25 Iowa 67.

Kansas. — Anthony *v.* Stinson, 4 Kan. 180.

Michigan. — Treat *v.* Bates, 27 Mich. 390.

Montana. — Kelley *v.* Cable Co., 8 Mont. 440, 20 Pac. 669.

New York. — Health Department *v.* Purdon, 99 N. Y. 237, 1 N. E. 687, 52 Am. Rep. 22, wherein the opinions of experts that adulterated teas were injurious to the human system were overcome by the testimony of persons who had used such teas without harm.

Opinion of Expert That Train Could Be Stopped When in Fact it Was Not Stopped. — The mere opinion of a locomotive engineer that a heavy passenger train consisting of a locomotive and six cars, running down grade at forty-five miles an hour, could be stopped within a distance of one hundred yards, is not sufficient to overcome the positive and uncontradicted evidence of the engineer and fireman upon the identical train that all was done which could possibly be done to stop it, and that nevertheless it was not stopped within a distance of over four hundred yards, especially when the evidence of these witnesses was strongly corroborated by others who were experts in such matters. Atlanta & C. A. L. R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553.

Statements Contrary to Laws of Nature. — Western Assurance Co. *v.* Weed, 40 Fed. 844, was a suit in which the question arose whether a collision was due to the negligence of a tug. The master of the tug testified that he was heading in a certain direction, so far as was prudent, and that he did all in his power to avert a collision, etc. The court said, in commenting on such testimony: "Such general testimony, and the various statements, also, that the tide causes, or would cause, this thing or that thing — statements that are in part hypothetical and in part contrary to the laws of nature — go for nothing, against the undoubted facts concerning the navigation of the East River that appear in the testimony and are familiar to the court, from which it is plain that if the proper course was taken originally there could have been no difficulty, despite the acts of the schooner, in keeping clear of pier 45 a half a mile above, had seasonable measures been taken to do so."

45. Sorenson *v.* Northern P. R. Co., 36 Fed. 166, *per* Brewer, J.

46. Tilghman *v.* Werk, 1 Bond (U. S.) 511, 23 Fed. Cas. No. 14,046. This was an action to enjoin the infringement of a patent for an improvement in processes for purifying fatty bodies. Two experts, called as witnesses for the defendant, stated it as their belief, not based, however, on experiment, that water has no decomposing power at a temperature less than 550° or 600°. The court said: "The fact relied upon to sustain this position is not made out by the evidence. The opinions of the two chemical experts referred to cannot prevail against the positive statements of no less than five witnesses, that by experiment it is found that, at a temperature of 350°, the heated water, under pressure, as applied by the defendant, will produce free fat acid by its chemical action alone."

be within their personal knowledge has been exposed and overcome by the testimony of experts.[47]

4. Proof of Facts Assumed in Hypothetical Question. — In General. An answer to a hypothetical question relates to such question, and assumes the correctness of the facts therein enumerated, and as the sole value of an expert's opinion must, of necessity, depend upon the correctness of the statement of facts assumed, if such statement is incorrect and in the opinion of the jury is not sustained by the evidence, the expert's testimony should have no weight or value whatever.[48]

47. Walsh *v.* Washington Ins. Co., 32 N. Y. 427. This is a striking case where the perjury of witnesses testifying to alleged facts was exposed by expert testimony. The captain of a ship was represented to have made auger holes in a ship's bottom for the purpose of scuttling her. He was represented as boring several of these holes in ten minutes with a single auger, and through a thickness of twenty inches. The court said: "The physical impossibility of accomplishing this evidently did not occur to the witnesses until they were confronted by the testimony of the shipwrights, who explained the difficulty of boring through the bolted frame of a vessel of that description, and the impracticability of penetrating it a second time with an auger that had once been forced through the heavy copper sheathing. . . . The witnesses perceived the necessity of giving some plausible explanation of an act so improbable as the deliberate scuttling of a ship in the open ocean, with no probable means of escape from death. This difficulty they met with the ready invention that the captain fitted plugs to the holes, which they inserted and withdrew from time to time, thus controlling at pleasure the ingress of water from the ocean. . . . But the evidence of the shipwrights showed that plugs a foot in length, such as the witness described, inserted in twenty-inch holes, could not by any possibility arrest the rush of water between the ceiling and the timbers, or retard the sinking of the ship. Their evidence also showed that a plug inserted in an aperture of this description would necessarily swell from the effect of the water, and it would not be possible for a person to withdraw it from time to time, even if he had possessed the strength of a hundred men."

48. *United States.* — Ætna Life Ins. Co. *v.* Ward, 140 U. S. 76; Forsyth *v.* Doolittle, 120 U. S. 73; Delaware, L. & W. R. Co. *v.* Roalefs, 70 Fed. 21.

Florida. — Baker *v.* State, 30 Fla. 41, 11 So. 492.

Georgia. — Central R. & Bkg. Co. *v.* Maltsby, 90 Ga. 630, 16 S. E. 953, *holding* that answers to hypothetical questions as to how an engine would act if steam escaped into the cylinders, etc., will not establish the fact that there was a defect in the engine, without evidence that the particular engine acted in that manner.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Goodwin *v.* State, 96 Ind. 550; Elliott *v.* Russell, 92 Ind. 526; Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433; Fulwider *v.* Ingels, 87 Ind. 414; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Iowa. — Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217; *In re* Norman, 72 Iowa 84, 33 N. W. 374.

Kansas. — Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655.

Kentucky. — Champ *v.* Com., 2 Metc. 17.

Massachusetts. — Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125.

Michigan. — Hitchcock *v.* Burgett, 38 Mich. 501.

Missouri. — State *v.* Baber, 74 Mo. 292.

New Hampshire. — Boardman *v.* Woodman, 47 N. H. 120.

New York. — Stearns *v.* Field, 90

Effect of Negativing Any One of Facts Assumed. — As a collection or state of facts assumed, whether few or many, constitute in the aggregate the basis on which the opinion is asked, if it does not appear that the opinion would be the same with any of those facts omitted, it necessarily follows that, if the jury should negative or fail to find any one of the assumed facts, the opinion expressed cannot be treated as evidence, but must be rejected by the jury.[49] Or as it has been otherwise expressed, the facts assumed in the question must be proved substantially to entitle the answer to consideration.[50]

Instructions to Jury. — It is well settled that it is proper for the court to instruct the jury that the opinions of experts are to be considered and given weight only if they find that the evidence supports the facts assumed in the hypothetical questions.[51]

5. Instructions. — In General. — It is proper to instruct the jury that it is within their province to determine the weight to be attached to expert testimony;[52] and the jury should not be given instructions which require them to accept the conclusions of experts instead of their own.[53]

N. Y. 640; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464; Dolz *v.* Morris, 10 Hun 201; People *v.* Thurston, 2 Park. Crim. 49.

Oregon. — Langford *v.* Jones, 18 Or. 307, 22 Pac. 1064.

Vermont. — Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; Wetherbee *v.* Wetherbee, 38 Vt. 454.

49. Kempsey *v.* McGinniss, 21 Mich. 123.

50. Hovey *v.* Chase, 52 Me. 304.

51. Effect of Striking Out Part of Evidence Upon Which Question Is Based. — Where some of the facts assumed in the hypothetical question are eliminated by a subsequent ruling of the court on a motion to strike out part of the testimony in support of the hypothesis, and enough evidence in support of the hypothesis remains to entitle the expert's opinion to go to the jury, and there are facts which the evidence tends to support, and upon which an opinion may be properly based, it is not error to refuse to strike out the entire opinion, for such an opinion should go to the jury for what it is worth, although the elimination of some of the facts may weaken the value of the opinion. Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Howe *v.* Richards, 112 Iowa 220, 83 N. W. 909; Loucks *v.* Chicago, M. & St. P. R. Co., 31 Minn. 526, 18 N. W. 651.

Approved Form of Instruction. In Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99, it was held that the court properly instructed the jury as follows: "You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witness are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, of the averments are true; and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not correct, and that they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine, from all the evidence, what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions."

52. Empire Spring Co. *v.* Edgar, 99 U. S. 645.

53. Williams *v.* State, 50 Ark. 511, 9 S. W. 5, in which case it was held that the court properly refused to give the following instruction and others similar to it. "If you believe

Receipt of Expert Testimony With Caution. — It has been held that it is erroneous for the court to instruct the jury that the opinions of experts are to be received and weighed with caution.[54]

Uncertainty and Unreliability of Expert Testimony. — It has been held that it is not proper for the court to instruct the jury that expert testimony is uncertain and unreliable, and that but little weight should be given to it.[55]

Substitution of Opinion of Jury for That of Experts. — Likewise it has been held that it is erroneous to inform the jury that they may substitute their own opinions for those expressed by expert witnesses.[56]

that the medical experts, the physicians who have testified in this case, have testified to the truth, and also believe that the testimony of the witnesses, on which their opinions as testified to are based, is true, you should acquit the defendant." See also Marshall *v.* Union Ins. Co., 2 Wash. C. C. (U. S.) 357, 6 Fed. Cas. No. 9133, where Washington, J., instructed the jury as follows: "In this case the opinions of the witnesses upon this point deserved to be respected; however, they are but opinions which are not obligatory upon a jury."

Instructing Jury That Testimony of Expert Must Be Their Guide. It is error for the court to charge the jury that "such testimony [evidence of experts as to professional services] is the guide of the jury in finding the amount justly due; and in this case you must take the testimony of these witnesses, and be governed by it;" nor is this error cured by the court adding that all the circumstances were before the jury, and were to be considered by them; and that, in the instructions given the jury, it was only intended to charge them that, in finding the value of the services rendered, they must not consider their judgment better than the judgment of the witnesses who had testified as to their value. Anthony *v.* Stinson, 4 Kan. 211.

54. Atchison, T. & S. F. R. Co. *v.* Thul, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484.

Instruction That Evidence Is Inherently Weak. — It is not proper to instruct the jury that expert testimony should be received with caution because it is inherently weak. Such evidence is to be received with caution only because of the fact that where it is based upon hypothetical statements the jury is not to apply the testimony at all unless it finds that the supposed facts are real. Langford *v.* Jones, 18 Or. 307, 22 Pac. 1064.

55. Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566, in which case the court followed People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326. See also State *v.* Townsend, 66 Iowa 741, 24 N. W. 535, *holding* that on a prosecution for murder where the defense of insanity is made it is not proper to instruct the jury to the effect that expert testimony is of the lowest order of evidence and of little weight as against the credible testimony of witnesses who testified to facts within their observation.

Calling Attention to Fact That Witness is Paid to Testify. — An expert witness is to be judged from the same standpoint as any other witness, and it is erroneous to instruct the jury that an expert is brought upon the stand to support a theory, and that his opinion is exposed to a reasonable degree of suspicion, which there is reason to believe is in many instances the result of employment and his bias arising out of it, and that such testimony is to be received and weighed with great caution. People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

56. Ball *v.* Hardesty, 38 Kan. 540, 16 Pac. 808, in which case it was held that the following instruction was erroneous: "The court

In Federal Courts it would seem that greater latitude is allowed in instructing the jury as to the weight to be attached to expert testimony than is proper in some state courts.[57]

X. WAIVER OF OBJECTIONS TO EXPERT TESTIMONY.

As a general proposition errors committed in the admission or rejection of expert testimony will be disregarded on appeal, and will not be deemed sufficient to justify a reversal unless it appears that objection was seasonably and properly made in the trial court.[58]

XI. HARMLESS ERROR IN ADMISSION OF EXPERT TESTIMONY.

1. In General. — An error committed by the court in admitting or excluding expert testimony will not constitute a ground for reversal unless such error was material and prejudicial.[59]

has permitted various witnesses to give their opinions as to whether or not there was back-water near plaintiff's land. The jury will give such testimony such weight as they think it entitled to. You will consider whether such opinions were justified by the facts upon which they were based; what opportunities they had to be informed of the facts and how competent they were to form correct opinions upon that question. If you think the reason anyone has given for his opinion is not good, you should not take it. And with reference to all such testimony, I say you are not bound to take the opinion of any witness upon the question of back-water. It is your own opinion upon the matter, and the conclusion you draw from the facts proven, that should determine your verdict, and not what any other person says or thinks."

57. Ætna Life Ins. Co. *v.* Ward, 140 U. S. 76. In this case, which was an action on a policy of life insurance, the defense was that the death of the insured was caused by intemperance, which by the terms of the policy exempted the defendant from liability. It was held that it was not error to instruct the jury that they were at liberty to reject the diagnosis of a medical witness offered on behalf of the defendant, if they had no confidence in his skill and experience, the same having been assailed by the plaintiff's testimony. See also Cox *v.* Griggs, 1 Biss. (U. S.) 362, 6 Fed. Cas. No. 3302, in which case Drummond, J., gave the following instruction: "You are to judge from the facts as proved and from the statements of experts. The mere opinions of experts are not entitled to much weight unless founded on good and satisfactory reasons. In many cases the testimony of experts is somewhat colored with feelings of a partisan character. The statement of a fact by one who has seen a machine work is better, if reliable, than the mere opinion of ever so scientific an expert." *Compare* Head *v.* Hosgrave, 105 U. S. 45.

58. Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Rosenheim *v.* America Ins. Co., 33 Mo. 230; Ward *v.* Kilpatrick, 85 N. Y. 413. See also Iowa City *v.* Newell, 115 Iowa 55, 87 N. W. 739, in which case it was held that where witnesses are allowed without objection to give their opinion as to the reasonableness of an ordinance imposing a tax, the defendant is not, on appeal from a conviction for violating such ordinance, entitled to a reversal because of such error.

59. Locke *v.* Sioux City R. Co., 46 Iowa 109.

2. Cumulative Evidence. — Error in the admission of expert testimony may not be ground for reversal where such testimony is merely cumulative, and there is an abundance of other evidence which is competent and which sustains the opinion of the witness;[60] and the same is true where under similar circumstances an error has been committed in excluding expert testimony.[61]

Where Witness is Not Qualified. — It would seem that where the court commits error in allowing witnesses who are not duly qualified as experts to give their opinions as experts, the error is harmless if their opinions are in harmony with the testimony of others who are qualified as experts, and the fact which it was sought to show by such unqualified witnesses is clearly established by unimpeachable evidence.[62]

3. Inevitable Opinions and Conclusions. — It has been held that it is not ground for reversal that the trial court erred in allowing the admission of expert testimony where the witness testified to an opinion or conclusion which was obvious and which the jury necessarily would have arrived at upon consideration of the other evidence.[63]

60. Kline *v.* Railroad Co., 50 Iowa 656, in which case the court said: "The plaintiff's stiffened fingers were exhibited to the jury, and the medical witness properly gave his opinion as to the nature and extent of the injury. That the plaintiff could not use his fingers as he did before the injury was a self-evident fact. The opinion of a thousand witnesses that he could not use his fingers as before would not add to the proof. How any party could be prejudiced by a witness gravely giving his opinion that the forefinger of the hand is the one principally used, and that stiff fingers would interfere with any work requiring their use, is more than we can comprehend." See also People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584, which was a prosecution for murder, where it appeared that the fatal wounds were made with a crescent-shaped knife which was proved to have been taken at the time of the homicide from the hand of the defendant. The knife was produced and identified on the trial, and a physician, a witness for the prosecution, who had testified that the wounds were made with a crescent-shaped knife, was shown the knife and asked if it would produce the wounds described. An objection was interposed but overruled. It was held that there was no error; that the evidence was merely cumulative upon an uncontroverted point and could not possibly have done harm to the rights of the prisoner. See further Metropolitan West Side Elevated R. Co. *v.* Dickinson, 161 Ill. 22, 43 N. E. 706; Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267; Missouri P. R. Co. *v.* Fox, 60 Neb. 531, 83 N. W. 744. In the last case the court said: "A great many witnesses testified regarding the matter, and in view of the large volume of the testimony offered on this subject we do not think the jury could have been perceptibly influenced by the statement referred to."

61. McPherson *v.* St. Louis, I. M. & S. R. Co., 97 Mo. 253, 10 S. W. 846, in which case it was held that it was not reversible error to exclude evidence that the engineer under whose supervision a railroad was constructed was competent and skillful, it appearing that other witnesses had testified that the railroad was, in all respects, properly constructed.

62. Siebert *v.* People, 143 Ill. 571, 32 N. E. 431.

63. Fisher *v.* Oregon S. L. R. & U. N. R. Co., 22 Or. 533, 30 Pac. 425, 16 L. R. A. 519, in which case the court said: "The question arises whether upon the facts the jury could have formed any other opinion, or reached any different

XII. IMPEACHMENT AND REBUTTAL OF EXPERT TESTIMONY.

1. In General. — The testimony of experts, like that of other witnesses, may be overcome by impeaching testimony or evidence in rebuttal.[64] An expert may be contradicted otherwise than by the testimony of other experts.[65]

2. Prior Different Opinion. — An expert witness may be asked on cross-examination with a view to affecting his credibility, whether he had not expressed opinions at variance with those given in his testimony in chief, and if he denies having so expressed himself the

conclusion from that expressed by these witnesses, for, if they could not, the error could affect no substantial right of the defendant, and was not reversible error." See also Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Donaldson *v.* Railroad Co., 18 Iowa 280; Downs *v.* State (Tex. Crim.), 23 S. W. 684; St. Louis A. T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

64. Missouri, K. & T. R. Co. *v.* Owens (Tex. Crim.), 75 S. W. 579.

Illustrations. — In Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938, the plaintiff's evidence tended to show that a certain compound was worthless for the purpose of allaying pain in filling teeth; and it was held that it was competent to meet this evidence by calling witnesses to testify that operations upon their own teeth when this compound was used were practically painless. See also Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163, in which case the court said: "Where the testimony to be met is the opinion of expert witnesses that it is impossible in the nature of things for a particular thing to be done, it is not necessary to rely on expert opinions to the contrary, if it can be shown as a matter of fact that the thing has been done. If, for example, expert witnesses were to testify that it would be impossible to propel a vessel by steam across the Atlantic ocean, or to navigate the air with balloons or flying machines, or to propel cars by electricity, or to communicate with other persons at a long distance away by telegraph, or by spoken words, or to store up sounds in a machine or instrument so that long afterwards they could be reproduced, or to render one temporarily insensible to pain by anesthetic, it would not be necessary in reply to call other experts to give opinions to the contrary. The direct facts might be testified to by any person who knew them."

Use of Intoxicating Liquor by Witness. — In Sisson *v.* Conger, 1 Thomp. & C. (N. Y.) 564, a physician who had attended a deceased person gave material evidence as to the capacity of such person to do a testamentary act. It was held that it was competent for the opposing party to show that the witness, during the time of his attendance on deceased, was under the influence of liquor and not capable of judging of the mental condition of deceased.

65. People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28, in which case it was held that it was error to give the following instruction: "Now the way to contradict testimony of experts is by the introduction of testimony of the same class of men, that is, of experts, to show the thing to be different." The court said: "Nor will the courts, in my opinion, compel, as this instruction would, a person accused and on trial for murder to employ experts at prices ranging from $10 to $50 per day, or else be bound by the opinions of the experts employed by the people. The charge of the court virtually put the evidence of these doctors and professors upon a higher plane than the other testimony, which was manifestly wrong. It must be remembered that their testimony, which weighed against the respondent, was not the facts they detailed, but the theories and opinions they offered. This is an inferior, not a superior, kind of evidence."

Louisville & N. R. Co. *v.* Malone,

party against whom he is called may show by other witnesses that he did give utterance to such different opinions.[66]

3. By Expert Testimony. — Likewise it is permissible to meet expert testimony by the testimony of other experts.[67]

XIII. GENERAL RULES AS TO ADMISSIBILITY OF OPINIONS AND CONCLUSIONS OF NON-EXPERTS.

1. In General. — Where it is sought to introduce the opinion or conclusion of a non-expert witness the practitioner is confronted with the general rule of evidence that a witness who is not called to testify as an expert must be confined to a statement of facts, and will not be permitted to testify to his opinions, inferences or

109 Ala. 509, 20 So. 33, in which case it was held that where in an action against a railroad company to recover damages resulting from a fire alleged to have been caused by the escape of sparks from an engine an expert witness for the defendant testified that the engines and spark-arresters which had been in use by the defendant for more than a year before the fire were such that it was impossible for a fire to originate from sparks emitted from the engine, it was proper to permit the plaintiff to rebut this testimony by proof that, about a year before the fire, other fires in that neighborhood were set by sparks from engines on the defendant's road.

66. Patchin *v.* Astor Mut. Ins. Co., 13 N. Y. 268. See also Montgomery *v.* Com., 88 Ky. 509, 11 S. W. 475.

67. Hartung *v.* People, 4 Park. Crim. (N. Y.) 319. This was a prosecution for murder by poisoning. After an opinion adverse to the theory of the prosecution had been testified to by a physician with reference to the appearances on a *post-mortem* examination and the time thereby indicated when the poison was introduced into the stomach, an experienced chemist, who had made the *post-mortem* examination, was asked by the prosecution the following question: "In your opinion can a physician, from a mere *post-mortem* examination of the exterior surface, and the indications of inflammation which he discovers, determine with any degree of certainty the precise period of time when such inflammation was caused?" and the question was objected to on the part of the prisoner as being "immaterial, improper and incompetent." It was held that such question was properly allowed. Hogeboom, J., said: "Whether a *post-mortem* examination of the exterior surface of the stomach would enable a professional man to determine accurately when the inflammation supervened was not a matter as to which unlearned persons or ordinary men could speak with confidence or reliability. It depended upon experience, or familiar acquaintance with the parts affected, their constitution and properties. It was beyond the range of ordinary knowledge. The parts affected were in the living body, hidden from view, and the effect upon them of such an irritating substance as arsenic, administered internally, and the precise time when these effects would be first visible in the form of inflammation upon the exterior surface of the stomach, were matters wholly beyond the range of ordinary knowledge or observation, and peculiarly within the scope of the comprehensive knowledge, large experience and close observation of the scientific man."

Failure to Make Proper or Full Examination. — The plaintiff in an action for personal injuries should be allowed to show by medical witnesses the particulars in which, in their opinion, the defendant's medical witnesses failed to make proper or full examinations, because necessarily inferences drawn from imperfect examinations are of inferior

conclusions based on facts within his knowledge or on the testimony of others.[68]

value. Laughlin *v.* Street R. Co., 62 Mich. 220, 28 N. W. 873.

68. Out of the multitude of cases upon this question the following have been selected as being peculiarly instructive:

England. — Ramadge *v.* Ryan, 9 Bing. 335, which case was cited in McPherson *v.* St. Louis, I. M. & S. R. Co., 97 Mo. 253, 10 S. W. 846; Sills *v.* Brown, 9 Car. & P. 601.

United States. — United States *v.* Faulkner, 35 Fed. 730.

Alabama. — National Surety Co. *v.* Mabry, 35 So. 698; White *v.* State, 136 Ala. 58, 34 So. 177.

Arkansas. — Dickerson *v.* Johnson, 24 Ark. 251.

California. — Pacheco *v.* Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833; Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125; People *v.* Taylor, 59 Cal. 640; Collins *v.* Sullivan, 54 Cal. 238; Central P. R. Co. *v.* Pearson, 35 Cal. 247; Hastings *v.* Steamer Uncle Sam, 10 Cal. 341.

Connecticut. — Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780.

Florida. — Mann *v.* State, 23 Fla. 610, 3 So. 207; Jones *v.* State, 32 So. 793.

Georgia. — Milledgeville *v.* Wood, 114 Ga. 370, 40 S. E. 329; Eagle & P. M. Co. *v.* Browne, 58 Ga. 240; Whitley *v.* State, 38 Ga. 50; Berry *v.* State, 10 Ga. 511.

Illinois. — Linn *v.* Sigsbee, 67 Ill. 75.

Indiana. — Bissell *v.* Wert, 35 Ind. 54; Evansville R. Co. *v.* Fitzpatrick, 10 Ind. 120.

Iowa. — Pelamourages *v.* Clark, 9 Iowa 1.

Kansas. — State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Parsons *v.* Lindsay, 26 Kan. 426; Shepard *v.* Pratt, 16 Kan. 209; State *v.* Folwell, 14 Kan. 105; Tefft *v.* Wilcox, 6 Kan. 46.

Maine. — Lewis *v.* Brown, 41 Me. 448.

Maryland. — Davis *v.* State, 38 Md. 15; Mahoney *v.* Ashton, 4 Har. & McH. 63.

Massachusetts. — Poole *v.* Richardson, 3 Mass. 330; Com. *v.* Fairbanks, 2 Allen 511; White *v.* Ballou, 8 Allen 408; New England Glass Co. *v.* Lovell, 7 Cush. 319; Ryder *v.* Ocean Ins. Co., 20 Pick. 259.

Michigan. — Hanish *v.* Kennedy, 106 Mich. 455, 64 N. W. 459.

Minnesota. — Peerless Machine Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260; Sowers *v.* Dukes, 8 Minn. 23; Selden *v.* Bank of Commerce, 3 Minn. 166.

Missouri. — Hurt *v.* St. Louis, I. M. & S. R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; State *v.* Babb, 76 Mo. 501; Greenwell *v.* Crow, 73 Mo. 638; Sparr *v.* Wellman, 11 Mo. 230; Campbell *v.* St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86; State *v.* Terry, 172 Mo. 213, 72 S. W. 513.

Nevada. — See Lea *v.* Clute, 10 Nev. 149.

New Hampshire. — Beard *v.* Rirk, 11 N. H. 397.

New Jersey. — Berckmans *v.* Berckmans, 16 N. J. Eq. 122; *In re* Vanauken, 10 N. J. Eq. 186.

New York. — People *v.* Bodine, 1 Denio 281; Lincoln *v.* Saratoga & S. R. Co., 23 Wend. 425; McKee *v.* Nelson, 4 Cow. 355, 15 Am. Dec. 384; Murray *v.* Bethune, 1 Wend. 191.

North Carolina. — State *v.* Vines, 93 N. C. 493, 53 Am. Rep. 466; Bailey *v.* Poole, 35 N. C. 404.

Oklahoma. — Devore *v.* Territory, 2 Okla. 562, 37 Pac. 1092.

Oregon. — First Natl. Bank *v.* Fire Ass'n of Phila., 33 Or. 172, 50 Pac. 568, 53 Pac. 8; Burton *v.* Severance, 22 Or. 91, 29 Pac. 200; Zachary *v.* Swanger, 1 Or. 92.

South Carolina. — Ward *v.* Charleston C. R. Co., 19 S. C. 521, 45 Am. Rep. 794; Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761. See also State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

Tennessee. — Woodward *v.* State, 4 Baxt. 322.

Texas. — Huff *v.* Crawford, 89 Tex. 214, 34 S. W. 606; San Antonio & A. P. R. Co. *v.* Long, 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637; Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753; Houston & T. C. R. Co. *v.* Smith, 52 Tex. 178; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

Natural Events. — It has been held that a witness should not be allowed to give his opinion as to how a thing, in the course of nature, would have happened, where such matter is one within the knowledge of all men of ordinary powers of observation.[69]

Border-Line Between Fact and Opinion. — The border-line between fact and opinion is often very indistinct, and a witness in testifying to a fact is frequently merely stating his opinion;[70] and it has been declared that there is in truth no general rule requiring the rejection of opinions as evidence, because a general rule can hardly be said to exist when it is lost to sight in the maze of exceptions.[71]

2. On Cross-Examination of Witness. — Even on the cross-examination of a witness and for the purpose of shaking the testimony given by him on his examination in chief, it is generally not proper to ask him a question which calls for his mere opinion.[72]

3. Questions Upon Which Expert Testimony is Necessary. — It is improper to allow a non-expert witness to express his opinion or conclusion upon a subject which is one calling for expert testimony, it being well settled that a witness will not be permitted to give an opinion upon matters of skill and science unless he has such

Utah. — Nichols *v.* Oregon S. L. R. Co., 25 Utah 240, 70 Pac. 996.

Vermont. — Brown *v.* Doubleday, 61 Vt. 523, 17 Atl. 135; Campbell *v.* Fairhaven, 54 Vt. 336; Don Crane *v.* Northfield, 33 Vt. 124.

Washington. — State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

Wisconsin. — Miles *v.* Stanke, 114 Wis. 94, 89 N. W. 833.

69. Manufacturers' Accident Indemnity Co. *v.* Dorgan, 7 C. C. A. 581, 58 Fed. 945, which was an action on an insurance policy. The dead body of the assured was found lying in a brook with the face downward, and submerged in six inches of water; and the defense was that he died from disease and not accident. On the trial the court refused to permit the defendant company to ask the following question of the witness who found the body in the water: "If he had been standing, in your judgment would it have been possible for him to have fallen in the water, in the position in which you found him?" This ruling was sustained by the court of appeals, Taft, J., saying the question "asked for an opinion of the witness on facts which it was quite possible for the witness to have detailed to the jury, so that the jury might have drawn its own inference. That there are cases where the judgment of a witness as to distance and other circumstances may be directly asked him is true, but such questions are not permissible when it is practicable to draw out with exactness the *data* upon which such judgment must be founded." See also to the same effect State *v.* Barrett, 33 Or. 194, 54 Pac. 807; State *v.* Williams, 111 La., 35 So. 521.

70. Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125. See also Cumberland T. & T. Co. *v.* Dooley, 110 Tenn. 104, *72* S. W. 457, where Beard, C. J., declared that the line between non-expert opinion which is competent and that which is incompetent is not well defined.

71. Hardy *v.* Merrill, 56 N. H. 227, 22 Am. Rep. 441, *per* Foster C. J.

72. Kelley *v.* Detroit, L. & N. R. Co., 80 Mich. 237, 45 N. W. 90, 20 Am. St. Rep. 514. This was an action for personal injuries, and it was held that it was proper to exclude, on the cross-examination of a witness called by the plaintiff, the following question: "At the time of the accident did it occur to you that the accident happened by reason of the darkness? Whether it occurred to your mind that the accident happened by reason of the darkness or by reason of the inattention of Miss Kelley to a step being there?"

knowledge and experience as are necessary to qualify him as an expert.[73]

4. Exception to General Rule. — However, the exception to the general rule that witnesses can not give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; but it includes the evidence of common observers testifying to the results of their observation made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury.[74]

73. *United States.* — Dushane *v.* Benedict, 120 U. S. 630.

Alabama. — White *v.* State, 136 Ala. 58, 34 So. 177.

California. — Marceau *v.* Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; Central P. R. Co. *v.* Pearson, 35 Cal. 247.

Connecticut. — Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

Georgia. — Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126; Atlantic C. S. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Brush E. L. & P. Co. *v.* Wells, 103 Ga. 512, 30 S. E. 533; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325; Central R. & Bkg. Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965.

Illinois. — Cooper *v.* Randall, 59 Ill. 317.

Iowa. — Healy *v.* Patterson, 98 N. W. 576.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 140; Manhattan A. & B. R. Co. *v.* Stewart, 30 Kan. 226, 2 Pac. 151.

Maine. — Moulton *v.* Scruton, 39 Me. 287.

Massachusetts. — Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747; Cowles *v.* Merchants, 140 Mass. 377, 5 N. E. 288; Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen 181.

Minnesota. — Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283; Payson *v.* Everett, 12 Minn. 216.

Missouri. — State *v.* Crisp, 126 Mo. 605, 29 S. W. 699; Stonam *v.* Waldo, 17 Mo. 489; State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

New Hampshire. — Spear *v.* Richardson, 34 N. H. 428.

New York. — Harris *v.* Panama R. Co., 3 Bosw. 7.

Rhode Island. — Buffum *v.* New York B. R. Co., 4 R. I. 221.

Texas. — Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525; Wilson *v.* State, 41 Tex. 320; Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247.

Illustrations. — *Sufficiency of Outlet for Water.* — In Kansas City & F. S. M. R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066, it was held that a non-expert witness cannot be asked whether an outlet of one hundred feet in a railway's roadbed is sufficient to carry off the water of a certain stream in time of ordinary flood.

Capacity of Reaping Machine. — It is error to permit a witness to testify as to how much wheat an ordinarily good reaper will cut in a day, unless it is shown that he is competent to testify with regard to such matter as an expert. Sandwich Mfg. Co. *v.* Nicholson, 32 Kan. 666, 5 Pac. 164.

Quality of Masonry. — One who is not a mechanic will not be permitted to give his opinion as to the quality of masonry in an action for work and labor done in building a house. Reynolds *v.* Jourdan, 6 Cal. 109.

74. *United States.* — Hopt *v.* Utah, 20 U. S. 430; Baltimore & O. R. Co. *v.* Rambo, 59 Fed. 75; Manufacturers' Accident Indemnity Co. *v.* Dorgan, 7 C. C. A. 581, 58 Fed. 945.

Alabama. — James *v.* State, 104 Ala. 20, 16 So. 94; Birmingham Min. R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886; Kansas City M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262; East Tennessee V. & G. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813; Perry *v.* State, 87 Ala. 30, 6 So. 425.

California. — Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398; People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697; Robinson *v.* Exempt Fire Ins. Co., 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715; Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; People *v.* Lavelle, 71 Cal. 351, 12 Pac. 226.

Colorado. — Denver T. & F. W. R. Co. *v.* Pulaski Irrigating Ditch Co., 19 Colo. 367, 35 Pac. 910.

Connecticut. — Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309; Taylor *v.* Monroe, 43 Conn. 36; Sydleman *v.* Beckwith, 43 Conn. 9; Clinton *v.* Howard, 42 Conn. 294.

Florida. — See Mann *v.* State, 23 Fla. 610, 3 So. 207.

Georgia. — See Crawford *v.* Georgia P. R. Co., 86 Ga. 5, 12 S. E. 176.

Illinois. — West Chicago R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447; Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Chicago C. R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Spear *v.* Drainage Comrs., 113 Ill. 632; Chicago, B. & Q. R. Co. *v.* Martin, 112 Ill. 16.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Louisville, N. A. & C. R. Co. *v.* Berkey, 136 Ind. 591, 36 N. E. 642.

Iowa. — Trott *v.* Chicago, R. I. & P. R. Co., 115 Iowa 80, 86 N. W. 33, 87 N. W. 722; Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770; Bizer *v.* Bizer, 110 Iowa 248, 81 N. W. 465.

Kansas. — Handley *v.* Missouri P. R. Co., 61 Kan. 237, 59 Pac. 271; Parsons *v.* Lindsay, 26 Kan. 426; State *v.* Folwell, 14 Kan. 105.

Louisiana. — State *v.* Southern, 48 La. Ann. 628, 19 So. 668.

Maine. — Stacy *v.* Portland Pub. Co., 68 Me. 279; Snow *v.* Boston & M. R., 65 Me. 230; Robinson *v.* Adams, 62 Me. 369.

Massachusetts. — Com. *v.* O'Brien, 134 Mass. 198; Nash *v.* Hunt, 116 Mass. 237; Barker *v.* Comins, 110 Mass. 477; Parker *v.* Boston S. B. Co., 109 Mass. 449; Com. *v.* Dorsey, 103 Mass. 412; Swan *v.* Middlesex, 101 Mass. 173.

Michigan. — Osten *v.* Jerome, 93 Mich. 196, 53 N. W. 7; Kelley *v.* Richardson, 69 Mich. 430, 37 N. W. 514; Laughlin *v.* Street R. Co., 62 Mich. 220, 28 N. W. 873; Huizega *v.* Cutler & S. L. Co., 51 Mich. 272, 16 N. W. 643.

Minnesota. — McKillop *v.* Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739; State *v.* Lucy, 41 Minn. 60, 42 N. W. 697; Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.

Missouri. — State *v.* Buchler, 103 Mo. 203, 15 S. W. 331; Elsner *v.* Supreme Lodge, 98 Mo. 640, 11 S. W. 991; Greenwell *v.* Crow, 73 Mo. 638; Eyerman *v.* Sheehan, 52 Mo. 221.

Montana. — State *v.* Lucey, 24 Mont. 295, 61 Pac. 994; Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.

Nevada. — Winter *v.* Fulstone, 20 Nev. 260, 21 Pac. 201, 687.

New Hampshire. — Hardy *v.* Minitt, 66 N. H. 227, 22 Am. Rep. 441; Taylor *v.* Grand Trunk R. Co., 48 N. H. 309; State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; State *v.* Knapp, 45 N. H. 148; Hackett *v.* Boston C. & M. R. Co., 35 N. H. 390.

New York. — Sloan *v.* R. R. Co., 45 N. Y. 125; De Witt *v.* Barley, 17 N. Y. 340; People *v.* Eastwood, 14 N. Y. 562; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Brown *v.* Hoburger, 52 Barb. 15; McKee *v.* Nelson, 4 Cow. 355, 15 Am. Dec. 384; Hotchkiss *v.* Germanica Ins. Co., 5 Hun 90.

North Carolina. — State *v.* Edwards, 112 N. C. 901, 17 S. E. 521.

Ohio. — Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426.

Oregon. — First Nat. Bank *v.* Fire Ass'n of Phila., 33 Or. 172, 50 Pac. 568, 53 Pac. 8.

Pennsylvania. — Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 298; Cookson *v.* Pittsburg & W. R. Co., 179 Pa. St. 184, 36 Atl. 194.

Rhode Island. — Wilson *v.* New York, N. H. & N. R. Co., 18 R. I. 598, 29 Atl. 300.

South Carolina. — Ward *v.* Charleston City R. Co., 19 S. C. 521, 45 Am. Rep. 794; Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761.

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

Tennessee. — See also Cumberland T. & T. Co. *v.* Dooley, 110 Tenn. 104, 72 S. W. 457.

Texas. — Mills *v.* Missouri, K. & T. R. Co., 94 Tex. 242, 59 S. W. 874; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Tompson *v.* State, 19 Tex. App. 593; Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247.

Utah. — Chipman *v.* Union P. R. Co., 12 Utah 68, 41 Pac. 562.

Importance of Opinions of Non-Expert Observers. — It would seem that as a general proposition the opinions and conclusions of non-experts as to matters which they have observed are more satisfactory and entitled to more weight than the opinions of expert witnesses who are personally unacquainted with the facts of the case.[75]

Shorthand Rendering of Facts. — Opinions and conclusions which

Vermont. — State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053; State *v.* Ward, 61 Vt. 153, 17 Atl. 483; Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569.

Washington. — Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

Wisconsin. — Snyder *v.* Western U. R. Co., 25 Wis. 60.

"It is not true as a legal proposition that no one but an expert can give an opinion to a jury. From the necessity of the case, testimony must occasionally be a compound of fact and opinion." Steam Boat Clipper *v.* Logan, 18 Ohio 375.

Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669. This was an action for divorce on the ground of adultery. A witness who was in a hotel in a room adjoining that in which it was alleged that the offense was committed testified as to noises which he heard just beyond the intervening door. He was then allowed to state his opinion that an act of sexual intercourse occurred in the adjoining room. The court said: "The sounds and the noises which the witness heard in the adjoining room could not be reproduced or described to the jury precisely as they appeared to the witness at the time, and the facts upon which his judgment and opinion were asked were such as men in general are capable of comprehending and understanding."

75. Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249. In this case, where non-expert witnesses who had examined a dam and who had a knowledge of the character of the stream in which it was built were permitted to testify as to the sufficiency of the dam to sustain the pressure of the water upon it in times of freshet, the court said: "The opinions of such persons on a question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triers than those of scientific men who were personally unacquainted with the facts in the case; and to preclude them from giving their opinion on the subject, in connection with the facts testified to by them, would be to close an ordinary and important avenue to the truth. Indeed, if none but professional persons could be heard on such an inquiry the result must often be left to be determined by mere conjecture. It is impossible for a person, however skillful or scientific, to give an intelligent or precise opinion on facts testified to by another witness, in the manner in which they are frequently related. Such witness may detail, in the best manner he can, the facts on the subject of which the opinion of a scientific person is sought; but it may be impossible to extract from his testimony the *data* for such an opinion, with sufficient precision or certainty. The present case furnishes a striking illustration of this remark. The witness stated that the water in the stream across which the defendants' dam was placed rose very rapidly in times of freshet, and that a great deal of water passed where that dam was; that dam was built very high — higher than any they had ever known — more than twenty feet high, and kept back a very large and deep pond of water; but how rapidly it rose, what quantity of water passed, how high the dam was, or how large or deep a pond of water was kept back, does not appear, nor could the witnesses state with definiteness. It is obvious that no peculiar skill on the subject would enable one to give an opinion on the sufficiency of the dam, based on such testimony, which would be a sure guide to the opinions of the triers. Nor would the statement of any abstract principles, by scientific witnesses, be of more essential use to them in connection with such testimony."

consist of the witnesses' statements as to matters which are incapable of being detailed to the jury have sometimes been spoken of as a shorthand rendering of facts.[76]

Statement of Compound Fact. — The testimony of a witness is sometimes regarded as admissible as being a statement of a compound fact rather than of a mere conclusion, as where a witness states in general terms that he loaned property.[77]

Conclusion From Collective Facts. — Facts are frequently collective, and a combination of the known elements may be expressed in the form of conclusions or inferences, and such inferences are received, not as founded on the judgment of the witness, but as the result of his personal observation and knowledge, and as an equivalent to a specification of the facts, because they are necessarily involved.[78]

In Furtherance of Justice. — The opinions of non-experts or their conclusions of facts observed, when the matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, are received in evidence in furtherance of justice, and as a matter of necessity because the matter as to which the witness is called to testify involves such limitless details, and the infirmity of language and memory is such that the witness cannot testify otherwise than by making a statement in the form of an opinion or conclusion.[79]

5. Under Statute. — In Georgia, by statute, the opinions of non-experts are admissible; and upon any question upon which an expert is allowed to give his opinion without stating his reasons one who is not an expert may give his opinion if he states the reasons upon which it is based.[80]

Three Necessary Conditions. — The admissibility of the opinions and conclusions of non-experts rests, as has been judicially declared, upon three necessary conditions which will be considered *seriatim* hereinafter, as follows: (1) That the witness detail to the jury, so far as he is able, the facts and circumstances upon which his opinion is based, in order that the jury may have some basis by which to judge of the value of the opinion; (2) that the subject-matter to which the testimony relates cannot be reproduced and described to the jury precisely as it appeared to the witness at the time; and (3) that the facts upon which the witness is called upon

76. State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

77. Cole *v.* Varner, 31 Ala. 244.

78. Alabama G. S. R. Co. *v.* Yarbrough, 83 Ala. 238, 3 So. 447, 3 Am. St. Rep. 715; Pollock *v.* Gantt, 69 Ala. 373, 41 Am. Rep. 519; Ware *v.* Morgan, 67 Ala. 461; S. & N. A. R. Co. *v.* McLendon, 63 Ala. 266; Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152.

79. Parsons *v.* Lindsay, 26 Kan. 426. See also Sydleman *v.* Beckwith, 43 Conn. 9; Yahn *v.* Ottumwa, 60 Iowa 429, 15 N. W. 257; First Natl. Bank *v.* Fire Ass'n of Phila., 38 Or. 172, 50 Pac. 568, 53 Pac. 8; Nutt *v.* Southern P. R. Co., 25 Or. 291, 35 Pac. 653; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

80. Augusta & S. R. Co. *v.* Dorsey, 68 Pa. St. 228, which case was

to express his opinion are such as men in general are capable of comprehending and understanding.[81]

6. Nature of Non-Expert Testimony. — It has been declared that where a non-expert is allowed to testify to his conclusions from collective facts and to give a shorthand rendering of facts which he has observed, it is not a mere opinion which is thus given by the witness, but a conclusion of fact to which his judgment, observation and common knowledge have led him.[82]

Conclusions of Witnesses Amounting to Knowledge. — Such opinion or conclusion is not a speculative one, but is knowledge, which may amount to certainty, or may not. Illustrations of this class of cases

decided under Code Ga., § 3867. See also Wylly *v.* Gazan, 69 Ga. 506; McLean *v.* Clark, 47 Ga. 24.

81. People *v.* Hopt, 4 Utah 247, 9 Pac. 407, *quoted* with approval in Sears *v.* Seattle Consol. R. Co., 6 Wash. 227, 33 Pac. 389, 1081. See also Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401, where it was declared that the admissibility of such testimony depends upon the existence of the second and third, the first condition stated in the text being omitted.

82. People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Meaning of Rule Best Shown by Examples. — In Hardy *v.* Merrill, 56 N. H. 227, 22 Am. Rep. 441, Foster, C. J., said: "All evidence is opinion merely, unless you choose to call it fact and knowledge, as discovered by and manifested to the observation of the witness. And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. . . . A general rule can hardly be said to exist which is lost to sight in an enveloping mass of arbitrary exceptions. But if a general rule will comfort any who insist upon excluding and suppressing truth, unless the expression of the truth be restrained within the confines of a legal rule, standard or proposition, let them be content to adopt a formula like this: *Opinions of witnesses derived from observation are admissible in evidence when from the nature of the subject under investigation no better evidence can be obtained.* No harm can result from such a rule, properly applied. It opens a door for the reception of important truths which would otherwise be excluded, while, at the same time, the tests of cross-examination, disclosing the witness' means of knowledge, and his intelligence, judgment and honesty, restrain the force of the evidence within reasonable limits by enabling the jury to form a due estimate of its weight and value. . . . The meaning of the rule is best shown by examples. Nobody ever doubted that a non-professional man could testify that a certain neighbor, whom he had been accustomed to see, appeared one day to be well and the next day to be sick. Although the testimony of a physician as to some of the details of the apparent health and sickness of that neighbor might be more satisfactory, and, in a certain sense, better evidence, the opinion of the non-expert on the general question of health and disease, in that case, would belong to the class of the best evidence, within the meaning of the rule. And so, also, with regard to a question of mental condition; a medical expert may be able to state the diagnosis of the disease more learnedly; but, upon the question whether it had, at a given time, reached such a stage that the subject of it was incapable of making a will or a contract because irresponsible for his acts, the opinions of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country."

are furnished whenever witnesses are called to establish identity, to prove handwriting, or to testify concerning sanity.[83]

7. Where Other Witnesses Purport to State Facts. — Where opinion evidence is otherwise admissible the fact that other witnesses have testified who purported to state facts within their knowledge does not affect the admissibility of such opinions.[84]

8. Qualification of Witness. — Persons competent to testify generally may, by reason of youth or inexperience, be disallowed to state conclusions or opinions.[85]

9. Basis of Opinion. — In General. — It is well settled that a witness who is not an expert cannot testify to his opinion without stating, if asked, the facts upon which the same is founded;[86] and

83. Cooper *v.* State, 23 Tex. 331, in which case Bell, J., in addition to making the statement contained in the text, said: "I may feel a strong conviction, not, however, amounting to certainty, that a man who stands before me in the court room today is the same man whom I knew ten years ago in a distant part of the world; I cannot explain to others the grounds of my strong belief, yet this belief amounts to a species of knowledge. If called as a witness, I may express my opinion that the man before me is the same man whom I knew in another place. My opinion is entitled to some weight, because it is the statement of a fact, about which, to be sure, I cannot speak with absolute certainty, but yet with so much certainty as, perhaps, to satisfy the minds of others that the thing stated is a fact."

84. State *v.* Grubb, 55 Kan. 678, 41 Pac. 951, in which case it was held that the opinions of witnessses as to the age of a girl were admissible, notwithstanding the fact that her parents had testified as to her age.

85. Collins *v.* People, 194 Ill. 506, 62 N. E. 902. A child of thirteen years, a daughter of the defendant, was called to give her opinion as to the mental condition of the defendant at the time of the homicide. It was held that although a witness does not need to be an expert to testify as to mental conditions, there was no abuse of discretion in refusing to allow the child to testify on the ground that the child had not had experience or observation enough to answer the question.

86. *United States.* — Ardmore Coal Co. *v.* Bevil, 61 Fed. 757.

Connecticut. — Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421; Sydleman *v.* Beckwith, 43 Conn. 9; Morse *v.* State, 6 Conn. 9.

Georgia. — Central G. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299; Atlanta C. S. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Moon *v.* State, 68 Ga. 687, which case was decided under Code Ga., § 3867.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Carthage Tpk. Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; Goodwin *v.* State, 96 Ind. 550.

Iowa. — State *v.* Stickley, 41 Iowa 232; Pelamourges *v.* Clark, 9 Iowa 1.

Kansas. — Handley *v.* Missouri P. R. Co., 61 Kan. 237, 59 Pac. 271.

New Jersey. — *In re* Vanauken, 10 N. J. Eq. 186; Sloane *v.* Maxwell, 3 N. J. Eq. 563.

South Carolina. — Hicks *v.* Southern R. Co., 41 S. E. 753.

Texas. — Gulf, C. & S. F. R. Co. *v.* Hepner, 83 Tex. 136, 18 S. W. 441.

Tennessee. — Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312.

Utah. — People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

West Virginia. — Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Goodwin *v.* State, 96 Ind. 550, in which case the court said: "It is settled law that a non-expert witness must state the facts upon which he bases his opinion, and there must be some facts upon which the opinion can rest, or it must not be expressed; what facts are sufficient to justify

not only must he state the facts, but it must appear that they are of such a character as will enable him to arrive at an intelligent opinion with respect to the subject under consideration.[87]

Conflict Between Opinion of Witness and Facts Stated. — Where there is a conflict between such facts and such conclusions the conclusion is entitled to no weight.[88]

Inability of Witness to State Whole Ground of Opinion. — Where the witness, from the nature of the case, cannot put before the jury in an intelligible and comprehensible form the whole ground of his judgment or opinion, he may give his opinion, first stating the facts, so far as he can.[89]

the formation and expression of an opinion by a non-expert witness it is by no means easy to declare. The value of an opinion expressed by a non-expert witness depends upon the facts on which it rests, but its competency is not measured by this standard, for an opinion of little value may nevertheless be competent. If any material facts at all are cited by the witness warranting the inference that he has sufficient knowledge to form an opinion, it is a duty of the court to permit it to go to the jury for whatever it may be worth."

Opinion as to Health of Party. The rule that a witness who is not an expert must give the facts on which he rests his opinion before he will be allowed to state what that opinion is, applies to one who is not a physician, and by whom it is proposed to prove the condition of the health of a party. Southern L. I. Co. *v.* Wilkinson, 53 Ga. 535.

Judicial Statement of Rule. — In Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312, the court said: "A non-expert witness does not testify from the same standpoint as the expert, and it is for this very reason that he is required to give the facts upon which he bases his conclusions, so that the jury may say whether his conclusions are warranted by the facts; and the opinions of the non-expert are only valuable and competent to the extent that they are supported by the facts and circumstances upon which they are predicated."

87. Gulf, C. & S. F. R. Co. *v.* Hepner, 83 Tex. 136, 18 S. W. 441.

Insufficient Observation Upon Which to Base Opinion. — In Conde *v.* State, 33 Tex. Crim. 10, 24 S. W. 415, which was a prosecution for murder, a witness who had viewed the body of the decedent testified that the upper part of the body, including the head, was entirely covered with coarse cloth; that the cloth was bloody, and also had dirt or sand upon it, and that he did not remove the cloth nor see the decedent's face. Thereupon he was asked the following question: "From the appearance, what do you judge the wounds to have been the result of? Of what nature do you judge them to have been?" to which the witness answered that he "thought the wound was the result of a gunshot, and that he thought so from the appearance." It was held that as the witness saw no wounds on the decedent's body it was error to allow him to express such opinion.

88. Young *v.* Power, 41 Miss. 197. In this case a witness, speaking of the facts that transpired at the time of an alleged gift, quoted the donor's language; but afterward when questioned he testified that he intended to say that there was no condition. It was held that the latter statement was entitled to no weight as against the statement of facts previously detailed by him.

89. *Per* Zollars, C. J., in Louisville, E. & St. L. R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153. See also Sydleman *v.* Beckwith, 43 Conn. 9, in which case the court said: "It is not quite correct to say that the opinion of a witness is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include among the facts referred to the acquaintance of the witness with the subject-matter and his

Opinions Not Necessarily Admissible Where Facts Are Stated. — There are general statements to be found in the books to the effect that non-expert witnesses may give their opinions, if they first state the facts, but such general statements are not to be understood as stating the rule to be that such witnesses may, in all cases, give their opinions after stating the facts.[90]

Requisite Personal Observation and Knowledge of Witness. — To render the opinions and conclusions of non-expert witnesses admissible it is indispensable that such opinions and conclusions are founded on their own personal observation, and not on the testimony of other witnesses, or on a hypothetical statement of facts, as is permitted in the case of experts;[91] and in cross-examining a non-expert wit-

opportunities for observation. The very basis upon which . . . this exception to the general rule rests is that the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time." And see Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761, in which case the court, after reviewing the authorities, said: "While it is necessary that the witness should first state the facts upon which he bases his opinion, where the facts are such as are capable of being reproduced in language, it is not necessary to do so where the facts are not capable of reproduction in such a way as to bring before the minds of the jury the condition of things upon which the witness bases his opinion."

Distinction Stated by Lumpkin, J. In Berry *v.* State, 10 Ga. 511, Lumpkin, J., after reviewing the cases and discussing the question, said: "Perhaps the distinction should be this — although I am free to confess that I find none such drawn in the books — that where the question at issue is one of opinion merely, as that of sanity or insanity, solvency or insolvency, personal identity, handwriting, age, etc., that in all such cases it should be allowable for the witness to give his opinion in connection with the facts upon which it is founded. For in all these cases the conclusion of the witness is the result of a thousand nameless things alike frequently inexplicable and incommunicable. But where matters of fact are to be tried — as contracts, crimes, torts, trespass on the case, and such like — that then the testimony should be restricted to words and facts only — repudiating entirely the opinion or belief of the witnesses."

90. Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216, in which case it was said: "If that was so [meaning if the rule were otherwise than as it is stated in the text], the rule allowing opinion testimony would be the general rule, and not one of the exceptions, as it is, to the general rule which requires that witnesses shall state facts and not conclusions or opinions. That non-expert witnesses may give an opinion at all is the rule of necessity and outside of the general rule. When the case is one in which all the facts can be presented to the jury, then no opinion can be given, because the jury are better qualified than the witness to form conclusions. There are cases where the witness can not put before the jury in an intelligible and comprehensive form the whole ground of his judgment or opinion. In such cases, after, and not until after, the witness has stated all the facts that it is possible to state, he may, from the necessity of the case, give an opinion."

91. Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780. In this case the question before the court was the condition of the light at a station at the time that the plaintiff, who was a passenger on one of the defendant's trains, sustained an injury. It was held that the court erred in allowing a witness to testify that there was not sufficient light to enable the plaintiff to safely alight from the train, because the witness did not know the

ness it is proper to inquire as to the extent of his knowledge,[92] and the reasons for his opinion.[93]

10. Question for Court as to Admissibility. — Whether or not non-expert testimony, such as is here under consideration, is admissible is a question for the court, and in determining such question and in applying the rules which govern the admission of such testimony the court may exercise its discretion.[94] Thus it has been declared that whether the witness has sufficiently observed and considered the particular fact or matter under consideration to enable him to form an opinion in respect thereto is a question which, if raised, is to be determined by the court by the application of the same rule which governs in ascertaining the qualifications of experts.[95]

11. Invading Province of Jury. — A. In General. — The opinions and conclusions of a witness are not admissible where the jury acting as such is equally capable with the witness of forming an opinion or conclusion from facts to which the witness may testify.[96]

conditions which existed at the time and place. The court said: "A general acquaintance with that station would not at all enable a witness to speak on that question. A knowledge of the way that station was lighted on other evenings would not afford a witness any safe criterion by which to judge the light that night. If the moon was shining, if it was starlight and a clear sky, the platform might have been perfectly safe so far as the light was concerned, even with no artificial light. And on the other hand, if it was cloudy, or if stormy, then a strong artificial light might not remove the danger of the place. It could have been only by observing the condition of the light at the time the accident happened, and stating what it was, that would have made the opinion of the witness admissible." See also Sydleman *v.* Beckwith, 43 Conn. 9. See further Little Rock Traction & Elec. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7; Baltimore & Yorktown Tpk. Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346; Madden *v.* Missouri P. R. Co., 50 Mo. 666.

92. State *v.* Stackhouse, 24 Kan. 320.

93. State *v.* Hooper, 2 Bail. L. (S. C.) 37.

94. *United States.* — Railroad Co. *v.* Warren, 137 U. S. 348; Manufacturing Co. *v.* Phelps, 130 U. S. 520; Spring Co. *v.* Edgar, 99 U. S. 645; St. Louis & S. F. R. Co. *v.* Bradley, 54 Fed. 630.

Arkansas. — Texas & St. L. R. Co. *v.* Kirby, 44 Ark. 103; St. Louis, A. & T. R. Co. *v.* Anderson, 39 Ark. 167, 17 Am. & Eng. R. Cas. 97.

California. — Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac. 109.

Kentucky. — Woolfolk *v.* Ashby, 2 Metc. 288.

Massachusetts. — Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Com. *v.* Coe, 115 Mass. 481; Nunes *v.* Perry, 113 Mass. 274; Swan *v.* Middlesex, 101 Mass. 173.

New York. — Brink *v.* Hanover Fire Ins. Co., 80 N. Y. 108.

Utah. — People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Vermont. — Middlebury *v.* Rutland, 33 Vt. 414.

95. Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081, *per* Anders, J.

Discretion of Court. — Whether a witness has such knowledge of the facts as to make his opinion of value is in a great measure a matter resting in the discretion of the trial court. Texas & St. L. R. *v.* Kirby, 44 Ark. 103; St. Louis & T. R. Co. *v.* Anderson, 39 Ark. 167, 17 Am. & Eng. R. Cas. 97.

96. *United States.* — Chateuagay Iron Co. *v.* Blake, 144 U. S. 476; Strother *v.* Lucas, 6 Pet. 763; Ardmore Coal Co. *v.* Bevil, 61 Fed. 757.

Alabama. — Larkinsville Min. Co. *v.* Flippo, 130 Ala. 361, 30 So. 358; St. Louis & Tenn. River Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; La Fayette R.

Co. *v.* Tucker, 124 Ala. 514, 27 So. 447; Birmingham R. & Elec. Co. *v.* Franscomb, 124 Ala. 621, 27 So. 508; Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Brinkley *v.* State, 89 Ala. 34, 8 So. 22, 18 Am. St. Rep. 87; Birmingham R. & Elec. Co. *v.* Ellard, 135 Ala. 433, 33 So. 276; Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Jacobs, 70 Ark. 401, 68 S. W. 248; St. Louis, I. M. & S. R. Co. *v.* Law, 68 Ark. 218, 57 S. W. 258; Little Rock Traction & E. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7; St. Louis & S. F. R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Jones *v.* State, 58 Ark. 390, 24 S. W. 1073; St. Louis, I. M. & S. R. Co. *v.* Yarborough, 56 Ark. 612, 20 So. 515; Fort *v.* State, 52 Ark. 180, 11 S. E. 959, 20 Am. St. Rep. 163.

California. — Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398; Pacheco *v.* Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833.

Colorado. — Moffatt *v.* Corning, 14 Colo. 104, 24 Pac. 7.

Connecticut. — Ætna Natl. Bank *v.* Charter Oak Life Ins. Co., 50 Conn. 167; Morse *v.* State, 6 Conn. 9.

Florida. — Hodge *v.* State, 26 Fla. 11, 7 So. 593; Jones *v.* State, 32 So. 793.

Georgia. — Foote *v.* Malony, 115 Ga. 985, 42 S. E. 413; Southern Mut. Ins. Co. *v.* Hudson, 115 Ga. 638, 42 S. E. 60; Acme Brg. Co. *v.* Central R. & Bkg. Co., 115 Ga. 494, 42 S. E. 8; Milledgeville *v.* Wood, 114 Ga. 370, 40 S. E. 239; Augusta & W. P. R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 766, 45 Am. & Eng. R. Cas. 211; Printup *v.* Patton, 91 Ga. 422, 18 S. E. 311; Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Illinois. — Hoehn *v.* Chicago, P. & St. L. R. Co., 152 Ill. 223, 38 N. E. 549; Evans *v.* Dickey, 117 Ill. 291, 7 N. E. 263; Chicago & A. R. Co. *v.* S. & N. W. R. Co., 67 Ill. 142.

Indiana. — Hamrick *v.* State, 134 Ind. 324, 34 N. E. 3; Board of Commissioners of Clay Co. *v.* Redifer (Ind. App.), 69 N. E. 305.

Iowa. — Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143; Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192; *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Orr *v.* Cedar Rapids & M. C. R. Co., 94 Iowa 423, 62 N. W. 851; Morgan *v.* Fremont Co., 92 Iowa 644, 61 N. W. 231; Dutton *v.* Seevers, 89 Iowa 302, 56 N. W. 398; Aiken *v.* Chicago, B. & Q. R. Co., 68 Iowa 363, 27 N. W. 281; State *v.* Pennyman, 68 Iowa 216, 26 N. W. 82; Baldwin *v.* St. Louis, K. & N. R. Co., 68 Iowa 37, 23 N. W. 918.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576; Atchison, T. & S. F. R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60; Atchison, T. & S. F. R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043; Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308; State *v.* Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486; Chicago, K. & W. R. Co. *v.* Woodward, 48 Kan. 599, 29 Pac. 1146; Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Soloman R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730; Dow *v.* Julien, 32 Kan. 576, 4 Pac. 1000.

Maryland. — Wheeler *v.* State, 42 Md. 563.

Massachusetts. — O'Donnell *v.* Pollock, 170 Mass. 441, 49 N. E. 745; Robbins *v.* Atkins, 168 Mass. 45, 46 N. E. 425; Plunger E. Co. *v.* Day, 68 N. E. 16; Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419.

Michigan. — McHugh *v.* Fitzgerald, 103 Mich. 21, 61 N. W. 354, *holding* that one who drew a will is not competent to give his opinion as to whether the testator was unduly influenced. Ireland *v.* C. W. & M. R. Co., 79 Mich. 163, 44 N. W. 426; Harris *v.* Clinton Twp., 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842.

Minnesota. — State *v.* Garvey, 11 Minn. 154.

Missouri. — Campbell *v.* St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86; State *v.* Terry, 172 Mo. 213, 72 S. W. 513; State *v.* Pratt, 121 Mo. 566, 26 S. W. 556; Koons *v.* St. Louis & I. R. M. R. Co., 65 Mo. 592.

Montana. — Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869; Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

Nebraska. — Russell *v.* State, 62 Neb. 512, 87 N. W. 344; Jameson *v.* Kent, 42 Neb. 412, 60 N. W. 879; Fremont E. & M. V. R. Co. *v.* Mar-

B. Opinion Based on Evidence Heard. — A witness not an expert cannot be allowed to testify to his opinion based upon the testimony he may have heard.[97]

C. Opinion as to Truth of Another's Testimony. — Witnesses will not be permitted to give their opinions upon the truth

ley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; Fremont E. & M. V. R. Co. *v.* Whalen, 11 Neb. 585, 10 N. W. 491; Fremont E. & M. V. R. Co. *v.* Ward, 11 Neb. 597, 10 N. W. 524; Searles *v.* Oden, 13 Neb. 344, 14 N. W. 420; Burlington & M. R. Co. *v.* Schluntz, 14 Neb. 421, 16 N. W. 439; Burlington & M. R. Co. *v.* Beebe, 14 Neb. 463, 16 N. W. 747; Cropsey *v.* Averill, 8 Neb. 151; Frederick *v.* Ballard, 16 Neb. 559, 20 N. W. 870.

New Hampshire. — Spear *v.* Richardson, 34 N. H. 428.

New York. — Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942; Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752; Hewlett *v.* Wood, 55 N. Y. 634; Real *v.* People, 42 N. Y. 270; O'Brien *v.* People, 36 N. Y. 276; Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Herrick *v.* Lapham, 10 Johns. 281; Dunham *v.* Simmons, 3 Hill 609; Paige *v.* Hazard, 5 Hill 603; Lincoln *v.* Saratoga & S. R. Co., 23 Wend. 425.

North Dakota. — Smith *v.* Northern P. R. Co., 3 N. D. 555, 58 N. W. 345; Railroad Co. *v.* Schultz, 43 Ohio St. 270, 1 N. E. 324.

Ohio. — Atlantic & G. W. R. Co. *v.* Campbell, 4 Ohio St. 583; Cleveland & P. R. Co. *v.* Ball, 5 Ohio St. 568.

Oklahoma. — Devore *v.* Territory, 2 Okla. 562, 37 Pac. 1092.

Oregon. — United States *v.* McCann, 40 Or. 13, 66 Pac. 274; Hahn *v.* Guardian Assurance Co., 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709; Fisher *v.* Oregon S. L. & U. N. R. Co., 22 Or. 533, 30 Pac. 425, 16 L. R. A. 519; Burton *v.* Severance, 22 Or. 91, 29 Pac. 200.

Pennsylvania. — Hiester *v.* Laird, 1 Watts & S. 245.

South Carolina. — State *v.* Green, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872; Meade *v.* Carolina Natl. Bank, 26 S. C. 608; Porter *v.* Jeffries, 40 S. C. 92, 18 S. E. 229.

South Dakota. — Webster *v.* White, 8 S. D. 479, 66 N. W. 1145.

Tennessee. — Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445; Cumberland T. & T. Co. *v.* Dooley, 110 Tenn. 104, 72 S. W. 457.

Texas. — McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Southern K. R. Co *v.* Cooper (Tex. Civ. App.), 75 S. W. 328; International & G. N. R. Co. *v.* Kuhn, 2 Tex. Civ. App. 210, 21 S. W. 58; Cananess *v.* State (Tex. Crim.), 74 S. W. 908; Stanley *v.* State (Tex. Crim.), 73 S. W. 400; Over *v.* Mo. K. & T. R. Co. (Tex. Civ. App.), 73 S. W. 535; Terry *v.* State (Tex. Crim.), 72 S. W. 382; Lentz *v.* Dallas, 96 Tex. 258, 72 S. W. 59.

Utah. — Nichols *v.* Oregon S. L. R. Co., 25 Utah 240, 70 Pac. 996; Wooley *v.* Maynes, 18 Utah 232, 54 Pac. 833; Farrand *v.* M. E. Church, 18 Utah 29, 54 Pac. 818; Ganaway *v.* Salt Lake Dramatic Ass'n, 17 Utah 37, 53 Pac. 830.

Vermont. — Don Crane *v.* Northfield, 33 Vt. 124; Fraser *v.* Tupper, 29 Vt. 409.

Virginia. — Cropp *v.* Cropp, 88 Va. 753, 14 S. E. 529; Tyler *v.* Sites, 90 Va. 539, 19 S. E. 174.

Wisconsin. — Miles *v.* Stanke, 114 Wis. 94, 89 N. W. 833; Farrand *v.* C. & N. W. R. Co., 21 Wis. 435.

Line Separating Duty of Witness From That of Juror. — The line that separates the duty of a witness from that of a juror is the line which separates facts from results, or conclusions arrived at by the aid of comparison and reason. The former is the province of a witness, the latter of jurors. *Per* Jacob, J., in Ferguson *v.* Tobey, 1 Wash. Ter. 275.

97. Daniels *v.* Mosher, 2 Mich. 183, in which case it was held that it was error to permit witnesses who were not experts to testify "whether from the testimony they should think the job was done in a good and workmanlike manner."

of a statement by another witness, though they may do the same thing in effect by denying the fact stated.[98]

12. Invading Province of Court. — A witness will under no circumstance be allowed to invade the province of the court by giving an opinion upon a question of law.[99]

13. Invading Province of Referee. — Where the case has been referred to a referee the same rule is applicable as if the case were being tried before a jury or the court without a jury, and a non-expert witness will not be permitted to express his opinion upon a question which it is the province of the referee to determine.[1]

14. Conjectures, Surmises, Suppositions, etc. — A. In General. The mere conjectures, surmises and suppositions of a witness are not admissible in evidence, such statements not being within the rule which allows witnesses to state their conclusions from facts which they have observed and which are incapable of being fully described to the jury.[2]

Guess of Witness. — Unless a witness is able to give something more than a mere vague guess, his testimony is inadmissible.[3]

98. Holliman *v.* Cabanne, 43 Mo. 568.

As to Basis of Testimony of Another Witness. — A witness will not be permitted to testify as to whether or not another witness who has testified to certain things had any ground for so testifying. Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511.

99. Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945; San Antonio & A. P. R. Co. *v.* Moore, 31 Tex. Civ. App. 371, 72 S. W. 226; Martin *v.* Texas B. & C. Co. (Tex. Civ. App.), 77 S. W. 651; Brown *v.* Doubleday, 61 Vt. 523, 17 Atl. 135; Rindskopf *v.* Myers, 77 Wis. 649, 46 N. W. 818. See also Elrod *v.* Alexander, 4 Heisk. (Tenn.) 342. See further *infra,* "Legal Conclusions."

1. Gutchess *v.* Gutchess, 66 Barb. (N. Y.) 483.

2. Menifee *v.* Higgins, 57 Ill. 50, in which case a witness, upon being asked whether a party acquiesced in the exchange of his property for other property, replied: "I do not know, but from his conversation I supposed he did." It was held that such evidence was inadmissible. See also Hall *v.* State, 40 Ala. 698, *holding* that the suppositions of a witness as to the whereabouts of another person at a particular time are not competent evidence.

3. Campbell *v.* St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86. In this case a witness testified that a street car was running between twelve and fifteen miles an hour. It was not claimed that he had ever made any particular study of the subject, or that he had even ever been in the business of operating a street car, and it was held that his testimony was inadmissible, the court saying: "Long training and study make men so proficient in particular subjects that they sometimes really know more than to the casual observer seems possible, and therefore we ought to hesitate to pronounce as impossible the possession of such knowledge when it is claimed with a fair show of reason. But when very unusual technical knowledge is claimed, the party offering the evidence ought to be able to show the court that such attainment is practicable by experience and study, and that it is so recognized in the particular trade or science." *Compare* Atlanta C. S. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24, where a witness was allowed to testify that she supposed that she would have seen a motorman turn off the electricity on his car if he had done so.

B. Probabilities. — A witness will not be permitted to testify to mere probabilities which amount to no more than speculations.[4]

C. Impressions of Witness. — A witness will not be allowed to state his impressions as aids to the deduction to be made by the court or jury.[5]

D. Cautious or Guarded Statements of Witness. — The testimony of a witness, however, is none the less admissible because he prefaces his statements with the words, "I should judge," or "I believe," or similar expressions, where it is apparent that he is merely making a careful and guarded statement of the facts, and is endeavoring not to commit himself to a positive allegation as to the accuracy of what he says.[6]

4. Stambaugh *v.* Snoblin, 32 Mich. 296, in which case it was held that a question propounded to one of the defendants as to the probability of their having delivered certain goods by mistake to some one other than the one for whom they were intended called for mere speculation or guess-work, and that it was proper to exclude such question. See also to the same effect Wrisley *v.* Burke Co., 203 Ill. 250, 66 N. E. 818.

5. Tait *v.* Hall, 71 Cal. 149, 12 Pac. 391.

Impression or Belief of Witness. In Blake *v.* People, 73 N. Y. 586, which was a prosecution for murder, a witness for the people was asked on cross-examination if he would swear that the deceased was not choking the prisoner. He answered: "I would not swear it; but don't think that he was." The last part of the answer the prisoner's counsel moved to strike out, which motion was denied. It was held that there was no error; that it was competent for the witness to testify to an impression or belief on the subject.

As to Who Shot Witness. — In People *v.* Wasson, 65 Cal. 538, 4 Pac. 555, a witness testified as follows: "I think that this man is the man that shot me." It was held that such testimony was inadmissible.

6. Hallahan *v.* New York, L. E. & W. R. R. Co., 102 N. Y. 194, 6 N. E. 287, in which case a witness was asked to describe the position of the plaintiff's right elbow in reference to a car window, and he answered as follows: "Mr. Hallahan sat straight up in the seat at the window and his elbow was resting on the sill, and I should judge that it could not project out of the window by the position that he held it in the car." The witness was also asked: Q. "Was or was not his elbow, at the time this object struck the car, inside or outside the car window?" to which he answered: "It could not be outside of the car window; it was probably on a level with the outside of the car; my opinion was from the position that it was inside." Counsel for the defendant objected to this answer, and moved to strike it out, on the ground that it was the opinion of the witness and not a statement of facts, and the motion was granted as to the part "my opinion," etc. In holding that no error was committed the court said: "The witness had described the position of the plaintiff's arm, and his ex- expression 'I should judge' was qualified by what he had previously stated and by what he stated afterward. It was a simple statement of the facts as they actually existed, with the qualification that in the position his arm was it could not project out of the car window. It was merely a careful statement of the facts without a positive allegation as to its accuracy, and not in the nature of an opinion alone. It may be regarded as the statement of a witness who is extremely cautious in giving evidence. The expression used and others of a similar character, such as 'I think,' when the facts are presented cannot always be regarded as a mere opinion. Cases frequently arise where witnesses are called upon to state the appearance of a person at a particular time, when a question arises as to the soundness of his mind, and when the

Statement of Witness That He Is Not Positive. — Where a witness in making a statement says that he is testifying according to his judgment, but that he will not be positive, his testimony is admissible as being made according to the best of his recollection.[7]

What Witness Considers. — It has been held that where a witness in testifying qualifies his statement by the use of the word "consider," his testimony is not open to the objection that he is stating merely an opinion or conclusion, the word "consider" when so used being synonymous with "think" or "believe."[8]

facts are stated the witness can properly be allowed to testify as to such appearance in a manner which to some extent involves the judgment of the witness." See also Royall *v.* McKenzie, 25 Ala. 363, where a witness was allowed to testify that he "regarded" certain debtors as insolvent.

Use of Word "Believe." — In Succession of Morvant, 45 La. Ann. 207, 12 So. 349, the court said: "Such testimony when credible and sufficient is not objectionable. The word 'believe' does not weaken the force of the testimony. . . . It must necessarily be a matter of judgment or opinion. Actual knowledge extends a comparatively little way; men are compelled to resort to judgment — a species of circumstantial evidence not secondary to direct."

"Impressions" of Witness. — In Humphries *v.* Parker, 52 Me. 502, it was held that it is permissible to allow a witness when testifying to say that it is "his impression," or that "he thinks," when it is apparent that he means by the former expression that he has a remembrance, and by the latter that he recollects.

Statement of Strength of Recollection. — The testimony of a witness that he thought the plaintiff told him that a certain sum of money had been paid to the plaintiff, was very confident he said so, but would not swear that he did, is a statement of the strength of the recollection of a fact by the witness, and is admissible evidence. Lewis *v.* Freeman, 17 Me. 260.

"To the Best of My Knowledge." In Blake *v.* People, 73 N. Y. 586, which was a prosecution for murder, a witness was asked, "Which was down; can you tell?" He answered: "The one that was shot was down and the other was helping him up, to the best of my knowledge." Counsel moved to strike out the words, "to the best of my knowledge." The motion was denied. It was held that there was no error.

Testimony of Witness That He Was "Pretty Certain." — In Atlanta C. S. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24, it was held that there was no error in allowing the plaintiff to testify that he was "pretty certain" that his horse became scared at a piece of terra-cotta pipe lying upon the edge of the street.

"I Should Say." — The testimony of a witness is none the less admissible because he prefixes his statement by the words "I should say" when the context makes it clear that those words, instead of being the expression of a conjecture, are simply a form of speech. White *v.* Van Horn, 159 U. S. 3.

7. Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65. See also Elliott *v.* Dyche, 80 Ala. 376. And see article "BELIEF."

8. Richards *v.* Knight, 78 Iowa 69, 42 N. W. 584. In this case a farmer was asked whether he "considered" corn ripe at a certain time, and it was held that such question was not open to the objection that it did not call for the fact as to its maturity. The court said: "In the connection in which the word occurs in the question it is used as synonymous with 'thought' or 'believed' and is not objectionable."

See also Ward *v.* Reynolds, 32 Ala. 384, in which case it was held that the testimony of a witness that a servant "was considered a good hand" was admissible because it was apparent that what the witness meant was that he regarded the serv-

E. Surmises and Suspicions. — A witness will not be allowed to testify to mere surmises and suspicions entertained by him.[9]

F. Recollection of Witness. — The general rule which forbids a witness from testifying as to his opinion has no application to the testimony of a witness as to his recollection.[10]

15. Opinions of Skilled Observers. — There is a class of cases in which the courts resort to the opinions and conclusions of witnesses who, while not regarded as experts, have the capacity for forming opinions and conclusions which puts their testimony upon a higher plane than that of ordinary witnesses, such witnesses being called, for want of a better term, skilled observers.[11]

ant as a good hand because he was active, able and willing.

9. Reid *v.* Ladaue, 66 Mich. 22, 32 N. W. 916, 11 Am. St. Rep. 462, in which case it was held that where a drover had made sales of hides for a number of years to certain dealers and sued them for alleged shortages in weights it is not competent for the plaintiff, upon it being shown that the defendants upon certain occasions had made mistakes or had been guilty of fraud in weighing hides, to give his opinion that he had been unfairly dealt by during the intervening years, and to attempt to fix an average per hide by which the suspected shortage might be ascertained during said years.

10. Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625. This was an action under a statute brought by a wife to recover damages against the defendant for having caused the intoxication of her husband. The witness was asked the following question: "What is your best recollection with regard to whether or not you have seen the husband drunk at the defendant's saloon within the last two and a half years before you went away?" It was held that this question was competent and that it did not seek to obtain of the witness his mere opinion. The court said: "The questions themselves were proper, especially as the witnesses interrogated showed a disposition to evade answering to facts within their knowledge. Oral evidence is after all only the uttered or spoken statement of existing facts or past transactions, and the witness, in making his statements under oath of a past event, relies wholly upon his memory or recollection. Therefore if he gives his best recollection of a past transaction or event, he testifies only to that of which he has knowledge or recollection. When asked to give his recollection, his opinion is not called for. An opinion is the judgment which the mind forms."

Distinction Between Recollection of Witness and His Conclusions. In Shepard *v.* Pratt, 16 Kan. 209, a person testified that he was present at a conversation among other persons, and that from "the conversation" he "learned" that such other persons had entered into a partnership. It was held that this testimony was properly stricken out because it did not purport to be the witness' recollection of the conversation, but his conclusions from it. The court said: "The use of the word, 'learned,' might not of itself be decisive; but the further language shows that the witness is not trying to give the language of the various parties to that conversation, or the substance of it, but is simply giving the results, as he understood them."

11. St. Louis & S. F. R. Co. *v.* Bradley, 54 Fed. 630; Chicago, B. & Q. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708, *holding* that persons who are familiar with trains, although not experts, may testify as to the rate of speed at which a train was running when they observed it; Case *v.* Perew, 46 Hun (N. Y.) 57, wherein a witness was allowed to testify as to the distance that a light could be seen on the water, the witness being a mariner; Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270, where a farmer was permitted to estimate the quantity of grain that was left in the straw after thrashing buckwheat, the witness not being regarded

XIV. OPINIONS AND CONCLUSIONS OF NON-EXPERTS CLASSIFIED.

1. In General. — The difficulty of classifying the questions upon which the opinions and conclusions of non-experts are admissible has been judicially declared as follows: "To exactly classify the cases in which such evidence may properly be given appears to have been a task of insurmountable difficulty to the text writers on evidence. No rule has yet been framed that can safely be applied as a touchstone for the difficulties that arise upon this subject. The difference of opinion between courts of last resort attests this."[12]

as an expert; Morris *v.* State (Tex. App.), 16 S. W. 757, in which latter case a witness who, though not an expert, was familiar with shotguns and Winchester rifles, was permitted to testify that a certain wound had the appearance of having been inflicted with a shotgun and that another wound had the appearance of having been inflicted with a Winchester. See also Porter *v.* Manufacturing Co., 17 Conn. 249; Railroad Co. *v.* Warren, 137 U. S. 348; Hopt *v.* Utah, 120 U. S. 430; Insurance Co. *v.* Lathrop, 111 U. S. 612; Empire Spring Co. *v.* Edgar, 99 U. S. 645; State *v.* Folwell, 14 Kan. 105; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Stewart *v.* State, 19 Ohio St. 302, 53 Am. Dec. 426; First Nat. Bank *v.* Fire Ass'n of Phila., 33 Or. 172, 50 Pac. 568, 53 Pac. 8; Clifford *v.* Richardson, 18 Vt. 620.

Woman Who Has Borne Children. Age of Child. — Where the question is whether a baby was a new-born baby or one that had been born some time, a woman who has herself borne four children may testify on the subject. Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770. In this case the court did not leave it clear whether such testimony was admitted as the testimony of an expert, or as an opinion which it was necessary to admit because of the impossibility of describing a child of tender age so as to enable a jury to judge whether it was a few days or a few weeks old. The court apparently placed its decision upon both grounds.

As to Whether Wagon Tracks Were Made by Defendant's Wagon. Where a witness knows and has examined a wagon owned by the defendant, and has observed the peculiarities of its running-gear, and has followed certain wagon-tracks, and measured them, and has noted many minute circumstances tending strongly to show that the tracks were made by the defendant's wagon, it is not error to permit him to give his opinion that the defendant's wagon made the tracks. State *v.* Folwell, 14 Kan. 105, in which case the court expressly declared that the question was not one of science and that the witness was not an expert.

12. Elsner *v.* Supreme Lodge, 98 Mo. 640, 11 S. W. 99. See also Indiana B. & W. R. Co. *v.* Hale, 93 Ind. 79, in which case it was declared that it is difficult, if not impossible, to lay down a rule applicable to all cases, to say when and under what circumstances the opinion of a witness may or may not be competent.

Judicial Enumeration of Subject-Matters. — "All concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention." *Per* Foster, C. J., in Hardy *v.* Merrill, 56 N. H. 227, 22 Am. Rep. 441. For other cases in which similar expressions have been used, see Carthage Tpk. Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364; Stacy *v.* Portland Pub. Co., 68 Me. 279; Com. *v.* Sturtivant, 117

2. Actions, Behavior, etc. — A. Accidents. — It has been held that a witness should not be permitted to state his opinion upon the question whether a person did an act accidentally or not.[13]

B. Attempts and Efforts. — It has been held that an observer may testify as to the attempts and efforts which another person was making;[14] but the witness will not be allowed to give an opinion as to the adequacy or sufficiency of such attempts or efforts to attain a specified purpose.[15]

C. Possibility, Feasibility, etc. — As a general proposition the opinions of non-experts as to the probability, possibility or feasibility of the performance of acts are not admissible;[16] but the question whether or not an act could have been performed may involve a matter which is incapable of exact description, and under such

Mass. 122, 19 Am. Rep. 401; Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800; DeWitt *v.* Barly, 17 N. Y. 340; Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270.

13. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18, in which case the question was whether or not a person committed suicide or died by accident. See also Treat *v.* Merchants' Life Ins. Ass'n, 198 Ill. 431, 64 N. E. 992, where a witness called as an expert was not allowed to give an opinion upon such question.

14. Lewis *v.* State, 49 Ala. 1, in which case it was held that one who was a witness to a struggle between parties may say whether or not one was trying to escape and whether or not the other was trying to prevent such escape.

15. Montgomery W. P. R. Co. *v.* Edmonds, 41 Ala. 667. In this case it was held that in an action against a railroad company as a common carrier to recover the value of cotton which was destroyed by fire a witness should not be allowed to testify "that everything was done which could have been done to save the cotton from being burned."

16. Alabama G. S. R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943, *holding* that a non-expert should not be permitted to give his opinion as to the distance within which a train could have been stopped. See also Indiana B. & W. R. Co. *v.* Hale, 93 Ind. 79; People *v.* Rector, 19 Wend. (N. Y.) 569.

Ability to Escape From Antagonist. — On a prosecution for murder, witnesses having detailed the facts and circumstances of a quarrel and fight between the defendant and the person killed, the witnesses will not be permitted to express an opinion as to whether the defendant had any chance to get away from his antagonist sooner than he did. State *v.* Mims, 36 Or. 315, 61 Pac. 888. See also State *v.* Donnelly, 69 Iowa 705, 27 N. W. 369, 58 Am. Rep. 234.

Method of Coupling Cars. — The opinions of a witness as to whether or not when a train of cars is in motion a person can go between the cars and uncouple them, and at the same time see whether a frog in the track is blocked, are conclusions drawn from a complication of circumstances, and should not be admitted in evidence. The witness should be asked for the facts, and the jury left to draw their own conclusions from them. Coates *v.* Burlington, C. R. & N. R. Co., 62 Iowa 486, 17 N. W. 760.

That Defendant Could Have Saved Goods From Fire. — Bluman *v.* State (Tex. Crim.), 26 S. W. 75.

Whether Person Could Have Hung Himself. — In Mann *v.* State, 23 Fla. 610, 3 So. 207, which was a prosecution for murder, it was held that the following question was improper, because it required the witness to give an opinion upon a question which was one for the jury: "Supposing there was a rope, as described by Mr. Dubois in his testimony yesterday, across that beam at the point indicated, the bottom of the loop extending ten inches below the beam, could a boy of the height of Edmond Dubois, as testified to yesterday, stand on the

circumstances it would seem that the witness may be allowed to state his conclusions.[17]

D. Means, Methods and Instrumentalities. — As a general proposition a non-expert witness who has had sufficient opportunities for observation will be permitted to give an opinion as to the means, methods and instrumentalities by which acts are accomplished, where the same are incapable of being fully described to the jury;[18] but the courts are careful to exclude mere speculations of a witness, and will not allow him to invade the province of the jury.[19]

barrel and place his head in the loop?"

17. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18, *holding* that one who has had experience as a pilot and is acquainted with a river may give his opinion as to whether one falling into it would likely be found after death, and may, among other reasons for his opinion, cite the case of a person who fell overboard many years ago at the same place and though searched for was never recovered.

18. State *v.* Folwell, 14 Kan. 105.

Amount of Force Necessary to Perform Act. — In Louisville & N. A. R. Co. *v.* Watson, 90 Ala. 68, 8 So. 249, which was an action against a railroad company by a brakeman to recover damages for personal injuries, the court said: "We do not think that the court erred in overruling the defendant's motion to exclude from the jury the plaintiff's statement, made as a witness, that the engineer 'backed the tender against the car with more force than was necessary.' This was but an inference necessarily involving the facts that the tender was to be moved, or that the space between the cars was only a few inches, and that the momentum imparted to the locomotive and tender carried them beyond that distance; and the form of the statement is only a shorthand rendering of these facts."

How Buggy Was Injured. — In State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865, it was held that it was competent for ordinary witnesses to give an opinion that the wheel and shaft of a buggy in which decedent had been riding were broken purposely by force applied thereto in a certain manner, the witnesses having also described the appearance of the wheel and shaft and the general condition of the buggy, and of the ground in the vicinity.

Applied From Outside to Break Lock of Inner Vault Door. — In Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163, which was a prosecution for burglary, a witness for the state testified as to the condition of safe-locks and doors after the burglary, and was permitted, against the defendant's objection, to state that force had been applied from the outside to break the lock of the inner vault door, which had been secured by an ordinary lock and key. It was held that there was no error in the admission of such testimony. The court said: "It was in reference to an ordinary transaction which any man of common understanding was capable of comprehending, but which could not be reproduced or described to the jury precisely as it appeared to the witness; and while it may not be the right of a party to demand an expression of an opinion of a witness under such circumstances, it is not reversible error to permit it."

19. Caleb *v.* State, 39 Miss. 721, holding that a witness who is not skilled in the science of surgery or medicine, but who has seen about a dozen gunshot wounds and about the same number of cuts with a sharp instrument on the human body, should not be permitted, after describing a wound, to testify that it was made with a knife and did not have the appearance of a gunshot or pistol wound. See also Jones *v.* State (Fla.), 32 So. 793; Carpenter *v.* Corinth, 58 Vt. 214, 2 Atl. 170.

E. Quantity of Work Performed. — A witness may give an estimate as to the quantity of work that has been performed without violating the rule against opinions.[20]

F. Adequacy and Sufficiency of Acts. — It has been held that where the subject is one involving skill it is not proper to allow a non-expert to give his opinion as to whether acts were done properly or not; *e. g.*, a non-expert will not be allowed to say whether bandages were put on a person properly.[21]

G. Legality and Morality of Acts. — Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably have been influenced, if the parties had acted in one way rather than in another.[22]

20. Cofer *v.* Scoggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54, in which case a witness was asked whether improvements had been made; and he answered as follows: "Yes, right smart improvements have been made in clearing and fencing." It was held that such testimony was admissible, as it consisted of an inference necessarily involving facts as to the quantity of land cleared and fenced — collective facts — subject to the right of cross-examination by opposing counsel.

21. Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832. See also Brush E. L. & P. Co. *v.* Wells, 103 Ga. 512, 30 S. E. 533, *holding* that in an action for death by wrongful act it is not admissible for a witness who is not shown to be an expert to testify that the decedent was doing the work he was required to do at the time of his death in a proper or improper manner, such testimony being an expression of opinion and not a statement of a fact. See further Baldwin *v.* St. Louis, K. & N. R. Co., 68 Iowa 37, 25 N. W. 918, where the court said: "Where the construction of a given pile of timber is properly explained it appears to us that a jury of men not especially experienced in piling lumber would have no difficulty in forming an opinion for themselves as to the liability of the pile to fall and injure a person who should be near it. Such work, it seems to us, does not in any proper sense involve the mystery of technical knowledge or skill. If we are right in this, it follows that it was not competent for the witness to testify as to how he would have piled the timber, or how, in his opinion, it ought to have been piled, and the testimony was improperly admitted." *Compare* Wood *v.* Brewer, 57 Ala. 515, where it was held that the witness testifying in an action for work and labor done by himself may state that he did good work.

Nature of Nursing. — In Missouri P. R. Co. *v.* Palmer, 55 Neb. 559, 76 N. W. 169, it was held that in an action to recover for services rendered and expense incurred in nursing a child which had been injured, a non-expert witness may express an opinion as to the nature of the care that was bestowed by the nurse upon the child. In this case the witness was asked the following question: "Could any professional nurse have rendered as good or better services for this child during the time you knew it, after this accident, than did her mother, the plaintiff in this case?" To which question she answered, "I think not." The court said: "From the nature of the subject under investigation it was not possible to lay before the jury all the facts from which the conclusion was drawn, and it was therefore proper to permit the witness to state the result of her observations."

22. *Per* Lord Denman in Campbell *v.* Richards, 5 Barn. & Ad. 846. *Quoted* with approval in Milwaukee & St. P. R. Co. *v.* Kellogg, 94 U. S. 469. See also Hill *v.* Lafayette Ins. Co., 2 Mich. 476, *per* Wing, P. J.

Indecency of Dance. — A witness who was present and saw a dance in which the deceased indulged just before an altercation which resulted in the killing can not testify that it was "indecent," this being the mere expression of an opinion, and not

H. HONESTY, FRAUD, ETC. — A witness will not be permitted to give his opinion whether a person acted honestly,[23] or fraudulently.[24]

I. CRUELTY, ILL-TREATMENT, ETC. — A witness will not be permitted to give his opinion upon the question whether acts were excessively cruel, etc., or constituted severity or ill-treatment.[25]

J. HABITS. — a. *In General.* — As a general proposition a witness who is acquainted with a person will be permitted to testify as to his habits, such testimony being regarded as a statement of a fact rather than of opinion or conclusion.[26]

b. *Temperate Habits.* — It has been held that a witness may testify as to whether or not another is intemperate in the use of intoxicating liquor.[27]

the statement of a fact. Brinkley *v.* State, 89 Ala. 34, 8 So. 22, 18 Am. St. Rep. 87.

Indecent, Brutal and Unbecoming Treatment. — In an action for false imprisonment a witness should not be permitted to characterize the defendant's treatment of the plaintiff as: "I thought then, and think now, that the defendant's treatment of plaintiff was very indecent, brutal, and very unbecoming an officer and gentleman." But if the witness has previously given all the particulars of the treatment, detailing the acts and words, so as to enable the jury to judge of the character of the same, the error will not be so grave as to call for a reversal. Kendall *v.* Limberg, 69 Ill. 355.

23. Johnson *v.* State, 35 Ala. 370, in which case it was held that on a prosecution for forgery a witness should not be allowed to state that the defendant obtained honestly the money he had in his possession on leaving home.

24. Rindskopf *v.* Myers, 77 Wis. 649, 46 N. W. 818. See also German Fire Ins. Co. *v.* Grunert, 112 Ill. 68, which was an action on an insurance policy. A witness was asked the following question: "You may state if, after the policy was issued by your company, you ascertained, at any time before or after the loss, that William Grunert, in his application for insurance, misrepresented the value of the property." It was held that this question was improper because it called for the opinion of the witness. See further for a full discussion of this question and an exhaustive citation of the authorities the articles "FRAUD" and "FRAUDULENT CONVEYANCES."

25. Sheffield *v.* Sheffield, 3 Tex. 79, which was an action for divorce on the ground of cruelty and ill-treatment. See also Smith *v.* State (Tex. Crim.), 20 S. W. 360. In the latter case, where a school teacher was prosecuted for assault and battery and the defense was that he was merely inflicting moderate correction upon an unruly scholar, the court remarked: "By the witness, the size of the rod used, character of the wounds inflicted, if any, and all the attending circumstances, could be proved, and the jury is competent to determine whether the whipping was severe and immoderate or not."

Excessive Force in Ejection of Passenger. — Where a passenger was ejected from a train a witness will not be permitted to testify whether or not excessive force was used. Raynor *v.* Wilmington S. C. R. Co., 129 N. C. 195, 39 S. E. 821.

26. Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335. See also Fields *v.* State (Fla.), 35 So. 185; Pearl *v.* Omaha & St. L. R. Co., 115 Iowa 535, 88 N. W. 1078.

27. Smith *v.* State, 55 Ala. 1, *holding* that a witness may testify that a man is "of intemperate habits," but not that he is "of known intemperate habits." See also Stanley *v.* State, 26 Ala. 26; Massey *v.* Walker, 10 Ala. 288; Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335.

c. *Carefulness.* — It has been held that it is not permissible to allow a witness to testify as to the carefulness of another.[28]

K. Conduct, Demeanor, Manner. — a. *In General.* — It is well settled that a witness may testify as to the conduct, demeanor or manner of another, and in so doing may use words which amount to a characterization of the same; *e. g.*, a witness may say that a person looked as if he were trying to fight.[29]

28. Morris *v.* East Haven, 41 Conn. 252. This was an action for death by wrongful act, and the question was whether the decedent was driving a horse with ordinary care. It was held that it was not proper to allow a witness to testify that he was a careful driver. The court said: "If the language was used for the purpose of proving the character of the intestate for prudence and care in driving horses generally, then manifestly the evidence was merely the expression of a naked opinion. It would be simply saying that they had often seen the intestate drive different horses on different occasions with care and prudence, and that the evidence thus derived was sufficient to satisfy them that he had a character for prudence and care, which would lead him to exercise these qualities on all occasions in the management of horses. This would be merely the expression of an opinion or conclusion, which the mind would arrive at by a process of reasoning from evidence. And furthermore, care, or reasonable care, is a deduction from all the facts of a particular case, which must be carefully considered in order to ascertain whether or not it was exercised. It follows therefore that when the witnesses said that the intestate drove carefully and prudently at the times when they had seen him drive, they likewise merely expressed opinions to that effect." But see article "Master and Servant."

29. Reeves *v.* State, 96 Ala. 33, 11 So. 296, which was a prosecution for using indecent language in the presence of women. A witness testified that the defendant and another "looked like they were trying to fight as I went on by them with the ladies." It was held that this evidence was a statement of a fact and was admissible. *Citing* Watkins *v.* State, 89 Ala. 82, 8 So. 134; Perry *v.* State, 87 Ala. 30, 6 So. 425; S. & N. A. R. Co. *v.* McLendon, 63 Ala. 266. See also Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; People *v.* Lavelle, 71 Cal. 351, 12 Pac. 226; Sylvester *v.* State (Fla.), 35 So. 142; McKillop *v.* Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739; State *v.* Buchler, 103 Mo. 203, 15 S. W. 331; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533; McKee *v.* Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; People *v.* Packenham, 115 N. Y. 200, 21 N. C. 1035. *Compare* Alabama & G. S. R. Co. *v.* Tapia, 94 Ala. 226, 10 So. 236, where it was alleged that the reason for putting a person off a railroad train was that he did not pay his fare. It was held that it was not permissible to allow a witness to testify that the conductor "conducted himself as well as a man could do in such a case."

Conduct and Demeanor of Defendant After Arrest. — On a criminal prosecution the conduct and demeanor of the defendant at the time of his arrest, or soon after the commission of the alleged crime, may go to the jury as evidence of a guilty mind; and in eliciting such evidence, it is proper to ask persons who had sufficient means of observing the defendant to state their opinions as to whether the defendant was apathetic, or sorry, or fearful, etc., and the witnesses are not to be confined to mere facts as to what the defendant did or said. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Appearance Rational. — In People *v.* Lavelle, 71 Cal. 351, 12 Pac. 226, where the defendant was charged with an assault with the intent to commit murder, the deputy sheriff who was present at the time of the arrest, which immediately followed the assault, was asked what was the appearance of the defendant "at that time with reference to his being

b. *Conduct as Evincing Intention.* — A witness, however, will not be permitted to testify to his conclusions or understandings as to the intention of another based on the conduct of such other.[30]

3. Age. — A. Age of Discretion. — Where, on a prosecution of an infant for the commission of a crime, the question arises whether the defendant had sufficient discretion to understand the nature and illegality of the particular act constituting the crime, the opinions of witnesses are admissible when they also state the facts upon which their opinions are based.[31]

B. Age of Writings. — The opinion of a witness as to whether a written instrument was executed at a recent or remote time is incompetent when such opinion is based on the appearance of the instrument.[32]

4. Animals. — A. In General. — The courts have been liberal in permitting non-experts to testify as to domestic animals. Thus, it has been held that a witness may give his opinion that a horse appeared to be sulky rather than frightened,[33] and that a horse appeared to be tired.[34]

rational or irrational." In holding that there was no error in allowing this question to be asked and answered the court said: "The evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on an acquaintance with him, but was as to the fact, namely, his appearance at the time. The appearance of a person at a given time is one thing; the opinion of the witness as to the mental condition of that person, based on an acquaintance with him, is quite another." Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

That Person's Manner Was Short. In Carroll *v.* State, 23 Ala. 28, 58 Am. Dec. 282, the statement of a witness that in replying to a certain question the defendant's "manner was short" was held to be admissible.

Insulting and Offensive Manner. In Raisler *v.* Springer, 38 Ala. 703, 82 Am. Dec. 736, a witness was permitted to testify that a seizure of property by an officer "was made in an insulting and offensive manner." See also Ray *v.* State, 50 Ala. 104. See further Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153, where a witness was permitted to state whether the pressure on his foot by another was done in an insulting manner.

30. Hodge *v.* State, 26 Fla. 11, 7 So. 593.

31. Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 505. In this case the defendant was over nine, but under thirteen, years of age, and he was charged with burglary. It was held that it was no error to permit witnesses to state their opinions that the defendant, at the time of the commission of the burglary, had sufficient discretion to understand the nature and illegality of the acts constituting that crime; said witnesses having stated the facts upon which their opinions were based, to-wit: Their acquaintance with the defendant, that he was a bright boy, that he could read and write, etc.

32. Williams *v.* Clark, 47 Minn. 53, 49 N. W. 398. See also Eisfield *v.* Dill, 71 Iowa 442, 32 N. W. 420, *holding* that the question is one which is proper for expert testimony.

33. Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185.

34. State *v.* Ward, 61 Vt. 153, 17 Atl. 483. See also State *v.* Avery, 44 N. H. 392.

Effect of Hard Driving on Horses. In an action on a warranty for the soundness of a horse, a witness who testifies for the plaintiff as to the appearance and action of the horse, but who is not an expert, cannot be asked on cross-examination whether he had observed the same appearance in horses which had been hard

B. Characteristics, Disposition, etc. — Likewise it has been held that witnesses may testify as to the characteristics and disposition of animals which they have observed.[35]

C. Disease, Soundness, Injuries. — The testimony of ordinary witnesses who are not offered as experts is admissible in so far as they attempt to describe the condition of domestic animals with reference to health, but the rule is that such a witness will not be permitted to testify as to the existence of a specific malady where the question obviously is one which requires expert knowledge.[36]

driven and then exposed. Moulton *v.* Scruton, 39 Me. 287.

35. Mattison *v.* State, 55 Ala. 224. See also Hardy *v.* Merrill, 56 N. H. 227, 22 Am. Rep. 441. *Compare* Chicago & A. R. Co. *v.* Kuckkuck, 197 Ill. 304, 64 N. E. 358, which was an action to recover damages for being bitten by a dog. The defendant was allowed to offer testimony as to the habits of the dog and that it never manifested a vicious disposition; but the court refused to admit the mere conclusion of the witness as to the character of the dog and as to whether in the opinion of the witness he had any reason to suppose the dog was of a ferocious nature. It was held that there was no error.

36. Spear *v.* Richardson, 34 N. H. 428, in which case the court said: "What constitutes unsoundness is a technical question; and so whether a horse has a particular disease. A witness not an expert cannot testify that a horse was or was not sound, or that he had or had not the heaves. Nor can such a witness testify to the appearance of a horse by reference to the question of soundness or unsoundness. He cannot say that the horse appeared sound or unsound, or that he saw nothing in the horse that appeared like unsoundness, or nothing but that he was sound. But whether the horse appeared well and free from disease in a general sense would be matter of common experience. A witness not an expert might testify that he saw the horse, and that he appeared to be well and free from disease; that he traveled well, ate well, breathed freely, and did not cough. The weight and importance of such testimony would depend much on the apparent intelligence of the witness, his means of observation, and the pains he took to examine. But it would be unexceptionable, since it would be matter of description and not of opinion." See also Stonam *v.* Waldo, 17 Mo. 489, *holding* that a witness should not be permitted to state the symptoms and appearance of cattle that died from want of food unless he is an expert in such matters; Spear *v.* Richardson, 34 N. H. 428, where a witness was allowed to testify that a horse appeared to be well and free from disease and that he had never seen any indications of the horse being diseased; Willis *v.* Quimby, 31 N. H. 485, wherein a non-expert was permitted to testify that in his opinion a horse was not sound, and that his feet appeared to be diseased; Laird *v.* Snyder, 59 Mich. 404, 26 N. W. 654, where a witness was permitted to testify that a horse was made lame by over-driving. See also Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227, wherein a witness was allowed to testify that sheep were diseased. The court said: "The testimony he gave, claimed by defendant to be expert testimony, was that the sheep were diseased. The testimony of other witnesses showing that they were diseased was overwhelming, and we presume that a witness not an expert could say that an animal was diseased if he did not attempt to describe the nature and effects of such disease."

Texas Fever. — In Grayson *v.* Lynch, 163 U. S. 468, witnesses testified fully as to the symptoms of the disease with which the plaintiff's cattle were afflicted, and the resemblance of those to such as they had previously observed in other cattle, and stated that the disease was generally called Texas fever. It was held that this evidence was admissible, as the witnesses were testifying to what were evidently matters of common observation. The court observed that these witnesses did not claim to

5. Appearance and Looks. — A. Of Persons. — It is well settled that a witness may be permitted to testify as to the appearance or looks of a person;[37] or that a person at a certain time looked pale;[38] and such testimony does not violate the general rule which governs the statements of opinions and conclusions by a witness.[39]

B. Of Things. — Frequently the opinion of a witness as to the appearance of an object he has seen is the best and only evidence obtainable,[40] and accordingly it is well settled that statements of a witness as to the appearance or condition of things are admissible.[41]

C. Of Places. — Likewise under certain circumstances witnesses in describing places or situations may give their opinion where otherwise the facts could not be properly and fully laid before the jury, as where a witness is permitted to state that certain tracks in the snow which he saw were the tracks of a sleigh.[42]

6. Condition, Quality and Nature of Things. — A. In General. The rule deducible from the cases seems to be that a witness in describing things which he has observed may give his conclusions or

testify of their own knowledge as to the name of the disease, but merely as to the symptoms they observed, and that cattle so afflicted were ordinarily spoken of as having Texas fever.

37. Childs *v.* Muckler, 105 Iowa 279, 75 N. W. 100, which was an action for alienating the affections of the plaintiff's wife. A witness was asked whether the wife was "nice looking," and it was objected that such testimony was immaterial as amounting merely to the opinion of the witness. The court said: "If the fact was admissible, we are inclined to think that it was one of those matters upon which opinion evidence is receivable, from the very necessities of the case. . . . No description of the woman would have enabled the jury to determine whether or not her appearance was prepossessing."

38. Burton *v.* State, 107 Ala. 108, 18 So. 284, *holding* that on a prosecution for murder it may be shown that the defendant looked paler than usual a short time after the firing of the shots which were supposed to have killed the decedent.

39. *California.* — Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125; People *v.* Lavelle, 71 Cal. 351, 12 Pac. 226. See also Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594.

Kansas. — State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Minnesota. — Cannady *v.* Lynch, 27 Minn. 435, 8 N. W. 164; Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

Missouri. — State *v.* Buchler, 103 Mo. 203, 15 S. W. 331.

New York. — People *v.* Packenham, 115 N. Y. 200, 21 N. E. 1035; McKee *v.* Nelson, 4 Cow. 355, 15 Am. Dec. 384.

North Carolina. — Hare *v.* Board of Education of Gates Co., 113 N. C. 9, 18 S. E. 55; State *v.* Jacobs, 51 N. C. 284.

Vermont. — State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053.

40. *Per* Sherwood, J., in State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

41. Com. *v.* Pope, 103 Mass. 440, *holding* that a witness may describe the condition of clothes or other articles of personal property; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419, *holding* that a witness may give his opinion that a depression in a bed was, from its shape and appearance, caused by the head of a person, he having seen and examined the bed. See also State *v.* Southern, 48 La. Ann. 629, 19 So. 668.

42. State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

deductions as to their condition, nature and quality when the subject-matter is one which is understandable by a witness of ordinary intelligence, and such conclusions or deductions of the witness are based upon facts which are incapable of being properly and accurately described by the witness to the jury.[43] But, as in all other cases,

Whether Gulleys Had Been Washed Out Recently. — In Bates *v.* Sharon, 45 Vt. 474, a witness who had observed certain gulleys in the highway was permitted to testify whether they had the appearance of having been washed out recently or not.

Indications That Scuffle Had Taken Place in Room. — In State *v.* Coella, 8 Wash. 512, 36 Pac. 474, which was a prosecution for murder, a witness was asked the following question: "From the looks of things when you arrived there, was there anything in the appearance of the things in the room that would indicate that a scuffle had taken place there?" It was held that there was no error in excluding this question because it asked merely for the conclusions of the witness. It was for the witness to state the condition of the room, etc., and for the jury to draw the conclusions whether or not there had been a scuffle.

43. In Avary *v.* Searcy, 50 Ala. 54, it was held proper to allow a witness to testify that the fence "was a partition fence," if he knew that it was erected by agreement between the parties who owned the land on either side of it, and that such testimony was not objectionable as a conclusion of law.

Gibson *v.* Hatchett, 24 Ala. 201, *holding* that a witness may state that the aperture in a wall was visible from a certain point; People *v.* Fitzgerald, 137 Cal. 546, 70 Pac. 554, *holding* that a witness who says that he knows alcohol by its color and smell may testify that a certain bottle contained alcohol.

Condition of Vegetables Delayed in Shipment. — In Illinois Central R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890, a witness was asked as to the condition of a carload of potatoes when they arrived at a certain place, the potatoes having been delayed in transportation, and he answered that they were in bad condition. It was held that such testimony did not consist of a mere conclusion of the witness, but was a statement of a fact, and was competent.

That Cotton Was "Protected." In an action against a common carrier for loss of cotton, a witness may state that "all the cotton under the boiler-deck was protected from the weather and from sparks," when the context shows that the word "protected" was used as a synonym of covered. Such expression is not the statement of an opinion or inference. Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

That Footprints Were Made by Man While Running. — Streater *v.* State, 137 Ala. 93, 34 So. 395.

Testimony That House Was a Gambling-house. — In State *v.* Williams, 111 La. —, 35 So. 521, which was a prosecution for assault with intent to kill, a witness was permitted to testify that he walked into "a gambling-house," which was the place where the defendant lived, and where the shooting charged took place. It was held that such testimony was admissible and was not open to the objection that it consisted of an opinion or conclusion, as it was a mere statement by a witness of a fact which had no direct bearing upon the guilt or innocence of the defendant, and which was not a deduction from the fact shown.

That Ladder Was Home-made. Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294.

Human Hair. — A witness will be permitted to testify that certain hairs were human. Com. *v.* Dorsey, 103 Mass. 412.

Description of Boundary Marks. In Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869, a witness was asked whether he found certain boundaries without assistance; whether the blazing upon certain posts appeared to be old or new; whether the marks of the boundaries appeared to be old or

the courts will carefully exclude opinions and deductions of the witness on facts that can be fully stated to the jury.[44]

B. State of Repair. — Whether or not a non-expert may testify as to a thing's state of repair depends, it would seem, upon the nature of the thing in question.[45]

C. Adequacy as Respects Purpose for Which Thing is Intended. — a. *In General.* — Upon the question whether or not a non-expert witness may give his opinion or state a conclusion as to the adequacy or sufficiency of a thing as respects the purpose for which it was intended, or its safety, the cases are conflicting and confusing. The admissibility of such evidence seems to depend somewhat upon the form in which the witness is questioned, and the language which he uses in stating his opinion, conclusions or deductions, but the true criterion seems to be that the court will not allow the witness to invade the province of the jury, and according to the weight of authority the witness must be confined to the mere description of what he has observed.[46]

new; whether he could readily find the blazes on the trees along the end lines; and whether they could be traced or observed from one to the other. It was held that such questions were admissible, as the evidence sought to be brought out consisted of matters of fact, a knowledge of which was gained by the witness from observation.

44. McCalman *v.* State, 96 Ala. 98, 11 So. 408, which was a prosecution for gaming in a tavern or inn. A witness was asked the following question: "Wasn't the room spoken of by Bell [a witness previously examined] just a private bed-room?" It was held that this question was objectionable as calling for a mere opinion or conclusion of the witness.

45. Kelleher *v.* Keokuk, 60 Iowa 473, 15 N. W. 280, in which case it was declared that any person of ordinary intelligence is capable of observing the condition of a sidewalk and of forming a correct conclusion as to whether or not it is in good repair. *Compare* Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933, where it was held that it is error to allow a witness to give his opinion as to the dangerous and unsafe condition of a sidewalk.

Condition of Dwelling-house. The condition of a dwelling-house as a whole is not observable except upon examination, and for this reason does not come within the rule that the testimony of matters within the observation of all is to be treated of as fact rather than opinions. McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143, in which case the court said: "There might well be wide differences of opinion as to what would constitute good repair, and the court rightly held that the house might be described in detail, and from such evidence the jury determine its condition."

Railroad Bridge. — Baldridge & C. B. Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8. In this case it was held that a witness not an expert was improperly allowed to testify touching the condition of the bridge, as follows: "Judging from its appearance and my inspection of said bridge I should think it did need repairs."

46. See Shafter *v.* Evans, 53 Cal. 32, where an action was brought to recover damages for the loss of cattle which broke out of a corral, and it was held it was error to allow witnesses to give their opinions as to the safety of the corral; Winch *v.* Baldwin, 68 Iowa 764, 28 N. W. 62, in which latter case an action was brought on a contract to feed and take care of cattle, and it was held that the court properly sustained an

Sufficiency of Dam. — A witness will be permitted to testify that a certain dam with which he was acquainted was sufficient to withstand the stream across which it was built.[47]

objection to a question in which the witness was asked to state whether in his "opinion the protection afforded the cattle in that yard, taking into consideration the location of the yard and the season of the year, was adequate and sufficient to hasten their fattening."

Whether Hole Near Depot Should Have Been Guarded. — In Cross *v.* Lake Shore & M. S. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399, it appeared that the plaintiff was injured by falling into a hole two feet deep, and the question was whether, considering the location of the defendant's depot, the situation of the streets, the location of the hole with reference to access to and egress from the depot, such hole should have been guarded, and it was held that it was proper to permit witnesses to testify that, located as it was with reference to these surrounding circumstances, it should have been guarded, the testimony being admitted because there was such a combination of surroundings that no amount of description and not even a photograph would have enabled the jury to see the situation as the witnesses saw it.

Sufficiency of Fire Apparatus. — In Cumberland T. & T. Co. *v.* Dooley, 110 Tenn. 104, 72 S. W. 457, which was an action on a fire insurance policy, a witness was asked the following question: "Could you, or not, with the apparatus there in hand, have stopped and controlled the fire at the time of the explosion had it not occurred?" It was held that it was error to allow such question to be answered.

Whether Pile of Stones Was Calculated to Frighten Horses. — In Clinton *v.* Howard, 42 Conn. 294, the question was whether a pile of stones in a public highway was calculated to frighten horses of ordinary gentleness. A witness who was accustomed to the use of horses and knew their characteristics and had observed the effect produced upon them by the sight of piles of stones and other similar objects, after having testified to his knowledge, and given the dimensions and location of the pile of stones, was permitted to testify "whether an object like this pile of stones would be likely to make an ordinarily gentle horse shy," and, holding that there was no error, the court said: "It would be difficult, if not impossible, to embody in words so as to be fully understood by the triers, a description of all the appearances which make a particular pile of stones a source of terror to gentle horses unaccustomed to the sight of such an object. The fright is the result of a combination of form, color and relative position, which would elude the effort of any witness clearly and fully to describe. Knowledge of the reasons why one object arouses the instinct of fear in a horse and another does not, and why the pile of stones in question should be put in one class or the other, is not presumptively within the knowledge of all jurors. To give to a juror who has neither had experience nor made observations upon the point, the dimensions of an object, and compel him to find therefrom alone that it would or would not frighten gentle horses, is to close other ordinary and important avenues to the truth."

Beneficial Qualities of Guano. In Young *v.* O'Neal, 57 Ala. 566, a witness was allowed to testify that a certain guano was beneficial. The court said: "The matter here inquired about was not a conclusion of law, or a mere inference of any kind, but a resultant fact which could be seen and known by any observer."

47. Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249. In this case the question was whether a certain dam was capable of sustaining the water accumulated by it suddenly in time of a freshet. Upon that point the court received the opinions of witnesses who had no peculiar skill in the mode of constructing dams, but who were acquainted with the stream, and who knew the height of the dam and the depth of the pond. The court said: "The judgment or opinion of these witnesses as practical and observing

b. *Bridges and Highways.* — According to the overwhelming weight of authority non-expert witnesses will not be permitted to state their opinions as to whether or not bridges, streets, roads or sidewalks were safe and sufficient.[48]

men was sought on this point, on the facts within their knowledge and to which they testified. They had acquired by their personal observation a knowledge of the character of the stream and also of the dam, and were therefore peculiarly qualified to determine whether the latter was sufficiently strong to withstand the former. The opinions of such persons upon a question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triers than those of scientific men who were personally unacquainted with the facts in the case; and to preclude them from giving their opinion on the subject, in connection with the facts testified to by them, would be to close an ordinary and important avenue to the truth. . . . On such a question the judgment of ordinary persons having an opportunity of personal observation and testifying to the facts derived from that observation was equally admissible, whatever comparative weight their opinions might be entitled to, of which it would be for the jury to judge. It was a question of common sense as well as of science."

48. Harris *v.* Clinton Twp., 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842, *holding* that a witness should not be asked whether from his knowledge of roads and his observation of the one in question it was a safe road; Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192, *holding* that a witness should not be allowed to give his opinion as to whether a billboard was in the way of people walking along the sidewalk; Lentz *v.* Dallas, 96 Tex. 258, 72 S. W. 59, *holding* that in an action against a municipal corporation for injuries received because of a defect in a sidewalk, a non-expert witness should not be allowed to testify that certain iron gratings were too light. See also Ryerson *v.* Abington, 102 Mass. 531; Spears *v.* Mt. Ayr, 66 Iowa 721, 24 N. W. 504; Parsons *v.* Lindsay, 26 Kan. 430; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Girard *v.* Kalamazoo, 92 Mich. 610, 52 N. W. 1021; Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753, wherein it was held that a witness in describing a bridge should be confined to facts; Don Crane *v.* Northfield, 33 Vt. 124; Lester *v.* Pittsford, 7 Vt. 158; Kelley *v.* Fond du Lac, 31 Wis. 179.

Condition of Bridge. — In Baldridge & C. B. Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8, it was held that it was error to permit a witness to testify: "I don't know anything about a bridge of that kind; it seemed to be good except the sidings, which were shabby."

Dangerous Condition of Bridge. The opinions of non-expert witnesses are admissible as to the defective and dangerous condition of a bridge, and such witnesses are not limited to a mere statement of the facts upon which their opinions are based. Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309, in which case the court followed Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151; Sydleman *v.* Beckwith, 43 Conn. 9, and Taylor *v.* Monroe, 43 Conn. 36.

Safety of Bridge as Compared With Others. — In Bliss *v.* Wilbraham, 8 Allen (Mass.) 564, which was an action against a town to recover damages for an injury sustained by reason of a defective bridge, it was held that it was not permissible to ask a witness, who was in the habit of crossing the bridge, as to how it compared on the day of the accident, respecting its safety and state of repair, with other bridges of like character on roads of like amount of travel, because this was the very question to be determined by the jury.

As to Safety of Crossing. — Parsons *v.* Lindsay, 26 Kan. 426.

Snow at Railroad Crossing. Laughlin *v.* Street R. Co., 62 Mich. 220, 28 N. W. 873.

As to Condition of Sidewalk. — In an action against a city for injuries

c. *Fences and Gates.* — It has been held that a non-expert witness should not be permitted to give his opinion as to the sufficiency of a fence or gate.[49]

d. *Machinery.* — Generally a non-expert witness will not be permitted to testify as to the improper construction of a machine or engine.[50]

caused by an alleged defective sidewalk, it was proper to refuse evidence of plaintiff's witness that the walk was in bad condition, and yet admit evidence by the defendant that the walk was in good and sound condition, since to state that the walk was defective was to announce a conclusion — he should have pointed out the condition which rendered it defective, while to say that it was sound was to state a fact. Brooks *v.* Sioux City, 114 Iowa 641, 87 N. W. 682.

Proper Construction of Sidewalk. The question whether a sidewalk made of rough plank, laid on stringers, is properly constructed or not, is not a question for experts altogether, only to be put to and answered by one who has a reputation for skill in such work, and in the handling of tools, and quality and adaptation of materials. Any man of common sense and ordinary observation and experience can pronounce as satisfactorily upon such a question as the most accomplished mechanic, and it is error to exclude such testimony from the jury. Alexander *v.* Mt. Sterling, 71 Ill. 366.

Whether Street Was of Sufficient Width. — In Milledgeville *v.* Wood, 114 Ga. 370, 40 S. E. 239, which was an action against a municipal corporation to recover damages alleged to have been sustained in consequence of physical injuries due to the defective and unsafe condition of a street, it was ruled that there was no error in not allowing a witness to testify whether the street was broad and wide enough at the point where the accident happened for all reasonable purposes.

49. Sowers *v.* Dukes, 8 Minn. 23, which was an action involving the sufficiency of a fence; Collins *v.* Chicago, M. & St. P. R. Co. (Iowa), 97 N. W. 1103, in which latter case it was held that it was not proper to allow a witness to testify as to the sufficiency of a gate at a railroad crossing. *Compare* Dunn *v.* Chicago & N. W. R. Co., 58 Iowa 674, 12 N. W. 734, where, in an action to recover damages for an animal killed on a railroad track, a witness gave testimony relating to the place where the stock were upon the railroad track and the condition of the fence, to which objection was made on the ground that it was based upon the opinion of the witness. The witness related what he had seen and knew from his acquaintance of the locality. It was held that such testimony was admissible.

50. Healey *v.* Patterson (Iowa), 98 N. W. 576. See also Koons *v.* St. Louis & I. M. R. Co., 65 Mo. 592. *Compare* Sievers *v.* Peters Box & Lumber Co., 151 Ind. 642, 50 N. E. 877, which was an action for negligence, involving the construction of an elevator. A witness for the defendant testified that he considered a worm-gearing a safe appliance for hauling freight. This testimony was objected to on the ground that the witness had not qualified as an expert, but it was held that such objection was without force, the court saying: "This witness had testified without objection that he had observed worm-gearings and their operation on elevators, and that he considered a worm-gearing a safe appliance to prevent an elevator from falling, but the construction of the worm-gearing and the elevator, and the manner of attaching the same to the elevators, and the manner of operating the same cannot be described to a jury as it appeared to the witness. In such case, the witness, not an expert, may express his opinion. It is clear that the objection that the witness was not an expert was properly overruled."

e. *Railroad Appliances, etc.* — A non-expert witness will not be permitted to give his opinion that a railroad crossing was not safe;[51] or upon other similar questions with reference to railroads and railroad appliances, because the questions are such that they must be submitted either to the jury or to expert witnesses.[52]

D. Dangerousness or Deadliness. — Ordinarily the question whether a place was dangerous or an instrument was deadly is one which is solvable by the jury after the subject-matter has been properly described by the witness, and accordingly his conclusions or deductions are not admissible,[53] but the court will not hesitate

51. Atchison, T. & S. F. R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576, in which case it was held that it was error to allow a farmer who resided near a railroad crossing to testify that he considered it too narrow for safety, because such testimony was an invasion of the province of the jury.

52. Whether Car Was in Proper Condition for Shipping Horses. Atchison, T. & S. F. R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 140.

Compare Healy *v.* Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125, where a non-expert witness who was on a handcar at the time when it jumped the track was allowed to testify that he thought the car was too narrow for the track; it being held that such testimony came within the rule which allows a witness to testify as to matters which he has observed and experienced.

As to Safety of Car, the opinion of a witness is inadmissible. Robinson *v.* Waupaca, 77 Wis. 544, 46 N. W. 809.

Dangerous Condition of Platform. Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293.

Particulars in Which Coupling Was Unsafe. — In an action to recover for injuries caused by a defective car-coupling, it is competent for a brakeman, who has personal knowledge of the facts, to testify as to wherein the coupling causing the injury was unsafe, and wherein it differed from other couplings used by him in the service of the company. Baltimore & P. R. Co. *v.* Elliott, 9 App. (D. C.) 341, in which case it was declared that such testimony is not expert testimony, but is admissible, because it is in regard to matters within the personal experience of the witness.

53. Couch *v.* Charlotte, C. & A. R. Co., 22 S. C. 557, which was an action against a railroad company to recover damages for injuries received by reason of the negligence of the section-master. It was held that witnesses who knew the position and character of an open waterway across a railroad track were not therefore competent to state their opinions as to the dangerous character of the place. See also Majors *v.* State (Miss.), 35 So. 825, which was a prosecution for murder. The defendant offered to prove by several witnesses that in their judgment a stick or board with which it was claimed an assault had been made by the decedent upon the defendant was, in the hands of the decedent, a deadly weapon, capable of producing death or serious bodily injury. It was held that such evidence was inadmissible and the witnesses should have been confined to a statement of the size and physical prowess of the decedent as compared with the defendant, and also the condition in which the stick was at the time of the homicide. Likewise in Holmes *v.* State, 100 Ala. 80, 14 So. 864, it was held that it is not proper to allow a witness to testify that a hoe which has been fully described to the jury was of such weight and strength as to enable a person in whose hands it was to kill a man within striking distance.

Dangerous Character of Turntable. In Bridger *v.* Asheville & S. R. Co., 25 S. C. 24, it was held that there was no error in admitting the testimony of witnesses to the effect that certain turntables as located were dangerous for children to ride upon.

to admit such testimony where the place or thing in question is of such a nature that it is impossible for the witness to give a proper description of it without stating his opinion.[54]

E. Public Utility. — In cases involving the establishment of public works, such as the opening of highways, according to the weight of authority witnesses may testify as to whether the proposed work will be beneficial or of public utility.[55]

7. Contracts. — See article "Contracts."

8. Contributory Negligence. — See article "Negligence."

9. Crimes. — A. In General. — On a criminal prosecution a witness will not be permitted to testify that the defendant is guilty

But see Koons *v.* St. Louis & I. M. R. Co., 65 Mo. 592, in which case it was held that the opinions of witnesses who are not experts as to whether or not a turntable is a dangerous machine, and as to whether or not it is gross carelessness to leave such machine unfenced and uncovered, are not admissible.

54. Bridger *v.* Asheville & S. R. Co., 25 S. C. 24. See also Alabama M. R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, where a witness was permitted to testify that a place where a railroad accident happened — on an abutting trestle of a river bridge — was a dangerous place to stop. In holding that such evidence was admissible the court said: "The question called for a statement of a collective fact, and the answer to it was not reversible error." And see Perry *v.* State, 110 Ga. 234, 36 S. E. 781.

55. Spencer *v.* New York & N. E. R. Co., 62 Conn. 242, 25 Atl. 350, which was a case involving the obstruction of an alleged right of way by a railroad company. The court allowed a witness to testify that "aside from its use for railroad purposes, the use of the land by the public, for purposes of passage, was of common convenience and necessity." In holding that there was no error, the court said: "The objection is that such evidence must necessarily be a mere matter of opinion — an opinion in the abstract; an objection equally valid, although the witness may be familiar with the location, and may know the needs of the public. We cannot regard the common convenience and necessity of a proposed highway as a mere matter of opinion, entirely apart from the facts on which it is based, but as a fact provable by showing the location, the surrounding property, the nature and extent of the business carried on in the neighborhood, the population, etc.; supplemented by the judgment of practical men residing in the vicinity." See also Hire *v.* Kniseley, 130 Ind. 295, 29 N. E. 1132, *holding* that the question whether or not the opening of a highway will be a convenience to the land of a person asking damages for the establishment of such highway through his land, and to persons residing on such land, so far as travel in a certain direction is concerned, does not call for an opinion, but a fact, and that it is not error to permit a witness to answer such questions. *Compare* Johnson *v.* Anderson, 143 Ind. 493, 42 N. E. 815; Dillman *v.* Crooks, 91 Ind. 158; Loshbaugh *v.* Birdsell, 90 Ind. 466.

Benefits Arising From Construction of Ditch. — In Bennett *v.* Meehan, 83 Ind. 566, 43 Am. Rep. 78, which was a proceeding to establish a public ditch, the court said: "It was proper to allow a witness who had stated in detail the number of acres in the vicinity of the ditch, and who had given its size and location, to testify as to how many acres of land would be benefited by its construction. This was the statement of a conclusion by a witness shown to have knowledge of the facts, upon which he based his conclusion, and who had detailed them to the jury. The conclusion stated by the witness can hardly be called an opinion, for it is the statement of a fact." In which case it was further held that it was proper to ask the witness the following question: "You may state

or innocent of the crime with which he is charged, but will be confined to a statement of facts, from which facts the jury, under the direction of the court, may find the defendant guilty or not guilty.[56]

Impeachment of Witness. — Even for the purpose of impeaching a witness, another witness will not be permitted to give his opinion as to whether or not the defendant is guilty of the crime charged.[57]

Suspicions. — A witness will not be permitted to testify that he suspicioned that the defendant was guilty of the crime with which he was charged.[58]

Device to Evade Law. — On a criminal prosecution the witness will not be permitted to testify that the acts which the defendant committed, and the instrumentalities which he used, constituted a device to evade the law.[59]

what effect, if any, the drainage of the wet land would have upon the public health of the community." But see Yost *v.* Conroy, 92 Ind. 464, 47 Am. Rep. 156.

56. State *v.* Robertson, 111 La. ——, 35 So. 375; State *v.* Terry, 172 Mo. 213, 72 S. W. 513; Garrett *v.* State, 6 Mo. 1; Devore *v.* Territory, 2 Okla. 562, 37 Pac. 1092; Campbell *v.* State, 30 Tex. App. 645, 18 S. W. 409. See also Terry *v.* State (Tex. Crim.), 72 S. W. 382.

Attempt to Kill. — In Hill *v.* State, 137 Ala. 66, 34 So. 406, it was held that the opinion of a witness that one person had tried to kill another was admissible.

Wrongfulness of Assault. — In an action for assault and battery an exclamation, during the affray, of a disinterested onlooker, when not instinctive, and when amounting to no more than a mere opinion as to whether the assault was wrongful — the very point to be decided by the jury — is incompetent, and its admittance in evidence, unrestricted, is prejudicial error. Ganaway *v.* Salt Lake Dramatic Ass'n, 17 Utah 37, 53 Pac. 830.

That Facts and Circumstances Pointed to Defendant's Guilt. — The opinion of a witness that "facts" within his knowledge, in connection with what other persons "thought" of the case, pointed to the accused as the person guilty of the offense charged in the indictment, is not competent evidence against him. McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501.

Opinions of Witness Based on Private Investigation. — Although the defendant on a criminal prosecution attempts to establish that the crime was committed by other persons, it is error to permit a witness for the state to testify that he had neither seen nor heard anything whatever indicating that those persons had any connection with the perpetration of the offense and had not found anything to confirm his suspicion of their guilt. Tiller *v.* State, 96 Ga. 430, 23 S. E. 825, in which case the court said: "In other words, the opinions of this witness, resulting from a private investigation made by himself, were allowed to go to the jury. While it would have been entirely proper to permit the witness to testify to relevant facts within his knowledge, it was for the jury, and not for him, to say what conclusions should be drawn from the same." See also Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

Belief in Truth of Another's Statement. — On a criminal prosecution it is not permissible to allow a witness to testify that complaint was made to him and that he became convinced that there was something in the story of the complaining witness. People *v.* Row (Mich.), 98 N. W. 13.

57. Campbell *v.* State, 23 Ala. 44.

58. Jones *v.* State, 30 Tex. App. 426, 17 S. W. 1080, which was a prosecution for larceny.

59. In Petteway *v.* State, 36 Tex. Crim. 97, 35 S. W. 646, the defendant

Belief in Defendant's Innocence. — It is equally settled that a witness in behalf of the defendant will not be permitted to testify that in his opinion the defendant is innocent.[60]

B. Commission of Act by Accident. — On a prosecution for arson the testimony of a witness as to whether a house appeared to have been set on fire accidentally or not is incompetent.[61]

C. Accessories. — Where the defendant is charged as an accessory, a witness will not be permitted to give his opinion as to whether he was a participant in the perpetration of the crime, but will be confined in his testimony to statements of the facts.[62]

D. Conspiracy. — Where the case is one which involves a conspiracy, the witness will not be permitted to give his opinion as to defendant's connection with the crime charged, but will be confined to a statement of facts.[63]

10. Damages. — A. In General. — In actions for damages the general rule is that a witness cannot give his opinion concerning the amount of damages resulting from the acts complained of, because it is the exclusive province of the jury to assess the damages under the rules of law declared by the court.[64]

was prosecuted for selling intoxicating liquors without a license; and the proof was that he had been selling brandied cherries. It was held that the witness should have been confined to a statement of the facts and should not have been permitted to state the conclusion that the sale was a device to evade the law.

60. Prince *v.* State (Tex. Crim.), 20 S. W. 582, in which case it was held that the court erred in refusing to allow a witness to give facts which led him to believe that the defendant did not steal a horse as was charged in the indictment.

That Defendant Did Not Consent to Bar-room Being Open on Sunday. On a prosecution for keeping a bar-room open on Sunday, the testimony of a witness (it not appearing that such witness had any connection with the keeping of the bar-room) that if the bar-room was open on Sunday it was without the consent or authority of the proprietor, is no more that an expression of opinion by the witness that the proprietor would not be guilty of violating the ordinance in question, and consequently is insufficient to free such proprietor from his responsibility to the law. Rooney *v.* Augusta, 108 Ga. 774, 33 S. E. 646.

61. State *v.* Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486.

62. Jones *v.* State, 58 Ark. 390, 24 S. W. 1073.

63. Ferguson *v.* State, 134 Ala. 63, 32 So. 760, 92 Am. St. Rep. 17. This was a prosecution for murder. The defendant was asked by his counsel the following question: "Were you not in any way knowing to the purpose of John to kill Will Andrews, before he had killed him, or were you in any way connected with the killing?" It was held that such question was properly excluded, because it called upon the defendant to state a conclusion involving both law and fact, viz., whether what he did was sufficient to fix his status as a conspirator, and so connect him with the killing.

64. *United States.* — Dushane *v.* Benedict, 120 U. S. 630; Chandler *v.* Thompson, 30 Fed. 38, *per* Dick, J.

Alabama. — Chandler *v.* Bush, 84 Ala. 102, 4 So. 207; Alabama & F. R. Co. *v.* Burkett, 42 Ala. 83; Montgomery & W. P. R. Co. *v.* Varner, 19 Ala. 185; Railroad Co. *v.* Vaughner, 19 Ala. 187.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Jacobs, 70 Ark. 401, 68 S. W. 248; St. Louis, I. M. & S. R. Co. *v.* Law, 68 Ark. 218, 57 S. W. 258; St. Louis & S. F. R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Little Rock, M. R. & T. R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774; Railroad Co. *v.*

Application of Rule. — This rule is of almost universal applicability, and it would be impracticable and useless to attempt to set forth the many classes of actions in which the rule has been applied,

Combs, 51 Ark. 324, 11 S. W. 418; Pierson *v.* Wallace, 7 Ark. 282.

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

Georgia. — Foote *v.* Malony, 115 Ga. 985, 42 S. E. 413; Macon *v.* Melton, 115 Ga. 153, 41 S. E. 409; Central R. Co. *v.* Senn, 73 Ga. 705; Smith *v.* Eubanks, 72 Ga. 281; Central R. Co. *v.* Kelly, 58 Ga. 107; Brunswick & A. R. Co. *v.* McLaren, 47 Ga. 546; Woodward *v.* Gates, 38 Ga. 205.

Illinois. — Rockford *v.* McKinley, 64 Ill. 338.

Indiana. — Ohio R. Co. *v.* Nickless, 71 Ind. 271; Baltimore P. & C. R. Co. *v.* Stoner, 59 Ind. 579; Baltimore P. & C. R. Co. *v.* Johnson, 59 Ind. 480; Bissell *v.* Wert, 35 Ind. 54; Mitchell *v.* Allison, 29 Ind. 43; Railroad Co. *v.* Fitzpatrick, 10 Ind. 120.

Iowa. — Harrison *v.* R. R. Co., 36 Iowa 323; Prosser *v.* Wapello, 18 Iowa 327; Dalzell *v.* City of Davenport, 12 Iowa 437.

Kansas. — Ottawa O. C. & C. G. R. Co. *v.* Adolph, 41 Kan. 600, 21 Pac. 643; Leroy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 675, 17 Pac. 322; Roberts *v.* Brown Co., 21 Kan. 247; Tefft *v.* Wilcox, 6 Kan. 46. See also Kansas C. R. Co. *v.* Allen, 24 Kan. 33.

Massachusetts. — Murdock *v.* Sumner, 22 Pick. 156. See also Batchelder *v.* Sturgis, 3 Cush. 201.

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

Missouri. — McPherson *v.* St. Louis, I. M. & S. R. Co., 97 Mo. 253, 10 S. W. 846; Hosher *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 329, 303.

Nebraska. — Wellington *v.* Moore, 37 Neb. 560, 56 N. W. 200; Darner *v.* Daggett, 35 Neb. 695, 53 N. W. 608; Fremont, E. & M. V. R. Co. *v.* Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; Burlington & M. R. Co. *v.* Beebe, 14 Neb. 463, 16 N. W. 747; Fremont, E. & M. V. R. Co. *v.* Ward, 11 Neb. 597, 10 N. W. 524; Fremont, E. & M. V. R. Co. *v.* Lamb, 11 Neb. 592, 10 N. W. 493.

New York. — Reed *v.* McConnell, 101 N. Y. 270, 4 N. E. 718; Dolittle *v.* Eddy, 7 Barb. 74; Harger *v.* Edmonds, 4 Barb. 256; Newton *v.* Fordham, 7 Hun 58; Lincoln *v.* Saratoga & S. R. Co., 23 Wend. 425; Norman *v.* Wells, 17 Wend. 137.

Ohio. — Alexander *v.* Jacoby, 23 Ohio St. 358; Atlantic & G. W. R. Co. *v.* Campbell, 4 Ohio St. 583, 64 Am. Dec. 607; Cleveland & P. R. *v.* Ball, 5 Ohio St. 568.

Oregon. — United States *v.* McCann, 40 Or. 13, 66 Pac. 274; Burton *v.* Severance, 22 Or. 91, 29 Pac. 200.

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

South Dakota. — Webster *v.* White, 8 S. D. 479, 66 N. W. 1145.

Texas. — Gulf C. & S. F. R. Co. *v.* White (Tex. Civ. App.), 32 S. W. 322; Gulf C. & S. F. R. Co. *v.* Hughes (Tex. Civ. App.), 31 S. W. 411; Railroad Co. *v.* Wright, 1 Tex. Civ. App. 402, 21 S. W. 80; Galveston H. & S. A. R. Co. *v.* Wesch (Tex. Civ. App.), 21 S. W. 62, 313, 1014.

Utah. — Andreson *v.* Ogden Union R. & Depot Co., 8 Utah 128, 30 Pac. 305. See also Lashus *v.* Chamberlain, 5 Utah 140, 13 Pac. 361.

Wisconsin. — Farrand *v.* Chicago & N. W. R. Co., 21 Wis. 435; Blair *v.* Railroad Co., 20 Wis. 276.

Contra. — In John *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761, which was an action to recover damages for breach of promise of marriage, intimate acquaintances of the plaintiff, who knew her social position, her temperament and disposition and all of her surroundings, were allowed to testify as to the amount of damages which the plaintiff sustained. The court said: "It is difficult to conceive how it would have been possible for these witnesses to state all the various facts, or reproduce in language the condition of things upon which they based their estimates, so as to make the same palpable to the minds of the jury. How could they express in language the decree of sensibility of the lady, or the numerous other impalpable things which went to make

but conspicuous among them are the following: Actions for waste,[65] for breach of contract,[66] and for trespass upon land.[67]

Opinion as to Measure of Damages. — Likewise a witness will not be permitted to give his opinion as to the measure of damages, that being a matter of law.[68]

Where Verdict is For Less Amount Than That Stated by Witness. Where in violation of this rule a witness is permitted to give his opinion as to the amount of damages sustained, the error is reversible even though the jury find for a less amount.[69]

B. Where Question is One of Value. — In General. — An exception to this rule is recognized in those cases where the opinion of the witness consists of a mere opinion as to the value of property before it was injured, and the value thereof afterward, and the amount of damages ascertainable by the mathematical process of subtraction.[70]

11. Death and Dead Bodies. — In General. — Upon various questions relating to death and dead bodies it has been held that the

up their estimates of the amount of damages which she had sustained."

65. Woodward *v.* Gates, 38 Ga. 205.

66. Morehouse *v.* Mathews, 2 N. Y. 514, in which case the witness was asked: "What damages occurred in consequence of feeding the cattle upon the hay in question instead of that agreed upon?" It was held that evidence in response to this question was admitted improperly. The court said: "The witness should have been confined in his testimony to questions of fact, such as the number, condition and value of the cattle kept by the defendant, the quality of hay used in comparison with that agreed for, the effect that poor hay produced upon the cattle, and thus have laid a foundation of facts from which the jury or justice could have formed an opinion of the amount of damages actually sustained."

Schlesinger *v.* Springfield Fire & Marine Ins. Co., 26 Jones & S. 112, 9 N. Y. Supp. 727, in which case it was held that in an action upon an insurance policy it was improper to ask one of the plaintiffs the following question: "What was the amount of loss and damage sustained by the plaintiffs by reason of the fire?"

67. Burlington & M. R. Co. *v.* Schluntz, 14 Neb. 421, 16 N. W. 439, 14 Am. & Eng. R. Cas. 182.

68. Houston & T. C. R. Co. *v.* Burke, 55 Tex 323, 40 Am. Rep. 808, which was an action against a carrier to recover damages for the loss and destruction of certain property.

69. Central R. Co. *v.* Kelly, 58 Ga. 107.

70. *Arkansas.* — Texas & St. L. R. Co. *v.* Kirby, 44 Ark. 103; Texas & St. L. R. Co. *v.* Eddy, 42 Ark. 527; St. Louis & R. R. Co. *v.* Anderson, 39 Ark. 167, 17 Am. & Eng. R. Cas. 97.

Illinois. — Heithsburg & E. R. Co. *v.* Henry, 79 Ill. 290; Eberhart *v.* Chicago, M. & St. P. R. Co., 70 Ill. 347; Cooper *v.* Randall, 59 Ill. 317.

Indiana. — Hire *v.* Kniseley, 130 Ind. 295, 29 N. E. 1132.

Maine. — Snow *v.* Boston & M. R., 65 Me. 230.

Massachusetts. — Shattuck *v.* Stoneham etc. R. Co., 6 Allen 115; Vandine *v.* Burpee, 13 Metc. 288, 46 Am. Dec. 733.

Minnesota. — Emmons *v.* Minneapolis & St. L. R. Co., 41 Minn. 133, 42 N. W. 789; Sherman *v.* St. Paul M. & M. R. Co., 30 Minn. 227, 15 N. W. 239; Simmons *v.* St. P. & C. R. Co., 18 Minn. 184; Marsh *v.* Webber, 16 Minn. 418.

Missouri. — Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82; Hosher *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 303, 329.

New York. — Seymour *v.* Fellows, 77 N. Y. 178; McCollum *v.* Seward, 62 N. Y. 316; Matter of Rochester, 40 N. Y. 588; Nellis *v.* McCarn, 35

opinions or conclusions of non-experts are admissible, the criterion as to the admissibility of such evidence being whether the condition is such that it cannot be adequately reproduced before the jury by a mere statement of facts, and, as in all other cases involving the admissibility of the opinions or conclusions of non-experts, they will not be permitted to invade the province of the jury. Thus it has been held that a witness may testify as to the appearance of a dead body.[71]

Identity of Dead Body. — Although ordinarily the question of identity is one of fact, yet where a dead body has become considerably decomposed, a witness will not be permitted to state a conclusion drawn from points of resemblance mentioned by him as to the identity of such body.[72]

Barb. 115; Rogers *v.* Anson, 42 Hun 436; Townsend *v.* Brundage, 6 Thomp. & C. 527.

Texas. — Brennan *v.* Corsicana Cotton Oil Co. (Tex. Civ. App.), 44 S. W. 588.

See article "VALUE."

71. Perry *v.* State, 87 Ala. 30, 6 So. 425, in which case it was held that a witness, who as a member of a coroner's jury had seen the dead body of a child alleged to have been murdered, may testify that its neck, which was broken, "looked like it had been struck with a hot iron and looked scarred." The court said: "The resemblance of things — or their likeness, similitude or similarity — is ordinarily rather a conclusion of fact than of opinion; and it is common for witnesses to be permitted to depose to it as an element of description, if not impracticable for the man of average intelligence to express himself in relation to it. The similarity testified to in this instance is one of common knowledge, and involved nothing requiring skillful comparison by an expert physiologist. There was no error in admitting this testimony." See also articles "DEATH;" "INJURIES TO PERSONS."

Condition of Suicide. — In Redd *v.* State, 63 Ark. 457, 40 S. W. 374, which was a prosecution for murder, the question was whether it was a case of murder or suicide, and it was held that the introduction of non-expert testimony on the part of a witness who had seen persons who had committed suicide, that in such cases the muscles of the hands were contracted after death and that the instrument with which the death was inflicted was tightly clasped in the hand, was held to be admissible.

As to Whether Person Died of Wounds or of Disease. — The opinion of a non-expert as to whether a person died of wounds or of disease or as to what particular injuries, if there were several of them, caused the death, is not admissible. People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482. See also article "INJURIES TO PERSONS."

Condition of Dead Body. — It has been held that a non-expert witness who has seen the dead body of a human being may testify that it was in an advanced state of decomposition. Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; but that a non-expert should not be permitted to give his opinion as to how long the decedent had been dead, because this is a matter of expert knowledge; White *v.* State, 136 Ala. 58, 34 So. 177.

72. In People *v.* Wilson, 3 Park. Crim. (N. Y.) 199, which was a prosecution for murder, a brother-in-law of the decedent stated that five months after the alleged murder he examined a body, claimed to be the body of the deceased, and testified to several points of resemblance between the body and the person charged to have been murdered. Witness was then asked by the counsel for the prosecution whether, in his opinion, it was the body of the person alleged to have been murdered. It was held that it was the province of the jury, and not of the witness, to draw the conclusions from the points of resemblance, and to decide upon the identity of the body found,

12. Direction. — In determining the question whether or not a non-expert witness may give his opinion as to the direction from which force was applied, the courts resort to the well-established rule that the witness must be confined to a statement of facts when they are such that they can be so put before the jury as to enable the latter to make the proper deductions, but in applying this rule the courts do not seem to have been altogether harmonious.[73]

13. Distance. — An estimate of distance may be given by a witness, even though he has not actually made measurements;[74] but it has been held that a non-expert witness should not be permitted to give his opinion as to how far a person would be thrown by a train if it should strike him.[75]

14. Duress and Undue Influence. — A witness will not be permitted to testify that a person in performing an act was under duress or was unduly influenced.[76]

it appearing that the body found had been much decomposed and changed, and that all the perceptible points of resemblance had been stated by the witness to the jury. See article "IDENTITY."

73. Com. *v.* Best, 180 Mass. 492, 62 N. E. 748. In this case, which was a prosecution for murder, it was held that there was no error in allowing a witness to testify that two shots heard by him came from the direction of a certain farm. In McKee *v.* State, 82 Ala. 32, 2 So. 451, it was held that the opinions of non-expert witness, based on the appearance of a wound, as to whether it was inflicted by a blow from the front or the rear, are not admissible. *Compare* Steamboat Clipper *v.* Logan, 18 Ohio 375, in which case it was held that it was proper to introduce evidence as to the direction from which force was applied.

74. People *v.* Alviso, 55 Cal. 230. **As to Distance Which Train Had Gone.** — A passenger on a railroad train, although he is not "an expert judge of the time, speed and distance at which the train may be running, or have run on any given occasion when circumstances are such that he cannot observe external objects," is competent to testify as to the distance which a train had gone from the station to where it was stopped for the purpose of putting him off. "It may be true that people accustomed to travel much on trains, in the night as well as in the daytime, as trainmen are accustomed to do, are better and more accurate judges of such matters than those who travel on trains occasionally, as does the average passenger; and yet the difference is only in degree at last, and, the subject-matter being more or less of common knowledge, we cannot say that one is incompetent to testify because he is not an expert. His testimony may not be entitled to as much weight as that of the experienced man, but that is all that can be said against it, and that of course is a question for the jury." St. Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

75. Central R. of Ga. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

76. Carpenter *v.* Calvery, 83 Ill. 62, *holding* that on a bill to contest the validity of a will it is not proper to allow witnesses to express opinions as to whether the supposed influence of one of the devisees over the testator sprang from affection or fear, and that the witness must state the facts only and leave the jury to draw the inferences from such facts. *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845. See also Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590. *Compare* McLean *v.* Clark, 47 Ga. 24, in which case it was held under a statute of Georgia that it was proper to allow a witness to testify that the vendor of property had been coerced into making the sale because of his having raised a British flag over his property during the war of secession.

15. Exercise of Senses. — A. In General. — In many cases it has been sought to prove or disprove a fact by the testimony of a witness as to what he would have observed or known by the exercise of his senses under the circumstances asserted. So far as any general rule can be stated, it is that such evidence is admissible where it consists of a description of conditions which, without such testimony, cannot be fully and accurately laid down before the jury, but that a mere speculative opinion of the witness is not admissible.[77]

B. Seeing. — A witness may be asked whether a person was at a stated place at a stated time, and whether any one could have been present at such place and time without being seen by the witness;[78] and according to the weight of authority other similar questions may be asked of the witness as to what he could have seen, or how far he could have seen things.[79]

77. Bennett *v.* State, 52 Ala. 370, which was a criminal prosecution. The defendant sought to prove an alibi and attempted to show that in the opinion of a witness whom he called, he could not have left or gotten out of the house without the knowledge of the witness. It was held that such evidence was inadmissible. The court said: "There is no appreciable difference between the opinion asked for and a request for the witness' opinion as to whether the alibi was proved. The question called for an opinion which was clearly inadmissible, and the court rightly refused to permit the witness to answer." But see Cochran *v.* Miller, 13 Iowa 128, which was an action for damages for malpractice in the treatment of the plaintiff by the defendant. The father of the plaintiff, who had the means of knowing the treatment she had received, was asked "whether or not he would most likely have known of the application of any other medicines than those applied by the defendant, if they had been applied to the arm." It was held that such question was not objectionable as asking for an opinion. In this case the court said: "His answer to this question would be no more objectionable, upon the ground of containing an *opinion* instead of a *fact,* than if he stated that defendant had prescribed and given medicine for the deceased. The inquiry is a very common one, and one that may be fairly and legitimately made under the precise circumstances as here disclosed. Were other medicines applied? Plaintiff says not, and to maintain, so to speak, this negative, she makes this inquiry of one who had ample means of knowing."

78. Barr *v.* Post, 56 Neb. 698, 77 N. W. 123, in which case the testimony was objected to as calling for a conclusion and opinion of the witness. It was declared by the court that what the witness stated was a matter of knowledge.

79. Atlanta C. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24, in which case a witness was asked the following question: "State whether or not, if the motorman had turned off the electricity, or wound the brake, you would have seen it." She answered: "Well, I suppose I would." It was held that there was no objection to either the question or the answer. The court said: "Counsel had a right to interrogate the witness concerning her opportunity to observe the conduct of the motorman on the occasion in question. Her answer merely states, in effect, that her position was favorable to noting any action on the part of the motorman in the respect inquired about." *Compare* Butler *v.* Cornwall Iron Co., 22 Conn. 335, in which case the plaintiff testified that he assisted in the construction of a water-wheel and another testified that the plaintiff did not. It was held that it was proper to refuse to allow such other witness to be asked if he would have seen the plaintiff if the latter had worked upon the wheel.

Distance at Which Object Could Have Been Seen. — In East Tennessee V. & G. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813, which was an ac-

Whether Another Person Could Have Seen Object. — Where an object is described by a witness and the position of another person with reference to such object is stated, it is discretionary with the court to permit the witness to express an opinion as to whether or not such other person could have seen the object if he had looked.[80]

tion to recover damages for the killing of a horse on a railroad track, the court said: "While it would be a matter of common knowledge, how far one could ordinarily see an object as large as a horse, and therefore not the subject of an opinion, the jury being as competent to judge of this fact as a witness; this inquiry assumed a different aspect when applied to the particular locality on the railroad track or right of way going from the depot towards the scene of the injury. It may have been impracticable to lay before the jury all the details upon which such a collective fact was founded. The soundness of the conclusion could be tested by the right of cross-examination." See also to the same effect Innis *v.* Steamboat Senator, 4 Cal. 5, 60 Am. Dec. 577, which was a collision case involving the distance at which a vessel could be seen at night; Kansas City M. & B. R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16, which was an action for personal injuries received at a railroad crossing and which is an authority in support of the right to ask a witness the following question: "Where was the first point at which the train could be seen, on account of the bushes there at the point?"

Ability to See Alleged Concealed Weapon. — In Nichols *v.* State, 100 Ala. 23, 14 So. 539, which was a prosecution for carrying a concealed weapon, defendant proposed to show that "the pistol could have been seen by ordinary observation," and it was held that such evidence was inadmissible, the court saying: "This was the mere opinion or conclusion of the witness from facts capable of being put before the jury, and from which it was their right and duty, unaided by the mental processes of the witness, to draw whatever conclusion was justified in the premises." *Compare* Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293, where on a prosecution for murder a witness testified that so far as he knew the decedent had no pistol at the time that he was killed, and it was held that it was proper to ask the witness the following question: "If he had had one do you think you would have seen it?"

Whether Objects Would Interfere With Line of Vision. — In State *v.* Carpenter (Iowa), 98 N. W. 775, which was a criminal prosecution, a witness who had looked over the ground was asked as to whether certain objects would interfere with the line of vision between the defendant's house and a stack of straw where it was claimed that the offense was perpetrated, and it was held that such question was properly excluded, because, for one reason, the witness gave the exact situations and conditions, and it was for the jury to answer such question.

80. Chicago, M. & St. P. R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398, in which case the question was whether or not a person who was killed on a railroad could have seen the engine if he had looked. The witness testified that he was about fifty or sixty feet north and east of the place where the deceased was killed, that it was daylight and that he saw the accident plainly. An objection was then sustained to a question whether the deceased could have seen the engine if he had looked. The court said: "It was simply a matter of common observation, and we think it would not have been improper to have allowed the question to be answered. At the same time, it was not error to sustain the objection, and leave it to the jury to draw the proper conclusion from the facts stated. In other words, it was a matter within the sound legal discretion of the court which course of examination should be pursued."

Statement of Fact as to What Third Person Saw. — Upon the question whether a witness who was present and observed a transaction may state what a third person saw, the authorities are in conflict.[81]

C. HEARING. — A witness who was present at the time and place when a sound or noise is alleged to have been made may be asked whether or not if there had been such a noise or sound he would have heard it;[82] *e. g.*, in cases where the question arises whether or not a railroad engineer gave a signal with his bell or whistle a witness who was present at the time and place in question may testify that if such signal had been given he would have heard it.[83]

81. Handley *v.* Missouri P. R. Co., 61 Kan. 237, 59 Pac. 271, which was an action to recover damages for personal injuries sustained as alleged because of the negligence of a railroad company. A witness testified that while the injured person was underneath a car and his feet were dragging, a porter standing on the steps of the car was leaning out and watching the boy. The statement or opinion that the porter was "watching the boy" was stricken out and it was held that this was proper, because, while it was competent for the witness to state the attitude of the porter, or the direction in which his eyes were turned, it was not proper to allow the witness to give his opinion as to what the porter saw or was watching. The court said: "Who can say that a person looking upward is watching a bird in a tree, the smoke from a high chimney or a passing cloud? When there are a number of things within the range of a person's vision, it is only conjecture or speculation to say that he saw any one of them merely because his eyes were turned in that direction. So, here, the porter may have been looking at the ties or track underneath, or at some of the trucks, rods or other parts of the car. If the train crew had trouble with the wheels, and there was what is called a hot box, the porter may have been watching that. The witness was not an expert, nor was the opinion given upon a subject of expert testimony." But see International & G. N. R. Co. *v.* Anchonda (Tex. Civ. App.), 75 S. W. 557, in which latter case it was held that the statement of a witness that a railroad agent saw certain children before he gave them tickets is a statement of a fact and not a conclusion of the witness.

82. Burnham *v.* Sherwood, 56 Conn. 229, 14 Atl. 715, in which case the question was whether or not a horse had the disease known as "chronic roaring." It was held that there was no reversible error in allowing a witness to testify that he had seen the horse race, that the horse did not roar on such occasion, and that he would have heard him roar if he had done so. See also Maynard *v.* People, 135 Ill. 416, 25 N. E. 740, wherein it was held error to refuse to permit a witness to testify that if there had been any such conversation as had been detailed by another witness he would have heard it. See further Birmingham Railway Light & Power Co. *v.* Mullin (Ala.), 35 So. 701, in which case a witness testified that he was present at a difficulty between the plaintiff and a conductor on a railroad train, and he was asked by the plaintiff whether or not if the plaintiff had made a certain remark concerning the conductor, he, the witness, could have heard it, or was close enough to have heard it. It was held that as against a general objection to the question the witness should have been allowed to answer.

83. Atchison, T. & S. F. R. Co. *v.* Miller, 39 Kan. 419, 18 Pac. 486, in which case witnesses testified that a whistle was not sounded, that they were satisfied that it was not and that they were in a position to have heard it if it had been sounded. The court said, in holding that such evidence was admissible: "The testimony objected to, in our opinion, is more in the statements of the facts than in the opinions of the witnesses. It is true that these facts are based upon the judgment and observation of the witnesses, but they are such

Whether Another Person Could Have Heard Noise. — Where a witness has testified as to a noise and as to the situation of another person with reference to a place where such noise was made, he will not be permitted to express an opinion upon the question whether such other person could have heard or did hear the noise;[84] nor will a witness be permitted to testify why another person near him did not hear a conversation which the witness overheard;[85] but it has been held that a witness may testify as to whether or not a person was within hearing distance of a remark made by another.[86]

16. Financial Condition. — A. IN GENERAL. — A witness will not be allowed to testify as to whether he had means with which to meet a particular obligation at a particular time.[87]

observations as are made by men of ordinary intelligence, without any special knowledge, learning, or skill. But even if it was the opinion of the witness and not a fact about which he was testifying, still we think it was such an opinion as falls within the exception to the general rule. The very nature of the circumstances about which they were testifying, with the surroundings, condition of the atmosphere, wind, organs of hearing, obstructions, and a host of other incidents, could not be portrayed to a jury in such a manner as to enable them to draw a conclusion from the facts." See also Crane *v.* Mich. C. R. Co., 107 Mich. 511, 65 N. W. 527, wherein it was held that there was no error in permitting a witness to be asked whether he could have heard the signal if it had been given, because the question amounted to no more than an inquiry as to whether he was within hearing distance. And see Renwick *v.* New York C. R. Co., 36 N. Y. 132, where a passenger on a railroad train testified that he did not hear the bell upon the engine at a specified place and time, and it was held that it was proper to allow him to testify that he could have heard the bell if it had been rung, because in reality the inquiry was whether the witness was so situated that he could have heard it.

Contra. — In Marcott *v.* Marquette H. & O. R. Co., 49 Mich. 99, 13 N. W. 374, a witness who testified that she was in the garden near her house, which was by the side of a railroad track, for several minutes before a train passed, and that she did not hear any whistle blown, was asked whether the whistle could have been blown anywhere near a station in the neighborhood without her hearing it. It was held that this question was properly ruled out, because it related to a matter of opinion and common observation and experience upon which the jury could have judged as well as the witness after she had stated the facts as to the distance and the existence of any obstacles.

84. Chicago, M. & St. P. R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398; Dyer *v.* Dyer, 87 Ind. 13; Hathaway *v.* Brown, 22 Minn. 214; Urdangen *v.* Doner (Iowa), 98 N. W. 317. *Compare* Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126, where it was held that there was no error in allowing a witness to give his opinion as an "expert" as to whether a person in a room occupied by a witness for the state on the night of the homicide, with the door open, could have heard a conversation going on in the room where the decedent was shot.

Prosecution for Abusive Language. On a prosecution for making use of abusive, insulting and obscene language in the presence of a woman, the court may permit a witness who was present and heard the language used by the defendant to testify whether certain women at the distance at which they were from the defendant at the time of the cursing could have heard his langauge. McVay *v.* State, 100 Ala. 110, 14 So. 862. See also Rollings *v.* State, 136 Ala. 126, 34 So. 349.

85. Cummins *v.* State, 58 Ala. 387.

86. Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398.

87. Nininger *v.* Knox, 8 Minn. 140.

B. Particular Matters Affecting Credit. — Questions asking the effect of given acts on the credit and commercial standing of a merchant are objectionable, as seeking to elicit opinions and not facts.[88]

17. Fire. — A. Existence of Fire. — Where a question arises as to whether or not a fire was burning at a certain time, a witness may be asked what he observed, and may be questioned as to his opportunities for observation, and as to whether he was looking in the direction of the alleged fire.[89]

B. Cause or Origin of Fire. — Witnesses who did not see a fire at the time it started, but merely saw it in progress or after the property had been consumed, will not be permitted to give their opinions as to the cause or origin of such fire.[90]

Destitute Condition. — A witness may testify that a certain person, for whom medical services were rendered by plaintiff, "was in such destitute condition as to demand public charity and prompt attention." Autauga Co. *v.* Davis, 32 Ala. 703, in which case it was declared that such testimony is not the statement by the witness of his mere opinion, nor of a legal conclusion; but is, at most, the statement of a conclusion of fact, which, from its very nature, the witness was authorized to make.

In Lacy *v.* Kossuth Co., 106 Iowa 16, 75 N. W. 689, which was an action to recover compensation for medical services rendered a pauper, in order to prove the inability of the father of the patient to pay for such services, witnesses who had made investigation and inquiries in regard to the amount of property owned by him, were allowed to state whether the bill could be collected by execution or otherwise. The objection was that it was hearsay, and an opinion based on hearsay, not the best evidence, and no foundation laid for secondary evidence. It was held that this objection was properly overruled. *Distinguishing* Hall *v.* Bollou, 58 Iowa 587, 12 N. W. 475, where it was held that a witness could not state whether another person was solvent or insolvent, it appearing that the witness in that case did not know of the financial condition of the person inquired about, except by general reputation.

88. Willis *v.* McNeill, 57 Tex. 465. Walker *v.* Fuller, 29 Ark. 448, in which case it was held that in an action for wrongful levy of an execution, the plaintiff in testifying as to the effect of such levy upon his credit, should not be allowed to usurp the province of the jury and assert conclusions instead of facts. The court said: "That he did close business was a fact; that he lost credit may or may not have been a fact; it needed specifications as to persons, time and place. That he was doing business before the levy was a fact, etc. But to allow the witness to say that in consequence of any one fact or a combination of them, certain results transpired, is to allow him to usurp the province of the jury — in this instance, a vital and damaging point to defendant." See also to the same effect Middlebrook *v.* Zapp, 79 Tex. 321, 15 S. W. 258.

89. Parkhurst *v.* Marsteller, 57 Iowa 474, 10 N. W. 864, in which case, however, it was held that after the witness has stated facts, and answered questions such as those specified in the text, it is for the jury to form an opinion, and not the witness, as to whether or not there was a fire.

90. Dore *v.* Babcock, 72 Conn. 408, 44 Atl. 736. See also Haynie *v.* Baylor, 18 Tex. 498. In the latter case it was held that where the question was as to the cause of the burning of a wagon-load of goods in the course of transportation, the opinions of witnesses who were at the place soon after the burning, formed upon grounds stated by them, were not admissible in evidence; and that it was for the witnesses to depose only to the matters of fact which came to

C. Avoidance of Fire. — The opinions of witnesses are not receivable upon the question of how a fire could or should have been prevented.[91]

D. Exposure to Fire. — Upon the question whether or not property was so situated as to be exposed to fire, a witness will not be allowed to give his opinion, but will be confined to a statement of the facts and circumstances in regard to the situation of the property.[92]

18. Health, Disease, Physical Condition. — A. In General. — As will be seen more particularly hereinafter, opinions may be given by non-expert witnesses as to the state of health, hearing or eyesight of another or the ability of another to work or use his arms or legs naturally, or whether such other is apparently suffering pain.[93]

Eyesight. — It has been held that the question whether a person's eyesight is good is one of fact in respect to which a layman acquainted with him can testify.[94]

Pregnancy. — It has been held that non-expert witnesses may testify that a woman was pregnant.[95]

their observation or knowledge, and leave the jury to draw their own conclusions from the facts and circumstances deposed to.

91. Gibson *v.* Hatchett, 24 Ala. 201. In this case a building having been consumed by fire which entered through an aperture in the wall, it was held that it was not proper to allow a witness to state that the house might have been saved if the aperture had been closed."

Necessity to Destroy Buildings to Avoid Fire. — The opinions of mere bystanders that buildings which were blown up would have taken fire and been consumed had they not been blown up was inadmissible in evidence. N. Y. *v.* Pentz, 24 Wend. (N. Y.) 668, in which case Verplanck, J., said: "It seems to me wholly inadmissible that each witness should, as a matter of right, be allowed to give his opinion to the jury as to mere contingent probabilities. Whether a building was in the direction of the flames or exposed to their ravages, or appeared about to take fire — these and similar circumstances were present facts, and the legitimate subjects of testimony. The rest is mere opinion. There might be particular knowledge and experience of *firemen or builders;* there might be the expression of an opinion connected with the statement of facts upon which it was formed at the time; and if particular evidence of that nature had been excluded, it might perhaps have formed good cause of exception upon its own special grounds and reasons."

92. Merchants' Wharf-Boat Ass'n *v.* Wood (Miss.), 3 So. 248.

93. West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447; Chicago & E. I. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142. See also Reininghaus *v.* M. L. Ass'n, 116 Iowa 364, 89 N. W. 1113.

Opinions as to Person's Feebleness. A non-expert witness for the plaintiff, who is acquainted with him and who has seen him frequently, may be allowed to testify as to his physical condition, and that he was feeble and unable to do hard work. This is not a question that calls for the opinion of a medical expert. Such evidence is evidence of a fact open to the observation of any one. Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459; Tierney *v.* Minnesota & St. L. R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35.

94. Adams *v.* People, 63 N. Y. 621.

95. Wilkinson *v.* Moseley, 30 Ala. 562. In this case a non-expert witness testified that a woman was sick, had fever and was pregnant. The

B. Sickness. — a. *In General.* — Persons who were familiarly associated with another, and who came in frequent contact with him, are capable of testifying as to whether he was in good or bad health;[96] and it has been further held that a non-expert witness may testify as to a sick person's change of condition for the worse.[97] A person who is not a physician may testify whether it was necessary

court said: "The argument is that inasmuch as the witness is not shown to be a physician or midwife she cannot be heard to give opinions. Neither one of these inquiries involves, necessarily, a knowledge of science or medicine. Most persons of ordinary experience are able to answer them." See also Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111, which was a prosecution for an attempt to procure the miscarriage of a woman, by reason of which she died. It was held that the mother of the deceased was properly allowed to testify to certain changes in her daughter, and that they indicated that her daughter was in the family way. *Compare* Boies *v.* McAllister, 12 Me. 308, where the opinions of men upon this question were excluded, but they were allowed to testify to the indications.

96. *United States.* — Baltimore & O. R. Co. *v.* Rambo, 59 Fed. 75.

Alabama. — Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; Birmingham R. & Elec. Co. *v.* Franscomb, 124 Ala. 621, 27 So. 508; Lewis *v.* State, 49 Ala. 1; Fountain *v.* Brown, 38 Ala. 72; Stone *v.* Watson, 37 Ala. 279; Blackman *v.* Johnson, 35 Ala. 252; Barker *v.* Coleman, 35 Ala. 221; Wilkinson *v.* Moseley, 30 Ala. 562; Bennett *v.* Fail, 26 Ala. 605; Milton *v.* Rowland, 11 Ala. 732.

California. — Robinson *v.* Exempt Fire Co., 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715. See also Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

Illinois. — Chicago C. R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321; Chicago, B. & Q. R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239.

Massachusetts. — Parker *v.* Boston & H. Steamboat Co., 109 Mass. 449.

Minnesota. — Tierney *v.* Minneapolis & St. L. R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; Cannady *v.* Lynch, 27 Minn. 435, 8 N. W. 164; Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

New Hampshire. — State *v.* Knapp, 45 N. H. 148. See also State *v.* Pike, 49 N. H. 399.

Ohio. — Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407.

Washington. — Sears *v.* Seattle St. Consol. R. Co., 6 Wash. 227, 33 Pac. 389, 1081, *per* Andrews, J.

That Person Appeared to Be Healthy. — In Bennett *v.* Fail, 26 Ala. 605, a witness testified that a person appeared to be healthy, and in holding that such evidence was competent the court said: "If the opposite side desired to ascertain what the appearances were which the witness denominated healthy, they should have elicited such proof upon the cross-examination."

He Seemed to Be Very Weak. — In Birmingham R. & Elec. Co. *v.* Franscomb, 124 Ala. 621, 27 So. 508, a witness, in speaking of the plaintiff's physical condition while in a hospital, stated that he seemed to be very weak. In holding that there was no error in admitting such testimony, the court said: "This was but an equivalent of the expression that 'he appeared to be very weak,' and consequently was nothing more than the statement of a fact, or, at most, a conclusion of fact. If the adverse party wished to know the foundation upon which the witness rested his conclusion, the facts could have been drawn out upon a cross-examination."

Contra. — Ashland *v.* Marlborough, 99 Mass. 47, wherein it was held that it was error to allow a non-expert witness to testify that a person "did not appear like a well man." See also Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 566; Bell *v.* Morrisett, 51 N. C. 178.

97. Parker *v.* Boston & H. Steamboat Co., 109 Mass. 449, in which case the court distinguished Ashland *v.* Marlborough, 99 Mass. 447.

for another to receive medical assistance, and as to the length of time such assistance was necessary.[98] But it has been said that such testimony is admissible in that the witness is merely stating facts within his observation, and is not expressing an opinion.[99]

b. *Nature of Disease.* — While it is competent for a non-expert witness to testify that a person is "sick," "diseased," or "has a fever," these being statements of facts which are mere expressions of opinion, yet it is not competent for a non-expert witness to testify as to the particular kind of disease where it is of a nature which a non-professional witness is not capable of diagnosing.[1]

c. *Origin or Cause of Disease.* — A non-expert witness will not be permitted to testify as to how a person contracted disease.[2]

d. *Effects of Disease.* — It has been held that a non-expert witness should not be permitted to testify as to the effects of disease.[3]

e. *Pain. — In General.* — A non-professional witness who has had opportunity to observe a sick or injured person may give in evidence his opinion as to the degree of suffering which he endured, provided such opinion is founded on the observations of the witness, and is limited to the time that the injured person was under such observation.[4]

98. Chicago, B. & Q. R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239, in which case the court said: "Any person of intelligence is capable of judging of the necessity of medical advice and services. It is universally acted upon by all classes of mankind, and we are not disposed to lay down a rule that none but a physician is competent to prove that a person is sick, or so sick as to require medical advice."

99. Tierney *v.* Minneapolis & St. L. R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35.

1. Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481, in which case the court declared that while a non-expert witness may state that a person has a fever he cannot state whether or not it was malarial or yellow fever. See also Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; People *v.* Olmstead, 30 Mich. 431; Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 566. *Compare* Tierney *v.* Minneapolis & St. L. R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35, in which case it was held that it was proper to allow a non-expert to testify as to the state of the plaintiff's health and that he had skin disease.

2. Dushane *v.* Benedict, 120 U. S. 630. In this case it was held that the testimony of workmen, not shown to be experts, that certain infected rags used in the manufacture of paper were the cause of an outbreak of smallpox, was incompetent. See also Ferguson *v.* Tobey, 1 Wash. Ter. 275. *Compare* Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993. In this case it appeared that the plaintiff's wife was put off a sleeping-car before she had time properly to dress herself, and that in consequence she suffered exposure to rain, cold, etc. After detailing very fully the circumstances of her exposure and sickness she testified as follows: "I know nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train." It was held that such evidence was admissible.

Cause of Sleeplessness. — It has been held that a witness should not be permitted to testify as to the cause of another person's sleeplessness. Nichols *v.* Oregon S. L. R. Co., 25 Utah 240, 70 Pac. 996.

3. State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

4. *United States.* — Baltimore & Ohio R. Co. *v.* Rambo, 59 Fed. 75.

Illinois. — North Chicago S. R. Co. *v.* Cook, 145 Ill. 551, 33 N. E. 958; Chicago, B. & Q. R. Co. *v.* Martin,

Cause of Pain. — A person who has received personal injuries may testify that pain which he suffered was in consequence of the injury.[5]

f. *Cure.* — Witnesses may testify whether they have been cured or not.[6]

19. Legal Conclusions. — In General. — A witness will not be allowed to state legal conclusions or his opinion upon a question which is for the determination of the court.[7]

112 Ill. 16; Chicago & E. I. R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142.

Massachusetts. — Parker *v.* Boston & H. Steamboat Co., 109 Mass. 449.

Minnesota. — Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

Missouri. — State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

Ohio. — Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407.

Washington. — Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081, *per* Andrews, J.

Wisconsin. — Heddles *v.* Chicago & N. W. R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

Manifestations of Pain and Anguish. — A witness may be permitted to testify that a person came home agitated and crying and appeared to be worried, and he need not be an expert or have had special training and experience in the study of the human mind and mental diseases to qualify him to so testify. McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427.

5. North Chicago S. R. Co. *v.* Cook, 145 Ill. 551, 33 N. E. 958, in which case the plaintiff was asked the following question: "Have you suffered any pain in consequence of the injury?" He answered in the affirmative. This evidence was objected to as being the opinion of the witness as to the cause of his suffering pain, but it was held that this objection was without force. The court said: "It is said, however, that it having been shown that appellee was aged and infirm, and to some extent a paralytic, the assumption that the confinement to his bed, the pain he suffered, and the like, resulted from the injury, invaded the province of the jury. It was competent for the appellee to testify to his condition resulting from the injury, and the effect produced by it." See also Creed *v.* Hartman, 8 Bosw. (N. Y.) 123; Wright *v.* Ft. Howard, 60 Wis. 119, 18 N. W. 750, 50 Am. Rep. 350. And see for a full discussion of this question article "Injuries to Persons."

6. Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737.

7. *Alabama.* — Larkinsville Min. Co. *v.* Flippo, 130 Ala. 361, 30 So. 358.

California. — Estate of Taylor, 92 Cal. 564, 28 Pac. 603; Wallace *v.* Maples, 79 Cal. 433, 21 Pac. 860; Conner *v.* Stanley, 67 Cal. 315, 7 Pac. 723. See also Lowrie *v.* Salz, 75 Cal. 349, 17 Pac. 232.

Colorado. — Moffatt *v.* Corning, 14 Colo. 104, 24 Pac. 7.

Connecticut. — Young *v.* Newark Fire Ins. Co., 59 Conn. 41, 22 Atl. 32.

Illinois. — Huftalin *v.* Misner, 70 Ill. 55.

Iowa. — Butler *v.* Chicago, B. & Q. R. Co., 87 Iowa 206, 54 N. W. 208; Kelso *v.* Fitzgerald, 67 Iowa 266, 25 N. W. 157; Daly *v.* Kimball, 67 Iowa 132, 24 N. W. 756.

Kansas. — Shepard *v.* Pratt, 16 Kan. 209; Olmstead *v.* Koester, 14 Kan. 463; Tefft *v.* Wilcox, 6 Kan. 46.

Kentucky. — Woolfolk *v.* Ashby, 2 Metc. 288.

Michigan. — Webster *v.* Sibley, 72 Mich. 630, 40 N. W. 772.

Minnesota. — Hathaway *v.* Brown, 22 Minn. 214; Selden *v.* Bank of Commerce, 3 Minn. 166.

Tennessee. — Elrod *v.* Alexander, 4 Heisk. 342.

Texas. — Houston & T. C. R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Purnell *v.* Gandy, 46 Tex. 190.

Utah. — See Levy *v.* Salt Lake City, 5 Utah 302, 16 Pac. 598.

As to Homestead. — Where homestead rights are asserted to defeat a mortgage the debtor will not be permitted to give his opinion that he has no homestead other than that

Affidavits. — This rule of course applies to affidavits, and allegations therein which are simply conclusions of law are incompetent.[8]

Harmless Error. — The testimony of a witness as to his legal conclusions may be harmless where it is consonant with ample other testimony.[9]

Objection Waived. — A witness may, with the consent of the opposite party, state a legal conclusion; a failure to object to the answer stating such a conclusion amounts to consent.[10]

20. Mental Operations, Motives, etc. — A. In General. — A witness, although not an expert, may testify as to another's mental characteristics, concerning which he has obtained knowledge by

which he claims upon the mortgaged land, but will be confined to a statement of the facts. Johnston *v.* Martin, 81 Tex. 18, 16 S. W. 550.

Commission of Tort by One of Two Defendants. — Where two parties are sued as joint tort feasors, and a default is taken against one, and the other pleads not guilty, it is not competent to permit the one in default to testify that he alone is responsible for the alleged tort. Hoener *v.* Koch, 84 Ill. 408.

Search Made for Lost Paper. Where it is sought to introduce secondary evidence of a paper on the theory that it has been lost, the witness should not be permitted to substitute his own opinion as to the diligence of the search which he made for the paper. Shepard *v.* Pratt, 16 Kan. 209.

Opinion of Witness as to His Own Legal Liability. — Where it is sought to hold one who while president of a bank had loaned moneys of the bank to an irresponsible person, liable for the same on the basis of his representations to the cashier at the time of the loans that he was interested with the borrower and would see the amounts repaid, it is error to permit the party to testify whether he ever regarded himself as liable. First Natl. Bank of Sturgis *v.* Reed, 36 Mich. 263.

What Constitutes Contraband of War. — In Elrod *v.* Alexander, 4 Heisk. (Tenn.) 342, it was held that it was error to allow a witness to testify that he thought salt was contraband of war, because what constitutes contraband is a question of law.

8. Olmstead *v.* Koester, 14 Kan. 463, which was a case where a sworn petition alleged that there was an attempt "to collect a tax, which is illegal in two respects: First, that it is levied to pay bonds which were illegally issued; second, that this township never issued said bonds, and that therefore, the tax being illegal, its collection should be enjoined." The court said: "Now, it may be sufficient to state in a petition that bonds were 'illegally issued,' but it would manifestly be improper for a witness to so testify. It is not a fact of which he may speak, but a conclusion of law to be drawn from the facts to which he testifies. Doubtless, witnesses do often speak of matters being duly and legally done, but it is either where there is no objection, or where the matter is collateral, or not seriously questioned, and never where it is the substantial matter in dispute." Accordingly it was held that such allegations were incompetent as evidence.

9. Jackson *v.* Boyles, 64 Iowa 428, 20 N. W. 746.

10. Sterne *v.* State, 20 Ala. 43. This was a prosecution for peddling. On the trial, a witness introduced by the state was asked if he knew in what business the defendant was engaged, and he answered that he was engaged in the business of peddling. The court said: "It is unnecessary to decide whether the answer of the witness stated a legal conclusion; conceding such to have been the case, it was perfectly competent for him to do so by the consent of the defendant, and by allowing his answer to pass without objection the defendant assented to its correctness. That being done, the legal conclusion, if it was one, must be taken as correct."

acquaintance, intercourse, and dealings with such other.[11] It has been held that one may be asked whether or not there were any acts on the part of another indicating dissent.[12]

Willingness. — A witness will not be permitted to testify whether another exhibited willingness to make a contract.[13]

B. ANGER AND HATRED. — It is well settled that any ordinary observer of a person is competent to testify whether or not he manifested anger or hatred toward another.[14]

11. Mills *v.* Winter, 94 Ind. 329. This was an action to set aside a fraudulent conveyance. In the complaint it was stated, as a part of the fraudulent means by which the plaintiff was prevailed upon to convey her land, that the defendant, knowing that the plaintiff's husband was of a fickle, visionary turn of mind and was easily influenced by said defendant, obtained an undue influence over him by various artifices stated, and got his assistance in carrying out the fraudulent purposes of the defendant to cheat and defraud the plaintiff out of her land. A witness testifying on behalf of the plaintiff was asked, referring to the plaintiff's husband: "What would you say as to his being a man of fickle mind?" It was held that the court properly overruled the objection to such question. See also article "INSANITY."

12. Tompkins *v.* Augusta & K. R. Co., 21 S. C. 420, which was an action to recover possession of land occupied by railroad company as a part of its roadbed. Witnesses were asked the following question: "Was there, or not, any act of S. S. Tompkins indicating a dissent?" The point of inquiry was whether the railroad company had entered by permission or not. It was held that there was no error in the form in which the question was put.

13. Roebling *v.* Merchants' Union Barb Wire Co., 78 Iowa 608, 41 N. W. 569, 43 N. W. 759. *Compare* Bradly *v.* Salmon Falls Mfg. Co., 30 N. H. 487, where it was held that a witness may testify that the plaintiff "seemed satisfied" with a business arrangement proposed to him by the witness.

14. *Alabama.* — Miller *v.* State, 107 Ala. 40, 19 So. 37; Jenkins *v.* State, 82 Ala. 25, 2 So. 150; Carney *v.* State, 79 Ala. 14; Arnold *v.* Cofer, 135 Ala. 364, 33 So. 539.

Florida. — Fields *v.* State, 35 So. 185.

Iowa. — State *v.* Shelton, 64 Iowa 333, 20 N. W. 459.

Maine. — Stacy *v.* Portland Pub. Co., 68 Me. 279.

Missouri. — State *v.* Buchler, 103 Mo. 203, 15 S. W. 331.

New Hampshire. — Hardy *v.* Merrill, 56 N. H. 227, 22 Am. Rep. 441; State *v.* Pike, 49 N. H. 399.

North Carolina. — State *v.* Edwards, 112 N. C. 901, 17 S. E. 521.

Compare People *v.* French, 69 Cal. 169, 10 Pac. 378, where it was held that a witness should not have been permitted to testify that in his opinion, based on the actions and words of a person, such person entertained no ill-feeling towards another.

Reason for Rule. — Whether a person manifested anger or any other passion upon a particular occasion depends so largely upon the peculiar and indescribable appearance of the face and other indications at the moment that an eye-witness may be morally sure of the fact, and yet utterly unable to communicate to another such *indicia* with sufficient distinctness to give any satisfactory idea of the existing fact. Snow *v.* Boston R. R. Co., 65 Me. 230, *per* Danforth, J., *obiter.*

That Defendant "Was Talking Mad." — In Reeves *v.* State, 96 Ala. 33, 11 So. 296, which was a prosecution for using indecent language in the presence of women, it was held that a witness was properly permitted to testify that the defendant "was talking mad."

To Show Intent on Criminal Prosecution. — State *v.* Buchler, 103 Mo. 203, 15 S. W. 331, which was a prosecution for assault with intent to kill. A witness was asked the following question: "State what you discovered on defendant's countenance, if anything. Answer. The expression

C. Excitement. — It is furthermore held that any ordinary observer of a person may testify as to whether or not at a given time he appeared to be excited or agitated.[15]

of his face was anger, ferocity, vulgar hate; the meanest look a mortal man's face could have." Another witness was asked substantially the same question as to defendant's appearance just after the affray, and his answer was that he appeared to be angry. In holding that such evidence was admissible, the court said: "If the expressions of the countenance of one accused of crime could be seen by or reproduced before the jury exactly as it was at the time, and immediately before and after the act, there can be no doubt it would have great weight in determining the intent and purpose of the accused, and the motives by which he was actuated. Often it would be absolutely convincing. . . . A person of ordinary understanding could not detail facts which would give to a jury the remotest idea of the passions expressed on the countenance, though a child one year old would distinguish anger from love in its mother's face. Witnesses are allowed to testify to their impressions or opinions on such matters for want of any other way to get the evidence before the jury; they admit of no more definite proof."

Vindictive Appearance of Witness on Stand. — In an action for malicious prosecution, a witness who was present at the examination of the plaintiff on a criminal charge, and heard the defendant testify against the plaintiff, should not be allowed to give his opinion of the appearance of the plaintiff on the stand and to testify that he was vindictive. Ames *v.* Snider, 69 Ill. 376, in which case the court said: "No doubt malice may be proved by showing the conduct and declarations of the prosecuting witness, but that is a very different thing from permitting the witness to express his opinion as to whether he was vindictive. The witness should state the facts and circumstances, and leave the jury to draw their own conclusions whether the party was actuated by motives of malice or was influenced by an honest purpose to elicit the truth. On neither question should the witness be allowed to express an opinion."

15. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188; McCrae *v.* Malloy, 93 N. C. 154; Hardy *v.* Merrill, 56 N. H. 227, 22 Am. Rep. 441, *per* Foster, C. J., *obiter;* Taylor *v.* Railroad Co., 48 N. H. 304; State *v.* Brown, 28 Or. 147, 41 Pac. 1042.

In Alabama the cases do not seem to be in accord. In Gassenheimer *v.* State, 52 Ala. 313, it was held that on a criminal prosecution a witness should not be allowed to state that the defendant "looked excited." The court said: "Whatever signs of excitement he exhibited the witness should have stated, and the jury should have been left free, without the aid of his opinion, to determine whether there was any undue excitement or agitation on the part of the defendant. . . . The witness may not have been free from excitement himself, and his own emotions may, in his imagination, have lent a hue to the conduct of the defendant. Opinions of witnesses as to the conduct, or appearance, or demeanor of others are never very reliable, and should never be received when better evidence is attainable. It is never satisfactory, though it may be more difficult for them to state facts and let impartial and sworn triers of fact form and express the opinion." But see State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59, in which case a tax collector, who was sued upon his official bond, set up the defense that he had been robbed. A witness was allowed to testify that the defendant about the time of the alleged robbery "looked very much excited and disordered when he arrived at his house, and impressed him with the belief that his robbery was real." The court said: "A witness may testify that a person was excited, but not to the impression made on his mind."

D. Fear. — Furthermore, a witness who has observed another may testify that he appeared to be frightened.[16]

E. Friendship. — A witness who has the requisite knowledge of the relations existing between two other persons may say whether or not they were on terms of friendship.[17]

F. Intention or Motive. — It is held by a long line of authorities that it is not proper to allow a witness to testify as to the undisclosed intention or motive of a third person, and that the witness must be confined to a statement of facts, leaving it to the jury to draw the proper inferences as to what were the party's intentions or motives.[18]

16. State *v.* Lucy, 24 Mont. 295, 61 Pac. 994, which was a prosecution for murder. A witness was asked to describe the defendant's actions immediately after his arrest. The witness replied: "He was shaking and very nervous and went by me and turned his head away from me as though he had run onto something he did not want to see. He turned right away as though he was about to be devoured." It was held that this statement, which was a compound of fact and conclusion — "a shorthand rendering of the facts" as they were observed by the witness — was properly admitted, although perhaps the use of the expression "as though he was about to be devoured," was objectionable on the ground that it was vague and conveyed no definite idea. See also State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Brownell *v.* People, 38 Mich. 732; Darling *v.* Westmoreland, 52 N. H. 401. *Compare* Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75, where it was held that on a prosecution for murder it is competent for the defendant to explain the fact of his flight by proving his personal fear of the father of the deceased, but that the testimony of a witness that "The defendant seemed afraid of" the father of the deceased is not admissible for this purpose, being a mere opinion of the witness, based on the conduct or declaration of the defendant himself, if supported by any fact at all.

17. State *v.* Stackhouse, 24 Kan. 445. In that case, which was a prosecution for murder, a witness was asked whether or not, from what he had heard the defendant say, he should say that the defendant and the decedent were on good or bad terms, and he replied "that he should say that they were on bad terms;" and another witness was asked whether he knew on what terms, as to friendship, the defendant was with the decedent just previous to the killing, and he replied, "that they were not on good terms." In holding that such testimony was admissible, Brewer, J., said: "In a certain sense this was calling for the opinion of these witnesses, and that, too, not upon matters of science or skill. And yet such opinions are often competent — often the very best and most satisfactory kind of testimony." See also Blake *v.* People, 73 N. Y. 586.

18. Peake *v.* Stout, 8 Ala. 647, holding that it is not proper to interrogate a witness as to his knowledge of the "motives and intentions" of the maker of a deed in executing it. It was declared that the question did not call for facts, but for the intention of the maker of the deed, and that it was a question which the witness either could not answer at all, or which, if answered, must be the opinion of the witness growing out of the facts which in his knowledge attended the execution of the deed. See also the following cases:

Alabama. — Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149; Clement *v.* Cureton, 36 Ala. 120; Whetstone *v.* Montgomery Bank, 9 Ala. 875; Planters' and Merchants' Bank of Mobile *v.* Borland, 5 Ala. 53; Holmes *v.* State, 136 Ala. 80, 34 So. 180.

California. — People *v.* Wright, 93 Cal. 564, 29 Pac. 240.

G. Love and Affection. — A person who has observed the conduct and relations of two persons toward each other will be allowed to testify as to whether or not they were attached to each other, or were affectionate or loved each other;[19] although it has been held that on a prosecution for seduction the prosecutrix should not be permitted to testify that the defendant treated her affectionately.[20]

Florida. — Hodge *v.* State, 26 Fla. 11, 7 So. 593; Dixon *v.* State, 13 Fla. 636.

Georgia. — Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202; Cothran *v.* Forsyth, 68 Ga. 560; Hawkins *v.* State, 25 Ga. 207, 71 Am. Dec. 166; Carey *v.* Moore (Ga.), 45 S. E. 998; Durrence *v.* Northern Natl. Bank, 117 Ga. 385, 43 S. E. 726.

Illinois. — Walker *v.* People, 133 Ill. 110, 24 N. E. 424; Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111.

Iowa. — Carey *v.* Gunnison, 51 Iowa 202, 1 N. W. 510.

Kansas. — Gardom *v.* Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 314.

New York. — Manufacturers' & Traders' Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9.

Texas. — Biering *v.* Wegner, 76 Tex. 506, 13 S. W. 537; Moffatt *v.* State, 35 Tex. Crim. 257, 33 S. W. 344.

Purpose for Which Man Visited Another's Wife. — Where in an action of criminal conversation a witness testifies that he saw the defendant at the plaintiff's house, in company with the wife of the latter, his opinion as to the purpose for which he was there is not admissible as evidence. Cox *v.* Whitfield, 18 Ala. 738.

Intention to Remove From State. A witness will not be allowed to testify that he knows that another person was not about to remove from the state at a specified time, for the reason that such testimony is a mere statement of the witness' opinion. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391.

Intention in Making Subdivision of Land. — In Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111, a non-resident owner of land, through her agent, had certain land subdivided into lots and had a plat of such subdivision recorded. Thereafter a question arose as to whether a certain alley between two lots was a private alley or not. It was held that it was improper to allow the husband of the woman who subdivided the land to testify that it was her intention to reserve such alley as a private alley for the use of certain designated lots. The court said: "It was not competent for him to swear to his wife's, or any one's else, intention. All that he might do in such regard would be to testify to acts and declarations, as showing intention. The question here is what others had reason to believe was the intention from the circumstances and the acts done."

19. McKee *v.* Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384. See also Lewis *v.* Mason, 109 Mass. 169; Robertson *v.* Stark, 15 N. H. 109. See further Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18, in which case a witness was permitted to testify that the domestic relations between a husband and wife were happy, and that there was love between them.

20. State *v.* Brown, 86 Iowa 121, 53 N. W. 92, in which case it was declared that this is the mere conclusion of the witness. The court conceded, however, that it is proper to allow her to testify that he commenced "keeping company" with her upon a certain date, as the phrase "keeping company" is so commonly used, and so generally understood, that it was a definite signification as applied to the relations of unmarried people. And see Carney *v.* State, 79 Ala. 14, where it was held that on a prosecution for seduction a witness should not be permitted to testify that the defendant acted towards the woman as a suitor, or lover.

H. Sorrow, Despair, Distress, etc. — A witness may testify that another was in sorrow, despair or distress, or suffering from melancholy.[21]

I. Surprise. — It has been held that a witness may testify that another appeared to be surprised on a certain occasion.[22]

21. Nationality, Race, Tongue. — A witness will be permitted to express an opinion formed from his observation of the demeanor, conduct, dress, conversation and general appearance of another as to his nationality.[23]

Negroes. — Except in cases of great doubt because of the small amount of negro blood, a witness may testify upon the question whether or not another is a negro or has African blood in him.[24]

As to the Ability of a Person to Speak the English Language, a witness who was present and heard such person talk may testify as to his ability to speak English, and state whether or not he spoke in broken English so that he could be understood.[25]

21. Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547. This was an action for breach of promise of marriage. The plaintiff's father was allowed to testify that after the defendant had broken the contract it was the witness' impression that the plaintiff appeared more melancholy and of less life and animation, and that at one time he found her weeping without knowing the cause. The court said: "Certain affections of the mind, such as joy and grief, hope and despondency, are often made known to an intimate acquaintance without any verbal communication, by the general appearance and conduct of the party, with entire certainty, when the facts on which conviction is founded in the mind of an acquaintance cannot be fully disclosed in language, so as to be understood by a stranger. The shedding of tears is evidence of some unusual condition of the mind. The evidence in this respect was such as practice had sanctioned and is not deemed improper." See also to the same effect State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Culver *v.* Dwight, 6 Gray (Mass.) 444.

22. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318, which was a prosecution for murder. A witness who saw the defendant after he was charged with the offense was allowed to testify that the appearance of the defendant was that of painful surprise that any one should suspect him of the act.

23. Kansas P. R. Co. *v.* Miller, 2 Colo. 442, in which case a person who had ridden in a railroad train with a party composed of adults and children during a portion of two days was permitted to express an opinion that they were of one family and of German nationality.

24. Hare *v.* Board of Education, 113 N. C. 9, 18 S. E. 55, in which case the court said: "While, in doubtful cases, only an expert would be qualified to testify, from the appearance of a person, as to the exact extent to which white and negro blood are commingled in his veins, it does not require any peculiar scientific knowledge to be able to detect the presence of African blood by the color or other physical qualities of the person." See also State *v.* Jacobs, 51 N. C. 284, in which case the court said: "It may well be admitted that simply to be able to detect the presence of African blood by the color, or other physical qualities of the person, is not a matter of science, but it will by no means follow that a qualification to ascertain the extent of the negro blood is not so. On the contrary, we believe that it would often require an eye rendered keen by observation and practice to detect, with any approach of certainty, the existence of anything less than one-fourth of African blood in a subject." See further White *v.* Clements, 39 Ga. 232.

25. Kuen *v.* Umpier, 98 Iowa 393, 67 N. W. 374, in which case the court

22. Noise. — A witness may state his opinion in regard to noises which he has heard, giving their character, from whence they proceeded, and the direction from which they seemed to come.[26]

23. Size, Quantity, Weight, etc. — It is well settled that witnesses may give estimates as to size, quantity, weight, etc., and that such testimony is not to be excluded on the ground that it consists of a mere opinion or conclusion of the witness.[27]

said: "It is certainly proper for a witness to state whether a person talks so as to be understood in a language the witness understands. It is, of course, a conclusion, but all statements are, more or less, conclusions. It was, at the same time, a fact of which the jury could be told, as evidence from which to form its conclusions. It was not a conclusion to be drawn from the evidence, so that the jury as well as the witness would draw it. The witness was asked: 'When you would talk with her in English, did she appear to understand what you said?' The question was rejected as incompetent and immaterial. It was both competent and material. The answer would go directly to the fact of her ability to understand the English language. For the same reasons, the witness should have been permitted to answer the following questions: 'When you would talk to her in English, what is the fact as to whether you would have to repeat it over and over, or whether she would respond without repeating what you said to her?' 'I will ask you as to whether or not, when you put a question to her, her answer would be responsive to that question?'"

26. Com. *v.* Dorsey, 103 Mass. 412; Com. *v.* Pope, 103 Mass. 440; State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Amount of Noise Made by Cable. In Mitchell *v.* Tacoma R. & M. Co., 13 Wash. 560, 43 Pac. 528, it was held that it was proper, in an action for damages for personal injuries, to allow a witness to testify as to the amount of noise made by a cable because it was not possible for the jury to be put in possession of all the circumstances surrounding the scene of the accident at the time it occurred.

Testimony That Shots Sounded as Though Fired Inside Building. — In People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697, which was a prosecution for murder, it was claimed that the shots which killed the deceased were fired from inside a house, whereas the defendant insisted that they were fired in the open air. One who was near the scene of the affray at the time, and heard the shots, was allowed to testify that they sounded as though fired inside the building, and that the noise sounded like that of a drum or something deep, and that it did not sound as if it were in the air. In holding that there was no error in permitting the introduction of this evidence the court declared that the evidence was simply a statement as to the nature of the impression of sound left upon the ear, and that it was not the opinion of the witness any more than it would have been a statement of his opinion if he had testified that the sounds were made by a drum.

Description of Sound. — Instrument Used. — On a prosecution for murder it is not error to permit a properly qualified witness to express the opinion that a blow struck by the defendant upon the side of a house, just before the commencement of a quarrel, in the night time, between said defendant and another person, in which the latter was killed, sounded like a blow struck with a piece of iron. State *v.* Lucy, 41 Minn. 60, 42 N. W. 697.

27. Mobile, J. & K. C. R. Co. *v.* Riley, 119 Ala. 260, 24 So. 858. See also Rembert *v.* Brown, 14 Ala. 360; Eyerman *v.* Sheehan, 52 Mo. 221.

Capacity of Sewer. — In Indianapolis *v.* Huffer, 30 Ind. 235, it was said: "The action of the court below in allowing witnesses not experts to give their opinion as to the capacity of the sewer is questioned. The rule is that any witness not an expert who knows the facts personally may give an opinion in a matter

Quantity. — The reports abound with cases in which it has been held that witnesses may give estimates of quantity.[28]

Quantity of Land. — The rule which allows estimates of quantity is not confined to chattels, but applies also to land.[29]

Necessary Quantity. — Under some circumstances the courts have even gone so far as to hold that a witness may state what constitutes a necessary or unnecessary quantity.[30]

requiring skill, stating also the facts upon which he bases that opinion."

Capacity of Water Ditch. — Frey *v.* Lowden, 70 Cal. 550, 11 Pac. 838.

Weight. — See Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 719, to the effect that a witness may give his opinion or judgment as to the weight of certain boxes of shoes; Ah Tong *v.* Earl Fruit Co., 112 Cal. 679, 45 Pac. 7, in which case witnesses were permitted to testify as to the weight of fruit packed in boxes, the witnesses being engaged in the business of packing and shipping fruit.

28. Gulf, C. & S. F. R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611, in which case it was held that a witness may make estimates as to the quantity of earth that was taken from the plaintiff's land for a railroad embankment. See also Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 So. 315, which was an action to recover damages for an alleged breach of contract of employment. It was held that the court did not err in allowing the plaintiff, when introduced as a witness in its own behalf, to state that, "according to his best judgment," he delivered to the defendant four hundred bushels of coal per day — the amount called for by the terms of the contract of service. The court said: "Quantity, like value, time, distance and some other like matters, is one of the subjects in reference to which even a non-expert witness may express his opinion, when based on personal observation, no better evidence being generally obtainable as to such matters than mere approximate estimates, based on judgment or opinion."

Grain Left on Straw After Threshing. — The opinions of witnesses properly qualified to speak upon the subject are competent evidence to aid in establishing how much or what proportion of the grain was left upon straw after threshing buckwheat. Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270.

Proportion of Crop Destroyed by Frost. — In Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270, a crop of buckwheat had been injured by frost, and a witness being asked what proportion of the crop had been so destroyed answered that in his judgment one-half had been thus destroyed, and it was held that such evidence was admissible.

Quantity of Apples on Ground. Townsend *v.* Brundage, 6 Thomp. & C. (N. Y.) 527.

29. Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85, in which case a witness was permitted to testify as to the number of acres of land on the north of a river, which testimony was objected to on the ground that it was a conclusion and not the best evidence, but the objection was overruled. The court said: "We think the ruling was correct, for the river was changing from time to time, and the number of acres on either side was a question of fact. Moreover, there was no plat or survey showing these facts. In any event, the ruling was without prejudice." See also Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769, in which case it was said: "The court properly allowed witnesses to testify as to whether the lands embraced in the ranch were all covered by the description in documents referred to, inasmuch as the extent of the ranch was a matter of fact."

30. Gulf, C. & S. F. R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611, in which case a witness was allowed to give his opinion that a railroad company took more land than was necessary to construct an embankment, the witness stating the facts upon which his opinion was based. The court said: "None of these witnesses were civil engineers or builders of railways, and were not required to be

24. Speed. — In General. — A witness who has been accustomed to observe the running of railroad trains may testify as to the rate of speed at which a train or engine was running when he saw it,[31]

to qualify them to state their opinions about the amount or quantity of earth or other material taken from plaintiff's land for the embankment. It was not necessary to measure the material left on the right of way or that used off plaintiff's land to show that more of plaintiff's land was used than was required. To know exactly how much land was unnecessarily taken, measurements and calculations would have to be made, but these witnesses did not pretend to be exact, and were not called on to express an opinion further than that more of plaintiff's land was used than was necessary."

Quantity Needed. — In New York Cent. Iron Wks. Co. *v.* United States Radiator Co., 174 N. Y. 331, 66 N. E. 967, the defendant agreed to furnish the plaintiff "with their entire radiator needs for the year 1899." In an action for the breach of such contract, the defense was that the defendant had furnished the plaintiff will all the radiators that it needed; the defendant construing the contract as calling for only the usual amount of goods and not a quantity materially exceeding that delivered in previous years under similar contracts. The plaintiff called its manager and treasurer as a witness, and proved by him that he was familiar with the business and the orders sent by the plaintiff to the defendant, and the witness was then asked whether "those orders were for goods which were required for the needs of the plaintiff's business." In holding that there was no error in allowing the witness to answer such question, the court said: "The question did not call for an opinion, but a fact. If the plaintiff could sell the goods ordered at a profit, then it needed them, and there was no doubt about the plaintiff's ability to sell the goods at a larger profit. What a merchant may need in his business is generally a matter of fact, and if he should testify that he needed fifty barrels of sugar or flour, or so many chests of tea, it would not, I think, violate the rule of evidence which requires a witness to testify to facts, and not opinions."

31. Alabama G. S. R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176, in which case the court said: "The court did not err in receiving non-expert testimony as to the rate of the speed of the engine. The judgment or conclusion of the witnesses as to its speed, in one sense, was an opinion. They were eye-witnessses to the speed of the train. Its speed was an issue before the jury. How better could the fact be gotten before the jury than by the judgment of those who saw it? On account of the necessity of the character of the evidence, courts permit ordinary witnesses to testify as to speed. The want of experience would go to the weight to be given to the evidence, but not to its admissibility." See also the following cases:

Alabama. — Louisville & N. R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562; Kansas M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

Georgia. — Atlantic K. & N. R. Co. *v.* Strickland, 116 Ga. 439, 42 S. E. 864.

Illinois. — Chicago, B. & Q. R. Co. *v.* Gunderson, 171 Ill. 495, 51 N. E. 708; Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 617; Chicago, B. & Q. R. Co. *v.* Johnson, 103 Ill. 512; Pennsylvania Co. *v.* Conlan, 101 Ill. 93.

Indiana. — Louisville N. A. & C. R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58; Evansville & T. H. R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450; Louisville N. A. & C. R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

Kansas. — Missouri P. R. Co. *v.* Hildebrand, 52 Kan. 284, 34 Pac. 738.

Michigan. — Guggenheim *v.* Lakesshore & M. S. R. Co., 66 Mich. 150, 33 N. W. 161; Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Detroit *v.* Von Steinberg, 17 Mich. 99.

Missouri. — Walsh *v.* Missouri P. R. Co., 102 Mo. 582, 14 S. W. 873.

and the same is true of street and electric cars.[32]

Basis of Opinion. — However, a witness will not be allowed to testify as to the speed of a train unless it appears that there is some proper basis for his opinion or conclusion.[33] Thus where the witness was run into by a train without seeing it, he will not be permitted to base an estimate of the rate of speed upon the force of the blow which he received;[34] and it has been held that the speed of a train cannot be shown by the opinions of passengers observing only from the inside, unless their experience and observation are such as to make their judgment reliable.[35]

Persons Who Reside Near a Railroad, and who are familiar with the passage of trains, are competent to testify as to their speed.[36]

Opinion Based on Sound. — Persons riding on a train may base their opinion upon the sound made by the train where the opinion is apparently a guarded one.[37]

Distance of Observer From Train. — It has been held that a person observing a train at a distance of a mile and a half may testify that it was running at a high and dangerous rate of speed.[38]

Definiteness of Estimate. — Opinions of witnesses as to the rate of speed of a train may often be no more definite than that the train

New Hampshire. — Nutter *v.* Boston & M. R. Co., 60 N. H. 483.

New York. — Salter *v.* Utica & B. R. Co., 59 N. Y. 631; Northrup *v.* New York O. & W. R. Co., 37 Hun 295.

Texas. — Campbell *v.* Warner (Tex. Civ. App.), 24 S. W. 703.

Utah. — Chipman *v.* Union P. R. Co., 12 Utah 68, 41 Pac. 562.

Virginia. — Norfolk & W. R. Co. *v.* Tanner, 100 Va. 379, 41 S. E. 721.

Wisconsin. — Ward *v.* Chicago, St. P., M. & O. R. Co., 85 Wis. 601, 55 N. W. 771.

32. Eckington S. R. Co. *v.* Hunter, 6 App. (D. C.) 287; Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

Whether Car Was Running at Full Speed. — Where a witness testifies that he has been in the habit of riding on a certain line of street cars and knows when they are running at full speed, he may testify that a certain car was running at full speed at a time when he observed it. Potter *v.* O'Donnell, 199 Ill. 119, 64 N. E. 1026.

33. Mathieson *v.* Omaha St. R. Co. (Neb.), 97 N. W. 243, which was an action for personal injuries sustained by reason of a collision between a street car and the plaintiff's vehicle. The plaintiff was not allowed to testify as to the speed of the car because it was evident from the circumstances of the accident as detailed by him that he formed no judgment at the time and made no observations enabling him so to do, concerning the speed of the car, and it was plain that he could at the time of the trial have had no opinion except such as was drawn by inference, or calculated from a knowledge of the relative positions of the two vehicles and the speed at which his own was moving.

34. Northern P. R. Co. *v.* Hayes, 87 Fed. 129.

35. Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

36. Pence *v.* Chicago, R. I. & P. R. Co., 79 Iowa 389, 44 N. W. 686.

37. Van Horn *v.* Burlington, C. R. & N. R. Co., 59 Iowa 33, 12 N. W. 752, in which case two persons were allowed to testify that they judged from the sound of the train that at the time of the accident it was running very rapidly and more than six miles an hour. *Compare* Campbell *v.* St. Louis & S. R. Co., 175 Mo. 161, 75 S. W. 86.

38. Louisville N. A. & C. R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

in question was moving at a greater or less rate of speed than other familiar objects which the witness has been accustomed to observe in motion, and the fact that the witness is unable to state that it was running at the rate of a certain number of miles in an hour does not necessarily render his opinion inadmissible.[39]

25. Time. — A. In General. — A witness may state his opinion as to the time of day when an event happened;[40] or his impression based on recollection as to the date when an event transpired.[41]

39. Kansas City, M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262, in which case the court said: "Assistance in coming to a conclusion on such a question may be derived from a statement that the object was going slowly, or at a snail's pace, or no faster than a man walks, or faster than a man could run. The opinions are admitted to enable the jury to realize, as far as possible, the impression as to speed made by the moving object upon the mind of one who saw it. It would be more satisfactory if the admissibility of such opinions could be made to depend upon their conformity to some definite standard of clearness or accuracy in their formation and expression. It is not practicable, however, to fix any such standard. The vagueness of the opinion would go to the weight of the testimony, and not to its admissibility."

Opinion That Train Was Running "Fast." — It is permissible to allow a witness to testify that a train was running "fast." Illinois C. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521, in which case the court said: "The fact that a witness might not be able to testify how fast or how slow a train was running should not preclude him from testifying whether the train was running fast or slow." See also Galveston H. & S. A. R. Co. *v.* Huebner (Tex. Civ. App.), 4 S. W. 1021.

That Car Was Not Going Faster Than Usual. — In Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64, which was an action for personal injuries received by the plaintiff while riding as a passenger on defendant's freight train, injuries were alleged to have been caused by the negligence of the defendant's agents and servants in allowing the freight cars to run together so rapidly as to produce an unusual and unnecessary jolt, which threw the plaintiff from his seat and injured him. It was held that the defendant was entitled to prove by a witness who was present and had had experience in such matters on the same railroad "that the car was not going faster than usual."

40. Campbell *v.* State, 23 Ala. 44. This was a criminal prosecution. A witness was allowed to give "his opinion" as to the time of day the prisoner left Centre, the witness stating that he had no time-piece. The court said: "This evidence was admissible. Every person of ordinary perception and observation must be regarded as capable of giving an opinion upon a matter of this nature, a matter upon which every man's knowledge and experience are supposed to qualify him to approximate a correct conclusion. We apprehend no case can be found asserting a different doctrine. Indeed, we know of no case where the point was ever called in question, and yet it is one involved in almost every trial."

41. McRae *v.* Morrison, 35 N. C. 46, in which case an action was brought on a written contract which had been lost, and the statute of limitation was relied upon. A witness testified as to his impression as to the time when the contract was made. It was held that there was no error in refusing to instruct the jury that the impression of the witness was no evidence, and so there was nothing to take the case out of the statute of limitation. The court said: "The impression of a witness who professes to have any recollection at all is certainly some evidence. The degree of weight to which it is entitled is a matter for the jury, and will, of course, depend very much upon circumstances. The witness in this case was not stating the time, simply from his recollection of the contents of the paper, but his recollection was aided by the fact

B. Duration of Time. — A witness may state his opinion as to the length of time which elapsed between the happening of two events.[42]

C. Sufficiency of Time. — The question whether or not under certain circumstances there was sufficient time in which to perform a specified act is one that some courts admit and others exclude.[43]

that he was present at the delivery of the bacon."

42. Campbell *v.* State, 23 Ala. 44; State *v.* Folwell, 14 Kan. 105, *per* Kingman, C. J.; State *v.* Casey, 44 La. Ann. 969, 11 So. 583, in which case it was declared that where a witness is asked to designate a period of time between certain events, it is a fact sought by the examiner, and not the opinion of a witness.

How Long Hogs Had Been Killed. In State *v.* Southern, 48 La. Ann. 628, 19 So. 668, which was a prosecution for larceny, a witness, after having stated the appearance of the place where hogs were killed and the appearance of the meat, ears, and blood signs, and other appearances, was allowed to state how long the hogs had been killed. It was held that such evidence was admissible, the court saying: "The witness was asked to state a fact and conclusion from other facts which had come under his observation and were within his knowledge."

Time Measured by Performance of Act. — In Bayley *v.* Eastern R. Co., 125 Mass. 62, which was an action for personal injuries occasioned by a collision with one of the defendant's trains at a grade crossing, a witness testified, without objection, that he was near the gate-house, and saw the gate-keeper go out in a hurry to close the gate; that he was familiar with the gate, and the neighborhood of the gate-house, and knew how the gate was operated. The plaintiffs then asked him this question: "Whether or not, in your judgment, from the time you saw the gate-keeper leave the gate-house until the train went past the gate-house, there was or was not time for the gate-keeper to go and close the gate?" To this question the defendant objected, but the judge permitted the witness to answer, and he replied: "In my best judgment, he had rather short time, though he might have shut it before the train passed, but he had short time." It was held that such testimony was admissible, because its purpose and effect were to get at the opinion of the witness as to the time which elapsed after the gate-keeper started from the gate-house before the train passed the gate-house, and the question was not put, nor answered, for the purpose of obtaining the opinion of the witness as to the length of time which the gate-keeper would require in order to travel the given distance.

43. State *v.* Parce, 37 La. Ann. 268. It was held that it was error to ask a witness the following question: "Would the defendant, after having struck the deceased with a rail, have had time to pull his knife out of his pocket, open it, and cut the man when he did?" The court said: "It is argued that time is a question of fact, and that witnesses are universally allowed to state facts concerning time — or their approximation of the length of time which has intervened between certain acts. But in this case the witness was not questioned as to time, but as to the possibility in a man to perform two distinct operations: to pull a knife out of his pocket and to open it during the time intervening between two other and distinct acts." See also Dowdy *v.* Georgia R. Co., 88 Ga. 726, 16 S. E. 62, wherein it was held that it is not proper to allow a witness to testify that an "engineer had time to blow the whistle before the deceased was struck." See further Curl *v.* Chicago, R. I. & P. R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308. See *contra*, Quinn *v.* New York, N. H. & H. R. Co., 56 Conn. 44, 12 Atl. 97, 7 Am. St. Rep. 284, in which case it was held that it was proper to allow one who saw an accident to testify as to whether or not the decedent had sufficient time in which to jump off a car. The court said: "Assuming that the answer involved an opinion, it was yet clearly admis-

26. Words and Phrases. — It is well settled that a witness should not be permitted to give his understanding of words and phrases, and even where he has heard the language he should not be permitted to give his understanding as to the speaker's meaning.[44] The applications of this rule which the books disclose are very numerous. Thus it has been held that a witness cannot testify as to inferences drawn by him as to the state of feeling between two persons;[45] or as to whether a person in conversation contradicted himself.[46] Further applications and illustrations of the rule are set forth in the note hereto.[47]

sible, for the time required for such sudden movements as are referred to it would be impossible to estimate in minutes or seconds with any approximation to accuracy; but every observer familiar with the running of trains and hand-cars, as this witness was, would carry in his mind, though unconsciously, the measure of time required for jumping from the car as compared with the time it took the train, after it was discovered, to reach the place of collision. We doubt whether in strictness such evidence should be considered matter of opinion. It would seem to be rather matter of fact to be determined by judgment or estimate. If the mental process be analyzed it would seem to involve just as much a matter of opinion, had the question been how long it would have taken to jump from the hand-car, and how long it took for the train after its discovery to reach the place of the accident." To the same effect as the latter case is Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426, where it was held that it was proper to allow a witness to testify whether the defendant had sufficient time in which to have escaped from the decedent. See also Bayley *v.* Eastern R. Co., 125 Mass. 62, cited in last preceding note.

44. *Alabama.* — National Surety Co. *v.* Mabry (Ala.), 35 So. 698.

Florida. — Livingston *v.* Roberts, 18 Fla. 70.

Georgia. — Elliott *v.* Western & A. R. Co., 113 Ga. 301, 38 S. E. 821.

Illinois. — Bragg *v.* Geddes, 93 Ill. 39; Menifee *v.* Higgins, 57 Ill. 50.

Iowa. — State *v.* Rudd, 97 Iowa 389, 66 N. W. 748.

Kansas. — Shepard *v.* Pratt, 16 Kan. 209; Da Lee *v.* Blackburn, 11 Kan. 190.

Louisiana. — State *v.* Wright, 41 La. Ann. 605, 6 So. 137.

Massachusetts. — First Natl. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444.

Missouri. — Sparr *v.* Wellman, 11 Mo. 230.

New York. — Clews *v.* Bank of N. Y., 114 N. Y. 70, 20 N. E. 852; First Baptist Church *v.* Brooklyn Fire Ins. Co., 28 N. Y. 153.

Oregon. — Aikin *v.* Leonard, 1 Or. 224.

Tennessee. — Girdner *v.* Walker, 1 Heisk. 186.

Texas. — Hammond *v.* Hough, 52 Tex. 63.

45. People *v.* French, 69 Cal. 169, 10 Pac. 378. The witness for the prosecution was asked the following question: "During your association with the deceased, Wells, and the *actions* on his part, from *words* of his and a combination of all the circumstances that would tend to throw light on the subject, what was the feeling and the expressed feeling between the deceased, Wells, and the defendant?" It was held that it was error to allow this question to be asked, as it was one for the jury upon proof of the words and the circumstances themselves.

46. Joyce *v.* State, 62 Ark. 510, 36 S. W. 908. A witness for the defendant on cross-examination was asked the following question: "In the conversation you had with Joyce, didn't he cross himself?" It was held that an objection to the question should have been sustained, as it called for nothing but the opinion of the witness to the effect of the statement made by the defendant in such conversation.

47. **Inferences and Conclusions Drawn From an Interview** with a

Whether Words Were Spoken Seriously. — It has been held that a witness may testify as to whether words were spoken seriously, or whether the speaker was jesting.[48]

XV. WEIGHT OF OPINIONS OF NON-EXPERTS.

1. Province of Court and Jury. — In cases tried before a jury the weight to be given to the opinions of non-experts is a question for the jury.[49]

Where non-expert opinions are introduced in a case tried by the court without a jury, the weight to be given to such testimony is

person having a claim against the city are not evidence, much less is the report of such conclusions made by a councilman to the council. Atchison *v.* King, 9 Kan. 375.

Understanding of Threats. — Dixon *v.* State, 13 Fla. 636.

Conclusion of Witness as to Admission. — A witness testifying in respect to an alleged admission of another, if he is unable to give the words, language, or the substance of it, should not testify at all. Helm *v.* Cantrell, 59 Ill. 524.

Assertion of Ownership. — It is not error to exclude a question addressed to a witness, requiring him to call to mind a conversation he has had with a certain person, and to state if it amounted to an assertion of a claim of ownership to certain land. Dickey *v.* Shirk, 128 Ind. 278, 27 N. E. 733.

Understanding That Persons Were Man and Wife. — In Diehl *v.* State, 157 Ind. 549, 62 N. E. 51, which was a prosecution for abortion, a witness was asked what was his understanding from a conversation between himself, the defendant and another man as to what relation the defendant bore to the woman upon whom the alleged offense was committed, whether husband or otherwise, and the witness answered as follows: "Well, I got the understanding that they were man and wife." It was held that this was error.

Whether Anything Was Said to Create Certain Belief. — Burlingame *v.* Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829.

"Abusive Language" and "Cursing" Heard by Witness. — In Shaefer *v.* Missouri P. R. Co., 98 Mo. App. 445, 72 S. W. 154, which was an action for personal injuries, the plaintiff was allowed to inquire of a witness "whether or not he heard any cursing or abusive language used, and, if so, to state by whom." It was held that there was no error, because the defendant could have protected itself, if it had to do so, by exercising its privilege of cross-examination and requiring the witness to state the language used, which, however, was not done.

48. Ray *v.* State, 50 Ala. 104, in which case it was held that a witness who has testified to a confession made by the defendant in a criminal case may be asked "whether or not he supposed that the defendant was jesting." The court declared: "Words are nothing except in connection with the intention with which they are used, or taken. The *animus* of a look, or other expressions of countenance, is as perceptible to the eye as words are to the ear, and often much more capable of correct understanding." See also Stacy *v.* Portland Pub. Co., 68 Me. 279, in which case it was held that a witness who has testified to threats made by a person in his presence may be allowed to state whether he apprehended the words to have been spoken in earnest or not, but that he cannot state what he understood the speaker to mean by the threatened words, because such words speak for themselves.

49. Pritchett *v.* Ballard, 102 Ga. 20, 29 S. E. 210; Frizzell *v.* Reed, 77 Ga. 724; Alexander *v.* State (Ga.), 44 S. E. 851; Illinois C. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 505; State *v.* Harr, 38 W. Va. 58, 17 S. E. 704. See also State *v.* Arnold, 35 N. C. 184.

for the trial court, and on appeal the finding of that court will not be disturbed unless it is manifestly erroneous.[50]

2. Rules for Weighing. — The weight of testimony of a non-expert witness who has testified to his opinion and conclusions depends upon the capacity of the witness, his experience, and more particularly his opportunities for observation.[51]

Such opinions are entitled to little or no regard unless they are supported by good reasons, and are founded on facts which warrant them, and if the reasons and facts upon which they are founded are frivolous, the testimony is worth little or nothing.[52]

XVI. WAIVER OF OBJECTIONS.

Objections to the admission in evidence of the opinions of non-experts will not be regarded on appeal unless objection was seasonably made in the trial court.[53]

XVII. HARMLESS ERRORS.

Where a witness in the introduction of his testimony incidentally states a conclusion necessary to a clear understanding of the facts which he is about to state, the error, if any, will not be regarded as reversible.[54]

Where Opinion is Obviously Correct. — It has been held that error, if any, permitting a witness to testify to his opinion is not reversible error where he details the facts upon which his opinion is based, and states the reasons for his opinion, and it is obvious that the conclusion of the witness is the only one that could be drawn from the facts stated.[55]

50. Barber *v.* Manchester, 72 Conn. 675, 45 Atl. 1014.

51. Eckington & S. R. Co. *v.* Hunter, 6 App. (D. C.) 287, *per* Shepard, J.

52. Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

53. State *v.* Murray, 11 Or. 413, 5 Pac. 55, in which case no objection was made in the trial court that the reasons upon which the opinions of the witnesses were based were not given. The court said: "That objection should have been made at the trial. The witnesses could have been required to give the reasons for their opinions, and if that were refused it should have been made a special ground of objection, which does not appear to have been done."

54. Hoadley *v.* Hammond, 63 Iowa 599, 19 N. W. 794, in which case the witness was testifying as to his authority to sign the name of another. In an answer to a question, he said: "I had direct authority, and also general authority, by reason of the relation between Hammond and myself." The witness in the succeeding part of his answer to the question proceeded to testify to verbal authority given him by Hammond to enter into the contract, and also to a partnership existing between him and Hammond. It was held that there was no reversible error.

55. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Jackson *v.* Benson, 54 Iowa 654, 7 N. W. 97; Langworthy *v.* Green, 88 Mich. 207, 50 N. W. 130; Robertson *v.* Wabash, St. L. & P. R. Co., 84 Mo. 119; Aikin *v.* Leonard, 1 Or. 224; Bixby *v.* Montpelier & St. J. R. Co., 49 Vt. 123. See also Miller Brewing Co. *v.* De France, 90 Iowa 395, 57 N. W. 959; Hoadley *v.* Hammond, 62 Iowa 599, 19 N. W. 794.

Illustration. — It is error to permit a witness to give his opinion of whether a sidewalk is dangerous and

Presumption That Error Was Prejudicial. — Where the opinion of a witness is erroneously admitted upon an important and material point in the case, the error will be presumed to be prejudicial, unless the record shows the contrary.[56]

Opinion Concerning Matter Not in Issue. — The admission of the opinion of a witness as evidence may be harmless because it relates to a matter not in issue.[57]

Finding Contrary to Incompetent Testimony. — Errors in the admission of opinion evidence will not be ground for reversal on appeal where the finding in the lower court was in disregard of such evidence.[58]

XVIII. IMPEACHMENT AND REBUTTAL.

Where a non-expert witness is permitted to testify as to his opinions and conclusions it is proper to inquire of him whether or not he has previously expressed a different opinion;[59] and also as to whether or not his previous actions have been consistent with such opinion.[60]

unsafe; but where immediately before he had described it in detail, and at length, and from such description no other inference could have reasonably been drawn than that it was unsafe and dangerous, such opinion evidence will be presumed, under all the circumstances of the case, to have not materially prejudiced the opposite party. Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

56. Johnson *v.* Anderson, 143 Ind. 493, 42 N. E. 815, in which case the court admitted the opinion of a witness that a proposed change in the location of a highway would be of public utility. It was urged that the error was harmless, but the court said: "The testimony was concerning an important and material point in the case, the question the jury were required to determine, and we cannot say that it did not influence them in the verdict. The evidence was incompetent, and as it was directed to the point in issue in the cause, will be presumed to be prejudicial unless the record shows the contrary."

57. Turner *v.* State, 114 Ga. 421, 40 S. E. 308, in which case it was held that there was no error in permitting a witness to testify that he had "tried" to do a certain thing because his diligence in so doing was not in issue, and the extent of his endeavors might have been ascertained by the objecting party by cross-examination.

58. Robinson *v.* Waupaca, 77 Wis. 544, 46 N. W. 809. This was an action to recover damages for personal injuries alleged by the plaintiff to have been caused by a defective highway. The court erred in allowing witnesses for the town to testify that in their opinion the car in which the plaintiff was riding was unsafe, but it was held that the error was harmless because the jury found for the plaintiff, and in order to do so they must necessarily have found that the car was a proper vehicle to be used by the plaintiff. See also Hanish *v.* Kennedy, 106 Mich. 455, 64 N. W. 459.

59. People *v.* Donovan, 43 Cal. 162.

60. Quinn *v.* New York & H. R. Co., 56 Conn. 55, 12 Atl. 97, 7 Am. St. Rep. 284.

Rebuttal of Evidence as to Damage. — Where a witness has testified as to the damage to property sought to be taken, evidence of sales of similar property by such witness is admissible for the purpose of determining the credit to be given to his testimony. Davis *v.* North Western El. R. Co., 170 Ill. 595, 48 N. E. 1058.

EXTORTION.

By Lomar O'Horrow.

CROSS-REFERENCES:

Intent;

Public Officers.

I. DEFINITION.

1. Scope. — At common law extortion is an unlawful taking by an officer, under color of his office, of money or other valuable thing not due him, or more than is due, or before it is due.[1] While many of the states have extended the meaning of the term by statute, this article will be mainly confined to a discussion of those rules of evidence relating to the crime as it was defined by the common law.

1. United States *v.* Waitz, 3 Sawy. 473, 28 Fed. Cas. No. 16,631; Com. *v.* Mitchell, 3 Bush (Ky.) 25, 96 Am. Dec. 192; People *v.* Whaley, 6 Cow. (N. Y.) 661; State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610.

2. Burden of Proof. — A. Official Title. — In order to sustain a conviction for extortion, it is absolutely necessary to prove that the accused is an officer *de jure* or *de facto*.[2]

a. *Under the Statute.* — And where the statute enumerates the officers included under its provisions, a person to be convicted of the crime must be shown to be an officer within the intent of the statute.[3]

b. *Deputies.* — Deputies are included within the intent of the common law, and of most of the statutes, and are liable to the same extent as the officers themselves. A deputy's official title is proved in the same manner as an officer's title.[4]

c. *Method of Proof.* — As in civil cases, the certificate of election or commission of appointment is the best evidence of title to an office. But these are not always the only and indispensable proofs.[5]

2. *England.* — Troy's Case, 1 Mod. 5; Reg. *v.* Baines, 6 Mod. 192.

Georgia. — White *v.* State, 56 Ga. 385.

Montana. — Territory *v.* McElroy, 1 Mont. 86.

New Hampshire. — Wilcox *v.* Bowers, 36 N. H. 372.

New Jersey. — Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213.

Pennsylvania. — Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610; Gallagher *v.* Neal, 3 Penn. & W. 183.

Tennessee. — State *v.* Critchett, 1 Lea 271.

Texas. — Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360, and note; 2 Bish. New Crim. Proc. 356; 2 Arch. Crim. Pr. & Pl. 1368.

3. White *v.* State, 56 Ga. 385; Herrington *v.* State, 103 Ga. 318, 29 S. E. 931; State *v.* Williamson, 17 Wk. L. Bul. (Ohio) 157; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610.

Accused Must Be One of the Officers Designated by Statute. "From the plain language of the statute it is very clear that it is of the very essence of a prosecution thereunder that the accused must be charged and proved to hold one of the offices therein designated." State *v.* Lubin, 42 La. Ann. 79, 7 So. 68.

4. Com. *v.* Bagley, 7 Pick. (Mass.) 279; Com *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610.

5. Throop's Pub. Off. 297-302; State *v.* McEntyre, 25 N. C. 171.

Officer Must Have Been Required to Take Oath. — In State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50, it was held that "it is of the essence of the offense . . . that it should be charged and proved that the accused officer was required by law to take an oath of office before entering upon the discharge of his duties."

Office Created by Unconstitutional Statute. — Presumptions. — Where the accused holds an office that has been created by an unconstitutional statute, the court will conclusively presume that such person is not an officer *de jure* or *de facto*, and cannot be guilty of the crime of extortion. Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213.

Estoppel. — And where a person acts as an officer and has assumed an officer's duties he is estopped to prove the irregularity of his appointment. Rex *v.* Borrett, 6 Car. & P. 124; Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610; State *v.* Sellers, 7 Rich. (S. C.) 368. So in State *v.* Cansler, 75 N. C. 442, it was held that a justice of the peace would not be allowed to show that he had never taken the oath of office.

Evidence of Other Crimes. — In People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017, the defendant, a police captain, was indicted for extortion, the act complained of being carried out by an agent. To prove the fact of agency the state introduced evidence to show that the police captain and the agent had been

3. Taking Illegal Fees. — The taking of illegal fees must be proved to convict an officer of extortion. The evidence must show that such officer took fees in excess of what were due him, or before they were due, or that he took fees where the law gave none.[6] It is usually necessary to prove only the amount of fees taken and the time of taking, for the lawful amount and the lawful time of taking being matters of statute, will be judicially known by the court.[7]

A. MONEY OR SOME OTHER THING OF VALUE. — And the evidence must show the fees to be money or some other thing of value.[8]

associated in similar deals at other times. For this purpose various conversations and incidents in connection with these former crimes were admitted. But the court of appeals held, reversing the decision in 2 App. Div. 419, that such evidence was inadmissible since the rule for establishing agency in civil cases does not apply to criminal law, where the presumption is of innocence, and the doctrine of estoppel has no application. See also Com. *v.* White, 162 Mass. 403, 38 N. E. 707.

Memoranda of Entries in Course of Business Not to Refresh Memory. Where there was a disagreement as to the person to whom the money was paid, a memorandum from the witness' cash book of payment on that day of the sum named to the defendant "for protection per" such other person, is not admissible as independent evidence of the matters stated therein, being ambiguous and uncertain so far as it relates to that portion of the transaction in regard to which the witness was unable to testify of his own memory, namely, as to which of the two persons he paid the money to. People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017. See article "OFFICERS."

6. But where the statute defines extortion to be the taking of greater fees than allowed by law, the court will presume that the taking of fees by an officer where the law gave none is not extortion. Smith *v.* State, 10 Tex. App. 413.

7. **Rule for Determining When Fees Illegal.** — The supreme court of New Jersey has laid down the rule for determining whether an officer had been guilty of taking illegal fees to be that where by force of a general statute an officer is entitled to no fee for a particular service, or to a fee the amount of which is unchangeably prescribed, "the court must take notice, *ex officio,* of the rights of the officer and the extent of such rights." In such cases the amount taken need only be proved. But where the amount of fees depends upon circumstances, as, in the case decided, upon the length of the affidavits and depositions taken, a thing which the court could not judicially know, then the amount allowed by law and the amount taken must be proved. State *v.* Maires, 33 N. J. L. 142.

Right to Fee Based Upon Return of Writ. — Where an officer's right to charge a fee depends upon the service of a writ such officer's official return of the writ is not conclusive evidence of its return and of his right to charge the fees allowed for such service. Such return is only *prima facie* evidence of its truth. And since the truth of such return is put directly in issue by the indictment, evidence to show that the writ was never served is admissible. Williams *v.* State, 2 Sneed (Tenn.) 160.

8. **Promissory Note.** — Where the evidence showed that instead of receiving money the accused had received a promissory note which was void because the consideration was illegal by statute, it was held that the crime of extortion had not been proved. Com. *v.* Dennie, Thatch. Crim. Cas. 165; Com. *v.* Cony, 2 Mass. 523; Com. *v.* Pease, 16 Mass. 91.

Bank Note. — In Garner *v.* State, 5 Yerg. (Tenn.) 160, it was held that an indictment charging the defendant with unlawfully demanding and receiving by color of his office as clerk so many dollars, "lawful money

B. Proof of Sum as Laid. — But it is not necessary to prove the exact sum as laid in the indictment, for the gist of the offense is the illegal taking. It is sufficient to show that any unlawful sum was taken.[9]

4. Color of Office. — It must be proved that the money was demanded and received by the officer under color of his office.[10]

A. Official Services. — Consequently the evidence must show that the fees were for real or pretended official services,[11] and that they were demanded from some one from whom the officer had a right to demand them.[12]

B. Involuntary Payments. — The evidence must also show that such fees were not given voluntarily, without a demand on the part of the officer,[13] and that they were not received by him in his private capacity.[14]

of the state of Tennessee," is not sustained by proof that he received the amount in a bank note.

9. Rex *v.* Burdette, 1 Ld. Raym. 148; Com. *v.* Dennie, Thatch. Crim. Cas. 165; Fowler *v.* Tuttle, 24 N. H. 9; Underhill's Crim. Ev. 547. "Proof that higher fees were received than the law allows is equivalent to proof that other fees than the law allows were taken." Spence *v.* Thompson, 11 Ala. 746.

10. *England.* — Reg. *v.* Baines, 6 Mod. 192.

Alabama. — Collier *v.* State, 55 Ala. 125.

Georgia. — White *v.* State, 56 Ga. 385.

Montana. — Ming *v.* Truett, 1 Mont. 322.

New Hampshire. — Fox *v.* Whitney, 33 N. H. 516.

New York. — People *v.* Whaley, 6 Cow. 661.

North Carolina. — State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50.

North Dakota. — State *v.* Bauer, 1 N. D. 273, 47 N. W. 378.

Pennsylvania. — Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610.

Texas. — Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360, and note.

11. Fees Paid for Unofficial Services. — Collier *v.* State, 55 Ala. 125; Cleaveland *v.* State, 34 Ala. 254; Runnells *v.* Fletcher, 15 Mass. 525. But where it was proved that the money was voluntarily offered and paid to the officer to be used in settling the case, and not for the officer's personal use, it was not extortion. White *v.* State, 56 Ga. 385. See also Ferkel *v.* People, 16 Ill. App. 310.

Services Must Be Rendered When Statute Requires It. — Where the statute defines extortion as the taking of unlawful fees for official services rendered, it must be proved that such services are rendered, or the indictment fails under the statute. Shattuck *v.* Woods, 1 Pick. (Mass.) 171. See also Hays *v.* Stewart, 8 Tex. 358.

12. Com. *v.* Dennie, Thatch. Crim. Cas. 165; Collier *v.* State, 55 Ala. 125; Garber *v.* Conner, 98 Pa. St. 551.

Variance. — Where the proof shows that the money was received from some other person than the one named in the indictment it is a fatal variance. Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610.

13. Fees Willingly Paid. — It must be proved that the fee was paid unwillingly, for no matter how improper or unjust it may be for an officer to take greater or other fees than he is allowed by law, if voluntarily given it is not extortion. Com. *v.* Dennie, Thatch. Crim. Cas. 165; Dunlap *v.* Curtis, 10 Mass. 210. See also People *v.* Rainey, 89 Ill. 34.

14. Unofficial Capacity. — In Collier *v.* State, 55 Ala. 125, where a prosecuting officer was charged with extortion, evidence of statements made by him at the time of taking the fee that he did it in his private capacity, as an attorney and not as an officer, was admitted to show that the fee taken was not for official services.

5. Corrupt Intent. — While the courts are divided as to whether it is necessary to prove a corrupt intention and knowledge, the weight of authority seems to require them to be proved.[15]

A. What May be Shown Where Evidence of Corrupt Intent is Admissible. — In such jurisdictions the accused may show that he was ignorant of the law and thought that he was entitled to the fees, or that he was merely guilty of a clerical error in computing the amount due him.[16]

B. Evidence to Show Corrupt Intent Not Admissible. — But in those jurisdictions where it is held that a corrupt intent is not essential, it being presumed from a violation of the statute, the

Fees for Former Services. — It is not extortion where the evidence showed that the excessive fees were for labor and trouble of a previous date. Runnells *v.* Fletcher, 15 Mass. 525. But proof that the fees were collected after the officer had given up the office for services rendered while in office would not excuse the offense. Jackman *v.* Bentley, 10 Mo. 293.

15. *Arkansas.* — Leeman *v.* State, 35 Ark. 438, 37 Am. Rep. 44.

Georgia. — White *v.* State, 56 Ga. 385; Ridenhour *v.* State, 75 Ga. 382.

Massachusetts. — Com. *v.* Shed, 1 Mass. 227; Com. *v.* Dennie, Thatch. Crim. Cas. 165.

New Jersey. — Cutter *v.* State, 36 N. J. L. 125.

New York. — People *v.* Whaley, 6 Cow. 661.

North Carolina. — State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50; State *v.* Cansler, 75 N. C. 442.

Pennsylvania. — Com. *v.* Hagan, 9 Phila. 574.

16. Ignorance of the Law. — Where there was evidence that a probate judge was ignorant of the repeal of a law giving him certain fees, his corrupt intent in taking such fees after the repealing act went into effect was a proper question for the jury to determine. Leeman *v.* State, 35 Ark. 438, 37 Am. Rep. 44. And the supreme court of New Jersey has held that where a justice of the peace charged more fees than the law gave him he might show that the amount of fees charged was what he honestly believed the statute gave him, and that he had not knowingly or willingly charged more than the law prescribed. The fact of the existence of a statute fixing the amount of his fee is not conclusive as to his guilty knowledge and intent. Cutter *v.* State, 36 N. J. L. 125.

Statements Made at Time of Transactions. — Conversations as to the purpose for which the money was to be received are admissible as a part of the *res gestae* to show lack of corrupt motives. And the officer's experience and acquaintance with his duties may be shown for the same purpose. White *v.* State, 56 Ga. 386. A statement made by the accused at the time of making the excessive charges that "If it is not all right I will make it all right" is not conclusive, but only some evidence on the question of corrupt intent. Especially is this true where it was proved that there was a serious controversy at the time over the question of charges, and the officer's attention especially directed to the matter of his legitimate fees, which were not at all difficult of ascertainment under the statute. Graham *v.* Kibble, 9 Neb. 182.

Clerical Error. — Com. *v.* Shed, 1 Mass. 227.

Burden of Proof. — Where the statute does not specifically require that the act must be knowingly and corruptly done, it was held by the court that it was not the intention of the legislature to visit the officer with such a severe penalty as prescribed when the act was done in good faith. But when the wrongful act has been established the burden of proof is on the defendant to show that he acted honestly and in good faith; Triplett *v.* Munter, 50 Cal. 644; United States *v.* Rose, 12 Fed. 576.

maxim "Ignorance of the law excuses no one" prevails, and evidence to show lack of a corrupt intent is not admissible.[17]

C. IGNORANCE OF FACT. — But even in those jurisdictions which hold that evidence of ignorance of the law is not admissible to show lack of corrupt motive, the defendant may show that he was mistaken as to the facts which were the basis of his charges.[18]

D. CUSTOM, USAGE. — The courts are also divided as to the effects of proof of usage, custom or general understanding as bearing on the question of corrupt motive. In those jurisdictions holding that ignorance of the law is no defense, evidence of custom is usually of no avail.[19] In the courts holding the other rule, such evidence is admissible to be considered by the jury in determining the intent of the accused.[20]

6. Civil Action for Penalty. — Many of the states provide for civil actions and a penalty by the oppressed party against an officer who has extorted fees from him. In such cases where it is necessary to

17. *Canada.* — Reg. *v.* Tisdale, 20 U. C. Q. B. 272.

Georgia. — Levar *v.* State, 103 Ga. 42, 29 S. E. 467.

Massachusetts. — Com. *v.* Bagley, 7 Pick. 279.

Missouri. — State *v.* Vasel, 47 Mo. 416.

Montana. — Leggatt *v.* Prideaux, 16 Mont. 205, 40 Pac. 377.

Pennsylvania. — Coates *v.* Wallace, 17 Serg. & R. 75; Com. *v.* Hagan, 9 Phila. 574.

Tennessee. — State *v.* Merritt, 5 Sneed 67.

Utah. — People *v.* Monk, 8 Utah 35, 28 Pac. 1115.

Tender Back of Illegal Fees. — In Leggatt *v.* Prideaux, 16 Mont. 205, 40 Pac. 377, the court went so far as to say that proof that the illegal fees had been tendered back to the aggrieved party when the mistake was discovered would not excuse the officer.

Effect of Part of Legal Fees Omitted. — See also Turner *v.* Blount, 49 Ark. 361, 5 S. W. 589, where it was held that proof that the accused had omitted fees to which he was lawfully entitled that would have amounted to more than the illegal fees charged did not relieve him from liability for the penalty.

Presumptions. — "And as all clerks must be presumed to know the law which prescribes their duties and fixes their fees, the intention, purpose and fraudulent and selfish design, in the illegal exaction, must be presumed from the illegality of the fees charged, rising in strength and conclusiveness by the number, continuance and destitution of plausible pretext for the illegal exactions." Com. *v.* Rodes, 6 B. Mon. (Ky.) 171.

18. So where an officer had reasonable grounds to believe that there were two sureties bound, besides the principal, it was held that he had not, by making a charge in pursuance to his belief, incurred the forfeiture. Bowman *v.* Blythe, 7 Ell. & Bl. 26, 90 E. C. L. 26.

19. *United States.* — Ogden *v.* Maxwell, 3 Blatch. 319, 18 Fed. Cas. No. 10,458.

England. — Rex *v.* Seymour, 7 Mod. 382.

Massachusetts. — Com. *v.* Bagley, 7 Pick. 279.

New Jersey. — Cutter *v.* State, 36 N. J. L. 125.

Pennsylvania. — Com. *v.* Hagan, 9 Phila. 574.

Utah. — People *v.* Monk, 8 Utah 35, 28 Pac. 115.

20. Henry *v.* Tilson, 17 Vt. 479; Haynes *v.* Hall, 37 Vt. 20. In *Res Publica v.* Hannum, 1 Yeates (Pa.) 71, where a justice of the peace introduced the certificates of the commissioners to show that he had not charged more fees than it was usual to charge for such services as he had rendered, although they were illegal, it was held that he had satisfactorily

establish the crime, the same rules of evidence apply as in prosecutions by the state.[21]

proved the lack of a criminal intent.

21. Spence *v.* Thompson, 11 Ala. 746; Turner *v.* Blount, 49 Ark. 361, 5 S. W. 589; Triplett *v.* Munter, 50 Cal. 644; Leggatt *v.* Prideaux, 16 Mont. 205, 40 Pac. 377.

EXTRADITION.

By C. P. de Blumenthal.

CROSS-REFERENCES:

Habeas Corpus;
Foreign Laws.

I. INTRODUCTION.

Scope of Article. — The present article is to embrace the evidence on the question of extradition, only in so far as it is not covered by the stipulations of treaties of the United States with the several foreign powers,[1] or by the statutory provisions of the United States and the several states of the Union.[2] Therefore, from an evidentiary point

1. For extradition treaties see 8 U. S. Stat. at L., and later volumes, also Hawley's International Extradition, pages 70-238; Moore on Extradition, Vol. II, App. 1, p. 1059, and Spear on Extradition, Vol. I.

2. See U. S. Const., art. 4, ¶ 2; U. S. Rev. Stat., §§ 5270-5280, inclusive; also Act of August 3, 1882, ch. 378, 22 Stat. at L. 475, and the various statutes of the states, a compilation of which may be found in

of view, this topic is very limited, since — as to international extradition — treaties exist between most civilized nations, and, as to interstate extraditions, there are definite statutory provisions in many of the states of the Union, and most evidentiary matters come up in *habeas corpus* proceedings, which do not fall within the scope of this article.

II. MATTERS TO BE PROVED.

1. Identity of a Fugitive. — The identity of a person against whom extradition proceedings are entered may be established by oral proof, by the testimony of some witness,[3] or by his own admission.[4] It was held that it is immaterial what the Christian name of a fugitive from justice is when, from the whole evidence, it appears that he is the person intended.[5] The burden of proving the identity of the fugitive lies upon the state demanding extradition.[6]

2. Fact of Flight. — To be a fugitive from justice, in the sense of the act of congress, it is not necessary that the party should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within the state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process, he has left its jurisdiction, and is found within another.[7] A requisition for extradition of a fugitive from justice must show that the accused is in fact a fugitive.[8] Actual fleeing from justice must be shown,[9] and a person who only constructively fled from the state where the crime was committed is not a fugitive from justice.[10] The act of congress does

Moore on Extradition, Vol. II, App. 2.

3. *In re* McPhun, 30 Fed. 57.

4. *In re* Charleston, 34 Fed. 531.

5. People *v.* Pinkerton, 17 Hun (N. Y.) 199.

An indictment is not necessarily void because of its omission to designate the fugitive by his full Christian name. People *v.* Byrnes, 33 Hun (N. Y.) 98.

6. People *v.* Byrnes, 33 Hun (N. Y.) 98; Johnston *v.* Riley, 13 Ga. 97.

7. Roberts *v.* Reilly, 116 U. S. 80; *Ex parte* Brown, 28 Fed. 653; *Ex parte* Dickson (Ind. Ter.), 69 S. W. 943.

8. *In re* Reggel, 114 U. S. 642; *Ex parte* Lorraine, 16 Nev. 63.

9. Hartman *v.* Aveline, 63 Ind. 344.

A person who commits a crime within a state and withdraws himself from such jurisdiction without awaiting to abide the consequences of such act, must be regarded as a fugitive from justice. Matter of Voorhees, 32 N. J. L. 141.

In extradition proceedings it must be proved that the person in question has actually fled from the justice of the demanding state, or there must be a substantial equivalent of such actual flight. *In re* Mohr, 73 Ala. 503.

10. Wilcox *v.* Nolze, 34 Ohio St. 520. In the case of Jones *v.* Leonard, 50 Iowa 106, the court quotes Bouvier's definition of a "fugitive from justice" to the effect that such a person is "one who, having committed a crime in one jurisdiction, goes into another in order to evade the law and avoid punishment." (I Bouv. Law Dict. 551.) The court also holds that a person who has only constructively been in the state where the crime is alleged to have been committed, and that he has constructively fled therefrom, is not a fugi-

not prescribe any mode of proof by which the fact that a person is a fugitive from justice shall be established.[11]

The fact that a man is charged with crime in one state and is afterwards found in another has generally been regarded as *prima facie* evidence that he is a fugitive.[12]

3. Charge of Crime. — In cases of international extradition such evidence of criminality must be introduced as would justify the apprehension and commitment of a fugitive for trial, if the crime had been committed in the place where the fugitive is found.[13] In such cases it must be shown that a crime has been committed and that there is *probable cause* or good reason to believe that the defendant is guilty of a crime.[14] However, it is not essential to

tive from justice, saying: "It is difficult to see how one can flee who stands still."

If a person goes into a state and commits a crime and then returns home, he is as much a fugitive from justice as though he had committed a crime in the state in which he resided and then fled to some other state. *In re* Roberts, 24 Fed. 132.

An affidavit alleging that the fugitive committed the crime in question and secretly fled is sufficient to prove that the accused is a "fugitive from justice." *In re* Manchester, 5 Cal. 237.

The motives and purposes of the party in leaving the state where the crime was committed are entirely immaterial; all that is necessary to constitute him a fugitive from justice is, first, that being within a state, he there committed a crime against its laws; and second, when required to answer its criminal process, he has left its jurisdiction and is found in the territory of another state. State *v.* Richter, 37 Minn. 436, 35 N. W. 9.

When a requisition states that a person is a fugitive from justice without detailing that he had fled to avoid prosecution, the fact of flight will be presumed. *Ex parte* Sheldon, 34 Ohio St. 319.

The charge that the fugitive committed a crime in another state, coupled with the fact that he is found in the state where extradition is demanded, is conclusive upon the question whether he is a fugitive from justice. People *v.* Pinkerton, 17 Hun (N. Y.) 199.

11. *Ex parte* Swearingen, 13 S. C. 74; *Ex parte* Reggel, 114 U. S. 642.

12. Drinkall *v.* Spiegel, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486; *In re* Kingsbury, 106 Mass. 223.

A requisition for surrender of a fugitive, accompanied by an affidavit, is *prima facie* evidence that the person is a fugitive from justice. *Ex parte* Swearingen, 13 S. C. 74.

13. *In re* Macdonnell, 11 Blatchf. (U. S.) 79; *In re* Farez, 7 Blatchf. (U. S.) 345; *In re* Henrich, 5 Blatchf. (U. S.) 414; *In re* Adutt, 55 Fed. 376; *In re* Risch, 36 Fed. 546; *In re* Charleston, 34 Fed. 531; *In re* Roth, 15 Fed. 506; *In re* Washburn, 4 Johns. Ch. (N. Y.) 106, 8 Am. Dec. 548.

Under the 13th article of the convention between the United States and the Swiss Confederation, a fugitive charged with a crime shall be delivered up only when the fact of the commission of the crime shall be so established as to justify his apprehension and commitment for trial, if the crime had been committed in the country where such person shall be confined. In this case the court held that to say the evidence must be such as to require the conviction of the fugitive would be equivalent to a destruction of the object of international extradition treaties. *In re* Farez, 7 Blatchf. (U. S.) 345.

But in the case of *Ex parte* Kaine, 3 Blatchf. (U. S.) 1, the court held that the evidence of criminality must be such as to warrant a conviction in the judgment of the magistrate, "if sitting upon the final trial and hearing of the case."

14. *In re* Herres, 33 Fed. 165; *In re* Ezeta, 62 Fed. 972; *In re* Charleston, 34 Fed. 531; Ornelas *v.*

international extradition that there should have been any previous criminal proceedings instituted in the foreign country as a prerequisite to the institution of extradition proceedings here.[15] In cases of interstate extradition, sometimes called rendition,[16] it must be shown that a crime has been committed against the laws of the demanding state.[17] The charge of crime must be made in the form of an indictment, information or accusation, known to the laws of the demanding state, by some court magistrate or officer of that state.[18] It has also been held that such charge must be made in the regular course of judicial proceedings,[19] and the crime must be distinctly and plainly charged.[20] The fact that an indictment has

Ruiz, 161 U. S. 502; Benson *v.* McMahon, 127 U. S. 457; *In re* Farez, 7 Blatchf. (U. S.) 345.

15. *In re* Roth, 15 Fed. 506.

16. Lascelles *v.* Georgia, 148 U. S. 537.

17. *United States.* — Roberts *v.* Reilly, 116 U. S. 80; *Ex parte* Reggel, 114 U. S. 642; Pearce *v.* Texas, 155 U. S. 311; *In re* Roberts, 24 Fed. 132.

California. — *Ex parte* Spears, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341.

Massachusetts. — *In re* Davis, 122 Mass. 324.

Minnesota. — State *v.* O'Connor, 38 Minn. 243, 36 N. W. 462.

Nevada. — *Ex parte* Lorraine, 16 Nev. 63.

New Jersey. — *In re* Voorhees, 32 N. J. L. 141.

New York. — People *v.* Donohue, 84 N. Y. 441; People *v.* Pinkerton, 77 N. Y. 247.

Ohio. — *Ex parte* Sheldon, 34 Ohio St. 319; Wilcox *v.* Nolze, 34 Ohio St. 520.

18. State *v.* Hufford, 28 Iowa 391; Smith *v.* State, 21 Neb. 552, 32 N. W. 594; *Ex parte* Lorraine, 16 Nev. 63; People *v.* Brady, 56 N. Y. 182.

An affidavit charging the commission of a distinct offense, although it does not set forth the crime with all the legal exactness necessary to be observed in an indictment, is competent proof of the charge. *In re* Manchester, 5 Cal. 237.

In the case of Drinkall *v.* Spiegel, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486, the plaintiff had been permitted to leave a prison upon parole, and disobeying the rules to which he had agreed, he had left the state. The court held that he was still to be considered charged with crime, as a person can be said to be charged with crime as well after conviction as before, the conviction simply establishing the charge conclusively.

To justify a requisition for the rendition of a fugitive, he must be charged with the crime. Bastardy proceedings, although of a mixed character, involve no indictable offense on which a conviction could be had in their course, and they are not criminal proceedings in the proper sense of the term. A demand of extradition cannot be made on such a charge. *In re* Cannon, 47 Mich. 481, 11 N. W. 280.

A complaint under oath made before a magistrate charging a person with being a fugitive from justice and having "feloniously, etc., by certain false pretences, obtained a large sum of money against the peace and dignity of the state of Iowa" without stating directly that such person was charged with a crime, is not sufficient proof for the arrest of such person. State *v.* Swope, 72 Mo. 399.

If an indictment clearly charges a crime, it will be sufficient, notwithstanding the conclusion of the indictment may seemingly be inconsistent with the charge; so an indictment containing but a single count, after clearly charging the defendant with embezzlement, by way of a conclusion avers that "so the defendant did steal, take and carry away," etc., will be sufficient. *Ex parte* Sheldon, 34 Ohio St. 319.

19. *Ex parte* Morgan, 20 Fed. 298; People *v.* Brady, 56 N. Y. 182.

20. People *v.* Brady, 56 N. Y. 182.

Where the charge alleged against

been found against a fugitive from the justice of another state is held *prima facie* evidence of a charge of the crime in that state.[21] Again, it has been held that it must be shown that a prosecution is pending against a fugitive in the demanding state.[22]

In cases of international extradition, the fugitive must be charged with an extraditable crime, as provided in the various treaties.[23]

In interstate extradition the charge must consist of the commission of "treason, felony or other crime."[24] The term "crime," in this case embraces every act punishable by the law of the demanding state.[25] So it has been held that "misdemeanors" are included within the meaning of the term.[26]

III. MODE OF PROOF.

1. International Extradition — Basis of Extradition in General. The surrender of fugitives from justice is a matter of conventional arrangement between countries, and no such obligation is imposed by the laws of nations.[27] The United States government does not

a fugitive from justice constitutes embezzlement, it is not absolutely necessary to follow the words of the statute in charging an offense, if words of a similar import are used. *In re* Grin, 112 Fed. 790.

A requisition stating that a fugitive is charged with the crime of selling and furnishing intoxicating liquors contrary to the laws of another state, is sufficiently explicit in its description. *In re* Brown, 112 Mass. 409.

21. State *v.* Schlemn, 4 Har. (Del.) 577; *In re* Van Sciever, 42 Neb. 772, 60 N. W. 1037, 47 Am. St. Rep. 730; *In re* Fetter, 23 N. J. L. 311; *Ex parte* Swearingen, 13 S. C. 74; *In re* Greenough, 31 Vt. 279; *In re* Hooper, 52 Wis. 699, 58 N. W. 741.

22. *Ex parte* White, 49 Cal. 433; Smith *v.* State, 21 Neb. 552, 32 N. W. 594.

23. See note 1, *supra.*

24. See Const. of U. S., art. 4, ¶ 2.

25. *Ex parte* Kentucky *v.* Dennison, 24 How. (U. S.) 66; *In re* Brown, 112 Mass. 409; People *v.* Donohue, 84 N. Y. 411.

In the matter of Voorhees, 32 N. J. L. 141, it was held that the term "or other crime" as used in violation of law which is of an indictable nature.

26. *Ex parte* Kentucky *v.* Dennison, 24 How. (U. S.) 66; Morton *v.* Skinner, 48 Ind. 123; State *v.* Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388.

But *In re* Greenough, 31 Vt. 279, Bennett, J., held that the general term "or other crime" as used in the constitution should be limited by the words which preceded, so as to include only crimes of a similar genus to those which may be denominated felonies, and that the offense of obtaining goods by false pretenses comes under the definition.

27. *In re* Metzger, 5 How. (U. S.) 176.

But *In re* Washburn, 4 Johns. Ch. (N. Y.) 106, 8 Am. Dec. 548, Chancellor Kent expressed the following opinion: "It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes and fleeing from the country in which the crime was committed into a foreign and friendly jurisdiction. When a case of that kind occurs, it becomes the duty of a civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the government here to deliver him up or for the foreign government to make the requisite applica-

recognize extradition, unless under treaty stipulations.[28] The provisions of the United States Revised Statutes are to be applied in all cases in which there now exists or hereafter may exist any treaty for extradition.[29]

A. Evidence Introduced by a Foreign Government. — The evidence admissible in such proceedings is determined by the various treaties, and the statutory provisions of the United States.[30]

a. *Documentary Evidence.* — Documentary evidence introduced by the government demanding extradition is admissible when properly and legally authenticated so as to entitle it to be received in evidence in support of the same criminal charge,[31] or for similar purposes,[32] by the tribunals of the foreign country.

(1.) Authentication. — The mode of authentication of documents in international extradition proceedings as provided by the United States Revised Statutes[33] is not exclusive; it may be assisted by

tion to the proper authorities here for his surrender."

28. 6 Op. Atty.-Gen. 85; 6 Op. Atty.-Gen. 431; United States *v.* Davis, 2 Sum. 482, 25 Fed. Cas. No. 14,932; State *v.* Buzine, 4 Har. (Del.) 572; Matter of Fetter, 23 N. J. L. 311; Adriance *v.* Lagrave, 59 N. Y. 110; Com. *v.* Deacon, 10 Serg. & R. (Pa.) 125.

29. Castro *v.* De Uriarte, 16 Fed. 93. In this case it was held that as long as the provisions of a treaty and those of the United States Revised Statutes are not repugnant to each other, the government demanding extradition may at its option pursue either the proceeding by treaty or according to the statutes.

Under a treaty with Great Britain, art. 10 (8 Stat. at L. 576), the evidence of criminality must be such as, according to the law of the place where the fugitive is found would justify his apprehension and commitment. The competency of the evidence must be therefore wholly according to our common law, and this must be either according to such rules of evidence as congress may have prescribed, or, in the absence of such provisions, and in so far as they may be inapplicable, according to the rules of the common law. *In re* McPhun, 30 Fed. 57.

30. See notes 1 and 2, *supra.*

31. *In re* Henrich, 5 Blatchf. (U. S.) 414; *In re* Wadge, 16 Fed. 332; *In re* McPhun, 30 Fed. 57; *In re* Fowler, 4 Fed. 303.

32. *In re* Charleston, 34 Fed. 531.

Depositions taken in a foreign country, and authenticated in such manner as to entitle them to be received for similar purposes by the tribunals of that foreign country, are as competent in evidence as if the witnesses themselves were personally present testifying in this country. *In re* Farez, 7 Blatchf. (U. S.) 345.

A complaint in extradition proceedings upon which a warrant of arrest is asked need not be drawn up with the same formal precision and nicety of an indictment for final trial, but should set forth the substantial and material features of the offense. *In re* Henrich, 5 Blatchf. (U. S.) 414.

A simple complaint upon the "best knowledge, information and belief," is not sufficient proof to justify the arrest of a fugitive from justice. Such complaint must be made upon oath. *Ex parte* Lane, 6 Fed. 34.

A complaint in extradition proceedings may be made under oath charging crime covered by the respective extradition treaty before any officer authorized to administer an oath. *In re* Grin, 112 Fed. 790.

A document offered in evidence which is in a foreign language ought to be accompanied by an accurate translation, with an affidavit of the translator made before a United States commissioner, or a judge of the United States, that the same is correct. *In re* Henrich, 5 Blatchf. (U. S.) 414.

33. U. S. Rev. Stat., § 5271; an

other evidence.[34] Documents may be authenticated by oral proof.[35] While the certificate of a resident diplomatic or consular officer of the United States is an absolute proof of authenticity, oral proof, if in proper form, also serves to authenticate the foreign documents or depositions.[36]

act of August 3rd, 1882, ch. 378; 22 Stat. L. 215.

34. *In re* Henrich, 5 Blatchf. (U. S.) 414; *In re* Wadge, 16 Fed. 332; *In re* McPhun, 30 Fed. 57; *In re* Fowler, 4 Fed. 303; *In re* Benson, 34 Fed. 649.

When the affidavits upon which the requisition is founded are authenticated by the certificate of a royal judge to the effect that the judicial proceeding certified to "is valid evidence according to the laws existing in Prussia," such certificate is sufficient to prove that the documents are valid evidence of criminality as regards the crime charged in the proceedings. *In re* Behrendt, 22 Fed. 699.

By the common law rules of evidence, mere copies of *ex parte* depositions, taken before a foreign criminal magistrate, though attested by the clerk of his court, would not be competent evidence of criminality. The original depositions are only evidence tending to show criminality and the attested copies presented are only evidence of evidence. But if these copies of depositions are competent evidence of criminality as against the accused in any part of the British dominions, a certificate to that effect by the general consular officer is sufficient. *In re* McPhun, 30 Fed. 57.

Depositions may be certified and authenticated by vice-consuls of a foreign nation, the vice-consul being not a deputy, but an acting consul. *In re* Herres, 33 Fed. 165.

The certificate of a consul not designating the papers, but stating that they are annexed, is sufficient authentication of such papers. *In re* Dugan, 2 Lowell 367, 7 Fed. Cas. No. 4120.

35. *In re* Fowler, 5 Blatchf. (U. S.) 430; *In re* Wadge, 16 Fed. 332.

The authentication of the documentary evidence may be made by oral proof given in the country where the fugitive is found. As far as the verity or identity of original papers is concerned, there is nothing in the United States Statutes which necessarily excludes oral proof authenticating copies of documents, or oral proof as to what the law of the foreign country is as to such authentication, or oral proof that such oral authentication is according to the law of the foreign country. There is nothing in the statutes which makes the certificate of the United States diplomatic or consular officer the only competent proof that either the originals or the copies are authentic in the manner required by the statutes. Whether the originals are offered, or copies are offered, it must appear that the originals would be received in the tribunals of the foreign country as evidence of the criminality of the person in respect of the offense charged against him as committed there, if inquiry as to such criminality were being had in such foreign tribunals. Not only is the provision in that respect specific as to the originals, but provision in regard to copies is, twice, that they are to be copies of "such" originals, that is, copies of originals which would be received in the tribunals of the foreign country as such evidence. *In re* Fowler, 4 Fed. 303.

The signature of a police magistrate on a document in extradition proceedings may be verified by oral proof. *In re* Wadge, 15 Fed. 864.

In re Benson, 34 Fed. 649, the documentary evidence submitted was not accompanied by a certificate of the principal diplomatic or consular officer of the United States. It was held that authentication may be made by oral proof given in this country, and two lawyers who had been for a long time residents of Mexico were allowed to testify to the effect that the documents introduced in evidence were properly and legally authenticated.

36. *In re* Wadge, 16 Fed. 332.

b. *Parol Evidence.* — Parol evidence in behalf of the demanding government is admissible to show a foreign law as to authentication, and if the authentication of the documents offered in evidence was oral, to prove that such oral authentication was in accordance with the law of the foreign country.[37] The identity of the fugitive may also be established by parol evidence.[38]

B. Evidence Introduced by the Fugitive. — The fugitive may introduce evidence on his own behalf,[39] but there is no warrant for receiving testimony on his behalf by commission or by depositions of witnesses taken abroad.[40]

2. Interstate Extradition. — A. Documentary Evidence and Its Authentication. — Documents or copies thereof are admissible when properly authenticated.[41] Such authentication must consist of a certificate by the governor or chief magistrate of the demanding state from the justice of which the fugitive fled.[42] The state seal

37. *In re* Fowler, 4 Fed. 303; *In re* Benson, 34 Fed. 649. See also article "Foreign Laws."

38. See notes 3 and 4, *supra.*

39. *In re* Wadge, 15 Fed. 864; *In re* Kelley, 25 Fed. 268; *In re* Ross, 2 Bond 252, 20 Fed. Cas. No. 12,069; *In re* Farez, 7 Blatchf. (U. S.) 345; *In re* Henrich, 5 Blatchf. (U. S.) 414.

40. Oteiza y Cortez *v.* Jacobus, 136 U. S. 464; *In re* Wadge, 15 Fed. 864.

A fugitive is not entitled to an adjournment for the purpose of sending and obtaining evidence from abroad, but if he so desires he may be examined himself, or may have any witness examined whom he shall produce. *In re* Farez, 7 Blatchf. (U. S.) 345.

41. Roberts *v.* Reilly, 116 U. S. 80; *Ex parte* Morgan, 20 Fed. 298; Soloman's Case, 1 Abb. Pr., N. S. (N. Y.) 347; *Ex parte* Thornton, 9 Tex. 635.

42. U. S. Rev. Stat., ¶ 5278; *Ex parte* Morgan, 20 Fed. 298; *Ex parte* Dickson (Ind. Ter.), 69 S. W. 943; *Ex parte* Reggel, 114 U. S. 642; Hackney *v.* Welch, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

In *Ex parte* Pfitzer, 28 Ind. 450, a requisition from the governor of Illinois to the governor of Indiana, for the extradition of a fugitive from justice, certified that "The annexed papers, duly authenticated in accordance with the law of Illinois, show that by affidavit in the county of Montgomery in said state, Caroline Miller, *alias* Caroline Pfitzer, has been charged with larceny," etc., although no such affidavit was annexed to the requisition. It was held that a copy of affidavit must be produced before the governor of a state is authorized to act upon the requisition of the governor of another state.

When a requisition for the extradition of a fugitive certifies that the affidavit is "duly authenticated according to the laws" of the state demanding the surrender, such affidavit is held duly authenticated. *In re* Manchester, 5 Cal. 237.

The genuineness of a copy of an indictment is not to be ascertained by resort to any technical rule for ascertaining the fact, nor need the fact be made to appear in any set form of words, or even in the words of the statute requiring the authentication. All that can be required is that the language employed by the demanding governor in the requisition understood in its ordinary meaning, shows that the copy of the indictment upon which the requisition is made is genuine. *Ex parte* Sheldon, 34 Ohio St. 319.

In the matters of extradition, the certificate of the governor demanding extradition is made conclusive as to the verity of judicial acts necessary to authorize a demand. *Ex parte* Kentucky *v.* Dennison, 24 How. (U. S.) 66.

need not necessarily be affixed to the requisition papers, if they are otherwise correct.[43]

a. *Indictment.* — An indictment, if duly certified as authentic, is *prima facie* evidence of the criminal charge of the fugitive,[44] but a copy of an "information" attached to a requisition for the extradition of a fugitive from justice to another state cannot serve as a substitute for an indictment.[45]

b. *Affidavit.* — An affidavit is admissible when authenticated by the governor of the demanding state,[46] but an information cannot serve as a substitute for an affidavit.[47] An affidavit must be duly certified by the magistrate before whom it is made, but a complaint is not necessarily an affidavit, nor are they understood to be convertible terms.[48]

B. Other Evidence. — The printed statutes of the demanding state, purporting to be published by its authority, may be received to show that the act is a crime by the laws of that state.[49] The authorities seem to be undecided on the question whether other evidence than the papers submitted may be received to show the fact that the accused is a fugitive from justice.[50]

43. *In re* Baker, 21 Wash. 250, 57 Pac. 827.

44. *In re* Van Sciever, 42 Neb. 772, 60 N. W. 1037, 47 Am. St. Rep. 730; Matter of Fetter, 23 N. J. L. 311; but in the case of People *v.* Byrnes, 33 Hun (N. Y.) 98, the court held that an indictment properly authenticated and attached to a requisition was conclusive evidence as to the criminal charge alleged against the fugitive.

45. *Ex parte* Bain, 121 U. S. 1; *Ex parte* Hart, 63 Fed. 249; however, *In re* Hoper, 52 Wis. 699, 58 N. W. 741, it was held that under § 5278 of the U. S. Rev. Stat., requiring that a requisition shall be accompanied by a "copy of an indictment found or an affidavit made before a magistrate" of the state making the demand, the proof of the charge by an "information" is a sufficient compliance with the law of congress. The intent of the law was held to be that a charge must be made in a regular course of judicial proceedings in the form of an information filed by the proper law officer, an indictment or other accusation known to the law of the state in which the offense was committed.

An information to the effect that the person is guilty of crime or murder alleged to be committed in another state, containing no averment as to an indictment nor to the place, time and manner of the commission of a crime, is not competent evidence as to the charge against a fugitive from justice. State *v.* Hufford, 28 Iowa 391.

46. Soloman's Case, 1 Abb. Pr., N. S. (N. Y.) 347; *Ex parte* Hart, 63 Fed. 249; *Ex parte* Morgan, 20 Fed. 298; *In re* Rutter, 7 Abb. Pr., N. S. (N. Y.) 67.

47. *Ex parte* Hart, 63 Fed. 249.

48. State *v.* Richardson, 34 Minn. 115, 24 N. W. 354.

49. *Ex parte* Sheldon, 34 Ohio St. 319.

50. *In re* Cook, 49 Fed. 833; *In re* Kingsbury, 106 Mass. 223; *In re* Brown, 112 Mass. 409.

In the case of Swearingen, 13 S. C. 74, it was held that while the act of congress expressly prescribes the mode of proof by which the fact that the person demanded is charged with crime shall be established, it does not prescribe any mode by which the fact that he is a fugitive from justice shall be authenticated. It is, therefore, not essential that it should be proved by an affidavit certified to by the governor of the state making the demand as authentic. Indeed, the governor's authentication

of such an affidavit would have no force, as it is not the mode prescribed by law for the authentication of the records and judicial proceedings of another state, and the only reason why the governor's authentication of the indictment or affidavit showing that the person demanded is charged with crime is sufficient, is that it is expressly so provided by the act of congress. It follows, therefore, that if the fact that the person demanded as a fugitive from justice must be proved, it must be by some evidence other than that which would be furnished by an affidavit authenticated by the governor of the state making the demand.

FACTORS.—See Principal and Agent.

FALSE IMPRISONMENT.

CROSS-REFERENCES:

Damages;
Intent.

I. ARRESTS BY OFFICERS.

1. Questions of Law and Fact. — False imprisonment is a mixed question of law and fact. Whether there has, in fact, been an imprisonment is a question for the jury,[1] and whether the authority under which it was effected was lawful or not is a question of law, depending on the circumstances of each case.[2]

2. What Plaintiff Must Prove. — In order to establish the offense of false imprisonment, it is only necessary on behalf of the plaintiff to show the imprisonment. After this is done, the law presumes it unlawful until the contrary is shown,[3] and it is a settled rule that he need not prove malice, nor want of probable cause.[4]

1. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250.

2. **Question of Law When Evidence is Not Conflicting.** — Diers *v.* Mallon, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

3. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250; Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253; People *v.* McGrew, 77 Cal. 570, 20 Pac. 92; Kirbie *v.* State, 5 Tex. App. 60.

4. *Arkansas.* — Akin *v.* Newell, 32 Ark. 605.

Georgia. — Mitchell *v.* Malone, 77 Ga. 301.

Illinois. — Krebs *v.* Thomas, 12 Ill. App. 266.

Indiana. — Boaz *v.* Tate, 43 Ind. 60.

Michigan. — Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

Missouri. — Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

New York. — Olmstead *v.* Doland, 25 N. Y. St. 634, 6 N. Y. Supp. 130; Rosen *v.* Stein, 26 N. Y. St. 881, 7 N. Y. Supp. 368.

Pennsylvania. — Neall *v.* Hart, 115

3. Burden of Proof. — When the imprisonment has been established it devolves upon the defendant to prove that he was justified in what he did, or that the imprisonment was lawful;[5] but when the authority to do, or direct, an act is presumed, or shown *prima facie*, the burden is on the plaintiff to prove want of authority.[6]

4. Justification. — A. WARRANT. — The defendant may offer in justification the affidavit and original warrant, or the complaint on which the warrant was issued.[7] Evidence that the arrest was made

Pa. St. 347, 8 Atl. 628, 2 Am. St. Rep. 559.

Vermont.— Clow *v.* Wright, Brayt. 118.

5. *Arkansas.* — Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250; Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253.

California. — People *v.* McGrew, 77 Cal. 570, 20 Pac. 92.

Illinois. — Mexican C. R. Co. *v.* Gehr, 66 Ill. App. 173.

Kentucky. — Kindall *v.* Powers, 4 Metc. 553; Stone *v.* Dana, 5 Metc. 98.

New York. — Griswold *v.* Sedgwick, 1 Wend. 126; Phillips *v.* Trull, 11 Johns. 486.

North Carolina. — State *v.* James, 78 N. C. 455.

Tennessee. — McCully *v.* Malcolm, 9 Humph. 187.

Texas. — Kirbie *v.* State, 5 Tex. App. 60.

Vermont. — Wood *v.* Kinsman, 5 Vt. 588.

6. Wachsmuth *v.* Merchants' Natl. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278; Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423; Miller *v.* Adams, 52 N. Y. 409; Snow *v.* Weeks, 75 Me. 105; Scott *v.* Ely, 4 Wend. 555; Love *v.* Wood, 55 Mich. 451, 21 N. W. 887.

In an action of false imprisonment against an officer for taking plaintiff's body in execution, the burden is on plaintiff to show that he had sufficient property subject to the writ. Barhydt *v.* Valk, 12 Wend. (N. Y.) 145, 27 Am. Dec. 124.

7. *Arkansas.* — Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250; Trammell *v.* Russelville, 34 Ark. 105, 36 Am. Rep. 1.

Illinois. — Gay *v.* DeWerff, 17 Ill. App. 417; Stomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786; Johnson *v.* Von Kettler, 66 Ill. 63; Resseler *v.* Peats, 86 Ill. 275.

Indiana. — Boaz *v.* Tate, 43 Ind. 60; Paterson *v.* Prior, 18 Ind. 440, 81 Am. Dec. 367.

Kentucky. — Wilmarth *v.* Burt, 7 Metc. 257; Donahoe *v.* Shed, 8 Metc. 326.

Louisiana. — Herzog *v.* Graham, 9 La. 152.

Maine. — Chase *v.* Fiske, 16 Me. 132.

Maryland. — Blake *v.* Burke, 42 Md. 45.

Massachusetts. — Stone *v.* Dana, 46 Mass. 98; Mason *v.* Lothrop, 73 Mass. 354.

Michigan. — Wheaton *v.* Beecher, 49 Mich. 348, 13 N. W. 769.

New Hampshire. — State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188.

New York. — Sleight *v.* Ogle, 4 E. D. Smith 445; Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181; Parker *v.* Walrod, 16 Wend. 514, 30 Am. Dec. 124.

Pennsylvania. — Allison *v.* Rheam, 3 Serg. & R. 137, 8 Am. Dec. 644.

Utah. — Clinton *v.* Nelson, 2 Utah 284.

Wisconsin. — Gelzenleuchter *v.* Niemeyer, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616.

When a court has jurisdiction it is sufficient to justify the officer executing its process, and he is not bound to examine into the validity of its proceeding or regularity of its process. Warner *v.* Shed, 10 Johns. (N. Y.) 137.

Arresting Wrong Person, Justifying on the Writ. — Rule at Common Law. — Mead *v.* Haws, 7 Cow. (N. Y.) 332; Miller *v.* Foley, 28 Barb. (N. Y.) 630; Scott *v.* Ely, 4 Wend. (N. Y.) 555; Griswold *v.* Sedgwick, 1 Wend. (N. Y.) 126; McMahan *v.* Green, 34 Vt. 69.

Contents of Warrant Cannot Be Proven. — If defendant justifies under a warrant it must be offered in

under the direction of a superior officer is no protection.[8]

B. Probable Cause. — To sustain a justification for arrest and imprisonment a peace officer or others acting officially may show probable cause and reasonable grounds for believing the party guilty

evidence; its contents cannot be proven. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250.

Defendant Must Produce a Warrant, Valid and Legal on Its Face. Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253.

Officer making the arrest must show that he has complied with the command of the warrant, or show some legal reason for not doing so. Tubbs *v.* Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; Brock *v.* Stimson, 108 Mass. 521.

Parol Evidence is inadmissible on part of defendant, in justification of his proceedings, to show that plaintiff, after failing to procure sureties, waived and withdrew his appeal. Kendall *v.* Powers, 45 Mass. 553.

Verdict of a Jury is Inadmissible to Show Justification. — Brant *v.* Higgins, 10 Mo. 728.

Copy of Indictment Found Against the Plaintiff is inadmissible without offering the whole of the proceedings as evidence. McCully *v.* Malcolm, 9 Humph. (Tenn.) 187.

Irregularity or Illegality in Issuing Process Immaterial. — Gordon *v.* Clifford, 28 N. H. 402; Underwood *v.* Robinson, 106 Mass. 296.

A void warrant is no justification in an action for false imprisonment. Elwell *v.* Reynolds, 6 Kan. App. 545, 51 Pac. 578; Painter *v.* Ives, 4 Neb. 122.

Depositions relating to the warrant and to the proceedings of the defendant admissible. Rogers *v.* Wilson, Minor (Ala.) 407, 21 Am. Dec. 61.

Criminal Process, regular and legal upon its face, will protect an officer. State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188; Wall *v.* Trumball, 16 Mich. 234.

Voidable Authority. — When authority under which arrest was made is voidable only, the officer may justify under it. Batchelder *v.* Curier, 45 N. H. 463.

Process from De Facto Court Will Protect an Officer. — Wilcox *v.* Smith, 5 Wend. (N. Y.) 231; Laver *v.* McGlachlin, 28 Wis. 364; Reynolds *v.* Moore, 9 Wend. (N. Y.) 35.

Order of Legislative Body. — A warrant of arrest issued by the speaker of the house is a sufficient justification. Wilckens *v.* Willet, 1 Keyes (N. Y.) 521.

Order of Court. — All facts necessary to give jurisdiction to the court must be shown where a person seeks to justify under an order of court. Von Kettler *v.* Johnson, 57 Ill. 109; Com. *v.* Wright, 158 Mass. 149, 33 N. E. 82, 35 Am. St. Rep. 475; Pinkerton *v.* Verberg, 78 Mich. 573, 44 N. W. 579, 18 Am. St. Rep. 473; Ross *v.* Leggett, 61 Mich. 445, 28 N. W. 692, 1 Am. St. Rep. 608.

Officers are Protected for Arrests for breaches of peace and misdemeanors committed in their presence. People *v.* Johnson, 86 Mich. 175, 48 N. W. 870, 24 Am. St. Rep. 116, 13 L. R. A. 163; Veneman *v.* Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; State *v.* Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; Martin *v.* State, 89 Ala. 115, 8 So. 28, 18 Am. St. Rep. 91.

8. Arteaga *v.* Conner, 88 N. Y. 403; Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635; Josselyn *v.* McAllister, 22 Mich. 300; Johnson *v.* Maxon, 23 Mich. 129; Barnes *v.* Viall, 6 Fed. 661.

Superior Officer Liable. — Elwell *v.* Reynolds, 6 Kan. App. 545, 51 Pac. 578.

Military Order, if Illegal, is no defense to subordinate who executes it. Nadenbousch *v.* Sharer, 4 W. Va. 203; Caperton *v.* Ballard, 4 W. Va. 420; Dynes *v.* Hoover, 20 How. (U. S.) 65; Tyler *v.* Pomeroy, 8 Allen (Mass.) 480; Mallory *v.* Merritt, 17 Conn. 178.

of a felony.[9] In all such cases, where the facts are not disputed, the question of probable cause is one of law for the court.[10]

Information of Third Person. — An officer arresting without a warrant, but on information of another upon whom he has reason to rely, will be justified, although no felony has, in fact, been committed. But the rule is that he should not receive every idle rumor, and should make as diligent inquiry as to the truth of the charge as the circumstances will permit before he makes an arrest.[11]

II. ARRESTS BY PRIVATE PERSONS.

1. Generally. — There can be no justification and no defense to an action for an arrest without a warrant by a private person, unless

9. Probable Cause.

Illinois. — Sughton *v.* Hall, 31 Ill. 108, 83 Am. Dec. 205.

Massachusetts. — Rohan *v.* Sawin, 5 Cush. 281.

Michigan. — Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266; Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

Missouri. — Roberts *v.* State, 14 Mo. 138, 55 Am. Dec. 97.

Nebraska. — Diers *v.* Mallon, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

North Carolina. — Brockway *v.* Crawford, 48 N. C. 433, 67 Am. Dec. 250.

Rhode Island. — Wade *v.* Chaffee, 8 R. I. 224, 5 Am. Rep. 572.

Tennessee. — Eaves *v.* State, 6 Humph. 53, 44 Am. Dec. 289.

The burden of proving want of probable cause is upon the plaintiff. Warren *v.* Dennett, 17 Misc. 86, 39 N. Y. Supp. 830.

Mere belief is no defense; there must be probable cause for the belief. Winebiddle *v.* Porterfield, 9 Pa. St. 137.

Statements Made to a Justice by a prosecutor, and which induced the justice to issue the warrant for arrest, are admissible in an action of false imprisonment to show probable cause. Neall *v.* Hart, 115 Pa. St. 347, 8 Atl. 628, 2 Am. St. Rep. 559.

Evidence that parties were on friendly terms is incompetent to show want of probable cause. Diers *v.* Mallon, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

Evidence that plaintiff's brother, who was arrested with plaintiff, was ill at the time is admissible to show want of probable cause.. Fitzpatrick *v.* New York El. Co., 53 Hun 629, 5 N. Y. Supp. 685.

Evidence as to what judge who presided at the criminal trial said in submitting case to the jury is inadmissible to show want of probable cause. Grohamann *v.* Kirchman, 168 Pa. St. 189, 32 Atl. 32.

10. Question of Law.

California. — Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; People *v.* Kilvington, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73.

Michigan. — White *v.* McQueen, 96 Mich. 249, 55 N. W. 843.

New York. — Pangburn *v.* Bull, 1 Wend. 345; Burns *v.* Erben, 40 N. Y. 463; Hawley *v.* Butler, 54 Barb. 490.

Pennsylvania. — McCarthy *v.* De Armitt, 99 Pa. St. 63.

Vermont. — Driggs *v.* Burton, 44 Vt. 124.

When Evidence is Conflicting, is a Question for the Jury.

Massachusetts. — Mitchell *v.* Wall, 111 Mass. 492.

Michigan. — Livingston *v.* Burroughs, 33 Mich. 511.

Missouri. — Brant *v.* Higgins, 10 Mo. 728.

New York. — Shea *v.* Manhattan R. Co., 27 N. Y. St. 33, 7 N. Y. Supp. 497; Newman *v.* New York El. R. Co., 54 Hun 335, 7 N. Y. Supp. 560; Perry *v.* Sutley, 63 Hun 636, 18 N. Y. Supp. 633; Neil *v.* Thorn, 17 Hun 144.

11. Information of Third Person. Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Farnan *v.* Feeley, 56 N. Y. 451; Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; White *v.* McQueen, 96 Mich. 249, 55 N. W. 843.

it first be shown that a felony has been actually committed and there were reasonable grounds to believe that the person arrested was the felon.[12] The burden is upon the defendant to show, when sued for arrest, that the circumstances justified the suspicion, and if this is made to appear, he is not liable, although the accused was, in fact, innocent.[13]

2. Party Aiding Officer. — It is a good defense to an action of false imprisonment that the party was commanded to make, or assist the officer in making, the arrest, except where the original act of the officer was unlawful.[14]

12. Arrest by Private Person.

Illinois. — Ryan *v.* Donnelly, 71 Ill. 100.

Indiana. — Teagardin *v.* Graham, 31 Ind. 422.

Iowa. — Allen *v.* Leonard, 28 Iowa 529.

Michigan. — Maliniemi *v.* Gronlund, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576.

New Jersey. — Reuck *v.* McGregor, 32 N. J. L. 70.

New York. — Holley *v.* Mix, 3 Wend. 350, 20 Am. Dec. 702; Bracket *v.* Eastman, 17 Wend. 32; Burns *v.* Erbin, 40 N. Y. 463; Fagnan *v.* Knox, 66 N. Y. 528; Carl *v.* Ayers, 53 N. Y. 14; Farnam *v.* Feeley, 56 N. Y. 451.

North Carolina. — Brockway *v.* Crawford, 48 N. C. 433, 67 Am. Dec. 250.

13. Burns *v.* Erbin, 40 N. Y. 463.

14. Main *v.* McCarthy, 15 Ill. 442; McMahan *v.* Green, 34 Vt. 69; Hooker *v.* Smith, 19 Vt. 151; Roth *v.* Smith, 41 Ill. 314.

Party Volunteering. — Kirbie *v.* State, 5 Tex. App. 60.

FALSE PERSONATION.

By Marion G. Evans.

CROSS-REFERENCES:

False Pretenses; Forgery;
Larceny;
Rape.

I. PRESUMPTION AND BURDEN OF PROOF.

The defendant is entitled to the presumption that in the act upon which the indictment was found he was not falsely personating anyone; and the burden is upon the prosecution to show beyond a reasonable doubt every essential allegation in the indictment.[1] But if defendant sets up an independent exculpatory fact he must prove it, and the burden is upon him to do so; still, upon the whole case, after all the evidence is in, the burden rests upon the prosecution to establish the guilt of defendant beyond a reasonable doubt.[2]

II. WHAT MUST BE PROVED.

1. State and Federal Statutes. — There are statutes on the offense of false personation in practically all the states which must be examined as constituting the basis of the law of evidence as regards that offense in any particular state. See also the several federal statutes.

1. United States *v.* Searcey, 26 Fed. 435; Com. *v.* Kimball, 24 Pick. (Mass.) 366; Wharton *v.* State, 73 Ala. 366; Dubose *v.* State, 10 Tex. 230; Com. *v.* Eddy, 7 Gray (Mass.) 583; Alexander *v.* People, 96 Ill. 96; Grise *v.* State, 37 Ark. 456; People *v.* Bodine, 1 Denio (N. Y.) 281; State *v.* Tibbetts, 35 Me. 81; State *v.* Jones, 5 N. H. 369; People *v.* Cheong Foon Ark, 61 Cal. 527.

2. Dubose *v.* State, 10 Tex. App. 230; Jones *v.* State, 18 Tex. App. 485; Hawthorne *v.* State, 58 Miss. 778; People *v.* Marshall, 59 Cal. 386; State *v.* Payne, 86 N. C. 609.

2. Personation Must be Proved as Alleged. — The allegation of false personation in the indictment is descriptive of the offense, and must be proved as alleged.[3] The proof must show the acts necessary under the statute to convict;[4] such as that defendant personated "pensioners, soldiers or sailors,"[5] or a holder of a public fund, or a stockholder of a corporation.[6]

3. That One Personated Was a Real Person. — It must appear from the evidence that the one personated was a real person; and it must also appear that said person was *prima facie* entitled to the thing sought to be procured.[7] If it be proved that the one personated was a real person, but dead at the time of the act of false personation, it is sufficient.[8] But not so in case a voter is falsely personated.[9]

4. Thing Obtained Must be Valuable. — In some states it must be shown that the thing obtained by the false personation was a valuable thing;[10] or that the act of false personation subjected

3. Kirtley *v.* State, 38 Ark. 543. Where the indictment charged false personation of another and by means of such false personation obtaining money, and the proof showed that two were acting in concert and one of them personated the assumed party with the assent and concurrence of the other, it was held that the proof would not sustain the charge of false personation by the latter. Jackson *v.* State, 106 Ala. 12, 17 So. 333.

4. Goodson *v.* State, 29 Fla. 511, 10 So. 738; Jones *v.* State, 22 Fla. 532; State *v.* Miller, 3 Mo. App. 584.

5. Rex *v.* Tannet, Russ & R. 351; McAnnelly's Case, 2 East P. C., ch. 20, § 4, p. 1009; Brown's Case, 2 East P. C., ch. 20, § 4, p. 1007.

6. Rex *v.* Parr, 1 Leach 434, 2 East P. C., ch. 20, p. 1005.

7. Under the English statute (28 and 29 Vict., ch. 124, § 8; 2 Will. IV, ch. 53, § 49) making it a felony for a person to falsely personate an officer, soldier, sailor, or one entitled to prize money, pension or bounty, it has been held that in order to make out the offense the proof must show that the one whose name and character were assumed was a real person and was *prima facie* entitled to receive the prize money, pension or bounty sought to be procured. Rex *v.* Tannet, Russ & R. 351; McAnnelly's Case, 2 East P. C., ch. 20, § 4, p. 1009; Brown's Case, 2 East P. C., ch. 20, § 4, p. 1007.

8. Russ *v.* Martin, Russ & R. 324; Rex *v.* Cramp, Russ & R. 327.

9. Under a statute making it unlawful falsely to personate "any person entitled to vote at such election," the evidence must show that the voter sought to be personated was alive at the time of the act of personation. If he were dead, the court say, he would not be a person entitled to vote. Whitely *v.* Chappell, 11 Cox C. C. 307.

10. People *v.* Stetson, 4 Barb. (N. Y.) 151. And a month's lodging is a valuable thing. United States *v.* Ballard, 118 Fed. 757. In that case the indictment was under the statute (1 Supp. Rev. St., p. 425) which provides that "every person who with intent to defraud . . . falsely assumes . . . to be an officer or employe acting under the authority of the United States," and in such pretended character demands or obtains "any money . . . or other valuable thing, shall be deemed guilty," etc. The evidence showed that defendant obtained a valuable thing by means of the fraudulent standing or credit secured by holding himself out as an officer. It was held that a month's lodging, which was the thing obtained by defendant, was a valuable thing and sufficient to sustain the indictment; and it was held further that it was not necessary in order to sustain the indictment to prove that defendant both demanded "and" obtained a valuable thing.

the one personated to some liability, or affected his right or interest;[11] but the thing obtained need not be shown to be of any particular value.[12]

5. The Intent. — In some states it must appear from the evidence that there was an intent on defendant's part to convert to his own use the property received by the act of false personation.[13]

6. Other Matters. — It has been held under one statute that the evidence must show that defendant both assumed to be another and undertook to act as such.[14] It is held in some jurisdictions that the evidence must not only disclose the fact that defendant falsely personated an officer of the law, but it must appear further that some particular person was personated by defendant.[15]

11. Edgar *v.* State, 96 Tenn. 690, 36 S. W. 379. In this case, under a statute (Shannon's Code, § 6731) making it an offense for one to personate another in any judicial proceeding "whereby the person so personated may be made liable for the payment of any debt, etc., or his right or interest in any way affected," Edgar was indicted for falsely personating one Davidson and accepting service of process in a divorce suit in which Davidson was defendant. The evidence showed that Edgar intentionally accepted service of process issued for Davidson, but showed further that after a few weeks the court discovered the fraud on its jurisdiction and dismissed the divorce suit. Edgar was found guilty by the jury, and a motion in arrest of judgment was made, on the ground that the evidence did not disclose how the judgment in the divorce suit could prejudice "any interest" of Davidson, since the defective service on Edgar would have made the divorce decree void. It was held that the evidence was sufficient. The court say: "It may be conceded that the decree would be void, so that in any collateral proceeding the husband might show this, yet it does not follow that it would nowise affect him. Upon its face it would be a good decree. The court in which the suit was brought had jurisdiction over divorce causes, the petition contained all proper jurisdictional averments, and the process upon the case of the officer's return was served upon the right defendant. We think the trial judge was right in his construction of the statute, and that the verdict of the jury was fully warranted by the evidence."

12. People *v.* Stetson, 4 Barb. (N. Y.) 151.

13. Jones *v.* State, 22 Fla. 532; Goodson *v.* State, 29 Fla. 511, 10 So. 738; United States *v.* Bradford, 53 Fed. 542.

14. Com. *v.* Wolcott, 10 Cush. (Mass.) 61.

In re Coffin, 6 Me. 281, the indictment was found under the following statute: "Be it enacted that if any person, not being really and *bona fide* a sheriff, deputy sheriff or constable, shall pretend himself to be either of said officers, and take upon himself to act as such, or to require any person or persons to aid or assist him in any matter appertaining to the duty of sheriff," etc. The court say: "To subject a person to the penalties of the above provision he must do both the acts specified; he must pretend himself to be a sheriff, and assume to act as such."

Under How. Ann. St. (Michigan), § 9252, making it a criminal offense for any person to falsely pretend to be a justice of the peace, sheriff, constable, or coroner, or falsely take upon himself to act or officiate in any office or place of authority, a conviction cannot be had on an information charging defendant with assuming to be a member of the metropolitan police force of Detriot, without alleging that he undertook to act as such. People *v.* Cronin, 80 Mich. 646, 45 N. W. 479.

15. People *v.* Knox, 119 Cal. 73, 51 Pac. 19.

III. SUFFICIENCY OF EVIDENCE.

The evidence must be sufficient to make out each separate essential element of the offense. The holding one's self out as another,[16] or the signing of another's name[17] is not sufficient. That one assented to or concurred in the false personation is not sufficient.[18] But it is sufficient if one falsely represents himself to be another and acts as such without *saying* he is that other.[19] It may be necessary to prove that defendant falsely represented himself as another to some specified person or his agent.[20] The words of defendant uttered at the time of the alleged act of false personation upon which the indictment was found are admissible, and with other circumstances may make out sufficient evidence to convict.[21] It is sufficient if a warrant was obtained by falsely personating an officer, and it is not necessary to show that said warrant was presented for payment, or cashed.[22]

It was said in James *v.* State, 22 Fla. 532, that the relations existing between the party defrauded and the party personated, by virtue of which the latter might demand or expect to receive the property, should be in evidence. Unless such right be made to appear, the indictment for false personation cannot be sustained.

16. The mere holding one's self out as a private detective, while admissible as evidence to show that defendant was so acting, does not of itself constitute the offense of false personation. State *v.* Bennett, 102 Mo. 356, 14 S. W. 865.

17. The signing of a physician's name to a certificate is not sufficient evidence that defendant "assumed to be" that physician. People *v.* Maurin, 77 Cal. 436, 19 Pac. 832.

18. Proof that two were acting in concert, and one of them personated the assumed party with the assent and concurrence of the other, will not sustain the charge of false personation by the latter. Jackson *v.* State, 106 Ala. 12, 17 So. 333.

19. An indictment which charges that defendant falsely represented that he was one B is sustained by evidence that defendant, by false actions, induced the defrauded party to believe that he was B. It was not necessary to prove that defendant said his name was B. State *v.* Goble, 60 Iowa 447, 15 N. W. 272.

20. Under act of Congress approved April 18, 1884, making it a felony to falsely pretend to be an officer or employe of the United States, with intent to defraud the United States or any person, where an indictment charges such false personation in order to defraud the United States or a certain railroad company, it must be shown, to authorize a conviction, that defendant, to consummate his fraudulent intent, so falsely represented himself to some agent of the government, or to some agent of the railroad company. United States *v.* Bradford, 53 Fed. 542.

21. Com. *v.* Connolly, 97 Mass. 591.

So defendant's assertion made at the time of the act upon which the indictment was found, that he was the person falsely personated, is admissible. But the act may be shown in other ways and without defendant's statement. State *v.* Goble, 60 Iowa 447, 15 N. W. 272.

Proof that the defendant demanded admittance to a house, stating that he was a constable, when in fact he was not one, and that he searched the house after being so admitted, is sufficient to convict under an indictment charging that he falsely pretended to be a deputy constable of the commonwealth. Com. *v.* Connolly, 97 Mass. 591.

22. Under a statute (33 and 34 Vict., ch. 58; 24 and 25 Vict., ch. 98) in England making it an offense

falsely to personate a holder of a public fund, or a stockholder of a corporation, with the intent thereby to obtain dividends or other money due the person falsely personated, it was held that if the evidence showed that the defendant by false personation obtained a warrant for money, the crime was made out even if the proof further showed that no steps were taken by defendant to have said warrant paid. Rex *v.* Parr, 1 Leach 434; 2 East P. C., ch. 20, p. 1005.

FALSE PRETENSES.

By Clark Ross Mahan.

CROSS-REFERENCES:

Corpus Delicti; Confessions;
Intent;
Larceny.

I. FRAUDULENT INTENT, KNOWLEDGE, ETC.

1. Presumptions and Burden of Proof. — On a prosecution for obtaining money or property by false pretenses, an intent on the part of the defendant to defraud is the gist of the offense, and the prosecution has the burden of establishing it beyond a reasonable doubt.[1] And there is authority in support of the proposition that such fraudulent intent cannot be inferred from the act itself when proved.[2]

2. Mode of Proof. — A. Direct Evidence. — The defendant is a competent witness to testify in his own behalf that there was in fact no such intent.[3]

B. Indirect Evidence. — a. *In General.* — All the circumstances

1. *California.* — People *v.* Jordan, 66 Cal. 10, 4 Pac. 773; People *v.* Martin, 102 Cal. 558, 36 Pac. 952.

Florida. — Edwards *v.* State (Fla.), 33 So. 853.

Kansas. — State *v.* Metsch, 37 Kan. 222, 15 Pac. 251.

Missouri. — State *v.* Dennis, 80 Mo. 589; State *v.* Myers, 82 Mo. 558, 52 Am. Dec. 389.

New York. — People *v.* Shulman, 80 N. Y. 375.

Texas. — Popinaux *v.* State, 12 Tex. App. 140; Hornbeck *v.* State, 10 Tex. App. 408; Porter *v.* State, 23 Tex. App. 295, 4 S. W. 889; Morrison *v.* State, 17 Tex. App. 34; Hernandez *v.* State, 20 Tex. App. 151; Sherwood *v.* State, 42 Tex. 498.

In People *v.* Getchell, 6 Mich. 496, which was a prosecution for procuring by falsehood the endorsement of a promissory note, the court, in ruling as to the burden of proving intent, said: "The simple fact of procuring, by falsehood, the endorsement, was not an offense within the statute; it must have been procured with the intent to defraud, and where an intent is made the gist of an offense, that intent must be shown by such evidence as, uncontradicted, will fairly authorize it to be presumed beyond a reasonable doubt. It is true that a man is presumed to intend the natural consequences of his acts, but, under this statute, it is not the consequence, but the intention, which fixes the crime. There are no *natural* consequences, strictly speaking, to this act. It is itself an indifferent act, as the consequences will depend upon what he does with the paper, and this will depend upon his will — in other words, his intent. It was, therefore, necessary for the prosecutor to show something more than the application, the falsehood, and the endorsement, before he could ask a conviction; he should have shown those facts which, in the absence of all other proof, would warrant the jury in finding an intent to defraud, unless such intent is fairly to be inferred from the circumstances attending the act itself." State *v.* Neimeir, 66 Iowa 634, 24 N. W. 247.

Contract to Perform Labor. — In Alabama a statute makes it an offense for any one with intent to defraud or injure his employer to enter into a contract in writing for the performance of labor and thereby obtain money or other property, and with like intent and without just cause and without refunding the money or paying for the property to refuse to perform such labor. And in Dorsey *v.* State, 111 Ala. 40, 20 So. 629, a prosecution under this statute, it was held that in order to establish the offense charged the prosecution must show that the defendant entered into the contract with intent to defraud or injure the employer, and also that he refused to perform the labor with intent to injure or defraud the employer, and without just cause and without refunding the money.

2. State *v.* Myers, 82 Mo. 558, 52 Am. Dec. 389, *quoting* with approval from Trogdon *v.* Com., 31 Gratt. (Va.) 862.

3. Babcock *v.* People, 15 Hun (N. Y.) 347.

occurring at the time of, and surrounding, the transaction in question are matters proper to be shown for the consideration of the jury.[4]

Wide Latitude of Inquiry. — Great latitude has been allowed in the reception of evidence bearing upon this issue.[5]

b. *Statements and Representations.* — It is proper to permit evidence of statements or representations made by the defendant at the time he got the money or property.[6] But evidence of such statements or representations made at a time so remote as to throw no light on the question of fraudulent intent is not relevant.[7]

Conspirators. — The general rule permitting evidence of acts and declarations of a co-conspirator, even though in the absence of the other, and when made during the existence and in furtherance of the common design, has been applied to evidence of such acts or declarations by one of several persons charged with cheating by

4. People *v.* Gibbs, 98 Cal. 661, 33 Pac. 630. See also State *v.* Miller, 49 Mo. 505; State *v.* Moats, 108 Iowa 13, 78 N. W. 701.

On a prosecution for cheating by false pretenses by representing that a bill of an insolvent bank was worth and was passing at its nominal value, evidence of the depreciated value of the bills of that bank in the market, connected with evidence that the bank had refused to pay its bills and that they were not passable as current bills, is competent to prove that the bill passed by the defendant was not worth its nominal value, and also to prove his fraudulent intent in passing it. Com. *v.* Stone, 4 Metc. (Mass.) 43; People *v.* Cook, 41 Hun (N. Y.) 67.

Res Gestae. — Britt *v.* State, 9 Humph (Tenn.) 31; State *v.* Dexter, 115 Iowa 678, 87 N. W. 417.

Attempting to Ward Off Threatened Prosecution. — Newberry *v.* State (Tex. Crim.), 22 S. W. 1041; White *v.* State, 86 Ala. 69, 5 So. 674.

Although conversion of property is not proof of an original felonious design in obtaining the possession of it by false pretenses, yet such conversion is a circumstance which, in connection with other facts, may be considered by the jury in determining the intent with which the possession was obtained. Long *v.* State, 1 Swan (Tenn.) 287.

5. Trogdon *v.* Com., 31 Gratt. (Va.) 862; McGee *v.* State, 117 Ala. 229, 23 So. 797; State *v.* Garris, 98 N. C. 733, 4 S. E. 633.

Proofs of Loss. — Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728, which was a prosecution for attempting to obtain money by false pretenses by taking out insurance on certain personal property belonging to the defendant, and afterwards attempting to obtain payment for its alleged loss by fire.

In People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298, where the defendant was being prosecuted for obtaining money on certain false representations as to his ownership and possession of certain realty, it was held that for the purpose of showing that at the time of the transaction the defendant knew of the worthlessness of his title to the property to which he pretended to have a good title, and which he was conveying to the prosecuting witness, the judgment-roll in a former civil action against the defendant in which the worthlessness of the defendant's title had been adjudged was competent evidence.

6. Meek *v.* State, 117 Ala. 116, 23 So. 155.

7. Statements Six Months After. In State *v.* Church, 43 Conn. 471, the court said: "The declarations made by the accused at the time of the transaction are claimed to have been false, and that by means of them he obtained the property in question. Declarations made by him six months afterward, variant from those, and also variant from the truth, have a direct bearing on his character for veracity. Beyond that, we do not think the testimony throws any light on the intent of the ac-

false pretenses as conspirators.[8] But, as in other cases, the fact of the combination must be established.[9]

c. *Acts and Statements Indicating Preparation.* — The prosecution is not restricted to the exact transaction as it took place between the prosecutor and the accused, but may give evidence of acts or statements showing the steps preliminary thereto when tending to show the intent.[10]

d. *Prior and Subsequent Transactions Between Parties.* — Where the transactions out of which the prosecution grew were of a complicated nature, it is competent for the defendant to show the course of dealing between himself and the prosecuting witness, both before and after the date of the alleged crime.[11]

cused at the time the acts charged were done. Evidence that the general reputation of the accused was bad for veracity would clearly be inadmissible, and so we think must be this testimony, that he told a particular falsehood. A specific charge of crime cannot be sustained by evidence of a bad reputation generally, nor by evidence of the commission of some other act of a criminal character. The effect of such testimony is to create an unfavorable impression, as to one charged with crime, in the minds of the triers. As bearing on the guilt of a party on trial for a specific offense, we think such an impression, so produced, is illegitimate and unwarranted."

8. State *v.* Montgomery, 56 Iowa 195, 9 N. W. 120. See also State *v.* Davis, 56 Iowa 202, 9 N. W. 123.

9. Jones *v.* Com., 2 Duv. (Ky.) 554.

10. People *v.* Winslow, 39 Mich. 505, where the court said: "The preparation for the crime is often more significant in demonstrating the intent than are the circumstances in which the prosecutor has been an actor; and the transaction appears innocent until the preparation is exposed which led to it." See also People *v.* Shelters, 99 Mich. 333, 58 N. W. 362, a prosecution against the supreme secretary of a mutual benefit society for obtaining money under false pretenses in that he induced the prosecuting witness to become a member of the society and to pay for a certificate of insurance by falsely representing that the society had a reserve fund secured for the indemnity of its members, and it was held that a circular issued on behalf of the society signed by the defendant and reciting that the society had a large and increased reserve fund was competent evidence against the defendant as being well calculated to deceive those who were being solicited to insure therein when in fact the society had no reserve fund.

Statements Showing Preparation. In State *v.* Wilson, 72 Minn. 522, 75 N. W. 715, which was a prosecution of several defendants for obtaining money under false pretenses, it was held proper to permit a witness to testify to a conversation overheard by him between the defendants which, for aught appeared to the contrary, was immediately preceding the commission of the offense charged, in which one of them said to the other two, "Go out and get a guy." The court, in holding the testimony admissible, said that the conversation was not a statement or admission by the declarant in the absence of the others, but one made in their presence and addressed to them in the course of a conversation among the three; that "it tended to prove that the three, whoever the third might have been, were engaged in the business of swindling green or unsophisticated persons, called in their vernacular 'guys.'"

11. State *v.* Rivers, 58 Iowa 102, 12 N. W. 117, where the court said: "Cases of this kind should be sifted to the bottom, and when a party appears to have obtained property by means of pretenses which are knowingly false, he should surely be punished. On the other hand, nothing

e. *Subsequent Disposition of Property.* — Again, for the purpose of showing the defendant's intent it is proper to receive evidence as to his conduct after receiving the property, in disposing of it, and appropriating to himself the proceeds.[12]

f. *Insolvency of Defendant.* — Evidence that at the time of making the alleged false representations the defendant was deeply insolvent is competent against him on the question of fraudulent intent.[13]

g. *Other Similar Acts.* — Evidence that the defendant had practiced other similar frauds on the same or other persons, at or about the same time as the fraud in question, may be received,[14]

which tends to show that a creditor is using the criminal law to enforce the collection of a debt should be suppressed or kept from the consideration of the jury."

12. State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720.

In State *v.* Luxton, 65 N. J. L. 605, 48 Atl. 535, *affirming* 46 Atl. 1101, where the defendant was being prosecuted for obtaining a payment on a contract to sell land to the prosecuting witness by means of certain false pretenses, it was held that evidence that subsequent to making the contract to sell, the defendant conveyed the land in question to a third person, was competent evidence as bearing on the question of the defendant's intent to defraud the prosecuting witness. The court said: "If such a conveyance had been made immediately after the execution of the contract and receipt of part of the price, the inference of an intent to defraud existing when the money was received would have been very strong. Of course the probability of such an inference would become weaker as more time intervened; but we cannot say, as matter of law, that the lapse of six months would destroy it."

13. Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712, where the court in so ruling said: "The inability of the person making the false pretense to pay for the goods which he has received becomes a significant circumstance bearing on his intent, and tends to show that the pretense, which otherwise would be innocent or harmless, was made for the purpose of accomplishing a fraud. The insolvency of the party has a direct tendency to show the intent with which the false pretense was used. Indeed, it is evidence of a most stringent and satisfactory character. The law presumes that every man intends the natural and necessary consequence of his acts. If a person by means of falsehood, under the guise of a purchase either for himself or a third person, obtains the property of another, which he converts to his own use, it is clear that whether the possession thus given is a responsible or irresponsible possession — that is, a possession which will subject the owner to a loss of the value of his property, or one that leaves him secure for its price — becomes a vital question in determining the intent of the party in obtaining the property."

To the same effect, Com. *v.* Drew, 153 Mass. 588, 27 N. E. 593, a prosecution for fraudulently obtaining goods under the false color and pretense of carrying on business, and dealing in the ordinary course of trade, wherein it appeared that soon after the purchase in question the defendant went into insolvency, filing a schedule showing a large indebtedness, it was held competent to receive in evidence against him such schedule as confirmatory evidence of his fraudulent purpose.

14. *England.* — Reg. *v.* Ollis (1900), 2 Q. B. 758; Reg. *v.* Rhodes (1899), 1 Q. B. 77.

Indiana. — Strong *v.* State, 86 Ind. 208, 44 Am. Dec. 292.

Iowa. — State *v.* Jamison, 74 Iowa 613, 38 N. W. 509; State *v.* Dexter, 115 Iowa 678, 87 N. W. 417.

Massachusetts. — Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Missouri. — State *v.* Sarony, 95 Mo. 349, 8 S. W. 407; State *v.* Wilson, 143 Mo. 334, 44 S. W. 722; State

although there is authority apparently holding the contrary view.[15] For the same purpose it may be shown that the act charged was one

v. Bayne, 88 Mo. 604; State *v.* Myers, 82 Mo. 558, 52 Am. Dec. 389.

New York. — People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; People *v.* Cole, 65 Hun 624, 20 N. Y. Supp. 505; Bielschofsky *v.* People, 5 T. & C. 277, *affirming* 3 Hun 40; Weyman *v.* People, 6 T. & C. 696; People *v.* Lewis, 62 Hun 622, 16 N. Y. Supp. 881.

Virginia. — Trogdon *v.* Com., 31 Gratt. 862.

The general rule that when offered simply for the purpose of proving a defendant's commission of the offense charged, evidence of his commission of other independent crimes is not admissible, applies in prosecutions for false pretenses. State *v.* Wilson, 72 Minn. 522, 75 N. W. 715; Com. *v.* Jackson, 132 Mass. 16; Cowan *v.* State, 22 Neb. 519, 35 N. W. 405.

State *v.* Walton, 114 N. C. 783, 18 S. E. 945. The charge in that case was that the defendant did falsely pretend to the county treasurer that a certain paper writing was a true and genuine order for the payment of money as it purported to be, and that by means of such false pretenses the defendant obtained the money from said treasurer. The defense was the absence of any intent to defraud; and the court in holding the evidence stated to be admissible said: "There could be no more direct evidence of such intent than the fact that the defendant had presented other false papers to the treasurer and obtained money upon the same, and upon discovery thereof had refunded the money." See also State *v.* Wilkerson, 98 N. C. 696, 3 S. E. 683, where the defendant was indicted for falsely obtaining from the county commissioners an order for the payment of money, evidence was admitted of continuous transactions of the same character and the state proposed to prove the obtaining of other orders of the same kind without producing the orders, and the testimony was admitted.

In People *v.* Wasservogle, 77 Cal. 173, 19 Pac. 270, a prosecution for obtaining money by means of a draft upon a firm with whom the defendant stated he had credit and who would honor the draft, it was held that evidence that the defendant before the transaction in question had drawn other drafts on the same firm which had not been paid was admissible as tending to show that he had no credit with the firm and must have known that the draft in question would not be honored.

On a prosecution for obtaining possession of property with intent to defraud the seller by not paying therefor, evidence of other purchases from other persons with a fraudulent intent is admissible to show the defendant's intent as to the purchase in question. State *v.* Rosenberg, 162 Mo. 358, 62 S. W. 435, 982; People *v.* Summers, 115 Mich. 537, 73 N. W. 818.

In People *v.* Henssler, 48 Mich. 49, 11 N. W. 804, a prosecution for obtaining an endorsement on a promissory note by falsely pretending that the proceeds of the note were to be paid to a specified person, it was held proper to permit the prosecution to show that the defendant had previously obtained from the endorser sums which he claimed were to be paid and afterwards said had been paid to the same person, when in fact they had not been so paid, such evidence tending to show a systematic scheme for obtaining money on false pretenses.

15. In State *v.* Bokien, 14 Wash. 403, 44 Pac. 889, where the defendant was being prosecuted for obtaining money by giving a check upon a bank in which he had no funds, it was held error to allow the prosecution to introduce evidence of other checks given by the defendant to other persons when he had no funds on deposit. The court said: "The evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information, for the reason that it would not logically or legitimately follow that he intended to defraud Sharick because he had defrauded other parties at various times previously. It was not competent for the

of a series or scheme of similar acts.[16]

Falsity of Other Representations. — But evidence of other statements and representations by the defendant is not admissible where there is no proof of the falsity of the other representations.[17]

Transaction Subsequent to Indictment. — Evidence of similar transactions which took place subsequent to the finding of the indictment against the defendant should not be received.[18]

II. FALSITY OF THE REPRESENTATIONS.

1. Presumptions and Burden of Proof. — The burden of proof is upon the prosecution to establish beyond a reasonable doubt that the representations alleged were false.[19] It is not incumbent upon

purpose of showing defendant's motive, for that, as well as his intent, would be inferred from his acts. The question of mistake was not involved in the case, and the previous transactions of the defendant which were permitted to be shown no more formed a part of a single scheme than the several larcenies of a thief (State *v.* Kelley, 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203); and it certainly would not be competent in order to show that one had stolen certain property to prove that he committed larceny at a previous time. The evidence as to these checks, which were not mentioned in the information, must have been greatly prejudicial to the defendant, for it, in effect, compelled him, without previous notice, to acquit himself of at least seven distinct offenses in addition to the one with which he was directly charged."

16. *United States.* — Waight *v.* United States, Hayw. & H. 189, 28 Fed. Cas. No. 17,042.

Massachusetts. — Com. *v.* Blood, 141 Mass. 571, 6 N. E. 769; Com. *v.* Jackson, 132 Mass. 16.

Michigan. — People *v.* Wakely, 62 Mich. 297, 28 N. W. 871.

Minnesota. — State *v.* Wilson, 72 Minn. 522, 75 N. W. 715.

Missouri. — State *v.* Jackson, 112 Mo. 585, 20 S. W. 674; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666.

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

Com. *v.* Stone, 4 Metc. (Mass.) 43, where the court said: "This is an exception to the general rule of evidence. But it must be considered that it is to prove a fact not provable by direct evidence; that is, a guilty knowledge and purpose of mind, which can rarely be proved by admissions or declarations, and can in general be proved only by external acts and conduct. The case is strictly analogous to the rule in relation to proof of *scienter* on a charge of passing counterfeit bills or coins, which is well established here and in England."

On a prosecution for obtaining money by false pretenses as to the genuineness of a forged instrument, evidence of the possession and use of other such forged instruments about the same time, whether before or afterward, is competent to show that the defendant's possession of those, for the use of which he was indicted, was not casual and accidental. Com. *v.* Coe, 115 Mass. 481.

In Whiteman *v.* People, 83 Ill. App. 369, a prosecution for obtaining money on a worthless draft, a quantity of other drafts similar to that set out in the indictment, together with envelopes, stamps and other documents which were found in the defendant's possession when he was arrested, were held to be competent as tending to show guilty knowledge and intent.

17. State *v.* Carter, 112 Iowa 15, 83 N. W. 715.

18. State *v.* Letourneau (R. I.), 51 Atl. 1048.

19. People *v.* Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096.

In People *v.* Simonsen, 107 Cal. 345, 40 Pac. 440, a prosecution for obtaining money by false representations as to the ownership of certain

the prosecution, however, to prove the falsity of all the pretenses alleged in the indictment where several are charged.[20]

2. Mode of Proof. — A. In General. — Necessarily in order to show the falsity of the representations resort must be had to circumstantial evidence.[21]

land, "the only evidence offered by the prosecution to prove that the defendant did not own any land, as represented, were the extrajudicial statements and admissions of the defendant himself to that effect, and we hold them insufficient to prove the fact. It is elementary that the *corpus delicti* must be established before extrajudicial statements and admissions of a defendant are admissible in evidence, and can be considered as tending to establish the fact to which they relate. The falsity of the representations made by defendant as to his ownership of the land is a material and essential element and portion of the *corpus delicti,* and a defendant's admissions alone can never be relied upon to establish as sufficient any fact which is a necessary ingredient to form the body of the crime."

In State *v.* Wilbourne, 87 N. C. 529, where it was alleged that the defendant obtained money from the prosecuting witness upon the representation that he owned certain bonds which were deposited with a third person, but never exhibited, it was held error to charge the jury that the burden was upon the defendant to produce the bonds, or give evidence satisfactorily accounting for their non-production.

In State *v.* Penny, 70 Iowa 190, 30 N. W. 561, where the defendant was on trial for obtaining money on false pretenses consisting of representations that certain property mortgaged to secure the money obtained was not encumbered when in fact it was, the only evidence offered to show that it was encumbered was an admission in the nature of a confession by the defendant; and it was held that such evidence was not sufficient to sustain a verdict unless corroborated. And it is error to impose upon the defendant the burden of proving the truth of the representations. Babcock *v.* People, 15 Hun (N. Y.) 347.

20. Todd *v.* State, 31 Ind. 514; Webster *v.* People, 92 N. Y. 422.

21. In State *v.* Hulder, 78 Minn. 524, 81 N. W. 532, a prosecution for obtaining money from a railroad company by falsely representing that defendant had suffered personal injuries while in the company's employ, it was held proper to receive the testimony of the physician who treated the defendant, as to the statements made by the defendant concerning his physical condition prior to the alleged injuries; that it was competent to show the defendant's history in that respect as bearing upon the truthfulness of his representations.

In Com. *v.* Castles, 9 Gray (Mass.) 121, 69 Am. Dec. 278, a prosecution for obtaining a signature to a written instrument by false pretenses, it was held that evidence of a conversation between the defendant and a third person prior to the making of the false pretenses charged in reference to the procurement of such a signature was admissible as showing the intent with which the defendant acted. "It was in the nature of a confession or admission, and although it did not tend directly to prove the false pretenses charged, yet it related to the subject-matter about which the false pretenses were subsequently made by the defendant. It was, in fact, the inducement or prelude to the fraudulent transaction and part of the *res gestae* which led to the criminal act."

In Elmore *v.* State, 118 Ala. 661, 23 So. 669, where the defendant was indicted for obtaining money by falsely pretending that he was the owner of certain property and that there was no encumbrance on said property, the prosecuting witness had testified that the defendant represented to him that he had the property in question, and it was held error for the court to permit the witness to state that he had sent a man "to look for and get said property," in the absence of any showing by the

B. Insolvency of Defendant. — Whether or not upon this issue evidence as to the financial condition of the defendant may be received is a question as to which the authorities seem to be at variance.[22]

III. RELIANCE ON REPRESENTATIONS.

1. Testimony of Prosecuting Witness. — While the testimony of the prosecuting witness is ordinarily the best evidence of the effect which the alleged statements had upon him, it is not essential to a conviction that he should testify expressly that the false pretenses induced him to act as he did, but the jury may be fully satisfied of that fact from the circumstances in the case.[23]

2. Arts and Devices Used by Defendant. — The prosecution may show the arts and devices used by the accused to induce his victim to rely upon the false representations.[24]

prosecution that the man sent had looked for and failed to find the property.

Certificate of Protest. — May *v.* State, 17 Tex. App. 213, *following* May *v.* State, 15 Tex. App. 430. See also State *v.* Reidel, 26 Iowa 430. And see article "Certificates," Vol. III.

In State *v.* Long, 103 Ind. 481, 3 N. E. 169, a prosecution for obtaining money by false pretenses, it was held that testimony of similar representations made by the defendant to another person shortly previous to the representations complained of, and the falsity of which he afterwards admitted, was admissible for the purpose of proving the falsity of the representations complained of.

22. In State *v.* Hill, 72 Me. 238, a prosecution for obtaining property by purchasing on credit and giving a note therefor, the false pretense consisting of representations as to the ownership of certain property, it was held proper to permit the prosecuting witness to testify that the note given for the property obtained had not been paid. The court said: "If one who is insolvent falsely pretends that he is the owner of property which in fact he does not own, and thereby obtains credit, the fact that he was insolvent very much strengthens the probability that his statement was not only false but fraudulently so, and made for the very purpose of procuring a credit which he knew he could not otherwise obtain. We think the answer was admissible."

In Com. *v.* Davidson, 1 Cush. (Mass.) 33, it was held that evidence of the individual indebtedness of the defendant and his partner was not admissible to prove the falsity of the representations as to the solvency of the copartnership.

On a prosecution for fraudulent representations made by the defendant as to his financial responsibility, the fact that the defendant had little credit with a third person is not relevant upon the question whether he had misrepresented his solvency to the prosecuting witness and thereby defrauded the latter. Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Inability to Employ Counsel. — In State *v.* Fooks, 65 Iowa 196, 21 N. W. 561, where the defendant upon arraignment on an indictment for borrowing money on the false pretense that he was a man of means stated to the court that he had no means with which to employ counsel and thereby obtained counsel at the expense of the state, it was held that his statements so made were admissible in evidence upon the trial to prove the falsity of the pretense made to the prosecuting witness.

23. People *v.* Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096.

24. State *v.* Fooks, 65 Iowa 196, 21 N. W. 561, where the defendant was charged with having induced the prosecuting witness to loan him money on the false representation that his brother was soon to arrive and bring with him money for the defendant, and it was held proper to

IV. PECUNIARY LOSS.

It is not incumbent upon the prosecution to show that any loss was suffered in consequence of the alleged representations.[25] Nor is it incumbent upon the prosecution to show that the defendant intended any pecuniary gain or personal profit.[26]

V. DEFENSES.

1. In General. — The presumption of a fraudulent intent may be repelled by the defendant by exhibiting in evidence such a state of facts as would show that fraud was not designed or could not have resulted.[27] But of course in making such proof the defendant

permit the introduction of certain letters written by the defendant addressed to his alleged brother, which he enclosed in a business envelope of the prosecuting witness having a direction for return, and a letter addressed to the prosecuting witness by the supposed brother delivered by the defendant himself.

25. Simmons *v.* People, 88 Ill. App. 334, *affirmed* 187 Ill. 327, 58 N. E. 384.

Under a statute making it an offense for a person by false pretenses and with the intent to defraud to obtain a signature of any person to a written instrument, the false making of which would be punished as forgery, it is not incumbent upon the prosecution to show that any one was actually defrauded. State *v.* Jamison, 74 Iowa 613, 38 N. W. 509, where the court said: "It is not essential that any person should have been actually defrauded, but it is essential, if a written instrument is the thing obtained, that it should be delivered; for until this is done the intent to defraud is not consummated, for the reason that, until there has been a delivery, the instrument creates no liability."

26. Com. *v.* Harley, 7 Metc. (Mass.) 462.

27. People *v.* Getchell, 6 Mich. 496, which was a prosecution for procuring the endorsement of the prosecutor to a promissory note, by the falsehood that a former note for the same amount, endorsed in like manner, had been destroyed, wherein it was held error to refuse to permit the defendant to show that he and the prosecuting witness were copartners; that the latter was bound by agreement between them to endorse for him to an amount considerably larger than the two notes, but had refused to perform the agreement, and that the money obtained on the notes was used in their business for their joint benefit.

On a prosecution for obtaining money by false representations as to the ownership of certain property, it is error to refuse to permit the defendant to show that the property or any part of it was owned by him, or to establish the truth of the representations. Rainforth *v.* People, 61 Ill. 365.

In Bozier *v.* State, 5 Tex. App. 220, where the defendant was charged with having used the name of the prosecuting witness without his knowledge or consent in the acquisition of groceries and provisions from merchants, whereby the latter were swindled, it was held that the defendant should have been permitted to prove that the articles were purchased for the family of the prosecuting witness and were delivered to his wife. The court said that if the defendant could prove that he did so purchase the articles and did so deliver them it was a circumstance which might have been material in aiding the jury as to the true facts in relation to the defendant's authority, and that if it enabled the jury to find affirmatively in favor of the statement made by the defendant, or if it was sufficient to create in their minds a reasonable doubt as to the matter, his acquittal would necessarily have followed.

cannot resort to evidence which is immaterial, irrelevant or otherwise objectionable.[28]

2. Character. — It is competent for the defendant to prove his character and general reputation in the community of his residence, with respect to the traits involved, although this does not allow him to go into details.[29]

3. Solvency of Defendant. — Evidence on behalf of the defendant that he was at the time of the transaction in good pecuniary credit and standing is not admissible.[30]

28. On a prosecution for fraudulently obtaining goods under an agreement to pay cash on delivery, evidence of arrangements had by the defendant with third persons to furnish him the money with which to pay for the goods, but which they failed to perform, is immaterial on behalf of the defendant. State *v.* Wilson, 143 Mo. 334, 44 S. W. 722.

Offer to Refund Money Obtained. On a prosecution for obtaining money under false pretenses, the fact that the defendant soon after obtaining the money offered to repay it with interest in no way sheds light on the intent with which he uttered the alleged false pretense, and hence evidence thereof is not admissible on his behalf. Carlisle *v.* State, 77 Ala. 71; People *v.* Lennox, 106 Mich. 625, 64 N. W. 488.

In Culver *v.* State, 86 Ga. 197, 12 S. E. 746, it was held that if by false statements that he was the owner of certain property of a given value the defendant induced the sale to himself of certain goods which he failed to pay for, he could not relieve himself of the charge of cheating by showing that he really owned other property of less value.

In Van Buren *v.* People, 7 Colo. App. 136, 42 Pac. 599, a prosecution for obtaining money by false representations as to the value of the security given for the repayment of the money, the defendant cannot, for the purpose of showing that the prosecuting witness did not rely on the security, introduce evidence respecting the financial ability and solvency of the endorser at the maturity of the note. The court said: "In the first place, Schlessinger's financial condition at the time of the maturity of the note in no manner tended to disprove the charge, nor did it bear on the question of the intent. Of course, Schlessinger's financial condition as an indorser was a proper matter of proof, when it was confined to the time of the transaction. This evidence would be of vital consequence in the settlement of the question as to Van Buren's intent when he made the statements, and as to the reliance Miss Snitjer placed on them when she made the loan. They were admissible for no other purpose, and all legitimate testimony in that direction was admitted by the court. Com. *v.* Coe, 115 Mass. 481; Com. *v.* Howe, 132 Mass. 250.

29. State *v.* Dexter, 115 Iowa 678, 87 N. W. 417, where "the questions to which objections were sustained were defective in this respect. To illustrate: One Hubbard was asked: 'Do you know what his habits or general make-up or character was there as to paying his obligations?' Also: 'Up to the time of his moving away, did you know of his defrauding, or attempting to defraud, any one in the purchase of property?' It is his general character which may be shown, and not what he did in particular instances. Besides, a man's make-up with respect to the payment of his debts may be peculiar, and yet he not be guilty of dishonesty." See also State *v.* Penley, 27 Conn. 587.

30. State *v.* Penley, 27 Conn. 587, where the court said: "Poor men, destitute of pecuniary credit and of property, are by no means the only men who procure the property of others by fraudulent practices and false pretenses. Pecuniary credit is a very different thing from moral character, and, unfortunately, too little dependent upon it to render proof of the former evidence of the existence of the latter.

Nor was the evidence admissible to show the absence of motive for the commission of the fraud. The obvious motive was the lust of acquisition — *lucri causa* — a desire of gain. And how does evidence of the enjoyment of good pecuniary credit tend to prove the absence of this besetting passion? Unmistakable indications of its existence and operation are but too frequently exhibited, as well by individuals in the enjoyment of credit and property, as by those who are destitute of both."

FALSE SWEARING.— See Perjury.

FAMILY BIBLE.— See Ancient Documents; Pedigree.

FARO.— See Gambling.

FELLOW SERVANTS.— See Expert and Opinion Evidence; Injuries to Person; Master and Servant; Negligence.

FIGURES.— See Abbreviation; Alteration of Instruments; Bills and Notes.

FINAL JUDGMENT AND DECREE.— See Judgment.

FIRE INSURANCE.— See Insurance.

FIRES.— See Arson; Negligence.

FIXTURES.

By Glenda Burke Slaymaker.

CROSS-REFERENCES:

Landlord and Tenant.

I. INTRODUCTORY.

1. Nature of Question. — Whether a thing once a chattel has become a part of the realty, a fixture, because of its annexation thereto, depends upon all of the circumstances and facts attendant upon the annexation, and the question is ordinarily one of mixed law and fact.[1]

1. *United States.* — Towson *v.* Smith, 13 App. D. C. 48.
Alabama. — DeLacy *v.* Tillman, 83 Ala. 155, 3 So. 294.
Kansas. — Traders' Bank *v.* First Natl. Bank, 6 Kan. App. 400, 50 Pac. 1,098.
Massachusetts. — Turner *v.* Wentworth, 119 Mass. 459; Allen *v.* Mooney, 130 Mass. 155.
Michigan. — Thomas *v.* Wagner, (Mich.), 92 N. W. 106.
Nebraska. — President, etc., of Ins. Co. of North America *v.* Buckstaff, (Neb.), 92 N. W. 755.
New York. — Scobell *v.* Block, 82 Hun 223, 31 N. Y. Supp. 975.
Pennsylvania. — Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243.
Virginia. — Tunis Lumb. Co. *v.* Dennis Lumb. Co., 97 Va. 682, 34 S. E. 613.

Evidence Unconflicting, but Different Inferences Deducible. — Even if the evidence is without conflict, if more than one inference as to the character of the annexation may be drawn by reasonable men from the evidence, the question is still one of fact to be determined by the jury under appropriate instructions from the court. Brownell *v.* Fuller, 60 Neb. 558, 83 N. W. 669.

Question of Law. — Where the facts are admitted, and the parties agreed, and only one inference may be reasonably drawn, the question becomes one of law. Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 247; St. Louis Radiator Mfg. Co. *v.* Hendricks, 72 Mo. App. 315; Catasauqua Bank *v.* North, 160 Pa. St. 303, 28 Atl. 694.

2. Burden of Proof. — The modern rule is that the burden of proof is upon him who asserts that a thing once a chattel, and ordinarily such, has become merged into the realty by being annexed thereto.[2]

II. INTENTION.

1. In General. — The trend of the authorities is to treat the intention of the party annexing a chattel to the realty as the sole criterion of the character of the annexation, in solving the vexed question whether a thing is a fixture and not susceptible of removal from the realty to which it has been attached.[3] The intention here referred to, however, is not the secret and unrevealed intention of the party making the annexation, but the probable intention deducible from the facts and circumstances attending the case; the manner of the annexation; the adaptability of the thing annexed for use with, and as a part of, the particular realty to which it is attached, together with the relation, the conduct, and the language of the parties concerned. And the evidence of these facts, therefore, is always competent.[4]

2. Bank of Opelika *v.* Kiser, 119 Ala. 194, 24 So. 11.

Rule Stated. — In Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940, the rule is thus stated: "An evident corollary of the modern rule thus established is that the burden of showing the existence of these requisites for merger, including the intention, is upon the party claiming the chattel to have become merged in the realty."

To convert a chattel into a fixture, immovable and inseparable from the realty, requires a positive act upon the part of the person making the annexation, and his intention so to do must clearly and fully appear. Hill *v.* Wentworth, 28 Vt. 428.

Between Mortgagor and Mortgagee of the Real Estate. — Where an engine, placed upon mortgaged premises after the execution of the mortgage, is not attached to the soil, but rests thereupon by its own weight, in an action by the mortgagee, the purchaser at the sale on foreclosure, against a purchaser of the engine from the mortgagor, the burden rests upon the mortgagee to establish that the engine was a fixture, and, therefore, his property by virtue of the purchase of the realty. Tillman *v.* DeLacy, 80 Ala. 103, 3 So. 294.

Where Structure is Ordinarily a Fixture Between Landlord and Tenant. — If the structure in controversy is of the character which the law usually denominates a fixture, and the question is between the tenant who erected it, and the landlord, the *onus* would be upon the tenant to show the agreement between him and his landlord that it was not to be considered as a fixture. Brearley *v.* Cox, 24 N. J. L. 287.

3. See Vail *v.* Weaver, 132 Pa. St. 363, 19 Atl. 138, 19 Am. St. Rep. 598; Seeger *v.* Pettit, 77 Pa. St. 437, 18 Am. Rep. 452.

4. *Illinois.* — Fifield *v.* Farmers' Nat. Bank, 47 Ill. App. 118; Kloess *v.* Katt, 40 Ill. App. 99; Dooley *v.* Crist, 25 Ill. 453.

Indiana. — Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Maine. — Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940.

Maryland. — Dudley *v.* Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368.

Massachusetts. — Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 247.

Missouri. — Thomas *v.* Davis, 76 Mo. 72, 43 Am. Rep. 756; State Sav. Bank *v.* Kercheval, 65 Mo. 682, 27 Am. Rep. 310.

Nebraska. — Brownell *v.* Fuller, 60 Neb. 558, 83 N. W. 669; Oliver *v.*

Lansing, 59 Neb. 219, 80 N. W. 829; Freeman *v.* Lynch, 8 Neb. 192.

New Hampshire. — Hadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

New York. — Snedeker *v.* Warring, 12 N. Y. 170.

Ohio. — Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

Oregon. — Henkle *v.* Dillon, 15 Or. 610, 17 Pac. 148; Helm *v.* Gilroy, 20 Or. 517, 26 Pac. 851.

Pennsylvania. — Catasauqua Bank *v.* North, 160 Pa. St. 303, 28 Atl. 694.

Vermont. — Kendall *v.* Hathaway, 67 Vt. 122, 30 Atl. 859.

Washington. — Chase *v.* Tacoma Box Co., 11 Wash. 377, 39 Pac. 639.

In Copp *v.* Swift, (Tex. Civ. App.), 26 S. W. 438, the court says: "The use and meaning of the term 'fixture' has never been very definitely fixed, and depends more upon the intention of the parties than upon constructive annexation to the freehold. It has been held that 'movable property which is attached to realty, and which is capable of being removed without being itself destroyed, and without detriment to the freehold, is generally called a fixture.' But, as said by our supreme court, 'using the word in its more general sense, whether a fixture is to be deemed real or personal property depends in many cases upon the circumstances which may reasonably be presumed to manifest the intention of the parties concerned in its annexation to the realty.' Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637; Moody *v.* Aiken, 50 Tex. 65; Hutchins *v.* Masterson, 46 Tex. 551. Whether the bar, counter, shelving and screen were conveyed, under the term 'fixtures,' to appellant, was to be determined by the acts and declarations of the parties at the time, the object in making the sale and purchase, the price paid for the article, and any other circumstances, part of the *res gestae*, that would throw light on the transaction. The mere fact of the property being fastened to the building 'by nails or otherwise' was not sufficient to fasten the nature of realty on the property, regardless of the circumstances evidencing the intention of the parties, and it was error for the court to so instruct the jury."

Knowlton, J., in Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 247, speaking for the court, said: "Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted — an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place. South Bridge Sav. Bank *v.* Exeter Machine Works, 127 Mass. 545; Turner *v.* Wentworth, 119 Mass. 459; Allen *v.* Mooney, 130 Mass. 155; Paper Co. *v.* Servin, 130 Mass. 513; Hubbell *v.* Bank, 132 Mass. 447, 43 Am. Rep. 446; McGuire *v.* Park, 140 Mass. 21; McRea *v.* Central Nat. Bank, 66 N. Y. 498; Hill *v.* Bank, 97 U. S. 450; Ottumwa Woolen Mill *v.* Hawley, 44 Iowa 57, 24 Am. Rep. 719. These cases seem to recognize the true principle on which the decisions should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention manifested and implied by his act. It is an intention which settles, not merely his own rights, but the rights of others, who have or who may acquire interests in the property. They cannot know his secret purpose; and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind, every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position."

Thus, evidence of the secret, unexpected intention of a vendor of real estate to replace certain de-

2. Question One of Mixed Law and Fact. — Likewise the intention of a party in making an annexation to realty is a question of fact, or of mixed law and fact, where there is any conflict in the evidence, or where more than one logical inference is admissible from the undisputed facts.[5]

tached parts of a building thereon with new parts, is incompetent as evidence of intention affecting a purchaser of such real estate. Hadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

Statue. — Intention to Sell as Personalty. — Evidence of the secret intention of one to sell a statue is not competent to affect its character as a fixture, Parker, J., saying: "I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds when he erected for it a permanent mound and base; and a purchaser had a right to so infer and to be governed by the manifest and unmistakable evidences of intention." Snedeker *v.* Warring, 12 N. Y. 170.

Annexed Chattel Necessary Part of "Going Concern." — The character of a thing, commonly a chattel, will not be affected by the fact that it is a necessary part of the "going concern" in which it is used, and was bought and placed therein with the intention of being permanently so used until worn out, and evidence of such facts is therefore immaterial. In a case of this character the court said: "It is urged by counsel that principles of law must change with the times, and that modern progress demands that the law — those rules of law, ancient almost as our language, which define clearly real and personal property — should be so modified as to permit litigants to make almost any imaginable article real property, if it be connected with what is termed a 'going concern;' that is, as we understand it, some enterprise which is being carried on as a whole, and with some particular object in view. While fully alive to modern thought and progress we cannot deem it wise or expedient in administering justice, to so modify the common law as to depart from the ancient landmarks which have been followed by the ablest jurists of the Anglo-Saxon race throughout the centuries. Whether this theatre was a 'going concern' or not is unimportant, so far as the question of determining whether these articles were or were not realty. Some of the articles contained therein, and some of those removed, the court below was justified in holding to the real property, although the evidence may have been conflicting as respects most of them. The court was warranted in finding that the stage appointments, such as scenery, etc., were fixtures, there being evidence to the effect that they had been built and fitted specially for this building, and, so far as their nature permitted, had been affixed to the realty. The same is true as to the opera chairs, the evidence sustaining the court in holding that they had been built on a plan, and specially adapted to this particular building, and affixed thereto by screws. But we can conceive of no rule of the common law which would justify a court in holding that a piano, a desk and its chair, carpets, curtains, a baggage truck, a step-ladder, a center table, or a settee, under the evidence, were real property, although they have been bought by the parties with the intention that they should remain permanently in this building, and be used in connection with it until worn out and unfitted for service." Oliver *v.* Lansing, 59 Neb. 219, 80 N. W. 829.

5. *Alabama.* — Nelson *v.* Howison, 122 Ala. 573, 25 So. 211; Gresham *v.* Taylor, 51 Ala. 505.

Kansas. — Traders' Bank *v.* First Nat. Bank, 6 Kan. App. 400, 50 Pac. 1,098.

Maine. — Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940.

3. Custom and Usage as Affecting Intention. — As between landlord and tenant, evidence of custom or usage prevailing at the place where the controverted article is annexed, may be received to characterize annexations to the realty, and to extend the tenant's right of removal.[6] But as between other parties, as, for example, mort-

Massachusetts. — Leonard *v.* Stickney, 131 Mass. 541; Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 247.

Michigan. — Studley *v.* Ann Arbor Sav. Bank, 112 Mich. 181, 70 N. W. 426.

Missouri. — Grand Lodge of Masons *v.* Knox, 27 Mo. 315; Elliott *v.* Black, 45 Mo. 372; Goodin *v.* Eleardsville Hall Ass'n, 5 Mo. App. 289.

New Hampshire. — Kent *v.* Brown, 59 N. H. 236.

Nebraska. — Brawnell *v.* Fuller, 60 Neb. 558, 83 N. W. 669.

New Jersey. — Ames *v.* Trenton Brg. Co., 56 N. J. Eq. 309, 38 Atl. 858; Pope *v.* Skinkle, 45 N. J. L. 39.

Oregon. — Alberson *v.* Elk Creek Min. Co., 39 Or. 552, 65 Pac. 978.

Pennsylvania. — Catasauqua Bank *v.* North, 160 Pa. St. 303, 28 Atl. 694; Harrisburg Elec. Light Co. *v.* Goodman, 129 Pa. St. 206, 19 Atl. 844; Seeger *v.* Pettit, 77 Pa. St. 437, 18 Am. Rep. 452; Benedict *v.* Marsh, 127 Pa. St. 309, 18 Atl. 26; Vail *v.* Weaver, 132 Pa. St. 363, 19 Atl. 138, 19 Am. St. Rep. 598; Campbell *v.* O'Niell, 64 Pa. St. 290.

Texas. — Copp *v.* Swift, (Tex. Civ. App.), 26 S. W. 438; Jones *v.* Bull, 85 Tex. 136, 19 S. W. 1,031; Hutchins *v.* Masterton, 46 Tex. 551.

Washington. — Philadelphia Mtg. Trust Co. *v.* Miller, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559.

Drainage by Removal of Trade Fixtures. — Evidence examined and held sufficient to show that the removal of a trade fixture would not so damage the property as to defeat tenant's right of removal. Bernheimer *v.* Adams, 70 App. Div. 114, 75 N. Y. Supp. 93, *affirmed* 175 N. Y. 472, 67 N. E. 1,080.

6. Landlord and Tenant. — Leading Case. — The leading American case on this subject is that of Van Ness *v.* Pacard, 2 Pet. (U. S.) 137. The supreme court of the United States, by Mr. Justice Story, there held, in a controversy between a landlord and tenant as to the right of the latter to remove during his term dairy buildings erected by him upon the demised premises, that evidence of a custom, prevailing in the city of Washington, the *situs* of the buildings in controversy, that the tenant was entitled to remove such buildings, was competent. In speaking upon this feature of the case, it was said: "The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the city of Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or the district where the land lies. Every person under such circumstances is supposed to be conusant of the custom, and to contract with a tacit reference to it."

In Keogh *v.* Daniell, 12 Wis. 181, in an action by a lessor to enjoin the removal of a building from a lot, which, when demised, was vacant, it was held that the tenant was entitled to the benefit of a general custom prevailing in the city in which the lot leased was situated, that tenants leasing naked ground and making improvements thereon might, in the absence of any restriction in the lease, remove such improvements at, or before, the expiration of their terms.

Custom of Hawaiian Islanders to Remove Buildings. — In Kahinu *v.* Aea, 6 Hawaii 68, it was held by Justice Widemann, of the supreme court of the Hawaiian Islands, that a two-story wooden building was not to be regarded as personalty because it was occupied by natives, who in former times frequently removed their

gagor and mortgagee, or grantor and grantee, evidence of custom is incompetent.[7]

house frames to other localities. In the course of the opinion it was said: "The building here in question is a two-story wooden building erected during the lifetime of the said Nahinu, and is no more to be regarded as personalty because it was occupied by natives than if occupied by foreigners. To declare that a permanent structure is personal property because natives in former times frequently removed their house frame to another locality, would be to define real and personal property, not by its inherent nature, but by the views of those who held it. Such an adjudication would involve us in a changeable and contradictory system of law."

See also Merritt *v.* Judd, 14 Cal. 60; Buller, Introduction to Law Relative to Nisi Prius, p. 34.

Evidence of Custom and Usage Not Competent to Vary Terms of Lease. — Of course evidence of custom or usage is not competent to vary a matter that the parties have determined by contract between them. Webb *v.* Plummer, 2 Barn. & Ald. (Eng.) 746; Boyd *v.* Sharrock, L. R. 5 Eq. (Eng.) 72; Stultz *v.* Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411; Keogh *v.* Daniell, 12 Wis. 181.

7. Boyd *v.* Sharrock, L. R. 5 Eq. (Eng.) 72; Christian *v.* Dripps, 28 Pa. St. 271.

As Between Mortgagor or Grantor and Mortgagee or Grantee. — The Missouri court, while conceding the admissibility of such evidence as between landlord and tenant, denies its competency in favor of a grantor or mortgagor, in the course of the opinion saying: "As between landlord and tenant, evidence of custom with respect to chattels annexed to the realty, by which they are treated as personalty, is admissible, but not so with respect to articles thus annexed by a mortgagor or grantor, before the execution of his conveyance. He has absolute dominion over the property, both real and personal, and his intention in making the annexation is to be determined by a consideration of the character of the annexation, and its appropriation or adaptation to the use or purpose of that part of the realty with which it is connected." Thomas *v.* Davis, 76 Mo. 72, 43 Am. Rep. 756.

Evidence of Custom as Between Vendor and Vendee Incompetent in Foreclosure of Mechanic's Lien. In Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674, the plaintiff sought to foreclose a mechanic's lien on mirror frames set by him in the parlors and halls of the defendant's houses. To show that such articles were a part of the buildings in which they were placed, and, therefore, proper subjects of mechanic's liens, under the statute, the plaintiff, over the defendant's objections, was allowed to introduce evidence that, as between vendor and vendee, by custom and usage, the mirror frames and racks would pass upon the conveyance of the building. In holding this evidence incompetent the court said: "The question asked the witness Sniffen whether on a sale of one of these houses the mirror frames and hat racks would have passed to the vendee, according to the general usage and custom, was certainly incompetent. It was objected to as such, and the error in overruling the objection would involve a reversal, but for the consideration that no possible evil resulted. The question whether the articles furnished became part of the realty within the meaning and just construction of the act of 1875 was a question of law utterly unaffected by any custom as between vendor and vendee. The facts as to the construction of the frames, their location and necessity, and the manner and purpose of their attachment, were wholly undisputed, and left only a legal conclusion to be drawn. We cannot see how that conclusion could be affected by the admission of the evidence objected to. The immateriality of this error will become more obvious when the question of the real or personal character of the frames comes under discussion." But see Sowden *v.* Craig, 26 Iowa 156, 96 Am. Dec. 125.

In Choate *v.* Kimball, 56 Ark. 55,

4. Particular Acts as Evidence of Intention. — A. Execution of Chattel Mortgage. — Where the owners of personal property, attached to the real estate, mortgage it as personalty, it will be presumed that they intend that it shall not become a fixture, but shall remain personalty. So, that a lessee of realty who brings chattels upon the leased premises, and attaches them thereto, gives a chattel mortgage upon them for their purchase price, at the time they are so placed upon the premises, is evidence of an intention that they shall not become part of the realty, and therefore such facts may be shown as between the lessor and the mortgagee of the chattels.[8] And the rule would apply with equal force where the annexation is made by the owner of the land.[9] But such evidence will not be

19 S. W. 108, the court was called upon to decide the character of a boiler, saw-rig, shingle-mill and planer as between the mortgagor and the mortgagee of the realty to which they were annexed, and in determining the question whether such annexations were chattels considers the general custom obtaining in the country where the land lay, as competent, in the course of its opinion saying: "It is shown that a custom obtained in the country where the land lies and the mortgage was made to put such articles upon land for temporary use, and to remove them when removal became desirable, in the light of which they would not, in ordinary understanding, be a part of the land, but removable chattels. When so attached as to be thus regarded, they do not become fixtures, under the third test. Wolford *v.* Baxter, 33 Minn. 12, 21 N. W. 744. It might be inferred from the mortgage itself that it was made with reference to this custom; for in describing the mortgaged property it enumerates 'lands' and 'also' other property, embracing machinery upon the land of the same character as that in dispute. If land included the machinery upon it no specific description of the machinery was necessary, and the fact that it is found indicates that the parties did not treat it as a part of the land; and as they treated such articles as chattels, and did not stipulate that the mortgage should embrace such of a like kind as should thereafter be put upon the land, it would be implied that the mortgage was not intended to cover them. But, however that might be, as the custom is shown to have been general, the inference is that the parties assented and contracted with reference to it."

8. Where an equipment for a saloon, consisting of bar fixtures, mirrors, counters, etc., is brought upon and attached to the leased premises, under a covenant providing that improvements made upon the leased premises shall be left undisturbed, the fact that the lessee, at the time he brought such equipment upon the leased premises, mortgaged them as chattels to secure the payment of the purchase price thereof, is such evidence of his intention to treat them as chattels as not to come within the meaning of the term "improvements" as used in the covenant mentioned. Ames *v.* Trenton Brg. Co., 56 N. J. Eq. 309, 38 Atl. 858.

See also Merchants Nat. Bank *v.* Stanton, 62 Minn. 204, 64 N. W. 390.

9. Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Carpenter *v.* Allen, 150 Mass. 281, 22 N. E. 900; Hendy *v.* Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Eaves *v.* Estes, 10 Kan. 314, 15 Am. Rep. 345; Studley *v.* Ann Arbor Sav. Bank, 112 Mich. 181, 70 N. W. 426; Corcoran *v.* Webster, 50 Wis. 125, 6 N. W. 513; Tifft *v.* Horton, 53 N. Y. 377, 13 Am. Rep. 537; Ford *v.* Cobb, 20 N. Y. 344; Sisson *v.* Hibbard, 75 N. Y. 542; Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889; Sword *v.* Low, 122 Ill. 487, 13 N. E. 826.

Incompetent as Against Subsequent Purchasers Without Notice. See Stillman *v.* Flenniken, 58 Iowa

conclusive of the intent of an owner to treat the annexation as a chattel, where at the same time a mortgage is given upon the real estate to which the chattels are affixed, the chattel mortgage being given to avoid a possible mistake as to the character of the chattels.[10]

B. Sales as of Personalty. — a. *Voluntary Sales.* — The sale of an article as personalty attempted to be made after annexation, where the annexation was made by the owner in such a manner as to impair the article should it be removed, and by its removal leave the building to which it was attached in an improper condition for immediate use, is inadmissible to prove an intention that it should be treated as personalty.[11] It may be otherwise, however, where, at the time of the annexation, the one claiming it, by virtue of a subsequent lien, as a fixture, is informed of the other's intention to treat it as personalty,[12] or where the present owner and his predecessors have bought and sold it as personalty.[13]

450, 10 N. W. 842, 3 Am. Rep. 120; Pierce *v.* George, 108 Mass. 78, 11 Am. Rep. 310; Hunt *v.* Bay State Iron Co., 97 Mass. 279; Tibbetts *v.* Horne, 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56.

Record of Chattel Mortgage as Notice. — Ordinarily the recording of a chattel mortgage of fixtures is not notice to persons dealing with the realty to which they are annexed. Case Mfg. Co. *v.* Garven, 45 Ohio St. 289, 13 N. E. 493; Bringholff *v.* Munzenmaier, 20 Iowa 513.

Contra. — In Illinois where the statute requires chattel mortgages to be filed and recorded in the office of the recorder of deeds, a different rule obtains. Sword *v.* Low, 122 Ill. 487, 13 N. E. 826; Craig *v.* Dimock, 47 Ill. 319.

10. Studley *v.* Ann Arbor Sav. Bank, 112 Mich. 181, 70 N. W. 426; Miles *v.* McNaughton, 111 Mich. 350, 69 N. W. 481; Trowbridge *v.* Hayes, 21 Misc. 234, 45 N. Y. Supp. 635.

Nor, it has been held, will the fact that a chattel mortgage has been given upon annexations to the realty, which have become fixtures, raise the presumption of an intention to restore to them their former character of personalty. Homestead Land Co. *v.* Becker, 96 Wis. 210, 71 N. W. 117; Fifield *v.* Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166; Strickland *v.* Parker, 54 Me. 263.

11. Lord *v.* Detroit Sav. Bank, (Mich.), 93 N. W. 1,063.

12. Benedict *v.* Marsh, 127 Pa. St. 309, 18 Atl. 26.

13. **Annexations Treated by Owners as Personalty.** — Where annexations are treated by successive owners thereof as personalty, appraised and invoiced and sold as such, and accounts thereof kept separately from the realty, evidence of these facts is competent as against third parties, to show an intention that they should not become fixtures. Benedict *v.* Marsh, 127 Pa. St. 309, 18 Atl. 26.

In Ferris *v.* Quimby, 41 Mich. 202, 2 N. W. 9, subsequent to the giving of a mortgage upon a factory building and prior to the foreclosure thereof, it appeared that successive owners of the building placed therein certain machinery. In the various sales and conveyances of the mortgaged premises, the building and the machinery were appraised, invoiced and sold separately, and separate accounts on the books of the owners were kept of the building and the machinery. After the foreclosure sale, and before the purchaser thereat took possession, the owner of the property detached and sold the machinery in the building, and appropriated the proceeds to his own use. In an action for conversion to recover the value of the property so taken and sold, the court said: "We find no error in the reception of evidence to show that the machinery

b. *Execution Sales.* — Evidence that fixtures, in fact a part of the realty, were treated and advertised by a sheriff in an execution sale, and considered by the purchaser as personal property, is not competent to give to them the character of personalty.[14]

C. Prior Attachment of Controverted Article as Against Attaching Plaintiff. — On the issue whether a thing is a fixture or a chattel the fact that one of the parties had previously attached the controverted article as personal property is competent as an admission against such party that it was not a part of the realty.[15]

had always been treated, invoiced and conveyed by the respective owners as personalty. The evidence legitimately tended to show that they had never intended to make it a part of the realty, and under the facts of the case no one could be wronged by their keeping it separate. The mortgage was in existence before; it was not taken under any deceptive appearances caused by the machinery being then in the building, and apparently a part of the realty, and the owners, when they put it in, were under no obligations to subject the machinery to the lien of the mortgage. They had a right to keep it separate and they violated no principle of law, or of morals, or of public policy in doing so."

Acts of Owners Not Conclusive. On the question whether steam engines and boilers, cupolas, a platform scale and similar articles permanently attached to a factory building were fixtures, the court held that the fact that the owners dealt with them as personal property in their accounts and in insuring them, and that assessors in taxing them treated them as personalty, was not conclusive of their personal character. Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 483.

14. In the case of Off *v.* Fenkelstein, 200 Ill. 40, 65 N. E. 439, *affirming* 100 Ill. App. 14, Off sued Fenkelstein in assumpsit for the contract price of a stable, blacksmith shop, dump house, engine and boiler houses, engines, scales, and other similar property used in and about a mine, all as described in a certain bill of sale. To this declaration a special plea of failure of consideration was filed. It appeared that the property described in the bill of sale had been segregated by the sheriff and sold as personalty, and the land to which it was attached sold as realty, on mortgage foreclosure proceedings. From the sale of the realty the mortgagor redeemed, and by virtue thereof claimed, the structures described in the plaintiff's bill of sale. The plaintiff offered to prove that he had purchased the property as personal property, which had been advertised and sold as such. The supreme court, in affirming the action of the court below in excluding this evidence, said: "That such property was in fact fixtures and part of the real estate was established without dispute. Appellant endeavored to meet this state of case by offering to show that the sheriff, in the advertisement for the sale of the property under the execution, described it as personal property and offered it for sale at the sale as personal property; that he bid upon and bought it as personal property; and that the sheriff directed him to take possession of it as personal property. The court refused to permit such proof to be made. This ruling is now assigned as for error. The court did not err in the ruling. The property which was the subject matter of the contract of sale between the appellant and the appellees, having been shown by the testimony, without dispute, to be fixtures, became and was part and parcel of the realty. It was not within the power of the sheriff to seize upon and sell it as personal property, and thus deprive the debtor of the right of redemption granted by the statute. . . . The court, therefore, properly declined to hear proof designed to show that the sheriff did what he had no lawful power or authority to do."

15. In Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153, on an issue as to the character of a steam engine, as a chattel or as a

D. Declaration of Homestead. — Evidence that a declaration of homestead was made by the owner of real estate is immaterial and incompetent to show the intention of the one making such declaration that annexations to the realty were intended to be permanent and part of the building to which they were attached.[16]

5. Statements of Intention. — A. While Owner and in Possession. — Where the character of a structure is equivocal, the expressed intention of the one making it, previously communicated to the party claiming it as a fixture,[17] or to third parties,[18] is admissible as evidence of an intention to treat it as personalty. Such a declaration would be inadmissible, however, if made after the controverted article was attached, and after a dispute had arisen as to its character, as being under such circumstances only a self-serving statement.[19]

B. After Sale and Surrender of Possession. — Statements of one's intention in annexing certain articles to the realty, made after he has executed a bill of sale thereof to another, and out of the presence of the one against whom such statements are offered, are inadmissible.[20]

fixture, it was held that the fact that one of the parties had previously attached the engine, in a proceeding before a justice's court, thereby treating it as personalty, was competent as an admission against such party of the personal character of the thing. But. *quaere,* whether such evidence is conclusive.

16. Philadelphia Mtg. Trust Co. *v.* Miller, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559.

17. In Benedict *v.* Marsh, 127 Pa. St. 309, 18 Atl. 26, in an action of replevin by a judgment creditor for a steam engine and saw-mill that the debtor had erected upon his timber land, brought against a purchaser of the machinery from the debtor after the lien of the plaintiff's judgment had attached, it was held, the evidence being conflicting as to whether the engine and the mill were portable, that evidence of conversations had between the debtor and the creditor showing the former's intention to erect a portable mill was admissible.

18. Benedict *v.* Marsh, 127 Pa. St. 309, 18 Atl. 26. In this case the court also held that conversations had between the debtor and third parties, to the effect that the former intended moving the engine and mill to another tract of timber, after he had sawed all the logs on the tract where the mill was then located, was competent against the plaintiff, the seller of the machinery.

19. "A declaration upon the part of its owner (the owner of a crane and cupola), not made at the time, but long afterwards, would clearly be inadmissible to prove the intent with which said annexation was made. Made, as it was in this case, after the foreclosure suit was commenced, it was a mere self-serving statement." Lord *v.* Detroit Sav. Bank, 132 Mich. 510, 93 N. W. 1,063.

Declarations Pertaining to Ownership of Fixtures. — Res Gestae. Evidence of the declaration of an owner of lands, while in possession, that he is not the owner of annexations thereto, is competent against him as part of the *res gestae.* It may also be admissible to establish an estoppel *in pais.* Nelson *v.* Howison, 122 Ala. 573, 25 So. 211.

20. In Copp *v.* Swift, (Tex. Civ. App.), 26 S. W. 438, it was said: "It was error to admit in evidence the declarations of Stork, made long after the execution of the bill of sale, and at a time when appellant was not present. Appellant could in no manner be bound by such declarations, and they were doubtless quite injurious to his cause. The intent that

6. Miscellaneous Facts Relating to Intention. — A. Character of Mortgagor's Estate. — In a suit for the foreclosure of a mortgage, where the title to buildings erected upon the mortgaged premises by a third party is involved, to show the intent with which such annexations are made, evidence that the mortgagor has only the legal title to the mortgaged premises, and that the annexations to the realty were made by the equitable owner after the execution of the mortgage, should be received.[21]

B. Effect of Removal Upon Remaining Structure as to Completeness Immaterial. — As evidence of intention to make a thing a fixture, it has been said to be an immaterial circumstance that the removal of the controverted article will leave the structure to which it is attached in an unfinished state, or will diminish its value for the purpose which it is designed to serve, and evidence of such facts is therefore inadmissible.[22]

III. RESERVATION BY PAROL.

1. As Between Landlord and Tenant. — As between landlord and tenant, parol evidence is competent to establish the reservation and the right of removal of fixtures during or after the expiration of the term.[23]

Stork had in placing the fixtures in the house, and what was intended by the term 'fixtures' as used by the parties at the time of the sale, is the subject of legitimate inquiry, but this cannot be shown by the declarations of Stork, made months after the sale."

21. Merchants' Nat. Bank *v.* Stanton, 59 Minn. 532, 61 N. W. 680.

22. Philadelphia Mtg. & Trust Co. *v.* Miller, 20 Wash. 374, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559. This was an action by a mortgagee against a mortgagor of real estate to recover the possession of some mantels, mirrors and brackets that had been removed from the mortgaged premises after the execution of the mortgage. The mortgagee offered to prove that these things removed would render the house from which they were taken of less value and would leave it in an unfinished condition unsuitable for residence purposes. In holding this evidence inadmissible, the court said: "Neither was it material under the theory that the intention of the mortgagor must govern whether the residence was a finished residence, without these disputed articles being annexed to it or not. The condition of the house was testified to, and the jury, if it was material to determine the question of whether the house was or was not finished, must have determined that question from the testimony submitted. And the offer to prove that the value of the premises as a residence was impaired by their removal was equally immaterial and irrelevant, for it is self-evident that the house would be of less value after the furniture was taken out than it would be with the furniture, conceding that the furniture was worth anything, and that concession or rather allegation of value is made by the complaint."

23. Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284; Fuller *v.* Tabor, 39 Me. 519; Powell *v.* McAshan, 28 Mo. 70; Hines *v.* Ament, 43 Mo. 298; Dubois *v.* Kelly, 10 Barb. (N. Y.) 496.

Parol Evidence Not Competent to Vary Written Lease. — Jungerman *v.* Bovee, 19 Cal. 355; Stephens *v.* Ely, 14 App. Div. 202, 43 N. Y. Supp. 762.

Where a written lease is silent as to fixtures, parol evidence of an agreement that the lessor has agreed,

2. As Between Vendor and Vendee. — But as between vendor and vendee of the real estate the rule is otherwise. And in such a case evidence of a parol reservation of the fixtures is incompetent, whether a sale thereof is attempted to be proved before the conveyance, or the reservation is sought to be affected by a parol agreement made at the time of the consummation of the conveyance.[24] The reservation must be made in the deed. So, where there is a controversy as to what passes by deed, parol evidence is inadmissible to

for an independent consideration, that certain fixtures should remain for the lessee's use, is admissible, the court saying: "The case is undoubtedly very near the line, but I am inclined to think that such parol agreement was a separate and independent one, touching a subject not covered by the lease, and made for an independent consideration paid by the plaintiff, not stipulated for or referred to in the lease. The promise that certain specific fixtures then on the premises should be retained and remain there, so that the plaintiff might enjoy the benefit of them, if she took the lease, may be sustained as a previous distinct collateral agreement upon a collateral and independent consideration, which did not merge in the subsequent written contract of hiring." Lewis *v.* Seabury, 74 N. Y. 409, 30 Am. Rep. 311.

Presumption of Abandonment. If a tenant does not, during or at the expiration of his term, remove the fixtures erected by him during his term, he will be presumed to have abandoned them; but this presumption will be rebutted by proof of an oral agreement reserving them, with the right to remove them after his term expires. McCracken *v.* Hall, 7 Ind. 30.

Parol Agreement Concerning Trade Fixtures Subsequent to Written Lease. — Parol evidence is admissible to show an oral agreement between the parties to a written lease, entered into subsequent to the making of the written lease, with regard to the ownership of trade fixtures. Podlech *v.* Phelan, 13 Utah 333, 44 Pac. 838.

24. Towson *v.* Smith, 13 App. D. C. 48; Noble *v.* Bosworth, 19 Pick. (Mass.) 314; Hadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284; Austin *v.* Sawyer, 9 Cow. (N. Y.) 39; Bond *v.* Coke, 71 N. C. 97; Conner *v.* Coffin, 22 N. H. 538; Landon *v.* Platt, 34 Conn. 517; Smith *v.* Odom, 63 Ga. 499; Curtis *v.* Riddel, 7 Allen (Mass.) 185; McKeage *v.* Hanover Fire Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471. But see Pea *v.* Pea, 35 Ind. 387.

The North Carolina court has said that as between the vendor and vendee of land the intent of the vendor in placing a saw-mill, engine and boiler upon the land conveyed is not competent to vary the terms of the deed by reserving those structures to himself. Horne *v.* Smith, 105 N. C. 322, 11 S. E. 173, 18 Am. St. Rep. 903.

As Between Tenants in Common. Where a house is affixed to realty owned by tenants in common, by one of the tenants, without a previous or contemporaneous agreement that it shall continue as personalty, it becomes part of the realty and it cannot afterwards be changed to a chattel by express parol agreement, and still less by an indefinite understanding. Aldrich *v.* Husband, 131 Mass. 480. See Gibbs *v.* Estey, 15 Gray (Mass.) 587; Howard *v.* Fessenden, 14 Allen (Mass.) 124; Morris *v.* French, 106 Mass. 326; Madigan *v.* McCarthy, 108 Mass. 376, 11 Am. Rep. 371; Westgate *v.* Wixon, 128 Mass. 304.

Agreement as to Fixtures Subsequently Annexed. — While a parol agreement made at the time of the execution of a deed cannot be given in evidence to affect fixtures presently annexed to the realty, parol is competent to establish an agreement that fixtures subsequently to be annexed to the realty shall not be treated as a part thereof under a deed of trust. Heitkamp *v.* LaMotte Granite Co., 59 Mo. App. 244.

show that certain fixtures, not passing by the express terms of the deed, were nevertheless by oral agreement of the parties made to pass thereunder.[25]

The reasons for this are twofold; first, to receive parol evidence of the reservation, while the deed itself contains no provision reserving the fixtures to the grantor, would be opposed to the familiar rule of evidence of the common law that a writing cannot be contradicted by parol, and that the prior negotiations and agreements of the parties are presumed to have been merged and embodied in the written contract;[26] and second, a fixture being a part of the realty, contracts affecting the title to it must be in writing, as required by the statute of frauds.[27]

IV. MISCELLANEOUS.

1. Reasonable Time for Removal of Trade Fixtures. — What is a reasonable time after the expiration of his term within which a tenant may remove his trade fixtures is a question of fact for the

25. Ripley *v.* Paige, 12 Vt. 353; McLaughlin *v.* Johnson, 46 Ill. 163.

26. Noble *v.* Bosworth, 19 Pick. (Mass.) 314; Austin *v.* Saywer, 9 Cow. (N. Y.) 39; Conner *v.* Coffin, 22 N. H. 538; Bond *v.* Coke, 71 N. C. 97.

Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284, was an action by the vendee of real estate to enjoin the vendor from taking from the land sold certain fruit trees and ornamental shrubbery thereon planted. The defendant sought to establish his right to the trees by a parol reservation made contemporaneously with the execution of the deed, which latter contained no reservation whatever. In holding that the written agreement could not be so varied, the court said: "While fruit trees and ornamental shrubbery grown upon the premises leased for nursery purposes would probably be held to be personal property as between the landlord and tenant, yet there is neither authority nor reason for saying that as between vendor and vendee such trees and shrubbery would not pass with the sale of the land. They are annexed to and a part of the freehold. As between vendor and vendee, even annual crops pass with the land, where possession is given. Under the contract of sale and the delivery of possession by Price to Smith, the latter became the owner of the trees as well as of the soil, and it would be a violation of the most familiar rules of evidence to receive proof of a verbal arrangement contemporaneous with the written contract and impairing its legal effect. The parties in executing the written instrument deliberately made it the exclusive evidence of the terms of their agreement. This instrument shows the sale of the land in such terms as to pass the trees. No reservation is made, and to permit the vendor now to show that there was a verbal arrangement for their reservation would be to permit him to prove a verbal contract inconsistent with the legal import of that executed by the parties under their hands and seals. This the law forbids."

Conversations of the parties to a conveyance of real estate, had during the negotiation of the conveyance, as to what the parties considered as fixtures passing under the deed, are incompetent. They are only expressions of opinion, and, furthermore, they are merged in the written deed of conveyance between the parties. Wadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

27. Curtis *v.* Riddel, 7 Allen (Mass.) 185; Noble *v.* Bosworth, 19 Pick. (Mass.) 314; Bond *v.* Coke, 71 N. C. 97; Horne *v.* Smith, 105 N. C. 323, 11 S. E. 173, 18 Am. St. Rep. 903; Leonard *v.* Clough, 59 Hun 627, 14 N. Y. Supp. 339.

"A deed of real estate, or of a

jury, under appropriate instructions from the court, in view of all the evidence and the circumstances proven in the case.[28]

2. Injury Resulting From Removal of Controverted Article. — The question of whether damage will result to the realty from the removal of an annexation, like the main question, is one of mixed law and fact, the determination of which will not be disturbed upon appeal.[29]

3. Prima Facie Character of Buildings. — All buildings erected upon the realty are presumed, *prima facie,* to belong as fixtures to the owner of the land upon which they are placed, and not to be removable, and the burden of proof will be upon him who asserts the contrary.[30] It has been said, however, that where such erections are made by one having no interest to enhance the value of the realty,

leasehold interest therein, embraces and conveys fixtures attached to the realty, and parol evidence is not admissible to establish an exception or reservation of the fixtures, if the deed itself is silent upon the subject, being inhibited by the statute of frauds." Towson *v.* Smith, 13 App. D. C. 48.

28. Berger *v.* Hoerner, 36 Ill. App. 360.

29. Slocum *v.* Caldwell, 12 Ky. L. Rep. 514, 13 S. W. 1,069; Ambs *v.* Hill, 10 Mo. App. 108; Fortman *v.* Goepper, 14 Ohio St. 558.

Evidence examined and held sufficient to show that the removal of trade fixtures would not so damage the realty as to preclude removal. Bernheimer *v.* Adams, 70 App. Div. 114, 75 N. Y. Supp. 93.

30. Merchants' Nat. Bank *v.* Stanton, 59 Minn. 532, 61 N. W. 680, 55 Minn. 211, 56 N. W. 821; Kendall *v.* Hathaway, 67 Vt. 122, 30 Atl. 859; Bridges *v.* Thomas, 8 Okla. 620, 58 Pac. 955.

Presumption as to Houses. — Burden of Proof. — The presumption is that a house, built upon real estate, is a part of the realty, and the burden of proof is upon the party asserting that such a structure is a chattel only, or that there is a right of removal. Powers *v.* Harris, 68 Ala. 409; Kassing *v.* Keohane, 4 Ill. App. 460.

Chattel Mortgage by Lessee of Hotel. — A house used as a homestead, residence and hotel, is presumed to be realty, and, as between third persons, it is not shown to be personalty by the fact that the lessee has given a chattel mortgage upon it. Docking *v.* Frazell, 34 Kan. 29, 7 Pac. 618.

Fences. — A fence is presumed to be a part of the realty, and the burden will rest upon him who seeks to deal with it as removable or as a chattel. Brown *v.* Bridges, 31 Iowa 138.

Railroad Tank House. — A railroad tank house is presumed to be annexed to the realty as a fixture. Titus *v.* Ginheimer, 27 Ill. 462.

Machinery in Building Where the Plant is Rented as a Whole. Where the parties to a lease of a factory, machinery and appliances treat them as a whole, subject to one rental, it will be presumed that the machinery and appliances were considered and intended to be a part of the realty. Baldwin *v.* Walker, 21 Conn. 168.

A house built upon and annexed to land cannot be shown to be personal property as against a subsequent grantee of the land, by evidence of an oral agreement of the owner of the land, after the building had been begun, to treat it as personalty; nor by declarations of a mesne owner of the land that he neither owned nor claimed the house. A house, being ordinarily real estate, the "separation of the personal from the real estate to which it is attached is to be established by evidence of assent to the erection of the same before the structure is erected and has become attached to the realty, and thus had its character fixed." Gibbs *v.* Estey, 15 Gray (Mass.) 587. See also Richardson *v.* Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424.

and by the permission and license of the owner, no other facts or circumstances to the contrary appearing, an agreement will be implied that the structures shall remain the property of the one making them.[31]

4. Purchase of Realty at Foreclosure Sale. — As between the purchaser at a sale under the foreclosure of a mortgage of the realty, and a conditional purchaser of the realty from the mortgagor who has failed to comply with the conditions entitling him to a deed, evidence that the purchaser at the foreclosure sale, or those claiming under him, had notice that the conditional purchaser did not own the mortgaged premises, and claimed the machinery and improvements placed by him in the building thereon, is immaterial and incompetent.[32]

5. Trover and Conversion. — A. Evidence of Wrongful Forfeiture. — In an action by a former tenant in trover and conversion against his landlord, for fixtures which he was entitled to remove prior to the termination of his lease, and which he had attempted to remove in due time, but was forcibly prevented from doing so by the landlord, who had wrongfully taken possession of the demised premises, under an unexpired notice of forfeiture, evidence is admissible on the part of the tenant to show that by the terms of the lease the defendant's possession was unlawful, and that at the time the plaintiff attempted to remove the fixtures he had complied

31. Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 62 Minn. 204, 64 N. W. 390. In this case the court said: "*Prima facie*, all buildings belong to the owner of the land on which they stand as a part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property. If erected wrongfully, or without such agreement, they become the property of the owner of the soil. But it is entirely competent for the parties to agree that they shall remain the personal property of him who erects them, and such agreement may be either express or implied from the circumstances under which the buildings are erected. . . . The court did not find and the stipulated facts do not disclose a single fact bearing on the question of the intention or implied agreement of the parties. The finding does, however, amount to one that the building was erected by permission and license from Stanton. At first we entertained some doubt whether that alone was sufficient to establish an implied agreement for separate ownership. Such an implication would not be drawn when a different intention of the parties is indicated, by the terms of any express agreement between them on the subject, or when a different intention is to be inferred from the interest of the party making the erections or from his relations to the title of the land. But we have arrived at the conclusion that where the erections are made by one having no estate in the land, and hence no interest in enhancing its value, by the permission or license of the owner, an agreement that the structures shall remain the property of the person making them, will be implied, in the absence of any other facts or circumstances tending to show a different intention."

32. McFadden *v.* Allen, 50 Hun 361, 3 N. Y. Supp. 356, *affirmed* 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; Meagher *v.* Hayes, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819. But see Stillman *v.* Flenniken, 58 Iowa 450, 10 N. W. 842, 43 Am. Rep. 120.

with the stipulations of the lease entitling him to do so.[33]

B. Proof of Demand Not Necessary. — Evidence of demand is not necessary to sustain an action for the recovery of property, or the value thereof in trover and conversion, which constituted a fixture, and which has been wrongfully severed and removed.[34]

6. Sale of Chattel Claimed by Third Party as Fixture May Be Shown to Have Been Conditional. — In an action by the seller of machinery against the purchaser of the buyer's factory in which such machinery is placed, and by virtue of which the ownership of the machinery as fixtures is claimed, the seller of the machinery may show that it was sold conditionally, and that it was connected to the factory only temporarily, with no intention that it should become part of the realty, awaiting the performance of the condition.[35] And in general it may be said that evidence of the conditional sale of a chattel claimed as a fixture is admissible in favor of the conditional seller, as against prior mortgagees and other holders of liens upon the realty, unless the removal of the controverted article would damage the security,[36] and against purchasers and mortgagees of the realty with notice.[37] In some jurisdictions, however, these propositions are controverted.[38]

33. Watts *v.* Lehman, 107 Pa. St. 106.

34. McNally *v.* Connolly, 70 Cal. 3, 11 Pac. 320.

In an action by a tenant to recover damages for the unlawful taking and retaining of fixtures during his term in the premises, proof of demand is not necessary. Beardsley *v.* Sherman, 1 Daly (N. Y.) 325.

35. Causey *v.* Empire Plaid Mills, 119 N. C. 180, 25 S. E. 863; Lansing Iron & Engine Works *v.* Wilbur, 111 Mich. 413, 69 N. W. 667; Gill *v.* DeArmant, 90 Mich. 425, 51 N. W. 527; Harris *v.* Hackley, 127 Mich. 46, 86 N. W. 389; Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889. See also Alberson *v.* Elk Creek Min. Co., 39 Or. 552, 65 Pac. 978.

36. As Against Prior Mortgagees of the Realty and Other Lien Holders. — Warren *v.* Liddell, 110 Ala. 232, 20 So. 89; Northwestern Mut. Life Ins. Co. *v.* George, 77 Minn. 319, 79 N. W. 1,028; Buzzell *v.* Cummings, 61 Vt. 213, 18 Atl. 93; General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101; Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Tifft *v.* Horton, 53 N. Y. 377, 13 Am. Rep. 537.

37. As Against Subsequent Purchasers and Mortgagees of the Realty With Notice. — Such proof may be made as against subsequent purchasers or mortgagees with notice, but the rights of innocent third parties cannot be affected by such evidence. Jenks *v.* Colwell, 66 Mich. 420, 33 N. W. 528, 11 Am. St. Rep. 502; Miller *v.* Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680; Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780; Wentworth *v.* Woods Machine Co., 163 Mass. 28, 39 N. E. 414; Tibbitts *v.* Horne, 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56. But see Peaks *v.* Hutchinson, 96 Me. 530, 53 Atl. 38.

38. In some jurisdictions it is held that a prior mortgagee cannot be affected by proof of an agreement between the mortgagor of the realty and the conditional seller of personalty, which, having become annexed to the realty, becomes a fixture. Clary *v.* Owen, 15 Gray (Mass.) 522; Hunt *v.* Bay State Iron Co., 97 Mass. 279; Thompson *v.* Vinton, 121 Mass.

139; Meagher *v.* Hayes, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819; McFadden *v.* Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446, *affirming* 50 Hun 361, 3 N. Y. Supp. 356; Fuller-Warren Co. *v.* Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603.

FOOD.—See Adulteration.

FORCIBLE ENTRY AND DETAINER.

4. *Abandonment,* 802
5. *Public Domain,* 803
6. *Tax Deed,* 803
7. *Limitations,* 803
8. *Lease for Immoral Purposes,* 804
9. *Proof of Title or Right of Possession,* 804
10. *Offer to Remunerate Plaintiff,* 804

CROSS-REFERENCES:

Ejectment;
Landlord and Tenant.

I. POSSESSION.

1. Generally. — The action of forcible entry and unlawful detainer can be sustained only by proof of an actual possession of the premises sued for, held by the plaintiff prior to the unlawful entry made by the defendant.[1]

1. *Alabama.* — Lalonett *v.* Lipscomb, 52 Ala. 570; Wray *v.* Taylor, 56 Ala. 188; Houston *v.* Farris, 71 Ala. 570; Welden *v.* Schlosser, 74 Ala. 355; Brady *v.* Huff, 75 Ala. 80; Clements *v.* Hays, 76 Ala. 280; Childress *v.* McGehee, Minor 131; Wright *v.* Mallens, 2 Stew. & P. 219; Espalla *v.* Gottschalk, 95 Ala. 254, 10 So. 755; Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561.

Arkansas. — Fowler *v.* Knight, 10 Ark. 43; McGuire *v.* Cook, 13 Ark. 448; Smith *v.* Saffery, 27 Ark. 46; Necklace *v.* West, 33 Ark. 682; Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959.

California. — Kilburn *v.* Ritchie, 2 Cal. 146, 56 Am. Dec. 326; Goodrich *v.* Van Landigham, 46 Cal. 601; Leroux *v.* Murdock, 51 Cal. 541; Spiers *v.* Duane, 54 Cal. 176; Castro *v.* Tewksbury, 69 Cal. 562, 11 Pac. 339; Bank of California *v.* Taaffe, 76 Cal. 626, 18 Pac. 781; McCormick *v.* Sheridan, 77 Cal. 253, 19 Pac. 419; Moore *v.* Goslin, 5 Cal. 266; Preston *v.* Kehoe, 15 Cal. 315; Saulque *v.* Durralde (Cal.), 33 Pac. 1,090; Giddings *v.* '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196.

Colorado. — Wier *v.* Bradford, 1 Colo. 14; Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58.

Connecticut. — Phelps *v.* Baldwin, 17 Conn. 209; Stiles *v.* Homer, 21 Conn. 507.

Georgia. — Stuckey *v.* Carleton, 66 Ga. 215; Thorpe *v.* Atwood, 100 Ga. 597, 28 S. E. 287.

Illinois. — Dudley *v.* Lee, 39 Ill. 339; Spurck *v.* Forsyth, 40 Ill. 438; Jamison *v.* Graham, 57 Ill. 94; Thompson *v.* Sornberger, 59 Ill. 326; Hoffman *v.* Reichert, 147 Ill. 274, 35 N. E. 527, 37 Am. St. Rep. 219; Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243; Stevenson *v.* Morrissey, 22 Ill. App. 258; Kimmel *v.* Frazer, 49 Ill. App. 462; City of Edwardsville *v.* Barnsback, 66 Ill. App. 381.

Indiana. — Judy *v.* Citizen, 101 Ind. 18.

Iowa. — Peddicord *v.* Kile, 83 Iowa 542, 49 N. W. 997.

Kansas. — Campbell *v.* Coonradt, 22 Kan. 491; Conaway *v.* Gore, 27 Kan. 122; Burdette *v.* Corgan, 27 Kan. 275; Peyton *v.* Peyton, 34 Kan. 624, 9 Pac. 479.

Kentucky. — Robert *v.* Long, 12 B. Mon. 194; Boyce *v.* Blake, 2 Dana 127; Lewis *v.* Stith, 2 Litt. 295; Combs *v.* Vanhorne, 3 Litt. 187; Hopkins *v.* Buck, 3 A. K. Marsh. 111; McCracken *v.* Woodfork, 3 A.

K. Marsh. 524; Clinton *v.* Clinton, 2 Bibb 432; Dils *v.* Justice, 10 Ky. L. Rep. 547, 9 S. W. 290.

Massachusetts. — Hodgkins *v.* Price, 132 Mass. 196; Williams *v.* McGaffigan, 132 Mass. 122; Lawton *v.* Savage, 136 Mass. 111; Page *v.* Dwight, 170 Mass. 29, 48 N. E. 850.

Michigan. — Newton *v.* Doyle, 38 Mich. 645.

Missouri. — Miller *v.* Northup, 49 Mo. 397; Armstrong *v.* Hendrick, 67 Mo. 542; St. Louis A. & M. Ass'n *v.* Reinecke, 21 Mo. App. 478; Ford *v.* Fellows, 34 Mo. App. 630; Meriwether *v.* Howe, 48 Mo. App. 148; Balch *v.* Myers, 65 Mo. App. 422; Long *v.* Noe, 49 Mo. App. 19; Rosenberger *v.* Wabash R. Co., 96 Mo. App. 504, 70 S. W. 395.

Nebraska. — Leach *v.* Sutphen, 11 Neb. 527, 10 N. W. 409; Comstock *v.* Cole, 28 Neb. 470, 44 N. W. 487; Brown *v.* Feagins, 37 Neb. 256, 55 N. W. 1048; Galligher *v.* Connell, 23 Neb. 391, 36 N. W. 566.

New Hampshire. — State *v.* Pearson, 2 N. H. 550.

New Jersey. — Mairs *v.* Sparks, 5 N. J. L. 592; Corlies *v.* Corlies, 17 N. J. L. 167.

New York. — People *v.* Fields, 1 Lans. 222; People *v.* Van Nostrand, 9 Wend. 50; Skelly *v.* Cohen, 26 Misc. 831, 57 N. Y. Supp. 247; People *v.* Field, 52 Barb. 198; People *v.* Carter, 29 Barb. 208.

Pennsylvania. — Com. *v.* Keeper of the Prison, 1 Ashm. 140; Pennsylvania *v.* Waddle, Add. 41.

South Carolina. — State *v.* Speirin, 1 Brev. 119; Burt *v.* State, 3 Brev. 413.

South Dakota. — Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

Tennessee. — Lane *v.* Marshall, Mart. & Y. 255; Edwards *v.* Batts, 5 Yerg. 441.

Virginia. — Olinger *v.* Shepherd, 12 Gratt. 462.

Wisconsin. — Jarvis *v.* Hamilton, 16 Wis. 598.

In O'Donohue *v.* Holmes, 107 Ala. 489, 18 So. 263, it was said by the court: "The only question for consideration is whether the plaintiff offered any evidence tending to show such previous actual possession as must have existed to maintain the action of unlawful detainer. The only evidence is that an agent of the plaintiff went upon the vacant, uninclosed lot about once a week for some months prior to its inclosure by the defendant, and on several occasions showed the lot to different parties to whom he offered to sell it as the property of the plaintiff. There were no notices upon the lot, nor any sign, evidencing actual possession of, or claim by, the plaintiff or other person to the lot. The possession of the plaintiff by his agent, as shown in the record, however long continued, could never ripen into a legal title on the ground of an adverse actual hostile possession against the true owner. . . . The plaintiff must show such actual possession as that if continued for the necessary period, the possession would vest in him a legal title against the true owner, if there was such title outstanding. When the plaintiff can not show such actual possession, his remedy is in ejectment, and not in unlawful detainer."

In Pennsylvania *v.* Robison, Add. (Pa.) 14, the court, speaking of the evidence essential to establish possession, said: "There must be some evidence of possession. A man cannot stand on every part of his land; he cannot build houses and settle tenants on every acre of it; he cannot plough every corner of it, nor make a fence around the whole. Binding the inhabitants of this country to rules so strict and protecting from forcible entries only lands so possessed would be very inconvenient and would, in a great measure, if not entirely, elude the law; especially in those cases, for which chiefly the laws were made, of poor people, least able to circumscribe their survey on a legal title, to build, plough or fence. Therefore, if a man, in any manner, circumscribe for himself a reasonable possession, within such bounds, as are lawfully allowed; sit down, on one part of it; build in such manner as is convenient; plough and fence, as may suit his interest, inclination and ability; and use the residue of his known and reasonable claim, as other men of like condition use their lands, he will be considered as in such possession of the whole that a forcible entry into any one part will be punished by those statutes."

2. Must Be Real Property. — Where the evidence shows a forcible invasion of personal property, and does not show a forcible entry and interruption of the possession of real property, such evidence will not support an action of forcible entry and detainer.[2]

3. Exercise of Dominion. — When it is shown that the plaintiff has subjected the premises to his exclusive will and control by means of the exercise of visible and notorious acts of dominion over them, such acts will be held to constitute actual possession.[3]

2. In State *v.* Brinkerhoff, 44 Mo. App. 169, the defendants were indicted for a forcible entry and detainer of certain real property, under § 3779 of the Revised Statutes of 1889. The facts are stated in the opinion of the court by Thompson, J.: "The defendants were convicted, and appeal to this court, assigning for error, among other things, that there was no evidence tending to show any forcible invasion or taking possession of *real* property, but that the evidence shows only a taking possession of *personal* property. We so read the evidence. It appears from the testimony of the prosecuting witness that there was a controversy between him and the defendant about the right to the possession of an engine and ore crusher, which he was using on or near the mining lots described in the information; and that they entered upon the premises and took possession of the ore crusher, but did not disturb him in the possession of the mining lots. . . . It is clear, therefore, that the testimony at most shows only a forcible trespass upon, or invasion of, the possession of personal property, and does not show a forcible invasion of the possession of real property, such as the statute was designed to punish."

3. *Alabama.* — Ladd *v.* Dubroca, 45 Ala. 421.

Illinois. — Brooks *v.* Bruyn, 18 Ill. 539; Allen *v.* Tobias, 77 Ill. 169; Pensoneau *v.* Bertke, 82 Ill. 161.

Missouri. — McCartney *v.* Alderson, 45 Mo. 35; Miller *v.* Northup, 49 Mo. 397; DeGraw *v.* Prior, 53 Mo. 313; Scott *v.* Allenbaugh, 50 Mo. App. 130; State *v.* Vansickle, 57 Mo. App. 611.

Nebraska. — Galligher *v.* Connell, 35 Neb. 517, 53 N. W. 383.

Tennessee. — Davidson *v.* Phillip, 9 Yerg. 93, 30 Am. Dec. 393.

West Virginia. — Hays *v.* Altizer, 24 W. Va. 505.

In Gray *v.* Collins, 42 Cal. 152, the plaintiff built a substantial fence about a city lot, and planted two dozen trees along two sides of it for ornamentation. Two months thereafter the defendants entered; *held*, that the plaintiff was in the peaceable and actual possession of the lot, within the meaning of the forcible entry law, without residing or having a house on it.

In House *v.* Camp, 32 Ala. 541, the court said: "If the complainant was in possession of the premises, under an agreement to keep possession of them, together with some articles of household furniture for another person, until demanded, he had such an interest as would enable him to bring the suit. All that is necessary to the maintenance of the action is that there should be a holding by some tenure which by law entitled the party to the possession, which is the only matter to be inquired of."

In Bartlett *v.* Draper, 23 Mo. 407, it was held: In order to constitute such a possession as will sustain an action of forcible entry and detainer, it is not necessary that the party should stand on the land, or keep a servant or agent there, but any act done by himself on the premises indicating an intention to hold the possession thereof to himself will be sufficient to give him the actual possession.

In Pennsylvania *v.* Lemmon, Add. (Pa.) 315, the court said: "It does not appear that at the time of Lemmon's entry on this land, William Todd was in possession of it. Surveying the land, building cabins, and leaving them unfinished and empty, is not occupying or possessing the land. It seems to have been vacant. Entering on vacant land is not a

A. Actual Residence Unnecessary. — Where the plaintiff shows a possession consisting of a present power and right of dominion over the premises in dispute, such a possession is sufficient to maintain the action of forcible entry and detainer, and he need not show an actual corporal presence on the premises.[4]

public offense. And after such entry there can be no forcible detainer, for there was no possession in another at the time of the entry."

In Edwards *v.* Cary, 60 Mo. 572, the plaintiff entered upon unoccupied land and plowed a few furrows across a portion of it. The court held this alone was not sufficient possession. Something more was required showing an intention to possess, accompanied with acts indicating that purpose. But upon the plaintiff showing that he had put up a house and enclosed about seven acres of the land, the court held these acts sufficient evidence of an intention to occupy.

In Miller *v.* Northup, 49 Mo. 397, the court said: "In actions under the statute for forcible entry and detainer, proof of title in the plaintiff, with payment of taxes and acts of ownership merely, is not evidence of peaceable possession." But entering upon uncultivated land, having it surveyed, establishing the corners and cutting hay were held to be sufficient evidence of possession.

In Clements *v.* Hays, 76 Ala. 280, the plaintiff was not an actual resident upon the disputed land, but he had a servant there at times who was engaged in building a log house for future occupancy The court held this fact sufficient evidence of possession to maintain the action, holding that "Possession is a fact continuous in its nature, and when once established by proof it must be presumed to continue until a different presumption is raised by contrary proof."

In Nelson *v.* Nelson, 30 Mo. App. 184, the plaintiff introduced evidence tending to show that in 1874 the defendant's ancestor under contract with him moved in the fence along his (the said ancestor's) land so as to throw outside of said ancestor's enclosure a certain described strip of ground twenty feet wide, for the purpose of being used by the plaintiff as a private road, and that he did, from that day to the entry complained of, use the said strip of ground as a private road. The plaintiff had no actual possession of the strip of ground, but simply claimed it as his way or road. It was held: "But one in the mere use and enjoyment of a way or an easement, without more, has no such possession as will enable him to maintain the action."

4. Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589; Goodrich *v.* Van Landigham, 46 Cal. 601; Hopkins *v.* Calloway, 3 Sneed (Tenn.) 11; Jarvis *v.* Hamilton, 16 Wis. 598.

In Spurck *v.* Forsyth, 40 Ill. 438, in speaking of the possession necessary to maintain an action of forcible entry and detainer, the court said: "The possession need not be by residence, but it must be actual as distinguished from constructive; that is to say, the premises must furnish visible tokens of occupancy, such as fences, buildings or cultivation."

Actual Residence Necessary. — In Minturn *v.* Burr, 16 Cal. 107, where it was claimed by the defendant that the fact of plaintiff's absence from the premises and his having locked the buildings was not a sufficient possession to maintain an action of forcible entry and detainer, the court said: "Nor is the objection good that the possession of the lot thus held was not such an 'actual possession' as the statute contemplates. This doctrine would lead to singular results. If a man, locking up his store and waiting to open it until he can rent or lease it, is not in legal possession, but may have his doors broken open and his property taken without this summary and effectual redress, it would be a premium for the lawless and irresponsible to find out unrented and uninhabited property and intrude by force — trusting to occupy until the termination of an action of ejectment, a process by which such intruders would make

B. Continuous Presence Unnecessary. — The possession of land necessary to support an action of forcible entry and detainer on behalf of the owner does not require the constant presence of the plaintiff, either in person or by agent. Any acts done by him on the premises showing an intention to hold possession for the purpose of cultivation and improvement will be sufficient.[5]

C. Fences. — Where it is shown that the lands in dispute are inclosed by a substantial fence, such inclosure would be evidence of possession, but the absence of it would not be conclusive as against other acts of possession.[6]

the value of the use in the meantime. There is no warrant for such doctrine. The statute does not require the plaintiff to be in the *actual occupancy* of the premises. 'Actual possession' as such consists of a present power and right of dominion as an actual corporal presence in the house. Here the plaintiff had the key and had locked up the premises; had been in the peaceable and quiet possession and use of the lot, through his agent and by his tenants; and, but for this intrusion and entry, could at any moment have gone in or introduced a tenant within the enclosure. This was enough to secure him the protection of the statute against any man who forcibly and unlawfully entered behind his back."

5. Shelby *v.* Houston, 38 Cal. 410; Leroux *v.* Murdock, 51 Cal. 541; Giddings *v.* '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196; Miller *v.* Northup, 49 Mo. 397; Bradley *v.* West, 60 Mo. 59; Scott *v.* Allenbaugh, 50 Mo. App. 130.

In Powell *v.* Davis, 54 Mo. 315, the court said: "There may be possession in fact of unimproved and uncultivated land, and persons owning timbered land situated separate and apart from their farms, who are accustomed to use it for the purpose of cutting wood and obtaining rails, exhibit such visible *indicia* of possession as to authorize and justify the finding of an actual possession. The owner is not always bound to be upon the land either by himself or agent. An entry with the intention of permanent occupation, and clearing and fitting the land for cultivation, will be sufficient."

In Wilson *v.* Shackelford, 41 Cal. 630, the evidence showed that the plaintiff entered upon a vacant quarter-section of public land, erected a small dwelling-house upon it, slept there several nights, and then, locking the door and taking the key with him, returned to an adjoining county where he had formerly resided, with the intention immediately to return with his family to the new house as his home. Upon reaching his family he found his wife too ill to be removed, and she continued so for several months. During the plaintiff's absence, defendants entered the new house by removing some boards from the side. The court held that in contemplation of law the plaintiff remained in possession and that such possession was sufficient to maintain an action of unlawful detainer against a person entering in his absence and refusing to surrender, under § 3 of the forcible entry and unlawful detainer act of 1866.

6. O'Callaghan *v.* Booth, 6 Cal. 63; McCormick *v.* Sheridan, 77 Cal. 253, 19 Pac. 419; Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589; Giddings *v.* '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196; Allen *v.* Tobias, 77 Ill. 169; King *v.* St. Louis Gas Co., 34 Mo. 34, 84 Am. Dec. 68; McCartney *v.* Alderson, 45 Mo. 35; Hinniger *v.* Trax, 67 Mo. App. 521.

The court said in Goodrich *v.* Landigham, 46 Cal. 601: "The only specification found in the statement on motion for a new trial is 'that the evidence is insufficient to justify the verdict, there being no evidence even upon the part of the plaintiff showing that the land in controversy was actually inclosed by a good or substantial fence, or that the plaintiff resided upon it at the time of the entry of the defendant.' Neither a good and substantial fence nor a residence upon the premises was necessary to a peaceable and actual

D. Possession of Part. — Where a plaintiff shows a possession of part of a tract of land, under a *bona fide* claim and color of title to the whole, his possession of part of the tract is a sufficient possession of the whole, or so much thereof as is not in the adverse possession of others.[7]

E. Scrambling Possession. — Where it is shown that the plaintiff had a mere scrambling or interrupted possession, or that he exercised only casual acts of ownership over the property, such possession is insufficient to maintain the action.[8]

F. Abandonment. — When the evidence shows that a person in possession of land has left it, with no intention of returning, such evidence is sufficient to establish an abandonment of possession. Mere lapse of time does not constitute an abandonment, but it may be given in evidence for the purpose of ascertaining the intention of the parties.[9]

G. Declarations Made During Entry. — It has been held that the declarations of a party entering upon land, respecting his intention regarding the property, are admissible as part of the *res*

possession of the land. Fences are a means by which the possession of land may be taken and held, but are not the only means. It is well settled that there may be an actual possession without fences or inclosure of any kind."

7. *Alabama.* — Clements *v.* Hays, 76 Ala. 280.

California. — O'Callaghan *v.* Booth, 6 Cal. 63.

Illinois. — Hardisty *v.* Glenn, 32 Ill. 62.

Kentucky. — Vanhorne *v.* Tilley, 1 T. B. Mon. 50.

Missouri. — Kincaid *v.* Logue, 7 Mo. 87; Packwood *v.* Thorp, 8 Mo. 636; McCartney *v.* Alderson, 45 Mo. 35.

Pennsylvania. — Pennsylvania *v.* Robison, Add. 14.

Virginia. — Olinger *v.* Shepherd, 12 Gratt. 462.

West Virginia. — Moore *v.* Douglass, 14 W. Va. 708.

8. *Alabama.* — Wray *v.* Taylor, 56 Ala. 188.

Arkansas. — Anderson *v.* Mills, 40 Ark. 192; Johnson *v.* West, 41 Ark. 535.

California. — Barlow *v.* Burns, 40 Cal. 351; Conroy *v.* Duane, 45 Cal. 597; Voll *v.* Butler, 49 Cal. 74; Spiers *v.* Duane, 54 Cal. 176; Castro *v.* Tewksbury, 69 Cal. 562, 11 Pac. 339; Tivnen *v.* Monahan, 76 Cal. 131, 18 Pac. 144.

Illinois. — Cox *v.* Cunningham, 77 Ill. 545.

Kansas. — Coonradt *v.* Campbell, 25 Kan. 227.

Missouri. — Keen *v.* Schweigler, 70 Mo. App. 409.

Pennsylvania. — Com. *v.* Keeper of of the Prison, 1 Ashm. 140.

Utah. — Brooks *v.* Warren, 5 Utah 118, 13 Pac. 175.

9. Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Laird *v.* Waterford, 50 Cal. 315; Knight *v.* Knight, 3 Ill. App. 206; McCracken *v.* Woodfork, 3 A. K. Marsh. (Ky.) 524; Haley *v.* Palmer, 9 Dana (Ky.) 321.

In Lewis *v.* Yoakum (Tex. Civ. App.), 32 S. W. 237, the plaintiff locked the doors of his house, which was then empty, wired the gate, put up a sign forbidding trespassing and left the premises. A few days later the defendants entered and took possession. It was claimed by defendants that the acts of the plaintiff constituted an abandonment and that he did not have such actual and peaceable possession as would give him a right of action in forcible entry and detainer. The court held that the plaintiff's absence being only temporary or casual, his actual possession continued, he having shown by his acts an intent to continue control of the property.

gestae to show that the entry was with the intent to take possession of the land.[10]

H. Servant or Agent. — Where the evidence shows that the plaintiff had for a long time been absent from the premises, but had left a servant or agent in charge, such evidence of possession is sufficient for the plaintiff to maintain an action of forcible entry and detainer,[11] although the servant or agent could not maintain the action.[12]

4. Right of Possession. — In some states it is held that actual possession is not essential, and all that seems to be necessary is that the plaintiff should prove the right of possession of the premises.[13]

10. Stephens *v.* McCloy, 36 Iowa 659.

11. *California.* — Moore *v.* Goslin, 5 Cal. 266; Minturn *v.* Burr, 16 Cal. 107.

Colorado. — Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58.

Indiana. — Bell *v.* Longworth, 6 Ind. 273.

Kansas. — Burdette *v.* Corgan, 27 Kan. 275.

Kentucky. — Higginbotham *v.* Higginbotham, 10 B. Mon. 369.

Missouri. — Powell *v.* Davis, 54 Mo. 315; Coolbaugh *v.* Porter, 33 Mo. App. 548.

12. Bertie *v.* Beaumont, 16 East (Eng.) 33 (*cited* in 20 Cal. 46). In Mitchell *v.* Davis, 20 Cal. 45, the court said: "The plaintiff, for the purpose of proving himself in the possession of the premises upon which the forcible entry was claimed to have been made, introduced as a witness the sheriff of the county, who produced a writ of restitution in a certain action between Charles B. Storer and Henry B. Davis, by which he was commanded to cause Davis to be removed from the premises in question, and Storer to have peaceable restitution of the same, and also his return on the writ, which, so far as respects the point in question, is as follows: 'I hereby certify that I received the within writ on the 14th day of March, 1860, and on the 26th day of March I put Charles Storer, by his representative, James Mitchell, in peaceable possession of the within described premises.' This writ and return were read in evidence, and the sheriff testified that he placed Mitchell in possession as the agent of Storer by the written instructions of the attorney of record of Storer." Two witnesses testified that they knew the sheriff put Mitchell in possession.

"Upon this proof the question is raised whether Mitchell can maintain this action, or whether it should have been brought by Storer. . . . The fact of possession, and not the title to the premises or the right to the possession, can alone be inquired into. In whom does the proof in this case show the possession to have been? All the proof in the case was given by the plaintiff, and this shows that the only connection which he had with the premises was that which resulted from the execution by the sheriff of the writ directing him to put Storer into the possession. The legal effect, as well as the language of the return to the writ, is that Storer and not Mitchell was put into the possession. . . . A plausible ground on which it might be claimed that this action could be prosecuted by Mitchell would be that an agent or servant having the care of real estate might be considered as a tenant at will of his principal or master. But such a principle is not countenanced by the authorities, and its adoption would lead to very inconvenient results. It would give to servants and agents novel and embarrassing powers over employers and their property."

13. Archey *v.* Knight, 61 Ind. 311; Frank *v.* Palmer, 65 Ill. App. 124; Maloney *v.* Shattuck, 15 Ill. App. 44. In Price *v.* Olds, 9 Kan. 66, the court said: "The only question that seems to have been raised is whether the plaintiff, who was entitled to possession of said land, but who does not seem to have ever had

A. Right Must Be Shown. — In Illinois one suing under the forcible entry and detainer act must show a right of possession in himself, and cannot rely upon the lack of right in those whom he seeks to dispossess.[14]

5. Possession of Tenant. — Where the evidence of possession showed that a tenant had been put upon the premises, the lessor cannot maintain the action, as it must be brought in the tenant's name.[15]

A. When Lease Has Expired. — Upon the lessor's showing that the lease had expired before the forcible entry and detainer, he may maintain the action.[16]

B. Tenant at Will. — One who shows a possession as tenant at will is held to be entitled to maintain the action.[17]

6. Evidence of Title. — A. Generally. — Title not being involved in the action of forcible entry and detainer, it is the general rule that no evidence can be introduced pertaining to title.[18]

actual possession of the same, could maintain the action of forcible entry and detainer. . . . The law upon this question is properly expressed in § 159 of the Justices' Act (Gen. St. 809), being the second section of art. 13, entitled 'Forcible Entry and Detainer.' That section provides that 'proceedings under this article may be had in all cases . . . where the defendant is a settler or occupier of lands or tenements without color of title, and to which complainant has the right of possession.' Neither this section nor any other section of the law provides that before the plaintiff can maintain this kind of action he must have had actual possession of the property. All that seems to be necessary is that he should have the *right of possession thereto.*"

14. Fitzgerald *v.* Quinn, 165 Ill. 354, 46 N. E. 287; McIlwain *v.* Karstens, 152 Ill. 135, 38 N. E. 555.

15. Treat *v.* Stuart, 5 Cal. 113; Polack *v.* Shafer, 46 Cal. 270; Hammel *v.* Zobelein, 51 Cal. 532.

16. Wall *v.* Goodenough, 16 Ill. 415.

17. Jones *v.* Shay, 50 Cal. 508; McDonald *v.* Gayle, Minor (Ala.) 98.

18. *Alabama.* — Houston *v.* Farris, 71 Ala. 570; Dumas *v.* Hunter, 25 Ala. 711; Milner *v.* Wilson, 45 Ala. 478; Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561; Beck *v.* Glenn, 69 Ala. 121; O'Donohue *v.* Holmes, 107 Ala. 489, 18 So. 263; Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483; Barefoot *v.* Wall. 108 Ala. 327, 18 So. 823.

Arkansas. — Anderson *v.* Mills, 40 Ark. 192; Hall *v.* Trucks, 38 Ark. 257; Fordyce *v.* Young, 39 Ark. 135; Hoskins *v.* Byler, 53 Ark. 532, 14 S. W. 864; James *v.* Mills, 54 Ark. 460, 16 S. W. 195.

California. — Conroy *v.* Duane, 45 Cal. 597; Mason *v.* Wolff, 40 Cal. 241; Voll *v.* Hollis, 60 Cal. 569; Fish *v.* Benson, 71 Cal. 437, 12 Pac. 454; Giddings *v.* '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196; Commissioners *v.* Barnard, 98 Cal. 199, 32 Pac. 982.

Colorado. — Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58; Kelly *v.* Hallack, 22 Colo. 221, 43 Pac. 1003; Smith *v.* Soper, 12 Colo. App. 264, 55 Pac. 195.

Connecticut. — Dutton *v.* Tracy, 4 Conn. 79; Bliss *v.* Bange, 6 Conn. 78; Bateman *v.* Goodyear, 12 Conn. 575.

Dakota. — Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

Florida. — Walls *v.* Endel, 17 Fla. 478; McLean *v.* Spratt, 20 Fla. 515.

Georgia. — Stuckey *v.* Carleton, 66 Ga. 215; Thorpe *v.* Atwood, 100 Ga. 597, 28 S. E. 287.

Illinois. — Kepley *v.* Luke, 106 Ill. 395; Kratz *v.* Buck, 111 Ill. 40; Stillman *v.* Palis, 134 Ill. 532, 25 N. E. 786; Palmer *v.* Frank, 169 Ill. 90, 118 N. E. 426; Peters *v.* Balke, 170 Ill. 304, 48 N. E. 1012; Fitzgerald *v.* Quinn, 58 Ill. App. 598; Roberts *v.* McEwen, 81 Ill. App. 413.

B. When Admissible. — In some states evidence of title may be introduced for certain purposes.

a. *Character or Extent.* — When actual possession of a part of the premises is shown to be in the plaintiff, his deed for the premises is proper evidence for the purpose of showing the character[19] or

Indiana. — Archey *v.* Knight, 61 Ind. 311; Vess *v.* State, 93 Ind. 211.

Iowa. — Webster *v.* Stewart, 6 Iowa 401; Stephens *v.* McCloy, 36 Iowa 659; Emsley *v.* Bennett, 37 Iowa 15; Settle *v.* Henson, 1 Morris 111; Bosworth *v.* Farrenholtz, 4 Greene 440.

Kansas. — Price *v.* Olds, 9 Kan. 66.

Kentucky. — Chiles *v.* Stephens, 3 A. K. Marsh. 340; Dils *v.* Justice, 10 Ky. L. Rep. 547, 9 S. W. 290; Beauchamp *v.* Morris, 4 Bibb 312; Smith *v.* Dedman, 4 Bibb 192; Carpenter *v.* Shepherd, 4 Bibb 501.

Mississippi. — Rabe *v.* Fyler, 10 Smed. & M. 440; Loring *v.* Willis, 4 How. 383; Cummings *v.* Kilpatrick, 23 Miss. 106; Clymer *v.* Powell, 56 Miss. 672.

Missouri. —Balch *v.* Meyers, 65 Mo. App. 422; Dilworth *v.* Fee, 52 Mo. 130; Kingman *v.* Abington, 56 Mo. 46; Silvey *v.* Summer, 61 Mo. 253; Edwards *v.* Cary, 60 Mo. 572; Craig *v.* Donnelly, 28 Mo. App. 342; Gooch *v.* Hollan, 30 Mo. App. 450.

Montana. — Parks *v.* Barkley, 1 Mont. 514; Boardman *v.* Thompson, 3 Mont. 387; Sheehy *v.* Flaherty, 8 Mont. 365, 20 Pac. 687.

Nebraska. — Myers *v.* Koenig, 5 Neb. 419; Grohousky *v.* Long, 20 Neb. 362, 30 N. W. 257; Lipp *v.* Hunt, 25 Neb. 91, 41 N. W. 143; Brown *v.* Feagins, 37 Neb. 256, 55 N. W. 1048.

Nevada. — Lachman *v.* Barnett, 16 Nev. 154.

New Jersey. — Allen *v.* Smith, 12 N. J. L. 199; Youngs *v.* Freeman, 15 N. J. L. 30; Drake *v.* Newton, 23 N. J. L. 111; Wilson *v.* Bayley, 42 N. J. L. 132.

New York. — People *v.* Rickert, 8 Cow. 226; People *v.* Leonard, 11 Johns. 504; People *v.* Brinkerhoff, 13 Johns. 340; Carter *v.* Newbold, 7 How. Pr. 166; Kelly *v.* Sheehy, 60 How. Pr. 439.

Oklahoma. — McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487.

Tennessee. — Allison *v.* Casey, 4 Baxt. 587; Pettyjohn *v.* Akers, 6 Yerg. 448; Settle *v.* Settle, 10 Humph. 504; McGhee *v.* Grady, 12 Lea 89.

Texas. — Warren *v.* Kelly, 17 Tex. 544; Texas Land Co. *v.* Turman, 53 Tex. 619; McRae *v.* White (Tex.), 42 S. W. 793; Meyer *v.* O'Dell, 18 Tex. Civ. App. 210, 44 S. W. 545.

Vermont. — Dustin *v.* Cowdry, 23 Vt. 631.

Virginia. — Olinger *v.* Shepherd, 12 Gratt. 462.

West Virginia. — Hays *v.* Altizer, 24 W. Va. 505; Brumbaugh *v.* Sterringer, 48 W. Va. 121, 35 S. E. 854.

Wisconsin. — Bracken *v.* Preston, 1 Pinn. 365; Ferrell *v.* Lamar, 1 Wis. 8; Jarvis *v.* Hamilton, 16 Wis. 598; Winterfield *v.* Stauss, 24 Wis. 394; Newton *v.* Leary, 64 Wis. 190, 25 N. W. 39.

In Warburton *v.* Doble, 38 Cal. 619, the court said: "The purpose of the action is to obtain a restitution of the premises and damages occasioned by the forcible entry and detainer; and title cannot be inquired into to defeat a recovery in either of those respects. . . . But when damages are claimed which do not necessarily result from the forcible entry or detainer, we are unable to perceive why title to the property alleged to have been injured may not be a proper subject of inquiry under the same circumstances and for the same purpose that it would be in an action of another character for the recovery of the same damages."

19. Character of Possession. Fowler *v.* Knight, 10 Ark. 43; Conroy *v.* Duane, 45 Cal. 597; Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58; Ragor *v.* McKay, 44 Ill. App. 79; Settle *v.* Settle, 10 Humph. (Tenn.) 504.

In Pearson *v.* Herr, 53 Ill. 144, the plaintiff purchased two tracts of land, one of which he used as his farm; the other, which was situated some distance from the farm, was used for supplying timber, wood and rails. There was no residence or enclosure

extent[20] of his possession, and is competent to show that his possession is coextensive with the boundaries of the deed.[21]

b. *Derivative Title.* — In Missouri, where, under a statute pro-

on the tract, but the plaintiff had used it for years without dispute when the defendant entered. The court held that the plaintiff's evidence of possession was sufficient to maintain the action of forcible entry and detainer, and that the deed to him for both tracts of land was admissible, in connection with proof of the use of the tract, to show the character and *extent of his* possession.

In Morgan *v.* Higgins, 37 Cal. 59, the plaintiff introduced evidence tending to show the actual possession of the premises by the witness Cardes, and that such possession continued in Cardes to the time of the alleged forcible entry. He introduced in evidence a deed of Cardes to plaintiff for the purpose of showing that at the time of the alleged forcible entry the apparent possession of the witness was the possession of the plaintiff, but it was not offered for the purpose of showing title in the plaintiff. The court held there was no error in the admission of the deed for the purpose for which it was offered, and that the possession of Cardes representing plaintiff was sufficient evidence of possession to maintain the action.

In Bloomington *v.* Brophy, 32 Ill. App. 400, the court said: "It needs no citation of authorities to show that evidence of title is inadmissible, when the title as such is the issue, and both parties rely upon conflicting titles for success. But when introduced merely for the purpose of showing the character or intent of a possession, evidence of title may be shown."

The court said, in Bloomington *v.* Graves, 28 Ill. App. 614: "Where the land is entirely vacant at the time of the alleged trespass or forcible entry, either party may introduce his title papers, because in such case title draws to it a constructive possession; and so also where it is actually occupied in part, the party so occupying may introduce them, because in such case they fix by conclusive presumption the extent of his actual possession, which in either case is sufficient for all the purposes of the action."

20. Extent of Possession.

Alabama. — Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483.

Arkansas. — Anderson *v.* Mills, 40 Ark. 192.

California. — Thompson *v.* Smith, 28 Cal. 527.

Florida. — Walls *v.* Endel, 17 Fla. 478.

Illinois. — Huftalin *v.* Misner, 70 Ill. 205; Slate *v.* Eisenmeyer, 94 Ill. 96; Smith *v.* Hoag, 45 Ill. 250; Griffen *v.* Kirk, 47 Ill. App. 258.

Indian Territory. — Heivlett *v.* Hyden (Ind. Ter.), 69 S. W. 839.

Kentucky. — Beauchamp *v.* Morris, 4 Bibb 312; Carpenter *v.* Shepherd, 4 Bibb 501; Bush *v.* Coomer, 24 Ky. L. Rep. 702, 69 S. W. 793.

Tennessee. — Philips *v.* Sampson, 2 Head 429.

Virginia. — Olinger *v.* Shepherd, 12 Gratt. 462.

In actions of forcible entry and detainer, deeds may be read in evidence to prove boundaries or extent of possession. Brooks *v.* Bruyn, 18 Ill. 539.

In Gray *v.* Finch, 23 Conn. 495, the defendant sought to produce evidence of the title under which the entry was made. In discussing the admissibility of such evidence, the court held: "To show the nature or character of the possession claimed by Mrs. Gray, therefore, it was proper to produce the evidence of title under which she entered. An unacknowledged deed, and the record of a judgment in a suit between other parties, are admissible as part of the evidence to evince the nature of a possession taken, or held under such deed and judgment. And in connection with proof of acts of possession, the execution was evidence to show the extent of the possession claimed by Mrs. Gray, as it showed the extent of the title under which she claimed."

21. In Barefoot *v.* Wall, 108 Ala. 327, 18 So. 823, the court said: "It is sometimes permissible to introduce written evidence of title or color of

viding that heirs, devisees, grantees and assignees are entitled to the remedy of forcible entry and unlawful detainer in the same manner as the ancestor, devisor, grantor or assignor, evidence of rights under derivative titles, since the demise, is made admissible in this action.[22]

c. *Judgment and Execution.* — The plaintiff may offer in evidence a valid judgment, an execution and sheriff's deed, and such evidence will estop the defendant from disputing the title of the plaintiff to possession of the land.[23]

d. *Homestead Right.* — A woman as defendant in an action of forcible entry and detainer may show a homestead right in herself and children as the widow of a former husband.[24]

e. *Conveyance.* — Where it is essential in an action of forcible entry and detainer to prove that the property in question had been conveyed by a grantor in possession, a trust deed may be read in evidence to prove the conveyance.[25]

title in the action of unlawful detainer, not for the purpose of showing title to the land, but to show the extent of actual possession claimed; as where, under color of title, a person is in actual possession of a part, the possession extends to the limits described in the deed or instrument conveying color of title."

22. Pentz *v.* Kuester, 41 Mo. 447.

23. Johnson *v.* Baker, 38 Ill. 98; Kratz *v.* Buck, 111 Ill. 40.

In Nicholson *v.* Walker, 4 Ill. App. 404, it was held by Pillsbury, P. J.: "While it is true that this is a mere possessory action in which the title is not involved and cannot be tried, yet this rule has never been held so rigid as to preclude a defendant from showing the source of his claim to the right of possession to the premises. The plaintiff is bound to establish a right to the present possession as against the defendant, and this very principle presupposes the right of the defendant to defeat the plaintiff's claim by providing a better in himself.

"The plaintiff's right to the possession of the premises, where the defendant in execution is also defendant in the action of forcible detainer, is fully established by the introduction in evidence of the judgment, execution, sale thereunder, and sheriff's deed; but where the defendant in the action is a stranger to the judgment, it is apprehended that it must be shown that the party in possession holds the premises in subordination to the title or possession of the judgment debtor, and that his right to the possession was acquired by him subsequent to the lien of the judgment upon which the premises were sold.

"If, prior to the rendition of a judgment against a party, he leases his land for a term of years, and the tenant takes possession, it certainly cannot be that the purchaser at a sale upon execution under such judgment can recover the possession in an action of forcible detainer against a tenant before his terms expires. Again, if A, owning a tract of land, conveys the same to B, who takes possession under his deed, and thereafter a judgment is rendered against A, and the land sold upon execution and the purchaser receives a sheriff's deed therefor, it would be singular if B, in an action of forcible detainer, could not introduce his deed in evidence, prove his possession thereunder, and thereby defeat the action, notwithstanding such evidence might show that the execution debtor had no vendible interest in the premises at the time of the rendition of the judgment and the sale upon execution."

24. Morrissey *v.* Stephenson, 86 Ill. 344.

25. In Muller *v.* Balke, 167 Ill. 150, 47 N. E. 355, the court said: "It is contended as the action of forcible detainer is merely a possessory one, that the question of passing of title under the trust deed can-

f. *Intent.* — It has been held that evidence of title is admissible in order to show the purpose with which an entry was made, and to uphold the possession if once peaceably obtained.[26]

C. Right of Possession. — In most states the right of possession is not involved in actions of forcible entry and detainer, and all evidence of title to show such right is inadmissible.[27]

a. *Burden of Proof.* — In Illinois it is held that the person who is in the actual and peaceable possession of land will be deemed to be rightfully in possession, and the burden of proof is upon him who would dispute that possessory right.[28]

D. Deeds. — While deeds cannot be introduced as evidence of

not be litigated in that action. It may be conceded that the question of title cannot be tried and determined in an action of this character. That, however, was not attempted. The appellee, however, had the right to prove on the trial that the property in question had been conveyed by a grantor in possession, and for that purpose she had the right to read in evidence the trust deed from Edward Muller to Charles S. Gloeckler, and the deed from Gloeckler, the trustee, to appellee. There was no other method of proving a conveyance, and unless that method could be availed of, the statute authorizing an action in such cases would be a nullity."

26. Conaway *v.* Gore, 27 Kan. 122.

27. *Alabama.* — Horsefield *v.* Adams, 10 Ala. 9; Dumas *v.* Hunter, 25 Ala. 711; Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397.

California. — Giddings *v.* '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196.

Illinois. — Doty *v.* Burdick, 83 Ill. 473.

Iowa. — Lorimer *v.* Lewis. 1 Morris 253; Emsley *v.* Bennett, 37 Iowa 15.

Kentucky. — Dils *v.* Justice, 10 Ky. L. Rep. 547, 9 S. W. 290.

Missouri. — Meriwether *v.* Howe, 48 Mo. App. 148; Van Eman *v.* Walker, 47 Mo. 169; Miller *v.* Tillmann, 61 Mo. 316; Sitton *v.* Sapp, 62 Mo. App. 197.

Montana. — Parks *v.* Barkley, 1 Mont. 514; Boardman *v.* Thompson, 3 Mont. 387; Sheehy *v.* Flaherty, 8 Mont. 365, 20 Pac. 687.

Nebraska. — Myers *v.* Koenig, 5 Neb. 419.

Nevada. — Lachman *v.* Barnett, 16 Nev. 154.

New York. — Carter *v.* Newbold, 7 How. Pr. 166.

Pennsylvania. — Pennsylvania *v.* Robison, Add. 14.

Virginia. — Olinger *v.* Shepherd, 12 Gratt. 462; Fore *v.* Campbell, 82 Va. 808, 1 S. E. 180.

Vermont. — Dustin *v.* Cowdry, 23 Vt. 631.

Delmonica Hotel Co. *v.* Smith, 112 Iowa 659, 84 N. W. 906, where a dispute arose over the possession of a narrow strip of land between two lots and an action of forcible entry and detainer resulted, evidence was inadmissible to show the true line between the lots, as the issue did not directly involve title or right of possession, but only the actual possession.

In Settle *v.* Henson, 1 Morris (Iowa) 111, the court said: "A person may render himself liable for a forcible entry and detainer by entering upon his property, even when he has the right to immediate possession. . . . It is simply the matter of entering upon and holding the property which creates the liability. It is only necessary for the complainant to show that he was actually in possession, and that the defendant either forcibly entered, or forcibly detained, possession, or both, and his action will, in all cases, be sustained, whoever may have the title to the property, or the right of possession thereto."

28. Fitzgerald *v.* Quinn, 165 Ill. 354, 46 N. E. 287; Gosselin *v.* Smith, 154 Ill. 74, 39 N. E. 980; Hammond *v.* Doty, 184 Ill. 246, 56 N. E. 371.

title, they are sometimes admitted as proof of the right of possession.[29]

II. FORCE.

1. Generally. — In actions of forcible entry and detainer, before the plaintiff can recover he must prove that the defendant holds the possession either by actual violence or such a show of force as is reasonably calculated to intimidate the plaintiff.[30]

29. *Alabama.* — Beck *v.* Glenn, 69 Ala. 121.

Georgia. — Poulan *v.* Sellers, 20 Ga. 228.

Illinois. — Roberts *v.* McEwen, 81 Ill. App. 413; Hannigan *v.* Mossler, 44 Ill. App. 117.

Tennessee. — Philips *v.* Sampson, 2 Head 429; Settle *v.* Settle, 10 Humph. 504; McGhee *v.* Grady, 12 Lea 89.

Texas. — Texas Land Co. *v.* Turman, 53 Tex. 619; Comley *v.* Stanfield, 10 Tex. 546.

Virginia. — Corbett *v.* Nutt, 18 Gratt. 624.

West Virginia. — Hays *v.* Altizer, 24 W. Va. 505.

In McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487, the court said: "Under our statutes governing the action of unlawful and forcible entry or unlawful detention, the action is purely a possessory action, and the title to the real estate in question cannot be properly put in issue. Deeds and other evidence of title may ordinarily be offered in evidence as proof of the right of possession."

In Rabe *v.* Fyler, 10 Smed. & M. (Miss.) 440, the defendant held the disputed premises as tenant of a bank. The bank subsequently conveyed the premises by deed to the plaintiffs. Defendant having refused to deliver the premises to plaintiffs, they brought an action of unlawful detainer against him. On the trial the plaintiffs were permitted, against defendant's objections, to read the deed from the bank to them. The court held: "Inasmuch as the right of possession was one of the points in controversy, the deed was properly admitted in evidence to enable the jury to determine that right."

In Allison *v.* Casey, 4 Baxt. (Tenn.) 587 the court said: "It is true, as a general proposition, that the right of possession only is involved in the action of forcible entry, or unlawful detainer, but it does not follow that title may not be legitimately used as evidence bearing upon the question as to the right of possession."

30. *England.* — Edwick *v.* Hawkes, 18 Ch. Div. 199.

Alabama. — McGonegal *v.* Walker, 23 Ala. 361; Welden *v.* Schlosser, 74 Ala. 355; Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397.

Arkansas. — McGuire *v.* Cook, 13 Ark. 448; Hall *v.* Trucks, 38 Ark. 257.

California. — McMinn *v.* Bliss, 31 Cal. 122; Thompson *v.* Smith, 28 Cal. 527; Shelby *v.* Houston, 38 Cal. 410; Wilbur *v.* Cherry, 39 Cal. 660; Castro *v.* Tewksbury, 69 Cal. 562, 11 Pac. 339; Buel *v.* Frazier, 38 Cal. 693.

Colorado. — Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58; Goshen *v.* People, 22 Colo. 270, 44 Pac. 503.

Connecticut. — Gray *v.* Finch, 23 Conn. 495; Bull *v.* Olcott, 2 Root 472.

Georgia. — Stuckey *v.* Carleton, 66 Ga. 215; Lissner *v.* State, 84 Ga. 669, 11 S. E. 500; Lewis *v.* State, 99 Ga. 692, 26 S. E. 496; Brown *v.* McJunkin, 99 Ga. 91, 24 S. E. 855.

Illinois. — Bloom *v.* Goodner, 1 Ill. 63.

Indiana. — Gipe *v.* Cummins, 116 Ind. 511, 19 N. E. 466; Archey *v.* Knight, 61 Ind. 311; Tibbetts *v.* O'Connell, 66 Ind. 171.

Massachusetts. — Com. *v.* Shattuck, 4 Cush. 141; Pike *v.* Witt, 104 Mass. 595.

Michigan. — Shaw *v.* Hoffman, 25 Mich. 162; Smith *v.* Detroit Loan & Bldg. Ass'n, 115 Mich. 340, 73 N. W. 395; Richter *v.* Cordes, 100 Mich. 278, 58 N. W. 1110.

Nebraska. — Estabrook *v.* Hateroth, 22 Neb. 281, 34 N. W. 634.

New Hampshire. — State *v.* Pearson, 2 N. H. 550.

New Jersey. — Day *v.* Hall, 12 N. J. L. 203.

New York. — People *v.* Carter, 29

2. Amount of Force. — There is no definite rule as to the amount or character of the force which must be shown to maintain the action of forcible entry and detainer. Much depends upon the circumstances of the entry, and the condition under the statutes.[31]

Barb. 208; People *v.* Field, 52 Barb. 198; People *v.* Rickert, 8 Cow. 226.

North Carolina. — State *v.* Godsey, 35 N. C. 348; State *v.* Caldwell, 47 N. C. 468; State *v.* Covington, 70 N. C. 71.

Ohio. — Yager *v.* Wilber, 8 Ohio 398.

Oregon. — Smith *v.* Reeder, 21 Or. 541, 28 Pac. 890.

Pennsylvania. — Respublica *v.* Devore, 1 Yeates 501.

South Carolina. — State *v.* Cargill, 2 Brev. 445.

South Dakota. — Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

Vermont. — Foster *v.* Kelsey, 36 Vt. 199.

West Virginia. — Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168.

Wisconsin. — Jarvis *v.* Hamilton, 16 Wis. 598; Winterfield *v.* Stauss, 24 Wis. 394; Ainsworth *v.* Barry, 35 Wis. 136; Steinlein *v.* Halstead, 42 Wis. 422.

The court said in O'Callaghan *v.* Booth, 6 Cal. 63: "It is not necessary to prove actual force to maintain this action, but threats or menaces of a hostile character, showing a determination to resort to violence if resistance is offered, are all that is necessary. It would certainly be a strange rule if a party were compelled to procure an assault to be made upon himself at the time of his ouster to enable him to maintain his action for a recovery of possession."

In Childress *v.* Black, 9 Yerg. (Tenn.) 317, the court said: "To constitute this offense, it is not necessary that violence and outrage upon person or property should in fact be resorted to. If the actual possession of another, in a house or tenement, be invaded, taken, and held under circumstances to show that it will not be surrendered without a breach of the peace on the one side or the other, this constitutes a case of forcible entry and detainer. The statute was intended to prevent bloodshed, violence, and breaches of the peace, too likely to arise from wrongful intrusion into the possession of another, and to give a right to restitution under the statute; it is not so absurd as to require actual bloodshed and violence, and frequent breaches of the peace in the acquisition or retention of the possession."

In Saunders *v.* Robinson, 5 Metc. (Mass.) 343, the court said: "A mere unlawful entry into lands, though it would justify the common averment of *vi et armis*, or force and arms, is not the forcible entry contemplated by the statute. It must be something more, either an original entry or subsequent detainer, with strong hand; and this may be by the use of actual force and violence, or by menace of force, accompanied by arms and manifest intent to carry such threat into effect, or by a show of force calculated to create terror and alarm, by an exhibition of arms, and a display of numbers, or other means manifesting an open and visible determination forcibly to make the entry, or forcibly to resist the entry of another."

31. Gray *v.* Collins, 42 Cal. 152; Bank of California *v.* Taaffe, 76 Cal. 626, 18 Pac. 781; Tibbett *v.* O'Connell, 66 Ind. 171; Smith *v.* Reeder, 21 Or. 541, 28 Pac. 890.

The court said, in Dickinson *v.* Mcguire, 9 Cal. 47: "As to what shall constitute a forcible detainer, it may be difficult to define in language so exact and certain as to exclude all room for reasonable doubt. The circumstances of different cases are so various as to make this impossible. But it may be stated in general terms that there must be something of personal violence, either threatened or actual. If, when the possession of the premises is demanded of the party, he, by word or act, look or gesture, gives reasonable ground to apprehend the use of force to prevent the rightful claimant from obtaining peaceable possession, this would be sufficient. It is not necessary for the claimant to wait until actual violence is resorted to."

In McGonegal *v.* Walker, 23 Ala.

A. Personal Violence. — The entry, or the unlawful detainer after a peaceable entry, must be accompanied with circumstances tending to excite terror in the owner and prevent him from maintaining his rights. There must be at least apparent violence, or some unusual weapons, or the parties accompanied with an unusual number of people, some menaces, or other acts giving reasonable cause to fear that the party making the entry will do some bodily hurt to those in possession, if they do not give up the same.[32]

B. Threats. — The plaintiff is only required, in some states, to show any circumstances of terror which induced him to yield possession. Threats which would have a tendency to excite fear, not of personal violence alone, but reasonable fear of a violent ouster of the person in possession, are sufficient evidence of force.[33]

361, the court said: "In order to sustain the proceedings of forcible entry and detainer, the plaintiff must show that the defendant has entered upon his premises *forcibly* and that he actually detains the possession from him. The detainer need not be by the defendant in person; he may detain by another, to whom he delivers the possession, after he has obtained it by force to be kept for him; nor does it make any difference that the person to whom he delivers it had been his tenant before the premises went into the possession of the plaintiff."

32. *Florida.* — Livingston *v.* Webster, 20 Fla. 325.

Georgia. — Blackwell *v.* State, 74 Ga. 816; Lewis *v.* State, 99 Ga. 692, 26 S. E. 496.

Massachusetts. — Com. *v.* Dudley, 10 Mass. 403; Com. *v.* Shattuck, 4 Cush. 141; Saunders *v.* Robinson, 5 Metc. 343.

Michigan. — Shaw *v.* Hoffman, 25 Mich. 162.

New Jersey. — Hendrickson *v.* Hendrickson, 12 N. J. L. 202; Butts *v.* Voorhees, 13 N. J. L. 13.

New York. — Willard *v.* Warren, 17 Wend. 257; People *v.* Fields, 1 Lans. 222; Wood *v.* Phillips, 43 N. Y. 152.

North Carolina. — State *v.* Pollok, 26 N. C. 305.

Oregon. — Smith *v.* Reeder, 21 Or. 541, 28 Pac. 890.

Pennsylvania. — Respublica *v.* Devore, 1 Yeates 501.

South Carolina. — State *v.* Cargill, 2 Brev. 445.

Vermont. — Foster *v.* Kelsey, 36 Vt. 199.

West Virginia. — Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168.

In People *v.* Rickert, 8 Cow. (N. Y.) 226, after reviewing the evidence as to possession, the court said: "The next question is, whether a forcible detainer was shown. On this subject the law is that the same circumstances of violence or terror which will make an entry forcible, will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter."

In Pennsylvania *v.* Robison, Add. (Pa.) 14, the court said: "As to the force in the entry, there must be, at least, such acts of violence, or such threats, menaces, signs or gestures, as may give ground to apprehend personal injury or danger, in standing in defense of the possession."

33. *Alabama.* — McKeen *v.* Nelms, 9 Ala. 507.

California. — Frazier *v.* Hanlon, 5 Cal. 156; Watson *v.* Whitney, 23 Cal. 376; O'Callaghan *v.* Booth, 6 Cal. 63.

Georgia. — Blackwell *v.* State, 74 Ga. 816.

Massachusetts. — Saunders *v.* Robinson, 5 Metc. 343; Com. *v.* Shattuck, 4 Cush. 141; Com. *v.* Dudley, 10 Mass. 403.

Michigan. — Shaw *v.* Hoffman, 25 Mich. 162.

New York. — People *v.* Rickert, 8

a. *Threats After Peaceable Entry.* — Where a defendant enters the premises unlawfully, but peaceably, and maintains his unlawful possession by threats of personal violence, or a show of force against the plaintiff, such a detainer is held within the meaning of the statute in most states.[34]

C. MERE TRESPASS INSUFFICIENT. — Where an entry is made with no more force than such as is implied in an ordinary trespass,

Cow. 226; Willard *v.* Warren, 17 Wend. 257.

North Carolina. — State *v.* Caldwell, 47 N. C. 468.

Texas. — Holmes *v.* Holloway, 21 Tex. 658.

West Virginia. — Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168.

In Pennsylvania *v.* Waddle, Add. (Pa.) 41, the court said: "Words are the slightest symptoms of force. If you think it was the meaning and tendency of the words to impress on Johnson a terror of personal harm, if he should proceed to take possession; this is force. If you think their meaning was only to signify that Waddle would not give up his claim, which he thought a just one, till by a legal trial it was declared unjust; this is not force."

In Harrow *v.* Baker, 2 Greene (Iowa) 201, the court said: "By our statute, the right of action may be complete in the absence of all force. Any circumstance of terror, which will induce the party to yield possession, is all that is necessary. Threats which would have a tendency to excite fear, not of personal violence alone, but reasonable fear of a violent ouster of the goods of the person in possession, we think, under our statute, will enable the party disposed by such fear to recover possession in an action of forcible entry and detainer."

In Strong *v.* State, 105 Ind. 1, 4 N. E. 293, the court said: "It is not necessary that the violence contemplated by this section of the statute shall be manifested by menaces, as well as by force and with arms, all as parts of the same transaction. Neither is actual force an essential requisite. Proof of such strong-handed proceedings, or such a show of force, as overawed and intimidated the injured party, and as either deterred him from defending his possession, or coerced him into surrendering it, is sufficient to make out a case of forcible entry, and proof of a similar exhibition of force is all that is required to sustain a charge of forcible detainer."

In Febes *v.* Tiernan, 1 Mont. 179, the court, speaking through Mr. Justice Knowles, say: "The unauthorized entry upon the premises of another is a trespass. When such a state of facts is established, the law implies that the entry was done with force, and it is not necessary to offer any further evidence upon that point."

34. *Alabama.* — McKean *v.* Nelms, 9 Ala. 507.

California. — Dickinson *v.* Maguire, 9 Cal. 47; Fogarty *v.* Kelly, 24 Cal. 317.

Georgia. — Lewis *v.* State, 99 Ga. 692, 26 S. E. 496.

Indiana. — Strong *v.* State, 105 Ind. 1, 4 N. E. 293.

New York. — People *v.* Rickert, 8 Cow. 226.

Wisconsin. — Winterfield *v.* Stauss, 24 Wis. 394.

In Foster *v.* Kelsey, 36 Vt. 199, the court said: "It has been urged that our statute does not apply to the case of an unlawful but peaceable entry followed by a forcible detainer, and that this case is of that class. It is true that the statute speaks in express terms only of those 'who make unlawful and forcible entry into lands and with strong hand detain them,' and of 'those who, having a lawful and peaceable entry into lands, unlawfully and by force hold the same.' But if those who enter lawfully and peaceably are liable to a conviction for a forcible detainer, we are at a loss to see why those who enter unlawfully though peaceably, and hold forcibly, should not be. It is the forcible detainer that constitutes the offense, and one who is guilty of that ought not to be better off for having entered *unlawfully* than if he had entered lawfully. The spirit and reason of these stat-

it is insufficient to maintain the action of forcible entry and detainer.[35]

D. Dwelling House. — Where it is shown that the defendant broke into the plaintiff's dwelling house during the latter's absence, intending to keep possession, it is held sufficient to maintain the action of forcible entry and detainer in some states.[36]

E. Unoccupied House. — But where the evidence shows that the breaking and entering was into an outhouse, or an unoccupied dwelling, and there were no circumstances of violence or terror, it is held insufficient to maintain the action.[37]

utes clearly require that an unlawful and peaceable entry, followed by a forcible detainer, should be held to come within their meaning and cognizance."

35. *Canada.* — Reg. *v.* Pike, 12 Manitoba 314; Bertram *v.* Bonham, 12 Nova Scotia 600.

California. — Frazier *v.* Hanlon, 5 Cal. 156; Castro *v.* Tewksbury, 69 Cal. 562, 11 Pac. 339.

Connecticut. — Gray *v.* Finch, 23 Conn. 495.

Indiana. — Archey *v.* Knight, 61 Ind. 311.

Michigan. — Shaw *v.* Hoffman, 25 Mich. 162; Smith *v.* Detroit Bldg. & Loan Ass'n, 115 Mich. 340, 73 N. W. 395.

New Hampshire. — State *v.* Pearson, 2 N. H. 550.

New York. — People *v.* Fields, 1 Lans. 222; People *v.* Smith, 24 Barb. 16; Willard *v.* Warren, 17 Wend. 257; Wood *v.* Phillips, 43 N. Y. 152.

North Carolina. — State *v.* Pollok, 26 N. C. 305; State *v.* Tolerer, 27 N. C. 452.

Ohio. — Yager *v.* Wilber, 8 Ohio 398.

Oregon. — Smith *v.* Reeder, 21 Or. 541, 28 Pac. 890.

South Dakota. — Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

Vermont. — Foster *v.* Kelsey, 36 Vt. 199.

Wisconsin. — Jarvis *v.* Hamilton, 16 Wis. 574; Ainsworth *v.* Barry, 35 Wis. 136.

36. Jarvis *v.* Hamilton, 16 Wis. 574.

In Mason *v.* Powell, 38 N. J. L. 576, the court holds that if one break into another's dwelling-house during the owner's absence he is guilty of a forcible entry within the statute.

In Ainsworth *v.* Barry, 35 Wis. 136, where the entry was made upon premises not in the actual possession of any one at the moment, and into a dwelling-house which was at the time vacant, the court held that the force might consist in the breaking in of a door or the forcible breaking of some other part of the house to obtain admission, and that in case the house was locked up, and the windows fastened, it would be sufficient, if the guilty party used some force, manual or otherwise, to undo the fastenings to the windows, or to crowd back the bolts in the locker, in order to secure an entrance, to render the entry forcible within the meaning of the statute.

In Lewis *v.* State, 99 Ga. 692, 26 S. E. 496, it is held that in order to constitute the offense of forcible entry and detainer, the entry must be accompanied by some act of actual violence or terror directed toward the person in possession; and consequently, breaking and entering an unoccupied house in the absence of the person who had previously been in possession and control thereof, and who still claimed the right to the possession, is not indictable.

37. State *v.* Pridgen, 30 N. C. 84; Bertram *v.* Bonham, 12 Nova Scotia 600.

In Willard *v.* Warren, 17 Wend. (N. Y.) 257, the defendant broke open a granary attached to the barn of the plaintiff. The court held that the breaking into an outhouse is not sufficient to sustain the action, and that the same would be true if the building were a dwelling in the absence of the owner.

In Shaw *v.* Hoffman, 25 Mich. 162, after construing the statute, the

3. Entry by Fraud. — Where the defendant enters by fraud or in the night time during the plaintiff's absence, and where he maintains the possession so obtained by a show of force, it is held sufficient to maintain the action.[38]

4. Entry Against Will of Possessor. — In a few states it is not essential that the entry be accompanied with force. Where it is shown that the defendant entered into the possessions of the plaintiff against the latter's will the entry is forcible in legal contemplation.[39]

court said: "The statute was not intended to apply to a mere trespass, however wrongful; but the entry or the detainer must be riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out; in other words, the force contemplated by the statute is not merely the force used against, or upon, the property, but force used or threatened against persons, as a means, or for the purpose, of expelling or keeping out the prior possessor. And, though the breaking into a dwelling house occupied by a person or a family, being of itself calculated to excite terror or the fear of personal violence, may come within the statute — and there is one case, hardly now regarded as law (2 Roll. R.; 2 Hill., XV Jac.), which held the breaking into a dwelling house to come within the statute, though no person was in the house — there is not, it is believed, from the reign of Henry the Sixth to this day, either in England or the state of New York, a single adjudged case reported, in which the breaking the door of a barn or outhouse, or the tearing it down and removing it, and the taking and remaining in possession, would, of itself, constitute the forcible entry or forcible detainer contemplated by the statute, if unaccompanied by any force toward any person, actual or threatened, and without creating in some way an apprehension of personal violence."

38. Treat *v.* Forsyth, 40 Cal. 484; Webster *v.* Stewart, 6 Iowa 401; Stephens *v.* McCloy, 36 Iowa 659; Emsley *v.* Bennett, 37 Iowa 15; Seitz *v.* Miles, 16 Mich. 456; Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

39. *Illinois.* — Smith *v.* Hoag, 45 Ill. 250; Reeder *v.* Purdy, 41 Ill. 279; Doty *v.* Burdick, 83 Ill. 473; Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243; Roberts *v.* McEwen, 81 Ill. App. 413; Coverdale *v.* Curry, 48 Ill. App. 213.

Kentucky. — Brumfield *v.* Reynolds, 4 Bibb 388; Henry *v.* Clark, 4 Bibb 426; Chiles *v.* Stephens, 3 A. K. Marsh. 340; Smith *v.* Morrow, 5 Litt. 210.

Missouri. — Warren *v.* Ritter, 11 Mo. 354; Wunsch *v.* Gretel, 26 Mo. 580; Richards *v.* Smith, 47 Mo. App. 619; State *v.* Vansickle, 57 Mo. App. 611; Wylie *v.* Waddell, 52 Mo. App. 226; Willis *v.* Stephens, 24 Mo. App. 494.

In Croff *v.* Ballinger, 18 Ill. 201, the court said: "To constitute forcible entry and detainer under our statute, it is not essential that the entry be made with *strong hand,* or be accompanied with acts of actual force or violence, either against person or property. If one enters into the possession of another against the will of him whose possession is invaded, however quietly he may do so, the entry is forcible in legal contemplation. The word *force,* in our statute, means no more than the term *vi et armis* does at common law, that is, with either actual or implied force. If A wrongfully enters into the possession of B, although with the least possible manual force, in consideration of law the entry is forcible, and the remedy for the trespass or wrong is as complete as if A had made the entry with actual force and violence, overpowering by *strong hand* all resistance."

In Oakes *v.* Aldridge, 46 Mo. App. 11, the court said: "It is sufficient upon which to base an action of forcible entry that the entry be made against the will of him who is in the

A. Plaintiff's Declarations. — It has been held that the plaintiff may be allowed to prove his declarations made at the time of the entry of the defendant, to show that the entry was made against his will.[40]

5. Unlawful Detainer. — In actions of unlawful detainer, the plaintiff must show that the defendant is holding over after the expiration of the term of his lease, and a refusal of defendant to surrender the possession of the premises.[41] In such action the terms

peaceable possession. There need not be actual force."

In Swartzwelder *v.* United States Bank, 1 J. J. Marsh. (Ky.) 38, the court said: "The statute declares that a forcible entry meant by it is an entry against or without the will of the individual in possession. If, then, an entry without the consent of the possessor is a forcible entry, a detention against his will must be a forcible detainer. Therefore, when the warrant charges a forcible entry *and* detainer, the entry is forcible, because it was against the will of the possessor; the detainer must necessarily be forcible, because it is contrary to his will."

In Gass *v.* Newman, 1 Head (Tenn.) 136, the plaintiff was in the peaceable possession of the premises and had erected an enclosure thereon, and the defendant, against the will, and in spite of the remonstrance of the plaintiff, came upon the premises and erected an enclosure around that of the plaintiff, although he did not remove any part of the plaintiff's enclosure, or otherwise disturb the same. Upon these facts the court said: "The law implies force in every unauthorized entry upon the possession of which another is in the peaceable possession; and likewise, in every unauthorized obstruction of such possession; and this is sufficient to support the action in a case like the present. The erection of the fence was, in law, a forcible and unlawful seizure of the possession of the plaintiff's enclosure, and an ouster of his possession. The effect, in law, was to exclude him from the occupation of the land, and such was the end designed, in fact. His enclosure being *impounded,* so to speak, he could not have ingress or egress to and from it, without a direct act of defiance and hostility to the usurped rights of the defendant. To put an end to all such provoking and threatening scrambles for possession was the object of the statute giving this action."

40. In Croff *v.* Ballinger, 18 Ill. 201, the court said: "A party may prove his own declarations made at the time of an act done, illustrative of his intention, or of the motive which actuated him. The declarations of dissent or opposition of Ballinger to the entry made on the occasion of the entry were proper, in connection with the whole evidence, for the consideration of the jury, to enable them to determine whether the entry was made against the will of Ballinger; and, as a part of the *res gestae,* he might prove them."

41. *Alabama.* — Barefoot *v.* Wall, 108 Ala. 327, 18 So. 823.

Arkansas. — Keller *v.* Henry, 24 Ark. 575; Johnson *v.* West, 41 Ark. 535; Winkler *v.* Massengill, 66 Ark. 145, 49 S. W. 494; McGuire *v.* Cook, 13 Ark. 448.

California. — Caulfield *v.* Stevens, 28 Cal. 118; Brummagim *v.* Spencer, 29 Cal. 661.

Colorado. — Keller *v.* Klopfer, 3 Colo. 132.

Connecticut. — Mason *v.* Hawes, 52 Conn. 12.

Illinois. — Jackson *v.* Warren, 32 Ill. 331; Doty *v.* Burdick, 83 Ill. 473; Cairo & St. L. R. Co. *v.* Wiggin Ferry Co., 82 Ill. 230; Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432; Mueller *v.* Newell, 29 Ill. App. 192; Toby *v.* Schultz, 51 Ill. App. 487.

Kansas. — Waite *v.* Teeters, 36 Kan. 604, 14 Pac. 146.

Kentucky. — Cammack *v.* Macy, 3 A. K. Marsh. 296; Gray *v.* Nesbit, 2 A. K. Marsh. 35; Allison *v.* Thompson, 1 Litt. 32; Reed *v.* Pawson, 2 Litt. 189; Herndon *v.* Pasco, 8 Dana 113; Taylor *v.* Mo[illegible] 8 Bush 238.

of the agreement between the parties are admissible in evidence.[42] The plaintiff must establish the existence of the relation of landlord and tenant between himself and the defendant.[43]

Maine. — Dunning *v.* Finson, 46 Me. 546.

Massachusetts. — Hildreth *v.* Conant, 10 Metc. 298.

Michigan. — Moody *v.* Seaman, 46 Mich. 74, 8 N. W. 711.

Missouri. — Pentz *v.* Kuester, 41 Mo. 447.

Oregon. — Rosenblat *v.* Perkins, 18 Or. 156, 22 Pac. 598.

Texas. — Murat *v.* Micand (Tex. Civ. App.), 25 S. W. 312.

Virginia. — Corbett *v.* Nutt, 18 Gratt. 624.

In Botts *v.* Armstrong, 8 Port. (Ala.) 57, the court said: "By the statute of this state, it is provided that no one who enters peaceably into the possession of lands shall afterwards hold the same unlawfully, and with force, etc. Under this section a peaceable entry into lands will be converted into an unlawful detainer, if possession is unlawfully withheld from the person entitled to the possession."

42. In Frazier *v.* Virginia Military Institute, 81 Va. 59, the corporation employed Frazier to act as treasurer, the consideration being $1000 per annum and the possession of a certain house for a residence. At the end of the term the corporation wished to end the contract, but defendant refused to vacate the residence. In an action of unlawful detainer against him, the records of the corporation were held admissible as evidence to show the arrangements between the parties.

In Lehnen *v.* Dickson, 148 U. S. 71, which was an action of unlawful detainer in which the defendant put in evidence a lease of the property by the owner, who had since died, and which lease had been assigned to him, whereupon the plaintiff offered evidence of a judgment canceling and setting aside that lease, which evidence the court admitted against the defendant's objection, the court held that since the defendant may offer testimony to prove a transfer of title away from the landlord, the latter may introduce testimony to show that the alleged transfer was of no validity, and that it is simply "evidence for proof of rights under a derivative title;" evidence which in terms is authorized by the statute. *Held,* that there was no error in admitting this testimony.

43. *Arkansas.* — Frank *v.* Hedrick, 18 Ark. 304; Necklace *v.* West, 33 Ark. 682; Dortch *v.* Robinson, 31 Ark. 296.

California. — Johnson *v.* Chely, 43 Cal. 299.

Indian Territory. — Sanders *v.* Thornton, 2 Ind. Ter. 92, 48 S. W. 1015.

Kentucky. — Morris *v.* Bowles, 1 Dana 97; Sullivan *v.* Enders, 3 Dana 66; Norton *v.* Sanders, 7 J. J. Marsh. 12; Reeder *v.* Bell, 7 Bush 255; Taylor *v.* Monohan, 8 Bush 238.

Massachusetts. — Sacket *v.* Wheaton, 17 Pick. 103; Larned *v.* Clark, 8 Cush. 29.

Minnesota. — Pioneer Sav. & Loan Co. *v.* Powers, 47 Minn. 269, 50 N. W. 227.

New York. — Sims *v.* Humphrey, 4 Denio 185.

Wisconsin. — Carter *v.* Van Dorn, 36 Wis. 289; Winterfield *v.* Stauss, 24 Wis. 394.

The court said in Steinback *v.* Krone, 36 Cal. 303: "It is well settled that under the act 'concerning forcible entries and unlawful detainers' an action for unlawful holding over cannot be maintained, unless the relation of landlord and tenant is shown to exist between plaintiff and defendant at the time of the preliminary demand for possession by plaintiff required by § 4 of the act. If the tenancy is terminated before such demand, an action by the lessor cannot be maintained in this form."

In Mason *v.* Delancy, 44 Ark. 444, the court said: "The action of unlawful detainer can be maintained only where the relation of landlord and tenant subsists between the parties. . . .

"While it is not necessary under our statute to show an express demise or letting of lands to sustain the action, the facts must show, impliedly at least, that the defendant occupies as tenant of the plaintiff,

III. NOTICE AND DEMAND.

1. Generally. — In actions of unlawful detainer it is generally incumbent upon the plaintiff to show upon the trial that he has served a notice to quit, and a demand for the possession of the premises.[44] Where the entry is forcible, notice and demand are unnecessary.[45]

2. Actions Where Force is Not Involved. — In those actions of unlawful detainer where force and injury are not involved, the plaintiff must generally show a demand.[46]

A. Landlord and Tenant Actions. — As a general rule the cases involving notice and demand are confined to actions of unlawful detainer brought by a landlord against a tenant holding over.[47]

a. *Duration of Lease.* — Where there is a tenancy for a determinate period, and the tenant holds over after the expiration of the period, the plaintiff is not required to show a notice and demand.[48]

and this must be something more than a *quasi* tenancy."

44. Dumas *v.* Hunter, 30 Ala. 75; Bates *v.* Ridgeway, 48 Ala. 611; Nason *v.* Best, 17 Kan. 408; Conaway *v.* Gore, 22 Kan. 216; Douglass *v.* Whitaker, 32 Kan. 381, 4 Pac. 874.

In Stuller *v.* Sparks, 51 Kan. 19, 31 Pac. 301, the court said: "Under the provisions of § 161, if three days' notice to leave the premises is not given, a plaintiff cannot maintain an action of forcible entry and detainer. . . . As a three days' notice to leave is necessary to maintain the action, the plaintiff or complainant must show, upon the trial, that such notice was given, before he can have judgment in his favor."

45. Miller *v.* Sparks, 4 Colo. 303; Farncomb *v.* Stern, 18 Colo. 279, 32 Pac. 612; Stillman *v.* Palis, 134 Ill. 532, 25 N. E. 786; Miller *v.* Drexel, 37 Ill. App. 462; Crane *v.* Dod, 2 N. J. L. 320; Smith *v.* Reeder, 21 Or. 541, 28 Pac. 890.

In Grice *v.* Ferguson, 1 Stew. (Ala.) 36, the court said: "Notice for the delivery of possession is required only where a tenant without force holds over after the expiration of his term, and is not necessary in a case of forcible detainer."

46. *Alabama.* — Spear *v.* Lomax, 42 Ala. 576; Beck *v.* Glenn, 69 Ala. 121; Littleton *v.* Clayton, 77 Ala. 571; King *v.* Bolling, 77 Ala. 594; Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397.

Arkansas. — Thorn *v.* Reed, 1 Ark. 480.

Illinois. — Dickason *v.* Dawson, 85 Ill. 53; Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432; Lehman *v.* Whittington, 8 Ill. App. 374; Brackensieck *v.* Vahle, 48 Ill. App. 312.

Iowa. — Shuver *v.* Klinkenberg, 67 Iowa 544, 25 N. W. 770.

Kentucky. — Shepherd *v.* Thompson, 2 Bush 176.

New Jersey. — Mead *v.* Kirkpatrick, 8 N. J. L. 308.

Oregon. — Rosenblat *v.* Perkins, 18 Or. 156, 22 Pac. 598.

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

47. *Alabama.* — Devitt *v.* Lambert, 80 Ala. 536, 2 So. 438.

California. — Gladwin *v.* Stebbins, 2 Cal. 103; Kilburn *v.* Ritchie, 2 Cal. 146.

Illinois. — McGrath *v.* Miller, 61 Ill. App. 497.

Tennessee. — Mallory *v.* Hanaur Oil Wks., 86 Tenn. 598, 8 S. W. 396.

Texas. — Warren *v.* Kelley, 17 Tex. 544.

Washington. — Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123.

48. *California.* — Stopplekamp *v.* Mangeot, 42 Cal. 316; Canning *v.* Fibush, 77 Cal. 196, 19 Pac. 376; Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45.

Illinois. — Walker *v.* Ellis, 12 Ill. 471; Ball *v.* Peck, 43 Ill. 482; Frank *v.* Taubman, 31 Ill. App. 592; Webb *v.* Heyman, 40 Ill. App. 335.

But where the tenancy is of uncertain duration,[49] or where there is a tenancy at will,[50] a notice and demand must generally be shown. A tenant at sufferance is not entitled to notice.[51]

b. *Two Notices.* — In some jurisdictions it is incumbent upon the plaintiff to show the service of two notices; the first to have been served before the expiration of the lease, and while the defendant had the lawful right to retain the possession. The termination of the existing lease having been accomplished by the first notice, it must be proved that a second notice to surrender the possession was served after the termination of the possessory interest.[52] It seems that in New Jersey, when the tenancy is from year to year, the notice to quit which is given for the purpose of determining the tenancy is at the same time a good demand of the possession.[53]

Iowa. — Grosvenor *v.* Henry, 27 Iowa 269.

Kentucky. — Hamit *v.* Lawrence, 2 A. K. Marsh. 366.

Missouri. — Young *v.* Smith, 28 Mo. 65; Anderson *v.* McClure, 57 Mo. App. 93.

In Secor *v.* Pestana, 37 Ill. 525, Mr. Justice Bresse said: "This was an action of forcible detainer. The facts briefly stated are, that the appellee leased, by writing, certain premises on Dearborn street, in the city of Chicago, for a term to expire on the first day of May, 1863. Afterward, by verbal agreement, appellant leased the same until the first day of May, 1864, and the question is, was the tenant entitled to notice to quit, before action brought? This tenancy was for a fixed period, namely, to the first day of May, 1864, consequently no notice was necessary. On that day appellant was bound to surrender the premises, as his term had expired by its own limitation."

In Knecht *v.* Mitchell, 67 Ill. 86, a landlord made a verbal lease of the premises for two years. The premises were occupied under the lease and the rents were paid. Upon the tenant holding over, the landlord brought this action of unlawful detainer. In regard to the necessity of the landlord showing the service of a notice to quit the possession the court said: "The premises have been occupied under the lease; the rent has been paid; the contract has been fully performed, and though not binding upon the parties in the first instance, because of the statute of frauds, yet, having been executed, no notice was necessary to terminate it."

49. Sullivan *v.* Cary, 17 Cal. 80; Uridias *v.* Morrell, 25 Cal. 31; Hunt *v.* Morton, 18 Ill. 75; Seem *v.* McLees, 24 Ill. 193; Rosenblat *v.* Perkins, 18 Or. 156, 22 Pac. 598.

50. *California.* — Garbrell *v.* Fitch, 6 Cal. 190; King *v.* Connolly, 51 Cal. 181; Martin *v.* Splivalo, 56 Cal. 128.

Illinois. — Dunne *v.* Trustees of Schools, 39 Ill. 578.

Iowa. — Munson *v.* Plummer, 59 Iowa 120, 12 N. W. 806.

Maine. — Wheeler *v.* Wood, 25 Me. 287; Dutton *v.* Colby, 35 Me. 505.

Massachusetts. — Hollis *v.* Pool, 3 Metcalf 350; Benedict *v.* Morse, 10 Metc. 223; Hildreth *v.* Conant, 10 Metc. 298; Larned *v.* Clark, 8 Cush. 29.

Michigan. — Rice *v.* Benedict, 18 Mich. 75; Rawson *v.* Babcock, 40 Mich. 330.

In Dunning *v.* Finson, 46 Me. 546, it is held that in an action for unlawful detainer in which the defendant is a tenant at will it is not necessary to allege or prove that the relation of landlord and tenant existed between the parties at the time of the service of notice to quit.

51. Kinsley *v.* Ames, 2 Metc. (Mass.) 29; Hollis *v.* Pool, 3 Metc. (Mass.) 350; Benedict *v.* Morse, 10 Metc. (Mass.) 223.

52. McDevitt *v.* Lambert, 80 Ala. 536, 2 So. 438; King *v.* Connolly, 51 Cal. 181; Martin *v.* Splivalo, 56 Cal. 128; Smith *v.* Rowe, 31 Me. 212; Dutton *v.* Colby, 35 Me. 505.

53. Townley *v.* Rutan, 21 N. J. L. 674.

c. *Waiver of Notice.* — Where the parties to a lease provide that the lessee waives his right to notice of an election to declare the term ended under any of the provisions of the lease, or for any demand for payment of rent, or for the possession of the premises, and provide that the simple fact of non-payment of rent shall constitute a forcible detainer, such agreement will be binding on the lessee so that the action will lie upon the simple proof of the non-payment of the rent; and proof that a demand had been made is unnecessary.[54]

d. *Disclaimer of Relation of Tenant.* — And where a tenant disclaims to hold under his landlord, he forfeits his term, and it is not incumbent upon the plaintiff to show the service of a notice to quit in order to maintain his action of unlawful detainer.[55]

3. Nature and Form of Demand. — While in most states the plaintiff must show a demand in writing and in express terms, it has been held in Alabama that no particular form of demand is required, and that it may be inferred from the acts and declarations of the parties.[56]

4. Time of Notice. — In proving notice the plaintiff must show a compliance with the time of service provided by statute in the different states.[57]

5. Proof of Service. — Generally the plaintiff must show that a written copy of the demand of possession was served upon the defendant and left with him,[58] although some statutes provide that

54. Espen *v.* Hinchliffe, 131 Ill. 468, 23 N. E. 592.

In Eichart *v.* Bargas, 12 B. Mon. (Ky.) 462, it is held that a stipulation in a lease to the effect that the bare non-payment of rent for ten days after due shall give a right to sue without notice, will be sufficient to dispense with the necessity of proving a demand or notice before bringing forcible detainer.

55. Doss *v.* Craig, 1 Colo. 177; Fogle *v.* Chaney, 12 B. Mon. (Ky.) 138; Rabe *v.* Fyler, 10 Smed. & M. (Miss.) 440; Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620; Emerick *v.* Tavener, 9 Gratt. (Va.) 220.

56. In Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397, the court said: "It is not essential the demand for possession should be in writing, or that it should be in express and positive terms; it is a question of fact to be determined by the justice (or by the jury on appeal) from all the evidence whether there has been a demand, or the equivalent thereof. It may be inferred from the acts and declarations of the parties as well as shown by direct testimony. So, also, as to the unlawful refusal to comply with the demand. Mere silence, or a failure to comply, in the face of a demand, or that which is equivalent to a demand, may be a refusal."

57. Ryan *v.* Dougherty, 38 Cal. 676; Shuver *v.* Klinkenberg, 67 Iowa 544, 25 N. W. 770; Dutton *v.* Colby, 35 Me. 505; Chamberlin *v.* Brown, 2 Doug. (Mich.) 120; Hawley *v.* Robeson, 14 Neb. 435, 16 N. W. 438; Leutzey *v.* Herchelrode, 20 Ohio St. 334; Marley *v.* Rodgers, 5 Yerg. (Tenn.) 217.

In Douglass *v.* White, 32 Kan. 381, 4 Pac. 874, where after serving notice to quit the possession the plaintiff waited nearly a year before commencing the action for unlawful detainer, it was held that his action would not lie, since he should have shown the service of a fresh notice.

58. Hynek *v.* Englest, 11 Iowa 210; Grovesnor *v.* Henry, 27 Iowa 269; Hyde *v.* Goldsby, 25 Mo. App. 29; Grundy *v.* Martin, 143 Mass. 279, 9 N. E. 647. Where the lease is to two tenants in common, a notice properly served upon one is notice to both.

in case the defendant cannot be found, proper service is made by leaving a copy at his residence.[59] It has been held that the person who served the demand should be introduced as a witness to prove the service.[60]

A. Waiver of Strict Proof. — Where counsel for defendant upon the trial admits that proper service has been made, he is estopped from making a subsequent complaint of the failure to make strict preliminary proof of such service.[61]

In Doss *v.* Craig, 1 Colo. 177, the court said: "A demand, formal according to all of the requirements of the law, and set out in writing, if read to the party, is not sufficient. It must be made in writing and left with the party or it is no demand."

In Seem *v.* McLees, 24 Ill. 193, the court said: "The defendant was a tenant from month to month, and was entitled to one month's notice to quit before he was liable to be sued in an action of forcible detainer. It did not appear that the notice, or a copy of it, was left with the defendant, but it was read to him. That statute says that the tenant holding over 'after demand made in writing for possession thereof,' shall be adjudged guilty of a forcible detainer, etc. A demand made by reading a paper to a tenant is not a demand made in writing. It is but an oral demand. The statute intended that the tenant should have a written demand to which he could refer, and which he could examine; that he need not depend upon his memory to know what the demand was."

59. In Douglass *v.* Whitaker, 32 Kan. 381, 4 Pac. 874, it is held that the demand must be served on the defendant personally, but if he cannot be found demand may be left at his place of abode.

Post *v.* Bohner, 23 Neb. 257, 36 N. W. 508. The demand may be left at defendant's residence if he cannot be found.

60. Vennum *v.* Vennum, 56 Ill. 430. The plaintiff should prove service of demand by the introduction of the witness who made the service.

In Ball *v.* Peck, 43 Ill. 482, the court held that the proof of the service of a notice to quit must be made by legitimate evidence. Such proof cannot be made by producing a copy with an affidavit of service. In the language of the court: "Whether it be necessary to leave the original, or show the original to the occupant, and serve him with a copy, or whether the two papers are duplicates, each signed by the person making the demand, and one is served and the other retained, still the fact of service must be proved. And that is a fact which must be established in the usual mode of making proof, clearly, according to the rules of evidence. The witness making the service should be called. Officers, only, are authorized to make return of service of process, unless it be in a few cases where the law has authorized private individuals to make a sworn return; and there is no express provision of the law authorizing a return to be made in this case, either by an officer or a private individual. It then follows that the affidavit of service in this case was not legitimate proof of the service of the notice, which must be proved to entitle a party to recover in this form of action. The person who served the notice should have been called to prove the fact."

61. In Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432, which involved the proof of notice to quit and a demand for possession, the court said: "Appellee produced the notice, and was proceeding to prove service of it, when appellant objected to such proof of service upon Mrs. Laddness, because she was not a party to the suit. Upon the court holding in effect that the evidence was competent, counsel said to the court, 'the lease to Mrs. Laddness was terminated by this notice,' whereupon the notice was admitted in evidence without further preliminary proof. When the written demands were offered in evidence, counsel for appellant objected. The proof shows that service was in fact made of all of the

B. Cure of Defective Service. — A defective service may be subsequently cured by the defendant's demand for, and receipt of, a copy.[62]

IV. DAMAGES.

1. Generally. — As a general rule in an action of forcible entry and detainer the plaintiff is entitled to such damages as are the natural and proximate result of the forcible entry and unlawful detainer.[63]

2. Rents and Profits. — In most states the rents and profits of the disputed premises may be shown in aggravation of damages.[64] It seems that in Texas they cannot be shown,[65] and in Indian Territory

writings. Under the circumstances, the conduct of appellant's counsel having induced appellee's counsel and the court to act upon the assumption that further preliminary proof was waived, appellant can not be heard to complain of the failure to make preliminary proof of the execution of said notice and demand."

62. Anderson *v.* Kerr, 10 Iowa 233, where a notice was read to defendant by the sheriff, but no copy was left, this is a defective service. But when plaintiff proves that subsequently defendant demanded a copy and was given one, such a demand cured the defect.

63. Anderson *v.* Taylor, 56 Cal. 131, 38 Am. Rep. 52.

In Hitchcock *v.* Pratt, 51 Mich. 263, 16 N. W. 639, where the defendant had unlawfully detained the premises of the plaintiff, consisting of a store, the court instructed the jury that they should take into consideration the rental value, loss of profits, costs of legal proceedings, injuries to stock, cost of moving to another place, and all such damages as naturally resulted from the unlawful detainer.

Hicks *v.* Herring, 17 Cal. 566. Under the Forcible Entry and Detainer Act, § 12, plaintiff is not compelled to claim damages for waste and injury or for rents and profits. He may simply claim possession, and in a subsequent suit may recover damages for waste committed pending the action of forcible entry and detainer. In action for damages the rule is that the proof of damage may extend up to the time of verdict as to all facts which flow as a natural result from the injury for which suit is brought.

In Case *v.* Hall, 2 Ind. Ter. 8, 46 S. W. 180, there was judgment against the defendant in an action for the unlawful detention of a tract of land. The court held that the damages consisted of the rental value of the land, but since it appeared from the evidence that the land was mainly or only suitable for raising wheat, and the unlawful detention of it prevented the plaintiff from putting in a wheat crop and thereby impairing its rental value for that year, the jury should take that fact into consideration.

64. *California.* — Hicks *v.* Herring, 17 Cal. 566; Holmes *v.* Horber, 21 Cal. 56; Roff *v.* Duane, 27 Cal. 565; Tewksbury *v.* O'Connell, 25 Cal. 262; Howard *v.* Valentine, 20 Cal. 282; Warburton *v.* Doble, 38 Cal. 619; Taylor *v.* Terry, 71 Cal. 46, 11 Pac. 813.

Missouri. — Finley *v.* Magill, 57 Mo. App. 481; Hosli *v.* Yokel, 58 Mo. App. 169.

Texas. — McRae *v.* White (Tex.), 42 S. W. 793.

Utah. — Eccles *v.* Union Pac. Coal Co., 15 Utah 14, 48 Pac. 148.

In Spear *v.* Lomax, 42 Ala. 576, in an action for unlawful detainer it is held that evidence of the price which the lot in dispute brought at public renting about the time of the expiration of the lease under which defendant held possession, is admissible to aid the jury in arriving at the value of the rent.

65. In Clark *v.* Snow, 24 Tex. 242, the plaintiff secured a judgment for rent of the disputed prem-

the rental value only may be shown in aggravation.[66]

3. Waste and Injury. — The waste and injury to the premises may be shown in aggravation of damages.[67]

4. Bodily Pain, etc. — Damages resulting from bodily pain and mental suffering cannot be shown in aggravation generally.[68] It seems they may be shown in Indiana.[69]

V. DEFENSES.

1. Contract to Purchase. — Where the defendant shows that he is in possession of the land under a contract to purchase, he cannot be evicted by the summary process of unlawful detainer, although he

ises, which was assigned as error. C. J. Wheeler said: "The remedy for forcible entry and detention is dependent entirely on the statute, which prescribes the mode of procedure and the judgment which shall be rendered, that is, if for the plaintiff, that he have restitution of the premises and costs. The statute evidently contemplates that no other matter will be put in litigation, in the action, than merely the right of possession. It is a summary remedy provided to enable a party upon whose possession another has entered by force, or against whom a tenant forcibly holds even after the termination of the lease, to have immediate restitution of the possession, without the necessity of resorting to an action upon the title. The provisions of the statute do not extend the remedy to other matters of dispute between the parties. The judgment for rent was unauthorized and must be reversed and set aside."

66. In Sanders *v.* Thornton, 2 Ind. Ter. 92, 48 S. W. 1015, the court held that the measure of damages in a case of unlawful detainer consisted of the rental value during the time of the unlawful dispossession.

67. Hicks *v.* Herring, 17 Cal. 566; Howard *v.* Valentine, 20 Cal. 282; Tewksbury *v.* O'Connell, 25 Cal. 262; Finley *v.* Magill, 57 Mo. App. 481.

In Eads *v.* Woolbridge, 27 Mo. 251, which was an action for forcible entry and detainer, the court instructed the jury as follows: "If the jury find for the plaintiffs, they will assess damages for all waste and injury committed upon the premises, as well as for all rents and profits of said premises up to the present time." Upon appeal the court said: "The instructions given for the plaintiffs in relation to the damages to be recovered, it is conceived, are as in accordance with the provisions of the 17th section of the act concerning forcible entry and detention."

68. In Anderson *v.* Taylor, 56 Cal. 131, the court said: "In an action for forcible entry and detainer the plaintiff cannot show damage sustained by reason of 'great bodily and mental pain and anguish.'"

69. In Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476, which was a suit by Gordon *v.* Moyer and others to recover damages for an alleged unlawful invasion of, and entry into and upon, the house and premises of the former, by the latter, and for forcibly ejecting the plaintiff, with his family, household goods and other personal property therefrom, the jury were authorized to take into consideration and to compensate the plaintiff for the actual injury to his goods and property, the actual inconvenience and expense of being deprived of their use, and of restoring them to their proper places, in addition to which he was entitled to compensation for any bodily or mental anguish or suffering, for injury to his pride and social position, and for the sense of shame and humiliation at having his wife and family turned out of their home into the public streets. There was judgment for $500. Upon appeal the court said: "We cannot say from anything that appears, that the damages were excessive, nor that the verdict was not sustained by the evidence."

has not strictly complied with the terms of the contract.[70] The rule is otherwise by statute in Illinois.[71]

A. Stipulation as to Rent. — But where it is shown that the defendant entered under a contract to purchase, to which is added a

70. *Iowa.* — Oleson *v.* Hendrickson, 12 Iowa 222; Jordan *v.* Walker, 52 Iowa 647; Hall *v.* Jackson, 77 Iowa 201, 41 N. W. 620.

Kentucky. — Hay *v.* Connelly, 1 A. K. Marsh. 291; Jack *v.* Carneal, 2 A. K. Marsh. 518; Reeder *v.* Bell, 7 Bush 255.

Missouri. — Young *v.* Ingle, 14 Mo. 426; Ragsdale *v.* Phelps, 90 346, 2 S. W. 300.

Nebraska. — Chicago, B. & C. R. R. Co. *v.* Skupa, 16 Neb. 341, 20 N. W. 393; Dawson *v.* Dawson, 17 Neb. 671, 24 N. W. 339; Grohousky *v.* Long, 20 Neb. 362, 30 N. W. 257; Worthington *v.* Woods, 22 Neb. 230, 34 N. W. 368; Malloy *v.* Malloy, 24 Neb. 766, 40 N. W. 285.

South Dakota. — Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

Texas. — Camley *v.* Stanfield, 10 Tex. 546; Texas Land Co. *v.* Turman, 53 Tex. 619.

Klopfer *v.* Keller, 1 Colo. 410. It is competent in a case of unlawful detainer against a tenant holding over, for the purpose of disproving the tenancy, for the defendant to show that he entered as a purchaser and not as a tenant, and this whether the agreement to purchase was good or bad.

In Brown *v.* Beatty, 76 Ala. 250, the defendant entered upon the lands as tenant under a lease, which was afterwards abrogated. He continued in possession under an executory agreement for the purchase of the lands, but having failed to comply with the stipulation of the contract, and having forfeited all rights under it, Brown brought an action of unlawful detainer against him. A demurrer to the complaint having been sustained, and which judgment was assigned for error, it was held by Sommerville, J.: "An action of unlawful detainer cannot be maintained in the present case. The defendant is shown to have been placed in possession of the premises sued for under a contract of purchase from the plaintiff, and is claiming ownership presumptively under this written evidence of title. It may be that the legal title to the lands is in the plaintiff, and that he is entitled to recover possession of them by reason of the defendant's forfeiture of his right of possession and title, under the express stipulation in the contract of sale and purchase. But in the absence of all relationship of landlord and tenant, the question involved is necessarily one as to the merits of the title."

In Mason *v.* Delancy, 44 Ark. 444, the defendant Delancy purchased the lands described in the complaint from Robert Lemons, by parol, and was placed in possession and made improvements. The plaintiff Mason, after defendant's purchase, entry, and two years' possession, purchased the same lands from Robert Lemons and received a deed therefor. The defendant paid nothing under the purchase, but cleared about ten acres of the land, and made other improvements. There was a judgment for defendant. Upon the facts the court said: "Our statutory remedy for use and occupation of lands has been construed to relate to proceedings between landlord and tenant only. . . . When one purchases lands, or makes an agreement to do so, and enters into possession in pursuance of the agreement, his entry and his possession are as owner and not as tenant. If nothing more than the entry and possession with the consent of the owner were shown, a demise would be implied on the one hand and an agreement to pay rent on the other, and the relation of landlord and tenant would *prima facie* be established. But if the defendant shows that he is in under a contract to purchase he rebuts the idea of a tenancy, and a different agreement cannot be inferred from that the parties have deliberately entered into."

71. Monsen *v.* Stevens, 56 Ill. 335; West *v.* Frederick, 62 Ill. 191; Phelps *v.* I. C. R. R. Co., 63 Ill. 468; Lesher *v.* Sherwin, 86 Ill. 420.

stipulation providing that upon the failure of defendant to pay the purchase price he shall pay rent for the land, the relation of landlord and tenant exists between the vendor and defendant, and upon the latter's failure to pay the purchase money or rent he may be evicted as a tenant holding over after the expiration of his term.[72]

2. Fraud. — It has been held that a defendant cannot introduce evidence to show that the plaintiff obtained the right of possession to the disputed premises by the procurement from him of a deed by means of false and fraudulent representations.[73]

3. Plaintiff Disclaiming Interest. — When the defendant shows that before the entry he had a conversation with plaintiff in which the latter disclaimed any interest or claim to the land in controversy, it is a good defense.[74]

4. Abandonment. — Where a defendant shows that the plaintiff has abandoned the premises, with no intent of returning, such an

72. In Ish *v.* Morgan, 48 Ark. 413, 3 S. W. 440, the defendant was put in possession of the land under a contract of sale. When the contract was executed he gave his two notes for the payment of this purchase-money, due one and two years thereafter, with interest. A deed was to be executed when all the purchase-money was paid. The first note contained a stipulation that if it was not paid when due, Ish should pay "customary rent" for the use of the land. Ish failed to pay his first note, and after an unsuccessful attempt to agree with him upon the rate he should pay for the occupation of the land, plaintiff gave him notice to quit and brought this action, concerning which Cockrill, C. J., said: "If the contract shows that the defendant was in under an agreement to purchase, the idea of a tenancy was rebutted, and he could not be evicted by the summary process of unlawful detainer, although he had not strictly complied with the contract of purchase. . . . But if, on the other hand, the meaning of it is that he is to pay rent, or a compensation for the use of the land, then he was a tenant, and as he held over after the expiration of his term, he could be evicted by the remedy here adopted." After reviewing several cases the court held that under the terms of the agreement the relation of landlord and tenant subsisted and that the plaintiff could maintain the action of unlawful detainer against the defendant as his tenant holding over after the expiration of his term.

73. In Dysart *v.* Enslow, 7 Okla. 386, 54 Pac. 550, the defendants claimed that the plaintiff's right of possession was based upon a "certain instrument denominated a trust deed," executed by the defendants to the plaintiff, and as a defense to the action of unlawful detainer defendants aver that such instrument is void because the plaintiff had made certain false and fraudulent representations in procuring the deed. Upon these facts the court held that the defense of fraud in the procurement of a deed purporting to convey the premises in controversy to the plaintiff is not available. And that testimony offered by the defendants to show that such a deed was procured from the defendants by the plaintiff by means of fraudulent representations is not admissible in such action.

74. In Dudley *v.* Lee, 39 Ill. 339, the court said: "One of the defenses set up was that the appellants, before entering, had a conversation with the appellee in regard to the land, in which he disclaimed any interest or claim except in eighty acres. It is not for us to express an opinion as to whether this fact was fully proved. It is sufficient that there was evidence tending to prove it, upon which the defendants had a right to have the jury pass. If proved, it clearly constituted a defense, as their entry was certainly not illegal nor forcible, so far as the

abandonment is a complete defense in an action of forcible entry and detainer.[75]

5. Public Domain. — The facts that the land in dispute is part of the public domain, that it has been withdrawn from entry and sale, and that the defendant, by the advice of his attorney and the United States land officers, entered upon it for the purpose of securing a prior right to a homestead, and with a *bona fide* intention to acquire such right as soon as the land might be open to entry, do not justify an entry upon the occupancy of another, and are no defense in an action of unlawful detainer.[76]

6. Tax Deed. — In Illinois it cannot be shown in defense to forcible entry and detainer proceedings, by one who has entered upon vacant and unoccupied lands without right or title, that he acquired a tax deed to the property after taking possession.[77]

7. Limitations. — In some states it is provided by statute that where a defendant can show that he has been in the quiet possession of the premises for three years next before the entering of the complaint, there shall be no restitution under the forcible entry and detainer acts.[78]

Some states provide that the plaintiff must show that the action was brought within seven years next after the right or title to the premises or to the action accrued.[79] In Iowa the defendant has a complete defense if he can show that he had thirty days' peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued.[80]

Other states provide that upon defendant showing that he has been in the actual and visible possession of real estate for over two years, under color of title, no action of forcible detainer can be maintained against him.[81] While still others provide that the quiet

plaintiff was concerned, if made with his consent, or in consequence of his disclaimer of possession in himself."

75. Laird *v.* Waterford, 50 Cal. 315; Moon *v.* Rollins, 36 Cal. 333; Knight *v.* Knight, 3 Ill. App. 206; Haley *v.* Palmer, 9 Dana (Ky.) 321; M'Cracken *v.* Woodfork, 3 A. K. Marsh. (Ky.) 524.

Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432. In an action of forcible entry and detainer it is competent for the plaintiff to show on the trial that he had instructed his agent to take possession immediately upon the departure of a tenant whose lease was about to expire, and this for the purpose of proving that there had been no abandonment of the possession. See *supra* note 8.

76. Randall *v.* Falkner, 41 Cal. 242.

77. Palmer *v.* Frank, 169 Ill. 90, 48 N. E. 426; Pederson *v.* Cline, 27 Ill. App. 249.

78. *Alabama.* — Wray *v.* Taylor, 56 Ala. 188.

Maine. — Morton *v.* Thompson, 13 Me. 162.

Minnesota. — Brown *v.* Brackett, 26 Minn. 292, 3 N. W. 705.

Mississippi. — Loring *v.* Willis, 4 How. 383.

Missouri. — Hannibal & St. J. R. R. Co. *v.* Hill, 60 Mo. 281; Miller *v.* Tillmann, 61 Mo. 316.

Tennessee. — Phillips *v.* Sampson, 2 Head 429.

West Virginia. — Billingsley *v.* Stutler, 52 W. Va. 92, 43 S. E. 96.

79. Ellis *v.* Murray, 28 Miss. 129.

80. Fultz *v.* Black, 3 Iowa 569.

81. Alderman *v.* Boeken, 25 Kan. 658; Mason *v.* Bascom, 3 B. Mon. (Ky.) 269.

In Hays *v.* Altizer, 24 W. Va. 505,

possession by the defendant for one whole year shall bar the prosecution.[82]

8. Lease for Immoral Purposes. — Where a defendant proves that the premises were leased to him for immoral purposes it is no defense in an action of unlawful detainer.[83]

9. Title or Right of Possession. — In actions of forcible entry and detainer it is no defense that the title or right of possession is in the defendant, or that the defendant is entitled to possession.[84]

10. Offer to Remunerate Plaintiff. — In Illinois where a railroad company secures possession of a strip of land by a quitclaim deed from a life tenant, it is competent, in defense of an action of forcible

it was proved by the defendant on the trial that he had been in the actual continuous possession of the land in controversy for more than two years. There was no evidence to show that the cause of action accrued within two years prior to the commencement of the action. The court said: "The possession of the defendants having thus continued for four years prior to the institution of this action, the plaintiff was not entitled to recover, because our statute is express that the action shall be commenced 'within two years after the cause of action accrues,' (Chap. 145, § 211, Acts 1882, p. 462.) The defendant, in error, however, insists that the two years' possession which will prevent a recovery under the statute must be adverse. That is true, but in the absence of any evidence to show privity of possession or license the presumption is that the holding was adverse. But even if this were not so the result would be the same. If the holding was not adverse, then the defendants were entitled to notice to quit or a demand of the possession before a cause of action could accrue to the plaintiff, and there being no evidence of such a demand or notice, the plaintiff was not entitled to recover."

82. Boardman *v.* Thompson, 3 Mont. 387; Galligher *v.* Connell, 23 Neb. 391, 36 N. W. 566.

83. In Toby *v.* Schultz, 51 Ill. App. 487, Mr. Justice Waterman said: "This is an appeal from a judgment rendered in an action upon an appeal bond given on an appeal from a judgment rendered in a forcible detainer suit. . . . The defense made to the action upon the appeal bond was that the premises, for the possession of which the judgment in the forcible detainer suit was rendered, were rented by the plaintiff in that suit for an immoral purpose. Such a defense might be a good one in an action to recover rent for premises so leased, but is no defense to a proceeding in forcible detainer, which is rather in disaffirmance of any intention to devote the premises to any improper purposes. The defense, in effect, was that the premises having been leased for a house of prostitution, such use may continue, and the owner cannot regain his property, notwithstanding the tenant may refuse to pay rent, and the landlord may desire to put his property to a laudable and proper use."

In Murat *v.* Micand (Tex. Civ. App.), 25 S. W. 312, the court said: "It clearly appears that the premises were knowingly rented to the defendant, a prostitute, for the purpose of pursuing her calling. The contract of lease was therefore not enforcible. Tayl. Landl. & Ten., § 521. But it does not follow that the action of forcible detainer will not lie. The defendant entered upon the premises and occupied the same by permission of the owner, and this established such a relation between the parties, independently of any express contract of lease, as would authorize the use of forcible detainer proceedings."

84. Terry *v.* Terry, 23 Ky. L. Rep. 2242, 66 S. W. 1024.

In Altree *v.* Moore, 1 Or. 350, the court said: "In a case of forcible entry and detainer, a defendant cannot set up title in himself and rely on that as a defense; he can only deny and offer evidence to rebut the

detainer by a remainderman, for the company to show that it needed the land for railroad purposes; that it had offered, before the commencement of the action, to pay the plaintiff all proper damages for its use.[85]

plaintiff's possession at the time of the alleged forcible entry; or he may deny that he lawfully holds, and offer evidence to rebut the plaintiff's case. If he, defendant, have a title paramount, he must assert it in a different manner." *Citing* Taylor's Landlord & Tenant, § 792, and see notes under "Evidence of Title and Right of Possession."

85. Chicago, P. & St. L. R. Co. *v.* Vaughn, 99 Ill. App. 386.

FOREIGN BILLS.—See Bills and Notes.

FOREIGN JUDGMENTS.—See Judgments.

FOREIGN LANGUAGE.—See Competency; Depositions; Witness.

FOREIGN LAWS.

By C. P. de Blumenthal.

CROSS-REFERENCES:

Judgment.

I. DEFINITION.

Foreign laws are laws of foreign countries. The laws of one state of the Union with respect to another state are placed upon the same ground as the laws of a foreign nation.[1] But the laws of a precedent or antecedent government, *i. e.*, laws which prevailed in a state before its cession to the United States, are not considered foreign, so far as their proof is concerned.[2]

1. The laws of another state of the Union are to be proved as those of a foreign country. Musser *v.* Stauffer, 178 Pa. St. 99, 35 Atl. 709.

For all national purposes embraced by the Federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign to and independent of each other. Buckner *v.* Finley, 2 Pet. (U. S.) 586; Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179; Hempstead *v.* Reed, 6 Conn. 480; Dyer *v.* Smith, 12 Conn. 384; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285; McDonald *v.* Pressler, 3 Wash. 636, 29 Pac. 209.

2. United States *v.* Chaves, 159 U. S. 452; Crespin *v.* United States, 168 U. S. 439; United States *v.* Cities of Philadelphia & New Orleans, 11 How. (U. S.) 609; United States *v.* Turner, 11 How. (U. S.) 663; Brownsville *v.* Cavazos, 2 Woods 293, 4 Fed. Cas. No. 2043.

The courts of the United States will take cognizance of the laws which were previously enforced in countries acquired by the United States before such acquisition. The laws of such countries are not to be considered foreign laws, but those of an antecedent government. United States *v.* Perot, 98 U. S. 428; Pecquet *v.* Pecquet, 17 La. Ann. 204; Ott *v.* Soulard, 9 Mo. 581; State *v.* Sais, 47 Tex. 307.

The laws of Mexico in force in California, before and at the time of the transfer of California to the United States, upon which the title to lands in California depends, must be judicially noticed and expounded by the courts in like manner as other public laws of the state of California. They are laws to be noticed, not facts to be proved. They are not regarded as foreign laws, but laws that pass with the territory. Bouldin *v.* Phelps, 30 Fed. 547.

The court is bound to take judicial notice of the general laws enforced in this state at the cession of California, which remained unrepealed until the Act of April, 1850. Those laws are not regarded as foreign so as to require proof of their existence. Wells *v.* Stout, 9 Cal. 479.

The courts must take notice of the laws of the mother-country as they existed before the revolution in the same manner as the courts of the several states are now bound to take notice of any regulation of the general government of the United State. Davis *v.* Curry, 2 Bibb (Ky.) 238.

The laws of a foreign country cannot be noticed by the courts unless they be proved like other facts, but when countries have once belonged to the same government and the same law prevailed in both, the separation of the countries does not render the law in existence at the time they divided foreign to each other. The courts will therefore take notice of such law. Malpica *v.* McKown, 1 La. 248, 20 Am. Dec. 279.

In the case of Chouteau *v.* Pierre, 9 Mo. 9, it was held that the courts will take judicial notice of the laws which prevailed in Missouri under the precedent governments of France and Spain.

In the case of Stokes *v.* Macken, 62 Barb. (N. Y.) 145, the court held that if the court has no means of information as to what the law of another country or state is, it will act upon its own laws; but if such country once constituted part of the same kingdom or government with that where the court sits, and they were governed by the same laws, the court will take judicial notice of the laws which prevailed in both

II. JUDICIAL NOTICE.

1. Laws of Foreign Countries. — As a general rule maintained both in England and America, courts will not take judicial notice of foreign laws, whether written or unwritten; such laws must be pleaded and proved, as any other matters of fact, in each particular case.[3]

2. Laws of Sister States. — A. In State Courts. — The laws of a sister state must be pleaded and proved as facts. The courts will not take judicial notice of them.[4] This rule prevails in most of the

before their separation, as a matter of public history, and presume them unchanged, till the contrary be shown.

3. *England.* — Mostyn *v.* Fabrigas, 1 Cow. 161, 172; Smith *v.* Gould, 4 Moore P. C. 26; Nelson *v.* Bridgport, 8 Beav. 539; Sussex Peerage Case, 11 C. & F. 86, 8 Eng. Rep. Full. Rep. 1034.

When a contract is made in a foreign country and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art; thirdly, evidence of any foreign law applicable to the case; and, fourthly, evidence of any particular rules of construction which may exist in that law; and must then itself interpret the instrument on ordinary principles of construction. Di Sora *v.* Phillips, 10 H. L. Cas. 624, (Clark's ed.)

Canada. — Rendell *v.* Black Diamond S. S. Co., 10 Rapp. Jud. Quebec, Cour. Sup. 257.

United States. — Talbot *v.* Seeman, 1 Cranch 1-38; Church *v.* Hubbart, 2 Cranch 187; Strother *v.* Lucas, 6 Pet. 763; Ennis *v.* Smith, 14 How. 400; Dundee Mortgage & T. I. Co. *v.* Hughes, 77 Fed. 855; Dainese *v.* Hale, 91 U. S. 13; Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356; Liverpool & Great Western Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397.

The court, not having been informed by the pleadings or proof what the law of England was as to the rate of interest, can not take judicial notice of it. Coghlan *v.* S. C. R. Co., 142 U. S. 101, 32 Fed. 316.

The maritime law of a foreign country must be both alleged and proved. The Mattherhorn, 128 Fed. 863.

Iowa. — Courts will take judicial notice as a matter of history of the fact that the civil law is the foundation of the law of Mexico, but will not take notice of any details of such laws without pleading and proof. Banco de Sonora *v.* Bankers Mut. Casualty Co. (Iowa), 95 N. W. 232.

Louisiana. — Bonneau *v.* Poydras, 2 Rob. 1.

Maine. — Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661.

Maryland. — De Sobry *v.* De Laistre, 2 Har. & J. 191, 3 Am. Dec. 535.

Massachusetts. — Bowditch *v.* Soltyk, 99 Mass. 136; Com. *v.* Kenney, 120 Mass. 387.

Michigan. — Chapman *v.* Colby, 47 Mich. 46, 10 N. W. 74.

New Hampshire. — Pickard *v.* Bailey, 26 N. H. 152.

New York. — Ocean Ins. Co. *v.* Francis, 2 Wend. 64, 19 Am. Dec. 549; Munroe *v.* Guilleaume, 3 Keyes 30; Latham *v.* De Loiselle, 3 App. Div. 525, 38 N. Y. Supp. 270; Pratt *v.* Roman Catholic Orph. Asylum, 20 App. Div. 352, 46 N. Y. Supp. 1035; *In re* Diez, 56 Barb. 591.

Oregon. — State of Oregon *v.* Looke, 7 Or. 55.

Pennsylvania. — Phillips *v.* Gregg, 10 Watts 158, 36 Am. Dec. 158; Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520.

South Carolina. — McFee *v.* South Carolina Ins. Co., 2 McCord 503.

Texas. — Armendiaz *v.* Serna, 40 Tex. 292.

Vermont. — Peck *v.* Hibbard, 26 Vt. 698, 62 Am. Dec. 605; Woodrow *v.* O'Conner, 2 Will. 776.

4. *United States.* — Hanley *v.* Donoghue, 116 U. S. 1.

Alabama. — Mims *v.* Central Bank of Ga., 2 Ala. 294.

Colorado. — Atchison, T. & S. F. R. Co. *v.* Betts, 10 Colo. 431, 15 Pac. 821.

Connecticut. — Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179; Dyer *v.* Smith, 12 Conn. 384.

Florida. — Bemis *v.* McKenzie, 13 Fla. 553; Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Samis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Illinois. — Chumasero *v.* Gilbert, 24 Ill. 293; Miller *v.* Macveagh, 40 Ill. App. 532; Rand, McNally & Co. *v.* Continental Mut. Fire Ins. Co., 58 Ill. App. 665; Richardson *v.* Mather, 77 Ill. App. 626; Close *v.* Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Shannon *v.* Wolf, 173 Ill. 253, 50 N. E. 682.

Indiana. — Baltimore & O. R. Co. *v.* Ryan, 31 Ind. App. 597, 68 N. E. 923; Shaw *v.* Wood, 8 Ind. 518; Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581; Crake *v.* Crake, 18 Ind. 156; Patterson *v.* Carrell, 60 Ind. 128; Robards *v.* Marley, 80 Ind. 185.

Iowa. — Bean *v.* Briggs, 4 Iowa 464.

Kansas. — The common-law rules of some other state must be proved like any other fact. St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408.

Kentucky. — Davis *v.* Curry, 5 Ky. 238; Louisville & N. R. Co. *v.* Sullivan, 25 Ky. L. Rep. 854, 76 S. W. 525; Tyler *v.* Trabue, 8 B. Mon. 306.

Louisiana. — Roehl *v.* Porteous, 47 La. Ann. 1582, 18 So. 645.

Maine. — McKenzie *v.* Wardwell, 61 Me. 136.

Massachusetts. — Holman *v.* King, 7 Metc. 384; Palfrey *v.* Portland, S. & P. R. Co., 4 Allen 55; Eastman *v.* Crosby, 8 Allen 206; Knapp *v.* Abell, 10 Allen 485; Kline *v.* Baker, 99 Mass. 253; Murphy *v.* Collins, 121 Mass. 6; Chipman *v.* Peabody, 159 Mass. 420, 34 N. E. 563; Washburn-Crosby Co. *v.* Boston & A. R. R. Co., 180 Mass. 252, 62 N. E. 590.

The courts will not take judicial notice of the statutes of another state, and of their interpretation by the court of that state, but if pleaded and proved, the courts will adopt the construction which is given in that other state to the law, and give force and effect to the same, as there established. Hancock Natl. Bank *v.* Ellis, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414.

Michigan. — Chapman *v.* Colby, 47 Mich. 46, 10 N. W. 74.

Minnesota. — Schultz *v.* Howard, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470; Brimhall *v.* Van Campen, 8 Minn. 13; Hoyt *v.* McNeil, 13 Minn. 390; Ligget *v.* Himle, 38 Minn. 421, 38 N. W. 201; Myers *v.* Chicago, St. P., M. & O. R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 759; Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458.

Missouri. — Chouteau *v.* Pierre, 9 Mo. 9; White *v.* Chaney, 20 Mo. App. 389; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 526; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Roll *v.* St. Louis & Colo. Smelt. & Min. Co., 52 Mo. App. 60; Plato *v.* Mulhall, 72 Mo. 522; Meyer *v.* McCabe, 73 Mo. 236; Sloan *v.* Torry, 78 Mo. 623; Southern Ill. & M. Bridge Co. *v.* Stone, 174 Mo. 1, 73 N. W. 453.

Nebraska. — Moses *v.* Comstock, 4 Neb. 516; Scroggin *v.* McClelland, 37 Neb. 644, 40 Am. St. Rep. 520.

New Hampshire. — Jenne *v.* Harrisville, 63 N. H. 405.

New Jersey. — Campion *v.* Kille, 14 N. J. Eq. 229; Leake *v.* Bergen, 27 N. J. Eq. 360.

States will not take judicial notice of the usury laws of another state; they must be proved. Campion *v.* Kille, 15 N. J. Eq. 476.

New York. — Hosford *v.* Nichols, 1 Paige Ch. 220.; Throop *v.* Hatch, 3 Abb. Pr. 23; Holmes *v.* Broughton, 10 Wend. 75.

North Carolina. — State *v.* Jackson, 13 N. C. 563; Moore *v.* Gwynn, 27 N. C. 187; State *v.* Twitty, 9 N. C. 441.

Ohio. — Pelton *v.* Platver, 13 Ohio 209, 42 Am. Dec. 197.

Oklahoma. — Keagy *v.* Wellington Natl. Bank, 12 Okla. 33, 69 Pac. 811.

Oregon. — Cressey *v.* Tatom, 9 Or. 541.

Pennsylvania. — Musser *v.* Stauffer, 178 Pa. St. 99, 35 Atl. 709.

states of the Union. But it has been held that the court having once found a certain statute to be in force in another state will thereafter take judicial notice of such statute.[5]

A few states have statutory provisions on the subject, requiring the courts to take judicial notice of the laws of the several states.[6] However, such statutory provisions, inasmuch as they relate to statutory laws of other states, include only public acts.[7] In some states it has also been held that the court is bound to know *ex officio* that in another state the common law prevails, and also what is the common law of such sister state.[8] All state courts are bound

South Carolina. — Sibley *v.* Young, 26 S. C. 415.

South Dakota. — Morris *v.* Hubbard, 10 S. D. 259, 72 N. W. 894.

Tennessee. — Templeton *v.* Brown, 86 Tenn. 50, 5 S. W. 441.

Texas. — Rosenthal Millinery Co. *v.* Lennox (Tex. Civ. App.), 50 S. W. 401; Huff *v.* Tolger L. & Co., Dall. Dec. 530; Bryant *v.* Kelton, 1 Tex. 434; Trigg *v.* Moore, 10 Tex. 197.

The rate of interest fixed by the written law of another state must be proved as any other fact. Burton *v.* Anderson, 1 Tex. 93.

The general principles of equity, wherever they may exist, as well as the general principles of common law, need no proof, for it is assumed that the court which may be called upon to enforce them has a judicial knowledge of them. Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

Vermont. — Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

Virginia. — Union Central Life Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

Wisconsin. — Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269; Walsh *v.* Dart, 12 Wis. 709; Continental Natl. Bank *v.* McGeoch, 73 Wis. 332, 41 N. W. 409; Osborn *v.* Blackburn, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 400, 10 L. R. A. 367.

In the case of State *v.* Rood, 12 Vt. 396, the law of New York as to the validity of a marriage was not introduced in evidence, and the defendant claimed that the court should not take judicial notice of that law, except upon proof. The court said: "By the laws of the state of New York, a marriage is legal if the parties appear before a magistrate and declare their consent to a marriage, and it was not necessary to prove the law, if it was known to the court at the trial, or if it is now known to be as decided on the trial."

5. Graham *v.* Williams, 21 La. Ann. 594.

6. *Arkansas.* — Act of April 11, 1901, p. 164.

Connecticut. — Gen. Statute (Ed. 1888), title 18, ch. 76, p. 256, § 1087.

Georgia. — Code 1882, p. 994, § 3824. See Chattanooga R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109.

West Virginia. — Code ch. 13, § 4.

In the case of Wilson *v.* Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, it is said that under § 4, ch. 13, of the West Virginia Code, the courts of that state will take judicial notice of the law of another state, this being changed from a former law, and in exercising this power must consult the statutes of other states.

7. Miller *v.* Johnson (Ark.), 72 S. W. 371. *Citing* Act of April 11, 1901, *par.* 164 Ark.

8. Copley *v.* Sanford, 2 La. Ann. 335, 46 Am. Dec. 548.

In this case it was also held that any modification of the common law of another state by statute would have to be pleaded and proved.

In the case of Cameron *v.* Orleans & J. R. Co., 108 La. 83, 32 So. 208, it was held that courts will take judicial notice of the law merchant which will be presumed to prevail in another state.

The courts will take judicial notice of the common law of another state, but they will not take cognizance of the statutory modifications

ex officio to know the constitution of the United States, with its amendments,[9] and the public acts of Congress.[10] Likewise, inasmuch as the federal constitution provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and that Congress may prescribe the effect to be given to such acts, records and proceedings;[11] and Congress having provided[12] that properly authenticated acts and records shall have such faith and credit given them in every state as they have by law or usage in the courts of the state from which they are taken, it follows that the courts are bound to take judicial notice of the faith and credit to which a properly proved judgment, for example, is entitled by the law of the state whose court rendered such judgment.[13] So, whenever a question arises under the constitution and laws of the United States, courts will take notice of the local laws of a sister state in the same manner as the supreme court of the United States would do.[14]

B. In the Courts of the United States. — The supreme court of the United States, and all the federal courts, take judicial notice of the laws of the several states of the Union, whenever acting within their original jurisdiction.[15] But the supreme court of the

of that law. Martin *v.* Boler, 13 La. Ann. 369; Sandidge *v.* Hunt, 40 La. Ann. 766; Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353.

9. Semple *v.* Hagar, 27 Cal. 163; Adams *v.* Way, 33 Conn. 419; Dickenson *v.* Breeden, 30 Ill. 279; Papin *v.* Ryan, 32 Mo. 21; Graves *v.* Keaton, 3 Coldw. (Tenn.) 8.

10. *Arkansas.* — St. Louis, I. M. & S. R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865.

California. — Schwerdtle *v.* Placer Co., 108 Cal. 589, 41 Pac. 448.

Connecticut. — Adams *v.* Way, 33 Conn. 419.

Georgia. — Morris *v.* Davidson, 49 Ga. 361.

Illinois. — Gooding *v.* Morgan, 70 Ill. 275.

Iowa. — Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005.

Kentucky. — Laidley *v.* Cummings, 83 Ky. 606.

Louisiana. — Pollard *v.* Cook, 4 Rob. 199.

Missouri. — Papin *v.* Ryan, 32 Mo. 21.

New York. — Wheelock *v.* Lee, 15 Abb. Pr. (N. S.) 24; Kessel *v.* Albetis, 56 Barb. 362.

Virginia. — Bird *v.* Com., 21 Gratt. 800.

11. U. S. Const., art. 4, § 1, ¶ 1.

12. U. S. Rev. Stats., § 906.

13. Kopperl *v.* Nagy, 37 Ill. App. 23; Knowlton *v.* Knowlton, 51 Ill. App. 71; Hull *v.* Webb, 78 Ill. App. 617; Paine *v.* Schenectady Ins. Co., 11 R. I. 411; Dormitzer *v.* German Sav. & Loan Ass'n, 23 Wash. 132, 62 Pac. 862; Fidelity Trust & Safe Deposit Co. *v.* Nelson, 30 Wash. 340, 70 Pac. 961.

14. State *v.* Hinchman, 27 Pa. St. 479.

15. *United States.* — Merrill *v.* Dawson, Hempst. 563, 17 Fed. Cas. No. 9469; Cheever *v.* Wilson, 9 Wall. 108; Junction Railroad Co. *v.* The Bank of Ashland, 12 Wall. 226; Swann *v.* Swann, 21 Fed. 299; Knower *v.* Haines, 31 Fed. 513; Newberry *v.* Robinson, 36 Fed. 841; Avery *v.* Boston Safe Deposit & Trust Co., 72 Fed. 700; Davidow *v.* Pennsylvania R. Co., 85 Fed. 943; Denel Co. *v.* First Natl. Bank, 86 Fed. 264; Andruss *v.* People's Bldg. Loan & Sav. Ass'n, 94 Fed. 575; Mutual Life Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159; Elwood *v.* Flannigan, 104 U. S. 562; Barry *v.* Snowden, 106 Fed. 571; Lamar *v.* Micou, 114 U. S. 218; Chicago & A. R. Co. *v.* Wiggins F. Co., 119 U. S. 615; Gormley *v.* Bunyan, 138 U. S. 623.

But see *contra,* Jaffray *v.* Dennis,

United States does not take judicial cognizance of the law of another state not proved and made a part of the bill of exceptions in the court of the state in whose court the judgment was rendered, unless the latter court is bound to take such notice of the law of the other state,[16] and in taking notice of the local law of a certain state, federal courts will follow the principles upon which the courts of that state proceed.[17]

3. Laws of the Several Nations of the Indian Territory. — Courts of the United States will not take judicial notice of the laws of the several Indian nations unless they are specially pleaded and proved.[18]

2 Wash. C. C. 253, 13 Fed. Cas. No. 7171.

"The circuit courts of the United States are created by congress, not for the purpose of administering the local laws of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government by the constitution extends to many cases arising under the laws of the different states; and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is then in no just sense a foreign jurisprudence to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same, as the laws of the United States are taken notice of in these courts." Owings *v.* Hull, 9 Pet. (U. S.) 607.

Federal courts will take notice of the land-laws of a state offered in evidence. Hinde *v.* Lessee of Vattier, 5 Pet. (U. S.) 398.

The Supreme Court of the United States will take notice of the laws of a state concerning the boundaries of a city, when the pleadings make it permissible to do so, but not in a hearing on a demurrer. Griffing *v.* Gibb, 2 Black (U. S.) 519.

On a hearing of a general demurrer, the Rhode Island District Court cannot take notice of the laws of Indiana, that being a matter of evidence. Failey *v.* Talbee, 55 Fed. 892.

16. Chicago & A. R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615.

In the case of Renand *v.* Abbott, 116 U. S. 277, it was held that the Supreme Court of the United States, upon writ of error to the highest court of the state, does not take judicial notice of the law of another state, not proved in that court, and made part of the record sent up, unless by the local law that court takes judicial notice of it.

17. Huntington *v.* Attrill, 146 U. S. 657.

Where the courts of a state are bound to take judicial notice of private statutes, the Federal courts will act upon the same principle in dealing with the laws of such state. Junction R. Co. *v.* Bank of Ashland, 12 Wall. (U. S.) 226.

18. Hockett *v.* Alston, 3 Ind. Ter. 432, 58 S. W. 675; Campbell *v.* Scott, 3 Ind. Ter. 462, 58 S. W. 719; Kelly *v.* Churchill (Ind. Ter.), 69 S. W. 817; Sass *v.* Thomas (Ind. Ter.), 69 S. W. 893.

In the case of Wilson *v.* Owens, 86 Fed. 571, it was held that the laws of the various tribes in the Indian Territory may be pleaded and proved by litigants who rely upon them for protection if they are at variance with the code of municipal law which has been extended over the Indian Territory for the guidance of the United States court sitting therein.

III. BURDEN OF PROOF.

The party who claims any benefit under the law of another country or state must plead and prove it.[19]

IV. PRESUMPTIONS.

1. In General. — In the absence of proof to the contrary, courts will presume that the law of another country[20] or similarly of an-

19. *England.* — Smith *v.* Gould, 4 Moore P. C. 26.

Iowa. — Bean *v.* Briggs, 4 Iowa 464.

Minnesota. — Desnoyer *v.* McDonald, 4 Minn. 515; Brimhall *v.* Van Campen, 8 Minn. 13; Hoyt *v.* McNiel, 13 Minn. 390.

Missouri. — Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

New York. — Leavenworth *v.* Brockway, 2 Hill 201; Pomeroy *v.* Ainsworth, 22 Barb. 118; Latham *v.* De Lorselle, 3 App. Div. 525, 38 N. Y. Supp. 270; Sullivan *v.* Babcock, 63 How. Pr. 120.

Where the public act of another state has received any peculiar construction by the courts of that state, which is relied on in the courts of the forum, it is incumbent upon the party insisting upon such peculiar construction to plead and prove the same, like any other fact. New York Life Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

20. Rendell *v.* Black Diamond S. S. Co., 10 Rapp. Jud. Quebec, 1 Cour. Sup. 257; Dupont *v.* Quebec S. S. Co., 11 Rapp. Jud. Quebec, Cour. Sup. 188; Bonneau *v.* Poydras, 2 Rob. (La.) 1; Pecquet *v.* Pecquet, 17 La. Ann. 204; Mittenthal *v.* Mascagni, 183 Mass. 19, 66 N. E. 425, 97 Am. St. Rep. 404, 60 L. R. A. 812; Daniel *v.* Golden Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

In the absence of proof that the rules of navigation in force in Canadian waters are different from those under the law of the United States, it is presumed that they are the same as the law of the forum. Robinson *v.* Detroit & C. Steam Navig. Co., 73 Fed. 883.

As the civil law prevailed both in Texas and the Republic of Mexico prior to the separation, it will be presumed in the absence of proof to the contrary that the law of Mexico is the same as that of Texas. Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356; Mexican Cent. R. Co. *v.* Olmstead (Tex. Civ. App.), 60 S. W. 267; Armendiaz *v.* Serna, 40 Tex. 292.

The law in Scotland, on a point of mercantile law, will be presumed to be the same as that of Massachusetts, in the absence of proof of any statute or judicial decision applicable to the question tending to show the contrary; and the English law will not be applied to the case when it is inconsistent with the sound principles of construction in the interpretation of the contracts to which it applies, and irreconcilable with the general principles relating to the point in question which have been recognized by the judges and approved by text-writers of Scotland. Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311.

In the case of Carpenter *v.* Grand Trunk R. Co., 72 Me. 388, 39 Am. Rep. 340, where there was no evidence offered of what the law of Canada was, Judge Walton said: "Undoubtedly the case was to be tried in accordance with the law of *this* state, in the absence of proof of any other law." "It it is a well-settled rule," say the court of appeals of New York, "founded on reason and authority that the *lex fori,* or, in other words, the laws of the country to whose courts a party appeals for redress, furnish in all cases, *prima facie,* the rule of decision; and, if either party wants the benefit of a different rule or law (as for instance the *lex domicilii, lex loci contractus,* or *lex loci rei sitae*), he must aver and prove it; the courts of a country are presumed to be acquainted with their own laws, but those of other coun-

other state[21] is the same as the law of the forum. This presumption, however, disappears in face of proof that the law is not the same, although the proof may be insufficient to show what the

tries are to be averred and proved, like other facts of which courts do not take judicial notice. Monroe *v.* Douglass, 5 N. Y. 447, and the rule is similarly stated in a recent English case: 'A party who relies upon a right, or an exemption, by foreign law, is bound to bring such law properly before the court, and to establish it in proof; otherwise the court (not being entitled to notice such law without judicial proof), must proceed according to the law of England.' Lloyd *v.* Guibert, L. R., 1 Q. B. 115-129. It is often said that in the absence of proof to the contrary, the court will presume the foreign law to be the same as a domestic law, but we think the above is the better way of stating the rule. The result is the same."

In the case of Latham *v.* De Loiselle, 3 App. Div. 525, 38 N. Y. Supp. 270, the court held that the presumption that the law of France be [was] the same as the law of New York, could not hold good; however, since in the case presented it was sought to enforce rights under the contract made abroad, which contract was of a character enforcible in the courts of New York, the rights of the party were to be determined by the law of the forum.

In the case of Savage *v.* O'Neil, 44 N. Y. 298, there was no proof offered what the laws of Russia in reference to the property and rights of married women were. It was held that the presumption that the common law was in force there could not be indulged in in reference to Russia, and that, in the absence of proof of the Russian law, the law of the forum was to furnish the rule for the guidance of the courts.

21. The law of another state is presumed to be the same as that of the forum in the absence of proof to the contrary.

Arkansas. — Cox *v.* Morrow, 14 Ark. 603; Hall *v.* Pillow, 31 Ark. 32.

California. — Bovard *v.* Dickenson, 131 Cal. 162, 63 Pac. 162; Estate of Richards, 133 Cal. 524, 65 Pac. 1034; Brown *v.* San Francisco Gas L. Co., 58 Cal. 426.

Colorado. — Martin *v.* Haggard Powder Co., 2 Colo. 596.

Georgia. — Hill *v.* Wilker, 41 Ga. 449, 5 Am. Rep. 540.

Indiana. — Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581; Shaw *v.* Wood, 8 Ind. 518; Draggoo *v.* Graham, 9 Ind. 212.

Iowa. — Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317, 89 Am. St. Rep. 351; Sieverts *v.* National Ben. Ass'n, 95 Iowa 710, 64 N. W. 671; Sayre *v.* Wheeler, 32 Iowa 559; Webster *v.* Hunter, 50 Iowa 215; Pack *v.* Parchen, 52 Iowa 46, 2 N. W. 597; Goodwin *v.* Provident Sav. Life Assur. Ass'n, 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

Kansas. — Heery *v.* J. L. Mott Iron Works Co., 10 Kan. App. 579, 62 Pac. 904; Mutual H. & S. Ass'n *v.* Worz, 67 Kan. 506, 73 Pac. 116; Kansas Pac. R. Co. *v.* Cutter, 16 Kan. 568; Shattuck *v.* Chandler, 40 Kan. 516, 20 Pac. 225, 10 Am. St. Rep. 227.

Louisiana. — Harris *v.* Allnutt, 12 La. 465; Marshall *v.* Watrigant, 13 La. Ann. 619; Patterson *v.* Garrison, 16 La. 558; Succession of Henderson Randall, 26 La. Ann. 163; Roehl *v.* Porteous, 47 La. Ann. 1582, 18 So. 645; Smoot *v.* Russell, 1 Mart. (N. S.) 522; Smoot *v.* Baldwin, 1 Mart. (N. S.) 528; Campbell *v.* Miller, 3 Mart. (N. S.) 149; Hernandez *v.* Garetage, 4 Mart. (N. S.) 419; Norwood *v.* Green, 5 Mart. (N. S.) 175; Bray *v.* Cumming, 5 Mart. (N. S) 252; Van Wyck *v.* Hills, 4 Rob. 140; Harris *v.* Alexander, 9 Rob. 151; Spears *et al. v.* Turpin, 9 Rob. 293.

Maine. — McKenzie *v.* Wardwell, 61 Me. 136.

Maryland. — Fouke *v.* Fleming, 13 Md. 392.

Michigan. — Crane *v.* Hardy, 1 Mich. 56.

Minnesota. — Brimhall *v.* Van Campen, 8 Minn. 13; Cooper *v.*

Reaney, 4 Minn. 528; Lewis *v.* Bush, 30 Minn. 244, 15 N. W. 113; Schultz *v.* Howard, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470.

Missouri. — Haworth *v.* Kansas City S. R. Co., 94 Mo. App. 215, 68 S. W. 111; Selking *v.* Hebel, 1 Mo. App. 340; Bergner *v.* Chicago & A. R. Co., 13 Mo. App. 499; Hurley *v.* Missouri Pac. R. Co., 57 Mo. App. 675; Law *v.* Crawford, 67 Mo. App. 150.

Nebraska. — Chapman *v.* Brewer, 43 Neb. 890, 62 N. W. 320, 47 Am. St. Rep. 779; Haggin *v.* Haggin, 35 Neb. 375, 53 N. W. 209; Scroggin *v.* McClelland, 37 Neb. 644, 40 Am. St. Rep. 520; East Omaha St. R. Co. *v.* Godola, 50 Neb. 906, 70 N. W. 491; Welton *v.* Atkinson, 55 Neb. 674, 76 N. W. 473, 10 Am. St. Rep. 416.

New York. — Robinson *v.* Danchy, 3 Barb. 20; Monroe *v.* Douglas, 1 Seld. 447; Waldron *v.* Ritchings, 9 Abb. Pr. (N. S.) 359; City Sav. Bank *v.* Bidwell, 29 Barb. 325; Cannon *v.* Northwestern Mut. Life Ins. Co., 29 Hun 470; Paine *v.* Noelke, 11 Jones & S. 176; Pratt *v.* Roman Catholic Orph. Asylum, 20 App. Div. 352, 46 N. Y. Supp. 1035; Stokes *v.* Macken, 62 Barb. 145; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Stewart *v.* Union Mut. Life Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147.

Oklahoma. — Keagy *v.* Wellington Natl. Bank, 12 Okla. 33, 69 Pac. 811.

Pennsylvania. — Bollinger *v.* Gallagher, 144 Pa. St. 205, 22 Atl. 815; Musser *v.* Stauffer, 178 Pa. St. 99, 35 Atl. 709.

South Dakota. — Commercial Bank of Union City *v.* Jackson, 9 S. D. 605, 70 N. W. 846; Morris *v.* Hubbard, 10 S. D. 259, 72 N. W. 894.

Tennessee. — Loud *v.* Hamilton (Tenn.), 51 S. W. 140, 45 L. R. A. 400.

Texas. — Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 32 S. W. 335; Silliman *v.* Thornton, 10 Tex. Civ. App. 303, 30 S. W. 700; Missouri, K. & T. R. Co. *v.* Cocreham, 10 Tex. Civ. App. 166, 30 S. W. 1118; Southern Pac. Co. *v.* Graham, 12 Tex. Civ. App. 565, 34 S. W. 135; Paul *v.* Chenault (Tex. Civ. App.), 44 S. W. 682; Ft. Dearborn Natl. Bank *v.* Berrott, 23 Tex. Civ. App. 662, 57 S. W. 340; Gill *v.* Everman, 94 Tex. 209, 59 S. W. 531; Texarkana & Ft. S. R. Co. *v.* Gray (Tex. Civ. App.), 65 S. W. 85; Southern Pac. Co. *v.* D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813; Crosby *v.* Huston, 1 Tex. 203; Green *v.* Rugely, 23 Tex. 539; Tempel *v.* Dodge, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222; Burgess *v.* Western Union Tel. Co., 92 Tex. 125, 46 S. W. 194, 71 Am. Rep. 833.

Utah. — Dignan *v.* Nelson, 26 Utah 215, 72 Pac. 936; American Oak Leather Co. *v.* Union Bank, 9 Utah 87, 33 Pac. 246.

Vermont. — Woodrow *v.* O'Connor, 28 Vt. 776.

Washington. — Gunderson *v.* Gunderson, 25 Wash. 459, 65 Pac. 791.

Wisconsin. — Hyde *v.* German Natl. Bank, 115 Wis. 170, 91 N. W. 230; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269; Walsh *v.* Dart, 12 Wis. 709; Osborn *v.* Blackburn, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 400, 10 L. R. A. 367.

In the case of Sharp *v.* Sharp, 35 Ala. 574, the decisions of the courts in Georgia, in reference to the rules for construing words of survivorship and substitution in wills, were not proved on the trial. Therefore the court gave the law such construction as would be given to a law in the same words executed in Alabama.

In the absence of pleadings and proof, the law of the forum obtains as a remedy wherever the common law governs. Chumasero *v.* Gilbert, 24 Ill. 293.

Since statutes of limitations are matters of procedure, pleading and proof, the courts, in the absence of any allegation to the contrary, will assume that those statutes are the same in another state as in the state of the forum, on the particular subject. Mowry *v.* McQueen, 80 Minn. 385, 83 N. W. 348.

There is no presumption that there is any difference in the law merchant of another state and the state of the forum. Low *v.* Learned, 13 Misc. 150, 34 N. Y. Supp. 68.

Contra. — The courts will not presume the laws of another state to be the same as that of the forum. And the statute of limitations of another country will not be presumed to

foreign law actually is.[22] Such law, once proved, is presumed to continue to exist until a change or repeal of the same is shown.[23] If both states have a system of equity jurisprudence, the courts of either will presume that the equity doctrines of the other are the same as its own.[24]

But there are exceptions to the general rule, as before stated. So, in the absence of proof to the contrary, courts of general jurisdiction of other states will be presumed to possess the authority they assume to exercise, and it will also be presumed that the methods of procedure pursued by them, although differing from the established practice in the state of the forum, are authorized by the laws of the states in which they act.[25] Furthermore, the presumption that the foreign law is the same as the law of the forum will not obtain when such foreign law enforces a penalty or works a forfeiture, as in the case of usury.[26] Again, there will be no

be the same in the absence of proof. Trigg *v.* Moore, 10 Tex. 197.

22. Ufford *v.* Spaulding, 156 Mass. 65, 30 N. E. 360.

In the case of Daniel *v.* Golden Hill Min. Co., 28 Wash. 411, 68 Pac. 884, it was held that it could not be presumed that another state had a law in reference to the sale of the stock of a foreign corporation, where there is no such law in the state of the forum.

23. St. Louis & T. H. R. R. Co. *v.* Eggmann, 161 Ill. 155, 43 N. E. 620, *s. c.* 60 Ill. App. 29; Miami Powder Co. *v.* Hotchkiss, 17 Ill. App. 622. *In re* Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620.

If the law of another state, duly proved before the court, be repealed, it is a matter which cannot be assumed on the mere presumption arising from the repeal of the same law in the state of the forum. *Ex parte* Edward Lafonta, 2 Rob. (La.) 495.

Since the state of Tennessee was once a territory within the limits of North Carolina and in the year 1789 was ceded to the United States, upon an express stipulation that the laws in force and use in the state of North Carolina at the time should be and continue in full force within the territory ceded, we must presume the continued existence of this law until the contrary is shown. State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699.

24. Johnston *v.* Gawtry, 83 Mo. 339.

25. Sandford *v.* Sandford, 28 Conn. 6; Dodge *v.* Coffin, 15 Kan. 277; Ward *v.* Baker, 16 Kan. 31; Council Bluffs Sav. Bank *v.* Griswold, 50 Neb. 753, 70 N. W. 376.

26. *Arkansas.* — Grider *v.* Driver, 46 Ark. 50.

Nebraska. — People's Bldg. L. & S. Ass'n of Geneva *v.* Backus (Neb.), 89 N. W. 315.

New Jersey. — Leake *v.* Bergen, 27 N. J. Eq. 360.

Tennessee. — Allen West Comm. Co. *v.* Carroll, 104 Tenn. 489, 58 S. W. 314. See also Phelps *v.* American Sav. & Loan Ass'n, 121 Mich. 343, 80 N. W. 120, and Fred Miller Br'g Co. *v.* De France, 90 Iowa 395, 57 N. W. 959.

But in the case of McCraney *v.* Alden, 46 Barb. (N. Y.) 272, it was held that a party seeking the advantage of the benefit of the statute of another state respecting usury, must prove it or abide by the presumption that such statutes are in accordance with the statutes of the forum.

The presumption in the absence of proof that the law of the forum is the same as that of another state does not apply to penalties. However, this rule does not hold good since the passage of the act requiring courts of Arkansas to take judicial notice of the laws of other states. Louisiana & N. W. R. Co. *v.* Phelps, 70 Ark. 17, 65 S. W. 709.

presumption as to the law of another state in reference to the rate of interest in such state.[27] It has also been held that courts will not presume that the law of another state fails to provide for compensation for injuries caused by negligence.[28]

As to criminal law, it is presumed that acts criminal at common law are crimes under the law of another state or country.[29] But this presumption does not prevail against the presumption of innocence of a party charged with a crime.[30]

2. As to the Common Law. — In the absence of proof to the contrary, the common law will be presumed to prevail in another state,[31] except, perhaps, in states created within territory where

27. Kernott *v.* Ayer, 11 Mich. 181; Huff *v.* Folger, Dall. Dec. (Tex.) 530. *Contra.* — Desnoyer *v.* McDonald, 4 Minn. 515.

28. Whitford *v.* Panama R. Co., 23 N. Y. 465; Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 32 S. W. 335.

29. Cluff *v.* Mutual Ben. Life Ins. Co., 13 Allen (Mass.) 308.

30. People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49.

31. *Alabama.* — Bangs *v.* Edwards, 88 Ala. 382, 6 So. 764; Alabama Great So. R. R. Co. *v.* Carroll, 97 Ala. 126, 11 So. 803, 38 Am. St. Rep. 163, 18 L. R. A. 433; Louisville & N. R. Co. *v.* Williams, 113 Ala. 402, 21 So. 938; Birmingham Water Works Co. *v.* Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43.

Arkansas. — Hydrick *v.* Burke, 30 Ark. 124; Thorn *v.* Weatherly, 50 Ark. 237, 7 S. W. 33; Eureka Springs Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690.

California. — Thompson *v.* Monrow, 2 Cal. 99, 56 Am. Dec. 318.

Colorado. — Wells *v.* Schuster-Hax Natl. Bank, 23 Colo. 534, 48 Pac. 809.

Georgia. — Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646; Charleston & W. S. R. Co. *v.* Miller, 113 Ga. 15, 38 S. E. 338; Hager *v.* National German Am. Bank, 105 Ga. 116, 31 S. E. 141.

Illinois. — Tinkler *v.* Cox, 68 Ill. 119; Scaling *v.* Knollin, 94 Ill. App. 443; Bradley *v.* Peabody Coal Co., 99 Ill. App. 427; McCurdy *v.* Alaska & C. Comm. Co., 102 Ill. App. 120; County of Jo Daviess *v.* Staples, 108 Ill. App. 539.

Indiana. — Supreme Council Order of Chosen Friends *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Buchanan *v.* Hubbard, 119 Ind. 187, 21 N. E. 538; Jackson *v.* Pittsburg C. C. & St. L. R. Co., 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; Baltimore & O. S. W. R. Co. *v.* Adams, 159 Ind. 688, 66 N. E. 43, 60 L. R. A. 396.

Kentucky. — Chesapeake & N. R. Co. *v.* Hanmer, 23 Ky. L. Rep. 1846, 66 S. W. 375; Cope *v.* Daniel, 9 Dana 415; Miles *v.* Collins, 1 Metc. 308.

Louisiana. — Copley *v.* Sanford, 2 La. Ann. 335, 46 Am. Dec. 548; Young *v.* Templeton, 4 La. Ann. 254, 50 Am. Dec. 563.

Maine. — Tllexan *v.* Wilson, 43 Me. 186.

Maryland. — State *v.* Pittsburg & C. R. Co., 45 Md. 41.

Massachusetts. — Hazen *v.* Mathews (Mass.), 68 N. E. 838; Palfrey *v.* Portland S. & P. R. Co., 4 Allen 55; Richards *v.* Barlow, 140 Mass. 218, 6 N. E. 68; Harvey *v.* Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200.

Michigan. — Schroeder *v.* Boyce, 127 Mich. 33, 86 N. W. 387; Gordon *v.* Ward, 16 Mich. 360; *In re* High, 2 Doug. 515; Ellis *v.* Maxson, 19 Mich. 186, 2 Am. Rep. 81.

Minnesota. — Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458; Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862; Pardoe *v.* Merritt, 75 Minn. 12, 77 N. W. 552.

Missouri. — American Oak Leather Co. *v.* Wyeth H. & Mfg. Co., 57 Mo. App. 297; Roll *v.* St. Louis & Colo. Smelt. & Min. Co., 52 Mo. App. 60; Meyer *v.* McCabe, 73 Mo.

some other system of jurisprudence prevailed,[32] as, for example,

236; Davis *v.* Cohn, 85 Mo. App. 530; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894; Gaylord *v.* Duryea, 95 Mo. App. 574, 69 S. W. 607.

New Hampshire. — Ela *v.* Ela, 70 N. H. 163, 47 Atl. 414.

New York. — First Natl. Bank *v.* New York Natl. Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139; *modifying* 22 App. Div. 24, 47 N. Y. Supp. 880; Townsend *v.* Van Buskirk, 33 Misc. 287, 68 N. Y. Supp. 512; Fifth Natl. Bank *v.* Woolsey, 21 Misc. 757, 48 N. Y. Supp. 148; Wiehle *v.* Schwarz, 22 Jones & S. 169; Goodman *v.* Mercantile Credit Guarantee Co., 17 App. Div. 474, 45 N. Y. Supp. 508; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; First Natl. Bank of Meadville *v.* Fourth Natl. Bank of N. Y., 77 N. Y. 320.

North Carolina. — State Bank of Chicago *v.* Carr, 130 N. C. 479, 41 S. E. 876; Terry *v.* Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663; Brown *v.* Pratt, 56 N. C. 202; Griffin *v.* Carter, 40 N. C. 413.

Oregon. — Cressey *v.* Tatom, 9 Or. 541; Goodwin *v.* Morris, 9 Or. 322.

South Carolina. — Rosemand *v.* Southern R. Co. (S. C.), 44 S. E. 574.

Texas. — Blethen *v.* Bonner (Tex. Civ. App.), 52 S. W. 571; Tempel *v.* Dodge, 89 Tex. 69, 33 S. W. 222.

Contra. — Crosby *v.* Huston, 1 Tex. 203; Mexican Central R. Co. *v.* Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778.

In the case of Inge *v.* Murphy, 10 Ala. 885, Judge Goldswaite said: "The *prima facie* presumption is that the common law prevails in that state [North Carolina], (it being of common natural origin with our own), and this presumption must prevail, unless a different rule is shown to exist, either by some modification of that law peculiar to that state, or in consequence of some statute."

The common law will be presumed to prevail in another state, in the absence of proof as to what the statute law of such state is. This is considered a better rule than the one followed in 4 Minn. 528, and 8 Minn. 13, according to which decisions the laws of another state will be presumed to be the same as those of the forum, unless the contrary be shown. Hoyt *v.* McNeil, 13 Minn. 390.

32. In the case of Norris *v.* Harris, 15 Cal. 226, the court said: "In all the states having a common origin, formed from colonies which constituted a part of the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists — it has been so held in repeated instances — and it rests upon parties who assert a different rule to show that matter by proof.

"A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where, in fact, the population of the new state upon the establishment of government was formed by emigration from the original states.

. . . "But no such presumption can apply to states in which a government already existed at the time of their accession to the country, as Florida, Louisiana and Texas. They had already laws of their own, which remained in force until by the proper authority they were abrogated and new laws were promulgated. . . .

"The question then recurs as to what is to be presumed as to the law of Texas, in the absence of any proof on the subject. . . . We cannot take judicial notice of the laws of Texas, and we must, therefore, as a matter of necessity, look to our own laws as furnishing the only rule of decision upon which we can act."

In the case of Silver *v.* Kansas City, St. L. & C. R. Co., 21 Mo. App. 5, the court said: "In those states, formerly subject to the common law of England, the presumption here would be that the common law is in force there. But as

in the states of Louisiana[33] and Texas[34] and the Indian Territory.[35] Courts having the common law will not presume that the law of another state is the same as that of the forum, if in such other state the common-law system never existed;[36] and where there is no proof of the law of another state, nor judicial knowledge of the origin of such state, which would raise the presumption that the common law prevails there, it will be presumed that the law of the forum is the law of such other state on the subject in question.[37]

The presumption that the common law prevails in another jurisdiction holds with reference to the laws of a foreign country,[38] and in some jurisdictions is entertained in spite of the well-known fact that the English common law never was in force in such country.[39]

It has also been held that the law merchant, being a part of the

Illinois was a part of the Louisiana Purchase, and was never subject to the common law of England, such presumption would not obtain in matters where the common law was applicable. There being no proof of the Illinois statute, and there being no presumption as to what her law is, we hold our own statute as to the powers of the notary applicable."

Since Kansas formed no part of the English dominions, but was, immediately before its acquisition by the United States government, subject to the French, and before to the Spanish laws, the courts will not presume that the principles of the common law prevailed in that state, and in the absence of proof the law of the *lex loci contratus* will be presumed to be the same as the *lex fori*. Bain *v.* Arnold, 33 Mo. App. 631.

The state of Arkansas was a part of the acquisition of territory by the Louisiana Purchase from France. Prior to becoming a member of the Union, it was never subject to the laws of England. Courts will, therefore, not presume that the common law is in force in Arkansas, and, in the absence of proof of its law, apply the law of the forum. Clark *v.* Barns, 58 Mo. App. 667.

33. Norris *v.* Harris, 15 Cal. 226; Sloan *v.* Torry, 78 Mo. 623.

34. Common Law Not Presumed to Prevail in the State of Texas. Castleman *v.* Jeffries, 60 Ala. 380; Brown *v.* Wright, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467; Hurley *v.* Missouri Pac. R. Co., 57 Mo. App. 675; Plato *v.* Mulhall, 72 Mo. 522; Bradshaw *v.* Mayfield, 18 Tex. 21; Norris *v.* Harris, 15 Cal. 226.

35. The Presumption That the Common Law Prevails in Another State Cannot Be Applied to the Indian Territory. — Therefore, the law of the forum must be applied to the case in the absence of other proof. Davison *v.* Gibson, 56 Fed. 443; Garner *v.* Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715; Johnson *v.* State, 60 Ark. 308, 30 S. W. 31; James *v.* James, 81 Tex. 373, 16 S. W. 1087.

Contra. — Pyeatt *v.* Powell, 51 Fed. 551.

36. Thorn *v.* Weatherly, 50 Ark. 237, 7 S. W. 33; White *v.* Chaney, 20 Mo. App. 389.

37. Kennebrew *v.* Southern Automatic E. S. Machine Co., 106 Ala. 377, 17 So. 545; Peet Co. *v.* Hatcher, 112 Ala. 514, 21 So. 711; Louisville & N. R. Co. *v.* Williams, 113 Ala. 402, 21 So. 938.

38. The common law is presumed to prevail in England, but the statutes must be pleaded and proved. Stokes *v.* Macken, 62 Barb. (N. Y.) 145.

39. Whitford *v.* Panama R. Co., 23 N. Y. 465; Mexican Central R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282.

Contra. — Courts will take judicial notice that the common law is not, and never was, in force in France, so as to render valid a common-law marriage. *In re* Hall, 61 App. Div. 266, 70 N. Y. Supp. 406. See also Savage *v.* O'Neil, 44 N. Y. 298.

common law, would be presumed to prevail in another state, in the absence of proof to the contrary.[40]

When a contract of a commercial character is governed by the law of another state, federal courts, it seems, will presume the general commercial law to prevail in that state,[41] since upon questions of the general commercial law such courts are not bound by state decisions or the rules of the common law.[42]

No presumption will prevail as to any modification of the common law in another country or state; it must be proved.[43]

3. As to Statute Law. — There is considerable conflict of authority on the question whether or not foreign statutory law will be presumed to be the same as that of the forum.[44] A foreign statute,

40. Donegan *v.* Ward, 49 Ala. 242, 20 Am. Rep. 275.

Since the general law merchant is part of the common law as prevailing throughout the United States, it will be presumed that the three days of grace allowed by the general law merchant are also allowed by the law of another state. Reed *v.* Wilson, 41 N. J. L. 29.

41. The Henry B. Hyde, 82 Fed. 81.

42. Railroad Co. *v.* Lockwood, 17 Wall. 357; Robinson *v.* Com. Ins. Co., 3 Sumn. 220, 20 Fed. Cas. No. 11,949; Williams *v.* Suffolk Ins. Co., 3 Sumn. 270, 29 Fed. Cas. No. 17,738; Jewett *v.* Hone, 1 Woods 530, 13 Fed. Cas. No. 7311; Schenck *v.* Marshall Co., 1 Biss. 533, 21 Fed. Cas. No. 12,449; *affirmed* in Supervisors *v.* Schenck, 5 Wall (U. S.) 772; Oates *v.* First Natl. Bank, 100 U. S. 239; Brooklyn City & N. R. Co. *v.* National Bank of the Republic, 102 U. S. 14; Pana *v.* Bowler, 107 U. S. 529; Pleasant Twp. *v.* Ætna Life Ins. Co., 138 U. S. 67.

43. Newton *v.* Cocke, 10 Ark. 169; Copley *v.* Sanford, 2 La. Ann. 335, 46 Am. Dec. 348; Dickey *v.* Pocomoke City Natl. Bank, 89 Md. 280, 43 Atl. 33; White *v.* Knapp, 47 Barb. (N. Y.) 549; Vanderpoel *v.* Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548.

44. The statute laws of another state will be presumed to be the same as that of the forum.

Iowa. — McMillan *v.* American Exp. Co. (Iowa), 98 N. W. 629; Barringer *v.* Ryder, 119 Iowa 121, 93 N. W. 56.

Kansas. — *In re* Hess, 5 Kan. App. 763, 48 Pac. 596; Thomen *v.* Sullivan, 9 Kan. App. 887, 60 Pac. 755; Poll *v.* Hicks, 67 Kan. 191, 72 Pac. 847; Scott *v.* Beard, 5 Kan. App. 560, 47 Pac. 986; Woolacott *v.* Case, 63 Kan. 35, 64 Pac. 965.

Louisiana. — Nalle *v.* Ventress, 19 La. Ann. 373; Sandidge *v.* Hunt, 40 La. Ann. 766.

Nebraska. — Fisher *v.* Donovan, 57 Neb. 361, 77 N. W. 778, 44 Am. St. Rep. 383; Schmidt & Bro. Co. *v.* Mahoney, 60 Neb. 20, 82 N. W. 99.

Nevada. — Rogers *v.* Hatch, 8 Nev. 35.

Texas. — Caledonian Ins. Co. *v.* Wenar (Tex. Civ. App.), 34 S. W. 385.

Wisconsin. — McCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707; Second Natl. Bank of Richmond *v.* Smith, 118 Wis. 18, 94 N. W. 664.

In the absence of proof, the rate of interest in another state will be presumed to be the same as that fixed by the statute of the forum. Fitzgerald *v.* Fitzgerald & M. C. Co., 41 Neb. 374, 59 N. W. 838.

When the wording of the statute of another state is substantially the same as that of the forum on a certain subject, the foreign law will be presumed to be the same and to have the same meaning as that of the forum. Howe *v.* Ballard, 113 Wis. 375, 89 N. W. 136.

Contra. — *Alabama.* — Downs *v.* Minchew, 30 Ala. 86.

Maryland. — State *v.* Pittsburg & C. R. Co., 45 Md. 41.

Massachusetts. — Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806; Murphy *v.* Collins, 121 Mass. 6.

proved to have once existed, will be presumed to remain in force in the absence of evidence showing its repeal or modification.[45]

V. MODE OF PROOF.

1. In General. — To prove a foreign law, the best evidence of which the cause is susceptible must be produced.[46]

2. Written Laws. — Most of the states have statutory provisions as to the mode of proof of both written and unwritten foreign laws.[47]

Minnesota. — Pardoe *v.* Merritt, 75 Minn. 12, 77 N. W. 552.

Missouri. — Rohan Bro. Boiler Mfg. Co. *v.* Richmond, 14 Mo. App. 595; Silver *v.* Kansas City, St. L. & C. R. Co., 21 Mo. App. 5; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521.

New York. — Throop *v.* Hatch, 3 Abb. Pr. 23; White *v.* Knapp, 47 Barb. (N. Y.) 549; Zeltner *v.* Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Dec. 491; Sullivan *v.* Babcock, 63 How. Pr. 120.

Utah. — Rudy *v.* Rio Grande R. Co., 8 Utah 165, 30 Pac. 366.

"If there was a total lack of evidence, it might be assumed that the common or unwritten law was the same as that of Massachusetts. But there are statutes regulating mortgages of personal property in New Hampshire, and these are not the same as the statutes of Massachusetts. . . . We cannot therefore assume that the law of New Hampshire was like that of Massachusetts." Ufford *v.* Spaulding, 156 Mass. 65, 30 N. E. 360.

The presumption that the law of another state is the same as that of the forum is questionable as to statute law of that other state. McCulloch *v.* Norwood, 58 N. Y. 562; Harris *v.* White, 81 N. Y. 532.

45. Bush *v.* Garner, 73 Ala. 162; Cochran *v.* Ward, 5 Ind. App. 89, 31 N. E. 581.

46. *United States.* — Ennis *v.* Smith, 14 How. 400.

"The principle that the best testimony shall be required which the nature of the thing admits of; or, in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it, applies to foreign laws as it does to all other facts." Church *v.* Hubbard, 2 Cranch 187.

Louisiana. — Isabella *v.* Pecot, 2 La. Ann. 387.

Missouri. — Charlotte *v.* Chouteau, 25 Mo. 465, 483.

New Hampshire. — Hall *v.* Castello, 48 N. H. 176, 2 Am. Rep. 207.

Pennsylvania. — Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520; Phillips *v.* Gregg, 10 Watts 158, 36 Am. Dec. 158.

47. *England.* — Stat. 24 & 25, Vict., ch. 11.

Alabama. — Civil Code (ed. 1887), Vol. I, § 2790.

Arizona. — Rev. Stat. (ed. 1887), Title 25, ch. 4, p. 330.

Arkansas. — Dig. of Stat. (ed. 1884), ch. 59, p. 620, §§ 2822 & 2823.

California. — Deering's Annot. Codes & Stat., Vol. 3, p. 643, § 1963, pp. 35 & 36.

Colorado. — General Laws, ch. 48, § 174 (Mill's Annot. Stat., ed. 1897, p. 1121).

Connecticut. — Gen. Stat. (ed. 1888) Title 18, ch. 76, §§ 1086 & 1088.

Delaware. — Rev. Code (ed. 1893), p. 798, §§ 6-8.

Florida. — Rev. Stat. (ed. 1892) Title 1, ch. 15, art. 2, §§ 1106-1108.

Georgia. — Code (1882), p. 994, §§ 3825, 3771, 3772.

Idaho. — Rev. Stat. (ed. 1887), p. 680, Title 1, ch. 3, §§ 5969 & 5971.

Illinois. — S. & C. Annot. Stat., Vol. 1, p. 1080, §§ 10-12.

Indiana. — Rev. Stat. (ed. 1888), §§ 457, 476 & 477.

Iowa. — McClain's Code (ed. 1888), Vol. II, p. 1465, §§ 4969 & 4970.

Kansas. — Annot. St. (ed. 1889), Vol. II, pp. 1410 & 4465.

Kentucky. — Third Section of Ky. Act of Feb. 11, 1809, 2 Dig. Laws 1115.

Louisiana. — Voorhees' Rev. Laws (ed. 1884), p. 230, Vol. 1440.

Maine. — Rev. Stat. (ed. 1883), p. 709, §§ 108 & 109.

As a general rule, the statute law of sister states may be proved by producing a copy purporting to be published by authority, and the copy produced must be duly authenticated.[48] It has been held that parol evidence is inadmissible to prove the statute of another state.[49] As to the statute laws of foreign countries, strictly speaking, it has been held that they may be proven by copies exemplified or properly authenticated.[50] However, the courts seem to have a discretion on the subject of admitting parol evidence for the proof of a written foreign law,[51] but the authorities are conflicting.[52]

Maryland. — Rev. Stat. (ed. 1888), Vol. I, p. 704, § 48.

Massachusetts. — Gen. Stat. of 1886, p. 993, §§ 71-73.

Michigan. — Howett's Ann. Stat. of 1888, amended act of May 11, 1885, Vol. III, Howett's ed., p. 2724, § 7508, Vol. II, § 7509 of same statute.

Minnesota. — Gen. St. (ed. 1878), Vol. I, p. 800, Title 7, ch. 73, §§ 58 & 59.

Mississippi. — Rev. Codes 2693.

Missouri. — Rev. Stat. (ed. 1889), Vol. I, p. 1092, §§ 4831, 4832, 4882.

Nebraska. — Code of Civ. Proc., Vol. 396.

New York. — Act of March 27, 1804, Vol. I. See also Bliss' N. Y. Annot. Code, Vol. I, art. 3, p. 764, § 942.

North Carolina. — Code, § 1338.

North Dakota. — Rev. Code (1895), p. 1030, § 5690.

Ohio. — Rev. Stat. (ed. 1882), p. 589, § 44.

South Carolina. — Code of Civ. Proc. (ed. 1882), p. 120, § 422.

South Dakota. — Annot. Stat. (ed. 1899), Vol. II, § 6533.

Tennessee. — Code (ed. 1884), ch. 3, p. 863, §§ 4550-4559 included.

Texas. — Rev. St. (ed. 1889), Vol. I, p. 729, art. 2250.

Utah. — Comp. Laws (ed. 1876), p. 520.

Virginia. — Code (ed. 1887), p. 793, § 3330.

Washington. — Hill's Ann. St. & Codes, Vol. II, p. 634 (ed. 1891), § 1684.

West Virginia. — Code (ed. 1892), ch. 13, § 4, p. 122.

Wisconsin. — S. & B. Ann. Stat., Vol. II, p. 2141, §§ 4136 & 4130.

Wyoming. — Rev. Stat. (ed. 1887), ch. 3, § 2592.

48. Taylor *v.* Bank of Illinois, 7 T. B. Mon. (Ky.) 576; Zimmerman *v.* Helser, 32 Md. 274; Baltimore & O. R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688; People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49; Lapice *v.* Smith, 13 La. 91, 33 Am. Dec. 555; State *v.* Carr, 5 N. H. 367; State *v.* Twitty, 9 N. C. 441, 11 Am. Dec. 779; Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

49. Line *v.* Mack, 14 Ind. 330; Merritt *v.* Merritt, 20 Ill. 65; Raynham *v.* Canton, 3 Pick. (Mass.) 293; Martin *v.* Payne, 11 Tex. 292.

50. Robinson *v.* Clifford, 2 Wash. C. C. 1, 20 Fed. Cas. No. 11,948; Pierce *v.* Indseth, 106 U. S. 546; McNeill *v.* Arnold, 17 Ark. 154; Comparet *v.* Jernegan, 5 Blackf. (Ind.) 375; Charlotte *v.* Chouteau, 25 Mo. 473; Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475; Woodbridge *v.* Auston, 2 Tyl. (Vt.) 364, 4 Am. Dec. 740; Ennis *v.* Smith, 14 How. (U. S.) 400; DeSobry *v.* DeLaistre, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; Isabella *v.* Pecot, 2 La. Ann. 387; Lincoln *v.* Battelle, 6 Wend. 475; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Territt *v.* Woodruff, 19 Vt. 182.

51. Line *v.* Mack, 14 Ind. 330; Comparet *v.* Jernegan, 5 Blackf. (Ind.) 375.

52. In the case of Barrows *v.* Downs & Co., 9 R. I. 446, 11 Am. Rep. 283, Judge Potter summarized the opinion of the court as follows: "The courts have been for some time relaxing the rigor of the ancient rules in relation to the proof of foreign statutes.

"In Ennis *v.* Smith, 14 How. 400, a copy of foreign statutes, received through the agency of the Vattenmaire system of exchange, was ad-

A. Authentication. — As to the law of a foreign country, strictly speaking, the authentication of the law must consist of an

mitted. In Jones *v.* Moffit, 5 S. & R. 523, a copy of Irish statutes sworn to by a barrister as having been received from the king's printer, was received.

"The United States Supreme Court, in Talbot *v.* Seaman, 1 Cranch 19, lay down the rule that the laws of a foreign country, designed for the direction of its own affairs, are not to be noticed, unless proved as facts; and in that case they admitted an edict of France, which had been promulgated by the United States government. And in Church *v.* Hubbart, 2 Cranch 187, they say that the sanction of an oath is required, unless verified by some other high authority entitled to equal respect with an oath. In that case, a Portuguese law and its translation were certified by the United States consul at Lisbon. He did not testify to them on oath. The court say that 'they are not verified by an oath,' and that it was not a consular function to certify to laws; and imply strongly that if there had been testimony on oath it would have been admitted. 'It is impossible,' says C. J. Marshall, 'to suppose that this copy might not have been authenticated by the oath of the consul, as well as by his certificate.' That this was the ground of that decision is stated in the opinion of the supreme court, in Ennis *v.* Smith, 14 How. 427, where the court say the copies would have been admitted in that case if they had been sworn to.

"And in Ennis *v.* Smith, 14 How. 400-426, the court hold that foreign written laws may be 'verified by an oath or proved by exemplification, etc. . . . But such modes of proof as have been mentioned are not to be considered as exclusive of others, especially as codes of law and accepted histories of the laws of a country.' And they say 'that a foreign written law may be received when it is found in a statute book, with proof that the book has been officially promulgated by the government which made the law.' Ib. 429. In Packard *v.* Hill, 2 Wend. 411, the court rejected a copy of a statute establishing a court of consulado in Havana, produced by a witness who had purchased it in Havana, and who testified that he had practiced in that court, and that the court was governed by this law. A 'book purchased in a bookstore, purporting to contain the laws of a state, unless published by authority, would not be admitted anywhere,' etc. In the case of Chanoine *v.* Fowler, 3 Wend. 173, the edition of laws rejected did not purport to be an official edition. In the case of Queen *v.* Dent, 1 Car. & K. 97, a witness, not of the legal profession, was admitted to prove the fact as to law. But this decision is decidedly condemned. See The Sussex Peerage, 11 C. & F. 124, 134; and see Vanderdonckt *v.* Thellusson, 8 M. G. & S. 824.

"In the case of Lacon *v.* Higgins, A. D. 1822, 3 Stark 178, Abbott, C. J., (Lord Tenterden) admitted a copy of the French code, produced by the French consul, and sworn to by him as the one used and acted on by him, and purporting to be printed at the Royal French printing office, where the laws were printed by authority. The decisions seem to have very much conflicted; sometimes (as generally in New York) the written law being rejected, unless proved by exemplification. And see Richardson *v.* Anderson, in note to 1 Camp. 64. See also the new English statute, 15 & 16 Victoria, ch. 96, § 7.

"Chancellor Kent, in Brush *v.* Wilkins, 4 Johns. Ch. Rep. 506, admitted the law of Demerara, as to succession and wills, to be proved by a witness. . . .

"In the Sussex Peerage Case, 1844, 11 C. & F. 85, Dr. Wiseman was called as a witness to prove the laws of marriage at Rome, and referred to a book containing the decrees of the Council of Trent as regulating them. The judges of the committee of the House of Lords expressed their opinions severally. Lord Brougham: 'The witness may refresh his recollection by referring to authorities,' etc. Lord Lyndhurst, Lord Chancellor: 'The witness may thus correct and confirm his recollection of

exemplification under the seal of the respective foreign state, or of a sworn copy of the same.[53]

the law, though he is the person to tell us what it is.' Lord Brougham agreed with the lord chancellor: 'The witness may refer to the sources of his knowledge; but the proper mode of proving a law is not by showing a book; the house requires the assistance of a lawyer who knows how to interpret it.' Lord Chief Justice Denman: 'There does not appear to be in fact any real difference of opinion; there is no question raised here as to any exclusive mode of getting at this evidence, for we have both materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of the law. A skillful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. That was decided after full argument on Friday last (June 20) in the Court of Queen's Bench (Baron de Bode's case). There was a difference of opinion, but the majority of the judges clearly held, on an examination of all the cases, and after full discussion, that proof of a law itself in a case of foreign law could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law, and this book truly states the law,' then you have the authority of the witness and of the book. You may have to open the question on the knowledge or means of knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony; but you must take the evidence from the witness.'

"In the matter of Robert's Will, A. D. 1840, 8 Paige 446, Chancellor Kent relied on the evidence of an expert in relation to the laws of Cuba, for the reasons we have stated above.

"In the case of Vanderdonckt *v.* Thellusson, 8 M. G. & S. 812 A. D. 1849, the court, after argument, admitted a person, not a lawyer, to prove the law of Belgium as to bills of exchange. In this case it is stated in the note that the old French Code of Commerce (without the subsequent French modifications) was in force in Belgium.

"The question before the court is, not the existence of a particular statute, but to ascertain the exact state of the law at a particular date, including its construction and effect.

"In this case the evidence offered is that of a person who testifies that he has practiced law in Havana for twenty-four years; has been the consulting lawyer of one of the tribunals, and a judge; and the book to which he refers, purporting to be the Spanish Code of Commerce of 1823, is the code of commercial law enforced in that island.

"It seems to us that this book is admissible in this case, as showing the law of Cuba, and to support the evidence and refresh the recollection of the witness.

"The book, even if exemplified under the great seal of Spain, could not of itself show that it was law at the present date; and there are many cases where the evidence of a professional person, or one skilled *virtute officii,* may be much more satisfactory evidence of what the law is than the mere exemplification of the exact words of a foreign statute, which the court may not have the necessary knowledge to construe. And it seems to us that the requiring an exemplified copy is pressing the rule of requiring the best evidence to an extent that would often defeat the ends of justice. And for the reasons we have given, the statute alone may not be the best evidence of the actual state of the law. There can be little danger of being imposed upon by the production of a forged or supposititious document, especially in the case of a code."

53. The written or statute law of a foreign government must be verified in the same manner as foreign judgments: by the exemplification of

The rule prevailing as to the laws of sister states, though essentially the same, is less rigid and not uniform,[54] and is frequently

a copy under the great seal of state, or by a sworn copy. Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622; Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475.

The written foreign law may be proved by producing a properly authenticated copy of it. The prevailing rule as to the manner of authenticating such copies of foreign law is that the best obtainable proof be produced. Such proof may consist of an oath or an exemplification of a copy, under the great seal of the state whose law it is supposed to be, or by the testimony of a witness who has examined and compared it with its original, or the copy may be verified by an officer authorized to do so by law, which certificate in turn must be properly proved.

In this particular case the copy of the French Code Civil had been officially transmitted to the supreme court as one of the volumes of the Bulletin des Lois a Paris L'imprimerie Royale, with this endorsement, "*Les Garde des Sceaux de France a la Court Supreme des Etats Unis*" and such act of the French government had been acknowledged officially by congress. Ennis *v.* Smith, 14 How. (U. S.) 400.

In the case of Chanoine *v.* Fowler, 3 Wend. (N. Y.) 173, a book furnished by the French government to its consul at New York, purporting to be conformable to an official edition of the French law published by that government, was introduced in evidence. The court held that written laws of a foreign state must be proved by exemplification, and cannot be proved by the printed statute book of such state, and that a protest of a bill of exchange by a "huissier" (an officier of a tribunal of commerce in France), will not be received in evidence without proof of the law.

The promulgation in the United States of a law of France, by the joint act of the state and war departments, makes such a law sufficiently authenticated. Talbot *v.* Seeman, 1 Cranch (U. S.) 1-38.

54. The Authentication Must Consist of an Exemplification of a Copy Under the Great Seal of the State, or of a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be authenticated. Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158; Line *v.* Mack, 14 Ind. 330; State *v.* Twitty, 9 N. C. 441, 11 Am. Dec. 779.

The Seal of a State is the Highest Test of Authenticity. — Where the seal of the state is affixed to an exemplification of a foreign law, the attestation of a public officer is not required. The seal of a state proves itself. Griswold *v.* Pitcairn, 2 Conn. 85; Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; State *v.* Carr, 5 N. H. 367; Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475; United States *v.* Johns, 4 Dall. (U. S.) 412.

The seal of any court or public officer may be affixed by an impression directly on the paper, without the use of a wafer or wax. Farmers & Mfg'rs Bank *v.* Haight, 3 Hill (N. Y.) 493. *Contra.* — Coit *v.* Millikin, 1 Denio (N. Y.) 376.

In Bush *v.* Garner, 73 Ala. 162, it is said that the authentication of a foreign law may be proved by producing either a copy properly certified by the secretary of the state, as being deposited in his office, or a printed volume purporting on its face to be printed by authority of such other state. (Code of Ala. 1876, § 3045.)

A copy of statutes bearing the inscription "Published for the State of Ohio, and distributed to its officers under the act of the general assembly" was held to be sufficient evidence of the law of that state. Paine *v.* Lake Erie L. R. Co., 31 Ind. 283.

In the case of Goodman *v.* Insurance Ass'n, 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473, the defendant offered in evidence four volumes of books entitled "The Revised Statutes, Codes and General Laws of the State of New York," which purported to contain the text, carefully compared with the original of all the general statutory laws of the state published by a New York

modified by statutory provisions.[55] In many states it has been held that a copy of the statutes of another state, purporting to be published by authority of its government, is *prima facie* evidence of that law.[56] It has also been held that when a copy of a statute of another state is certified according to the act of congress of 1790, such copy *must* be admitted in evidence, and if certified or authenticated according to state provisions, it *may* be admitted as proof of such statute.[57]

B. EXPERT EVIDENCE. — a. *To Prove the Statute.* — The English rule is that foreign written law may be proved by properly qualified expert witnesses.[58] Such witnesses may refer to foreign law books to refresh their memory.[59] The American rule is more rigid, and is

lawyer. One of the books contained a printed certificate of the secretary of the state, to the effect that so much of the matter contained in the text of that edition of the revised statute as purported to be a copy thereof, was a correct transcript of the text of the revised statutes as originally published under authority of the state, except such typographical errors in the original as have been corrected in the copy, and except such parts as had been altered by the acts of the legislature, and that, with respect to such parts, it conformed to the acts by which such alterations had been made. None of those volumes purported to have been published under the authority of the legislature of New York, nor were they proved to be lawfully admitted as evidence of the existing laws of their state, in the courts thereof, as required by § 3718, of the code of Iowa. The court considered that evidence inadmissible.

In the case of Wilt *v.* Cutler, 38 Mich. 189, a printed volume of a statute of New Jersey was offered in evidence, the title page to which read as follows: "Revised Statutes of the State of New Jersey: Passed in 1874. Trenton. Printed by order of the government. 1874." The copy was held to be properly authenticated, although the volume did not purport to be published under the authority of the government of New Jersey. (2 Comp. L. Par. 59, 35 Mich.) The court held that the distinct authority for printing and publishing the laws need not appear in any case where they purport to be published under the authority of the government.

Printed copies of law of another state, authorized by its legislature, are admissible as evidence whether the law be public or private. Biddis *v.* James, 6 Binn (Pa.) 321, 6 Am. Dec. 456.

A copy of laws printed under the order of congress by the public printer, and distributed by law to the executives in the several states for the distribution among the people, is considered admissible in evidence. Taylor *v.* Bank of Alexandria, 5 Leigh (Va.) 471.

55. See *supra,* note 47.

56. *Alabama.* — Inge *v.* Murphy, 10 Ala. 885.

Kentucky. — Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629.

Maine. — Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Massachusetts. — Raynham *v.* Canton, 3 Pick. 293.

New Hampshire. — Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

New York. — Toulandou *v.* Lachenmeyer, 6 Abb. Pr. (N. S.) 215.

57. Taylor *v.* Bank of Ill., 7 Mon. (Ky.) 576; Chamberlain *v.* Maitland, 5 B. Mon. (Ky.) 448; State *v.* Stade, 1 D. Chip. (Vt.) 303.

58. See Barrows *v.* Downs Co., 9 R. I. 446, 11 Am. Rep. 283, *quoted* in note 52 *supra* and cases cited therein. As to qualifications of such expert witnesses see V. III, A.

59. A professional or official witness giving evidence on foreign law may refer to foreign law books to refresh his memory, or to correct or confirm his opinion; but the law

not uniform. Generally, foreign statute laws may be proved by parol evidence only when an authenticated copy of the latter cannot be produced;[60] it has been held that the court has a discretion on

itself must be taken from his evidence. The Sussex Peerage Case, 11 C. & F. 86, 8 Eng. Rep. Full Reprint 1034.

Witnesses in giving their testimony on foreign law may refer to laws or treatises for the purpose of aiding their memory upon the subject of examination; but in general it is the testimony of the witness and not the authority of the law or of the text writers, detached from the testimony of the witness, which is to influence the judge. Nelson *v.* Bridgport, 8 Beav. (Eng.) 527.

60. Merritt *v.* Merritt, 20, Ill. 65; Raynham *v.* Canton, 3 Pick. (Mass.) 293; People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49; Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

In the case of United States *v.* Garcia, 1 Sawy. 383, 25 Fed. Cas. No. 15,186*a*, the United States proposed to show by a practicing lawyer in Mexico what the practice in regard to mines was in San Luis Potosi, and what the duties of prefects were, which knowledge he had acquired not only from the study of the law, but also his practice as a prefect. The court said: "The law was formerly very rigid in its requirements as to proof of the laws of foreign countries. It has lately been less so. The modern decisions have admitted parol proof of such laws. The Sussex Peerage Case and the Baron de Bode's Case are authorities for its admission. In 11 Clark & F. 118, the witness, Dr. Wiseman, proved the contents of a decree of the consul of Trent as well as its construction. De Bode's Case is stronger. Here the witness on the stand is *peritus virtute officii* and professionally skilled, too. In the cases referred to, the evidence admitted went to the statute law, and the decrees, decisions or adjudications on it; that is, the witness stated what the law altogether was in France. . . . I am of the opinion that the evidence offered is admissible."

Parol evidence, if direct, clear and free from ambiguity, is admissible to prove the written law of so peculiar a country as China. Willcocks *v.* Phillips, 1 Wall. Jr. 47, 29 Fed. Cas. No. 17,639.

Our code (Georgia, par. 3824) declares: "The public laws of the United States and of the several states thereof, as published by authority, shall be judicially recognized without proof.' While, therefore, the trial judge might have resorted to the statutes and the decisions of the supreme court of Tennessee, we cannot say that it was error to receive the testimony of skilled attorneys who practiced in the courts of that state to aid him in arriving at a proper conclusion as to what was the law of that state, and especially as to the practice of the courts thereof in regard to appeals and their dismissal. . . . The record shows that the judge in this case did not confine himself to the opinions of the attorneys, but that the statutes of Tennessee and the decisions of its supreme court were read to him. Moreover, in some states that have no statute like our own above quoted (Code, par. 3824), evidence of this kind is the proper mode of proving the law of another state. Chattanooga R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109.

In the case of De Sobry *v.* De-Laistre, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535, the proof of the laws of France in testamentary matters was returned under commissions by the court to take the testimony, and admitted in evidence.

In the case of Kennard *v.* Kennard, 63 N. H. 303, the testimony of two witnesses, experienced lawyers of Philadelphia, was held competent to prove what the law of that place was upon a subject of executing and proving wills, and their testimony was found to accord with the public statutes and judicial decisions of that state.

In the case of Sierre Madre Construction Co. *v.* Brick (Tex. Civ. App.), 55 S. W. 521, the court held

this point,[61] and many states have statutory provisions,[62] some making parol evidence to prove the foreign written law inadmissible, as the state of New York, for example.[63]

b. *To Prove Construction.* — Expert evidence is admissible to show the construction of foreign written laws.[64]

c. *To Prove the Authenticity of a Copy of Foreign Written Law.* Generally, expert evidence to show that a copy of the law of a foreign country or state is authentic, and as such received by the courts of the respective country or state, is admissible.[65] Many

that even written foreign law may be proved by the expert evidence of a lawyer acquainted with that law.

61. Comparet *v.* Jernegan, 5 Blackf. (Ind.) 375; Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 89, 34 N. W. 581; Line *v.* Mack, 14 Ind. 336.

62. See note 47 *supra.*

63. In the case of Geoghegan *v.* Atlas Steamship Co., 16 Daly 229, 10 N. Y. Supp. 121, an application was made to take the testimony of two advocates in active legal practice in the republic of Columbia, as experts, to prove a certain statute law alleged to have been in operation in the United States of Columbia and the interpretation of such statute made and accepted by the courts of that country. The court referred to § 942 of the code of New York providing the manner of proving foreign statutes by officially printed copies, and held the evidence offered inadmissible.

64. Walker *v.* Forbes, 31 Ala. 9; Bush *v.* Garner, 73 Ala. 162; Dyer *v.* Smith, 12 Conn. 384; Greasons *v.* Davis, 9 Iowa 219; Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283, and decisions quoted therein.

In the case of Ingraham *v.* Hart, 11 Ohio 255, the plaintiff wished to lay before the court the construction of a Pennsylvania statute, and the court held that the existence of the law of another state is a question of fact, triable by a jury, and provable if necessary by witnesses.

The evidence of a lawyer of another state as to the construction of a statute of that state is not admissible where the language of the statute is plain, and there is no decision by the courts of that state upon the point in controversy. Molson's Bank *v.* Boardman, 47 Hun (N. Y.) 135; Hennessey *v.* Farrelly, 13 Daly (N. Y.) 468.

65. Ennis *v.* Smith, 14 How. (U. S.) 400; Lord *v.* Staples, 23 N. H. 449; Hale *v.* Ross, 3 N. J. L. 373. *Contra.* — Van Buskirk *v.* Mulock, 18 N. J. L. 184; Pacific Pneum. Gas. Co. *v.* Wheelock, 80 N. Y. 278. *Affirmed* 12 Jones & S. 566; Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283.

In the case of Greasons *v.* Davis, 9 Iowa 219, three witnesses learned in the law of Pennsylvania were admitted to prove the fact that certain law books introduced in the case were received in the court of Pennsylvania as evidence of the statute law of the state, also what the practice and usage under the statute of Pennsylvania was. The court held that it is a familiar practice to prove the unwritten law of another state by the evidence of those who are conversant with it. They are experts. So, too, it is equally competent to prove in the same manner the practice and usage under the written law or statute.

"Were the written or statute laws of that province (Canada) legally proved and admitted? The general rule is that foreign laws are to be proved as a matter of fact; and the mode of proof of the written law is to be by the production of a duly authenticated copy. An exception to the rule respecting the mode of proof has been allowed in the courts of the United States and in those of several of the states, by receiving the printed volumes of the laws of the states of the Union as *prima facie* evidence. But in 3 Pick. 293, the court say that they 'do not mean to decide that the law of any country merely foreign may be so proved.' Another exception may be said to be

established by the case of Talbot *v.* Seeman, 1 Cranch 38, allowing foreign laws, which have been promulgated as such by our own government, to be read without other proof. The only case at common law noticed, allowing a printed volume to be read as evidence of a foreign law, is the case of Lacon *v.* Higgins, 3 Stark. 178. In that case the French vice-consul, being called as a witness, produced a book, which he stated contained the French code of laws upon which he acted at his office; that there was an office called the Royal Printing Office, where the laws were printed by the authority of the French government; the book purported to have been printed in that office; and the witness stated that the book would have been acted upon in any of the French courts. Upon this testimony C. J. Abbott admitted the book to be read as proof of the law, and seemed to rely upon the case of the King *v.* Picton, 30 Howell's State Trials 514. In this latter case the objection to the book of Spanish Laws is said to have been waived.

In the present case the books admitted purported to contain the laws of the province, and to have been printed by the printer to his Majesty, and it was proved that the laws thus printed were distributed by the government to its officers, and that they had been cited and read in the courts there as laws in force, and as regulating the administration of justice. These books have received the sanction of the executive and judicial officers of the province as containing its laws; and this is proved upon the oath of witnesses. It is difficult to say that it is not as satisfactory to the mind as the exemplification of a roll found in the possession of the *custos rotulorum* would be, accompanied by the oath of the person making it. It can hardly be said to be a departure from the rule requiring the best evidence; because the present proof does afford evidence that, if these books were offered in the courts of the province where the estate is situated, the laws which they contain would be allowed to operate upon that estate. And this is the very object to be attained; to allow them the same efficiency which they would have where the estate is situated. And that is all that can reasonably be required where the *lex rei sitae* governs the case." Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

In the case of Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. 246, the court said: "It is claimed that the charge for the services rendered was in accordance with the rates established by the statute of Ontario. To prove this, Mr. Weir, a barrister and solicitor of Ontario, was called, and he was shown a printed volume, which plaintiff's attorneys claimed was the Revised Statutes of Ontario for 1887, and appeared to be printed at Toronto at the Toronto Law Printer's. He was asked to state if that was a volume of the statutes commonly admitted and used as evidence in the courts of Ontario, and answered that it was. He also testified that §§ 31 and 34, ch. 147, of that volume, had reference to solicitors' fees. The book was then offered and received in evidence, under objection of defendant's counsel that it was incompetent and irrelevant, and that no foundation had been laid for its introduction. The general rule is that foreign laws may be proved by a printed volume thereof, which a witness having means of information can swear is recognized as authentic, and received by the courts in the country in which such laws are alleged to exist. 23 Am. & Eng. Enc. Law, p. 294; Owen *v.* Boyle, 15 Me. 147; Woodbridge *v.* Austin, 2 Tyler, 364 (4 Am. Dec. 740); Jones *v.* Maffet, 5 Serg. & R. 523. In the last case a printed copy of the Irish statutes was offered in evidence, with the testimony of a barrister of Ireland that he had received them of the king's printer in Ireland, and that they were good evidence there. The statute was received in evidence by the Pennsylvania court to show the law of Ireland. See also O'Keefe *v.* United States, 5 Ct. Cl. 674; Talbot *v.* Seeman, 1 Cranch 1; Ennis *v.* Smith, 14 How. 400. In Lacon *v.* Higgins, 3 Starkie 178, a printed copy of the French code, produced by the French consul resident in London, who obtained it at a bookseller's shop in Paris, was admitted as evidence of the laws

states, however, have statutory provisions on this point.[66]

C. Other Proofs. — The construction of a foreign written law may be proved by the printed reports of adjudged cases, and by text-writers of authority.[67]

3. Unwritten Laws. — A. Expert Evidence. — The unwritten law may be proved by the evidence of expert witnesses.[68] Such

of France by proof that it was admitted and used as evidence in France. In the present case the statute was sufficiently proved, and was properly received in evidence."

Mere parol proof that a book was read and received in the courts of another state as an authentic copy of its statutes is not sufficient. Van Buskirk *v.* Mulock, 18 N. J. L. 184.

66. See statutes cited in note 47 *supra.*

67. Roberts *v.* Knights, 7 Allen (Mass.) 449; The Maggie Hammond, 9 Wall. (U. S.) 435; Ennis *v.* Smith, 14 How. (U. S.) 400; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728; Bremer *v.* Freeman & Bremer, 10 Moore P. C. (Eng.) 361.

The reports of adjudged cases accredited to the Supreme Court of Mississippi were properly introduced as evidence of the construction placed upon the statute of that state, and such construction must be received by this court as authoritative.

But such reports are usually evidence only of the *unwritten law* of the state in which the decisions were rendered, and as there is a prescribed rule for proving foreign statutes, we are clear in the opinion that the reported decisions cannot, taken alone, be received as legal evidence of the contents or provisions of such statute. Bush *v.* Garner, 73 Ala. 162.

"While courts of one state will not take judicial notice of the laws of another, written or unwritten, the opinions of the court of last resort of another in construing its statutes may properly be referred to, and are entitled to very great weight." Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853.

68. *United States.* — Ennis *v.* Smith, 14 How. 400; Robinson *v.* Clifford, 2 Wash. C. C. 1, 20 Fed. Cas. No. 11,948; Robinson *v.* Detroit & C. Nav. Co., 73 Fed. 883; United States *v.* Ortega, 4 Wash. C. C. 531, 27 Fed. Cas. No. 15,971; Livingston *v.* Maryland Ins. Co., 6 Cranch 274.

Alabama. — Inge *v.* Murphy, 10 Ala. 885.

Arkansas. — McNeill *v.* Arnold, 17 Ark. 154; Barkman *v.* Hopkins, 11 Ark. 157.

Connecticut. — Dyer *v.* Smith, 12 Conn. 384.

Illinois. — Merritt *v.* Merritt, 20 Ill. 65; Milwaukee & St. P. R. Co. *v.* Smith, 74 Ill. 197; McDeed *v.* McDeed, 67 Ill. 545.

Indiana. — Comparet *v.* Jernegan, 5 Blackf. 375.

Iowa. — Greasons *v.* Davis, 9 Iowa 219.

Louisiana. — Isabella *v.* Pecot, 2 La. Ann. 387; Taylor *v.* Sweet, 3 La. 33, 22 Am. Dec. 156.

Maine. — Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Maryland. — DeSobry *v.* DeLaistre. 2 Har. & J. 191, 3 Am. Dec. 535; Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Gardner *v.* Lewis, 7 Gill 377.

Massachusetts. — Carnegie *v.* Morrison, 2 Metc. 381; Bowditch *v.* Soltyk, 99 Mass. 136; Mowry *v.* Chase, 100 Mass. 79.

Mississippi. — Hemphill *v.* Bank of Ala., 6 Smed & M. 44.

Missouri. — Charlotte *v.* Chouteau, 25 Mo. 465.

Nebraska. — Barber *v.* Hildebrand, 42 Neb. 400, 60 N. W. 594.

New York. — Brush *v.* Wilkins, 4 Johns. Ch. 506; Lincoln *v.* Battelle, 6 Wend. 475; Genet *v.* President Del. & H. Canal Co., 13 Misc. 409, 35 N. Y. Supp. 147; White *v.* Knapp, 47 Barb. 549; Kenny *v.* Clarkson, 1 Johns. 385, 3 Am. Dec. 336; Packard *v.* Hill, 2 Wend. 411.

New Hampshire. — Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

North Carolina. — Temple *v.* Board

expert witnesses need not be lawyers by profession, but must be persons acquainted with the law.[69]

B. Reports of Adjudged Cases. — The reports of cases adjudged in the courts of another state are competent evidence of the unwritten law of that state.[70]

of Com'rs of Pasquotauk Co., 111 N. C. 36, 15 S. E. 886.

Oregon. — State *v.* Looke, 7 Or. 55.

Pennsylvania. — Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520.

Tennessee. — City Sav. Bank *v.* Kensington Land Co. (Tenn.), 37 S. W. 1037.

Texas. — State *v.* DeLeon, 64 Tex. 553.

Vermont. — Woodbridge *v.* Austin, 2 Tyl. 364, 4 Am. Dec. 740.

69. Reg. *v.* Dent, 1 C. & R. 96 (Eng.); Reg. *v.* Povey, 14 Eng. L. & Eq. 549; Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207; American Life Ins. Co. *v.* Rosenagle, 77 Pa. St. 507.

A Roman Catholic bishop holding the office of coadjutor to a vicar-apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law. The Sussex Peerage Case, 11 C. & F. 86, 8 Eng. Rep. 1034.

In the case Banco de Sonora *v.* Bankers Mutual Casualty Co (Iowa), 95 N. W. 232, an attorney was called as a witness who testified that he was not acquainted with the laws of the republic of Mexico, nor of the state of Sonora, but that he had been a student of the history of law and government, and from his studies knew in a general way the countries having the civil law as a basis of their jurisprudence, and that Mexico was one of these. Also that that country had a constitution and statutory laws in system like those of the United States. The court held that such testimony was not admissible, since the unwritten law of a foreign government may be proven by parol only by the persons familiar with the law of such country, or who are at least in a situation rendering such knowledge probable.

In the case of State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449, J. Avery summarizes the opinion of the court by saying: "The statute provides that 'the unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence.' Code § 1338. The plain intendment of the law is that any person who is competent to testify as to other facts, of which such person professes to have knowledge, shall be permitted to state the pertinent provisions of the unwritten laws of a foreign country, after having stated that he has had opportunity to learn what they are. The legislature intended, evidently, that all persons who might profess to have an acquaintance with such laws should be permitted to testify what were their requirements as to the celebration of marriages, or entering into any other contracts. It is only where, by reason of peculiar skill and experience, certain persons are enabled to draw inferences from facts which the ordinary, untrained mind cannot deduce, that the services of experts become desirable, if not essential, for the enlightenment of courts and juries." Shepherd, C. J., (*dissenting.*)

In the case of Pickard *v.* Bailey, 26 N. H. 152, a witness was admitted to show what the law in Canada was in relation to notarial instruments. The witness was not a lawyer, but had been a magistrate for several years, and in addition to this, from his mercantile employments, had become acquainted with that law.

70. *Alabama.* — Inge *v.* Murphy, 10 Ala. 885.

Illinois. — McDeed *v.* McDeed, 67 Ill. 545.

Massachusetts. — Roberts *v.* Knights, 7 Allen 449; Raynham *v.* Canton, 3 Pick. 293; McRae *v.* Mattoon, 13 Pick. 513; Cragin *v.* Lamkin, 7 Allen 395.

New York. — White *v.* Knapp, 47 Barb. 549.

Pennsylvania. — Dougherty *v.* Sny-

C. Other Proofs. — The books of text-writers of recognized authority may be received in evidence of an unwritten foreign law.[71]

VI. QUESTIONS FOR COURT OR JURY.

The prevailing rule seems to be that, since foreign laws are facts, they must be proved to the jury as such,[72] but their construction and effect are for the courts.[73] However, the functions of court and jury are not well distinguished;[74] yet when a case arises under the

der, 15 Serg. & R. 84, 16 Am. Dec. 520.

Contra. — Gardner *v.* Lewis, 7 Gill (Md.) 377.

This is true in some states by statute. Billingsley *v.* Dean, 11 Ind. 331. See also note 47 *supra*.

Where a party is pleading the common law of another state, it is sufficient to aver the same as a fact without setting out in detail the decisions, opinions and expressions of the courts. The latter are evidence of the law. Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458.

71. The Maggie Hammond, 9 Wall. (U. S.) 435; Roberts *v.* Knights, 7 Allen (Mass.) 449; Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

Bouv. L. Dict. was admitted in evidence on the question as to when an infant becomes an adult under the law of Mexico. Banco de Sonora *v.* Bankers' Mutual Casualty Co. (Iowa), 95 N. W. 232.

72. *Connecticut.* — Dyer *v.* Smith, 12 Conn. 384.

Maryland. — DeSobry *v.* DeLaistre, 2 Har. & J. 191, 3 Am. Dec. 535; Trasher *v.* Everhart, 3 Gill & J. 145.

Massachusetts. — Kline *v.* Baker, 99 Mass. 253; Ufford *v.* Spaulding, 156 Mass. 65, 30 N. E. 360.

Missouri. — Charlotte *v.* Chouteau, 33 Mo. 194.

Ohio. — Ingraham *v.* Hart, 11 Ohio 255.

Contra. — Charlotte *v.* Chouteau, 25 Mo. 465; Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207; Hooper *v.* Moore, 50 N. C. 130.

In the case of Pratt *v.* Roman Catholic Orphan Asylum, 20 App. Div. 352, 46 N. Y. Supp. 1035, the proof was offered on a point of the foreign law, consisting of a letter, and also a declaration made under the laws of Great Britain and Ireland. The court held that such proof, to show the law of a foreign country, is inadmissible.

The question of what the law of another state is as to the matter in issue between the parties of the case, is to be left to the jury to decide, as a fact, with such instructions on the part of the court to assist the jury in ascertaining and applying the law as are deemed proper. Holman *v.* King, 7 Metc. (Mass.) 384.

If what the law is be a matter of doubt, the court may decline to decide it, and may inform the jury that if they believe the foreign law attempted to be proved exists as alleged, then they ought to receive the instrument in evidence; on the contrary, if they should believe that such is not the foreign law, they should reject it. Trasher *v.* Everhart, 3 Gill & J. (Md.) 145.

In the case of State of Oregon *v.* Looke, 7 Or. 55, the court held that historical works could not be offered as evidence on the subject of marriage according to the law of a foreign country.

73. Inge *v.* Murphy, 10 Ala. 885; State *v.* Jackson, 13 N. C. 563.

74. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538.

In the case of State *v.* Looke, 7 Or. 55, the court follows Story's opinion as to what is a question for court or jury, and quotes from Story's Conflict of Laws, § 638, as follows: "All matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what in point of law is the result of the foreign law to be applied to the matters in controversy before them. The court are there-

statute of another state,[75] or when the evidence consists entirely of a written document or statute, or judicial opinion,[76] the question of its construction is for the court; so are also questions of competency of evidence, as the qualifications of experts, for example, or the admissibility of written documents.[77] Furthermore, where, by the statutory provisions, courts are bound to take judicial notice of the statutes and reports of decisions of other countries or states, the question what the foreign law is will be for the court and not for the jury.[78]

fore to decide what is the proper evidence of the laws of a foreign country, and when the evidence is given of those laws, the courts are to judge of their applicability, when proved, to the case in hand. But when the evidence consists of parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. But when the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone."

75. Moore *v.* Gwynn, 27 N. C. 187.

76. Ufford *v.* Spaulding, 156 Mass. 65, 30 N. E. 360; Kline *v.* Baker, 99 Mass. 253; Molson's Bank *v.* Boardman, 47 Hun (N. Y.) 135; Union Cent. Life Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

77. Kline *v.* Baker, 99 Mass. 253; Trasher *v.* Everhart, 3 Gill & J. (Md.) 145; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538.

78. Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Lockwood *v.* Crawford, 18 Conn. 361.

FORFEITURES.

By George P. Cook.

CROSS-REFERENCES:

Corporations;
Landlord and Tenant;
Dower;
Insurance.

Scope Note. — Includes: (1.) Forfeiture of property under the U. S. revenue laws. (2.) Forfeiture of property under the state liquor laws. (3.) Forfeiture of corporate stock.

Excludes: Forfeiture of lands for non-payment of taxes (see "TAXATION"); forfeiture of bail; forfeiture of bonds and undertakings; forfeiture of membership in beneficiary societies; forfeiture of rights under insurance policies (see "INSURANCE"); forfeiture of rights between landlord and tenant for breach of conditions and covenants (see "LANDLORD AND TENANT"); forfeiture of public offices; forfeiture of vessels for violation of neutrality laws (see "ADMIRALTY").

I. FORFEITURE OF PROPERTY UNDER THE REVENUE LAWS.

1. Nature of Proceeding as Affecting Rules of Evidence. — The rules of evidence in proceedings for forfeiture under the United States revenue laws are somewhat affected by the nature of the proceeding, as regarded by the courts, whether civil or criminal.

A. SELF-INCRIMINATING TESTIMONY. — Thus, it is a general rule of evidence that no person can be compelled to give testimony which will subject him to a penalty or forfeiture,[1] and this rule has been held to apply in proceedings for forfeiture under the revenue laws.[2]

1. Self-incriminating Testimony. General Rule. — Northrup *v.* Hatch, 6 Conn. 361; Higdon *v.* Heard, 14 Ga. 255; Matter of Proceedings against Dickinson, 58 How. Pr. (N. Y.) 260.

But in the case of Wilkins *v.* Malone, 14 Ind. 153, it was held that the article of the state constitution providing that no person in any criminal prosecution shall be compelled to testify against himself applied to criminal prosecutions only, and not to mere penalties and forfeitures.

2. Johnson *v.* Donaldson, 18 Blatchf. (U. S.) 287.

In Boyd *v.* United States, 116 U. S. 616, it was held that suits for penalties and forfeitures incurred by the commission of offenses against the law are of a quasi-criminal nature and are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and that a compulsory production of the private books and papers of the owner of the goods sought to be forfeited in such a suit is compelling him to be a witness against himself. Consequently the inspection of such papers by the district-attorney, when produced in

B. Degree of Proof Required. — But a proceeding for forfeiture under the revenue laws is not such a criminal proceeding that the issues are required to be proved beyond a reasonable doubt.[3]

C. Right to Be Confronted by Prosecuting Witnesses. And it is not criminal to the extent that the claimant can demand, as of right, that he be confronted by the witnesses for the prosecution.[4]

2. Rule as to Probable Cause. — It is a general rule in all proceedings for forfeiture under the revenue laws, that where the government has shown probable cause for the seizure, the burden of proof is cast upon the claimant to show that the law has been complied with.[5]

A. Application of the Rule. — a. *Goods Found Under Suspicious Circumstances.* — In applying the foregoing rule as to probable cause, there are many cases in which the circumstances surrounding the goods have been held sufficient in themselves to make out a *prima facie* case for the government.[6] And in such case, the fact that the goods bear all

obedience to a notice from the court, and their admission in evidence were erroneous and unconstitutional proceedings.

3. Degree of Proof Required. Lilienthal's Tobacco *v.* United States, 97 U. S. 237; United States *v.* Seventy-eight Cases of Books, 2 Bond 281, 27 Fed. Cas. 16,258*a*. See also Three Thousand Eight Hundred and Eighty Boxes of Opium *v.* United States, 23 Fed. 367, for a full discussion of this doctrine.

4. Right to Be Confronted by Prosecuting Witnesses — In United States *v.* Zucker, 161 U. S. 475, it was held that in an action under the Customs Administrative Act of June 10, 1890, c. 407, § 9, for goods alleged to have been forfeited to the United States under the provisions of the said act, the evidence for the government could be brought before the jury in the form of a deposition as in other civil proceedings.

5. The John Griffin, 15 Wall. (U. S.) 29; Cliquot's Champagne, 3 Wall. (U. S.) 114; The Croquitlam, 57 Fed. 706; Taylor *v.* United States, 3 How. (U. S.) 197; Wood *v.* U. S., 16 Pet. (U. S.) 342; United States *v.* Lot of Jewelry, 59 Fed. 684. See U. S. Comp. Stat. (1901), § 3087; also § 909 Rev. Stat. U. S.

In the case of Cliquot's Champagne, 3 Wall. (U. S.) 114, it was held that the rule relating to the probable cause and the *onus probandi* prescribed in the 71st section of the act of 1799, was not confined to prosecutions under that act, but applied with equal force to proceedings under subsequent acts which were silent upon the subject of the burden of proof. It was held that the rule laid down in that act as to the *onus probandi* has always been regarded as a permanent feature of the revenue system of the country. See also United States *v.* Sixteen Cases of Silk Ribbons, 12 Int. Rev. Rec. 175, 27 Fed. Cas. No. 16,301.

On the other hand, in order to justify the seizure, it is necessary for the government to show probable cause. United States *v.* Cook, 1 Spr. 213, 25 Fed. Cas. No. 14,852.

And where the property is claimed by *bona fide* purchasers without notice, the court will require somewhat stronger evidence to make out a case of forfeiture than where the claimants are the original owners. The Ruby, 5 Mason 534, 20 Fed. Cas. No. 12,104.

And the rule as to probable cause does not apply to actions *in personam* brought by the United States to recover the value of property alleged to be forfeited. United States *v.* Baker, 5 Ben. 251, 24 Fed. Cas. No. 14,500.

6. The Luminary, 8 Wheat. (U. S.) 407; Quantity of Distilled Spirits, 3 Ben. 70, 20 Fed. Cas. No. 11,494.

the marks and brands required by statute is not usually sufficient

False Invoice. — So held where the valuation of the goods as indicated in the invoice has been materially raised by the government appraisers. United States *v.* Two Hundred Quarter Boxes of Cigars, 28 Fed. Cas. No. 16,587; One Hundred and Twenty-three Packages of Glass, 5 Hunt. Mer. Mag. 450, 18 Fed. Cas. No. 10,525; United States *v.* Fourteen Packages of Pins, 1 Gilp. 235, 25 Fed. Cas. No. 15,151.

But where goods are seized for forfeiture for being imported under a false invoice, the value set upon the goods by the appraisers in the first instance, although *prima facie* evidence, is not invariably evidence of the highest character, as it is not to be supposed that the appraisers are acquainted with the value of all articles which come into port; and where it appears that the appraisers have no practical knowledge of the value of the goods, except that acquired from general inquiries, the fact that their valuation differs from that as shown in the invoice will not be sufficient to prove the fraud. And if the market or adjudged value is not much greater than that in the invoice, the jury have the right to consider whether the deviations are greater than the ordinary fluctuations of the market; and if the testimony shows that the invoice was as nearly right as wrong, then it is the duty of the jury to consider that the importer intended to act rightly towards the government, and they should not impute the fraud to him which the testimony has not clearly established. United States *v.* Eight Cases of Lamps, 1 Hunt. Mer. Mag. 252, 25 Fed. Cas. No. 15,029.

And the acts of the appraisers in assenting to the valuations as stated in the invoice are not conclusive upon the government. United States *v.* Twenty-five Cases of Cloths, Crabbe 356, 28 Fed. Cas. No. 16,563; United States *v.* Baker, 5 Ben. 251, 24 Fed. Cas. No. 14,500.

Where distilled spirits are found upon the premises of a rectifier, and no proof is given by the claimants that the taxes on them have been paid, the jury have the right to infer that the tax has not been paid. Quantity of Distilled Spirits, 3 Ben. 70, 20 Fed. Cas. No. 11,494.

Liquors Fraudulently Imported. Where certain liquors were seized for being fraudulently imported, the evidence showed that a considerable quantity of foreign distilled spirits and wines was found in an upper room of a private house, stored for safe keeping as alleged by the proprietor, and not his property. *Held,* that this was sufficient to make out a *prima facie* case for the government and cast the burden of proof upon the claimant to show that the goods were legally imported, and that the original packages had been inspected, marked and branded as required by law. United States *v.* Five Jugs of Brandy, 25 Fed. Cas. No. 15,118.

Removing Cigars From Factory. In a proceeding for the forfeiture of certain cigars for being removed from the factory in which they were made, without being properly stamped as required by § 16 of the act of March 1, 1879, the evidence showed that the boxes were stamped with the words "Factory No. 120. Dist. Florida," but that, although there was such a factory, the cigars in suit were never manufactured in that factory. *Held,* that this was sufficient to make out a *prima facie* case for the government without proving affirmatively that when the cigars were removed from the factory in which they were made they were not in boxes properly stamped. Jackson *v.* United States, 21 Fed. 35.

Freight Not on Manifest. — In a proceeding against a vessel for violation of §§ 2806, 2807, 2809 and 3126, Rev. Stat. U. S., regulating the entry of freight in a ship's manifest, it was held that the failure to enter such freight in the ship's manifest, as required by law, was a circumstance to justify suspicion of the complicity on the part of the master in the unlawful importation, and was sufficient to show the probable cause for the seizure of the ship so as to throw the burden of proof upon the claimant. United States *v.* The Walla Walla, 44 Fed. 796. *Held,* also, in a

to rebut the other suspicious circumstances.[7] But in order for the government to make out a complete case by proving suspicious circumstances, the circumstances must be such as to negative all presumptions of legality.[8] Where, however, the claimant fails to clear up the suspicious circumstances surrounding the goods by the production of evidence which is properly within his power to produce, and is not within the power of the government, condemnation will often follow from the defects in claimant's own testimony.[9]

similar case, that the fact "that the seized goods were not placed by the master on his sworn manifest, and were concealed on the ship, and the master offered money to the seizing officers, not only justifies the seizure, but makes a strong *prima facie* case for the government in demanding the penalty against the ship, and the condemnation of the goods." The Purissima Concepcion, 24 Fed. 358.

Smuggling Goods. — Where certain property was seized as being forfeited under the 50th section of the act of March 2, 1799, for being landed without a permit, the evidence showed that the property, consisting of three ordinary goods cases, filled with new and dutiable goods only, was included by the claimant among his personal baggage and was landed on the wharf with the personal baggage of the passengers; that it was not named in the manifest of the vessel, and no entry was made of the goods, nor had any duties on them been paid or secured to be paid, and no permit had been granted to land them except a general baggage permit issued for the vessel. *Held*, that on the above facts the jury must find a verdict in favor of the government. United States *v.* Three Cases, 6 Ben. 558, 28 Fed. Cas. No. 16,498.

7. United States *v.* Six Barrels of Distilled Spirits, 5 Blatchf. 542, 27 Fed. Cas. No. 16,294. See also United States *v.* Eight Casks of Whiskey, 7 Int. Rev. Rec. 4, 25 Fed. Cas. No. 15,030. It has been held that the existence of marks and certificates on imported goods is no evidence of the payment of duties, and the want of any such marks and certificates affords no presumption that the duties have not been paid. Six Hundred and Fifty-one Chests of Tea *v.* United States, 1 Paine 499, 22 Fed. Cas. No. 12,916.

8. Thus in a proceeding to forfeit a package of distilled spirits as not "having thereon each mark and stamp required therefor by law," it was held that the law did not require any additional marks or stamps when the proof or volume of an original package of distilled spirits is changed either from natural causes or the addition of water, and that in such case mere evidence that the contents as to volume or proof does not conform to the volume or proof as marked on the package, without more, fails to make out a *prima facie* case for seizure or forfeiture. In this case the court used the following language with reference to the government making out a case of forfeiture by circumstantial evidence: "In seeking a forfeiture, therefore, not upon direct evidence of an alleged act, but upon proof of a condition, a condition must be shown which could not have occurred by natural causes or by legal means; in other words, the government should negative every presumption of legality. The rules of evidence apply as well to the government as to the other plaintiffs, with the exception that under certain conditions the burden is upon the claimant to prove that the tax has been paid on distilled spirits." United States *v.* One Package of Distilled Spirits, 88 Fed. 856.

9. **Evidence in Possession of Claimant.** — United States *v.* Three Thousand Eight Hundred and Eighty Boxes, etc., 12 Fed. 402; The Busy, 2 Curt. 586, 4 Fed. Cas. No. 2232; United States *v.* Seven Hundred and Forty Tins of Opium, 44 Fed. 798; United States *v.* Eighteen Barrels of High Wines, 8 Blatchf. 475, 25 Fed. Cas. No. 15,033; United States *v.* Five Hundred and Eight Barrels of Distilled Spirits, 5 Blatchf. 407,

3. The Intent of the Claimant. — A. General Rule. — In all proceedings for forfeiture under the revenue laws, a distinction is to be taken between acts which are made *per se* an offense, and those where the intent constitutes an essential part of the offense; in the former it is not necessary for the government to prove a fraudulent intent; in the latter it is.[10]

B. When Necessary to Prove Fraud. — As a result of the foregoing distinction, there are many cases where it is not sufficient for the government to show that the revenue laws have been violated, without proving further that it was done with a fraudulent intent,[11] and in such cases it is usually a good defense that

25 Fed. Cas. No. 15,113; United States *v.* Hayward, 2 Gall. 485, 26 Fed. Cas. No. 15,336.

But this rule does not apply where goods are seized for being invoiced below the market value, and it becomes necessary to determine the true market value of the goods, since such a question depends upon matters of public information equally open to the government as well as to the claimants. One Hundred and Twenty-three Packages of Glass, 5 Hunt. Mer. Mag. 450, 18 Fed. Cas. No. 10,525.

10. United States *v.* The Margaret Yates, 22 Vt. 663.

See also United States *v.* One Still, 5 Blatchf. 403, 27 Fed. Cas. No. 15,954; United States *v.* Quantity of Tobacco, 5 Ben. 112, 27 Fed. Cas. No. 16,105.

Statute of 1874. — The sixteenth section of the act of June 22nd, 1874, made it necessary to prove an intent to defraud in all cases of forfeiture for the violation of the customs revenue laws. United States *v.* Ninety Demijohns of Rum, 8 Fed. 485; United States *v.* Three Trunks, 8 Fed. 583; and under this statute the jury must find as a distinct and separate fact that there was a fraudulent intent on the part of the claimant. Lewey *v.* United States, 15 Blatchf. 1, 15 Fed. Cas. No. 8309; and where it appears that the property has become liable to forfeiture through the fraudulent acts of parties who were not the true owners, and that the owner was innocent of any complicity in the fraud, the property must be released. United States *v.* One Hundred and Eight Bags of Kainit, 37 Fed. 326; and in a proceeding against a vessel, while this statute was in force, for importing goods which were not included in, or did not appear on, her manifest, it was necessary to show that the goods were omitted from the manifest with an actual intention to defraud the United States. The Purissima Concepcion, 24 Fed. 358. See U. S. Stat. at L., Vol. XVIII, p. 189.

But this statute was expressly repealed by the act of June 10, 1890 (26 Stat. 141). See United States *v.* Ortega, 66 Fed. 713; United States *v.* One Sorrel Stallion and One Roan Horse, 51 Fed. 877.

11. Goods Imported Under False Invoices. — United States *v.* One Hundred and Twenty-nine Bales of Merchandise, 46 Fed. 468; United States *v.* Bishop, 125 Fed. 181; United States *v.* Lot of Jewelry, 13 Blatchf. 60, 26 Fed. Cas. No. 15,626. (*Criticised* in United States *v.* A Lot of Jewelry, etc., 59 Fed. 684.) United States *v.* Fifty-three Bags of Havana Sugar, 2 Bond 346, 25 Fed. Cas. No. 15,098; United States *v.* Four Cases of Cutlery, 1 Hunt. Mer. Mag. 166, 25 Fed. Cas. No. 15,144; Three Thousand One Hundred and Nine Cases of Champagne, 1 Ben. 241, 23 Fed. Cas. No. 14,012; United States *v.* One Hundred and Fifty Bales of Unwashed Wool, 27 Fed. Cas. No. 15,932*b*.

And where the invoice required by the statute is one representing the true market value of the goods at the time of purchase, in the principal markets of the country from which they are exported, it is incumbent on the government not only to show that it was made up with a fraudulent intent, but that the market with reference to which it was made was one of the principal markets of the

the alleged acts of forfeiture occurred through mistake or accident.[12] And the want of complicity or guilty knowledge on the part of a master of a vessel is generally a good defense in a proceeding to forfeit the vessel.[13] But it is no defense that the claim-

country from which the goods were exported. United States *v.* One Case of Cashmere Shawls, 5 N. Y. Leg. Obs. 247, 27 Fed. Cas. No. 15,923.

Distilled Spirits Sold and Removed Without Payment of Taxes. Quantity of Distilled Spirits, 3 Ben. 70, 20 Fed. Cas. No. 11,494; United States *v.* One Rectifying Establishment, 11 Int. Rev. Rec. 45, 27 Fed. Cas. No. 15,952; United States *v.* Two Hundred and Fifty-six Barrels of Beer, 2 Bond 395, 28 Fed. Cas. No. 16,579.

Distillery Seized for Failure to Keep Books. — United States *v.* Thirty-five Barrels of High Wines, 2 Biss. 88, 28 Fed. Cas. No. 16,460; Quantity of Distilled Spirits, 3 Ben. 70, 20 Fed. Cas. No. 11,494.

Land Used for Access to Distillery. Gregory *v.* United States, 17 Blatchf. 325, 10 Fed. Cas. No. 5803.

Goods Concealed on Board Ship. United States *v.* Twenty-six Diamond Rings, 1 Spr. 294, 28 Fed. Cas. No. 16,572.

Vessel Seized for Violation of Any of the Provisions of Title 34 of the Revised Statutes. — The Saratoga, 15 Fed. 382, *affirming* 9 Fed. 322. See also United States *v.* Walla Walla, 44 Fed. 796.

Where a distillery has been seized for forfeiture in the hands of a lessee, it has been held unnecessary to prove a complicity in the fraudulent acts on the part of the lessor. Dobbins Distillery *v.* United States, 96 U. S. 395.

Where the claimants to goods are partners, it is unnecessary to prove a fraudulent intent in both of them. United States *v.* Six Hundred and Sixty-one Bales of Tobacco, 24 Int. Rev. Rec. 77, 27 Fed. Cas. No. 16,297.

12. United States *v.* The Margaret Yates, 22 Vt. 663.

Goods Undervalued. — "In all the cases that have come before the courts of the United States on this subject, a distinction is drawn between an undervaluation that takes place by mistake or accident and one that does not take place by mistake or accident. Where the undervaluation is shown to have occurred by mistake or accident of course it is excused; but where it is not shown to have occurred by mistake or accident it necessarily follows that it must have been made, in the sense of the statute, knowingly, or with an intent to defraud the revenue." United States *v.* Sixteen Cases of Silk Ribbons, 12 Int. Rev. Rec. 175, 27 Fed. Cas. No. 16,301.

And where goods are seized for forfeiture for being imported under a false invoice, and the claimant sets up mistake or accident as defense, the fact that the government has made out probable cause does not impose upon the claimant the necessity of making out an unusually clear case of mistake; he is required to produce only ordinary proof. The Governor Cushman, 1 Abb. 14, 1 Biss. (U. S.) 490, 10 Fed. Cas. No. 5646; United States *v.* Nine Packages of Linen, 1 Paine 129, 27 Fed. Cas. No. 15,884. Although statutes have been passed providing that the question of accident or mistake could not be inquired into at the trial, but was to be referred exclusively to the secretary of the treasury. See act of April 20, 1818 (3 Stat. 433), act of May 28, 1830 (4 Stat. 409). *Compare* U. S. Comp. Stat. (1901), § 5292, and see United States *v.* One Case of Hair Pencils, 1 Paine 400, 27 Fed. Cas. No. 15,924; United States *v.* Package of Wool, Gilp. 349, 27 Fed. Cas. No. 15,986.

13. Want of Knowledge. — United States *v.* Walla Walla, 44 Fed. 796.

But such a defense must be proved affirmatively since the master is presumed to have knowledge that the goods were on board until the contrary is shown. United States *v.* The Missouri, 9 Blatchf. 433, 26 Fed. Cas. No. 15,785.

ants were not guilty of any fraudulent intent, but were laboring under a mistake of law.[14]

C. When Unnecessary. — On the other hand, where the acts themselves are *per se* an offense, the absence of a fraudulent intent on the part of the claimant is no defense.[15] And in many cases it is held sufficient for the government to show a guilty knowledge on the part of the claimant, without showing a premeditated scheme of fraud.[16]

D. Mode of Proving Fraud. — a. *Prima Facie Case.* — In many cases the circumstances under which the goods are found will raise a presumption of fraud sufficient to cast the burden of proof on the claimant.[17]

b. *Evidence Admissible to Prove Fraud* — (1.) **Prior Acts of Fraud.** — In order to prove a fraudulent intent on the part of the claimant, evidence is admissible of previous acts of fraud

14. United States *v.* Five Casks of Files, 3 Hunt. Mer. Mag. 439, 25 Fed. Cas. No. 15,112.

15. Baggage Omitted From Statement. — United States *v.* One Pearl Necklace, 111 Fed. 164, 56 L. R. A. 130.

Conveyance Used to Haul Spirits. United States *v.* Two Horses, 9 Ben. 529, 28 Fed. Cas. No. 16,578.

Forfeiture for Non-delivery of Manifest. — United States *v.* One Sorrel Stallion and One Roan Horse, 51 Fed. 877.

Goods Not Described in Invoice. United States *v.* Package of Lace, Gilp. 338, 27 Fed. Cas. No. 15,985.

Trans-shipping Without Permit. The Ploughboy, 6 Brown Adm. 48, 19 Fed. Cas. No. 11,229.

16. Cotzhausen *v.* Nazro, 107 U. S. 215; United States *v.* Two Thousand One Hundred and Seventeen Bushels of Malt, 8 Fed. 224.

But as bearing upon the question of proving fraudulent intent, it has been held that there is no practical difference between the meaning of the two phrases "guilty knowledge" and "fraudulent intent." One Thousand Two Hundred and Nine Quarter Casks of Wine, 2 Ben. 249, 24 Fed. Cas. No. 14,279.

17. Goods Invoiced at a Great Undervaluation. — United States *v.* Three Hundred and Thirty-seven Cases of Wine, 1 Woods 47, 28 Fed. Cas. No. 16,506; United States *v.* Sixty-five Packages of Glass, 27 Fed. Cas. No. 16,305*a*; United States *v.* Two Hundred Quarter Boxes of Cigars, 28 Fed. Cas. No. 16,587; United States *v.* Seventy-eight Cases of Books, 2 Bond. 281, 27 Fed. Cas. No. 16,258*a*.

But a false and fraudulent invoice which is not required by statute, and is of no avail at the custom house, is not sufficient to make out such a *prima facie* case. United States *v.* One Case of Cashmere Shawls, 5 N. Y. Leg. Obs. 247, 27 Fed. Cas. No. 15,923.

And where goods are seized for forfeiture for being imported under a false invoice, the fact that the consignee in entering the goods added two cents to the invoice value, not because he thought the invoice was not high enough, but to avoid having the goods subjected to penal duties or charges of forfeiture by the government appraisers, will not prejudice the question whether the shipper of the goods, in stating the value, as he did in the invoice, stated it correctly. United States *v.* Three Hundred Bales of Wool, 2 Int. Rev. Rec. 139, 28 Fed. Cas. No. 16,508.

Goods Unaccompanied by Proper Marks and Entries. — United States *v.* Brewery Utensils, 13 Int. Rev. Rec. 95, 24 Fed. Cas. No. 14,641; Locke *v.* United S ates, 7 Cranch (U. S.) 338; Lilienthal's Tobacco *v.* United States, 97 U. S. 237.

And where the entry of a cargo, which is produced by the claimant, covers only a part of the cargo, as consigned in the invoice, it is *prima facie* evidence that the duties on the

on his part in respect to the conduct of his business with reference to the revenue laws.[18]

remainder of the cargo have not been paid. United States *v.* Certain Hogsheads of Molasses, 1 Curt. 276, 25 Fed. Cas. No. 14,766.

Goods Concealed on Board Ship. So it has been held that the fact that the person in possession of spirits bought them for less than the amount of the tax is sufficient in the absence of any explanatory circumstances to show that he could not have believed that the tax was paid. Quantity of Distilled Spirits, 3 Ben. 70, 20 Fed. Cas. No. 11,494.

But where a conveyance had been seized for forfeiture, it was held that the fact that a decree of condemnation had been entered by default against the goods that were being conveyed was not conclusive evidence of a fraudulent intent on the part of the owner of the conveyance. United States *v.* Two Horses, 9 Ben. 259, 28 Fed. Cas. No. 16,578.

In those cases which draw a distinction between guilty knowledge and fraudulent intent, it has been held that the presence of the guilty knowledge will raise a presumption of the fraudulent intent. United States *v.* Nine Trunks, 24 Int. Rev. Rec. 327, 27 Fed. Cas. No. 15,886; United States *v.* Baker, 5 Ben. 251, 24 Fed. Cas. No. 14,500. Thus where the evidence is such as to satisfy the jury that the affidavit under which goods are imported is false and not made in good faith, they have a right to presume that it was made with an intent to defraud the revenue. United States *v.* Six Hundred and Sixty-one Bales of Tobacco, 24 Int. Rev. Rec. 77, 27 Fed. Cas. No. 16,297.

18. United States *v.* One Hundred Forty-six Thousand Six Hundred and Fifty Clapboards, 4 Cliff. 301, 27 Fed. Cas. No. 15,935; United States *v.* Quantity of Tobacco, 6 Ben. 68, 27 Fed. Cas. No. 16,106.

Fraudulent Acts Seven Months Before Seizure. — In a proceeding to condemn certain property as liable to forfeiture for being in possession of the claimants in violation of § 48 of the act of June 30, 1864 (13 Stat. 240), as amended by § 9 of the act of July 13, 1866 (14 Stat. 111), it was held that in order to show a fraudulent intent on the part of the claimants, evidence was admissible showing illegal acts of the claimants covering a period of seven months preceding the seizure in the present case. United States *v.* Thirty-six Barrels of High Wine, 7 Blatchf. 469, 28 Fed. Cas. No. 16,469.

Acts One Month Before Seizure. In a proceeding for the forfeiture of certain goods alleged to be imported in violation of the customs and duty laws, it was held that a bill of lading, entry, and owner's oath, taken in the month preceding the seizure of the goods in question, of certain goods which were not part of the goods seized, but were marked with the same mark, were admissible, not as independent evidence, but in connection with other documents and evidence to establish a privity, between the claimants in this case, in other importations of a kindred character, to show the scheme of meditated fraud upon the revenue of the United States. Taylor *v.* United States, 3 How. (U. S.) 197.

Where certain wine was seized for being imported under a false invoice, *held*, that evidence showing the value of wines previously sent to this country by the same manufacturers, and not under seizure in this case, was to be considered only in determining the question of fraudulent intent. One Thousand Two Hundred and Nine Quarter Casks of Wine, 2 Ben. 249, 24 Fed. Cas. No. 14,279.

And it has been held no objection to the admission of such evidence that a suit is pending to enforce a forfeiture for a previous seizure of the same property. United States *v.* Thirty-six Barrels of High Wines, 7 Blatchf. 469, 28 Fed. Cas. No. 16,469.

But to entitle prior acts of fraud to be admitted in evidence, they must be accompanied or supported by evidence of a fraudulent intent or fraudulent acts at a period nearly coincident with the seizure in the present case. United States *v.* Quantity of Tobacco, 5 Ben. 112, 27 Fed. Cas. No. 16,105.

(2.) Contemporaneous and Subsequent Acts. — Other acts of fraud are also admissible in evidence on the question of fraudulent intent, when occurring at about the same time, or even subsequent to the act in question.[19]

(3.) Other Evidence Bearing Upon Fraudulent Intent. — (A.) PRICES RECEIVED. — Where imported goods are seized for being fraudulently undervalued, evidence is admissible showing how the prices received by the claimant compare with those received by others engaged in the line of trade.[20]

(B.) GOODS REMAINING IN CUSTOM HOUSE. — On the question of fraudulent intent, evidence has been admitted showing that certain other goods, which have been imported and are owned by the same claimant and bear the same marks as the goods seized, are still in the custom house.[21]

(C.) VARIANCE IN ENTRY. — But a slight variance in the entry of goods as to quality, although competent on the question of fraudulent intent, has been held so insufficient in itself that its exclusion was no ground for reversal.[22]

Where goods are seized for forfeiture for being fraudulently imported, evidence is admissible of information communicated to the revenue officers of a previous purpose to make the illegal importation and of the manner of committing it. This evidence may be regarded as so connected with the act itself as to constitute a part of the *res gestae*. United States *v.* Nine Trunks, 24 Int. Rev. Rec. 327, 27 Fed. Cas. No. 15,886.

19. United States *v.* One Hundred and Forty-six Thousand Six Hundred and Fifty Clapboards, 4 Cliff. 301, 27 Fed. Cas. No. 15,935; United States *v.* Eighteen Barrels of High Wines, 8 Blatchf. 475, 25 Fed. Cas. No. 15,033; United States *v.* Baker, 5 Ben. 251, 24 Fed. Cas. No. 14,500.

Rule Stated. — Where the question in the case is whether certain goods have been fraudulently invoiced at an undervaluation, other invoices are generally admissible in evidence of goods consigned to the same claimant to show the fraudulent intention of the claimant in those importations, as well as the one in the present case. Wood *v.* United States, 16 Pet. (U. S.) 342. In this case the court stated the reason for this rule as follows: "The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.

20. Buckley *v.* United States, 4 How. (U. S.) 251.

21. Goods Remaining in Custom House. — This evidence was held admissible as part of the *res gestae*, the court using the following language in explanation: "If the other parts of the evidence were favorable to the innocence of the claimants in their various importations, then no conclusion against them could fairly be drawn from this fact. But if, on the other hand, strong circumstance of suspicion or fraud attached to other importations, then the circumstance, so contrary to the usual course of mercantile transactions in cases of perishable articles, or articles liable to depreciation or decay, of their remaining long in the custom house might fairly be deemed to inflame those suspicions, especially if, in the interval, the government was on the alert to detect supposed frauds in other importations." Taylor *v.* United States, 3 How. (U. S.) 197.

22. Variance in Entry. — Thus in a proceeding for the forfeiture of

(D.) Worthlessness of Sureties. — The fact that the sureties on the bond of a person operating a business which is regulated by the internal revenue laws were totally worthless, and that the principal knew this fact, has been held material evidence on the question of fraudulent intent.[23]

(E.) Omitting to Furnish Plans of Distillery. — The fact that the owner of a distillery has omitted to furnish the assessor with an accurate plan or description of his works, although not sufficient in itself to incur a forfeiture, may be admitted to corroborate other evidence of a fraudulent intent.[24]

(F.) Affidavit Attached to Invoice. — The affidavit of the claimant, attached to an entry or invoice, is a declaration which may be used against him.[25]

c. *Question for the Jury.* — In all such cases the question as to whether or not the fraudulent intent exists is usually one of fact for the jury.[26]

4. Admissibility of Evidence in General. — A. Declarations in General. — In proceedings for forfeiture the declarations of the parties concerned are usually admissible on the general principles of evidence.[27]

certain goods for being imported under a false invoice, it appeared that the entry of the goods was of "worsted shawls," while the evidence showed that they were part cotton. *Held,* that this evidence was competent on the question of fraudulent intent, but so insufficient in itself that its exclusion was not ground for reversal. United States *v.* Ten Cases of Shawls, 2 Paine 162, 28 Fed. Cas. No. 16,448.

23. United States *v.* Three Hundred and Eight Caddies of Tobacco, 10 Int. Rev. Rec. 126, 28 Fed. Cas. No. 16,501.

24. United States *v.* Forty-eight Hundred Gallons of Spirits, 4 Ben. 471, 25 Fed. Cas. No. 15,153.

25. United States *v.* Sixty-five Packages of Glass, 27 Fed. Cas. No. 16,305*a*.

26. Question for the Jury. United States *v.* Fourteen Packages of Pins, 1 Gilp. 235, 25 Fed. Cas. No. 15,151; United States *v.* Sixteen Cases of Silk Ribbons, 12 Int. Rev. Rec. 175, 27 Fed. Cas. No. 16,301; United States *v.* Six Cases of Silk Ribbons, 3 Ben. 536, 22 Fed. Cas. No. 12,914.

27. In a proceeding for the forfeiture of a vessel for violating the coasting laws, it was held that the declarations of the owners of the vessel, so far as they constitute a part of the *res gestae,* at the time of the asserted offense, were evidence against all subsequent holders. But declarations made after the *res gestae* and constituting in no just sense a part thereof, or which contain a mere historical narrative or admission of pre-existing facts, although made by them while they were yet owners of the vessel, were not evidence against *bona fide* purchasers. The Ruby, 5 Mason 534, 20 Fed. Cas. No. 12,104.

In a proceeding *in rem* for the recovery of certain diamonds alleged to have been forfeited to the United States, it was held that the declarations of one S., not the claimant, in whose custody the goods had been placed for the purpose of sale, made to the custom-house officer while he was making an official investigation as to whether the goods should be seized for forfeiture, were part of the *res gestae* and admissible in evidence against the real claimant. Friedenstein *v.* United States, 125 U. S. 224.

Declarations in Course of Trade. Where certain goods were seized for forfeiture for being imported into the United States under false in-

B. Declarations Not in Presence of Claimant. — In regard to the admission of declarations in evidence, one peculiarity of proceedings *in rem* for forfeiture is that the goods themselves are regarded as the defendant, and therefore it is no objection to the admissibility of declarations that they were not made in the presence of the claimant.[28]

C. Original Entries of Officers. — The original entries of the revenue officers as to the finding and seizure of the goods are admissible either as official documents or as contemporaneous memoranda made by them in the discharge of their official duty.[29]

D. Invoices of Other Dealers. — And the invoices of other dealers have been held admissible to rebut a statement by the claim-

voices, *held* that representations made by the agent of the foreign importer to the purchaser in the United States, through a series of importations and dealings with the said purchaser, to the effect that certain invoices exhibited to the purchaser by the agent were true invoices sent him by his principal, are admissible against the principal for the purpose of showing the falsity of the invoices under which the goods were imported. United States *v.* Three Cases, 28 Fed. Cas. No. 16,497.

In a proceeding for the forfeiture of a certain distillery it was held that certain private books, letters and memoranda, found in an open box in a room occupied by the lessee and operator of the distillery as a private office, were admissible in evidence since it appeared that they were books, letters and papers of the person in whose office they were found and that they related in part to the business of the distillery. In the same case it was held that the declarations of the lessee, who was an occupant of the distillery, made subsequent to his arrest, but while the lease under which he was occupying the premises was still in force, were admissible in evidence against the owner of the property. Dobbin's Distillery *v.* United States, 96 U. S. 395.

Declarations of Agent After Agency Ceases. — The declarations of the agent of the claimant, made to the purser of the ship after he had parted with possession of the goods and had delivered them to the purser to be transported to the claimant, are not admissible against the claimant, when it appears from the facts of the case that at the time of the delivery of the goods to the purser the agency had practically ceased. United States *v.* Lot of Jewelry, 13 Blatchf. 60, 26 Fed. Cas. No. 15,626.

In a proceeding *in rem* to condemn certain opium alleged to be forfeited for violation of the United States custom laws, a letter written from a third party to parties in China and apparently referring to the transaction involved in the case, to which was appended a note by the claimant written on the same sheet of paper, was held admissible in evidence as a statement made in the presence of the claimant and acquiesced in by him, it appearing that the letter had been left unsealed apparently for the examination of the claimant and to give him an opportunity of adding any remarks he thought proper. This letter was put into an open envelope and placed in the hands of a Chinaman to be by him read, sealed up, and forwarded to China. *Held,* that a letter from the Chinaman to another Chinaman in China enclosed in the same envelope was also admissible in evidence, although the claimant testified that he did not know of its contents or that it was to be sent, and there was no direct evidence to the contrary. Three Thousand Eight Hundred and Eighty Boxes of Opium *v.* United States, 23 Fed. 367.

28. United States *v.* Nine Trunks, 24 Int. Rev. Rec. 327, 27 Fed. Cas. No. 15,886.

29. United States *v.* The Missouri, 9 Blatchf. 433, 26 Fed. Cas. No. 15,785.

ant to the effect that a custom prevailed allowing certain discounts.[30]

E. SHIP'S MANIFEST. — Where goods are seized which do not appear upon a ship's manifest, the manifest of the cargo itself which is filed in the custom house is competent evidence.[31]

F. MARKET VALUE. — Where goods are seized for being invoiced at less than the market value, evidence is always admissible to show what the market value was at the time and place of exportation.[32]

II. FORFEITURE UNDER THE LIQUOR LAWS.

1. Nature of Proceeding as Affecting Rules of Evidence. A. SELF-INCRIMINATING TESTIMONY. — The defendant cannot be compelled to testify against himself in a proceeding for the forfeiture of a liquor license.[33]

B. DEGREE OF PROOF REQUIRED. — According to the weight of authority, the state's case must be proved beyond a reasonable doubt.[34]

2. Evidence Necessary for Prima Facie Case. — A. THE GUILTY INTENT. — In proceedings for forfeiture under the liquor laws, it is generally incumbent on the government to prove that the acts alleged to incur a forfeiture were done with a guilty intent.[35]

30. Taylor *v.* United States, 3 How. (U. S.) 197.

31. United States *v.* The Missouri, 9 Blatchf. 433, 26 Fed. Cas. No. 15,785.

32. United States *v.* Two Cases of Woolens, 28 Fed. Cas. No. 16,576. In fact the law conclusively presumes that there is a market value, and no evidence will be received to the contrary. United States *v.* Sixteen Cases of Silk Ribbons, 12 Int. Rev. Rec. 175, 27 Fed. Cas. No. 16,301.

33. *In re* Peck, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888.

34. State *v.* Whalen, 85 Me. 469, 27 Atl. 348; Com. *v.* Intoxicating Liquors, 105 Mass. 595; Com. *v.* Intoxicating Liquors, 115 Mass. 142.

In New Hampshire a different doctrine seems to prevail. State *v.* Barrels of Liquor, 47 N. H. 369; but *compare* State *v.* Spirituous Liquors, 68 N. H. 47, 40 Atl. 398.

35. State *v.* Harris, 36 Iowa 136. Under a statute providing that the board of excise commissioners may revoke a liquor license, "if the licensee shall during the term of his license permit any girl or woman, not a member of his family, to sell or serve upon the licensed premises any strong or spirituous liquors, wines, ale or beer," in order to make out a case of forfeiture it is essential that the sale be proved to have been made with the permission of the licensee, and that the person selling was not a member of his family. If the proof on the part of the state fails in this respect, no forfeiture will be incurred. People *v.* Excise Commissioners, 2 App. Div. 89, 37 N. Y. Supp. 485.

Present Intent. — It has been held also that it must be shown that the unlawful intent existed at the time when the complaint was made. State *v.* Malia (Me.), 5 Atl. 562; but not at the precise moment of the seizure. State *v.* McGowan (Me.), 5 Atl. 561; and the state must prove that the liquors were intended for sale in the city or town in which they were kept or deposited, but not in the very shop or other building in which they were seized. State *v.* Robinson, 33 Me. 564.

Owner's Intent. — It has been held also that the guilty intent must be brought home to the owner or possessor of the property. State *v.* Robinson, 33 Me. 564; (see *contra,* State *v.* Learned, 47 Me. 426); but in proceedings of this nature the action is primarily against the property, and

B. PROCEEDINGS BY DEFAULT. — In all proceedings for forfeiture under the liquor laws, the state must prove the allegations of the complaint, and judgment of forfeiture cannot be rendered upon the mere default of the claimant.[36]

3. Presumptions. — Where the property sought to be condemned is found under suspicious circumstances it will sometimes cast the burden of proof upon the claimant.[37]

4. Evidence Admissible. — A. ORIGINAL PAPERS IN CASE. — In proceedings of this nature, the original complaint and warrant used in the inferior court are usually admissible in evidence on behalf of the state.[38] In proceedings to revoke a license, previous indictments against the same defendant have been admitted in evidence.[39]

B. DECLARATIONS AND CONDUCT. — The declarations of the person in whose possession the property is found are admissible in evidence, and it is no objection to such evidence that the declarant

it is usually unnecessary to determine the ownership, except for the purpose of fixing costs. State *v.* Intoxicating Liquors, 109 Iowa 145, 80 N. W. 230.

36. *In re* Peck, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888.

In a proceeding for the forfeiture of intoxicating liquors, "the statute requires that the government should, as in other criminal cases, prove the allegations in the complaint before a judgment of forfeiture can be rendered. If a claimant appears and through his laches or otherwise is in default at the time of trial, it would justify the magistrate or court in proceeding in his absence, but would not justify rendering judgment of forfeiture without proof of the allegations of the complaint." Com. *v.* Intoxicating Liquors, 113 Mass. 23; Com. *v.* Intoxicating Liquors, 115 Mass. 142.

37. In Iowa, by virtue of a state statute, it is provided that the finding of intoxicating liquors in the possession of one not legally authorized to sell or use the same, except in a private dwelling-house which is not used in connection with a tavern or other place of public resort, shall be presumptive evidence that such liquors are kept for illegal sale, and where the sheriff testifies to finding the liquor under the circumstances described in the statute, it is sufficient to make out a *prima facie* case for the government. State *v.* Intoxicating Liquors, 109 Iowa 145, 80 N. W. 230.

38. State *v.* Bartlett, 47 Me. 396.

But the officer's return, on a search and seizure warrant for intoxicating liquors, though it may be read to the jury as a part of the opening statement of the case, should not be regarded as evidence at all. "The officer's return is a part of the allegations to be proved, but is no part of the proof itself." State *v.* Howley, 65 Me. 100.

39. In a proceeding for the forfeiture and revocation of a liquor license on the ground of selling liquor to minors, it was not error to admit in evidence several other indictments against the same defendant for the same cause, which were then pending in the court for trial, and also the testimony of a minor to the effect that he had purchased liquor from the defendant at a period prior to the time when his license went into effect. "In a proceeding of this kind, the whole matter is heard and determined by the court, and it is not confined to the strict rules of evidence which obtain on the trial of an issue before a jury, but the doors of evidence are and should be thrown open, that the court may be satisfied whether or not it has intrusted the sale of liquor to an unfit person, and the privilege of the license been abused or the law violated." Lilienfeld *v.* Com., 92 Va. 818, 23 S. E. 882.

may not be the owner.[40] The fact that the claimant had been formerly engaged in the sale of liquors in the town where the liquors in question were seized may be shown by the state.[41]

III. FORFEITURE OF CORPORATE STOCK.

1. Nature of Power to Forfeit. — The power to forfeit corporate stock must be proved in each case.[42]

2. Presumptions. — A. As to Regularity. — Where it appears from the books of the corporation that certain shares have been forfeited it will sometimes be presumed, in the absence of direct evidence, that the proper resolution has been passed to that effect.[43]

B. As to Knowledge of By-Laws. — As a rule, the owner of shares of stock must be presumed to know, as a member of the corporation, the terms upon which it may be forfeited.[44]

3. Matters in Estoppel. — Subsequent knowledge and acquiescence in irregular proceedings will usually work an estoppel both against the company and the shareholder.[45]

40. The Liquors of Horgan, 16 R. I. 542, 18 Atl. 279.

41. Com. *v.* Intoxicating Liquors, 110 Mass. 500.

42. No Implied Power to Forfeit Corporate Stock. — Clarke *v.* Hart, 6 H. L. Cas. 633.

Where a corporation proceeds to forfeit stock for non-payment of assessments, it must have such a by-law as the statute prescribes, and compliance with such by-law must be made to affirmatively appear. Budd *v.* Multnomah St. R. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

Not Favored by the Courts. Forfeitures of corporate stocks are not favored by the courts and will not be sustained unless created by unambiguous language. Building & Loan Ass'n *v.* Sullivan, 62 Cal. 394.

43. Where it appeared from the books of the corporation that certain shares had become forfeited on the 2nd of September, and there was an entry on the 3rd of September in a book of the company called the "New Share Book," of the shares having been transferred to the company on that date, and an entry in another book called the "List of Share Holders," of the same shares having been forfeited to the company on the 3rd of September, it was held that from these facts it would be presumed that the proper resolution had been passed by the board of directors declaring the shares forfeited, though there was no direct evidence of such a resolution having been passed. *In re* North Hallensbeagle Mining Co., L. R. 2 Ch. App. 321.

44. Germantown P. R. Co. *v.* Fitler, 60 Pa. St. 124, 100 Am. Dec. 546.

Where the by-laws of a corporation provide for the absolute forfeiture of the stock of defaulting members, the stockholders must be presumed to know that the board of directors will act promptly in declaring forfeiture and in distributing the sums realized therefrom to the remaining stock shares. Barton *v.* Pioneer Savings & Loan Co., 69 Minn. 85, 71 N. W. 906.

45. Acquiescing in Irregularities. Raht *v.* Sevier Min. Co., 18 Utah 290, 54 Pac. 889; Crissey *v.* Cook, 67 Kan. 20, 72 Pac. 541.

Against Company. — Where proceedings by which shares are forfeited are irregular, but are acquiesced in by the shareholders, the company will be estopped from setting up the irregularity and holding the owners of the forfeited shares liable as stockholders. *In re* Cobre Copper Min. Co., L. R. 9 Eq. 107. *In re* Financial Corporation, L. R. 2 Ch. App. 714.

Against Shareholders. — Where the owners of stock which has been forfeited by proceedings which are irregular, apparently acquiesced in

what has been done for a period of over four years, and fail to protest or assert their rights, but by means of assignments put it in the power of third parties to institute an action nominally against the corporation, but really against those members who have acquired their interests upon the faith of the acquiescence and out of whom the amount of the judgment, if recovered, will ultimately come, this will work an equitable estoppel against the persons attempting to enforce such a right. Barton *v.* Pioneer Savings & Loan Co., 69 Minn. 85, 71 N. W. 906.

Estoppel by Unauthorized By-law. Although a corporation is not empowered by charter to forfeit the stock of its members, still, where a by-law has been adopted providing that certain stock shall be forfeited upon certain conditions and the stockholders acquiesce in the passage of this by-law, a stockholder whose stock has been forfeited under the by-law and who, though not at the meeting at which the by-law was adopted, is shown to have assented to it, and whose certificates of stock contained at the bottom of each a printed copy of the by-law, will be estopped from afterward objecting to the validity of the forfeiture. Lesseps *v.* The Architects Co., 4 La. Ann. 316.

FORGERY.

CROSS-REFERENCES:

Handwriting.

I. INTENT.

1. When Inferred. — Where the intent alleged is to defraud the person whose name is forged it may be inferred from the forgery without further proof.[1] The intent to defraud may also be inferred by the jury when the evidence shows the forgery to have been committed with the design that the instrument forged should be used as genuine, and it is also shown that there was a possibility that some person might be damaged thereby.[2]

2. As to Particular Persons. — It is not required of the prosecution to prove that the intent of the accused in committing the forgery was to injure any particular person,[3] but making the false writings or signing them with a general intent to injure and defraud is sufficient.[4]

3. Shown by Conduct. — The accused may so conduct himself in

1. *England.* — Reg. *v.* Cooke, 8 Car. & P. 586.
Arkansas. — Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.
Georgia. — Timmons *v.* State, 80 Ga. 216, 4 S. E. 766.
Kentucky. — Barnes *v.* Com., 19 Ky. L. Rep. 803, 41 S. W. 772.
Maine. — State *v.* Kimball, 50 Me. 409; Rounds *v.* State, 78 Me. 42, 2 Atl. 673.
Nevada. — State *v.* Cleavland, 6 Nev. 181.
New Jersey. — West *v.* State, 22 N. J. L. 212.
Presumption Not Conclusive. — In Kotter *v.* People, 150 Ill. 441, 37 N. E. 932, the jury were told that, "While it was necessary that the defendant forged the receipts with intent to damage and defraud the respective parties whose receipts were forged, yet that, if they found that the defendant forged the receipts, or either of them, then the law presumes that the said defendant intended to damage and defraud the party whose name is proven to be forged." *Held,* the intent to damage and defraud was a salient and essential part of the people's case. Such intent was not an irrebuttable presumption of law, but was an open question for the jury, to be determined by the facts and circumstances in proof. It was error to give said instructions.

2. Benson *v.* State (Ala.), 26 So. 119; People *v.* Turner, 113 Cal. 278, 45 Pac. 331; Anson *v.* People, 148 Ill. 494, 35 N. E. 145; State *v.* Patch, 21 Mont. 534, 55 Pac. 108.

3. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; People *v.* Turner, 113 Cal. 278, 45 Pac. 331; State *v.* Barrett, 8 Iowa 536; State *v.* Kimball, 50 Me. 409; Com. *v.* Henry, 118 Mass. 460; State *v.* Patch, 21 Mont. 534, 55 Pac. 108; State *v.* Yerger, 86 Mo. 33; People *v.* Rathbun, 21 Wend. (N. Y.) 509; Henderson *v.* State, 14 Tex. 503; Riley *v.* State (Tex. Crim.), 44 S. W. 498.

4. Reg. *v.* Marins, 2 Car. & K. (Eng.) 356; Arnold *v.* Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302. In Bennett *v.* State, 62 Ark. 516, 36 S. W. 947, an error was assigned in the motion for a new trial that the court's charge on the question of intent was erroneous, and there was no evidence to support the intent alleged in the indictment, which was that Bennett made the deed with intent to defraud Burns, his heirs and estate. The evidence showed that the accused forged the deed for the sole purpose of use as evidence for a defendant on trial charged with taking timber from the land of another, and that fully rebutted the presumption of intent to defraud Burns, and that defendant was not guilty of forgery. Hughes, J., stated, that "In the ordinary language of the books there must be in the mind of the wrongdoer an intent to defraud a particular person or persons, though no one in fact need be cheated, yet the intent is not necessarily, in truth, exactly this. It is rather that the instrument forged should be used as good. . . . There must be a

regard to the transactions connected with the instrument as would tend to show a consciousness of the fraudulent character of the writing, and such conduct, if voluntary, is admissible to show that the acts of the accused constituting the crime were intentionally done.[5]

II. THE FALSE WRITING.

1. Question for the Court. — Whether or not the writing was such an instrument as would import to be a legal document and capable of being made a subject of forgery is purely a question for the court.[6]

2. As to the Existence of the Instrument. — The existence or location of the instrument is a preliminary matter for the court, to be decided before secondary evidence is admissible,[7] but it becomes a question for the jury when the issue is whether such a writing as the alleged false document was ever in existence.[8]

3. The Fact of Forgery. — Whether the instrument was forged or not is a question of fact for the jury, and no preliminary proof of its forgery is necessary before it is offered in evidence.[9]

4. Extrinsic Matter Explaining the Instrument. — When the instrument is not *per se* of legal efficacy, the defects may be supplied by showing a course of dealing between the parties in which it is so understood and treated.[10]

possibility of fraud, but that is sufficient."

5. Burdge *v.* State, 53 Ohio St. 512, 42 N. E. 594.

6. Butler *v.* State, 22 Ala. 43; Lampkin *v.* State, 105 Ala. 1, 16 So. 575; Espalla *v.* State, 108 Ala. 38, 19 So. 82; Colson *v.* Com., 22 Ky. L. Rep. 1674, 61 S. W. 46; State *v.* Gryder, 44 La. Ann. 962, 11 So. 573; People *v.* Smith, 112 Mich. 192, 70 N. W. 466; State *v.* Ryan, 9 N. D. 419, 83 N. W. 865; Daud *v.* State, 34 Tex. Crim. 460, 31 S. W. 376; Overly *v.* State, 34 Tex. Crim. 500, 31 S. W. 377; Frazier *v.* State (Tex. Crim.), 64 S. W. 934.

In State *v.* Stephen, 45 La. Ann. 702, 12 So. 883, the defendant's counsel objected to the admission of the "plantation ticket" for the forgery of which defendant was being prosecuted. The objection was upon the ground that it was not an instrument of a character to serve as a basis for the prosecution for forgery. Nicholls, C. J., stated: "It was the judge's duty to have passed on that objection one way or the other, and he should not have remitted the whole matter to the jury. It is the duty of the court to pass upon the admissibility of evidence, and that of the jury to pass upon its force and sufficiency."

7. Morton *v.* State, 30 Ala. 527; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

8. Mosher *v.* State, 14 Ind. 261; Garrett *v.* Gonter, 42 Pa. St. 143; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

9. Mosher *v.* State, 14 Ind. 261.

10. *Alabama.* — Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639; Hobbs *v.* State, 75 Ala. 1; Dixon *v.* State, 81 Ala. 61, 1 So. 69.

California. — State *v.* Tomlinson, 35 Cal. 503.

District of Columbia. — Howgate *v.* United States, 7 App. D. C. 217.

Indiana. — Reed *v.* State, 28 Ind. 396; Shannon *v.* State, 109 Ind. 407, 10 N. E. 87.

Iowa. — State *v.* Pierce, 8 Iowa 231; State *v.* Sherwood, 90 Iowa 550, 58 N. W. 911; State *v.* Beerling, 102 Iowa 681, 72 N. W. 295.

Louisiana. — State *v.* Stephens, 45 La. Ann. 702, 12 So. 883; State *v.*

5. The Writing as Evidence. — The alleged false writing must be produced in court against the accused, or it must be accounted for by showing that the accused has possession of it, or that it has been destroyed.[11]

Murphy, 46 La. Ann. 415, 14 So. 920; State *v.* Leo, 108 La. 496, 32 So. 447.

Massachusetts. — Com. *v.* Castles, 9 Gray 123.

Michigan. — People *v.* Parker, 114 Mich. 442, 72 N. W. 250.

Minnesota. — State *v.* Wheeler, 19 Minn. 98.

Texas. — Daud *v.* State, 34 Tex. Crim. 460, 31 S. W. 376; Hendricks *v.* State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463.

Wyoming. — Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746.

In Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639, it was said that "When the instrument is imperfect, incomplete, and its real meaning and terms are not intelligible from its words and figures, but are to be derived from extrinsic facts, and its capacity to injure is dependent on such facts, then, when such facts are averred, and the instrument, its meaning and purport made intelligible to the court, it appears judicially, with as much certainty as if the extrinsic facts were on the face of the instrument, and that set out *in hacc verba*, whether it has the vicious capacity and is the subject of forgery. Carberry *v.* State, 11 Ohio St. 411; Com. *v.* Ray, 3 Gray (Mass.) 448; State *v.* Wheeler, 19 Minn. 98; People *v.* Shall, 9 Cow. 778; People *v.* Harrison, 8 Barb. (N. Y.) 560; Reed *v.* State, 28 Ind. 396; Com. *v.* Hines, 101 Mass. 33; People *v.* Stearns, 21 Wend. (N. Y.) 413."

The Averment and Proof Must Not Be Fanciful. — In People *v.* Shall, 9 Cow. (N. Y.) 778, a forgery was alleged of a writing which purported to be a promise without consideration, and as to completing the indictment by averment Cowen, J., said: "I grant that on coupling a genuine note, like the one in question, with a consideration, a cause of action would be made. But you must aver the consideration in your declaration, and show it in proof on the trial. It is the subject of a direct issue. In that sense, here may be forgery of a piece of evidence, which might be eked out by other evidence, the whole forming a mischievous compound. That answer would hold equally in every case cited; the void will, the void bill of exchange, the void receipt. We are not to put on an exploring expedition for possible evils. They must be palpable and tangible; a practical fraud must be shown in the indictment, so that the finger may be put upon it. That a false writing, purporting to be nothing of itself, may be put to some fancied use as an ingredient in the work of mischief cannot be the criterion of forgery."

11. *England.* — Rex *v.* Hunter, 3 Car. & P. 591.

United States. — United States *v.* Britton, 2 Mason 464, 24 Fed. Cas. No. 14,650.

Alabama. — Morton *v.* State, 30 Ala. 527; Manaway *v.* State, 44 Ala. 375.

Illinois. — Cross *v.* People, 192 Ill. 291, 61 N. E. 400.

Iowa. — State *v.* Calendine, 8 Iowa 288.

Massachusetts. — Com. *v.* Snell, 3 Mass. 82.

Michigan. — People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.

New York. — People *v.* Kingsley, 2 Cow. 522, 14 Am. Dec. 520.

Texas. — Dovalina *v.* State, 14 Tex. App. 312.

Virginia. — Pendleton *v.* Com., 4 Leigh 694.

West Virginia. — State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

In Cross *v.* People, 192 Ill. 291, 61 N. E. 400, when secondary evidence was offered and exceptions taken, the court reviewing the cause stated: "The defendant was charged with the knowledge of the law that after laying the proper foundation for secondary evidence it would become the duty of the court to admit such evidence on any question before the jury. It may be that in some cases it might be more difficult to establish the forgery of an instrument which has been lost or destroyed, and in others more difficult to defend against the charge; but such a situa-

A. Notice. — Notice must be given the accused to produce the alleged false writing when in his possession,[12] but when the destruction of the instrument is proved, such notice being in fact nugatory, secondary evidence may be admitted without proof of notice to produce the writing.[13]

B. Photographic Copy. — When the record shows that the alleged forgery is in the possession of the accused, and that he does not intend to produce it, photographic copies of the writing are admissible, together with the testimony of the photographer as to the correctness and accuracy of the copy.[14]

C. Effect of False Seal. — The fact that the seal upon the instrument is false raises a strong presumption that the signature is a forgery.[15] That the seal is false may be shown by comparison with one which is admitted to be genuine.[16]

6. The Handwriting as Evidence of the Forgery. — A. In General. — The fact that the forged instrument is in the handwriting of the accused is always competent, and, unexplained, is necessarily strong evidence of his guilt.[17]

B. Attempt to Disguise. — In weighing evidence of handwriting it is to be considered that the forger seeks to disguise his own handwriting and to imitate that of the person whose signature he forges.[18] And it is proper to show that the forger imitated the handwriting of the party whose name is annexed to the instru-

tion of parties usually has its compensating advantages, which counsel are not likely to allow to pass unnoticed."

12. Rex *v.* Haworth, 5 Car. & P. (Eng.) 254; Rex *v.* Hunter, 3 Car. & P. (Eng.) 591; Rollins *v.* State, 21 Tex. Crim. 148, 17 S. W. 466; Pendleton *v.* Com., 4 Leigh (Va.) 694; State *v.* Lowry, 42 Va. 205, 24 S. E. 561; State *v.* Cole, 19 Wis. 142.

In State *v.* Kimbrough, 13 N. C. 431, Henderson, C. J., held: "The object of the notice is not *to compel* the party to produce the paper; for no such power is assumed, either directly or indirectly, by placing him under a disadvantage if he does not produce it. Its object is to enable the prisoner to protect himself against the falsity of the secondary evidence, which the law presumes may be false, as its very name imports. The copyist may make a mistake in transcribing; he may be corrupt; so may the witnesses who give evidence of the contents. It is but reasonable, therefore, that the accused should have an opportunity of correcting a falsity in the evidence, if one should exist. Notice is given for that purpose, and that alone, and whatever be its form in common practice, it is in substance a notification that the secondary evidence will be offered."

Contra. — Ross *v.* Bruce, 1 Day (Conn.) 100. In United States *v.* Doebler, 1 Baldw. (U. S.) 519, 25 Fed. Cas. No. 14,977, the court held that the indictment itself was notice to produce all competent evidence, and therefore the alleged forgery should be produced without further notice.

13. How *v.* Hall, 14 East (Eng.) 276; Thompson *v.* State, 30 Ala. 28.

14. United States *v.* Ortiz, 176 U. S. 422; Duffin *v.* State, 107 Ill. 113; Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370.

15. People *v.* Marion, 29 Mich. 31.

16. Collins *v.* Carnegie, 1 Ad. & E. (Eng.) 695; People *v.* Marion, 29 Mich. 31.

17. Allgood *v.* State, 87 Ga. 668, 13 S. E. 569; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874.

18. Lodge *v.* Pipher, 11 Serg. & R. (Pa.) 333.

ment,[19] even if the accused has admitted that he signed the writing and claimed authority to do so.[20]

III. THE ACT OF FORGERY.

1. Admissions. — Evidence of admissions or statements in reference to the writing, for the forgery of which the accused is being prosecuted, is admissible,[21] but statements as to other instruments,

19. Neall *v.* United States, 118 Fed. 699; Walker *v.* Logan, 75 Ga. 759; West *v.* State, 22 N. J. L. 212; Riley *v.* State (Tex. Crim.), 44 S. W. 498.

20. In State *v.* Lurch, 12 Or. 99, 6 Pac. 408, Thayer, J., stated: "The evidence that the signature to the note had the appearance of having been written by some one other than the person who wrote the body of the note was, no doubt, proper, notwithstanding the appellant's admission that he signed T.'s name to it as maker. His claim that he so signed it by T.'s direction, and that he acted in good faith, was impeached, to a great extent, by the fact that he disguised his handwriting. He signed T.'s name to the note without doubt; but his pretense that the latter directed him to do so might well be questioned when the fact was made known that he attempted to imitate T.'s handwriting. He undertook, it is true, to explain why he tried to write T.'s name so as to have it appear as though T. wrote it himself, but it was highly proper that the jury should consider whether or not the explanation was satisfactory. It was an important circumstance, and the testimony bearing upon it was rightly submitted to the jury."

21. Henderson *v.* State, 120 Ala. 360, 25 So. 236; Fox *v.* People, 95 Ill. 71; Harding *v.* State, 54 Ind. 359; Jackson *v.* Com., 17 Ky. L. Rep. 1197, 34 S. W. 14; State *v.* Matlock, 119 N. C. 806, 25 S. E. 817; State *v.* Newton, 29 Wash. 373, 70 Pac. 31.

In Riley *v.* State (Tex. Crim.), 44 S. W. 498, the appellant objected to proof offered by the state to the effect that after the defendant negotiated the draft in question he came back and redeemed the same and then destroyed it, by tearing it to pieces. As to the ground of objection asserted, that when he destroyed the draft he was then aware that he was accused of the forgery, *held*, "We do not think it tenable. This doctrine applies to a witness who is required to testify in a case, and knows himself then to be under suspicion of being implicated in the criminal matter under investigation. And besides, this testimony was not in the nature of a confession, but simply an act of spoliation on the part of the appellant, and would be admissible on the same principle that flight or attempted flight would be proved in a criminal case, although at the time he may have been under arrest."

Subsequent Conduct Admissible to Show Intent. — In People *v.* Phillips, 70 Cal. 61, 11 Pac. 493, the appellant urged that the court erred in admitting evidence of the assignment of a mortgage, which took place the day after the uttering of the alleged false note. Defendant claims that the uttering was an act completed and the damage if any was sustained, and that the assignment was no part of the *res gestae* and was no part of the act charged. The court, affirming the lower court, held that "The assignment of the mortgage was admissible as tending to show the intent of the defendant in passing the note to Elgin. The jury were clearly instructed that the defendant was not charged in the information with forging or uttering the mortgage; and even if the mortgage was forged or feloniously passed, that fact would not justify a verdict against the defendant, but the fact could only be considered as tending to prove his intent in passing the note."

Statements Not Admitted on Behalf of Accused. — An accused on trial for forgery cannot defend himself by proving his own declarations made in conversation which he had with third persons before the instrument alleged to be forged existed, and at which the ostensible maker of the instrument was not present. Not

of the same kind, supposed to have been forged or uttered by him are not so admitted.[22]

2. Culpatory Acts. — Acts merely inferential of guilt, though not amounting to a confession, are admissible to show that the accused was aware of the suspicions against him, and did the acts with a consciousness of guilt, with intent to evade the consequences.[23]

3. Capacity to Effect Forgery. — But it is error to show, except in rebuttal, that the defendant was an expert penman and could imitate the signatures of others, and was capable of committing the forgery.[24]

4. Manner of Effecting Forgery. — If the prosecution have the burden of proving that a part of the writing has been removed and other writing substituted in its place, it is proper to show that there is a known means by which this may be effected.[25]

5. Genuine Documents. — Writings that are true legal documents are admissible in evidence if they serve to explain the true location of the title of the property, to identify the true owners with the property, and to form a predicate for further evidence of the falsity of the alleged transfer of the same.[26]

to exclude such evidence would be to incur the risk of trying the accused by evidence which he may have manufactured beforehand in his own favor. Surles *v.* State, 89 Ga. 167, 15 S. E. 38.

22. Reg. *v.* Cooke, 8 Car. & P. (Eng.) 582; Fox *v.* People, 95 Ill. 71.

23. Johnson *v.* State, 35 Ala. 370; State *v.* King, 125 Cal. 369, 58 Pac. 19; Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370; Riley *v.* State (Tex. Crim.), 44 S. W. 498; State *v.* Williams, 27 Vt. 724.

24. Dow *v.* Spenny, 29 Mo. 386.

In State *v.* Hopkins, 50 Vt. 316, the court stated: "If the respondent in his defense had introduced evidence tending to show that he did not possess the capacity to commit the crime with which he was charged, it would have been competent for the state to meet such proof by opposing evidence; but as we understand the case, no such evidence was introduced by the respondent, and the witness was permitted to testify to the ability of the respondent to imitate or counterfeit the signatures of other parties. The guilt or innocence of a party charged with crime is not to be determined upon any such theory of the law of evidence. No inference of guilt can be established by showing that the party charged had the ability to commit the crime. . . . The commission of crime includes the ability to commit it; and if evidence of the commission of crime is not admissible as bearing upon the question of guilt it is difficult to see why ability alone should be. We think the court erred in admitting the evidence."

25. People *v.* Brotherton, 47 Cal. 388; People *v.* Dole, 122 Cal. 486, 55 Pac. 581; Flemming *v.* Lawless (N. J. Eq.), 36 Atl. 502.

26. Manaway *v.* State, 44 Ala. 375; Espalla *v.* State, 108 Ala. 38, 19 So. 82; Perkins *v.* People, 27 Mich. 386; People *v.* Marion, 29 Mich. 31; State *v.* Allen, 56 S. C. 495, 35 S. E. 204; State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

Records and Public Documents. In People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578, it was said: "Evidence was introduced by the people of the record of a deed executed in 1869 by one Walters to Eleanor Pelton, and the register of deeds was permitted to testify that a careful examination of the records failed to show any transfer of the land by Eleanor Pelton, or Eleanor Van Alstine, since that time, save the alleged forged instrument. This was done with the avowed purpose of showing title in the land to Eleanor at the time of the alleged

6. Possession of Forged Instrument. — The possession of a false instrument is not sufficient proof of the crime in the absence of a guilty intent or knowledge.[27] But a presumption of guilt arises from the possession of a forged writing by one who is a beneficiary,[28] and the presumption grows stronger when he uses or

forgery. The evidence was proper." The defendant was indicted for forging a deed. The defendant claimed the right to put another deed in evidence, claiming that both deeds bore the genuine signature of Eleanor, and were executed by her upon the same day, and were originally parts of a double blank and detached on the day of their execution. Two witnesses testified that they had carefully compared the two deeds, and that they matched completely at the top where they were torn apart. Morse, J., stated. "It seems to me that it was proper and legitimate to introduce the Cleveland deed in evidence, and to prove that it was part of the blank to which the deed in question here belonged. The defense also should have been permitted to show that the Cleveland deed was a genuine one, and so treated and regarded by Eleanor Pelton in her lifetime, and that it was seen in existence and used upon a public trial before her death; and this being allowed, a comparison between the two signatures would have been proper. There was, therefore, error in not permitting this proof to be made. If it were a fact that this deed were part of the same double blank and respondent was entitled to the full weight and bearing of the probabilities arising from such fact, and if the Cleveland deed was a genuine one, and so recognized by Eleanor Pelton, such facts would have a very pertinent bearing upon the point in issue, to-wit, the genuineness of the alleged forged deed."

When Part of the Res Gestae. In Manaway *v.* State, 44 Ala. 375, the instrument alleged to have been forged was a lottery ticket. When the instrument was uttered the defendant was seen to throw several tickets upon the table and demand returns for them. Three were genuine and the other was not. When arrested there were found several tickets in his possession. *Held,* that "The genuine tickets taken from the prisoner at same time were part of the *res gestae* and constituted a link in the chain of evidence."

27. Rex *v.* Shukard, Russ. & R. (Eng.) 200; People *v.* Dole, 122 Cal. 486, 55 Pac. 581; Millsaps *v.* State, 38 Tex. Crim. 570, 43 S. W. 1015.

28. *Alabama.* — Hobbs *v.* State, 75 Ala. 1; Williams *v.* State, 126 Ala. 50, 28 So. 632.

Georgia. — Watson *v.* State, 78 Ga. 349; Womble *v.* State, 107 Ga. 666, 33 S. E. 630.

Kentucky. — Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772.

Massachusetts. — State *v.* Talbot, 2 Allen 161.

Missouri. — State *v.* Allen, 116 Mo. 548, 22 S. W. 792; State *v.* Milligan, 170 Mo. 215, 70 S. W. 473; State *v.* Pyscher (Mo.), 77 S. W. 836.

North Carolina. — State *v.* Morgan, 19 N. C. 348; State *v.* Lane, 80 N. C. 407; State *v.* Carter, 129 N. C. 560, 40 S. E. 11.

In State *v.* Britt, 14 N. C. 122, it was held: "Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that either by himself or by false conspiracy with others he forged or assented to the forgery of the instrument; that he either did the act or caused it to be done — until he showed the actual perpetrator and that he himself was not privy. It is very different from having a counterfeit bank note. That is an instrument current in its nature and use, and may well come innocently into one's hands, but it is next to impossible that the defendant could get possession of such an instrument as this, purporting to be for his own benefit, without having fabricated or aided in the fabrication of it. If the instrument be a forgery, he who holds it under such circumstances is taken to be the forger, unless he shows the contrary."

attempts to use such instruments for his own benefit,[29] with this exception, that having in possession, and publishing as true, a commercial instrument which is a forgery, raises no presumption that it was forged by the party uttering the same.[30]

IV. SUFFICIENCY.

1. In General. — The prosecution must show that the instrument bears such a resemblance to the instrument it is intended to represent as to effectually deceive,[31] and the averment that the instrument has been forged is satisfied by proof of a forgery of any material part.[32]

2. Creating False Instrument. — A. GENERALLY. — It must be shown that the false writing by the accused purported to be the act and writing of another,[33] and that the act of making and sign-

29. United States *v.* Brooks, 3 McA. 315; Allen *v.* State, 74 Ala. 1; Hoskins *v.* State, 11 Ga. 92; State *v.* Williams, 152 Mo. 115, 53 S. W. 424; State *v.* Milligan, 170 Mo. 215, 70 S. W. 473; State *v.* Pyscher (Mo.), 77 S. W. 836; State *v.* Morgan, 19 N. C. 348; State *v.* Peterson, 129 N. C. 556, 40 S. E. 9.

30. State *v.* King, 125 Cal. 369, 58 Pac. 19.

As to Commercial Instruments. In Miller *v.* State, 51 Ind. 405, the jury were instructed that a presumption arises that the defendant made the indorsement for the reason that he had had the writing in his possession and had used it for his own benefit. *Held*, "We do not think it can be laid down as a rule of law that the uttering and publishing as true of a commercial instrument, with the name of the payee forged thereon, raise a presumption that the person uttering is guilty of forging the indorsement. On a charge of the forgery of the name, the uttering and publishing are circumstances to be considered by the jury with any other evidence bearing on the question of the forgery, and what weight shall be given to the uttering and publishing is to be determined by the jury, in the same manner as they determine the weight of other evidence in criminal cases."

31. *Alabama.* — Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639; Elmore *v.* State, 92 Ala. 51, 9 So. 600; Koch *v.* State, 115 Ala. 99, 22 So. 471; Glenn *v.* State, 116 Ala. 483, 23 So. 1.

California. — People *v.* Turner, 113 Cal. 278, 45 Pac. 331.

Indiana. — Garmire *v.* State, 104 Ind. 444, 4 N. E. 54.

Louisiana. — State *v.* Ferguson, 35 La. Ann. 1042.

Maryland. — Arnold *v.* Cost, 3 Gill & J. 219, 22 Am. Dec. 302.

Massachusetts. — Com. *v.* Ray, 3 Gray 441; Com. *v.* Hinds, 101 Mass. 209.

Montana. — State *v.* Evans, 15 Mont. 539, 39 Pac. 850.

Nebraska. — Roode *v.* State, 5 Neb. 174.

New Jersey. — Rohr *v.* State, 60 N. J. L. 576, 38 Atl. 673.

Ohio. — Hess *v.* State, 5 Ohio 5.

Texas. — Hendricks *v.* State, 26 Tex. App. 176, 8 Am. St. Rep. 463, 9 S. W. 555.

Wyoming. — Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746.

32. Com. *v.* Buttrick, 100 Mass. 12; Darbyshire *v.* State, 36 Tex. Crim. 547, 38 S. W. 173; Dudley *v.* State (Tex. Crim.), 58 S. W. 111.

33. People *v.* Peacock, 6 Cow. (N. Y.) 72; Leslie *v.* State, 10 Wyo. 10, 69 Pac. 2.

In Frazier *v.* State (Tex. Crim.), 64 S. W. 934, the court instructed the jury as follows: "By the use of the word 'another,' as used in the definition of this offense, is meant and includes all persons, and the instrument must purport to be the act of another person." *Held*, that it "was not necessary for the court to define the word 'another' at all. But the definition as given is complete,

ing purporting to be the act of another was fraudulently done without authority.[34]

B. Assuming Authority to Act for Another. — Evidence showing that the defendant did the acts for another, though the authority was falsely and fraudulently assumed, will not sustain a prosecution for forgery.[35]

C. By Procuration. — It is not necessary that the defendant should personally write the forgery, but it is sufficient if he, with intent to utter it as genuine, procured another to write it.[36]

D. Forgery by Alteration. — A forgery may also be shown to occur by alteration,[37] and evidence that the writing went into the possession of the accused in the original condition and that he subsequently uttered it in a forged condition, furnishes com-

except that it does not state another than the person engaged in the forgery. We think a fair construction of the charge in question conveyed the idea to the minds of the jury that 'another' as defined meant some person other than the alleged forger."

34. People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597; People *v.* Whiteman, 114 Cal. 338, 46 Pac. 99; People *v.* Lundin, 117 Cal. 124, 48 Pac. 1024; State *v.* White, 98 Iowa 346, 67 N. W. 267; Com. *v.* Bowman, 96 Ky. 40, 27 S. W. 816; Roberts *v.* State (Tex. Crim.), 53 S. W. 864; Knowles *v.* State (Tex. Crim.), 74 S. W. 767; Romans *v.* State, 51 Ohio St. 528, 37 N. E. 1040.

In State *v.* Swan, 60 Kan. 461, 56 Pac. 750, the court refused to give the following instruction: "In case you find from the evidence, beyond a reasonable doubt, that the name of R. H. Jordan is signed to the check introduced in evidence, you must further find from the evidence, beyond a reasonable doubt, that said name was without authority from the said R. H. Jordan so to do, before you can find the defendant guilty." *Held,* "This instruction should have been given. There was evidence showing that appellant signed the name of R. H. Jordan to the check in question. It is presumed where one person signs the name of another to an instrument, he does so with authority. . . . If the appellant had authority from Jordan to sign his name, the act was forgery."

35. People *v.* Bendit, 111 Cal. 274, 43 Pac. 901; State *v.* Davis, 53 Iowa 252, 5 N. W. 149; Com. *v.* Baldwin, 11 Gray (Mass.) 197; State *v.* Millner, 131 Mo. 432, 33 S. W. 15; Mann *v.* People, 15 Hun 155; State *v.* Thornburg, 28 N. C. 79; Kegg *v.* State, 10 Ohio 75. See article "False Pretenses."

36. Gooden *v.* State, 55 Ala. 178; Com. *v.* Stevens, 10 Mass. 181; Koch *v.* State, 115 Ala. 99, 22 So. 471; Com. *v.* Foster, 114 Mass. 311, 19 Am. Rep. 353.

37. State *v.* Millner, 131 Mo. 432, 33 S. W. 15; State *v.* Thornburg, 28 N. C. 79; Kegg *v.* State, 10 Ohio 75. In State *v.* Hendry, 156 Ind. 392, 59 N. E. 1041, the defendant sold wheat to the elevator company and received a slip or receipt stating the number of pounds and the quality of the same. The quality was designated by "2 red" or "3 red," which was marked upon the back of the slip. Defendant altered this figure "3" to "2" on the receipt, and for this the charge of forgery by alteration is made. *Held,* that "The purpose of the indorsement was to indicate the judgment of the weigher in respect to the grade of wheat. The receipt appears to be complete within itself, aside from the indorsement thereon, and makes no reference whatever to the memorandum in controversy, and the latter makes no reference to the receipt; and, unaided by extrinsic facts, each is apparently independent of the other. . . . As a consideration of the facts discloses that a charge or alteration of the memorandum would not, under the circumstances, operate to vary or affect

plete proof that the accused either forged the instrument or caused it to be done.[38]

E. Effect of Misspelling or Fictitious Signature. — If the felonious intent is clearly manifested and is completely executed, the fact that the writing is misspelled,[39] or that the name signed to the instrument is fictitious, will not excuse the defendant;[40] that no account exists in favor of the person whose name is signed to a check or order is *prima facie* evidence that the name is fictitious.[41] That no such person resides in the locality may be proved by showing that the name does not appear in the local directories,[42] by the

the receipt in any degree, consequently any change or alteration thereof cannot be held to be forgery of the receipt.

38. Darby *v.* State, 41 Fla. 274, 26 So. 315; State *v.* Millner, 131 Mo. 432, 33 S. W. 15; State *v.* Burd, 115 Mo. 405, 22 S. W. 377.

39. *Alabama.* — Gooden *v.* State, 55 Ala. 178.

Arkansas. — Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

California. — People *v.* James, 110 Cal. 155, 42 Pac. 479; People *v.* Alden, 113 Cal. 264, 45 Pac. 327; People *v.* Nishiyama, 135 Cal. 299, 67 Pac. 776.

Georgia. — Allgood *v.* State, 87 Ga. 668, 13 S. E. 569.

Indiana. — Selby *v.* State, 161 Ind. 667, 69 N. E. 463.

Louisiana. — State *v.* Gryder, 44 La. Ann. 962, 11 So. 573.

Massachusetts. — Com. *v.* Woods, 10 Gray 477.

North Carolina. — State *v.* Covington, 94 N. C. 913, 55 Am. Rep. 650.

Texas. — Scroggins *v.* State (Tex. Crim.), 69 S. W. 510; Allen *v.* State, 44 Tex. Crim. 63, 68 S. W. 286.

40. *England.* — Mead *v.* Young, 4 T. R. 28.

United States. — United States *v.* Turner, 7 Pet. 132; *Ex parte* Hibbs, 26 Fed. 421.

California. — People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538; People *v.* Nishiyama, 135 Cal. 299, 67 Pac. 776.

Louisiana. — State *v.* Hahn, 38 La. Ann. 169.

Massachusetts. — Com. *v.* Costello, 120 Mass. 358.

Nebraska. — Randolph *v.* State, 65 Neb. 520, 91 N. W. 356.

New York. — Brown *v.* People, 8 Hun 562.

Oregon. — State *v.* Wheeler, 20 Or. 192, 25 Pac. 394, 23 Am. St. Rep. 119, 10 L. R. A. 779.

Texas. — Brewer *v.* State, 32 Tex. Crim. 74, 22 S. W. 41, 40 Am. St. Rep. 760; Davis *v.* State, 34 Tex. Crim. 117, 29 S. W. 478; Hocher *v.* State, 34 Tex. Crim. 359, 30 S. W. 783, 53 Am. St. Rep. 716; Scott *v.* State, 40 Tex. Crim. 105, 48 S. W. 523; Adkins *v.* State, 41 Tex. Crim. 577, 56 S. W. 63; People *v.* Warner, 104 Mich. 337, 62 N. W. 405.

In Logan *v.* United States, 123 Fed. 291, Richards, J., held: "The fact that the names signed as president and cashier were fictitious is of no importance. The public cannot be presumed to know who are president and cashier of each national bank at the time each issue of its notes is put in circulation. The public mischief is the same whether the names forged are those of the genuine officers or of fictitious persons."

41. Rex *v.* Boskler, 5 Car. & P. (Eng.) 118; Rex *v.* Brannan, 6 Car. & P. (Eng.) 326; People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538; People *v.* Chretien, 137 Cal. 450, 70 Pac. 305; Karoly Elec. Con. Co. *v.* Globe Sav. Bk., 64 Ill. App. 225; State *v.* Hahn, 38 La. Ann. 169; People *v.* Jones, 106 N. Y. 523, 13 N. E. 93.

42. People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538; People *v.* Ellenwood, 119 Cal. 166, 51 Pac. 553; People *v.* Terrill, 133 Cal. 371, 65 Pac. 303.

In People *v.* Laird, 118 Cal. 291, 50 Pac. 431, a check was uttered by defendant that purported to be signed by A. B. Clark; the directories of the city and county showed that only two persons by that name resided in the county. *Held,* that

testimony of officers, postmen,[43] or by persons who have resided in the locality,[44] that such person is not known to them.

V. AS TO DEFENSES.

1. Intoxication as a Defense. — The accused may show that he was incapable from intoxication of forming the intent necessary to constitute the crime.[45]

2. Intent to Repay. — The accused cannot show that he expected to, or did, repay the party as a matter of defense.[46]

3. Ratification. — An instrument forged is absolutely void, and a subsequent ratification of the instrument constitutes no bar to a prosecution for the act of forging.[47]

they were competent witnesses to show that they did not sign the check or authorize it to be signed.

43. State *v.* Hahn, 38 La. Ann. 169; People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.

44. In Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997, the accused was indicted for endeavoring to obtain goods of another by means of a forged contract and by representing that he was a wealthy resident of Exeter and engaged in erecting large buildings where such material was required. C. Allen, J., in his opinion stated: "One principal element in the alleged conspiracy being that Kennedy should assume to be Geo. Brown, a man of wealth, residing in Exeter, and then or recently an owner of real estate there, it was competent to show by the witnesses that they knew of no such man. The witnesses testified to a general acquaintance with the inhabitants and owners of real estate in that town. It is not necessary that each witness should be able to state absolutely that he knew every resident."

45. People *v.* Blake, 65 Cal. 275, 4 Pac. 1; Williams *v.* State, 126 Ala. 50, 28 So. 632; People *v.* Ellenwood, 119 Cal. 166, 51 Pac. 553; State *v.* Hahn, 38 La. Ann. 169.

46. Reg. *v.* Beard, 8 Car. & P. (Eng.) 143; Reg. *v.* Hill, 8 Car. & P. (Eng.) 274; Reg. *v.* Grach, 9 Car. & P. (Eng.) 499; Green *v.* State, 36 Tex. Crim. 109, 35 S. W. 971.

In Com. *v.* Henry, 118 Mass. 460, the defendant was indicted for forging a note. At the trial the defendant requested the judge to rule that if the jury were satisfied, upon the whole evidence, that the defendant did not intend to defraud anyone at the time when he made and uttered the note, but that he intended and had the means to pay said note when it became due, and would have done so but for the previous settlement of the same, he could not be convicted upon either count. The judge declined to give the instructions and the defendant alleged exceptions. *Held,* "The subject to which the request of the defendant was apparently intended to call the attention of the presiding judge was the effect of his possession of the means and of his intention to take up the note when due, and in relation to this the statement of the law was correct. The intention of one who utters a forged note to take it up at maturity, and the possession of the means to do so, do not rebut the inference of intent to defraud, which is necessarily drawn from knowingly uttering it for value to one who believes it to be genuine, nor deprive the transaction of its criminal character."

47. Howell *v.* McCrie, 36 Kan. 636, 14 Pac. 257; Kelchner *v.* Morris, 75 Mo. App. 588; Workman *v.* Wright, 33 Ohio St. 405, 31 Am. Rep. 546; McHugh *v.* Schuylkill Co., 67 Pa. St. 391, 5 Am. Rep. 445; Countee *v.* State (Tex. Crim.), 33 S. W. 127.

In Henry Christian Bldg. & Loan Ass'n *v.* Walton, 181 Pa. St. 201, 37 Atl. 261, Fell, J., *citing* various authorities, stated in his opinion as follows: "The distinction between the power to ratify acts void because of a fraud affecting individual in-

4. Similarity of Name. — The accused cannot excuse himself by showing that the name forged is identical with his own if the instrument was signed with intent to defraud.[48]

5. Lack of Vigilance by Party Defrauded. — Showing that the party defrauded was not careful or vigilant, and that if he had been so the crime could not have been perpetrated, will not excuse the defendant.[49]

terests only and the power to ratify acts which involve a public wrong has been carefully defined and preserved in our decisions. . . . . Where the transaction is contrary to good faith, and the fraud affects individual interests only, ratifying is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery does not admit of ratification. A forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits; and the subsequent adoption of the instrument cannot supply the authority which the forger did not profess to have."

Effect of Condonation. — In State *v.* Tull, 119 Mo. 421, 24 S. W. 1010, a son was charged with forging his mother's name, and the court refused to allow evidence that the mother was willing to condone the offense and also to pay the obligation. *Held*, that "The condonation and willingness to pay the obligation did not render the act less a crime in the forger."

48. Mead *v.* Young, 4 T. R. 28; Barfield *v.* State, 29 Ga. 127, 74 Am. Dec. 49; Beattie *v.* Natl. Bank, 174 Ill. 571, 51 N. E. 602; People *v.* Peacock, 6 Cow. (N. Y.) 72.

In People *v.* Rushing, 130 Cal. 449, 62 Pac. 742, Cooper, C., said: "Because the initial of Elmer Geddes' name is "E." he will not be allowed to forge the name of every other Geddes in the state whose initial might be "E." and in defense claim that he was only signing his own name. If the power of attorney was made and signed by Elmer Geddes for the fraudulent purpose of getting the money of Edwin Geddes, which was on deposit in the bank, and if defendant knew all these facts, and uttered the power of attorney for the purpose of making the sale to Levy, knowing that Levy believed it to be the power of attorney of Edwin Geddes, he committed the crime of forgery."

Procuring Signature of Name Similar. — In Com. *v.* Foster, 114 Mass. 311, 19 Am. Rep. 353, Wells, J., stated in his opinion that "When that intent exists, and the instrument is the fruit of it, the author of the fraud cannot escape the charge of forgery by procuring one who happens to bear a name that suits his purpose to supply him with a pretended genuine signature. There is double falsity in such a mock performance."

49. United States *v.* Turner, 7 Pet. (U. S.) 132; Garmire *v.* State, 104 Ind. 444, 4 N. E. 54; Cochran *v.* Atchison, 27 Kan. 728; Com. *v.* Stephenson, 11 Cush. (Mass.) 481; Com. *v.* Foster, 114 Mass. 311, 19 Am. Rep. 353.

In Lawless *v.* State, 114 Wis. 189, 89 N. W. 891, Barden, J., said: "The change made in the check gave it the capacity to mislead and deceive the unwary. Its vicious capacity to defraud was certainly known to the accused. He represented that it called for a much larger sum than he knew he was entitled to. It comes with very poor grace from him now to say that the person who cashed the check for him ought not to have been deceived. The fact remains that he was deceived, and the accused profited by such deception. We think the alteration was material, and of such a character as was calculated to deceive non-experts."

In Rohr *v.* State, 60 N. J. L. 576, 38 Atl. 673, Hendrickson, J., said: "The suggestion that there was no attempt to conceal the erasure — that

VI. JURISDICTION.

1. Caption. — The instrument must be shown to have been forged within the jurisdiction of the court,[50] but if it is shown that it bears date at a certain place within the jurisdiction and it is proved that the accused was at the place at the time, this is sufficient evidence that it was forged at that place.[51]

2. Inference Raised by Uttering. — Uttering the false instrument in the county where the indictment is found is cogent evidence that the forgery was committed by the defendant in the same county.[52]

VII. WITNESSES.

1. Interested Witnesses. — The testimony of the parties whose names are signed to the instrument is competent evidence in establishing the fact of forgery,[53] but such evidence is not indispensable.[54]

it was plain to any one — is no defense in this case. The alteration was, at least, successful in its object; and the rule of law in that particular is that it is sufficient to constitute the crime if a signed writing which is forged be intended to be taken as true and might be so taken by ordinary persons." *Citing* Justice Ford in State *v.* Robinson, 16 N. J. L. 507, which states: "Nice observers might detect the falsification by holding it to the light, but that does not justify the forgery. The law is to protect the mass of society, and it matters not if a few knowing men are safe."

50. State *v.* Thompson, 19 Iowa 299.

51. State *v.* Thompson, 19 Iowa 299; State *v.* Duffield, 49 W. Va. 274, 38 S. E. 577.

52. *Illinois.* — Bland *v.* People, 4 Ill. 364.

Iowa. — State *v.* Blanchard, 74 Iowa 628, 38 N. W. 519.

Kansas. — *In re* Carr, 28 Kan. 1.

Missouri. — State *v.* Yerger, 86 Mo. 33; State *v.* Burd, 115 Mo. 405, 22 S. W. 377; State *v.* Haws, 98 Mo. 188, 11 S. W. 574.

North Carolina. — State *v.* Morgan, 19 N. C. 348.

Tennessee. — Toute *v.* State, 15 Lea 712.

Texas. — *Ex parte* Rogers, 10 Tex. App. 655; Henderson *v.* State, 14 Tex. App. 503; Hocker *v.* State, 34 Tex. App. 359, 30 S. W. 783, 53 Am. St. Rep. 716.

In United States *v.* Britton, 2 Mason 464, 24 Fed. Cas. No. 14,650, Story, J., stated in his opinion that "It is rare that the government can offer any evidence of the place of the forgery, except that which arises from the fact of the utterance of the forged instrument. And I take the rule to be that the place where the instrument is found or offered in a forged state affords *prima facie* evidence, or a presumption, that the instrument was forged there, unless that presumption be repelled by some other fact in the case."

In Johnson *v.* State, 35 Ala. 370, it was held: "The place of the forging is peculiarly, and in most cases exclusively, within the defendant's knowledge; and it is in his power to shield himself from a conviction in a wrong place by proof of the true venue. It is, therefore, a matter of manifest justice and propriety to infer the forgery to have been committed at the place where the paper appears to have been first in the defendant's possession. The inference is by no means conclusive, and will give way to sufficient countervailing evidence."

53. State *v.* Morgan, 25 La. Ann. 293; People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.

54. Anson *v.* People, 148 Ill. 494,

2. Subscribing Witnesses. — The rule of evidence that the subscribing witnesses must be first called or their absence accounted for, to prove the authenticity of the instrument has no application in the prosecution for forgery.[55] Their testimony is competent, however, and may show that the signatures upon the instrument were not in fact made by them.[56]

VIII. UTTERING FORGED INSTRUMENT.

1. The Act of Uttering. — The forgery of the instrument uttered constitutes no part of the proof necessary for conviction for uttering, other than the fact that it is a forged instrument,[57] and the act of uttering may be shown by evidence that the accused exhibited it in any manner which would induce another to credit it.[58]

Evidence of declarations either by words or acts which show an attempt to utter the alleged false writing as true is admissible to show the guilt of accused.[59] Attempts to pass the same instrument upon others are admissible to identify the accused with the forged instrument.[60] It is not necessary to prove that the party

35 N. E. 145; Hess *v.* State, 5 Ohio 7; Foulkes *v.* Com., 2 Rob. (Va.) 836.

55. Garrett *v.* Hanshue, 53 Ohio 482, 42 N. E. 256.

In Simmons *v.* State, 7 Ohio 116, the reasons were discussed as to the rule requiring the subscribing witness to testify, and it was there held that subscribing witnesses to deeds and like instruments "are presumed to be better acquainted with the circumstances that transpired at the time, and not only so, but by so selecting the parties mutually agreed to resort to them for the proof. . . . The person whose name is forged cannot be supposed to have selected a subscribing witness to prove that *he* executed an instrument, and the circumstances attending the execution; because the very fact of forgery proves that he had no knowledge of the making of it. When the obligor is competent he must be the best witness of which the case will admit; and the subscribing witness need not, in such case, be called for *ratione cessante, cessat ipsa lex.*"

56. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.

57. State *v.* Bigelow, 101 Iowa 430, 70 N. W. 600; State *v.* Hahn, 38 La. Ann. 169.

58. Rex *v.* Arscott, 6 Car. & P. (Eng.) 408; Stockslager *v.* United States, 116 Fed. 590; Anderson *v.* State, 65 Ala. 553; Com. *v.* Baldwin, 11 Gray (Mass.) 197; People *v.* Brigham, 2 Mich. 550; People *v.* Caton, 25 Mich. 388; Folden *v.* State, 13 Neb. 328, 14 N. W. 412; Harris *v.* People, 9 Barb. (N. Y.) 664.

In Chahoon *v.* State, 20 Gratt (Va.) 733, the evidence showed an attempt as counsel, by action at law and suit in equity, to enforce payment of the money mentioned in the writing, and to employ said instrument as true, which, if done with knowledge that the writing was a forgery, constitutes guilt within the meaning of the law.

In Espalla *v.* State, 108 Ala. 38, 19 So. 82, the court instructed the jury: "The court will charge you that as a matter of law the presenting of a deed at the probate court for record is an uttering and publishing. And if you believe from the evidence beyond a reasonable doubt that the defendant presented the deed with intent to defraud, this would be sufficient proof of uttering."

59. Gardner *v.* State, 96 Ala. 12, 11 So. 402; Chahoon *v.* State, 20 Gratt. (Va.) 733.

60. Leslie *v.* State (Tex. Crim.), 47 S. W. 367; Wolf *v.* State (Tex. Crim.), 53 S. W. 108.

upon whom the attempt to defraud is made should receive the writing as genuine, or in fact ever receive it into his actual possession.[61] Proof of offer is sufficient though refused.[62]

2. Damage. — No actual damage is necessary to be shown; it is enough that the accused designed and intended that the instrument was to be used as genuine,[63] and there existed a possibility

In Preston *v.* State, 40 Tex. Crim. 72, 48 S. W. 581, the accused was indicted for uttering certain forged deeds. Evidence was admitted as to the manner in which the accused had employed the deeds in a civil suit. Henderson, J., held: "We believe, on objection, the court should have required a certified copy of so much of the proceedings in the district court of Atascosa county as the state desired to use. With said certified copy of the records before the court, we believe it would have been entirely competent for the witnesses to state that said deeds were used in said suit by appellant as evidence on his behalf. Although this was not the transaction charged against appellant, and might be considered another uttering of said deeds, yet it was competent testimony, as showing a use by appellant of said deeds, and illustrating his intent and purpose in having said deeds recorded."

61. People *v.* Compton, 123 Cal. 403, 56 Pac. 44; State *v.* Sherwood, 90 Iowa 550, 58 N. W. 911; State *v.* Taylor, 46 La. Ann. 1332, 16 So. 190; People *v.* Brigham, 2 Mich. 550; People *v.* Caton, 25 Mich. 388; State *v.* Harner, 48 Mo. 520; Smith *v.* State, 20 Neb. 284, 29 N. W. 923, 57 Am. Rep. 832.

62. People *v.* Compton, 123 Cal. 403, 56 Pac. 44; State *v.* Eaton, 166 Mo. 575, 66 S. W. 539; People *v.* Rathbun, 21 Wend. (N. Y.) 509; Keeler *v.* State, 15 Tex. App. 111; Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746.

In Brazil *v.* State, 117 Ga. 32, 43 S. E. 460, the court, *citing* Bish. New Crim. Law, stated: "'Since the offense of uttering is an attempt' to cheat by means of such an instrument, 'it is complete when the forged instrument is offered, and acceptance of it is unnecessary, while yet it does not take away or diminish the crime.' That is to say, the guilty intent which accompanies such an attempt to defraud is the gravamen of the offense, and is punishable whether the attempt proves successful or not. Hence, one fraudulently uttering a forged instrument capable of working legal injury cannot escape punishment for his felonious intent merely because, through ignorance or stupidity, he undertook to make a use of such instrument not calculated to deceive a person familiar with the law, but which, as matter of fact, accomplished his purpose. The use made of the writing is, of course, to be taken into consideration, but only with a view of determining the intent of the person, as evidenced by his conduct."

63. *United States.* — United States *v.* Mitchell, 1 Baldw. 366, 26 Fed. Cas. No. 15,787; United States *v.* Lawrence, 13 Blatchf. 211, 26 Fed. Cas. No. 15,572.

Alabama. — Benson *v.* State (Ala.), 26 So. 119.

Arkansas. — Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

Florida. — Hawkins *v.* State, 28 Fla. 363, 9 So. 652.

Louisiana. — State *v.* Hahn, 38 La. Ann. 169.

Maryland. — Arnold *v.* Cost, 3 Gill & J. 219, 22 Am. Dec. 302.

Massachusetts. — Com. *v.* Ladd, 15 Mass. 526.

New York. — People *v.* Fitch, 1 Wend. 198, 19 Am. Dec. 477.

South Carolina. — State *v.* Washington, 1 Bay 120, 1 Am. Dec. 601.

Tennessee. — Hale *v.* State, 1 Coldw. 167, 78 Am. Dec. 488.

Texas. — Scott *v.* State, 40 Tex. Crim. 105, 48 S. W. 523.

West Virginia. — State *v.* Duffield, 49 W. Va. 274, 38 S. E. 577.

In People *v.* Brigham, 2 Mich. 550, Whipple, J., *discussing* this point, said: "We must intend, from the

of defrauding.[64] But it is not error to admit evidence of actual damage.[65]

3. Guilty Knowledge. — A. GENERALLY. — Proof of the knowledge of the accused as to the falsity of the instrument is required,[66] but such knowledge may be shown by circumstantial evidence to be passed upon by the jury.[67]

B. WHEN INFERRED. — If the party is shown to be in possession of the forged instrument and passed and uttered it, a *prima facie* presumption arises that it was uttered with knowledge that it was a forgery.[68] The guilty knowledge of its character may be inferred from what transpired at the time of passing the instrument, or from his conduct after the transaction,[69] or from the act of offering

verdict of the jury, that J. knew that the draft was a forgery; by presenting it to the bank officers he asserted its genuineness; by demanding its payment he did all that was necessary to constitute an *uttering* within the meaning of the statute. That the payment of the draft was refused, and subsequently redelivered to J., in no respect affects the transaction. If the draft had been actually paid, it is admitted that the offense would have been complete. Can it make any difference in reason or morals that it was not paid? It seems to me not. J. did all that could have been done to accomplish his illegal purpose; that he was foiled in the attempt to perpetrate a gross fraud does not help his case."

64. *Alabama.* — Jones *v.* State, 50 Ala. 161; Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639.

California. — People *v.* Munroe, 100 Cal. 664, 35 Pac. 326; People *v.* Turner, 113 Cal. 278, 45 Pac. 331.

Idaho. — People *v.* Heed, 1 Idaho 531.

Illinois. — Waterman *v.* People, 67 Ill. 92.

Iowa. — State *v.* Sherwood, 90 Iowa 550, 58 N. W. 911.

Massachusetts. — Com. *v.* Ray, 3 Gray 441.

Mississippi. — Cox *v.* State, 66 Miss. 14, 5 So. 618.

Nebraska. — Roode *v.* State, 5 Neb. 174.

New York. — People *v.* Shall, 9 Cow. 778.

Oklahoma. — Territory *v.* Delana, 3 Okla. 573, 41 Pac. 618.

Texas. — Green *v.* State, 36 Tex. Crim. 109, 35 S. W. 971; Rollins *v.* State (Tex. App.), 3 S. W. 759; Hendricks *v.* State, 26 Tex. App. 176, 9 S. W. 555, 8 Am. St. Rep. 463.

Vermont. — State *v.* Briggs, 34 Vt. 501.

Wyoming. — Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746.

65. Arnold *v.* Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; People *v.* Phillips, 70 Cal. 61, 11 Pac. 493.

66. McGuire *v.* State, 37 Ala. 161; Parker *v.* People, 97 Ill. 32; State *v.* Williams, 152 Mo. 115, 53 S. W. 127; Lindley *v.* State, 38 Ohio St. 507; Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370.

67. Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; Parker *v.* People, 97 Ill. 32.

Financial Condition of Accused. It is competent to show that he in whose favor the alleged false instrument was drawn was in embarrassed circumstances at the time it was uttered by him. State *v.* Smith, 5 Day (Conn.) 175.

68. Watson *v.* State, 78 Ga. 349; State *v.* Beasley, 84 Iowa 83, 50 N. W. 570; State *v.* Lane, 80 N. C. 407.

69. In United States *v.* Brooks, 3 McArthur (U. S.) 315, the government introduced testimony that defendant presented a trust deed and obtained a loan upon the same. The defendant objected, and asked the court to exclude the testimony for the reason that said deed of trust and note having been delivered to Starr after the making and recording of the alleged false deed formed an entirely different transaction and was therefore inadmissible. *Held,* that

the paper accompanied by silence, when identified as the party to whom the writing purports to belong.[70]

C. Other Forgeries. — The fact that the accused uttered other false writings under similar circumstances is admissible,[71] but if

the evidence was properly admitted. "Obtaining the money on the deed of trust upon property which had been conveyed by a forged deed immediately or shortly previous thereto was evidence of the fraudulent intent with which the original deed was executed."

Knowledge of Falsity May Be Inferred. — Where it was established that the defendant in an indictment for uttering a forged note had falsely represented that he was the payee thereof, it was a circumstance tending to impeach the good faith of the transaction and sufficient to justify an inference that the defendant was aware of the falsity of the instrument. State *v.* Williams, 66 Iowa 573, 24 N. W. 52.

70. State *v.* Vineyard, 16 Mont. 138, 40 Pac. 173.

71. *England.* — Rex *v.* Smith, 2 Car. & P. 633; Rex *v.* Ball, Russ & R. 132.

California. — People *v.* Frank, 28 Cal. 507.

Florida. — Langford *v.* State, 33 Fla. 233, 14 So. 815.

Illinois. — Steele *v.* State, 45 Ill. 152; Anson *v.* People, 148 Ill. 494, 35 N. E. 145.

Indiana. — Harding *v.* State, 54 Ind. 359; Robinson *v.* State, 66 Ind. 331.

Iowa. — State *v.* Prins, 117 Iowa 505, 91 N. W. 758.

Maryland. — Bishop *v.* State, 55 Md. 138.

Massachusetts. — Com. *v.* Stone, 4 Metc. 43; Com. *v.* Price, 10 Gray 472; Com. *v.* Edgerly, 10 Allen 184; Com. *v.* Miller, 3 Cush. 243; Com. *v.* White, 145 Mass. 392, 14 N. E. 611.

Michigan. — Carver *v.* People, 39 Mich. 786.

Missouri. — State *v.* Hodges, 144 Mo. 50, 45 S. W. 1093.

Nebraska. — Davis *v.* State, 58 Neb. 465, 78 N. W. 930; Burlingim *v.* State, 61 Neb. 276, 85 N. W. 76.

New York. — People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62.

Ohio. — Lindsey *v.* State, 38 Ohio St. 507.

Oregon. — State *v.* Childers, 32 Or. 119, 49 Pac. 801.

South Carolina. — State *v.* Williams, 2 Rich. 418, 45 Am. Dec. 741; State *v.* Allen, 56 S. C. 495, 35 S. E. 204.

Tennessee. — Garner *v.* State, 5 Lea 213; Foute *v.* State, 15 Lea 712.

Texas. — Ham *v.* State, 4 Tex. App. 645; Francis *v.* State, 7 Tex. App. 501; Heard *v.* State, 9 Tex. App. 1; Mallory *v.* State, 37 Tex. Crim. 482, 36 S. W. 750; McGlasson *v.* State, 37 Tex. Crim. 620, 4 S. W. 503.

Virginia. — Spencer *v.* Com., 2 Leigh 751; Hendrick *v.* Com., 5 Leigh 707.

Wisconsin. — State *v.* Cole, 19 Wis. 142.

In Bell *v.* State, 57 Md. 108, the court held that "It is not often possible to prove by positive and direct evidence that a party who utters a forged paper has a knowledge that it is forged. When it has been proved that the party charged has done the act for which he is indicted, the question still remains whether he committed it with guilty knowledge or whether he acted under a mistake; and evidence which tends to prove that he was pursuing a course of similar acts raises a presumption that he was not acting under a mistake, but with guilty knowledge and intent, and is admissible for that purpose.

In State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561, Dent, J., stated: "Not only must it be shown to have been forged, but the prisoner must be shown to have had a questionable connection with it. It is true that the prisoner denied all connection with such check; so he denied all connection with the check on which the indictment was founded, and yet the jury found against him; and the mere intimation that he had forged other checks even in presence of his denial may have prejudiced him with

such writings are put in evidence they must be shown to be forgeries, even if found in the possession of the accused.[72] The possession of other similar instruments by the one accused of uttering the forgery is sufficient to raise a presumption that the uttering was accomplished with guilty knowledge as to the false character of the document.[73]

the jury, coupled with the fact that the court refused to reject such improper testimony."

Notice Not Necessary Before Offering Evidence. — In United States *v.* Doebler, 1 Baldw. 519, 25 Fed. Cas. No. 14,977, Baldwin, J., stated: "If the note he is charged with forging, passing or delivering is of the same kind or character with others which he has disposed of, or retains in his possession, he has notice in effect that if practicable to procure it evidence will be given of their counterfeit character, and of his having passed them as true. . . . With the notes in his pocket he cannot complain that he is ignorant of their character; if he has put them off he knows to whom, and can trace them as easily as the prosecutor; if he has retained a part he can better compare them, and thus avoid the imposition to his charge of notes for which he is not accountable. . . . The law, the knowledge of the defendant, and his counsel, all inform him that the passing of other similar notes will be brought into question, and this is legal notice not only to this extent, but as to any letters or other papers in the hands of himself, his confederates or others, which would be legal evidence if the originals were produced."

72. State *v.* Cole, 19 Wis. 142; People *v.* Whiteman, 114 Cal. 338, 46 Pac. 99; State *v.* Breckenridge, 67 Iowa 204, 25 N. W. 130; State *v.* Saunders, 68 Iowa 370, 27 N. W. 455; State *v.* Prins, 113 Iowa 72, 84 N. W. 980; State *v.* Wills, 70 Minn. 403, 73 N. W. 177; People *v.* Aultman, 147 N. Y. 473, 42 N. E. 180; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

In People *v.* Bird, 124 Cal. 32, 56 Pac. 639, the prosecution introduced a number of checks drawn in the name of the purported maker of the instrument in issue upon the bank. There was no evidence whatever to connect defendant with these forgeries, if they were such. Temple, J., said: "The prosecution assumed the same burden of proof as to each of the checks introduced to show guilty knowledge as in regard to the check for which he was being tried. Without such proof there can be no doubt that the evidence was improperly admitted."

Must Be Produced or Accounted For. — In State *v.* Breckenridge, 67 Iowa 204, 25 N. W. 130, the defendant was convicted of forging a note. For the purpose of showing a guilty knowledge the prosecution offered to prove another forgery of a note by the defendant. The note was not produced, but one Campbell was called as a witness, and was allowed, against the objection of the accused, to testify in relation to said note. His testimony was to the effect that he had seen the note, and that in his opinion the signatures to it were in the same handwriting as the signatures to the note upon which the indictment was based. Adams, J., held that "In allowing such evidence without the production of the note, we think that the court erred. If the note had been produced it may be that a mere comparison of the signature would have been sufficient to rebut Campbell's testimony. But if not, it was the defendant's privilege to examine witnesses in regard to the genuineness of the signatures, and the production of the note was necessary for this purpose. We do not say that Campbell's testimony would have been admissible if the note had been produced. Upon that question we might not be agreed, but it is clear that it was inadmissible without the production of the note."

73. Johnson *v.* State, 35 Ala. 370; Anson *v.* People, 148 Ill. 494, 35 N. E. 145; State *v.* Breckenridge, 67 Iowa 204, 25 N. W. 130; State *v.* Saunders, 68 Iowa 370, 27 N. W. 455; Bishop

D. Writings in Support of the Forgery. — A false and fictitious writing, obtained by one charged with forgery by impersonating the purported maker, and used by him in support of the instrument alleged to be forged, is admissible to show the guilty knowledge of the character of the instrument uttered.[74]

v. State, 55 Md. 138; Com. *v.* Russell, 156 Mass. 196, 30 N. E. 763; Lindsay *v.* State, 38 Ohio St. 507.

In State *v.* Cole, 19 Wis. 142, Cole, J., held that evidence of the passing of other counterfeit bills cannot be admitted, unless the other bills are produced in court, or their absence accounted for, as in other cases where secondary evidence is admissible.

In Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772, objection was made to the introduction of three other checks, it having been shown that they were not genuine by the testimony of the assistant cashier of the bank upon which they were drawn. *Held*, "The possession of similar checks bearing false certifications was admissible evidence as tending to show the guilty intent of appellant with respect to the check charged in the indictment."

74. State *v.* Williams, 27 Vt. 724. In Hennessey *v.* State, 23 Tex. Crim. 340, 5 S. W. 215, it was held: "That they are not papers of contemporaneous date with the alleged forged paper is not a valid objection to them. It was the object of the prosecution by this collateral evidence to show a system of fraudulent acts on the part of the defendant to obtain money from the state to which he was not entitled, and thus to show that in the alteration of the particular instrument he was actuated by such fraudulent intent. 'When the object is to show system, subsequent as well as prior offenses, when tending to establish identity or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts the more complete the induction is. The time of the collateral inculpatory facts is immaterial, provided they be close enough together to indicate that they are a part of a system.'"

FORMER CONVICTION.

By Charles M. Bufford.

CROSS-REFERENCES:

Former Jeopardy;
Judgments.

I. FACT OF CONVICTION.

It often happens that, in order to increase the penalty assessable, an indictment contains an averment that the defendant has theretofore been convicted of some particular offense.

1. Record Evidence. — The record of the former prosecution showing the former conviction is proper evidence to prove the former conviction, without the necessity of producing the former indictment.[1]

2. Other Evidence. — Where the record cannot for any reason be produced, docket entries of the former conviction may be admitted in evidence.[2]

1. State *v.* Lashus, 79 Me. 504, 11 Atl. 180.

The transcript of the judgment of former conviction reciting that the case was tried before a judge *pro tem.,* in order to be admissible as evidence, need not contain a copy of the judge's appointment as such, nor set forth the reasons for such appointment, nor show that the judgment of former conviction was signed by the judge of the court. Myers *v.* State, 92 Ind. 390.

Where an indictment avers a conviction for the same offense, and the verdict of conviction rendered thereunder is in full force, the fact that sentence has not been passed does not render docket entries of the former conviction inadmissible in proof thereof, where the record has not been extended. State *v.* Hines, 68 Me. 202.

2. State *v.* O'Connell (Me.), 14 Atl. 291.

II. TIME OF FORMER OFFENSE.

It seems that proof must be given that the former conviction was obtained for an offense committed before the offense charged in the subsequent prosecution.[3]

III. IDENTITY OF ACCUSED AND CONVICT.

The mere fact that documentary evidence offered to prove the former conviction shows the conviction of a person of the same name as the subsequent defendant does not of itself sufficiently show the identity of the offender to sustain the averment of former conviction.[4]

IV. QUESTIONS FOR COURT AND JURY.

Where only documentary evidence is introduced on the issue of former conviction, the court may direct a verdict, or in other states determine the question itself.[5]

3. Com. *v.* Daley, 4 Gray. (Mass.) 209.

4. Reg. *v.* Kennedy, 10 Ont. (Q. B.) 397. *Compare* Reg. *v.* Edgar, 15 Ont. C. P. 142, where judgment on this question was expressly reserved. "The identity of name is some evidence of identity of person, more or less potent, according to its connecting circumstances, but it is not, certainly in this case, sufficiently conclusive to authorize the court to take it from the jury and treat it as a question of law." "The identity of the defendant on trial with the person named in the record is a question of fact." State *v.* Lashus, 79 Me. 504, 11 Atl. 180.

5. Where docket entries showing a former conviction are offered in evidence under an indictment charging a former conviction, and there is no question of identity, the court may properly instruct the jury that the evidence constitutes sufficient proof of the former conviction charged. State *v.* O'Connell (Me.), 14 Atl. 291.

Where evidence of former conviction of selling or furnishing intoxicating liquors is given in proof, but the evidence given is merely the record of the former conviction, the identity of the defendant not being in question, the issue of former conviction is to be determined by the court without the intervention of a jury. State *v.* Haynes, 36 Vt. 667, where the question is reasoned at length.

FORMER JEOPARDY.

By Chas. M. Bufford.

CROSS-REFERENCES:

Former Conviction;
Judgments.

INTRODUCTION.

Scope of Article. — Under the title "Former Jeopardy"[1] is here included a discussion of evidence receivable not only on a plea of once in jeopardy made by a defendant in a criminal case, but also on a similar plea of former conviction or former acquittal.[2]

1. Jeopardy Defined. — "The term 'jeopardy' signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when a valid indictment had been found and a petit jury has been impaneled and sworn to try the case and a true verdict render." State *v.* Manning, 168 Mo. 418, 68 S. W. 341. See also Lyman *v.* State, 47 Ala. 686.

2. Nature of Plea. — "The plea

I. QUESTIONS TO BE PROVED.

In the proof of former jeopardy, these four principal matters of fact must be established: A former prosecution in the same state as the subsequent prosecution;[3] the fact that some person was placed in jeopardy by the former prosecution; the identity of the person so placed in jeopardy in the two prosecutions;[4] and the particular offense for which the jeopardy formerly attached (which offense must be such a matter of law as to constitute a bar to the subsequent prosecution).[5] Nothing further need be shown.[6]

II. BURDEN OF PROOF AND DEGREE REQUISITE.

1. Burden of Proof. — In order to sustain a defense of former

of former conviction is not a plea upon the merits. It is not an inquiry as to anything that the defendant has or has not done, and is not, therefore, of a criminal nature. It is a collateral civil inquiry as to what action the court has taken on a former occasion." State *v.* Ellsworth, 131 N. C. 773, 42 S. E. 669, 92 Am. St. Rep. 799; *per* Clark, J., Furches, C. J., Montgomery and Cook, JJ.; Douglas, J., *dissenting.*

3. The matters to be proved to establish the plea are not stated in the form in the cases, but the statements made, and the proof required, involve these elements.

An indictment under which the defendant could have been lawfully convicted of the offense charged in the present indictment must be shown. Reg. *v.* Bird, 5 Cox C. C. (Eng.) 20.

On a plea of former acquittal the defendant must establish that the acquittal was had on a hearing on the merits. State *v.* Waterman, 87 Iowa 255, 54 N. W. 359.

A plea of former jeopardy requires the consideration of whether in fact the party pleading the defense had before been put in jeopardy. Com. *v.* Roby, 12 Pick. (Mass.) 496.

The defendant must prove that he had formerly been put upon trial under a valid indictment charging him with the same offense. O'Connor *v.* State, 28 Tex. App. 288, 13 S. W. 14.

In order to establish jeopardy it is necessary to show the validity of the former indictment. Harrison *v.* State, 36 Ala. 248.

4. **Identity of Defendant in the Two Prosecutions Must Be Proved; Otherwise the Defense Cannot Be Sustained.** — Emerson *v.* State, 43 Ark. 372; Peachee *v.* State, 63 Ind. 399; See Com. *v.* Roby, 12 Pick. (Mass.) 496; Corbey's Anno. Stat. (Neb.) 1903, § 2583.

5. **Identity of Two Offenses Prosecuted for Must Be Proved; Otherwise the Defense Cannot Be Sustained.**

England. — Reg. *v.* Bird, 5 Cox C. C. 11; Reg. *v.* Bird, 5 Cox C. C. 20.

Alabama. — Faulk *v.* State, 52 Ala. 415.

Arkansas. — Emerson *v.* State, 43 Ark. 372.

Georgia. — Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238.

Indiana. — Jenkins *v.* State, 78 Ind. 133.

Iowa. — State *v.* Waterman, 87 Iowa 255, 54 N. W. 359.

Kentucky. — Vowells *v.* Com., 83 Ky. 193.

Mississippi. — Rocco *v.* State, 37 Miss. 357.

Missouri. — State *v.* Andrews, 27 Mo. 267; State *v.* Wister, 62 Mo. 592.

Nebraska. — Corbey's Anno. Stat. 1903, § 2583.

New York. — People *v.* Cramer, 5 Park. Crim. Rep. 171.

6. **Proof of the Four Matters of Fact Sufficient; Nothing Further Need Be Shown.** — Reg. *v.* Bird, 5

jeopardy, a defendant making it must affirmatively show facts sufficient to raise a presumption of former jeopardy.[7]

2. Rebuttal. — The prosecution may rebut such *prima facie* case by other competent evidence.[8]

3. Degree Requisite Where Evidence Conflicting. — Where evidence in opposition to the defense is introduced, the defendant must establish his former jeopardy by a preponderance of evidence.[9]

4. Where Opposing Evidence Not Introduced. — In the absence of a contrary showing, a *prima facie* case of former jeopardy becomes conclusive.[10]

III. MANNER OF PROOF.

1. Admissibility of Former Record. — The fact that the former judgment was irregular or voidable, but was not void, and was in full force, does not render the record of the former prosecution inadmissible.[11] The record, in order to be admissible, need not

Cox C. C. 20; State *v.* Nunnelly, 43 Ark. 68; State *v.* Reed, 26 Conn. 202.

7. Burden of Proof Lies on Defendant; He Must Show Former Jeopardy. — *England.* — Rex *v.* Parry, 7 Car. & P. 836; Reg. *v.* Bird, 5 Cox C. C. 11; Reg. *v.* Bird, 5 Cox C. C. 20.

Alabama. — Oakley *v.* State, 135 Ala. 29, 33 So. 693.

Arkansas. — Emerson *v.* State, 43 Ark. 372.

Indiana. — Cooper *v.* State, 47 Ind. 61.

Kentucky. — Vowells *v.* Com., 83 Ky. 193; Chesapeake & O. R. R. Co. *v.* Com., 88 Ky. 368, 11 S. W. 87.

Massachusetts. — Com. *v.* Daley, 4 Gray 209; Com. *v.* Wermouth, 174 Mass. 74, 54 N. E. 352.

Mississippi. — Rocco *v.* State, 37 Miss. 357.

Missouri. — State *v.* Andrews, 27 Mo. 267; State *v.* Small, 31 Mo. 197.

Nebraska. — Corbey's Anno. Stat. 1903, § 2583.

New Jersey. — State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York. — People *v.* Cramer, 5 Park. Crim. Rep. 171; People *v.* Trimble, 60 Hun 364, 15 N. Y. Supp. 60, *affirmed* 131 N. Y. 118, 29 N. E. 1100; People *v.* Satchwell, 61 App. Div. 312, 15 N. Y. Crim. 450, 70 N. Y. Supp. 307.

North Carolina. — State *v.* Ellsworth, 131 N. C. 773, 42 S. E. 699, 92 Am. St. Rep. 790.

Texas. — Hozier *v.* State, 6 Tex. App. 501; O'Connor *v.* State, 28 Tex. App. 288, 13 S. W. 14; Davidson *v.* State, 40 Tex. Crim. 285, 49 S. W. 372.

"The defendant asserts the affirmative of the issue, and the obligation rests on him to prove it." Willis *v.* State, 24 Tex. App. 586, 6 S. W. 857.

8. Prosecution May Rebut Prima Facie Case Made by Defendant. State *v.* Nunnelly, 43 Ark. 68; State *v.* Maxwell, 51 Iowa 314; People *v.* McGowan, 17 Wend. (N. Y.) 386; Bainbridge *v.* State, 30 Ohio St. 264.

9. Former Jeopardy Must Be Established by Preponderance of Evidence. — State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27; Willis *v.* State, 24 Tex. App. 586, 6 S. W. 857; Davidson *v.* State, 40 Tex. Crim. 285, 49 S. W. 372.

"When the guilt of the defendant is in question he is protected by the presumption of innocence, but when a former acquittal is in question the defendant has no such presumption to aid him." State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264.

10. Where Prosecution Does Not Rebut Prima Facie Case Made by Defendant, it Becomes Conclusive. State *v.* Nunnelly, 43 Ark. 68.

11. Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34.

of itself identify the particular offense for which the former jeopardy attached;[12] and the fact that the former prosecution is alleged to have been collusive does not impair the admissibility of the record.[13]

2. Necessity of Production of Record. — In General. — The record of the former proceeding, if it exists and can be produced, or a duly certified copy thereof, is evidence indispensable to sustaining the defense of former jeopardy.[14] It is only necessary to put in evidence the material parts of the record;[15] yet mere fragments thereof are not admissible.[16]

Waiver of Production. — The production of the record may be waived by a failure to object to the use of other evidence,[17] or by an admission as to what the record if produced would prove.[18]

Judicial Notice Dispensing With Production. — It seems that on the subsequent trial of the same cause in the same court, the court will take judicial notice of the record made pursuant to the former trial.[19]

3. Evidence Outside of Record. — A. ADMISSIBILITY. — a. *In*

12. Record Need Not Identify Offense. — United States *v.* Claflin, 25 Fed. Cas. No. 14,798; Goudy *v.* State, 4 Blackf. (Ind.) 548.

13. Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34.

14. Record is Proper and Indispensable Evidence; it Cannot Be Dispensed With by Other Proof.

England. — Rex *v.* Bowman, 6 Car. & P. 101. *Contra.* — Rex *v.* Parry, 7 Car. & P. 836.

Arkansas. — Moore *v.* State, 51 Ark. 130, 10 S. W. 22.

Indiana. — State *v.* O'Connor, 4 Ind. 299; Marshall *v.* State, 8 Ind. 498 (where transcript used); Cooper *v.* State, 47 Ind. 61; Farley *v.* State, 57 Ind. 331; Wilkinson *v.* State, 59 Ind. 416, 26 Am. Rep. 84; Walter *v.* State, 105 Ind. 589, 5 N. E. 735. *Compare* Dunn *v.* State, 70 Ind. 47.

Louisiana. — State *ex rel.* Voorhies *v.* Judge, 42 La. Ann. 414, 7 So. 678.

Mississippi. — Rocco *v.* State, 37 Miss. 357; Brown *v.* State, 72 Miss. 95, 16 So. 202.

Missouri. — State *v.* Edwards, 19 Mo. 674; State *v.* Andrews, 27 Mo. 267; State *v.* Orr, 64 Mo. 339.

Nebraska. — Corbey's Anno. Stat. 1903, § 2583.

New Jersey. — State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York. — People *v.* Benjamin, 2 Park. Crim. Rep. 201.

Ohio. — Robbins *v.* Budd, 2 Ohio 16.

Tennessee. — Jacobs *v.* State, 4 Lea 196.

Vermont. — State *v.* Ainsworth, 11 Vt. 91.

West Virginia. — State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

On a plea of former conviction, the indictment on which the former conviction was founded, with the finding of the jury marked upon the back of it, cannot be used as evidence of the fact of former conviction. Rex *v.* Bowman, 6 Car. & P. (Eng.) 101.

On a trial for assault, where former conviction is pleaded, an offer as evidence of the docket entry of a justice of the peace imposing a fine on the defendant for an assault upon the person named in the indictment as the assaulted party, where the docket was not a certified copy from the justice's record nor accompanied by an offer to prove its genuinenss, is properly refused. Moore *v.* State, 51 Ark. 130, 10 S. W. 22.

15. Jenkins *v.* State, 78 Ind. 133.

16. Jenkins *v.* State, 78 Ind. 133. See Boyer *v.* State, 16 Ind. 451.

17. Wilkinson *v.* State, 59 Ind. 416, 26 Am. Rep. 84.

18. Cooper *v.* State, 47 Ind. 61.

19. Court Will Take Judicial

General. — Evidence outside the record is not admissible as tending to prove any fact evidenced by the record,[20] and extrinsic evidence cannot be admitted to contradict, amend or supplement the record in respect to any material averment contained therein,[21] although by such evidence the defense might be established;[22] but the record may be varied by extrinsic evidence as a matter immaterial to a conviction under it.[23]

b. *Impeaching Record.* — The invalidity or collusive character of the former prosecution, rendering it void, may be shown by extrinsic evidence.[24]

c. *Inability to Produce Record.* — Where the record of the former proceeding, or a certified copy thereof, cannot for any reason be produced, the fact of former jeopardy may be proved by other evidence,[25] or where a portion of the record cannot be produced,

Notice of Its Own Record in Same Cause. — State *v.* Bowen, 16 Kan. 475; George *v.* State, 59 Neb. 163, 80 N. W. 486.

20. Extrinsic Evidence Not Admissible as Tending to Prove Any Fact Evidenced by Record. — People *v.* Benjamin, 2 Park. Crim. Rep. (N. Y.) 201.

Thus where a plea of former jeopardy is made on the ground that the jury in a former trial of the cause were dismissed without adequate cause, a record showing a proper order of mistrial is conclusive evidence that the order was properly made. Kinkle *v.* People, 27 Colo. 459, 62 Pac. 197.

21. Record Cannot Be Materially Varied by Extrinsic Evidence.

Alabama. — See Martha *v.* State, 26 Ala. 72.

Colorado. — Kinkle *v.* People, 27 Colo. 459, 62 Pac. 197.

Indiana. — Conway *v.* State, 4 Ind. 94.

Louisiana. — State *ex rel.* Voorhies *v.* Judge, 42 La. Ann. 414, 7 So. 678.

Texas. — Vestal *v.* State, 3 Tex. App. 648.

"This is in accordance with the general principle that matters of record can only be proved by the introduction of the record itself, and, when introduced, it can neither be contradicted, supplemented nor amended by extrinsic testimony." State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

22. Conway *v.* State, 4 Ind. 94.

23. On a prosecution for passing counterfeit state bank notes payable to A, the introduction as evidence of a record of a conviction for passing counterfeit state bank notes payable to B, together with proof that both prosecutions were as matter of fact for passing the identical notes, and not, as would appear from the record, for passing different notes, is sufficient to establish a defense of former conviction. Porter *v.* State, 17 Ind. 415.

24. Record May Be Impeached by Extrinsic Evidence. — State *v.* Reed, 26 Conn. 202, where former conviction was shown to have been obtained by the procurement and at the solicitation of the defendants. Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34, where collusion was shown. State *v.* Maxwell, 51 Iowa 34, where fraud was shown.

25. Where Record Cannot Be Produced, Other Evidence Admissible. — See Walter *v.* State, 105 Ind. 589, 5 N. E. 735. See State *v.* Neagle, 65 Me. 468, where docket entries were read to the jury in default of a more extended record; People *v.* Benjamin, 2 Park. Crim. Rep. (N. Y.) 201, where the record was not made up.

In Ohio it seems that if there is no record, the plea must be established by a certified transcript from the docket of the justice who made the judgment of conviction, and cannot be proved orally. Robbins *v.* Budd, 2 Ohio 16.

such part may be established by extrinsic evidence.[26]

B. Extrinsic Evidence of Identity of Parties and Offenses. — Admissibility in General. — The identity or non-identity of the former and subsequent parties or offenses may be shown by extrinsic evidence,[27] unless where the identity or non-identity of the offenses affirmatively appears from the face of the record.[28] The fact that the former record introduced in evidence does not show the particular offense under which the state elected to try the defendant, but is broad enough to cover the subsequent offense, does not render extrinsic proof of identity inadmissible.[29]

4. Showing Jeopardy Where No Verdict Rendered. — A record showing a discharge of the jury without a verdict does not raise a presumption of former jeopardy, but rather that the discharge was made for legal cause.[30] Extrinsic evidence as to the sufficiency of

26. Territory *v.* Stocker, 9 Mont. 6, 22 Pac. 496.

27. *England.* — Reg. *v.* Bird, 5 Cox C. C. 11; Reg. *v.* Bird, 5 Cox C. C. 20.

United States. — Dunbar *v.* United States, 156 U. S. 185; Durland *v.* United States, 161 U. S. 306.

Illinois. — See Swalley *v.* People, 116 Ill. 247, 4 N. E. 379.

Indiana. — Goudy *v.* State, 4 Blackf. 548; State *v.* O'Connor, 4 Ind. 299; Marshall *v.* State, 8 Ind. 498; Cooper *v.* State, 47 Ind. 61; Dunn *v.* State, 70 Ind. 47.

Iowa. — State *v.* Waterman, 87 Iowa 255, 54 N. W. 359.

Louisiana. — State *ex rel.* Voorhies *v.* Judge, 42 La. Ann. 414, 7 So. 678.

Mississippi. — Rocco *v.* State, 37 Miss. 357; Brown *v.* State, 72 Miss. 95, 16 So. 202.

Missouri. — State *v.* Thornton, 37 Mo. 360.

New Jersey. — State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York. — People *v.* Cramer, 5 Park. Crim. Rep. 171.

Ohio. — Bainbridge *v.* State, 30 Ohio St. 264.

Vermont. — State *v.* Ainsworth, 11 Vt. 91.

West Virginia. — State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

Contra. — *Georgia.* — See Lovett *v.* State, 80 Ga. 255, 4 S. E. 912.

28. Where Identity of Offenses Appears of Record, it Seems That Extrinsic Evidence Thereof is Improper. — Reg. *v.* Bird, 5 Cox C. C. 20; Goudy *v.* State, 4 Blackf. (Ind.) 548; State *v.* Waterman, 87 Iowa 255, 54 N. W. 359; State *v.* Thornton, 37 Mo. 360; People *v.* Cramer, 5 Park. Crim. Rep. (N. Y.) 171; State *v.* Haynes, 35 Vt. 565.

29. Bainbridge *v.* State, 30 Ohio St. 264.

30. Record Showing Discharge Without Verdict Does Not Raise Presumption of Former Jeopardy. People *v.* Greene, 100 Cal. 140, 34 Pac. 630; Kinkle *v.* State, 27 Colo. 459, 62 Pac. 197; O'Connor *v.* State, 28 Tex. App. 288, 13 S. W. 14.

Thus the introduction as evidence merely of the record showing that the defendant had once before been tried on the same information and that the jury had been discharged on their statement that they could not agree, after deliberating six hours, is insufficient as matter of law to sustain the defense. The record was not required to show that it satisfactorily appeared to the judge that there was no reasonable probability that the jury could agree. People *v.* Greene, 100 Cal. 140, 34 Pac. 630.

Contra. — A record showing a discharge of the jury without a verdict raises a presumption of former jeopardy. Dobbins *v.* State, 14 Ohio St. 493.

See Helm *v.* State, 67 Miss. 562, 7 So. 487, where, such a record being introduced, the state offered evidence showing legal cause for the discharge of the jury.

Until the defense of former jeopardy is established by affirmative proof, the presumption will prevail

the cause of discharge is admissible, unless the sufficiency thereof is shown by the record.[31]

5. Proof of Identity of Parties and Offenses. — A. Competency of Witnesses. — Any person present at the former trial, as the trial judge or a juror, may be called to establish the identity of parties or offenses,[32] and may testify in respect to what occurred on the former trial.[33] A witness present at both trials may be asked whether the offense charged in the former information was the same as that testified to on the subsequent trial, and whether or not the evidence given on both trials was the same.[34]

B. Presumption From Identity of Indictments. — First Group of States. — In case of offenses which in their nature are capable of repetition, in some states the identity of the offenses cannot be presumed from the identity of the former and subse-

that the trial court in discharging the jury acted upon legal cause and did not abuse its discretion. O'Connor *v.* State, 28 Tex. App. 288, 13 S. W. 14.

31. Extrinsic Evidence as to the Cause of Discharge Admissible. Where the jury were discharged without a verdict, the defendant may prove his plea by oral evidence, including that of the judge who presided at the trial and the jurors who were discharged on that trial. A bill of exceptions showing what occurred on the former trial is unnecessary. Kinkle *v.* People, 27 Colo. 459, 62 Pac. 197.

In order to show legal cause for the discharge of the former jury, testimony of the judge who conducted the former trial and of the jurors who were there impaneled as to the impossibility of an agreement, together with the communications in writing sent by the jury to the judge stating the impossibility of their agreement, are proper evidence. Helm *v.* State, 67 Miss. 562, 7 So. 487.

32. Any Person Present May Testify to Identity. — Dunn *v.* State, 70 Ind. 47, where a juror at the former trial testified.

State *v.* Maxwell, 51 Iowa 314 (where the justice who presided at the former trial testified); State *v.* Waterman, 87 Iowa 255, 54 N. W. 359 (where the judge who presided at both trials testified).

On a subsequent trial for arson, a witness may properly be asked whether the former prosecution had reference to the very house involved in the subsequent prosecution. Page *v.* Com., 27 Gratt. (Va.) 954.

Where no evidence is offered on the former trial and an acquittal takes place, what the offense charged was may be proved "(1) by the testimony of witnesses who are subpoenaed to go, and did go, before the grand jury by the proof of what they then swore, or (2) perhaps by a grand juryman himself, or (3) by the evidence of the prosecutor, or (4) by proof how the case was opened by counsel for him; in short, by any evidence which would show what crime was the subject of the inquiry and identify the charge, and limit and confine the generality of the indictment to a particular case." *Per* Parke, B., in Reg. *v.* Bird, 2 Cox C. C. 20. See also remarks of Jervis, C. J., in Reg. *v.* Bird, 5 Cox C. C., p. 98.

33. Reg. *v.* Bird, 5 Cox C. C. 20.

34. "If the witnesses were the same and they described a certain transaction, any one who heard them on both occasions could properly state such fact. Such evidence would tend to prove the identity of the two offenses. It was not admissible for any other purpose. Properly speaking, it was not an opinion the witness was asked to communicate, but a fact that occurred in his presence. State *v.* Maxwell, 51 Iowa 314.

quent indictments, but must be proved.[35] It seems, however, that where a continuing offense is charged, the identity of the offenses is *prima facie* presumed from the substantial identity of the indictments.[36]

Second Group of States. — In other states, however, a *prima facie* presumption of former jeopardy arises from the identity of the indictments in material respects (a variation in the time when the offense is averred to have been committed being deemed immaterial).[37] This presumption arising from the identity of the indict-

35. Where Offense Capable of Repetition, Identity Cannot Be Presumed From Identity of Indictments.

Arkansas. — Emerson *v.* State, 43 Ark. 372.

Indiana. — Marshall *v.* State, 8 Ind. 498.

Iowa. — See State *v.* Waterman, 87 Iowa 255, 54 N. W. 359.

Massachusetts. — Com. *v.* Southerland, 109 Mass. 342; Com. *v.* Wermouth, 174 Mass. 74, 54 N. E. 352.

Mississippi. — Rocco *v.* State, 35 Miss. 357.

Texas. — Campbell *v.* State, 2 Tex. App. 187; Reed *v.* State (Tex. Crim.), 29 S. W. 1085.

Illustrations. — Although on a plea of former conviction interposed in a prosecution for selling liquor to a minor, defendant put in evidence the former record, showing an indictment the counterpart of the subsequent indictment except as to the date at which the offense was averred to have been committed, a presumption of the identity of the offenses is not raised thereby. Emerson *v.* State, 43 Ark. 372.

Where a person indicted for keeping an unlicensed dog at W. on August 24, 1898, pleads a former acquittal and puts in evidence a certified copy of a complaint charging him with keeping an unlicensed dog at the same place at the same time, and the record of his trial for and acquittal of the offense, but fails to identify the dog mentioned in the two indictments as the same, he having several dogs, a verdict finding against the plea will be sustained. Com. *v.* Wermouth, 174 Mass. 74, 54 N. E. 352.

Under a statute making each day's keeping of a disorderly house a separate offense, where a plea of former acquittal is made, a record including an indictment in all respects the same does not make a *prima facie* case of former acquittal without proof that the former prosecution was for keeping the house on the same day as that for which the latter prosecution was conducted. Reed *v.* State (Tex. Crim. App.), 29 S. W. 1085.

36. Reed *v.* State (Tex. Crim. App.), 29 S. W. 1085.

37. Identity Presumed From Identity of Indictments.

England. — Rex *v.* Parry, 7 Car. & P. 836. But *compare* Parke, B., in Reg. *v.* Bird, 5 Cox C. C. 20.

Georgia. — Bryant *v.* State, 97 Ga. 103, 25 S. E. 450; Craig *v.* State, 108 Ga. 776, 33 S. E. 653; McWilliams *v.* State, 110 Ga. 290, 34 S. E. 1016.

New York. — People *v.* McGowan, 17 Wend. 386; People *v.* Satchwell, 61 App. Div. 312, 15 N. Y. Crim. 450, 70 N. Y. Supp. 307. *Contra.* People *v.* Cramer, 5 Park. Crim. Rep. 171.

Ohio. — Bainbridge *v.* State, 30 Ohio St. 264.

In many states the test of the identity of the offenses necessary to constitute former jeopardy is said to be whether or not the testimony necessary to sustain the subsequent indictment would have been sufficient to sustain the former indictment; where this test prevails it would seem that a showing that the former and the subsequent indictments are identical in material averments would of itself raise a presumption of the truth of the plea. The presumption is not, however, conclusive, but may be rebutted where, in point of fact, the offenses are distinct. Duncan *v.* Com., 6 Dana (Ky.) 295; Chesapeake & O. R. R. Co. *v.* Com., 88 Ky. 368,

ments becomes conclusive where a plea of guilty was made to the former indictment.[38]

IV. DETERMINATION OF QUESTION.

In General. — The relative provinces of judge and jury in the determination of the question of former jeopardy are the same as on other questions.[39] Where only the record of the former proceeding is introduced in evidence on a defense of former jeopardy, the question of former jeopardy is properly decided by the court.[40] Where evidence outside the record is introduced, the question must be referred to a jury for determination, and is within their exclusive province to decide.[41]

11 S. W. 87; Page *v.* Com., 27 Gratt 954.

38. Where on a plea of former conviction the defendant puts in evidence a former indictment which could be sustained by the evidence necessary to support the second indictment, and to which the accused formerly pleaded guilty, as such plea is a record admission of whatever is well averred in the indictment, it renders impossible a rebuttal of the *prima facie* presumption of former conviction made, and is conclusive of the matter. People *v.* Satchwell, 61 App. Div. 312, 15 N. Y. Crim. 450, 70 N. Y. Supp. 307.

39. State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

40. Where Record Only Introduced, Question for Court.

England. — See Reg. *v.* Bird, 5 Cox C. C. 20.

Kansas. — State *v.* Bowen, 16 Kan. 475.

Kentucky. — Brady *v.* Com., 1 Bibb 517.

Missouri. — See State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441.

North Carolina. — State *v.* Ellsworth, 131 N. C. 773, 42 S. E. 699, 92 Am. St. Rep. 790.

Tennessee. — Hill *v.* State, 2 Yerg. 248; Hite *v.* State, 9 Yerg. 357; Slaughter *v.* State, 6 Humph. 410.

Wisconsin. — Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128.

41. Where Extrinsic Evidence Introduced, Question Must Be Decided by Jury Exclusively.

England. — Rex *v.* Parry, 7 Car. & P. 836; Reg. *v.* Bird, 5 Cox C. C. 20.

California. — People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298.

Colorado. — Kinkle *v.* People, 27 Colo. 459, 62 Pac. 197.

Georgia. — Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238.

Indiana. — Willard *v.* State, 4 Ind. 407; Cooper *v.* State, 47 Ind. 61; Dunn *v.* State, 70 Ind. 47.

Kentucky. — Chesapeake & O. R. R. Co. *v.* Com., 88 Ky. 368, 11 S. W. 87; Raubold *v.* Com., 111 Ky. 433, 23 Ky. L. Rep. 735, 63 S. W. 781.

Louisiana. — State *el rel.* Voorhies *v.* Judge, 42 La. Ann. 414, 7 So. 678; State *v.* Williams, 45 La. Ann. 936, 12 So. 932.

Mississippi. — Helm *v.* State, 67 Miss. 562, 7 So. 487.

Missouri. — State *v.* Huffman, 136 Mo. 58, 37 S. W. 797; State *v.* Hatcher, 136 Mo. 641, 38 S. W. 719; State *v.* Wisebeck, 139 Mo. 214, 40 S. W. 946; State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441; State *v.* Laughlin, 68 Mo. 415, 68 S. W. 340.

Nebraska. — Arnold *v.* State, 38 Neb. 752, 57 N. W. 378.

Nevada. — State *v.* Johnson, 11 Nev. 273.

New Jersey. — State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York. — Grant *v.* People, 4 Park. Crim. Rep. 527.

Ohio. — Miller *v.* State, 3 Ohio St. 476.

Tennessee. — Hite *v.* State, 9 Yerg. 357.

Texas. — Troy *v.* State, 10 Tex. App. 319; Grisham *v.* State, 19 Tex. App. 504; Munch *v.* State, 25 Tex. App. 30, 7 S. W. 341; McCullough *v.* State (Tex. Crim.), 34 S. W. 753; Woodward *v.* State, 42 Tex. Crim. 188, 58 S. W. 135; Scott *v* State (Tex. Crim.), 68 S. W. 680; Cook *v.* State, 43 Tex. Crim. 182, 63 S. W. 872.

Utah. — People *v.* Kerm, 8 Utah 268, 30 Pac. 988.

FORMER ADJUDICATION. — See Judgment.

FORMER TESTIMONY.

By Charles M. Bufford, M. A.

CROSS-REFERENCES:

Admissions;
Depositions;
Examination of Defendant Before Committing Magistrate;
Examination of Parties Before Trial.

I. FORMER TESTIMONY AS A METHOD OF PROOF.

1. Nature and Scope. — Definition. — By former testimony is meant evidence already given by oral testimony or deposition on a former hearing of a cause then pending in a judicial tribunal.

Subject-matter of Present Article. — This article deals with the use of former testimony as independent evidence of facts relevant to an issue in a subsequent judicial proceeding, excluding, however, former testimony given on the examining trial of an accused person, or on a coroner's inquest. It does not consider its use as an admission, a confession or a declaration, as hearsay or *res gestae*,[1] or for impeachment; but merely its use as independent evidence, the grounds, conditions, method and effect of its use as such.

Nature and Value as Evidence. — Former testimony is often called hearsay,[2] but by the better opinion is original evidence,[3] in weight the equivalent of a new deposition, at any rate when preserved in the shorthand notes of an official court reporter.[4] Proof of

1. **Use as Res Gestae.** — See Rundlett *v.* Small, 25 Me. 29.

2. *Arkansas.* — Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

Massachusetts. — Warren *v.* Nichols, 6 Metc. 261.

Michigan. — Michigan Sav. Bank *v.* Estate of Butler, 98 Mich. 381, 59 N. W. 253.

New Jersey. — Berney *v.* Mitchell, 34 N. J. L. 337.

New York. — Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

Texas. — Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201.

3. Proof of former testimony is direct and immediate evidence. Wright *v.* Tatham (Q. B.), 1 Ad. & El. (Eng.) 3.

"It was not giving in evidence what a third person mentioned in an extrajudicial matter, but what he had said on his oath as a witness, in a cause in which he had been examined; it came therefore before the jury in the present cause under the sanction of an oath, and in that sacramental form in which evidence only was admissible." Strutt *v.* Bovingdon, 5 Esp. (Eng.) 56.

"The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath, and of an opportunity to cross-examine, neither of which applies to testimony given on a former trial." Minneapolis Mill Co. *v.* Minneapolis & St. L. R. Co., 51 Minn. 304, 53 N. W. 639.

"The admissibility of this species of evidence rests . . . upon a well-established exception to the rule which excludes hearsay, if, indeed, we may not, in one sense, regard it as original testimony." United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702.

4. Strutt *v.* Bovingdon, 5 Esp. (Eng.) 56; Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752. (This premise, on which this decision was founded, was not questioned in Magnes *v.* Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. 879, although the conclusion based thereon was in effect overruled.) Minneapolis Mill Co. *v.* Minneapolis & St. L. R. Co., 51 Minn. 304, 53 N. W. 639; McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

"Testimony taken down word for word at a former trial and preserved as the law provides is evidence of at least as high a grade as a deposition. The testimony is taken in open court, in the presence of parties and witnesses, under the eye and supervision of the trial judge, where there is full opportunity to examine and cross-examine the witness, to search his motives, appeal to his conscience, and test his recollection and the accuracy of his statements. So taken,

former testimony is producing testimony anew, and not in any sense using or referring to a former verdict.[5]

2. General Admissibility. — A. Admissibility as Independent Evidence in General. — a. *Oral Testimony. — In General.* — The oral testimony of a witness present in court is generally deemed the best evidence of facts within his knowledge, excluding other proof of his statements.[6] Thus as a general rule former oral testimony of a witness present in court cannot be proved as independent evidence;[7] and even where the former witness is not present at the subsequent trial his former testimony is *prima facie* inadmissible, and cannot be proved except on the special grounds and conditions hereinafter set forth.[8]

it must be as high an order of testimony as a deposition taken upon interrogatories in the private office of a notary public or some like officer in some town or city remote from the one in which the trial is had. Under our system, where the words of a witness are taken down as they fall from his lips, and are recorded by an official stenographer, who performs his duties under the sanction of an oath, the written testimony, being preserved as the statute directs, is likely to be more satisfactory and reliable than that taken in the form of a deposition." Atchison, T. & S. F. R. Co. *v.* Osborn, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189.

Contra. — A deposition "is the primary and best evidence." Gerhauser *v.* North British & Mercantile Ins. Co., 7 Nev. 174.

Proof of former testimony from the notes of the official court reporter lacks the high degree of value possessed by a deposition. Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

5. People *v.* Devine, 46 Cal. 45.

6. *Indiana.* — Larrence *v.* Lanning, 2 Ind. 256.

Kentucky. — Baylor *v.* Smithers, 1 T. B. Mon. 6.

New York. — Putnam *v.* Crombie, 34 Barb. 232, where the court said: "The object of the statute in directing evidence to be taken by the examination of witnesses in open court was to enable the judge or jury whose duty it became to determine the facts from the evidence to judge of the credibility of witnesses, and determine the weight to be given to the testimony of each in some measure from his appearance and manner on the stand."

Ohio. — Richards *v.* Foulke, 3 Ohio 52.

Pennsylvania. — Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048; Molloy *v.* United States Exp. Co., 22 Pa. Super. Ct. 173.

South Carolina. — Drayton *v.* Wells, 1 Nott & McC. 409, 9 Am. Dec. 718.

Texas. — Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201.

7. *Colorado.*—Tourtelotte *v.* Brown, 4 Colo. App. 377, 36 Pac. 73.

Illinois. — Campbell *v.* Campbell, 138 Ill. 612, 28 N. E. 1080.

Louisiana. — Rierdon *v.* Thompson, 5 La. (O. S.) 364; Trimmel *v.* Marvel, 11 La. Ann. 404.

Maryland. — Marshall *v.* Haney, 9 Gill 251.

Missouri. — State *v.* Lee, 66 Mo. 165.

Nebraska. — Lamb *v.* Briggs, 22 Neb. 138, 34 N. W. 217.

New York. — McCabe *v.* Brayton, 38 N. Y. 196.

Pennsylvania. — Stiles *v.* Bradford, 4 Rawle 394.

8. *Canada.* — Court *v.* Holland, 8 Prac. Rep. 219. But *compare* Adamson *v.* Adamson, 28 Gr. Ch. 221.

United States. — Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637.

Alabama. — Patton *v.* Pitts, 80 Ala. 373; Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Georgia. — Savannah F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183; Augusta & S. R. R. Co. *v.* Randall, 85 Ga. 297,

When Reduced to Writing Verbatim. — The fact that former testimony was reported in shorthand by the court reporter does not of itself authorize its introduction as independent evidence on a subsequent trial,[9] nor does a requirement that it be reduced to writing.[10]

When Testimony of One of Several Former Witnesses Provable. — The fact that circumstances exist which render the former testimony of a certain witness at a former hearing provable does not render that of other witnesses who testified thereat provable.[11]

b. *Former Depositions.* — Except in those chancery proceedings where depositions are favored, the foregoing statement as to oral testimony also applies to the proof of former depositions at subsequent hearings.[12]

11 S. E. 706; McElmurray *v.* Turner, 86 Ga. 215, 12 S. E. 359.

Indiana. — Hobson *v.* Harper, 2 Blackf. 308; Shearer *v.* Harber, 36 Ind. 536; Woollen *v.* Whitacre, 91 Ind. 502; Shafer *v.* Shafer, 93 Ind. 586.

Iowa. — Baldwin *v.* St. Louis, K. & N. R. Co., 68 Iowa 37, 25 N. W. 918; Case *v.* Blood, 71 Iowa 632, 33 N. W. 144.

Kentucky. — Arderry *v.* Com., 3 J. J. Marsh. 183; Johnson *v.* Com., 24 Ky. L. Rep. 842, 70 S. W. 44.

Louisiana. — Baptiste *v.* Soulie, 13 La. (O. S.) 268; Lesassier *v.* Dashiell, 14 La. (O. S.) 467; Wells *v.* Compton, 3 Rob. 171.

Maryland. — Karthaus *v.* Owings, 2 Gill & J. 430.

Michigan. — Michigan Sav. Bank *v.* Estate of Butler, 98 Mich. 381, 59 N. W. 253.

Mississippi. — Robinson *v.* Lane, 14 Smed. & M. 161; Broach *v.* Worthheimer-Swartz Shoe Co. (Miss.), 21 So. 300.

Missouri. — Leeser *v.* Boekhoff, 38 Mo. App. 445.

Nebraska. — Wittenberg *v.* Mollyneaux, 59 Neb. 203, 80 N. W. 824.

New Hampshire. — Young *v.* Dearborn, 22 N. H. 372; Robinson *v.* Gilman, 43 N. H. 295.

New York. — Ginochio *v.* Porcella, 3 Bradf. Sur. 277; Rippowan *v.* Strong, 2 Hilt. 52; Mutual Life Ins. Co. *v.* Anthony, 50 Hun 101, 4 N. Y. Supp. 501.

North Carolina. — Harper *v.* Burrow, 28 N. C. 30.

Pennsylvania. — Richardson *v.* Lessee of Stewart, 2 Serg. & R. 84; Forney *v.* Hallagher, 11 Serg. & R. 203; Powell *v.* Powell, 3 Del. Co. R. 206; *In re* Lafferty's Estate, 17 Pa. Co. Ct. R. 401, 5 Pa. Dist. R. 75.

Tennessee. — Louisville & N. R. Co. *v.* Atkins, 2 Lea 248.

Texas. — Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122.

9. Wabash R. R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005.

10. Pinnell *v.* Scriber, 1 Rob. (La.) 2.

11. Payne *v.* Price, 16 B. Mon. (Ky.) 86.

12. Where a former deposition is offered in evidence, but no ground for its admission appears, it is properly excluded.

England. — Carring *v.* Cornock, 2 Sim. 567; Blagrave *v.* Blagrave, 1 De Gex. & Sm. 252, 16 L. J. Ch. 346, 11 Jur. 744.

United States. — Tappan *v.* Beardsley, 10 Wall. 427; Brewer *v.* Caldwell, 13 Blatchf. 361, 4 Fed. Cas. No. 1848.

Arizona. — Rev. Stat. 1901, § 2523.

Georgia. — Broach *v.* Kelly, 71 Ga. 698.

Idaho. — Code Civ. Proc., §§ 4517 and 4518.

Louisiana. — Pinnell *v.* Scriber, 1 Rob. 2.

New Hampshire. — Hayward *v.* Barron, 38 N. H. 366.

New Jersey. — Trimmer *v.* Larrison, 8 N. J. L. 56.

Vermont. — Sergeant *v.* Adams, 1 Tyl. 197.

Virginia. — Powell *v.* Manson, 22 Gratt. 177.

Washington. — Bal. Anno. Codes & Stat., § 6028.

In this state "legislation has always proceeded upon the ground that the *viva voce* testimony of wit-

B. Order of Court for Admission. — It is doubtful whether a new trial may be ordered subject to the condition that former testimony may be proved without the necessity of recalling the witnesses.[13]

C. Stipulations for Admission. — a. *Validity. — Civil Cases.* A stipulation entered into by the parties to a civil cause, for the admission of proof of former testimony upon the trial thereof, is valid and binding upon the parties to it.[14] It seems that the stipulation should be in writing.[15]

Criminal Cases and Bastardy Proceedings. — In bastardy proceedings,[16] and in criminal causes,[17] such a stipulation is also valid and binding, except that in a prosecution for felony it perhaps does not bind the accused.[18]

nesses before the jury was the original right of parties and the requirement of the law; and that depositions were only taken . . . as a convenient substitute therefor, in many respects less desirable than oral testimony, and never to be used if the witness were produced in court at the trial by the opposite party." Hayward *v.* Barron, 38 N. H. 366.

Contra. — *California.* — See Code Civ. Proc., § 2034

Montana. — See Code Civ. Proc., § 3363.

North Carolina. — Mabe *v.* Mabe, 122 N. C. 552, 29 S. E. 843.

Oregon. — See Bel. & C. Anno. Codes & Stat., § 841.

13. Order of Court for Admission. — In an order granting a new trial, the court can impose, as a condition of opening up the case, that the evidence on the part of a party, or any part of it, taken on the first trial, should be considered on the second; such is the everyday practice of the courts when reasons exist for so doing. A witness may have died, or left the country, or become insane since the first trial, any of which causes have been considered sufficient to make orders conditional upon the reception of the testimony of such witness on a subsequent trial of the same case. The exercise of this power is, however, discretionary, and cannot be reviewed. Chouteau *v.* Parker, 2 Minn. 118.

In Rex *v.* Whitehead, 1 Car. & P. (Eng.) 67, and in Oakley *v.* Sears, 2 Rob. (N. Y.) 440, such an order was made.

But where the trial judge goes out of office before the completion of a trial, and the cause consequently has to be tried *de novo,* the trial judge at the new trial has no power to order the former evidence to stand as evidence upon the new trial. Putnam *v.* Crombie, 34 Barb. (N. Y.) 232.

14. Quantock *v.* Bullen (Ch.), 5 Madd. (Eng.) 81; Wright *v.* Tatham (Q. B.), 1 Ad. & El. (Eng.) 3; Tourtelotte *v.* Brown, 4 Colo. App. 377, 36 Pac. 73; Magnes *v.* Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. 879; Saffold *v.* Horne, 72 Miss. 470, 18 So. 433; Putnam *v.* Crombie, 34 Barb. (N. Y.) 232; Herbst *v.* Vacuum Oil Co., 68 Hun 222, 22 N. Y. Supp. 807, *affirmed* 143 N. Y. 671, 39 N. E. 21; Ryan *v.* Mayor, 154 N. Y. 328, 48 N. E. 512, *affirming* 7 App. Div. 336, 40 N. Y. Supp. 227.

15. An Oral Stipulation for the admission of former testimony taken in another action between different parties, if indeed it can be relied upon at all, cannot be relied upon where not proved. Doe d. Foster *v.* Derby (Q. B.), 1 Ad. & El. (Eng.) 783.

16. Jerdee *v.* State, 36 Wis. 170.

17. Valid in Criminal Cases — at least in prosecutions for misdemeanor. — Rex. *v.* Foster, 7 Car. & P. (Eng.) 495 (misdemeanor); Rex *v.* Hagan, 8 Car. & P. (Eng.) 167 (where a former deposition was held admissible by consent); Reg. *v.* St. Clair, 27 Ont. App. 308 (misdemeanor); State *v.* Foulk, 57 Kan. 255, 45 Pac. 603; Bebee *v.* People, 5 Hill (N. Y.) 32 (misdemeanor).

18. Admissibility Against Ac-

b. *Construction and Operation.* — **(1.) Trials to Which Stipulation Applies.** — A stipulation for the admission of certain former testimony upon the trial of a cause renders it admissible upon any subsequent trial of the cause;[19] but not upon the trial of another action subsequently commenced upon the same cause of action.[20]

(2.) Testimony to Which Stipulation Applies. — A stipulation for the admission of all the testimony taken on a certain trial includes not only the testimony taken before the stipulation was entered into, but also that thereafter taken.[21]

Testimony Given on Direct and Cross-Examination. — A stipulation for the admission of the testimony of a former witness covers his testimony both on the direct and the cross-examination.[22]

(3.) Conditional and Unconditional Stipulations. — Reservation of All Legal Objections. — A stipulation for the admission of former testimony, subject to all legal objections, means that it is to be received subject to all the legal objections of the party against whom it is put in evidence.[23]

Reservation of Particular Objections. — Only such objections may be taken to the admission of former testimony as are expressly reserved in the stipulation.[24]

cused Even With His Consent Doubted in Felony Case. — Rex *v.* Foster, 7 Car. & P. (Eng.) 495; Reg. *v.* St. Clair, 27 Ont. App. 308.

19. Admissible Upon Subsequent Trial of Same Cause.

United States. — Vattier *v.* Hinde, 7 Pet. 252, *affirming* Hinde *v.* Vattier, 1 McLean 110, 12 Fed. Cas. No. 6512.

Colorado. — Magnes *v.* Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. 879.

Iowa. — Nelson *v.* Chicago, M. & St. P. R. Co., 77 Iowa 405, 42 N. W. 335.

Maryland. — Woodruff *v.* Munroe, 33 Md. 146.

Missouri. — Carroll *v.* Paul, 19 Mo. 102.

Nebraska. — Keens *v.* Robertson, 46 Neb. 837, 65 N. W. 897.

New York. — Herbst *v.* Vacuum Oil Co., 68 Hun 222, 22 N. Y. Supp. 807, *affirmed* 143 N. Y. 671, 39 N. E. 21.

Wisconsin. — Hinckley *v.* Beckwith, 23 Wis. 328; United States Exp. Co. *v.* Jenkins, 73 Wis. 471, 41 N. W. 957.

20. Where a stipulation is made that a certain former deposition taken in a suit between different parties may be read on the trial of a certain case, and after the trial thereof the plaintiff takes a nonsuit and commences another suit on the same cause of action, the stipulation does not operate to render the former deposition admissible on the subsequent suit. Acme Mfg. Co. *v.* Reed, 197 Pa. St. 359, 47 Atl. 205, 80 Am. St. Rep. 832.

21. Saffold *v.* Horne, 72 Miss. 470, 18 So. 433.

22. Campau *v.* Traub, 27 Mich. 215.

23. Thus when one party read the direct examination of a former witness, it was subject to the legal objections which the opposite party might make, and when the latter read the cross-examination it was subject to the legal objections which the former might make. People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830.

24. Thus a stipulation for the admission of certain former testimony, each party reserving the right to object to any portion thereof for immateriality, irrelevancy, or other matter of substance, waives an objection that the parties in the former action were different, or that the former issue was not the same, or that a former witness was incompetent. Weldon Hotel Co. *v.* Seymour, 54 Vt. 582.

Unconditional Stipulations. — An unconditional stipulation for the admission of certain former testimony precludes either party from objecting thereto on the grounds of incompetency or irrelevancy,[25] or of formal defects in a deposition,[26] and does not preserve in force objections taken to such testimony by the adverse party when given in evidence on the former trial.[27]

(4.) Enforcement. — Under a stipulation for the reading of all the testimony of a former witness, the court properly compels the party offering the testimony to read all the direct examination of the former witness without omission.[28]

c. *Revocation and Annulment.* — *By Notice.* — A stipulation that either party may use certain former testimony cannot be revoked by notice of revocation served by one party upon the other.[29]

By Change of Counsel. — Nor is it revoked by a change by a party of his counsel, after the stipulation was entered into.[30]

By Joinder of Third Party. — Nor is it rendered inoperative by the subsequent joinder of another party not a signer of the stipulation, where his pleadings admit the facts which the former testimony tends to prove.[31]

By Order of Court. — The trial court will not relieve an accused person of a stipulation entered into by him, unless made hastily or under a misapprehension of the law, and unless the prosecutor's course was not influenced by the stipulation.[32]

By Reversal of Judgment Rendered After Stipulation Made. — An unlimited stipulation for the admission of former testimony is not annulled by the reversal in the appellate court of the judgment rendered pursuant to the trial for which the stipulation was entered into.[33]

D. ESTOPPEL. — **Use by Objecting Party of Similar Testimony.** — The party at whose instance certain testimony taken on a former trial

25. Ryan *v.* Mayor, 154 N. Y. 328, 48 N. E. 512, *affirming* 7 App. Div. 336, 40 N. Y. Supp. 227; Unis *v.* Charlton, 12 Gratt. (Va.) 484.

Rationale. — "Where such a stipulation is made, applying generally to all the testimony taken in a particular action, it must be presumed that the counsel considered and treated it for the purpose of that trial as competent and material, and either party had the right to read such portions of it as he desired." Carroll *v.* New York El. R. Co., 14 App. Div. 278, 43 N. Y. Supp. 524.

Contra. — *In re* Bridgham, 82 Me. 323, 19 Atl. 824, where objections for incompetency were said to be reserved. Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344, where objections for irrelevancy were said to be reserved.

26. Parlin *v.* Hutson, 198 Ill. 389, 65 N. E. 93.

27. Carroll *v.* New York El. R. Co., 14 App. Div. 278, 43 N. Y. Supp. 524.

28. People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830.

29. Herbst *v.* Vacuum Oil Co., 68 Hun 222, 22 N. Y. Supp. 807, *affirmed* 143 N. Y. 671, 39 N. E. 21, where the notice was served before the beginning of the subsequent trial.

30. Saffold *v.* Horne, 72 Miss. 470, 18 So. 433.

31. Waller *v.* Gibbs, 10 Ala. 131.

32. Bebee *v.* People, 5 Hill (N. Y.) 32.

33. Vattier *v.* Hinde, 7 Pet. (U. S.) 252.

has been read, cannot be heard to object to the introduction by the adverse party of other testimony taken on the same trial, on grounds which would have been equally available against the testimony already introduced by him.[34]

Consolidation of Actions. — A party who agrees to the consolidation of an action in which certain former testimony is admissible with another in which it is not admissible is precluded from objecting to the use of the former testimony on the trial of the causes for divergence of parties.[35]

E. Subject-Matter of Testimony Admissible. — An admission made on a former trial by a party thereto as to the manner in which a witness whose personal production thereat was waived by him would testify if called, may be proved against him on a subsequent trial as former testimony.[36]

Dying Declarations. — The fact that the substance of former testi-

34. A party who has offered in evidence certain former depositions given in a former suit by a witness present at the subsequent trial, cannot be heard to object to the introduction by the adverse party of similar depositions given in the same suit, either on the ground that the parties are present in court, or on the ground that the issues are different in the two suits. Lohman *v.* Stoke, 94 Mo. 672, 8 S. W. 9.

35. Objections Precluded by Consolidation of Actions. — Hocker *v.* Jamison, 2 Watts & S. (Pa.) 438.

So likewise where two actions were brought against the same person on a verbal promise made to them both at once, and the actions were consolidated with the defendant's consent, he thereby virtually consented that a deposition taken against him in one cause might be read against him in the other. Smith *v.* Lane, 12 Serg. & R. (Pa.) 80.

The fact that on a former trial an accused person was tried alone, while on a subsequent trial he was tried with another person jointly indicted with him, does not render proof of former testimony of a witness inadmissible in his favor. State *v.* Milam, 65 S. C. 321, 43 S. E. 677. [The other defendant might be held to have consented to this by waiving his right to demand a separate trial.]

36. Where on a former trial a party admits in writing that a certain person if called as a witness would testify in a certain manner, and waives his personal production, on a subsequent trial after his death the stipulation may be read in evidence. Fortunato *v.* Mayor, 74 App. Div. 441, 77 N. Y. Supp. 575.

Where on a former trial of a criminal case the judge refuses a continuance to procure the attendance of a witness for defendant, upon an admission being made by state's counsel as to what his testimony would be, upon the death of such witness before a subsequent trial of the cause, such admission may be read. State *v.* Milam, 65 S. C. 321, 43 S. E. 677.

Contra. — Where on the former trial of a cause the adverse party in order to prevent a continuance admitted that the testimony of a witness prevented by sickness from being present in court would be as set forth in an affidavit, on a subsequent trial of the cause, where from the time the new trial was granted until his death before the trial the condition of such witness was such that his deposition could not be taken, the former affidavit was not admissible.

"Such affidavits would never be competent as evidence on a trial in the absence of statutory provision making them so. Our statute makes them competent under the admission of the adverse party, for the single reason of avoiding a continuance. None of the conditions that render such affidavit competent as evidence on the trial existed at the time of the second trial." Hudson *v.* Applegate, 87 Iowa 605, 54 N. W. 462.

mony is the dying declarations of a person feloniously killed does not impair the admissibility thereof.[37]

Counsel's Offer of Proof. — An offer of proof made by counsel since deceased on a former trial cannot be proved on a subsequent trial.[38]

F. TESTIMONY OF WITNESS ON SEVERAL FORMER TRIALS. Where a witness has testified at several former trials, his former testimony at any of them is equally provable, when circumstances exist authorizing proof of former testimony.[39]

3. Particular Grounds of Admissibility. — A. FOUNDATION OF RULE. — Former testimony may be proved, not because in its general nature it is equal to the oral testimony of the former witness, but because it is the best evidence of which the nature of the case admits.[40] It is admitted as necessary to prevent a failure of justice;[41] it cannot be admitted merely because it is inconvenient to

37. Black *v.* State, 1 Tex. App. 368.

38. Lane *v.* De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437.

39. City of Ord *v.* Nash, 50 Neb. 335, 69 N. W. 964.

In Schindler *v.* Milwaukee, L. S. & W. R. Co., 87 Mich. 400, 49 N. W. 670, however, the issues had been altered by amendments to the pleadings between the first and second trial of the cause, and on the third trial the trial court excluded proof of former testimony given on the first trial, while admitting that given on the second, which ruling was upheld by the appellate court for that reason, and because the appellant was not injured by the ruling.

40. United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702; Costigan *v.* Lunt, 127 Mass. 354; Gerhauser *v.* North British & Mer. Ins. Co., 7 Nev. 174.

"The real ground upon which this secondary grade of evidence is ordinarily admissible is that the statement of the deceased witness was evidence between the parties when made; and the best evidence (viz., the oral statement of the witness in person) being unattainable, that which was formerly stated by him, under circumstances which made it then evidence, is allowed to be transmitted, for the benefit of either party, through the recollection and by the statement of witnesses who heard him depose." Kelly *v.* Connell, 3 Dana (Ky.) 532.

No Hardship Can Come From Permitting Proof of Former Testimony. "No injustice can result from the adoption of the rule, as the testimony of the deceased witness was not only given under oath, but was judicially given in the trial of the cause between the same parties and on the same issue, and the person to be affected by the testimony enjoyed the invaluable right of cross-examination." Bowie *v.* O'Neale, 5 Har. & J. (Md.) 226.

The ground upon which the rule admitting former testimony rests is "that in an authorized action or proceeding, testimony given under the solemnity of an oath, where the witness was or might have been cross-examined, the probabilities of the truth having been told are so great as to justify the resort to that testimony when the witness has died or become insane since the former trial." Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

41. United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702; Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Harris *v.* State, 73 Ala. 495; Lowe *v.* State, 86 Ala. 47, 5 So. 435; Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 855; Bowie *v.* O'Neale, 5 Har. & J. (Md.) 226; Karthaus *v.* Owings, 2 Gill & J. (Md.) 430; Jackson d. Potter *v.* Bailey, 2 Johns. (N. Y.) 17.

In Drayton *v.* Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718, the court doubts whether this is the foundation of the rule, and says:

hear the witnesses again.[42] Parties should not lose the benefit of evidence taken on a former trial merely because events or contingencies have arisen which render the personal presence of the former witness impossible, or if possible, his examination impracticable.[43]

B. Former Oral Testimony. — a. *In General.* — A number of specific grounds are recognized in various states as warranting the proof of former testimony, while in a few of the states certain more generalized grounds have been established by statute.[44]

Criminal Cases. — Former testimony is admissible on behalf of either party to a criminal cause on same grounds as in civil cases,[45]

"It is said that this testimony, in the enumerated cases, is admitted *ex necessitate,* and that in the present case (where the witness had forgotten his former testimony), this reason applies with equal strength. But either the reason is, in my opinion, very indefinitely expressed, or I doubt its accuracy. What is the necessity? That the party should have the benefit of the testimony? Now this necessity would equally exist in cases where witnesses had never been examined, and who were dead, or unavoidably absent. But it would be utterly unsafe to receive their declarations without oath and without cross-examination. It is not then, necessity, but expediency, which is the foundation of the rule."

42. Anaconda Copper Min. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909.

43. Thompson *v.* State, 106 Ala. 67, 17 So. 512.

"Suppose the death of a material and only witness for the accused, and such an accident may not unfrequently occur, how important it is to the life, liberty and reputation of the citizen that he have the benefit of such evidence when wrongfully accused. The admission of such evidence is more important to the accused than to the prosecution. The state could dispense with the punishment of an occasional offender without any material public injury, but the success of the defense is all important to the individual accused." Kendrick *v.* State, 10 Humph. (Tenn.) 479. See also Greenwood *v.* State, 35 Tex. 587.

44. Special Statutory Grounds for Admitting Former Testimony. Evidence may be given on a trial of the testimony of a former witness "unable to testify." Code Civ. Proc. Cal., § 1870, subd. 8; Code Civ. Proc. Mont., § 3146, subd. 8; Bel. & C. Anno. Codes & Stat. Or., § 718, subd. 8. This provision is but declaratory of the common law as announced by the decisions of the highest courts of several states. Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

The testimony of a former witness since become "disqualified or inaccessible for any cause" may be proved. Ga. Code 1895, § 5186 (Code 1882, § 3782).

The former testimony of any witness may be proved "where the testimony of such witness cannot be procured" on a subsequent trial. Ky. Stat. 1899, § 4643.

The former testimony of any witness "who has become incompetent to testify for any legally sufficient reason properly proven" may be proved. Bright. Purd. Dig., p. 816, § 24; same, page 818, § 37.

45. *United States.* — United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702.

Alabama. — Davis *v.* State, 17 Ala. 354; Horton *v.* State, 53 Ala. 488; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Lowe *v.* State, 86 Ala. 47, 5 So. 435; Thompson *v.* State, 106 Ala. 67, 17 So. 512.

California. — People *v.* Murphy, 45 Cal. 137.

Illinois. — Barnett *v.* People, 54 Ill. 325.

Kentucky. — O'Brian *v.* Com., 6 Bush 563.

New York. — People *v.* Elliott, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318, *affirming* 66 App. Div. 179, 73 N. Y. Supp. 279.

Pennsylvania. — *Compare* Bright.

except in California[46] and Kentucky,[47] and perhaps in Texas,[48] in which states it can be proved against an accused person only with his consent.

b. *Death.* — The death of a witness is a sufficient ground for admitting proof of his former testimony,[49] unless he was convicted

Purd. Dig., p. 816, § 24, with same, p. 818, § 37. In § 24, former testimony is expressly declared to be admissible on behalf of either party to a criminal prosecution.

"The tendency of the courts in modern times in criminal cases is to afford the jury every opportunity that is consistent with the rules of law to determine the guilt or innocence of the accused, and I think they are peculiarly entitled to this sort of testimony, giving to it such weight as is proper under all the circumstances of the case.

"If the rule operates so as to expose guilt, it may protect innocence. There are anomalies enough in the law of evidence now without increasing them unnecessarily. . . . In the instance we are now considering we have the sanction of the oath itself, administered by competent authority, and the cross-examination of the witness, the great test of truth, by the party; and there is thus every reasonable safeguard thrown around the claims of the public on the one hand, and the rights of the accused on the other." United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702.

"The general rules of evidence when observed, and the relaxations of those rules when permitted, are ordinarily the same, whether the particular case be civil or criminal in its character." People *v.* Murphy, 45 Cal. 137.

46. Under Cal. Penal Code, § 686, subd. 3, giving the defendant in a criminal case the right to be confronted by the witnesses against him, proof of former testimony cannot be given on behalf of the state. People *v.* Bird, 132 Cal. 261, 64 Pac. 259.

47. *Kentucky.* — Statutes 1899, § 4643.

48. In Cline *v.* State, 36 Tex. Crim. 320, 37 S. W. 722, 61 Am. St. Rep. 850, the court of criminal appeals, *per* Davidson, J., and Hurt, P. J. (Henderson, J., *dissenting*), held that a *written* statement of the former testimony of a witness since deceased, given on the *examining trial,* must be excluded as violating the constitutional guarantee that "in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury . . . [and] shall be confronted by the witnesses against him." The reasons principally given for the decision were (1) the trial before the examining court is not a trial within the meaning of the constitutional provision, there being no jury; (2) the testimony being reproduced in writing, the accused is not confronted with the witnesses against him; (3) the reasons offered for admitting such statement neglect the plain words of the statute. This decision does not in terms, however, cover the case of *oral* proof of testimony given on a former trial.

49. *England.* — Rex *v.* Carpenter (K. B.), 2 Shower 47; Pyke *v.* Crouch, 1 Ld. Raym. 730; Coker *v.* Parwell, 2 P. Wms. 563, 2 Eq. Cas. Ab. 736, 1 Swan. 390*n;* Rex *v.* Joliffe (K. B.), 4 T. R. 285; Strutt *v.* Bovingdon, 5 Esp. 56; Mayor of Doncaster *v.* Day, 3 Taunt. 262; Wright *v.* Tatham (Q. B.), 1 Ad. & El. 3; Morgan *v.* Nicholl, L. R. 2 C. P. 117.

Canada. — Town of Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352; Court *v.* Holland, 8 Prac. Rep. 219.

United States. — United States *v.* White, 5 Cranch C. C. 457, 28 Fed. Cas. No. 16,679; United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702.

Admissible in a Civil Case. United States *v.* Sterland, 3 Quart. L. J. 244, 6 Pitts. Leg. J. 50, 27 Fed. Cas. No. 16,387; United States *v.* Angell, 11 Fed. 34.

Contra. — In behalf of neither party to a criminal cause: United States *v.* Sterland, 3 Quart. L. J. 244, 6 Pitts. Leg. J. 50, 27 Fed. Cas. No. 16,387.

Alabama. — Bryant *v.* Owen, 2 Stew. & P. 134; Gildersleeve *v.* Car-

away, 10 Ala. 260, 44 Am. Dec. 485; Tharp *v.* State, 15 Ala. 749; Goodlett *v.* Kelly, 74 Ala. 213; Jeffries *v.* Castleman, 75 Ala. 262; Pruitt *v.* State, 92 Ala. 41, 9 So. 406; Lucas *v.* State, 96 Ala. 51, 11 So. 216; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Lett *v.* State, 124 Ala. 64, 27 So. 256.

Arizona. — See Rev. Stat. 1901, § 2537.

Arkansas. — Pope *v.* State, 22 Ark. 372; Green *v.* State, 38 Ark. 304; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; St. Louis, Iron Mt. & S. R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

California. — Code Civ. Proc., § 1870, subd. 8; People *v.* Murphy, 45 Cal. 137; Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305; People *v.* Bird, 132 Cal. 261, 64 Pac. 259.

Colorado. — Rico Reduction & Min. Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458; Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752; Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

Connecticut. — Fitch *v.* Hyde, Kirby 258.

Delaware. — Kinney *v.* Hosea, 3 Har. 397.

Georgia. — Code 1895, § 5186; Code 1882, § 3782. See Broach *v.* Kelly, 71 Ga. 698.

Illinois. — Letcher *v.* Nortob, 5 Ill. 575; Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672; Stout *v.* Cook, 47 Ill. 530; Chicago & E. R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263; Loughry *v.* Mail, 34 Ill. App. 523.

Indiana. — Shearer *v.* Harber, 36 Ind. 536; Rooker *v.* Parsley, 72 Ind. 497; Sage *v.* State, 127 Ind. 15, 26 N. E. 667; Fisher *v.* Fisher, 131 Ind. 462, 29 N. E. 31; Western Assur. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119. See Wabash R. R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005.

Iowa. — Packard *v.* McCoy, 1 Iowa 530; State *v.* Porter, 74 Iowa 623, 38 N. W. 514.

Kansas. — State *v.* Conway, 56 Kan. 682, 44 Pac. 627.

Kentucky. — Kelly *v.* Connell, 3 Dana 532; Cantrell *v.* Hewlett, 2 Bush 311; O'Brian *v.* Com., 6 Bush 563; Kean *v.* Com., 10 Bush 190, 19 Am. Rep. 63; Collins *v.* Com., 12 Bush 271; Walkup *v.* Com., 14 Ky. L. Rep. 337, 20 S. W. 221; Louisville & N. R. Co. *v.* Whitely Co., 100 Ky. 413, 38 S. W. 678; Johnson *v.* Com., 24 Ky. L. Rep. 842, 70 S. W. 44. *Compare* Stat. 1899, § 4643.

Louisiana. — Hennen *v.* Monro, 4 Mart. (N. S.) 449; Riordon *v.* Davis, 9 La. (O. S.) 239, 29 Am. Dec. 442; Lopez *v.* Berghel, 15 La. (O. S.) 42; Wafer *v.* Hemken, 9 Rob. 203; Conway *v.* Erwin, 1 La. Ann. 391.

Maine. — Watson *v.* Proprietors of Lisbon Bridge, 14 Me. 201.

Maryland. — Bowie *v.* O'Neale, 5 Har. & J. 226; Black *v.* Woodrow, 39 Md. 194.

Massachusetts. — Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137; Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608; Warren *v.* Nichols, 6 Metc. 261; Yale *v.* Comstock, 112 Mass. 267; Costigan *v.* Lunt, 127 Mass. 354; Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389.

Michigan. — Howard *v.* Patrick, 38 Mich. 795; People *v.* Sligh, 48 Mich. 54, 11 N. W. 782; Lewis *v.* Koulo, 93 Mich. 475, 53 N. W. 622.

Minnesota. — Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605; State *v.* George, 60 Minn. 503, 63 N. W. 100.

Mississippi. — Strickland *v.* Hudson, 55 Miss. 235; Owens *v.* State, 63 Miss. 450; Lipscomb *v.* State, 76 Miss. 223, 25 So. 158; Dukes *v.* State, 80 Miss. 353, 31 So. 744.

Missouri. — Jaccard *v.* Anderson, 37 Mo. 91; Morris *v.* Hammerle, 40 Mo. 489; Coughlin *v.* Haeussler, 50 Mo. 126; State *v.* Able, 65 Mo. 357; Breeden *v.* Feurt, 70 Mo. 624; Scoville *v.* Hannibal & St. J. R. R. Co., 94 Mo. 84, 6 S. W. 654; Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Leeser *v.* Boekhoff, 38 Mo. App. 445; State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136.

Montana. — Code Civ. Proc., § 3146, subd. 8.

Nebraska. — County of Dodge *v.* Kemnitz, 28 Neb. 224, 44 N. W. 184; Omaha St. R. Co. *v.* Elkins, 39 Neb. 480, 58 N. W. 164.

Nevada. — Gerhauser *v.* North British & Mer. Ins. Co., 7 Nev. 174; State *v.* Johnson, 12 Nev. 121.

New Hampshire. — Young *v.* Dear-

of an infamous crime and executed.[50]

c. *Insanity.* — Incapacity of the former witness to testify at the subsequent trial is also a sufficient ground,[51] but in Maine the insan-

born, 22 N. H. 372; Orr *v.* Hadley, 36 N. H. 575.

New Jersey. — Berney *v.* Mitchell, 34 N. J. L. 337.

New Mexico. — Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York. — Code Civ. Proc., § 830; Jackson *v.* Bailey, 2 Johns. 17; Beals *v.* Guernsey, 8 Johns. 446; Powell *v.* Waters, 17 Johns. 176; Wilbur *v.* Selden, 6 Cow. 162; Crary *v.* Sprague, 12 Wend. 41, 27 Am. Dec. 110; Emerson *v.* Bleakeley, 2 Abb. Dec. 22, 5 Abb. Pr. (N. S.) 350; Bradley *v.* Mirick, 91 N. Y. 293, *affirming* 25 Hun 272; Morehouse *v.* Morehouse, 41 Hun 146, 17 Abb. N. C. 407, 11 Civ. Proc. Cas. 20; Odell *v.* Buckhout, 25 Wkly. Dig. 500, 6 N. Y. St. Rep. 45; Varnum *v.* Hart, 47 Hun 18, 14 N. Y. St. Rep. 140; Mutual Life Ins. Co. *v.* Anthony, 50 Hun 101, 4 N. Y. Supp. 501.

North Carolina. — Doe d. Ingram *v.* Watkins, 18 N. C. 442.

North Dakota. — Persons *v.* Persons (N. D.), 97 N. W. 551.

Ohio. — Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467; Summons *v.* State, 5 Ohio St. 325; Hoover *v.* Jennings, 11 Ohio St. 624; Bonnet *v.* Dickson, 14 Ohio St. 434; De Veaux *v.* Clemens, 17 Ohio Cir. Ct. R. 33. In civil cases: Rev. Stat., § 5242*a*; State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

Oregon. — Bel. & C. Ann. Codes & Stat., § 718, subd. 9.

Pennsylvania. — Bright. Purd. Dig., p. 816, § 24, and p. 818, § 37; Act May 23, 1887, §§ 3 and 9; Miles *v.* O'Hara, 4 Binn. 108; Lightner *v.* Wike, 4 Serg. & R. 203; Chess *v.* Chess, 17 Serg. & R. 409; Hocker *v.* Jamison, 2 Watts & S. 438; McAdams *v.* Stilwell, 13 Pa. St. 90; Jones *v.* Wood, 16 Pa. St. 25; Beers *v.* Cornelius, 1 Pittsb. R. 274; Rothrock *v.* Gallaher, 91 Pa. St. 108; Walbridge *v.* Knipper, 96 Pa. St. 48; Berg *v.* McLafferty (Pa.), 12 Atl. 460; Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048.

South Carolina. — Drayton *v.* Wells, 1 Nott. & McC. 409, 9 Am. Dec. 718; State *v.* DeWitt, 2 Hill L. 282, 27 Am. Dec. 371; State *v.* Hill, 2 Hill L. 607, 27 Am. Dec. 406; Mathews *v.* Colburn, 1 Strob. 258; Bishop *v.* Tucker, 4 Rich. 178; Yancey *v.* Stone, 9 Rich. Eq. 429; Fellers *v.* Davis, 22 S. C. 425; State *v.* Milam, 65 S. C. 321, 43 S. E. 677.

South Dakota. — Merchants' Nat. Bank *v.* Stebbins, 10 S. D. 466, 74 N. W. 199.

Tennessee. — Kendrick *v.* State, 10 Humph. 479. In criminal cases, *contra,* State *v.* Atkins, 1 Overt. 229, has been overruled.

Texas. — Greenwood *v.* State, 35 Tex. 587; Johnson *v.* State, 1 Tex. App. 333; Black *v.* State, 1 Tex. App. 368; Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580; Lane *v.* De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437.

Vermont. — Glass *v.* Beach, 5 Vt. 172; Williams *v.* Willard, 23 Vt. 369; Matheson *v.* Estate of Sargeant, 36 Vt. 142; Whitcher *v.* Morey, 39 Vt. 459; Earl *v.* Tupper, 45 Vt. 275.

Virginia. — Caton *v.* Lenox, 5 Rand. 31; Finn *v.* Com., 5 Rand. 701.

West Virginia. — Carrico *v.* West Virginia C. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

Wisconsin. — Elberfeldt *v.* Waite, 79 Wis. 284, 48 N. W. 525; McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116; Dunck *v.* Milwaukee Co., 103 Wis. 371, 79 N. W. 412.

50. Former Witness Convicted and Executed. — St. Louis, Iron Mt. & S. R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 84, where a former deposition was excluded under such circumstances. For the witness having been rendered incompetent by the conviction the evidence was not rehabilitated by his death.

51. *England.* — Rex *v.* Inhabitants of Eriswell (K. B.), 3 T. R. 707.

Alabama. — Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Pruitt *v.* State, 92 Ala. 14, 9 So. 406; Lucas *v.* State, 96 Ala. 51, 11 So. 216; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Mitchell *v.* State, 114 Ala.

ity must be confirmed and hopeless.[52]

d. *Physical and Mental Disability.* — **Physical Infirmity.** — Where bodily infirmity[53] renders the former witness' attendance in court on the subsequent trial dangerous or unduly burdensome to himself, or otherwise impracticable, proof of his former testimony[54] may be

1, 22 So. 71; Lett *v.* State, 124 Ala. 64, 27 So. 256.

Illinois. — Stout *v.* Cook, 47 Ill. 530; Pittsburg C. C. & St. L. R. Co. *v.* Story, 104 Ill. App. 132.

Indiana. — Schearer *v.* Harber, 36 Ind. 536. See Wabash R. R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005.

Kentucky. — Walkup *v.* Com., 14 Ky. L. Rep. 337, 20 S. W. 221, wherein it appeared that the former witness was confined in an insane asylum at the time of the subsequent trial.

Louisiana. — Wafer *v.* Hemken, 9 Rob. 203.

Michigan. — Howard *v.* Patrick, 38 Mich. 795.

Missouri. — Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654.

New Hampshire. — Whitaker *v.* Marsh, 62 N. H. 477.

New Jersey. — Berney *v.* Mitchell, 34 N. J. L. 337.

New Mexico. — Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York. — Code Civ. Proc., § 830.

Ohio. — In civil cases: Rev. Stat., § 5242*a*. See State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

Pennsylvania. — Emig *v.* Diehl, 76 Pa. St. 359; Walbridge *v.* Knipper, 96 Pa. St. 48.

South Carolina. — Drayton *v.* Wells, 1 Nott & McC. 409, 9 Am. Dec. 718; Bishop *v.* Tucker, 4 Rich. 178.

Tennessee. — Louisville & N. R. Co. *v.* Atkins, 2 Lea 248.

Contra. — In the following states former testimony is admissible only in case of death:

Massachusetts. — Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389.

Mississippi. — Dukes *v.* State, 80 Miss. 353, 31 So. 744. See Rev. Stat. Ariz., 1901, § 2537.

52. State *v.* Canney, 9 Law. Rep. 408.

53. See note 44 above in relation to this subdivision.

54. Central R. R. & Bkg. Co. *v.* Murray, 97 Ga. 326, 22 S. E. 972, where from extreme old age and both mental and physical infirmity a witness who testified on a former trial had become incompetent to testify as to facts once within his knowledge and memory.

Kercheval *v.* Ambler, 4 Dana (Ky.) 166, where the former deposition of a witness who was unable to attend court because of old age, bad health and distance from the court house, was admitted.

See Rogers *v.* Raborg, 2 Gill & J. (Md.) 54, where a former deposition of a witness who had become a paralytic and unable to leave his house or to speak so as to be understood, was admitted. See also Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280.

Howard *v.* Patrick, 38 Mich. 795, where the witness had been struck with paralysis five months before, was confined to his house and most of the time to his bed, and was irrational.

Berney *v.* Mitchell, 34 N. J. L. 337, where physical disability of a permanent character was held to be a ground. Also in Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175. In civil cases: Rev. Stat. Ohio, § 5242*a*. See State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048; Com. Title Ins. & Trust Co. *v.* Gray, 150 Pa. St. 255, 24 Atl. 640, where the former witness was 70 years old and had been in bed for three days from general disability and his memory was affected.

In Rogers *v.* Raborg, 2 Gill & J. (Md.) 54, where a former deposition was admitted, the court said: "He was dead to all the purposes of giving evidence in a court of justice, and the benefit of his oral testimony at the bar was as much lost to the party as if he had, in fact, been dead, or had left the state.

"The necessity, therefore, of resorting to his deposition was the same as if he had been dead, and, the reason being the same, we think it

received. But in New Jersey[55] and in New Mexico[56] due diligence must first be exercised to take his deposition as prerequisite thereto.

Sickness With Inability to Attend. — Former testimony may also be received where the former witness is sick and unable to attend.[57]

Mental Incapacity. — The former witness' loss of memory through old age or disease is also a sufficient ground;[58] but mere forgetfulness by a witness of the subject-matter of his former testimony

ought to have been admitted. And more strongly than if he had left the state; his inability to give evidence being produced by the act of God, leaving to the party requiring the benefit of it no means of obtaining it, and without any negligence or fault on his part, which may not always be strictly the case, in relation to a witness who has left the state."

55. Berney *v.* Mitchell, 34 N. J. L. 337.

56. Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

57. See Luttrell *v.* Reynell (K. B.), 1 Mod. 283, where a witness while en route to the place of trial fell so sick that he was not able to travel any farther; Kinsman *v.* Crooke (K. B.), 2 Ld. Raym. 1166; Fry *v.* Wood, 1 Atk. 445, all these being cases where former depositions were admitted.

Contra. — Doe d. Lloyd *v.* Evans, 3 Car. & P. 219, where a former deposition of a witness about 100 years old and bed-ridden and thus unable to appear was excluded.

Schearer *v.* Harber, 36 Ind. 536. See Wabash R. R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005. *Compare* Woollen *v.* Whitacre, 91 Ind. 502.

Miller *v.* Russell, 7 Mart. (N. S.) (La.) 266; Wafer *v.* Hemken, 9 Rob. (La.) 203.

See Chase *v.* Springvale Mills Co., 75 Me. 156, where the former deposition of a witness within the jurisdiction, but sick with typhoid fever and delirious, was admitted.

Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654.

Emig *v.* Diehl, 76 Pa. St. 359; Walbridge *v.* Knipper, 96 Pa. St. 48; Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048; Perrin *v.* Wells, 155 Pa. St. 299, 26 Atl. 543; Knights of Pythias Benev. Ass'n *v.* Leadbeter, 2 Pa. Super. Ct. 461, 27 Pitts. Leg. J. (N. S.) 188; Molloy *v.* United States Exp. Co., 22 Pa. Super. Ct. 173.

But the witness ought to be brought into court if that is practicable. Yet "to have examined him, laboring under disease, and taken down his testimony, would have afforded no better evidence (perhaps not so clear) as that which had been obtained from him on the former trial." Miller *v.* Russell, 7 Mart. (N. S.) (La.) 266.

Contra. — Where counsel for a party enters upon a trial knowing that an important witness is sick and may be unable to attend, but does not disclose this fact until the midst of the trial, his former testimony cannot be given in evidence. The party should have applied at the proper time for a delay of the trial or a continuance. Chicago & A. R. Co. *v.* Mayer, 91 Ill. App. 372.

Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389.

Siefert *v.* Siefert, 123 Mich. 664, 82 N. W. 511, where the court held that where the illness is only temporary the adverse party should be allowed the option of a continuance or of the admission of the former testimony. Here the witness whose former testimony was excluded was said to be sick and unable to go out, suffering from nervous prostration, and under the doctor's care; it was also said that excitement made her nervous; yet that she was up and around the house and had been for a week, and did some work and was getting better.

58. State *v.* New Orleans Waterworks Co., 107 La. 1, 31 So. 395; Stein *v.* Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234, where the failure of memory amounted to mental imbecility.

Whitaker *v.* Marsh, 62 N. H. 477, *overruling* State *v.* Staples, 47 N. H. 113, 90 Am. Dec. 565.

In civil cases: Rev. Stat. Ohio,

does not authorize its proof.[59] Yet where the former witness has become so blind that he cannot consult the memorandum from which he formerly testified, his former examination and deposition may be read, and he may also testify to those matters which he remembers.[60]

e. *Incompetency as Witness.* — **Incompetency on Account of Supervening Interest.** — Where a witness at a former trial has since become disqualified as a witness by supervening interest, the right to prove his former testimony is not clear.[61]

Incompetent Witness Formerly Called by Other Party. — The fact that a person disqualified by interest to testify for one party to a former trial was called by the adverse party is no ground for admitting proof of his former testimony.[62]

Disqualification Through Death or Insanity of Adverse Party. — But where a party or an interested witness who testified on his behalf on the former trial (being competent thereat) has since been rendered incompetent through the death or insanity of the adverse party, his former testimony may be proved,[63] although the former

§ 5242*a*. See State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

Jack *v.* Woods, 29 Pa. St. 375; Emig *v.* Diehl, 76 Pa. St. 359; Walbridge *v.* Knipper, 96 Pa. St. 48.

See State *v.* Hill, 2 Hill L. (S. C.) 607, 27 Am. Dec. 406.

"Although bodily present, yet if shown to have become so bereft of memory by senility or sickness that he is unable to recall a past transaction to which he had once testified, and has forgotten that he ever testified in regard to it, he may be considered as practically absent, and his former testimony, if otherwise admissible, may be read in evidence." Rothrock *v.* Gallaher, 91 Pa. St. 108.

59. Stein *v.* Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234; Robinson *v.* Gilman, 43 N. H. 295. *Compare* Whitaker *v.* Marsh, 62 N. H. 477.

Drayton *v.* Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718, where the former witness testified that since the former trial five years before he had dismissed the matter from his mind and remembered little or nothing of his former testimony, but that whatever he stated on the former trial was certainly true.

60. Kinsman *v.* Crooke (K. B.), 2 Ld. Raym. 1166, "because if he had been so ill as that he could not come to the trial, they had been good evidence, and now he is disable to consult the rental [memorandum] by the act of God, and therefore the same reason holds."

61. Witness Disqualified by Supervening Interest. — *Compare* St. Louis, Iron Mt. & S. R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 84, where the court said that the competency of a former deposition is not determined by the competency of the former witness at the time of the taking of the deposition or of the former trial, but by his competency at the time of the subsequent trial whereat the former deposition is offered in evidence.

His former testimony may be proved. Wafer *v.* Hemken, 9 Rob. (La.) 203.

New York. — Code Civ. Proc., § 830; Matter of Budlong, 54 Hun 131, 18 Civ. Proc. 18, 26 N. Y. St. 863, 7 N. Y. Supp. 289; Bright. Purd. Dig., p. 816, § 24; p. 818, § 37.

Contra. — Chess *v.* Chess, 17 Serg. & R. (Pa.) 409.

62. Crary *v.* Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110.

63. *District of Columbia.* — Bowie *v.* Hume, 13 App. D. C. 286.

Mississippi. — Strickland *v.* Hudson, 55 Miss. 235.

Missouri. — Coughlin *v.* Haeussler, 50 Mo. 126; Corbey *v.* Wright, 9 Mo. App. 5.

New York. — Code Civ. Proc.,

§ 830; Lawson *v.* Jones, 61 How. Pr. 424, 1 Civ. Proc. 247; Morehouse *v.* Morehouse, 41 Hun 146, 17 Abb. N. C. 407, 11 Civ. Proc. 20, 3 N. Y. St. 790; Koehler *v.* Scheider, 16 Daly 235, 31 N. Y. St. 549, 10 N. Y. Supp. 101. *Contra.* — Eaton *v.* Alger, 47 N. Y. 345.

Pennsylvania. — Pratt *v.* Patterson, 81 Pa. St. (31 P. F. Smith) 114; Walbridge *v.* Knipper, 96 Pa. St. 48; Galbraith *v.* Zimmerman, 100 Pa. St. 374 (where a former deposition was read). *Contra.* — Allum *v.* Carroll, 67 Pa. St. 68.

Virginia. — See Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666, where the former testimony was proved by the personal representative of the deceased party, not by the survivor, as in the preceding cases under this note, and thus was more like proving an admission, although not placed by the court on that ground.

"It would be most unjust to permit the testimony of one of the parties to a transaction to go to the jury and exclude that of the other, and such a result is not in the contemplation of the law. The principle is that the living party shall not be heard to give his version of a transaction about which death has sealed the lips of the other; but when the testimony of the deceased party is made available in the controversy, it would shock justice to deny the right of the living party to be heard as to the matters covered by the testimony." Strickland *v.* Hudson, 55 Miss. 235.

"Is it reasonable to put the plaintiff in a worse condition than his administrator would be in? If he had also died, his former testimony could be proved as well as that of his opponent, and the only reason why it cannot be now is because he is living and the best evidence is required. As has been so often stated, the object and spirit of the statute is to place parties upon an equality, so that one party shall not be permitted to testify to transactions cognizant to both, when the other can no longer be heard. . . . The ground of objection . . . is insufficient." Coughlin *v.* Haeussler, 50 Mo. 126.

"This evidence was taken on due notice, with ample opportunity for cross-examination. It was not testimony that could have been fabricated after the death of the party whose interest might be injuriously affected thereby. When taken the parties stood on an equal footing. Each had the right to perpetuate his own testimony." Pratt *v.* Patterson, 81 Pa. St. (31 P. F. Smith) 114.

Contra. — Trunkey *v.* Hedstrom, 131 Ill. 204, 23 N. E. 587, *affirming* 33 Ill. App. 397. See Rev. L. (Vt.), § 1036, *rendering* a former deposition inadmissible in such case.

"The statute makes no exceptions, and we cannot legislate one into it. It expressly prohibits the living party from testifying. . . . If the stenographer gives her testimony correctly, she was testifying just as much as though she herself were on the stand. . . . Anyone who has heard the testimony . . . is competent to testify to what he said. Therefore, if plaintiff's contention be correct the plaintiff herself might testify to what she said upon the former trial." Barker *v.* Hebbard, 81 Mich. 267, 45 N. W. 964.

Some states have avoided this issue by a piece of judicial legislation, whereby an exception has been made to the rule disqualifying a person as a witness in case of the death or insanity of the adverse party, in cases where the former testimony of such party is proved. Mumm *v.* Owens, 2 Dill. 475, 17 Fed. Cas. No. 9919; Monroe *v.* Napier, 52 Ga. 385; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869. (In Missouri his former testimony may also be proved.) Runnels *v.* Belden, 51 Tex. 48; O'Neill *v.* Brown, 61 Tex. 34.

The ground of these decisions is that this construction is necessary to preserve the reason, spirit, intention and purpose of the statute.

In other states an express statutory exception is recognized in such cases, and the witness otherwise disqualified is allowed to testify to those matters in respect to which the former testimony of the deceased or insane witness is reproduced.

Nebraska. — Code Civ. Proc., § 329; Kronck *v.* Madsen, 56 Neb. 609, 77 N. W. 202; Bangs *v.* Gray,

testimony of the deceased or insane party is not proved.[64]

f. *Conviction of Crime.* — Former testimony cannot be proved on the ground that the witness has been rendered incompetent by conviction of an infamous crime.[65]

g. *Witness Privileged From Testifying.* — The fact that a person otherwise available as a witness is excused from testifying on the ground that he cannot do so without criminating himself is no ground for admitting his former evidence.[66]

h. *Absence in General.* — The mere unexplained absence of a former witness from the courtroom at the time of the subsequent trial

60 Neb. 457, under the name Olcott *v.* Gray in 83 N. W. 680.

North Carolina. — Code, § 590.

West Virginia. — Code 1899, p. 876, c. 130, § 23.

In Michigan, where the former testimony of the disqualified witness cannot be proved, the exception to the language of the statute is not recognized, and he cannot testify at all on the subsequent trial. Taylor *v.* Bunker, 68 Mich. 258, 36 N. W. 66.

Nor in Pennsylvania, where his former testimony is provable, can he testify at all, although by his failure to testify on the former trial he has no former testimony to prove, while the representative of the deceased party reproduces his testimony. Evans *v.* Reed, 84 Pa. St. 254.

64. The fact that the personal representative of the deceased refused to prove his former testimony does not prevent the surviving party from proving his own former testimony. Coughlin *v.* Haeussler, 50 Mo. 126.

As prerequisite to proving the former testimony of a witness disqualified by the death of the adverse party, it is not necessary to offer in evidence deceased's former evidence. Lawson *v.* Jones, 61 How. Pr. (N. Y.) 424, 1 Civ. Proc. (N. Y.) 247, 12 Wkly. Dig. (N. Y.) 551.

"The object of judicial investigation is the truth, and the tendency of modern ruling is, under reasonable rules, to exclude nothing that can throw light upon the transaction. Statutes and rules are interpreted to this end, and it would be in the interest of concealment to shut out upon the second trial the testimony of the plaintiff merely because the defendant refuses to offer that of his testator." Coughlin *v.* Haeussler, 50 Mo. 126.

65. St. Louis, I. M. & S. R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 84, where the former witness had since been convicted of an infamous crime and executed.

State *v.* Conway, 56 Kan. 682, 44 Pac. 627, where the former witness, having been convicted and sentenced to state's prison for a term of years, while not civilly dead, was yet incompetent as a witness.

Berney *v.* Mitchell, 34 N. J. L. 337, where the former witness had become infamous.

"The crime committed proves a state of mind capable of crime; and as it is impossible to ascertain when the moral sense was corrupted, the antecedent character of the witness is affected by the conviction to a degree which would render his testimony on a controverted point of little use to a jury. It is true they may judge of his credibility; but it would not be safe to try experiments upon the credulity of the jurors by committing to them suspicious testimony; and exceptions need not be multiplied to those rules which are already known and practiced upon.

"It may also be considered as a forcible objection to this species of testimony that it brings with it a necessity of making such public inquiries into the character of the person whose declarations are sworn to as are very inconvenient in a court of justice, and ought as much as possible to be avoided." Le Baron *v.* Crombie, 14 Mass. 234.

66. Hayward *v.* Barron, 38 N. H. 366 (where a former deposition was offered in evidence).

does not warrant the admission of proof of his former testimony,[67] nor does the fact that one party to an action relying upon the witness' promise to be present at the subsequent trial, or relying upon the statement of the adverse party that the witness would be present thereat, took no steps to compel his attendance by judicial process, in consequence whereof the former witness failed to appear.[68]

i. *Absence From Jurisdiction.* — The absence of the former witness from the state is a sufficient ground for admitting proof of his former testimony.[69] In some states, however, the rule is not so

67. Fresh *v.* Gilson, 16 Pet. (U. S.) 327; M. Heminway & Sons Silk Co. *v.* Porter, 94 Ill. App. 609.

68. Provo City *v.* Shurtliff, 4 Utah 15, 5 Pac. 302.

69. *England.* — See Fry *v.* Wood, 1 Atk. 445, so holding in case of a former deposition.

United States. — Chicago, St. P., M. & O. R. Co. *v.* Myers, 25 C. C. A. 486, 80 Fed. 361.

Contra. — In criminal cases in behalf of either party: United States *v.* Angell, 11 Fed. 34.

In civil cases: Mulcahey *v.* Lake Erie & W. R. Co., 69 Fed. 172.

Alabama. — Mims *v.* Sturtivant, 36 Ala. 636; Lowe *v.* State, 86 Ala. 47, 5 So. 435; South *v.* State, 86 Ala. 617, 6 So. 52; Pruitt *v.* State, 92 Ala. 41, 9 So. 406; Lucas *v.* State, 96 Ala. 51, 11 So. 216; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Burton *v.* State, 115 Ala. 1, 22 So. 585; Lett *v.* State, 124 Ala. 64, 27 So. 356; Birmingham Nat. Bank *v.* Bradley, 30 So. 546; Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

Arizona. — See Rev. Stat. 1901, § 2537.

Arkansas. — Clinton *v.* Estes, 20 Ark. 216; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

California. — Code Civ. Proc., § 1870, subd. 8; People *v.* Devine, 46 Cal. 45; Benson *v.* Shotwell, 103 Cal. 163, 37 Pac. 147; People *v.* Bird, 132 Cal. 261, 64 Pac. 259.

Colorado. — Rico Reduction & Min. Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458; Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752, *per* Thompson and Wilson, JJ., Bissell, J., *dissenting.*

Connecticut. — Rev. Stat. 1902, § 694; Mechanics' Bank *v.* Woodward, 74 Conn. 689, 51 Atl. 1084.

Georgia. — Adair *v.* Adair, 39 Ga. 75; Eagle & Phœnix Mfg. Co. *v.* Welch, 61 Ga. 444; Owen *v.* Palmour, 111 Ga. 885, 36 S. E. 969.

Illinois. — Illinois C. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

Indiana. — Schearer *v.* Harber, 36 Ind. 536. See Wabash R. R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005. *Compare* Woollen *v.* Whitacre, 91 Ind. 502.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Osborn, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189; State *v.* Nelson, 75 Pac. 505.

Kentucky. — Louisville Water Co. *v.* Upton, 18 Ky. L. Rep. 326, 36 S. W. 520.

Contra. — In criminal cases: Collins *v.* Com., 12 Bush 271.

Louisiana. — Hennen *v.* Monro, 4 Mart. (N. S.) 449; Williams *v.* Bethany, 1 La. (O. S.) 315; Rierdon *v.* Thompson, 5 La. (O. S.) 364; Reynolds *v.* Rowley, 2 La. Ann. 890.

Maryland. — See Howard *v.* Moale, 2 Har. & J. 249; Rogers *v.* Raborg, 2 Gill & J. 54; and Woodruff *v.* Munroe, 33 Md. 146; in all of which former depositions were used.

Michigan. — Howard *v.* Patrick, 38 Mich. 795; Stewart *v.* First Nat. Bank, 43 Mich. 257, 5 N. W. 302; Dunbar *v.* McGill, 69 Mich. 297, 37 N. W. 285.

Minnesota. — Minneapolis Mill Co. *v.* Minneapolis & St. L. R. Co., 51 Minn. 304, 53 N. W. 639; Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030.

Missouri. — Franklin *v.* Gumerse'l, 11 Mo. App. 306; Augusta Wine Co. *v.* Weippert, 14 Mo. App. 483; Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654; Bruce Lumb. Co. *v.* Hoos, 67 Mo. App. 264.

limited. In Iowa[70] and Louisiana,[71] but not in California,[72] it is sufficient that the witness, without being outside the state, is in a portion thereof from which under the laws his personal attendance cannot be enforced. But so long as his personal attendance may be compelled, mere absence from the place of trial is insufficient.[73]

Montana. — Code Civ. Proc., § 3146, subd. 8.

Nebraska. — City of Omaha *v.* Jensen, 35 Neb. 68, 52 N. W. 833, 37 Am. St. Rep. 432; Omaha St. R. Co. *v.* Elkins, 39 Neb. 480, 58 N. W. 164; Young *v.* Sage, 42 Neb. 37, 60 N. W. 313; City of Ord *v.* Nash, 50 Neb. 335, 69 N. W. 964.

New Mexico. — Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175, where it is said that the former testimony of a witness beyond the seas may be proved; but his absence from the territory, he being elsewhere in the United States and having been heard from within ten days, does not render it competent, where no diligence is exercised to obtain his deposition.

Ohio. — De Veaux *v.* Clemens, 17 Ohio Cir. Ct. R. 33. In civil cases: Rev. Stat., § 5242*a*. See State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

Oregon. — Bel. & C. Anno. Codes & Stat., § 718, subd. 9.

Pennsylvania. — Bright. Purd. Dig., p. 816, § 24; p. 818, § 37; Magill *v.* Kauffman, 4 Serg. & R. 317, 8 Am. Dec. 713; Carpenter *v.* Groff, 5 Serg. & R. 162; Hocker *v.* Jamison, 2 Watts & S. 438; Noble *v.* McClintock, 6 Watts & S. 58; Flanagin *v.* Leibert, Brightly N. P. 61; N. Y. Union Mut. Ins. Co. *v.* Johnson, 23 Pa. St. 72; Beers *v.* Cornelius, 1 Pittsb. R. 274; Rothrock *v.* Gallaher, 91 Pa. St. 108; Walbridge *v.* Knipper, 96 Pa. St. 48; Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048.

South Carolina. — Drayton *v.* Wells, 1 Nott & McC. 409, 9 Am. Dec. 718; Bishop *v.* Tucker, 4 Rich. 178; Yancey *v.* Stone, 9 Rich. Eq. 429.

South Dakota. — Merchants' Natl. Bank *v.* Stebbins, 10 S. D. 466, 74 N. W. 199.

Utah. — Reese *v.* Morgan Silver Min. Co., 17 Utah 489, 54 Pac. 759.

Vermont. — McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

"To preserve consistency of principle, it appears to me that in the present instance we should consider the residence of the witness in the state of Ohio the same thing as his death for the purpose of letting in the evidence of what he swore on the former trial." Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713.

Contra. — *Massachusetts.* — Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389.

Mississippi. — See Dukes *v.* State, 80 Miss. 353, 31 So. 744.

In a criminal case: Owens *v.* State, 63 Miss. 450.

New Jersey. — Berney *v.* Mitchell, 34 N. J. L. 337.

New York. — Wilbur *v.* Selden, 6 Cow. 162; People *v.* Hill, 5 Hill 295; Weeks *v.* Lowerre, 8 Barb. 530; Mutual Life Ins. Co. *v.* Anthony, 50 Hun 101, 4 N. Y. Supp. 501, where the rule was held to apply although the deposition of the former witness could not be taken.

Tennessee. — See Hall *v.* State, 6 Baxt. 522.

Texas. — In a criminal case, see Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580.

Virginia. — Finn *v.* Com., 5 Rand. 701; Brogy *v.* Com., 10 Gratt. 722.

70. Bank of Monroe *v.* Gifford, 79 Iowa 300, 44 N. W. 558; Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227.

71. Conway *v.* Erwin, 1 La. Ann. 391.

72. Meyer *v.* Roth, 51 Cal. 582; Butcher *v.* Vaca Val. R. R. Co., 56 Cal. 598, in which cases the statutory words "out of the jurisdiction" were interpreted to mean "outside the state," as the witness' deposition could be compelled to be taken so long as he remained in the state.

73. Southern Car & Foundry Co.

Time of Absence. — The absence must occur at the time of the subsequent trial.[74]

Intent in and Duration of Absence. — It need not appear that the absent witness is actually domiciled outside the state.[75] But in Alabama and Michigan it is not sufficient if the absence is merely temporary; it need not be permanent, but must be for an indeterminate period.[76]

Diligence to Procure Absent Witness. — In some states the party seeking to prove former testimony must show due diligence to procure the personal attendance of the absent witness;[77] in others this is not essential.[78]

Diligence to Procure Deposition. — In some states such party must likewise show due diligence to procure the deposition[79] of the absent

v. Jennings, 137 Ala. 247, 34 So. 1002; Hunter *v.* Smith, 6 Mart. (N. S.) (La.) 351; Pinnell *v.* Scriber, 1 Rob. (La.) 2; Brennan *v.* Jacobs, 22 Wkly. Notes Cas. 453; Mendum *v.* Com., 6 Rand. (Va.) 704.

74. Admissibility depends on state of facts at time of particular trial wherein the evidence is offered. Thompson *v.* State, 106 Ala. 67, 17 So. 512.

75. King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960.

76. Lowe *v.* State, 86 Ala. 47, 5 So. 435; Pruitt *v.* State, 92 Ala. 41, 9 So. 406 (wherein it is said that the absence should be for such an indefinite time that the witness' return is merely contingent or conjectural); Lucas *v.* State, 96 Ala. 51, 11 So. 216; Thompson *v.* State, 106 Ala. 67, 17 So. 512 (wherein mere temporary absence was held insufficient).

See Kellogg *v.* Secord, 42 Mich. 318, 3 N. W. 868.

The Absence Need Not Be Permanent. — "It is possible, it is true, that the absent witness may return at some day in the future, just as it is possible that an insane man may be restored to his reason; but the courts cannot be expected to delay the administration of justice waiting for the happening of so indefinite a contingency." Lowe *v.* State, 86 Ala. 47, 5 So. 435.

77. **Diligent Effort to Procure Personal Attendance Necessary.**

United States. — See Chicago, St. P., M. & O. R. Co. *v.* Myers, 25 C. C. A. 486, 80 Fed. 361.

Illinois. — Illinois C. R. Co. *v.* People, 59 Ill. App. 256, *holding* that the party should apply for a stay of the trial or continuance, if by that means the personal attendance could be procured.

Indiana. — Wabash R. R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005. *Compare s. c.* 27 Ind. App. 180, 59 N. E. 485, 60 N. E. 1127.

Iowa. — Slusser *v.* City of Burlington, 47 Iowa 300.

Michigan. — See People *v.* Long, 44 Mich. 296, 6 N. W. 673.

Minnesota. — Wilder *v.* City of St. Paul, 12 Minn. 192.

Missouri. — Franklin *v.* Gumersell, 11 Mo. App. 306.

Texas. — See Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580.

78. **Effort to Procure Attendance of Absent Witness Unnecessary.** State *v.* Nelson (Kan.), 75 Pac. 505; Omaha St. R. Co. *v.* Elkins, 39 Neb. 480, 58 N. W. 164, *per* Irvine and Ryan, CC., Ragan, C., *dissenting;* Giberson *v.* Patterson Mills Co., 187 Pa. St. 513, 41 Atl. 525; McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

79. *Colorado.* — Magnes *v.* Sioux City Nursery & Seed Co., 14 Colo App. 219, 59 Pac. 879. *Contra.* — Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

Illinois. — Cassady *v.* Trustees of Schools, 105 Ill. 560.

Indiana. — Wabash R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005. *Compare s. c.* 27 Ind. App. 180, 59 N. E. 485, 60 N. E. 1127.

Mississippi. — See Gastrell *v.* Phillips, 64 Miss. 473, 1 So. 729. (This

witness; in others this also is unnecessary;[80] in Arkansas whether the deposition shall be required or the proof of former testimony admitted rests in the discretion of the trial judge.[81]

Deposition Taken by Adverse Party. — The fact that the adverse party has with the consent of the party offering proof of former testimony taken the deposition of the absent witness and has it present in court is no ground for rejecting proof of the former testimony.[82]

Witness Not Subpoenaed Before Absence. — A failure to place the absent witness under subpœna before he went away does not raise a presumption of bad faith, nor amount to such lack of diligence as to forbid the use of former testimony.[83]

Procurement of Absence. — But a party by whose procurement a former witness is absent cannot prove his former testimony.[84]

case, however, has little persuasive force because former testimony can not be proved in Mississippi even where the deposition can not be procured.)

Missouri. — Franklin *v.* Gumersell, 11 Mo. App. 306.

Nevada. — Gerhauser *v.* North British & Mercantile Ins. Co., 7 Nev. 174.

New Mexico. — See Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

80. Effort to Procure Deposition Unnecessary. — *Iowa.* — See Laws 27th Gen. Assm., c. 9, also Bank of Monroe *v.* Gifford, 79 Iowa 300, 44 N. W. 558; Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227. *Contra.* — Slusser *v.* City of Burlington, 47 Iowa 300.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Osborn, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189.

Michigan. — Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630. *Contra.* People *v.* Long, 44 Mich. 296, 6 N. W. 673.

Minnesota. — King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960.

Nebraska. — Omaha St. R. Co. *v.* Elkins, 39 Neb. 480, 58 N. W. 164, *per* Irvine and Ryan, CC., Ragan, C., *dissenting.*

Vermont. — McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

But a party who since the former trial has taken the deposition of the former witness who is absent from the state, and who has such deposition present with him in court, cannot prove the former testimony of such absent witness. Stein *v.* Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234.

As to the relative value of a deposition and of proof of former testimony see note 4 above.

81. Clinton *v.* Estes, 20 Ark. 216.

82. Labar *v.* Crane, 56 Mich. 585, 23 N. W. 323.

In an early case (1818) there is found, however, a different line of reasoning: "It is true that it might perhaps be more advantageous to the adverse party to have him examined again. . . . But . . . it is in the power of the adverse party to prevent the secondary evidence by sending a commission to examine the witness in the state where he resides. And if he will not do this, it will tend to the easier administration of justice to admit proof of what the absent witness had sworn on an occasion where there was an opportunity of cross-examining him." McGill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713.

83. State *v.* Nelson (Kan.), 75 Pac. 505.

84. See Arizona Rev. Stat. 1901, § 2537.

"The ordinary rules of evidence require the presence of the witness if it can be had, and a party procuring the absence of a witness could not derive an advantage from it." State *v.* Nelson (Kan.), 75 Pac. 505.

The objection that a former witness is absent from the state by the aid and procurement of state's counsel is invalid when it appears that she had been induced to come from her home in a distant state by the wiles

j. *Absence by Procurement of Adverse Party.* — Where a former witness is absent by the procurement of the adverse party, that is a sufficient ground for admitting proof of his former testimony.[85]

k. *Absence on Governmental Duty.* — Where, in Louisiana, a former witness is engaged elsewhere in discharge of his duties as deputy sheriff at the time of the subsequent trial, and although subpœnaed does not attend, his former testimony may in a proper case be proved.[86]

l. *Inability to Find.* — The fact that after diligent search a former witness cannot be found warrants the admission of his former testimony.[87]

of defendant, had been swindled by defendant and left destitute, and that state's counsel had paid her passage money home. Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531.

The fact that a former witness who has removed from the state was carried away by the private prosecutor does not raise the objection to the proof of her former testimony that she had been taken away by the procurement of the party offering her testimony, as the state is the party offering it. Peddy *v.* State, 31 Tex. Crim. 547, 21 S. W. 542.

85. *United States.* — Reynolds *v.* United States, 98 U. S. 145.

Georgia. — Williams *v.* State, 19 Ga. 402.

Illinois. — Stout *v.* Cook, 47 Ill. 530. *Contra.* — In a criminal case: Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672.

Indiana. — Schearer *v.* Harber, 36 Ind. 536. See Wabash R. R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005.

Missouri. — Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654.

New Mexico. — Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

Ohio. — In civil cases: Rev. Stat., § 5242*a*. See State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

South Carolina. — Drayton *v.* Wells, 1 Nott & McC. 409, 9 Am. Dec. 718; Yancey *v.* Stone, 9 Rich. Eq. 429.

In United States *v.* Reynolds, 1 Utah 319, in response to objections made to receiving former testimony on this ground, the court said: "It is true that the defendant was not required by law to aid the prosecution in supplying witnesses against himself, but in his effort to avail himself of such right he went to the extent of showing that he was favoring and aiding in her concealment, and endeavoring to thwart the efforts of the officers of the law to procure her presence as a witness. In such a case he has no right to complain if the court allows the next best evidence to be introduced, and the proof of her former testimony to go to the jury."

Contra. — Berney *v.* Mitchell, 34 N. J. L. 337. See Wilbur *v.* Selden, 6 Cow. (N. Y.) 162; People *v.* Newman, 5 Hill (N. Y.) 295.

86. Noble *v.* Martin, 7 Mart. (N. S.) (La.) 282.

87. *Alabama.* — Thompson *v.* State, 106 Ala. 67, 17 So. 512; Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Burton *v.* State, 115 Ala. 1, 22 So. 585; Lett *v.* State, 124 Ala. 64, 27 So. 256. In these cases the witness could not be found within the jurisdiction.

Arkansas. — Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

Connecticut. — Rev. Stat. 1902, § 694.

Delaware. — Hall *v.* Dougherty, 5 Houst. 435, where the witness could not be found in any county in the state.

Louisiana. — Williams *v.* Bethany, 1 La. (O. S.) 315.

Maryland. — Darnall *v.* Goodwin, 1 Har. & J. 282, where a former deposition was admitted.

Missouri. — Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654; State *v.* Riddle, 78 S. W. 606.

New Mexico. — Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

Ohio. — In civil cases: Rev. Stat., § 5242*a*. See State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

Pennsylvania. — Bright. Purd. Dig., p. 816, § 24; p. 818, § 37; Ballman *v.* Heron, 169 Pa. St. 510, 32 Atl. 594.

m. *Surprise.* — Where a party surprised by certain adverse testimony desires to contradict it by a former witness whose attendance may be procured, but who is not in actual attendance upon the trial, his surprise is no reason for admitting proof of the witness' former testimony.[88]

C. FORMER DEPOSITIONS. — **Grounds of Admission Classified.** — The existence at the time of a subsequent trial of any ground sufficient to render former oral testimony admissible,[89] or which would be sufficient to render a deposition originally taken on the particular trial admissible,[90] is sufficient to warrant the admission in evidence of a former deposition.

Contra. — Berney *v.* Mitchell, 34 N. J. L. 337; Crary *v.* Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110. See Yancey *v.* Stone, 9 Rich. Eq. (S. C.) 429.

A showing of diligent and unavailing search must be made, otherwise the former testimony is inadmissible. Darnall *v.* Goodwin, 1 Har. & J. (Md.) 282 (case of former deposition); State *v.* Riddle (Mo.), 78 S. W. 606.

88. Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122. The party should have applied for a continuance or postponement of the cause.

89. As to admissibility on this ground in general, see Emig *v.* Diehl, 76 Pa. St. 359; Powell *v.* Manson, 22 Gratt. (Va.) 177; Bal. Anno. Codes & Stat., § 6028.

Particular grounds of admissibility, the same as those rendering former oral testimony admissible, have been recognized in the following cases:

Death. — *England.* — Coker *v.* Farwell, 2 P. Wms. 563; Fry *v.* Wood, 1 Atk. 445.

United States. — Turner *v.* Hand, 3 Wall. Jr. 88, 24 Fed. Cas. No. 14,257.

Alabama. — Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

Connecticut. — Ray *v.* Bush, 1 Root 81.

Delaware. — Dawson *v.* Smith, 3 Houst. 335.

Georgia. — Broach *v.* Kelly, 71 Ga. 698.

Iowa. — Watson *v.* Russell, 18 Iowa 79.

Maine. — Chase *v.* Springvale Mills Co., 75 Me. 156.

Maryland. — Darnall *v.* Goodwin, 1 Har. & J. 282; Rogers *v.* Raborg, 2 Gill & J. 54.

Pennsylvania. — White *v.* Bisbing, 1 Yeates 400; Hocker *v.* Jamison, 2 Watts & S. 438; Haupt *v.* Henninger, 37 Pa. St. 138.

Absence From State.

England. — Fry *v.* Wood, 1 Atk. 445.

Alabama. — Long *v.* Davis, 18 Ala. 801 (where the former witness is beyond the jurisdiction).

Arkansas. — McTighe *v.* Herman, 42 Ark. 285.

Georgia. — Broach *v.* Kelly, 71 Ga. 698 (where the former witness is without the jurisdiction).

Maryland. — Howard *v.* Moale, 2 Har. & J. 249; Rogers *v.* Raborg, 2 Gill & J. 54.

Pennsylvania. — Hocker *v.* Jamison, 2 Watts & S. 438.

Where at the time of taking a former deposition the deponent was in a distant state, and the adverse party although notified was not present at the taking, but intermediate the two trials was at the adverse party's residence, the fact that a new deposition was not then taken is no ground for excluding his former deposition. Spear *v.* Coon, 32 Conn. 292.

90. *England.* — Nevil *v.* Johnson, 2 Vern. 447, 1 Eq. Cas. Ab. 227; City of London *v.* Perkins, 3 Bro. P. C. 602.

United States. — Philadelphia, W. & B. R. R. Co. *v.* Howard, 13 How. 307; Grunninger *v.* Philpot, 5 Biss. 104, 11 Fed. Cas. No. 5853.

Alabama. — Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369.

Colorado. — Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

Georgia. — Evans *v.* Lampkin, Dud. 193. (A note states that the court was equally divided in opinion on this question.) Radford *v.* Georgia

Deposition Embodied in Record Partly Admissible. — The mere fact that a former deposition is embodied in a record of a former proceeding, a part of which is admissible on a subsequent hearing, does not render the whole admissible thereon.[91]

Subsequent Oral Testimony Unsatisfactory. — Nor does the fact that the oral testimony of the former witness on the subsequent hearing is variant from or less explicit than his former deposition render the deposition admissible.[92]

4. Prerequisites to Admissibility. — A. Right of Cross-Examination. — a. *Former Testimony Offered by Party Offering It on Former Hearing.* — The fundamental prerequisite to the admission in evidence of proof of former testimony, of which the others are corollaries, is that the party against whom it is offered, or some one deemed to represent him, had both the right and the opportunity of cross-examining the former witness when his testimony was given.[93]

& A. R. Co., 113 Ga. 627, 39 S. E. 108.

Idaho. — Code Civ. Proc., § 4519.

Illinois. — Wade *v.* King, 19 Ill. 301; McConnel *v.* Smith, 27 Ill. 232; Jarrett *v.* Phillips, 90 Ill. 237.

Indiana. — Earl *v.* Hurd, 5 Blackf. 248.

Iowa. — Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323.

Kentucky. — Brooks *v.* Cannon, 2 A. K. Marsh. 525; Kerr *v.* Gibson, 8 Bush 129.

Maryland. — Woodruff *v.* Munroe, 33 Md. 146.

Michigan. — Campau *v.* Dubois, 39 Mich. 274.

Minnesota. — Chouteau *v.* Parker, 2 Minn. 118.

Missouri. — Tindall *v.* Johnson, 4 Mo. 113; Finney *v.* St. Charles College, 13 Mo. 266; Samuel *v.* Withers, 16 Mo. 532; Parsons *v.* Parsons, 45 Mo. 265; Lohman *v.* Stocke, 94 Mo. 672, 8 S. W. 9; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869.

New Hampshire. — Leviston *v.* French, 45 N. H. 21.

New Jersey. — Holcombe *v.* Holcombe, 10 N. J. Eq. 284.

North Carolina. — Kaighn *v.* Kennedy, 1 Mart. 37; Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Pennsylvania. — Bright. Purd. Dig., p. 820, § 45; Kohler *v.* Henry, 4 Phila. 61; Riegel *v.* Wilson, 60 Pa. St. 388.

South Carolina. — Pulaski *v.* Ward, 2 Rich. 119; Oliver *v.* Columbia, N. & L. R. Co., 65 S. C. 1, 43 S. E. 307. But *compare* Bishop *v.* Tucker, 4 Rich. 178.

Texas. — Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534.

Vermont. — Walsh *v.* Pierce, 12 Vt. 130; Perry *v.* Whitney, 30 Vt. 390; Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617; McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

Virginia. — Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

Washington. — Bal. Anno. Codes & Stat., §§ 6028-6029.

"It would be unnecessarily oppressive to require the party, merely to gratify form, to take his testimony over again, as well as uselessly expensive." McCormick *v.* Howard, 1 McArthur Pat. Cas. 238, 15 Fed. Cas. No. 8719.

Contra. — Shepherd *v.* Willis, 19 Ohio 142; O'Harra *v.* Hunt, 19 Ohio 460, *holding* that the deposition must, if possible, be taken over again, or the witness produced.

Some of the cases above cited would seem to state the rule more broadly than it is stated in the text, but such cases must be read in the light of the well-established rule laid down in note 12 above.

91. Tappan *v.* Beardsley, 10 Wall. (U. S.) 427.

92. Stout *v.* Cook, 47 Ill. 530.

93. *England.* — See Wright *v.* Tatham, 1 Ad. & El. 3.

United States. — United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702. See also Grunninger *v.* Philpot, 5 Biss. 104, 11 Fed. Cas. No. 5853.

Legally Bound to Cross-Examine.— Such party must also have been legally called upon to cross-examine the witness.[94]

Alabama. — Bryant *v.* Owen, 2 Stew. & P. 134; Davis *v.* State, 17 Ala. 354; Jeffries *v.* Castleman, 75 Ala. 262.

Arkansas. — Carpenter *v.* State, 58 Ark. 233, 24 S. W. 247; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; McNamara *v.* State, 60 Ark. 400, 30 S. W. 762.

Illinois. — McConnel *v.* Smith, 27 Ill. 232.

Indiana. — Earl *v.* Hurd, 5 Blackf. 248.

Kansas. — State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Kentucky. — O'Brian *v.* Com., 6 Bush 563.

Louisiana. — See Conway *v.* Erwin, 1 La. Ann. 391.

Maryland. — Black *v.* Woodrow, 39 Md. 194; Walsh *v.* McIntire, 68 Md. 402, 13 Atl. 348.

Massachusetts. — Warren *v.* Nichols, 6 Metc. 261.

Mississippi. — Owens *v.* State, 63 Miss. 450; Lipscomb *v.* State, 76 Miss. 223, 25 So. 158; Dukes *v.* State, 80 Miss. 353, 31 So. 744.

Missouri. — See Breeden *v.* Feurt, 70 Mo. 624.

Nevada. — See State *v.* Johnson, 12 Nev. 121.

New Hampshire. — Bailey *v.* Woods, 17 N. H. 365.

New York. — Bradley *v.* Mirick, 91 N. Y. 293, *affirming* 25 Hun 272; Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275; Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643, *affirming* 78 App. Div. 633, 79 N. Y. Supp. 536.

Pennsylvania. — Watson *v.* Gilday, 11 Serg. & R. 337; Walbridge *v.* Knipper, 96 Pa. St. 48; Bright. Purd. Dig., p. 818, § 37.

South Carolina. — State *v.* Hill, 2 Hill L. 607, 27 Am. Dec. 406; State *v.* Campbell, 1 Rich. 124.

Texas. — Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534.

Wisconsin. — Charlesworth *v.* Tinker, 18 Wis. 633.

Where the Opportunity is Not Given Former Testimony Cannot Be Proved. — *United States.* — Rutherford *v.* Geddes, 4 Wall. 220; Wilde *v.* United States, 7 Ct. Cl. 415, where an *ex parte* affidavit was rejected.

Arkansas. — McNamara *v.* State, 60 Ark. 400, 30 S. W. 762.

Colorado. — Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331.

Connecticut. — See Lane *v.* Brainerd, 30 Conn. 565.

Illinois. — McConnel *v.* Smith, 27 Ill. 232; Pittsburg, C. & St. L. R. Co. *v.* McGrath, 115 Ill. 172, 3 N. E. 439.

Iowa. — State *v.* Porter, 74 Iowa 623, 38 N. W. 514.

Louisiana. — *In re* Mason, 9 Rob. 105, where *ex parte* affidavits were rejected.

Maryland. — Walsh *v.* McIntire, 68 Md. 402, 13 Atl. 348, where *ex parte* affidavits used on motion to set aside a default judgment were excluded.

New York. — People *v.* Mullins, 5 App. Div. 172, 39 N. Y. Supp. 361; Morley *v.* Castor, 63 App. Div. 38, 71 N. Y. Supp. 363.

The fact that when the evidence of a witness since deceased was taken, according to the practice then in force, it was taken by *ex parte* affidavit, whereas the present practice recognizes the right of cross-examination, does not render such former affidavit inadmissible on the present trial. Lawrence *v.* Maule, 4 Drew (Eng.) 472.

94. Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275. See Thurmond *v.* Trammell, 28 Tex. 372, 91 Am. Dec. 321.

Where a trial is interrupted and the hearing adjourned in the midst of the testimony of a witness for one party by the discovery of a variance between his pleading and proofs, on a subsequent retrial *de novo* such party cannot prove the former testimony of such witness, he having in the interim died. "The trial was interrupted to enable defendant to apply for the amendment, and until that was granted or denied and a new trial had it was entirely right to suspend further examination of the witness." Morley *v.* Castor, 63 App. Div. 38, 71 N. Y. Supp. 363.

Where the plaintiff in a former action had no capacity to sue, so that

Failure to Cross-Examine. — But where he might have cross-examined the witness, the fact that he failed to avail himself of the opportunity, either by neglecting to appear at the former trial,[95] or by omitting to exercise the right when present thereat,[96] does not render the former testimony inadmissible.

b. *Former Testimony Offered by Party Against Whom Offered on Former Trial.* — Where the redirect examination to which a party had given notice of his intention to subject a former witness was rendered impossible by the disappearance of the witness during a recess of court, on a subsequent trial his former testimony cannot be proved in behalf of the adverse party.[97]

B. FORMER PROCEEDING. — **Must Be Judicial in Character.** — In order that former testimony may be provable, it must have been

the adverse party, while having the opportunity, was not under any obligation to cross-examine the plaintiff's witnesses, proof of their former testimony cannot be given in a subsequent action. Sample *v.* Coulson, 9 Watts & S. (Pa.) 62.

95. Dist. of Columbia *v.* Washington Gas Light Co., 20 D. C. 39; Bruner *v.* Battell, 83 Ill. 317; Watson *v.* Russell, 18 Iowa 79, where a deposition taken *ex parte* on a former trial, after defendant had defaulted, was used on a subsequent trial after the default was set aside.

State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257, where the accused person failed to be present at the hearing.

Bradley *v.* Mirick, 91 N. Y. 293, *affirming* 25 Hun 272; Walbridge *v.* Knipper, 96 Pa. St. 48; Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534; O'Neil *v.* Brown, 61 Tex. 34.

Where defendant had legal notice of the commencement and pendency of a suit, but permitted judgment to be taken by default, and subsequently plaintiff's damages were assessed by the clerk in an *ex parte* proceeding at which the testimony of witnesses was taken, on a subsequent trial after the default had been set aside, proof of former testimony of a witness since deceased, given on the proceeding to assess damages, may be given in evidence. Deming *v.* Chase, 48 Vt. 382.

As against a non-resident who is notified of the pendency of a suit by publication, but who fails to appear at the former trial, former testimony of a witness since deceased, although not cross-examined by him, is admissible against him on a subsequent trial at which he appears. Bruner *v.* Battell, 83 Ill. 317.

Where defendant to an action had appeared therein by his attorney, but on the trial the attorney failed to appear and cross-examine plaintiff's witness, that fact cannot render proof of the testimony of such witness inadmissible after his death. Bradley *v.* Mirick, 91 N. Y. 293, *affirming* 25 Hun 272.

96. *Alabama.* — Pruitt *v.* State, 92 Ala. 41, 9 So. 406; Lucas *v.* State, 96 Ala. 51, 11 So. 216.

Arkansas. — McNamara *v.* State, 60 Ark. 400, 30 S. W. 762.

Maryland. — Walsh *v.* McIntire, 68 Md. 402, 13 Atl. 348.

Missouri. — Tindall *v.* Johnson, 4 Mo. 113.

New York. — Bradley *v.* Mirick, 91 N. Y. 293, *affirming* 25 Hun 272; Varnum *v.* Hart, 47 Hun 18, 14 N. Y. St. Rep. 140; Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

Pennsylvania. — Walbridge *v.* Knipper, 96 Pa. St. 48.

South Carolina. — State *v.* Hill, 2 Hill 607, 27 Am. Dec. 406; State *v.* Campbell, 1 Rich. 124.

The fact that when a former deposition was taken on behalf of defendant in a former suit, plaintiff therein, intending to dismiss the suit, failed to cross-examine the witness, does not render the former deposition inadmissible. Tindall *v.* Johnson, 4 Mo. 113.

97. Noble *v.* McClintock, 6 Watts & S. (Pa.) 58.

taken in the course of a judicial proceeding in a competent tribunal.[98] The particular character of the tribunal or proceeding, however, is immaterial so long as it is judicial in its nature.[99]

Invalidity of or Irregularity in Former Proceedings. — Where the former proceedings are void for want of jurisdiction, testimony taken

98. *Alabama.* — Bryant *v.* Owen, 2 Stew. & P. 134.

Former testimony taken in the course of a judicial proceeding before a competent tribunal is admissible. Thompson *v.* State, 106 Ala. 67, 17 So. 512; Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Lett *v.* State, 124 Ala. 64, 27 So. 256.

Kentucky. — The former trial must have been such a one as authorized the administration of a binding oath. Rucker *v.* Hamilton, 3 Dana 36.

Mississippi. — The legal existence of the former suit must be shown. Harrington *v.* Harrington, 2 How. 701.

New Jersey. — Jessup *v.* Cook, 6 N. J. L. 434; Chambers *v.* Hunt, 22 N. J. L. 552; Camden & A. R. R. Co. *v.* Stewart, 19 N. J. Eq. 343.

North Carolina. — Bryan *v.* Malloy, 90 N. C. 508.

Pennsylvania. — Montgomery *v.* Snodgrass, 2 Yeates 230; Lessee of De Haas *v.* Galbreath, 2 Yeates 15; Lessee of Sherman *v.* Dill, 4 Yeates 295, 2 Am. Dec. 408; Lessee of Packer *v.* Gonsalus, 1 Serg. & R. 526; McAdams *v.* Stilwell, 13 Pa. St. 90; Kirkpatrick *v.* Vanhorn, 32 Pa. St. 131.

South Carolina. — State *v.* Hill, 2 Hill L. 607, 27 Am. Dec. 406.

Tennessee. — The former testimony must have been given in a cause legally pending. Draper *v.* Stanley, 1 Heisk. 432.

99. Bailey *v.* Woods, 17 N. H. 365; Orr *v.* Hadley, 36 N. H. 575.

Under Bright. Purd. Dig., p. 820, § 45, providing that a deposition taken in a former cause may be read in a subsequent cause, a cause includes any contested question before a court of justice. Haupt *v.* Henninger, 37 Pa. St. 138.

Particular Proceedings as Judicial. The taking of evidence *de bene esse* is a judicial proceeding. Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352.

An inquiry before a grand jury is usually not a judicial proceeding. State *v.* Porter, 74 Iowa 623, 38 N. W. 514.

A hearing before arbitrators whose authority was created by consent of the parties, this consent not authorizing them to administer an oath to a witness, is not a judicial proceeding. Jessup *v.* Cook, 6 N. J. L. 434.

A hearing before two of the three trustees appointed under the insolvent act, two of the trustees having the power to examine any person on oath concerning, and settle all accounts between, the debtor and his creditors, is a judicial proceeding. Cox *v.* Trustees of Pierce, 7 Johns. (N. Y.) 298.

The Board of Property, not having the power to administer an oath, to enforce the attendance of witnesses, or to punish for contempt, is not a judicial body. Montgomery *v.* Snodgrass, 2 Yeates (Pa.) 230; Lessee of De Haas *v.* Galbreath, 2 Yeates (Pa.) 315; Lessee of Sherman *v.* Dill, 4 Yeates (Pa.) 295, 2 Am. Dec. 408; Kirkpatrick *v.* Vanhorn, 32 Pa. St. 131. See also Lessee of Packer *v.* Gonsalus, 1 Serg. & R. (Pa.) 526.

The submission of a controversy to arbitrators by agreement of the parties, being a recognized method in the policy of the law for the settlement of litigation, is a judicial proceeding. McAdams *v.* Stilwell, 13 Pa. St. 90; Bailey *v.* Woods, 17 N. H. 365.

Where a defendant permitted a judgment for damages to be taken against him by default, and subsequently plaintiff's damages were assessed by the clerk in an *ex parte* proceeding at which the testimony of witnesses was taken, such assessment proceeding was a judicial proceeding. Deming *v.* Chase, 48 Vt. 382.

Testimony given before an investigating committee appointed by a board of supervisors is not a judicial proceeding within the meaning of the rule admitting former testimony. Dunck *v.* Milwaukee Co., 103 Wis. 371, 79 N. W. 412.

therein cannot be proved;[1] but irregularities not wholly invalidating the proceedings do not render the testimony unprovable.[2]

Discontinuance of Former Proceedings. — The fact that the proceedings lapse, or are abandoned, or dismissed, or set aside, does not preclude proof of the former testimony.[3] It is sufficient that when

1. Backhouse *v.* Middleton, 22 Eng. 748, 1 Ch. Cas. 173, 3 Ch. Rep. 39, 2 Freem. 132; Flower *v.* Swift, 8 Mart. (N. S.) (La.) 449; State *v.* Johnson, 12 Nev. 121; Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275; Haupt *v.* Henninger, 37 Pa. St. 138; Walbridge *v.* Knipper, 98 Pa. St. 48.

Where no valid law exists which authorizes a trial court to try an accused person for an offense at the time of his former trial, at a subsequent trial proof of the former testimony of a witness given thereat cannot be received. State *v.* Johnson, 12 Nev. 121.

Where the trial court was without jurisdiction of the subject-matter of the controversy in a former action, a party who set up such want of jurisdiction was not thereby estopped from claiming that such testimony as was received on such action was taken under the sanctity of an oath, and thus may prove former testimony taken thereat. Jerome *v.* Bohm, 21 Colo. 322, 40 Pac. 570. See Succession of Saunders, 37 La. Ann. 769.

2. Where the court has jurisdiction and is authorized to try the accused for an offense, and the exercise of this power is not derived from an unconstitutional statute, the fact that the statute under which the jury was impaneled to try accused was unconstitutional does not render proof of former testimony inadmissible. State *v.* Johnson, 12 Nev. 121.

3. The fact that a suit in equity has been dismissed as being in substance unfit for a decree does not render it improper to read a deposition taken thereat in a subsequent suit. Haupt *v.* Henninger, 37 Pa. St. 138.

Notwithstanding a cause was dismissed after certain testimony was taken, the former testimony may be used in a proper case. Smith *v.* Veale, 1 Ld. Raym. 735; Lubier *v.* Genow, 2 Ves. 579; Wright *v.* Tatham (Q. B.), 1 Ad. & El. 3.

Where an action is referred to arbitrators for decision by agreement of the parties and an order of court, and the arbitrators have a sitting at which the testimony of a witness is taken subject to cross-examination, but afterward without a decision the matter is brought back into court for trial, proof of the testimony of a witness since deceased given before the arbitrators may be given in the trial before the court, although the arbitrators make no award. Kelly *v.* Connell, 3 Dana (Ky.) 532.

Former testimony given on a hearing before arbitrators may be proved at a subsequent trial, where the arbitrators failed to agree upon an award. Bailey *v.* Woods, 17 N. H. 365.

Where a case is closed and submitted to a jury, although the jury afterwards disagrees, there is a trial within the meaning of § 830, Code Civ. Proc., admitting proof of former testimony taken at a trial. Lawson *v.* Jones, 61 How. Pr. 424, 1 Civ. Proc. 247, 12 Weekly Dig., 551.

Where a referee before whom a trial was in progress dies after a witness had been examined and cross-examined, and his examination exhausted, the testimony being taken in the investigation of an issue of fact by a competent court, there is such a "trial" within the meaning of § 830, N. Y. Code Civ. Proc., as will render proof of former testimony admissible on a subsequent trial. Taft *v.* Little, 78 App. Div. 74, 79 N. Y. Supp. 507.

An examination of a former witness since deceased, reduced to writing by the referee to whom the cause was referred, may be proved on a subsequent trial in open court, the proceedings before the referee having lapsed. Nutt *v.* Thompson, 69 N. C. 548.

Former testimony taken under a submission to arbitrators, the award made having been set aside, may be proved in a subsequent action in

given the testimony was given under the formalities and solemnities of a regular judicial proceeding.[4]

Former Witness Sworn. — The former witness must have testified under oath legally administered,[5] unless the adverse party on the former trial waived this requirement, in which case he cannot on a subsequent hearing set up the want of oath.[6]

Relative Nature of Former and Subsequent Proceedings. — Former testimony may be proved on a retrial of a cause in the same[7] or in an appellate[8] court, or in a proper case upon the trial of another judicial proceeding.[9] The former proceeding need not have been

court. McAdams *v.* Stilwell, 13 Pa. St. 90.

4. Wherever the testimony of a witness is given under all the formalities and solemnities of a regular judicial proceeding in court, and the witness has been examined and cross-examined and his testimony fully completed, there is such a "trial" within the meaning of § 830, N. Y. Code Civ. Proc., as will render proof of his former testimony admissible in a subsequent trial. Taft *v.* Little, 78 App. Div. 74, 79 N. Y. Supp. 507.

The right to prove former testimony depends upon the power of the tribunal to hear and determine the controversy — as upon the power of referees to make an award — not upon the continued existence of the award or judgment. Thus, former testimony may be proved after a new trial is granted, or a judgment reversed on appeal, or an award set aside for mistake. McAdams *v.* Stilwell, 13 Pa. St. 90.

Compare, however, Morley *v.* Castor, 63 App. Div. 38, 71 N. Y. Supp. 363, *holding* that where a trial is interrupted in the midst and the hearing adjourned in order to give a party an opportunity to move to amend his pleadings to correspond with his proofs, there is not such a trial as renders proof of testimony taken therein admissible in a subsequent proceeding.

5. *England.* — Rex *v.* Inhabitants of Eriswell, 3 T. R. 707.

Alabama. — Davis *v.* State, 17 Ala. 354.

Georgia. — See Code 1895, § 5186 (Code 1882, § 3782).

Kansas. — State *v.* Wilson, 24 Kan. 189. 36 Am. Rep. 257.

Massachusetts. — Warren *v.* Nichols, 6 Metc. 261.

Mississippi. — See Owens *v.* State, 63 Miss. 450; Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

Ohio. — Summons *v.* State, 5 Ohio St. 325.

Pennsylvania. — Walbridge *v.* Knipper, 96 Pa. St. 48.

6. Wheeler *v.* Walker, 12 Vt. 427.

7. *Alabama.* — Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485; Tharp *v.* State, 15 Ala. 749.

Arizona. — Rev. Stat. 1901, § 2537.

California. — People *v.* Murphy, 45 Cal. 137.

Illinois. — Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672.

Iowa. — Packard *v.* McCoy, 1 Iowa 530.

Kentucky. — Cantrell *v.* Hewlett, 2 Bush 311.

Missouri. — Tindall *v.* Johnson, 4 Mo. 113; State *v.* Able, 65 Mo. 357.

Nevada. — State *v.* Johnson, 12 Nev. 121.

New York. — Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

Ohio. — Hoover *v.* Jennings, 11 Ohio St. 624; Bonnet *v.* Dickson, 14 Ohio St. 434.

Pennsylvania. — Bright. Purd. Dig., p. 818, § 37.

Texas. — People's Nat. Bank *v.* Mulkey, 94 Tex. 395, 60 S. W. 753; People's Nat. Bank *v.* Mulkey (Tex. Civ. App.), 61 S. W. 528.

Vermont. — Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67.

8. Jarrett *v.* Phillips, 90 Ill. 237; Packard *v.* McCoy, 1 Iowa 530; Austin *v.* Slade, 3 Vt. 68; Glass *v.* Beach, 5 Vt. 172; Perry *v.* Whitney, 30 Vt. 390; Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617.

9. *England.* — Stephenson *v.* Biney, L. R. 2 Eq. 303, 12 Jur. (N. S.) 428, 14 L. T. 432, 14 W. R. 788.

United States. — Philadelphia, W.

in the same technical shape as that in which the former testimony is offered in evidence, so long as the foregoing requisites are observed.[10]

C. Identity of Issues. — In order that former testimony may be admissible, some distinct common issue must be controverted on both trials from substantially the same standpoint.[11] Where, how-

& B. R. Co. *v.* Howard, 13 How. 307.

Alabama. — Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369.

Arkansas. — McTighe *v.* Herman, 42 Ark. 285.

California. — Code Civ. Proc., § 1870, subd. 8.

Connecticut. — Ray *v.* Bush, 1 Root 81.

Idaho. — Code Civ. Proc., § 4519.

Illinois. — Wade *v.* King, 19 Ill. 301.

Kentucky. — Brooks *v.* Cannon, 2 A. K. Marsh. 525; Kercheval *v.* Ambler, 4 Dana 166; Kerr *v.* Gibson, 8 Bush 129.

Louisiana. — Hennen *v.* Monro, 4 Mart. (N. S.) 449; Conway *v.* Erwin, 1 La. Ann. 391.

Maine. — Chase *v.* Springvale Mills Co., 75 Me. 156.

Maryland. — Darnall *v.* Goodwin, 1 Har. & J. 282.

Missouri. — Tindall *v.* Johnson, 4 Mo. 113; Lohman *v.* Stocke, 94 Mo. 672, 8 S. W. 9; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869.

Montana. — Code Civ. Proc., § 3146, subd. 8.

New Hampshire. — Leviston *v.* French, 45 N. H. 21.

New York. — Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

Oregon. — Bel. & C. Anno. Codes & Stat., § 718.

Pennsylvania. — Bright. Purd. Dig., p. 818, § 37; p. 820, § 45.

Vermont. — Rev. L., § 1036; Austin *v.* Slade, 3 Vt. 68; Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67.

Contra. — People's Nat. Bank *v.* Mulkey, 94 Tex. 395, 60 S. W. 753; People's Nat. Bank *v.* Mulkey (Tex. Civ. App.), 61 S. W. 528; both of these cases relating to the use of former depositions.

10. Charlesworth *v.* Tinker, 18 Wis. 633.

Instances of Differences in Shape of Two Proceedings. — Former a proceeding in equity; latter an action at law. Ray *v.* Bush, 1 Root (Conn.) 81; Haupt *v.* Henninger, 37 Pa. St. 138.

Evidence taken in Court of Exchequer afterwards used in Chancery. Magrath *v.* Veitch, 1 Hog. (Ir.) 127.

Former trial held before a recorder vested with all the powers and authority belonging to justices of the peace in criminal, latter held in a city court. Lowe *v.* State, 86 Ala. 47, 5 So. 435. Former proceeding an action for unlawful detainer, latter an action to quiet title. Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305. Deposition taken on motion for new trial used on the new trial. Spear *v.* Coon, 32 Conn. 292.

Testimony taken on reference subsequently used on trial in open court. Nutt *v.* Thompson, 69 N. C. 548.

After the former trial the pleadings are amended, but the issues remain substantially the same. Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517.

Testimony taken before arbitrators chosen by parties used in subsequent action in court. McAdams *v.* Stilwell, 13 Pa. St. 90; Walbridge *v.* Knipper, 96 Pa. St. 48.

Deposition taken on notice on application to set aside judgment heard before judge, used on subsequent rehearing of cause on its merits before jury. Haupt *v.* Henninger, 37 Pa. St. 138; Riegel *v.* Wilson, 60 Pa. St. 388.

11. *England.* — Rex *v.* Arundel, Hob. 109; Lawrence *v.* Maule, 4 Drew 472; Stephenson *v.* Biney, L. R. 2 Eq. 303, 12 Jur. (N. S.) 428, 14 L. T. 432, 14 W. R. 788.

Canada. — Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, *affirming* 20 Ont. App. 444, 22 Ont. 693; Court *v.* Holland, 8 Prac. Rep. 219.

United States. — See Philadelphia, W. & B. R. Co. *v.* Howard, 13 How. 307; Reynolds *v.* United States, 98 U. S. 145; United States *v.* Angell, 11 Fed. 34.

Alabama. — Heirs of Holman *v.*

Bank of Norfolk, 12 Ala. 369; Davis *v.* State, 17 Ala. 354; Goodlett *v.* Kelly, 74 Ala. 213; Patton *v.* Pitts, 80 Ala. 373; Smith *v.* Keyser, 115 Ala. 455, 22 So. 149.

Arkansas. — McTighe *v.* Herman, 42 Ark. 285; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; St. Louis, Iron Mt. & S. R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

California. — People *v.* Murphy, 45 Cal. 137; Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305; Code Civ. Proc., § 1870, subd. 8.

Colorado. — Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

Georgia. — Whitaker *v.* Arnold, 110 Ga. 857, 36 S. E. 231.

Illinois. — See Wade *v.* King, 19 Ill. 301; McConnel *v.* Smith, 27 Ill. 232; Chicago & E. I. R. R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263.

Kentucky. — Brooks *v.* Cannon, 2 A. K. Marsh. 525; Rucker *v.* Hamilton, 3 Dana 36; Kelly *v.* Connell, 3 Dana 532.

Louisiana. — Succession of Rieger, 37 La. Ann. 104.

Maine. — See Chase *v.* Springvale Mills Co., 75 Me. 156.

Maryland. — See Black *v.* Woodrow, 39 Md. 194.

Massachusetts. — Melvin *v.* Whiting, 7 Pick. 79; Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608; Warren *v.* Nichols, 6 Metc. 261; Yale *v.* Comstock, 112 Mass. 267; Costigan *v.* Lunt, 127 Mass. 354.

Michigan. — See Howard *v.* Patrick, 38 Mich. 795.

Mississippi. — Harrington *v.* Harrington, 2 How. 701.

Missouri. — Parsons *v.* Parsons, 45 Mo. 265; Lohman *v.* Stocke, 94 Mo. 672, 8 S. W. 9. But *compare* Jaccard *v.* Anderson, 37 Mo. 91, where the court said that if the issues are so nearly the same that it is apparent that there was an opportunity to cross-examine the witness as to the same matter in both cases, the issue will be considered as sufficiently identical to warrant the admission of former testimony.

Montana. — See Code Civ. Proc., § 3146, subd. 8.

New York. — Wilbur *v.* Selden, 6 Cow. 162; Osborn *v.* Bell, 5 Denio 370, 49 Am. Dec. 275; Varnum *v.* Hart, 47 Hun 13, 14 N. Y. St. 140; Odell *v.* Solomon, 16 N. Y. St. 577, 23 Jones & S. 410, 4 N. Y. Supp. 440.

North Carolina. — Harper *v.* Burrow, 28 N. C. 30; Bryan *v.* Malloy, 90 N. C. 508.

Oregon. — See Bel. & C. Anno. Codes & Stat., § 718, subd. 8.

Pennsylvania. — Watson *v.* Gilday, 11 Serg. & R. 337; Jones *v.* Wood, 16 Pa. St. 25; Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708.

South Carolina. — Bishop *v.* Tucker, 4 Rich. 178.

Texas. — Choate *v.* Huff (Tex. App.), 18 S. W. 87.

Vermont. — See Mathewson *v.* Estate of Sargeant, 36 Vt. 142.

Virginia. — Reed *v.* Gold (Va.), 45 S. E. 868.

Wisconsin. — Dunck *v.* Milwaukee Co., 103 Wis. 371, 79 N. W. 412.

Illustrations. — Where a person brought an action for personal injuries which was afterwards abated by his death, in a subsequent action for damages for his death brought for the benefit of his heirs by his personal representative, former testimony of a witness since deceased, as to the cause of the injury, is relevant to a common issue material to the two actions, and is competent in the subsequent action. Corporation of Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, *affirming* 20 Ont. App. 444, 22 Ont. 693.

The issue is substantially the same in a criminal proceeding for assault with intent to kill and a subsequent civil action for assault, so as to warrant the admission of the former testimony of a witness given on the examining trial. Gavan *v.* Ellsworth, 45 Ga. 227.

In an action for wrongful death, proof of former interrogatories as to the injury and the manner of its occurrence taken in a former action for personal injuries brought by the decedent before his death, is competent. Atlanta & West Point R. *v.* Venable, 67 Ga. 697.

Testimony as to the extent of an injury given in a former action by an infant for pain and suffering and permanent injury caused by defendant's negligence cannot be proved on a subsequent action by the infant's father for the loss of services to him caused by the injury. Hooper *v.*

ever, the former testimony is taken by deposition, it is enough that the parties anticipated at the time the deposition was taken that the issue would be controverted, although in fact not controverted, on the former trial.[12]

Relevancy to Identical Issue. — The former testimony must on each trial be relevant to and directed at the common issue.[13] Proof of former testimony relevant to the common issue is not, however, to be excluded merely because certain matter irrelevant to the present trial is inextricably interwoven therewith.[14]

Divergence in Other Respects. — So long as these conditions are fulfilled it is immaterial that other issues, whether similar or divergent, are also involved in one or both trials.[15]

Variant Cause of Action. — The cause of action itself need not be the same in the two proceedings.[16]

Southern R. Co., 112 Ga. 96, 37 S. E. 165.

Where a replevin suit was brought for certain property and afterwards dismissed, but, the plaintiff therein having taken possession of the property, the former defendant commenced a second action for the value of the property, former testimony, on the issue of the ownership of the property, given in the former action may be proved in the latter. Goodrich *v.* Hanson, 33 Ill. 499.

Where one action was brought in ejectment to recover certain land, the chief issue therein being the length of time a certain contract entitled defendant to hold the land, in a subsequent action in detinue wherein the principal issue is the construction of the same contract, former testimony in respect thereto is admissible. Rucker *v.* Hamilton, 3 Dana (Ky.) 36.

In some cases the necessity of a distinct issue in common between the cases does not seem to be recognized, but it seems to be thought that a general similarity of issues between them is enough. See, for instance: Lowe *v.* State, 86 Ala. 47, 5 So. 435; Dawson *v.* Smith, 3 Houst. (Del.) 335; Mabe *v.* Mabe, 122 N. C. 552, 29 S. E. 843.

12. Long *v.* Davis, 18 Ala. 801.

13. Ray *v.* Bush, 1 Root (Conn.) 81; Hennen *v.* Monro, 4 Mart. (N. S.) (La.) 449; Parsons *v.* Parsons, 45 Mo. 265; Odell *v.* Solomon, 16 N. Y. St. 577, 23 Jones & S. 410, 4 N. Y. Supp. 440.

It is not sufficient that the former testimony relevant to the subsequent issue would have been relevant thereto in the former trial, had the issue arisen thereon, where in fact the issue was not involved; in such case the former testimony can not be admitted. Davis *v.* State, 17 Ala. 354; Deming *v.* Chase, 48 Vt. 382.

"The reason . . . is that the opposite party is not supposed to have cross-examined the witness with any other view except as to the issue upon which the evidence was taken." Holcombe *v.* Holcombe, 10 N. J. Eq. 284.

"If a witness in his deposition testifies with respect to a matter not in issue, his testimony would be immaterial, and might with safety and propriety be passed by without challenge or cross-examination, and in such a case to permit it to be read in another suit upon a different state of the pleadings would operate a surprise and an injustice." Reed *v.* Gold (Va.), 45 S. E. 868.

14. Rucker *v.* Hamilton, 3 Dana (Ky.) 36.

15. Morehouse *v.* Morehouse, 17 Abb. N. C. (N. Y.) 407, 41 Hun 146, 11 Civ. Proc. 20; Kohler *v.* Henry, 4 Phila. (Pa.) 61.

Some cases, however, seem to have been decided on the theory that all the issues must be the same. *Compare* Succession of Rieger, 37 La. Ann. 104; Melvin *v.* Whiting, 7 Pick. (Mass.) 79.

16. Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, *per* King, Fournier, and Sedgwick, JJ., Gwynne and Taschereau, JJ., *dissenting; affirming* 20

Variant Subject-matters. — It is often said that the subject-matter of the two trials must be the same, otherwise the former testimony cannot be proved;[17] but even this identity is unnecessary where the two conditions of identity of issue and relevancy of proof thereto are fulfilled.[18]

Ont. App. 444, 22 Ont. 693; Williams *v.* Bethany, 1 La. (O. S.) 315; Cox *v.* State, 28 Tex. App. 92, 12 S. W. 493.

Where the former action was for personal injuries, that action being afterward abated by the plaintiff's death, in a subsequent action for his death brought for the benefit of his heirs his former testimony may be proved. Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, *affirming* 20 Ont. App. 444, 22 Ont. 693; Atlanta & W. P. R. *v.* Venable, 67 Ga. 697. *Compare* Hooper *v.* Southern R. Co., 112 Ga. 96, 37 S. E. 165; Indianapolis & St. L. R. R. Co. *v.* Stout, 53 Ind. 143.

Where a replevin suit was brought for certain property and afterward dismissed, but the plaintiff therein having taken possession of the property, the former defendant commenced a second action for the value of the property, former testimony may be proved in the subsequent action, the issue of ownership of the property being involved in both cases. Goodrich *v.* Hanson, 33 Ill. 499.

Where on a former trial for horse theft the indictment laid the ownership in one person, while the count of a subsequent indictment on which defendant was convicted laid the ownership in another person, the transaction involved, the defendant and the animal being the same in the two trials, former testimony, not relating in any way to the ownership of the horse, may be proved. Cox *v.* State, 28 Tex. App. 92, 12 S. W. 493.

In a few cases it is held that the cause of action or the offense charged must be the same in the two actions. McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; Ephraims *v.* Murdock, 7 Blackf. (Ind.) 10; Dukes *v.* State, 80 Miss. 353, 31 So. 744.

17. *Alabama.* — Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Simmons *v.* State, 129 Ala. 41, 29 So. 929.

Illinois. — Loughry *v.* Mail, 34 Ill. App. 523.

Maryland. — Darnall *v.* Goodwin, 1 Har. & J. 282.

Massachusetts. — Warren *v.* Nichols, 6 Metc. 261.

Missouri. — Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869; Heyworth *v.* Miller Grain & El. Co., 174 Mo. 171, 73 S. W. 498.

New Jersey. — Camden & A. R. Co. *v.* Stewart, 21 N. J. Eq. 484.

New York. — Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

Ohio. — Summons *v.* State, 5 Ohio St. 325; DeVeaux *v.* Clemens, 17 Ohio Cir. Ct. Rep. 33.

Pennsylvania. — Beers *v.* Cornelius, 1 Pittsb. R. 274; Haupt *v.* Henninger, 37 Pa. St. 138.

South Carolina. — Yancey *v.* Stone, 9 Rich. Eq. 429.

Where the subject-matter of two actions is not shown to be the same, a former deposition is inadmissible, although the parties are the same. Crawford *v.* Word, 7 Ga. 445.

Where in a former action in ejectment the plaintiff laid claim merely to a portion of a tract of land held by defendant by a certain title, in a subsequent action against the same defendant for the remainder of the land held by that title, the subject-matter not being the same, nor a part of the same property claimed in the former action, a deposition taken in the former action cannot be used in the latter. Walker *v.* Walker, 16 Serg. & R. (Pa.) 379.

But in Sample *v.* Coulson, 9 Watts & S. (Pa.) 62, it is said that the two trials must relate to the same "title," not to the same "subject-matter." And where the former testimony offered in evidence related to such title, in general, this would be the correct rule.

18. The fact that two actions re-

D. Identity of Parties. — a. *Necessity in General.* — The parties to the trial at which the former testimony is offered to be proved must, either personally or by representation, have been parties likewise interested in the former trial;[19] otherwise the for-

lated to the title to different tracts of land does not, where an issue in each was heirship to a certain person, render former testimony relating to such issue inadmissible in the subsequent of the two actions. Doe d. Foster *v.* Foster (Q. B.), 1 Ad. & El. (Eng.) 791*n*.

Where the issue in two cases is the same, viz., "Is this the last will of M," the fact that in one proceeding the controversy concerned testator's personal property and the other his real property does not render former testimony inadmissible on the ground of difference of subject-matter. Turner *v.* Hand, 3 Wall. Jr. 88, 24 Fed. Cas. No. 14,257.

19. *England.* — Mayor of Doncaster *v.* Day, 3 Taunt. 262; Lawrence *v.* Maule, 4 Drew 472; Stephenson *v.* Biney, L. R. 2 Eq. 303, 12 Jur. (N. S.) 428, 14 L. T. 432, 14 W. R. 788.

United States. — The John H. Starin, 9 Ben. 331, 13 Fed. Cas. No. 7351; United States *v.* Angell, 11 Fed. 34.

Alabama. — Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485; Tharp *v.* State, 15 Ala. 749; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Arkansas. — McTighe *v.* Herman, 42 Ark. 285; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; St. Louis, Iron Mt. & S. R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

California. — People *v.* Murphy, 45 Cal. 137; Code Civ. Proc., § 1870, subd. 8.

Colorado. — Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

Delaware. — Kinney *v.* Hosea, 3 Har. 397.

Georgia. — Code 1895, § 5186, Code 1882, § 3782.

Illinois. — Wade *v.* King, 19 Ill. 301; McConnel *v.* Smith, 27 Ill. 232; Stout *v.* Cook, 47 Ill. 530; Jarrett *v.* Phillips, 90 Ill. 237; Loughry *v.* Mail, 34 Ill. App. 523.

Indiana. — Earl *v.* Hurd, 5 Blackf. 248.

Iowa. — Packard *v.* McCoy, 1 Iowa 530.

Kentucky. — Brooks *v.* Cannon, 2 A. K. Marsh. 525; Rucker *v.* Hamilton, 3 Dana 36; Kelly *v.* Connell, 3 Dana 532; Kercheval *v.* Ambler, 4 Dana 166; Cantrell *v.* Hewlett, 2 Bush 311.

Louisiana. — Conway *v.* Erwin, 1 La. Ann. 391.

Maine. — Chase *v.* Springvale Mills Co., 75 Me. 156.

Maryland. — Black *v.* Woodrow, 39 Md. 194.

Massachusetts. — Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608; Warren *v.* Nichols, 6 Metc. 261; Yale *v.* Comstock, 112 Mass. 267; Costigan *v.* Lunt, 127 Mass. 354.

Michigan. — Howard *v.* Patrick, 38 Mich. 795.

Mississippi. — Owens *v.* State, 63 Miss. 450; Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

Missouri. — Tindall *v.* Johnson, 4 Mo. 113; Finney *v.* St. Charles College, 13 Mo. 266; Samuel *v.* Withers, 16 Mo. 532; State *v.* Able, 65 Mo. 357; Lohman *v.* Stocke, 94 Mo. 672, 8 S. W. 9; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869.

Montana. — Code Civ. Proc., § 3146, subd. 8.

New Hampshire. — Leviston *v.* French, 45 N. H. 21.

New York. — Jackson d. Potter *v.* Bailey, 2 Johns. 17; Wilbur *v.* Selden, 6 Cow. 162; Deering *v.* Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

North Carolina. — Harper *v.* Burrow, 28 N. C. 30.

Ohio. — Summons *v.* State, 5 Ohio St. 325; Hoover *v.* Jennings, 11 Ohio St. 624; Bonnet *v.* Dickson, 14 Ohio St. 434; De Veaux *v.* Clemens, 17 Ohio Cir. Ct. R. 33.

Oregon. — Bel. & C. Anno. Codes & Stat., § 718, subd. 8.

Pennsylvania. — Watson *v.* Gilday, 11 Serg. & R. 337; Beers *v.* Cornelius, 1 Pittsb. R. 274; Bright. Purd. Dig., p. 818, § 37.

South Carolina. — State *v.* De Witt, 2 Hill L. 282, 27 Am. Dec.

mer testimony cannot be proved.[20]

371; State *v.* Hill, 2 Hill L. 607, 27 Am. Dec. 406; Yancey *v.* Stone, 9 Rich. Eq. 429.

Vermont. — Rev. L., § 1036.

Wisconsin. — Dunck *v.* Milwaukee Co., 103 Wis. 371, 79 N. W. 412.

The parties must be essentially the same. Patton *v.* Pitts, 80 Ala. 373.

It is sufficient that the parties are virtually and substantially the same. Wright *v.* Tatham, 1 Ad. & El. (Eng.) 3.

The party against whom the former testimony is offered must be the same. McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; Lane *v.* Brainerd, 30 Conn. 565.

Rationale. — As the former was a trial between different parties, and as the party against whom the former testimony is offered had no opportunity to examine or cross-examine the witnesses, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion, however identical the questions or some of them may have been with the questions which arise in the present case. Lane *v.* Brainerd, 30 Conn. 565.

The cases stating the necessity for sameness of parties must be taken subject to the cases hereinafter cited which set forth the degree of sameness requisite.

20. *England.* — Rex *v.* Arundel (Countess), Hob. 109; Taylor *v.* Brown, T. Raym. 170; Peterborough (Earl) *v.* Germaine, 3 Bro. P. C. 539; Doe d. Foster *v.* Derby (Earl), 1 Ad. & El. 783; Hope *v.* Liddell, 21 Beav. 180.

United States. — McCormick *v.* Howard, 1 McArthur Pat. Cas. 238, 15 Fed. Cas. No. 8719; The Oregon, 89 Fed. 520.

Alabama. — Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369.

California. — Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61.

Colorado. — Tourtelotte *v.* Brown, 4 Colo. App. 377, 36 Pac. 73.

Georgia. — Haslam *v.* Campbell, 60 Ga. 650; Hughes *v.* Clark, 67 Ga. 19.

Illinois. — Brown *v.* Bierman, 24 Ill. App. 574.

Indiana. — Burroughs *v.* Hunt, 13 Ind. 178; Schafer *v.* Schafer, 93 Ind. 586.

Kentucky. — Kerr *v.* Gibson, 8 Bush 129.

Louisiana. — Reynolds *v.* Rowley, 2 La. Ann. 890; Stockmeyer *v.* Weidner, 32 La. Ann. 106; Succession of Rieger, 37 La. Ann. 104.

New Jersey. — Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

New York. — Borst *v.* Boyd, 3 Sandf. Ch. 501.

North Carolina. — McMorine *v.* Storey, 20 N. C. 272, 34 Am. Dec. 374; Bryan *v.* Malloy, 90 N. C. 508.

Pennsylvania. — McCully *v.* Barr, 17 Serg. & R. 445.

South Carolina. — Petrie *v.* Columbia & G. R. Co., 29 S. C. 303, 7 S. E. 515.

Texas. — Luckie *v.* State, 33 Tex. Crim. 562, 28 S. W. 533; Ellis *v.* Le Bow, 30 Tex. Civ. App. 449, 71 S. W. 576, *affirmed* 74 S. W. 528.

Where party against whom former testimony is offered is not a party to the former trial, former testimony is inadmissible.

England. — Quantock *v.* Bullen, 5 Madd. 81.

United States. — The John H. Starin, 9 Ben. 331, 13 Fed. Cas. No. 7351.

California. — McDonald *v.* Cutter, 120 Cal. 44, 52 Pac. 120.

Colorado. — Williams *v.* People, 26 Colo. 272, 57 Pac. 701.

Iowa. — Golden *v.* Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257.

Louisiana. — Arendell *v.* Arendell, 10 La. Ann. 566.

Michigan. — Walterhouse *v.* Walterhouse, 130 Mich. 89, 89 N. W. 585.

New York. — People *v.* Mullins, 5 App. Div. 172, 39 N. Y. Supp. 361.

Pennsylvania. — Walker *v.* Walker, 16 Serg. & R. 379.

Where party joined on subsequent trial was neither joined nor represented on former trial, former testimony cannot be proved.

United States. — Boudereau *v.* Montgomery, 4 Wash. C. C. 188, 3 Fed. Cas. No. 1694; Tappan *v.* Beardsley, 10 Wall. 427.

Where Former Cause Criminal, Latter Civil. — It would seem that where the former cause is a criminal prosecution and the latter a civil proceeding to which the state is not a party, the parties to the two causes are not sufficiently the same, although sometimes former testimony has been admitted.[21]

Michigan. — Mason *v.* Kellogg, 38 Mich. 132.

Mississippi. — Harrington *v.* Harrington, 2 How. 701.

New Hampshire. — Orr *v.* Hadley, 36 N. H. 575.

Oregon. — Murray *v.* Murray, 6 Or. 26.

Pennsylvania. — Good *v.* Good, 7 Watts 195.

In Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, *per* King, Fournier, and Sedgwick, JJ., Gwynne and Taschereau, JJ., *dissenting; affirming* 20 Ont. App. 444, 22 Ont. 693, the court recognized an important qualification of this rule.

Under R. S. Ont., ch. 184, § 531, subd. 4, where an injury is sustained by a person "by reason of any obstruction, excavation or opening in a public highway, street or bridge, placed, made, left or maintained" by any person other than a servant or agent of a municipal corporation, the corporation has a right over against such person to recover the damages and costs, if any, recovered from the corporation by the injured person. In the above case the court held that where an action is brought against such a corporation for personal injuries and certain testimony taken therein, and afterwards a third person alleged to be liable under this provision is interpleaded on a subsequent trial afterwards had, such former testimony may nevertheless be proved. The court said: "The case is not affected by the circumstance of the third party proceedings. The plaintiff may succeed against the town [municipal corporation] and fail as to Heughan [the third party]. The town might have made an admission of liability, and this would be admissible evidence against the town, but could not bind Heughan. In order to make the third party liable it must be established on the trial, as against him, that the damages were sustained by reason of an obstruction, excavation or opening, placed, made, left or maintained by him. This is not made out as against him by evidence admissible against the town, but not against him, although such evidence may establish a case as against the original defendant."

21. Testimony taken on a criminal cause, although in the presence of the prosecutor, is not admissible in a subsequent civil proceeding by the accused against the prosecutor. Melen *v.* Andrews, Moody & M. 336, 31 R. R. 736.

The parties to a prosecution for forgery of a note and a subsequent action by the accused upon the note are not the same, and former testimony of a deceased witness taken in the criminal prosecution is not admissible in the subsequent civil case, although offered against the same person in both cases. "A criminal prosecution, although instituted by an individual, is not in any sense an action between the person instituting it and the prisoner." Harger *v.* Thomas, 44 Pa. St. 128.

Sometimes former testimony taken in a criminal case has nevertheless been admitted in a subsequent civil case.

The parties to a criminal proceeding for assault with intent to murder and a subsequent civil suit for the assault are substantially the same, so that testimony given against the defendant in the criminal action may be again used against him in the civil action. For the defendant was in the criminal case in *propria persona,* and the plaintiff — the injured party — was represented by his protector, the state. Gavan *v.* Ellsworth, 45 Ga. 227.

Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059, where the facts and the holding were the same as in the Georgia case.

As the complainant in a criminal prosecution before a magistrate for assault and breach of the peace is given the control of the prosecution

Where Former Cause Civil, Latter Criminal. — Former testimony given in a civil proceeding to which the state was not a party cannot be proved in a subsequent criminal prosecution because of diversity of parties.[22]

b. *Persons Represented by Former Parties.* — **(1.) In General.** The general rule as often stated is that a person claiming under, or a privy of, a party to a former trial has been so represented by the former party that former testimony may be proved against him.[23]

with full power to examine all witnesses sworn upon the trial, and state's counsel need not appear therein, and judgment for costs may be entered by the magistrate against the complainant if the complaint is willful and mischievous, the parties to such action and to a subsequent civil action for such assault are substantially the same, so that the testimony of a former witness since deceased may be proved against the complainant by defendant in the civil action. Charlesworth *v.* Tinker, 18 Wis. 633.

22. A former deposition of a witness since deceased, taken in a former civil action to which the state was not a party, is not admissible in defendant's behalf. Watkins *v.* United States, 5 Okla. 729, 50 Pac. 88.

Testimony taken in a former civil action for an offense to the person is not admissible in a subsequent criminal prosecution for the offense. Luckie *v.* State, 33 Tex. Crim. 562, 28 S. W. 533.

23. Court *v.* Holland, 8 Prac. Rep. 219; Adams *v.* Raigner, 69 Mo. 363; Walker *v.* Walker, 16 Serg. & R. (Pa.) 379.

Authorities holding or intimating that the parties to the subsequent trial must be the same as the former parties, or their privies, and often designating the privies as "privies in blood, in law, or in estate;" and that otherwise the former testimony is inadmissible:

England. — Humphreys *v.* Pensam, 1 Myl. & C. 580; Printing, Telegraph & Const. Co. *v.* Drucker (1894), 2 Q. B. 801, 64 L. J. Q. B. 58, 9 R. 677, 71 L. T. 172, 42 W. R. 674. *Contra.* — A former deposition of a witness since deceased taken thirty years before in a cause between different parties may be read. Terwit *v.* Gresham, 22 Eng. 701, 1 Ch. Cas. 73.

United States. — Tappan *v.* Beardsley, 10 Wall. 427; Metropolitan St. R. Co. *v.* Gumby, 39 C. C. A. 455, 99 Fed. 192.

Alabama. — Bryant *v.* Owen, 2 Stew. & P. 134; Clealand *v.* Huey, 18 Ala. 343; Long *v.* Davis, 18 Ala. 801; Goodlett *v.* Kelly, 74 Ala. 213; Patton *v.* Pitts, 80 Ala. 373; Smith *v.* Keyser, 115 Ala. 455, 22 So. 149; Simmons *v.* State, 129 Ala. 41, 29 So. 929.

California. — Poorman *v.* Miller, 44 Cal. 269.

Colorado. — Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

Iowa. — Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323.

Kentucky. — Kerr *v.* Gibson, 8 Bush 129.

Maryland. — Darnall *v.* Goodwin, 1 Har. & J. 282.

Massachusetts. — Yale *v.* Comstock, 112 Mass. 267.

Mississippi. — Harrington *v.* Harrington, 2 How. 701; Merrill *v.* Bell, 6 Smed. & M. 730.

Missouri. — Parsons *v.* Parsons, 45 Mo. 265.

New Hampshire. — Orr *v.* Hadley, 36 N. H. 575.

New York. — Perine *v.* Swaim, 2 Johns. Ch. 475; Roberts *v.* Anderson, 3 Johns. Ch. 371; Jackson *v.* Lawson, 15 Johns. 539; Jackson d. Barton *v.* Crissey, 3 Wend. 251; Vail *v.* Craig, 13 N. Y. St. Rep. 448, 28 Wkly. Dig. 236.

Pennsylvania. — Hocker *v.* Jamison, 2 Watts & S. 438; Sample *v.* Coulson, 9 Watts & S. 62.

Wisconsin. — McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116.

What constitutes privity:

England. — For the purpose of admitting proof of former testimony by

This statement must be interpreted in view of the following specific rules.

(2.) Where Former Proceeding in Rem. — Where the former proceeding was *in rem,* any person afterward setting up any claim to the subject-matter of such proceeding becomes so related to it that former testimony taken therein may be proved against him.[24]

(3.) Personal Representatives of Former Parties. — Former testimony may be proved against the personal representative of a former party,[25] and one personal representative of a decedent so represents his joint personal representative that former testimony competent against one of them is competent against any when sued in such capacity.[26]

persons privy to the former parties is really meant persons claiming under them. Morgan *v.* Nicholl, L. R. 2 C. P. 117.

To constitute one person a privy in estate to another, such other must be a predecessor in respect to the property in question, from whom the privy derives his right or title — a mutual or successive relationship. Patton *v.* Pitts, 80 Ala. 373.

For the purpose of privity of parties so as to render a former deposition admissible, privity cannot exist, unless one hold under another, and claim through him, or unless both have an estate in the same identical thing by title accruing at the same time, when the possession of one is not incompatible with the title of the other, or unless the title and possession be joint. Harrington *v.* Harrington, 2 How. (Miss.) 701.

The same privity is requisite as would make the judgment in the former action evidence in a subsequent action. Patton *v.* Pitts, 80 Ala. 373.

24. Former Proceeding in Rem. A deposition taken on the hearing of a proceeding for the distribution of a fund in court may be used on a subsequent hearing for the same purpose, subject to the right of a person who was not a party to the prior proceeding to cross-examine the party upon paying the mileage of the former witness. Maclennan *v.* Gray, 12 Prac. Rep. (Ont.) 431.

By Ky. Rev. Stat., c 106, § 40, the record of former testimony given, or a former deposition made, on a motion to admit a will to probate, by a witness who cannot afterwards be produced, is admissible in a subsequent proceeding to contest the will, brought by a non-resident contestant to prove the former testimony, although the non-resident contestant was not a party to the probate proceedings. Thompson *v.* Blackwell, 17 B. Mon. 609.

A person who appeals from a decree admitting a will to probate so makes himself bound by the proceedings that a former deposition taken on the hearing of the proceeding probating the will may be used against him in his contest of the will. Ottinger *v.* Ottinger, 17 Serg. & R. (Pa.) 142.

25. *Alabama.* — Long *v.* Davis, 18 Ala. 801; Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136.

Idaho. — Code Civ. Proc., § 4519.

Indiana. — Fisher *v.* Fisher, 131 Ind. 462, 29 N. E. 31.

New York. — Osborn *v.* Bell, 5 Denio 370, 49 Am. Dec. 275.

Pennsylvania. — Haupt *v.* Henninger, 37 Pa. St. 138; Bright. Purd. Dig., p. 820, § 45.

Vermont. — Mathewson *v.* Estate of Sargeant, 36 Vt. 142.

Washington. — Bal. Anno. Codes & Stat., § 6029.

26. Boudereau *v.* Montgomery, 4 Wash. C. C. 188, 3 Fed. Cas. No. 1694, wherein the court said: "The executors or administrators of the deceased are considered in law as but one person, representing the testator; and the acts done by any one of them which relate to the estate of their testator or intestate are deemed the acts of all, inasmuch as they have a joint and entire authority over the whole."

(4.) Personal Representative Succeeded by Heir or Devisee. — In California the personal representative of a decedent so represents the heirs that former testimony taken against the representative may be used against the heirs,[27] but in Maryland[28] and Pennsylvania[29] the representative does not so represent the heirs, nor does he in New York so represent the devisees.[30]

(5.) Successors in Interest. — An heir[31] or other successor in interest of a former party,[32] in whole or in part, may also be affected by former testimony likewise as the former party, but only, however, where he has derived his interest since the commencement of the former action.[33] Where an action for personal injuries is afterwards abated by the complainant's death resulting therefrom, in a subsequent action for his death brought for the benefit of his statutory heirs, the complainants are so related in interest to the former complainant that testimony given in the former action may be proved in the latter.[34]

27. Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305.

28. Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166.

29. Sample *v.* Coulson, 9 Watts & S. (Pa.) 62.

30. Burnham *v.* Burnham, 46 App. Div. 513, 62 N. Y. Supp. 120, *affirmed* 165 N. Y. 659, 59 N. E. 1119.

31. Llanover *v.* Humfray, 19 Ch. Div. 224, 30 W. R. 557, where in the former action one lord of a manor was a party, and in the subsequent his successor. Benzein *v.* Robenett, 16 N. C. 444; Bryan *v.* Malloy, 90 N. C. 508; Haupt *v.* Henninger, 37 Pa. St. 138; Bright. Purd. Dig., p. 820, § 45.

32. Wright *v.* Tatham, 1 Ad. & El. (Eng.) 3, in the former action the lessor being the party, in the subsequent his lessee.

Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136, where on the subsequent trial a person who had derived an interest in the property involved in the suit was added as a party.

Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334; Idaho Code Civ. Proc., § 4519; Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323, where an assignor was party in the former suit, and his assignee party in his stead in the subsequent suit.

Parsons *v.* Parsons, 45 Mo. 265, where a husband who was party to a former ejectment having died, his wife was party to a subsequent ejectment in his stead. Bryan *v.* Malloy, 90 N. C. 508; Haupt *v.* Henninger, 37 Pa. St. 138; Bright. Purd. Dig., p. 820, § 45.

"While the successor in interest may not have had an opportunity to cross-examine the witness, yet the person in whose shoes he stands had, and this is sufficient for every practical purpose." Briggs. *v.* Briggs, 80 Cal. 253, 22 Pac. 334.

33. Court *v.* Holland, 8 Prac. Rep. (Ont.) 219; Bryan *v.* Malloy, 90 N. C. 508; Good *v.* Good, 7 Watts (Pa.) 195.

34. Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, *per* King, Fournier, and Sedgwick, JJ., Gwynne and Taschereau, JJ., *dissenting; affirming* 20 Ont. App. 444, 22 Ont. 693, where the subsequent action was, under the statute, brought by the decedent's personal representative for the benefit of the heirs. Atlanta & W. P. R. *v.* Venable, 67 Ga. 697; Indianapolis & St. L. R. Co. *v.* Stout, 53 Ind. 143.

Contra. — Murphy *v.* New York Cent. & H. R. R. Co., 31 Hun (N. Y.) 358.

Ground on Which Former Testimony Admitted. — In Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, cited above, where the subsequent action was brought by the executrix of deceased, the court said: "The plaintiff in this action, although suing as executrix, fills a mere nominal or formal position in the action.

(6.) Former Party Standing in Place of Subsequent.— Where the former party stood in place of a party to the subsequent proceeding, former testimony may also be proved.[35] It is immaterial

. . . The plaintiff so suing is a mere instrument acting on behalf of the person, whether widow, parent or child, claiming to have sustained pecuniary loss through the death of the deceased. . . . What has to be regarded, therefore, is the relation which the beneficial parties bear in point of interest to the deceased. Can they be said to claim under him? . . . In the interpretation of the provision of the statute that the wrongful act causing the death shall be such as would, but for the death, have entitled the person injured to maintain an action, it has been held that this means a right of action subsisting in him down to the time of his death; and if previously having a right of action, he released it, or discharged it by accord and satisfaction, the statutory cause of action could not arise upon the death. . . . I think it follows from this that the persons seeking the benefit of this action, the widow and children of Erdman, are in effect claiming through him. They are claiming the benefit of a breach of duty which the defendant owed to Erdman, and so in a substantial sense they ground their action, in an essential condition of it, upon rights which in his lifetime he possessed, viz., the right to the exercise toward him of due care, and upon his right of action in his lifetime for breach thereof. . . . Erdman's executor could make no admission against the right of the persons beneficially entitled, but Erdman's own acts and admissions in his lifetime would be relevant evidence against the present plaintiff's right of action. . . . The injured person's competency in his lifetime to extinguish the present action by release of his own right of action, as well as the consideration that the statute grounds the present right of action upon the breach of duty owed to the deceased, points to the conclusion that the rule of evidence is reasonably and fairly to be extended by analogy to the new relation created by the statute."

35. Where the former party defended in behalf of the subsequent party it is sufficient. Hulin *v.* Powell, 3 Car. & P. (Eng.) 323.

Where the Defendant Called Upon to Defend, Although He Failed to Do So. — Where a private individual obtained a judgment against a municipal corporation for an injury caused by a defect in a sidewalk for which the municipality had a right of action over against a private corporation, and the private corporation had notice of the trial of the original action and an opportunity to defend it, and to cross-examine the witnesses therein, in a subsequent action by the municipality against the private corporation to recover the amount expended in paying the judgment, proof of the testimony of a former witness on a question common to the two actions may be proved. "We think that such evidence is admissible in what is called 'an action over,' on the ground that, having received notice of the trial of the original action, and having had the opportunity to take part in that defense, and to cross-examine the witnesses, he is not a stranger to such former action. When the law has afforded to such a party the same opportunities and guaranties for securing the truth which it affords to a party to the record, it regards him as having in that respect the status of a party." Dist. of Columbia *v.* Washington Gas Light Co., 20 D. C. 39.

Where the parties to a subsequent action are the same as to a former, except that the lessee of a party to the present action (who had been called on to defend the former action, but had not appeared) was a party therein instead of his lessor, a former deposition may be admitted. Cannon *v.* White, 16 La. Ann. 85.

Where a former party was an undisclosed agent of a subsequent party, former testimony is admissible. Clossman *v.* Barbanccy, 7 Rob. (La.) 438; Ritchie *v.* Lyne, 1 Call (Va.) 489.

whether or not the adverse party on the former proceeding knew that the former party stood in the place of another.[36]

(7.) Former Party Successor in Interest of Latter. — But where the former party derived his interest from a party to the latter proceeding who was joined in his stead, former testimony cannot be proved.[37]

(8.) Husband and Wife. — The fact that the wife of a party to the subsequent proceeding (and not the subsequent party himself) was a party to the former proceeding does not establish a sufficient identity of parties to render former testimony admissible.[38]

(9.) Tenants in Common or Joint Tenants. — One tenant in common or joint-tenant so represents his co-tenants or joint-tenants that former testimony competent against one of them is competent against any.[39]

(10.) Common Source or Title Not Amounting to Such Tenancy. — But the mere fact that the party to a subsequent trial derives his interest from the same source as the former party,[40] or by virtue of the

Where it becomes proper under the rules of equity for one of a few to sue or defend on behalf of many persons, on a subsequent trial the former testimony taken in such suit may be proved against any person so represented therein by the actual parties, although not himself joined as a party. Llanover *v.* Humfray, 19 Ch. Div. 224, 30 W. R. 557; Phillips *v.* Llanover, same.

36. In Hulin *v.* Powell, 3 Car. & P. (Eng.) 323, the court said that it could see no reason for supposing that the cross-examination would have been to a different effect, whether the former plaintiff knew or did not know who was the real defendant in the former action. The former plaintiff had to succeed by the goodness of his own title, the former action being ejectment, and who was the defendant would be of little importance with respect to his being able to show that or not; and his cross-examination would have the same direction in either case.

37. Morgan *v.* Nicholl, L. R. 2 C. P. 117, where a son, thinking his father to be dead, brought the former action as heir, and the father brought the subsequent action.

Patton *v.* Pitts, 80 Ala. 373, where the successor in interest of a lessor of land was held not to be in privity with the lessee of such lessor.

Rowe *v.* Smith, 1 Call (Va.) 487, where the former plaintiff was a purchaser under the subsequent plaintiff.

38. Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708.

39. The rights of two tenants in common are so in *pari materia* that a former deposition used by one of them in a former action may be used by the other in a subsequent action against the same defendant. Byrne *v.* Frere, High Ct. Ch. (Ir.) 157.

The parties to two actions are so in privity as to render a former deposition admissible, where both have an estate in the same identical thing by title accruing at the same time, the possession of one not being incompatible with the title of the other, and also where the title and possession are joint. Harrington *v.* Harrington, 2 How. (Miss.) 701.

Where, however, in one action one tenant in common is suing for an aliquot part of the tenement in common, while in a subsequent action another cotenant is suing for another aliquot part of the tenement, former testimony cannot be proved. Norris *v.* Monen, 3 Watts (Pa.) 465. This case, however, does not seem to turn on a sound distinction.

40. *England.* — Peterborough (Earl) *v.* Norfolk (Duchess), 24 Eng. 104, Pr. Ch. 212, where the former party was the tenant for life, the latter the remainderman in tail; Doe d. Foster *v.* Derby (Earl), 1 Ad. & El. 783, where the respective parties were owners of lands in severalty deraigning their titles from a common source.

Jackson d. Barton *v.* Crissey, 3

same instrument,[41] or that his cause of action arises from the same transaction,[42] does not of itself constitute such relationship between the respective parties that testimony given at the former trial may be proved at the latter.

(11.) Primary and Secondary Parties. — Nor can former testimony given in an action against a primary debtor be used in a subsequent action against his surety or guarantor.[43]

c. *Identity of Parties as Real or Nominal.* — Nominal identity of parties is neither necessary[44] nor sufficient,[45] but the interrelationship must exist between the real parties in interest.

Wend. (N. Y.) 251, where the respective parties were the owners of lands in severalty deraigning their titles from the same source.

Contra. — Jackson *v.* Lawson, 15 Johns. (N. Y.) 539, where the former party was a tenant for life, the latter a purchaser from a remainderman claiming under the same devise.

41. Harrington *v.* Harrington, 2 How. (Miss.) 701, where both claimed under the same will. *Compare,* however, Jackson *v.* Lawson, 15 Johns. (N. Y.) 539.

42. The parties to an action by an infant for personal injuries, and to a subsequent action by his parents for loss of his services, are not between parties so related that testimony given in the former action may be proved in the latter. Metropolitan St. R. Co. *v.* Gumby, 39 C. C. A. 455, 99 Fed. 192; Hooper *v.* Southern R. Co., 112 Ga. 96, 37 S. E. 165.

43. Former testimony in a suit against the maker of a note cannot be proved in a subsequent suit against a guarantor of the note, against such guarantor. Robinson *v.* Lane, 14 Smed. & M. (Miss.) 161.

The sureties of an administrator are not his privies; thus former testimony given in a proceeding against the administrator for an accounting is not admissible in a subsequent proceeding against the sureties for the recovery of the amount found due from the administrator. Fellers *v.* Davis, 22 S. C. 425.

44. *England.* — Lawrence *v.* Maule, 4 Drew 472, where the real parties in interest were the same, although represented by a different trustee.

Canada. — Walkerton *v.* Erdman, 23 Can. (Sup. Ct.) 352, where in an action for damages for wrongful death brought by the personal representative of the decedent for the benefit of the heirs, the court said that in determining the identity of parties in this and a former action, the nominal party (the personal representative) being a mere instrument, was not to be regarded, but the real parties (the beneficiaries).

United States. — McCormick *v.* Howard, 1 McArthur Pat. Cas. 238, 15 Fed. Cas. No. 8719, where in one case an assignor was nominal party for the benefit of his assignee, and in the other the assignee was party in person.

Alabama. — Clealand *v.* Huey, 18 Ala. 343; Patton *v.* Pitts, 80 Ala. 373; Smith *v.* Keyser, 115 Ala. 455, 22 So. 149, where the former action was brought by Harriet, executrix of William, and the latter by Harriet as executrix of William, the intention, however, having been to bring the former action also in a representative capacity.

Illinois. — Goodrich *v.* Hanson, 33 Ill. 499, where in the former action a naked bailee of certain property was the nominal party, the owner being the real party in interest, and in the latter the owner was joined as party.

Louisiana. — See Succession of Saunders, 37 La. Ann. 769, where in the former action the defendant was joined in his individual capacity, but in respect to funds which had come into his hands as executor for plaintiff's use, while in the latter action he was joined as executor.

Wisconsin. — Charlesworth *v.* Tinker, 18 Wis. 633.

45. Where in a subsequent suit certain minors sued by their next friend, the fact that their next friend was the party in interest in a former

d. *Necessity of Mutuality in Right to Prove.* — Mutuality or reciprocity between the parties to the subsequent trial is essential, and the former testimony cannot be proved in favor of a party against whom it is not admissible.[46]

e. *All Parties Not Necessary.* — It is not necessary that all the parties on either side of the former trial are joined on the subsequent trial.[47]

f. *Change in Position of Parties.* — The fact that the adverse parties to the subsequent trial were joined on the same side on the former trial does not render the former testimony inadmissible,[48]

action to which they were not parties does not render proof of former testimony taken therein admissible. Walterhouse *v.* Walterhouse, 130 Mich. 89, 89 N. W. 585.

Where an ejectment was brought by a nominal party for the use of the heirs of a certain person, while a former ejectment was brought by that person for himself, a former deposition is not admissible. Cluggage *v.* Lessee of Duncan, 1 Serg. & R. (Pa.) 111.

Where in the former suit the husband was suing for the use of his wife, while in the latter the wife was suing as personal representative of the since deceased husband, the real parties are not the same, and former testimony is not provable. Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708.

46. *England.* — Humphreys *v.* Pensam, 1 Myl. & C. 580; Atkins *v.* Humphreys, 1 M. & R. 523; Lawrence *v.* Maule, 4 Drew 472; Morgan *v.* Nicholl, L. R. 2 C. P. 117. *Contra.* — Peterborough *v.* Germaine, 3 Bro. P. C. 539.

United States. — Marine Ins. Co. *v.* Hodgson, 6 Cranch 206; Boudereau *v.* Montgomery, 4 Wash. C. C. 188, 3 Fed. Cas. No. 1694; The John H. Starin, 9 Ben. 331, 13 Fed. Cas. No. 7351; Metropolitan St. R. Co. *v.* Gumby, 99 Fed. 192, 33 C. C. A. 455.

Alabama. — Patton *v.* Pitts, 80 Ala. 373; Smith *v.* Keyser, 115 Ala. 455, 22 So. 149; Simmons *v.* State, 129 Ala. 41, 29 So. 929.

Delaware. — Dawson *v.* Smith, 3 Houst. 335.

Illinois. — Wade *v.* King, 19 Ill. 301.

Iowa. — Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.

Louisiana. — Clossman *v.* Barbancey, 7 Rob. 438; Cannon *v.* White, 16 La. Ann. 85.

Mississippi. — Harrington *v.* Harrington, 2 How. 701; Merrill *v.* Bell, 6 Smed. & M. 730. *Contra.* — Some cases, however, hold that complete mutuality is not essential; that it is sufficient that the party against whom the former testimony is offered was a party to the former trial, although it could not be proved against the party offering it.

Nebraska. — Omaha St. R. Co. *v.* Elkins, 39 Neb. 480, 58 N. W. 164.

Virginia. — Reed *v.* Gold (Va.), 45 S. E. 868.

The reason for requiring mutuality, as stated in Marine Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206, is that it does not appear reasonable to permit one party to a cause to select a former deposition as evidence for himself, while the adverse party to the action could not have made use of that, or any other testimony given in the former suit, if ever so favorable to himself.

47. *England.* — Wright *v.* Tatham, 1 Ad. & El. 3; Morgan *v.* Nicholl, L. R. 2 C. P. 117.

United States. — Philadelphia, W. & B. R. Co. *v.* Howard, 13 How. 307; Turner *v.* Hand, 3 Wall. Jr. 88, 24 Fed. Cas. No. 14,257.

Missouri. — Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869.

New York. — Hall *v.* Bennett, 16 Jones & S. 302.

Pennsylvania. — Wright *v.* Cumpsty, 41 Pa. St. 102.

South Carolina. — Parker *v.* Leggett, 12 Rich. 198.

48. Nevil *v.* Johnson, 2 Vern. 447, 1 Eq. Cas. Abr. 227; Barstow *v.* Palmes, 2 Eq. Cas. Abr. 490. Proc. Ch. 233; Wade *v.* King, 19 Ill. 301;

at least where the party against whom the former testimony is offered had an opportunity of cross-examination.[49] Furthermore, former testimony may be proved in behalf of an intervenor, the adverse parties to the subsequent action having been joined as parties adverse to the intervenor in the former action.[50]

5. Objections to Admissibility. — A. CONSTITUTIONAL OBJECTIONS. — The admission in a criminal case of proof of former testimony against the accused does not violate or infringe the right of the accused to be confronted by the witnesses against him.[51]

Morehouse *v.* Morehouse, 17 Abb. N. C. 407, 3 N. Y. St. 790, 41 Hun 146, 11 Civ. Proc. 20.

49. In Morehouse *v.* Morehouse, 17 Abb. N. C. 407, 3 N. Y. St. Rep. 790, 41 Hun 146, 11 Civ. Proc. 20, the court says: "We see no reason, although the parties are not quite the same, if the subject-matter to be now established is the same *against the party against whom the testimony is offered*, as upon a former trial, and was of as much importance to that issue as this, why the death of the witness should exclude his testimony."

50. Magrath *v.* Veitch, 1 Hog. (Ir.) 127.

51. *United States.* — Reynolds *v.* United States, 98 U. S. 145; (where the former witness was kept away by the procurement of accused); Mattox *v.* United States, 156 U. S. 237.

Alabama. — Lowe *v.* State, 86 Ala. 47, 5 So. 435 (where the former witness was indefinitely, although not permanently, absent from the state.)

Arkansas. — Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; McNamara *v.* State, 60 Ark. 400, 30 S. W. 716.

Georgia. — Williams *v.* State, 19 Ga. 402.

Idaho. — Territory *v.* Evans, 2 Idaho 651, 23 Pac. 232.

Indiana. — Sage *v.* State, 127 Ind. 15, 26 N. E. 667.

Kansas. — State *v.* Nelson (Kan.), 75 Pac. 505. *Compare* State *v.* Foulk, 57 Kan. 255, 45 Pac. 603, where the contrary was held in a case where no reason was shown for not producing the former witness.

Kentucky. — See Walston *v.* Com., 16 B. Mon. 15, where the constitutionality of permitting proof of dying declaration was upheld on grounds broad enough to cover former testimony.

Louisiana. — State *v.* Cook, 23 La. Ann. 347; State *v.* Kline, 109 La. 603, 33 So. 618.

Massachusetts. — Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608.

Michigan. — People *v.* Sligh, 48 Mich. 54, 11 N. W. 782.

Mississippi. — See Woodsides *v.* State, 2 How. 655, where the constitutionality of permitting proof of dying declarations was upheld on grounds broad enough to cover former testimony.

Missouri. — State *v.* McO'Blenis, 24 Mo. 402, 69 Am. Dec. 435, *per* Leonard and Scott, JJ., Ryland, J., *dissenting;* State *v.* Baker, 24 Mo. 437, *per* Leonard and Scott, JJ., Ryland, J., *dissenting;* State *v.* Houser, 26 Mo. 431; State *v.* Harman, 27 Mo. 120; State *v.* Able, 65 Mo. 357.

Montana. — State *v.* Byers, 16 Mont. 565, 41 Pac. 708. But *compare* State *v.* Lee, 13 Mont. 248, 33 Pac. 690.

Nebraska. — Hair *v.* State, 16 Neb. 601, 21 N. W. 464.

Nevada. — State *v.* Johnson, 12 Nev. 121.

New York. — People *v.* Penhollow, 42 Hun 103; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319 (where the former witness could not with due diligence be found); People *v.* Elliott, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318.

Ohio. — Summons *v.* State, 5 Ohio St. 325, *per* Bartley, C. J., Swan, Brinkerhoff and Scott, JJ., Bowen, J., *dissenting* (in which case the former witness was deceased); State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514 (where the former witness was deceased). *Contra.* — Where the former witness is beyond the jurisdiction.

State *v.* Wing, 66 Ohio St. 407, 64 N. E. 514.

Pennsylvania. — Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740; Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110.

Tennessee. — Johnston *v.* State, 2 Yerg. 58; Kendrick *v.* State, 10 Humph. 479. *Contra.* — State *v.* Atkins, 1 Overt. 229.

Utah. — United States *v.* Reynolds, 1 Utah 319 (where the former witness was kept away by the procurement of accused); State *v.* King, 24 Utah 482, 68 Pac. 418, 91 Am. St. Rep. 808.

Washington. — State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

Wisconsin. — Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

In California it is held that the admission against an accused person of proof of former testimony violates the provision of § 686, subd. 3, of the Penal Code, that the accused in a criminal action is entitled "to be confronted with the witnesses against him." People *v.* Chung Ah Chue, 57 Cal. 567; People *v.* Qurrse, 59 Cal. 343; People *v.* Gardner, 98 Cal. 127, 32 Pac. 880; People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; People *v.* Bird, 132 Cal. 261, 64 Pac. 257. Former testimony may, however, be proved in behalf of accused. People *v.* Bird, 132 Cal. 261, 64 Pac. 257.

In Texas, in the earlier cases, it is held that the admission of *viva voce* proof of former testimony does not infringe defendant's right of confrontation. Greenwood *v.* State, 35 Tex. 587; Johnson *v.* State, 1 Tex. App. 333; Black *v.* State, 1 Tex. App. 368. In Cline *v.* State, 36 Tex. Crim. 320, 37 S. W. 722, 61 Am. St. Rep. 850, *per* Davidson, J., and Hurt, P. J., Henderson, J., *dissenting*, the court held that the admission of a written statement of the former testimony of a witness since deceased as given on the examining trial was unconstitutional for three principal reasons, as violating the two constitutional provisions that "in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. . . . [and] shall be confronted by the witnesses against him." The grounds of unconstitutionality enumerated were (1) the trial before the examining court is not a trial within the meaning of this provision, there being no jury; (2) where the evidence is reproduced in writing the accused is not confronted with the witnesses against him; and (3) the reasons offered for admitting such testimony, such as necessity, etc., neglect the plain words of the provision. But the first reason does not apply where the former was a formal trial before a jury, and where the former testimony is proved by oral testimony, the second reason also is answered, and the third obviated, as the witness who testifies to the former testimony certainly confronts the accused within the literal meaning of the constitutional provision. In this view of the case of Cline *v.* State, the Texas rule must be considered to be that the constitutional provision is not violated by the admission of oral proof of former testimony.

The accused confronts the witness who narrates the former testimony. The constitutional provision leaves it to the law to determine what a witness, when confronted, shall be allowed to state as evidence.

Georgia. — See Campbell *v.* State, 11 Ga. 353, where dying declarations were held the proper subject-matter of testimony on this ground.

Kansas. — State *v.* Nelson (Kan.), 75 Pac. 505.

Kentucky. — Kean *v.* Com., 10 Bush 190, 19 Am. Rep. 63. See also Walston *v.* Com., 16 B. Mon. 15 (case of dying declarations).

Massachusetts. — Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608.

Mississippi. — See Woodsides *v.* State, 2 How. 655 (case of dying declarations).

Ohio. — Summons *v.* State, 5 Ohio St. 325.

Tennessee. — Kendrick *v.* State, 10 Humph. 479.

Texas. — Greenwood *v.* State, 35 Tex. 587; Black *v.* State, 1 Tex. App. 368.

"It has application to the matter of the personal presence of the witness on the trial, and not to the subject-matter or competency of the testimony to be given. The requirement that the accused shall be confronted, on his trial, by the witnesses

Waiver on Former Trial of Right to Confront. — The fact that on the former trial, whereat the former witness personally testified, the accused did not avail himself of his right to confront him does not prevent the use of former testimony on a subsequent trial.[52]

Impairment of Right of Cross-Examination. — Nor is its admission prevented by a constitutional provision guaranteeing the accused the right to cross-examine the witnesses against him.[53]

B. Miscellaneous Objections. — In General. — None of the following objections to the admissibility of proof of former testimony are valid: That former testimony is hearsay;[54] that the former witness swore with doubt and hesitation, not, however, rendering his testimony incompetent on the former trial;[55] that his former testimony was not reduced to writing;[56] that the petition or complaint in the action in which the former testimony was taken was not properly filed, or the proceedings therein not properly docketed;[57] that the verdict given pursuant to the former trial is

against him has sole reference to the personal presence of the witnesses, and it in no wise affects the question of the competency of the testimony to which he may depose. When the accused has been allowed to confront, or meet face to face, all the witnesses called to testify against him on the trial, the constitutional requirement has been complied with. . . . If the right secured by the bill of rights applies to the *subject-matter of the evidence,* instead of the *witness,* it would exclude, in criminal cases, all narration of statements or declarations made by other persons heretofore received as competent evidence. The construction insisted on . . . treats the person whose statements or declarations are narrated as the witness, rather than the person who testifies on the trial. . . . It must be conceded that the accused is confronted by the person called to testify against him on the last as well as on the former trial." Summons *v.* State, 5 Ohio St. 325.

In Reynolds *v.* United States, 98 U. S. 145, where former testimony of a witness kept away by the accused was admitted, the court said: "The constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted by the witnesses against him; but if he voluntarily keeps the witnesses away he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

In People *v.* Sligh, 48 Mich. 54, 11 N. W. 782, where it was held that the former testimony of a deceased witness could be proved against the accused, the court said: "The exception, if justified at all, can only be maintained on the ground of necessity, and to prevent a failure of justice." But the very unsatisfactory nature of this reasoning is shown in Cline *v.* State, 36 Tex. Crim. 320, 37 S. W. 722, 61 Am. St. Rep. 850.

52. Bostick *v.* State, 3 Humph. (Tenn.) 344.

53. Greenwood *v.* State, 35 Tex. 587.

54. Rooker *v.* Parsley, 72 Ind. 497.

55. Garrott *v.* Johnson, 11 Gill & J. (Md.) 173, 35 Am. Dec. 272.

56. Hutchings *v.* Corgan, 59 Ill. 70.

57. Haupt *v.* Henninger, 37 Pa. St. 138, where the court says: "Such accidents must not be per-

inadmissible on the subsequent trial;[58] that the former testimony was taken before the commencement of the subsequent action;[59] that the former witness was a party to the former trial;[60] that on the former trial the former witness was called by the party adverse to the party seeking to prove his former testimony;[61] that the deposition of the former witness has been taken since the former trial and is introduced in evidence on the subsequent trial;[62] that there are other available witnesses to the facts testified to by the former witness;[63] that new facts have appeared which would have affected the examination of the former witness or the value of his testimony.[64]

In Criminal Cases. — A statutory provision that on a new trial of a criminal cause the testimony must be produced anew and the former verdict cannot be used or referred to in no wise militates against the admission of former testimony.[65]

Where Former Trial by Court, Latter Before Jury. — The fact that a former deposition was taken for use in an equity cause tried by the court does not render it inadmissible on the trial of a cause at law before a jury.[66]

Testimony at One Only of Several Former Trials Available. — Where there have been two trials, on both of which a witness testified, but on a subsequent trial only his testimony given on the first of them was available, an objection to the proof of such testimony on the ground that it was manifestly unfair to allow the party to prove the testimony first given, is untenable.[67]

Death of Former Witness Rendering Another Competent. — The fact that a person before incompetent was rendered competent as a

mitted to impair the rights of parties, for they do not affect the substantial merits of the case. These depositions are none the less evidence because of such official delinquencies."

58. Rucker *v.* Hamilton, 3 Dana (Ky.) 36.

59. Ray *v.* Root, 1 Root (Conn.) 81.

60. Emerson *v.* Bleakeley, 2 Abb. Dec. 22, 29, 5 Abb. Pr. (N. Y.) (N. S.) 350.

61. Hudson *v.* Roos, 76 Mich. 173, 42 N. W. 1099; McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

62. Atchison, T. & S. F. R. Co. *v.* Osborn, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189.

63. Wright *v.* Tatham (Q. B.), 1 Ad. & El. (Eng.) 3, where there were three witnesses to the execution of a will and on a former trial its due execution was proved by the testimony of one of the three witnesses who had since died, the testimony of another witness still surviving and available as a witness is not best evidence so as to exclude proof of the former testimony of a witness since deceased.

64. First Nat. Bank *v.* Wirebach, 106 Pa. St. 37.

"Such an exigency might arise if the testimony were taken by deposition, and the fact that additional testimony was received, or that additional testimony by the witness was a necessity, would not render the deposition first taken inadmissible." Atchison, T. & S. F. R. Co. *v.* Osborn, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189.

65. People *v.* Devine, 46 Cal. 45.

66. Haupt *v.* Henninger, 37 Pa. St. 138.

67. There is no presumption that testimony of a witness as given on the first of two former trials will be more favorable to the party offering it in evidence on a subsequent trial, than that given on the second. City

witness on a subsequent trial by the death of a former witness does not render proof of the former testimony of the deceased incompetent as increasing the number of witnesses available to one party.[68]

Death of Former Witness Rendering Adverse Party Incompetent. Although the former witness, since deceased or mentally incapacitated to testify, was interested in the action so that the adverse party was disqualified as a witness by his death or incapacity, his former testimony may nevertheless be proved.[69]

II. INTRODUCTION AS EVIDENCE.

1. Proof of Existence of Grounds and Conditions. — A. NECESSITY OF PROOF. — a. *Oral Testimony.* — Where former oral testimony is offered to be proved, the party offering it[70] must by proper evidence show the existence at the time it is so offered[71] of a state of facts rendering it admissible;[72] otherwise it cannot be proved

of Ord *v.* Nash, 50 Neb. 335, 69 N. W. 964.

68. "Legal and competent evidence cannot be excluded for the reason that by admitting it the party offering it will have more witnesses or more testimony than the other." Mathewson *v.* Estate of Sargeant, 36 Vt. 142.

69. Parsons *v.* Parsons, 45 Mo. 265; Breeden *v.* Feurt, 70 Mo. 624; Evans *v.* Reed, 78 Pa. St. 415; Walbridge *v.* Knipper, 96 Pa. St. 48; O'Neill *v.* Brown, 61 Tex. 34; McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116.

Contra. — "The manifest policy of the statute forbids that the evidence of a deceased party should be received while the mouth of the living adverse party is closed upon the same subject. As it is only by force of the statute that parties become competent witnesses, the limitations which the statute imposes upon their competency should be fully enforced." Hoover *v.* Jennings, 11 Ohio St. 624.

70. Patton *v.* Pitts, 80 Ala. 373; Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

71. Thus a determination that the admission of former testimony on a particular trial is reversible error does not necessarily render it such on a retrial of the same cause. Thompson *v.* State, 106 Ala. 67, 17 So. 512.

72. *United States.* — Reynolds *v.* United States, 98 U. S. 145.

Alabama. — Harris *v.* State, 73 Ala. 495; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Mitchell *v.* State, 114 Ala. 1, 22 So. 71.

Kentucky. — Louisville & N. R. Co. *v.* Whitely Co., 100 Ky. 413, 38 S. W. 678.

Missouri. — State *v.* Able, 65 Mo. 357.

Montana. — Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

Nebraska. — Young *v.* Sage, 42 Neb. 37, 60 N. W. 313.

New York. — Jackson d. Potter *v.* Bailey, 2 Johns. 17; Powell *v.* Waters, 17 Johns. 176; Crary *v.* Sprague, 12 Wend. 41, 27 Am. Dec. 110.

Tennessee. — Draper *v.* Stanley, 1 Heisk. 432.

Concurrence of Prerequisites Must Be Shown. — Chambers *v.* Hunt, 22 N. J. L. 552; Camden & A. R. Co. *v.* Stewart, 19 N. J. Eq. 343, in which cases it was held that the fact of a former action and trial must be shown.

McAdams *v.* Stilwell, 13 Pa. St. 90 (jurisdiction of former tribunal must be shown).

Draper *v.* Stanley, 1 Heisk. (Tenn.) 432 (pendency of former proceeding must be shown).

Oral stipulation for admission of former testimony taken in another action between different parties, if indeed it can be relied upon at all, must be proved, in order to render former testimony admissible. Doe d. Foster *v.* Derby (Earl), 1 Ad. & El. (Eng.) 783.

over the objection of the adverse party.[73]

b. *Former Depositions. — Subsequent Trial of Another Cause.* The existence of the requisite grounds and conditions must likewise be shown where a former deposition is offered on a subsequent trial of another cause.[74]

Subsequent Hearing of Same Proceeding. — But on a subsequent hearing of the same proceeding the grounds rendering it admissible on the former hearing will be presumed to exist, and the former deposition will be presumed to be admissible.[75]

Presumption Rebuttable. — The mere fact that the deposition was used on the former hearing does not, however, conclude the adverse party from objecting to its admissibility in a proper case.[76]

B. FORMAL REQUISITES. — a. *Order for Admission.* — An order of court for the admission of oral proof of what was testified at a former hearing, or permitting the reading of a deposition taken in a former action between the same parties, is usually unnecessary.[77]

b. *Notice of Intention and Filing.* — In Iowa notice of the intention to introduce is also unnecessary.[78] In Missouri it is proper either to give such notice or to file such deposition in the subsequent suit,[79] but a failure to do so is ground for excluding it only where the adverse party is surprised by the introduction thereof.[80]

73. Plano Mfg. Co. *v.* Parmenter, 56 Ill. App. 258; Edwards *v.* Edwards, 93 Iowa 127, 61 N. W. 413; Lesassier *v.* Dashiell, 14 La. (O. S.) 467.

74. Goodenough *v.* Alway, 2 Sim. & S. (Eng.) 481; Stephenson *v.* Biney, L. R. 2 Eq. 303, 12 Jur. (N. S.) 428, 14 L. T. 432, 14 W. R. 788; Allen *v.* Bonnett, L. R. 6 Eq. 522, 16 W. R. 1075; Idaho Code Civ. Proc., § 4518; Jones *v.* Jones, 45 Md. 144.

75. Grunninger *v.* Philpot, 5 Biss. 104, 11 Fed. Cas. No. 5853; Randolph *v.* Woodstock, 35 Vt. 291.

The same rule holds on a cross-suit in equity. Gray *v.* Haig, 21 L. J. Ch. 542. But *compare* Idaho Code Civ. Proc., § 4518, providing that "when a deposition is offered to be read in evidence it must appear to the satisfaction of the court that the cause for taking and reading it still exists."

76. Chapize *v.* Bane, 1 Bibb (Ky.) 612.

77. *England.* — Printing Tel. & Cons. Co. *v.* Drucker (1894), 2 Q. B. 801, 64 L. J. Q. B. 58, 9 R. 677, 71 L. T. 172, 42 W. R. 674.

Contra. — Coke *v.* Fountain, 1 Vern. 413, 1 Eq. Cas. Abr. 227; Carrington *v.* Cornock, 2 Sim. 567; Ernest *v.* Weiss, 1 N. R. 6; Lake *v.* Peisley, L. R. 1 Eq. 173, 11 Jur. (N. S.) 1012; Stephenson *v.* Biney, L. R. 2 Eq. 303, 12 Jur. (N. S.) 428, 14 L. T. 432, 14 W. R. 788.

See also Williams *v.* Broadhead, 1 Sim. 151, 5 L. J. (O. S.) Ch. 112; Goodenough *v.* Alway, 2 Sim. & S. 481; Chouteau *v.* Parker, 2 Minn. 118; Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Contra. — Grunninger *v.* Philpot, 5 Biss. 104, 11 Fed. Cas. No. 5853; see Leviston *v.* French, 45 N. H. 21.

78. Shaul *v.* Brown, 28 Iowa 37. See Fleming *v.* Town of Shenandoah, 71 Iowa 456, 32 N. W. 456.

79. Samuel *v.* Withers, 16 Mo. 532; Parsons *v.* Parsons, 45 Mo. 265; Lohman *v.* Stocke, 94 Mo. 672, 8 S. W. 9.

80. Adams *v.* Raigner, 69 Mo. 363.

"It is obvious that the rule requiring depositions taken in another cause to be filed before they are read is not an inflexible one, and may be dispensed with when the ends of justice require it. When the evidence can be met and would operate as a surprise on the opposite party it would not be proper to depart from the rule but on terms

Custody of Deposition Between Hearings. — In some states the deposition, to be admissible, must have been in the custody of the law during the interim between the trials;[81] in others the intermediate custody is immaterial.[82]

c. *Stipulation.* — A stipulation for the admission of proof of former testimony need not be filed as a paper in the case.[83]

C. PROOF OF GROUNDS FOR ADMISSION. — a. *Manner of Proof. In General.* — The existence of grounds rendering former testimony admissible may always be shown in like manner as any other fact, often in a less formal way.[84] Circumstantial evidence may

which would effect justice between the parties; but if the evidence cannot be met, if it is merely cumulative, and will not surprise, why reject it?" Cabanne *v.* Walker, 31 Mo. 274.

81. In order that former depositions be admissible "it must appear that the depositions have been duly filed in the court where the previous cause was pending, and have remained on file from the time the action was dismissed until the time at which it was proposed to use them." Idaho Code Civ. Proc., § 4519.

Where a cause is appealed to an appellate court for retrial, in order to be admissible as evidence on the retrial a former deposition must, under the rule of the Supreme Court, be sent up enclosed under seal, and certified on the outside of the cover to have been sealed below by the clerk. If not sealed and certified the former deposition cannot be read. Clarissa *v.* Edwards, 1 Overt. (Tenn.) 392.

In order that a former deposition may be admissible, the deposition must have been duly filed in the court where the first action was pending, and must have remained in the custody of the court from the termination of the first action until the commencement of the other. Wash. Bal. Ano. Codes & Stat., § 6029.

82. Pulaski *v.* Ward, 2 Rich. (S. C.) 119.

Compare Nutt *v.* Thompson, 69 N. C. 548, where the court held that the written examination of a former witness made by the referee to whom the cause was referred under the former chancery practice, but which proceedings had lapsed, is not rendered inadmissible by the fact that such writing had remained in the possession of the party offering it in evidence from the time of the reference till offered in the subsequent hearing in open court.

83. Carroll *v.* Paul, 19 Mo. 102.

84. See Mawich *v.* Elsey, 47 Mich. 10, 10 N. W. 57; Wheeler *v.* Jenison, 120 Mich. 422, 79 N. W. 643; Post *v.* State, 10 Tex. App. 579; State *v.* Cook, 23 La. Ann. 347.

The competency of evidence for this purpose is not governed by the same strict rules which apply to the admission of evidence upon the issues of the case. Anything which will reasonably satisfy the court that the absent witness is not likely to return within the jurisdiction of the state may be admitted. King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960; Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030.

In Kentucky the existence of a sufficient ground is proved by the affidavit of the party offering the former testimony, or of his attorney. Statutes 1899, § 4643. But where former testimony is offered to be proved against an accused person in a criminal prosecution, an affidavit cannot be used to establish the ground, because violating the right of the accused to be confronted by the witnesses against him. People *v.* Plyler, 126 Cal. 379, 58 Pac. 904.

The mere statement of counsel that a former witness is absent, that diligent search has been made for him, and that his whereabouts cannot be ascertained, does not furnish a sufficient basis to justify the admission of proof of his former testimony. Houston & T. C. R. Co. *v.* Smith (Tex. Civ. App.), 51 S. W. 506.

be used,[85] but not mere hearsay.[86]

Degree of Proof Requisite. — The predicate for the admission of former testimony must be clearly,[87] although not conclusively,[88] shown.

Where Competent Proof Sufficient, Effect of Admitting Incompetent. Where sufficient competent evidence is introduced to establish the predicate, the fact that certain incompetent testimony is also introduced for such purpose does not prejudice the adverse party.[89]

b. *Proof of Particular Grounds.* — **(1.) Inaccessibility.** — Proof that a former witness is inaccessible will render his former testimony admissible.[90]

(2.) Death. — General Repute. — The death of a witness may be sufficiently shown to render former testimony admissible by proof of a general repute of his death acted upon by his family connections.[91]

Lapse of Time. — The mere fact that the former testimony was taken fifty years before does not raise a presumption of the former witness' death, unless it is shown that with due diligence he cannot be accounted for.[92]

85. Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510; Conner *v.* State, 23 Tex. App. 378, 5 S. W. 189; McCollum *v.* State, 29 Tex. App. 162, 14 S. W. 1020.

86. State *v.* Wright, 70 Iowa 152, 30 N. W. 388; Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227; Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510; Mitchell *v.* State, 114 Ala. 1, 22 So. 71.

87. Harris *v.* State, 73 Ala. 495; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 855; Louisville & N. R. Co. *v.* Whitely Co., 100 Ky. 413, 38 S. W. 678.

It is incumbent upon the party offering to show the predicate to exhaust the best sources of information reasonably accessible, in order to satisfy the claims of good faith and present a fair case for the judgment of the trial judge. Mawich *v.* Elsey, 47 Mich. 10, 10 N. W. 57.

Where the predicate is reasonably established, proof of former testimony is admissible. Gunn *v.* Wades, 65 Ga. 537.

88. *Prima facie* proof, not conclusive, is sufficient. Rooker *v.* Parsley, 72 Ind. 497.

89. Jacobi *v.* State, 133 Ala. 1, 32 So. 158; Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227.

90. Proof that a witness on a former trial had since committed a homicide, had been advised to leave and had not been heard of in several years, and that his wife and sisters did not know or would not tell his whereabouts, sufficiently shows his inaccessibility to render his former testimony admissible. Gunn *v.* Wades, 65 Ga. 537.

91. Testimony of a witness that he knew "from general repute" that a former witness was dead, together with proof by another witness that the report of the witness' death was brought home to the family of the deceased, is sufficient. Welch *v.* New York, N. H. & H. R. R. Co., 182 Mass. 84, 64 N. E. 695.

Where the death of a former witness is involved merely collaterally or incidentally — as preliminary to proof of his former testimony — resort may be had to what is commonly said and understood to be true among the immediate relatives and family connections of the party to whom the inquiry relates. People *v.* Hill, 65 Hun 420, 20 N. Y. Supp. 187.

Testimony of a witness merely that he understood a former witness was dead, by itself does not sufficiently show his death. Tibbetts *v.* Flanders, 18 N. H. 284.

92. Benson *v.* Olive, 2 Strange (Eng.) 920.

Absence From County. — The death of a former witness cannot be presumed merely from proof of his absence from the county.[93]

(3.) Physical and Mental Incapacity. — Necessity of Producing Mentally Incapacitated Witness in Court. — Where former testimony is offered because the former witness has lost his memory through senility it is not necessary to produce him in court as prerequisite to proof of his testimony, although he might be physically able to come into court.[94]

(4.) Absence From State. — Presumption of Continuance of Absence. Where a witness, since giving his former testimony, is shown to be absent from the state for an indefinite period, the contrary not appearing, he will be presumed to continue absent at the time of the subsequent trial.[95]

Foreign Domicil. — A showing that a former witness is domiciled outside the state is satisfactory evidence of his absence.[96] His declarations are competent to show domicil.[97]

Declarations When Taking Departure. — Declarations as to destination made by a former witness when in the act of leaving the place of trial on a train are admissible as tending to show his absence.[98] Where a former witness while en route through the state stopped over merely to testify at the former hearing, his declarations as to the purposes and destination of his journey are admissible.[99]

Motive for Departure. — Testimony showing that the former wit-

93. Wheat *v.* State, 110 Ala. 68, 20 So. 449.

94. Senile Witness Need Not Be Produced in Court. — "It would have been a painful and improper exposure, and no rule of law requires it. Besides, he would not have understood the meaning of the subpœna — would not have attended, perhaps, voluntarily — and an attachment against him for contempt would have been entirely out of the question." Emig *v.* Diehl, 76 Pa. St. 359.

In same case it seems that perhaps proof should be offered that at the time the witness gave the former testimony he was in possession of his memory and reason.

Sufficiency of Proof of Sickness. Where a husband testifies that his wife is too ill to attend court her former testimony may be proved. Perrin *v.* Wells, 155 Pa. St. 299, 26 Atl. 543.

95. See Owen *v.* Palmour, 111 Ga. 885, 36 S. E. 969; Wheeler *v.* McFerron, 38 Or. 105, 62 Pac. 1015.

Where a witness is known to have been absent from the state six months before a trial, and also two weeks before it, the *prima facie* presumption is that such witness remained absent during the interval and continued absent up to and at the time of the subsequent trial. Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

96. King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960; Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030; Flanagin *v.* Leibert, Brightly N. P. 61.

97. King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960; Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030.

98. "What one says when he goes upon a journey or returns to his home is admissible in evidence as a verbal act, indicating a present purpose or intention." Scruggs *v.* State, 35 Tex. Crim. 622, 34 S. W. 951.

99. Burton *v.* State, 107 Ala. 68, 18 So. 240, such declarations being of the *res gestae* of the fact that he had immediately resumed his journey.

ness had a motive to leave the state is admissible;[1] but common report and rumor cannot be shown.[2]

Inability to Find in County. — The mere fact that after diligent search a former witness cannot be found in the county of his residence does not warrant the inference that the witness is absent from the state,[3] but such inference is properly drawn from a diligent but unavailing search for him in every county in which there is any apparent likelihood of his being found.[4]

Calling Acquaintances of Former Witness. — The fact that none of the persons with whom the former witness formerly lived are called to prove his absence is no objection to the proof offered where the absence is otherwise satisfactorily shown.[5]

(5.) Inability to Find. — A return made upon a subpoena for a former witness, reciting the inability to find him after diligent search, is competent,[6] although not indispensable,[7] evidence of such fact.

c. *Sufficiency of Proof of Ground.* — Where preliminary proof sufficient to establish one ground for the admission of former testimony is given, the fact that proof insufficient to establish another ground was also given does not render the former testimony inadmissible.[8]

D. Proof of Existence of Requisites. — a. *Offer of Proof.* An offer in evidence of all the papers in a former cause is not

1. Testimony that a former witness has said: "I had rather die than to come back to another trial and go through the same ordeal," is admissible as an expression of a present mental condition to show a motive for leaving and remaining indefinitely from the state. Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

2. Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Baldwin *v.* St. L., K. & N. R. Co., 68 Iowa 37, 25 N. W. 918.

Testimony of a witness, from knowledge gained in the neighborhood, that a former witness had left the county, is incompetent as hearsay. Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227.

3. Harris *v.* State, 73 Ala. 495; Mitchell *v.* State, 114 Ala. 1, 22 So. 71.

Nor does an unavailing search in a county where there is no likelihood of his being found. Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

4. Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

5. Wheeler *v.* Jenison, 120 Mich. 422, 79 N. W. 643.

Evidence examined and held sufficient to show absence.

Alabama. — Pruitt *v.* State, 92 Ala. 41, 9 So. 406; Burton *v.* State, 107 Ala. 68, 18 So. 240; Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

Arkansas. — Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; Battle and Mansfield, JJ., *dissenting.*

Georgia. — Eagle & Phoenix Mfg. Co. *v.* Welch, 61 Ga. 444.

Michigan. — Wheeler *v.* Jenison, 120 Mich. 422, 79 N. W. 643.

Minnesota. — King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960.

Oregon. — Wheeler *v.* McFerron, 38 Or. 105, 62 Pac. 1015.

Texas. — Conner *v.* State, 23 Tex. App. 378, 5 S. W. 189; Bennett *v.* State, 31 Tex. Crim. 216, 22 S. W. 684.

Evidence Examined and Held to Show Absence From County. Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227.

6. Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030.

7. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

8. State *v.* Nelson (Kan), 75 Pac. 505.

equivalent to an offer to prove the requisites to the admission of former testimony, and is insufficient to show its admissibility.[9]

b. *Necessity of Production of Record.* — **(1.) Subsequent Trial of Same Proceeding.** — Where proof of former testimony is offered on a subsequent trial of the same proceeding, the record of the proceeding being before the court, a formal offer of the record in evidence is not a necessary prerequisite to the admission of the former testimony.[10]

(2.) Trial of Another Proceeding. — (A.) First Group of States. Where former testimony is offered in another proceeding, the record of the former proceeding, if such there is, is in some states indispensable evidence of the fact of a former trial, the identity of issues, and of parties.[11] Only that part of the record, however, which shows the existence of these prerequisites is properly admissible.[12]

Aider of Record by Parol. — A record not showing the legal pendency of the former proceeding when the former testimony was given cannot be aided in that respect by oral testimony;[13] but the exact point in issue upon which the former testimony was given may be shown by oral testimony where it does not appear from the record.[14]

No Record of Former Proceeding. — Where the former proceedings are not and need not be a matter of record, these prerequisites may be shown by oral testimony.[15]

(B.) Second Group of States. — In other states the prerequisites may be shown by oral testimony, notwithstanding the existence of a record.[16]

E. Objections for Defects in Preliminary Proof. — a. *In General. — Manner of Taking.* — A general objection to the admission of former testimony is not sufficient to reach an insufficiency in the proof of the grounds given for its admission, nor to raise

9. The papers offered in evidence might not have shown what was necessary to render the former deposition admissible. Jones *v.* Jones, 45 Md. 144.

10. Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113.

11. *England.* — Anon. (K. B.), 2 Show. 163; Laybourn *v.* Crisp, 4 Mees. & W. 320.

Indiana. — Ephraims *v.* Murdock, 7 Blackf. 10.

Maryland. — Jones *v.* Jones, 45 Md. 144.

Mississippi. — Harrington *v.* Harrington, 2 How. 701.

New Jersey. — Chambers *v.* Hunt, 22 N. J. L. 552.

North Carolina. — Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234 (the material parts of the record should be produced to show the relevancy and competency of the former testimony).

12. Jones *v.* Jones, 45 Md. 144.

13. Bryan *v.* Malloy, 90 N. C. 508.

14. Bryan *v.* Malloy, 90 N. C. 508.

15. Kelly *v.* Connell, 3 Dana (Ky.) 532.

16. See Turner *v.* Hand, 3 Wall. Jr. 88, 24 Fed. Cas. No. 74,257, *holding* that the record may be considered in evidence on this point.

Lett *v.* State, 124 Ala. 64, 27 So. 256.

Contra. — Bryant *v.* Owen, 2 Stew. & P. (Ala.) 134; Ayer *v.* Chisum, 3 N. M. 59.

Taft *v.* Little, 78 App. Div. 74, 75 N. Y. Supp. 507.

Compare. — Beales *v.* Guernsey, 8 Johns. (N. Y.) 446.

the point that the former witness was not properly sworn on the former trial.[17]

Failure to Object on Former Trial as Waiver of Objections to Relevancy. The fact that on the former trial the party against whom the testimony was given did not object to its relevancy does not preclude him from objecting to the relevancy on a subsequent trial.[18]

Of Objections to Competency. — Nor does a failure to object to competency on the former trial preclude an objection for incompetency on the subsequent trial.[19]

Where Party Now Objecting Formerly Offered the Testimony. — Nor does the fact that the testimony was formerly given by a witness of one party preclude such party from objecting to its competency when such testimony is offered on a subsequent trial by the adverse party.[20]

b. *Former Depositions.* — The party against whom a former deposition is offered cannot object to it for any informality or irregularity waived by him at the former trial;[21] but an objection for an irregularity in the deposition, properly reserved on the former trial, may be taken on the subsequent trial.[22] Objections should be made when it is offered in evidence.[23]

17. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; St. Louis, Iron Mt. & S. R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

18. Calvert *v.* Coxe, 1 Gill (Md.) 95; Willard *v.* Goodenough, 30 Vt. 393; Randolph *v.* Woodstock, 35 Vt. 291.

19. *Alabama.* — House *v.* Camp, 32 Ala. 541.

Arkansas. — Redd *v.* State, 65 Ark. 475, 47 S. W. 119.

Maryland. — Calvert *v.* Coxe, 1 Gill 95.

South Carolina. — Garrett *v.* Weimberg, 54 S. C. 127, 31 S. E. 341.

Vermont. — Randolph *v.* Woodstock, 35 Vt. 291.

"Neither party can rely upon the testimony as taken at the previous trial, nor is he bound thereby. On the contrary, each party must offer his evidence anew just as if there had been no previous trial, and when it is so offered it necessarily becomes subject to any legal objection which may be taken to it." Petrie *v.* Columbia & G. R. Co., 29 S. C. 303, 7 S. E. 515.

20. House *v.* Camp, 32 Ala. 541.

21. *Connecticut.* — Spear *v.* Coon, 32 Conn. 292.

Georgia. — Thomas *v.* Kinsey, 8 Ga. 421.

Iowa. — McMillan *v.* Burlington & M. R. R. Co., 56 Iowa 421, 9 N. W. 347.

New Hampshire. — Burnham *v.* Wood, 8 N. H. 334; Spence *v.* Smith, 18 N. H. 587; Bartlett *v.* Hoyt, 33 N. H. 151; Wendell *v.* Abbott, 45 N. H. 349.

North Carolina. — Kaighn *v.* Kennedy, 1 Mart. 26.

Pennsylvania. — Syphers *v.* Meighen, 22 Pa. St. 125; Hill *v.* Meyers, 43 Pa. St. 170.

Tennessee. — Clarissa *v.* Edwards, 1 Overt. 392.

Vermont. — Pettibone *v.* Rose, Brayt. 77; Perry *v.* Whitney, 30 Vt. 390; Randolph *v.* Woodstock, 35 Vt. 291.

Virginia. — Perkins *v.* Hawkins, 9 Gratt. 649; Peshine *v.* Shepperson, 17 Gratt. 472, 94 Am. Dec. 468.

Wisconsin. — Hobby *v.* Wisconsin Bank, 17 Wis. 167.

But a waiver of an irregularity in the taking of a former deposition cannot in a subsequent action between the parties be deemed a waiver of a difference between issues rendering the former deposition inadmissible therein. Reed *v.* Gold (Va.), 45 S. E. 868.

22. Clarissa *v.* Edwards, 1 Overt. (Tenn.) 392.

23. Where a former deposition is

F. Rebuttal of Preliminary Proof. — In General. — When the existence of a ground for the admission of former testimony is *prima facie* shown, the burden is cast upon the party against whom it is offered to rebut the showing made.[24]

2. Proof of Oral Testimony. — A. Certainty and Completeness Requisite in Proof. — a. *Certainty.* — In order that former testimony may be provable, the substance thereof must be available as evidence. An offer to prove the exact words is not necessary,[25] yet

taken in a proceeding to which a certain person is not a party, in a subsequent trial to which such person is a party it is neither necessary nor proper for him to file exceptions to the use of the former deposition before the commencement of the trial, but he should file the exception when the order to read it is made. Kerr *v.* Gibson, 8 Bush (Ky.) 129.

At the time when a former deposition is offered in evidence, the adverse party may make any proper objection to it, as that it was not taken in an action between the parties, or that it was taken in respect to a different matter or cause of action, or that it was in no way material in the former action. Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

24. Reynolds *v.* United States, 98 U. S. 145. See also Grunninger *v.* Philpot, 5 Biss. 104, 11 Fed. Cas. No. 5853.

25. *England.* — Young *v.* Dearborn, 22 N. H. 372, wherein the English cases are reviewed and held at best to establish nothing.

United States. — United States *v.* White, 5 Cranch C. C. 457, 28 Fed. Cas. No. 16,679; United States *v.* Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702; Ruch *v.* Rock Island, 97 U. S. 693. *Contra.* — See United States *v.* Wood, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756; Bennett *v.* Adams, 2 Cranch C. C. 551, 3 Fed. Cas. No. 1316.

Alabama. — Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485; Tharp *v.* State, 15 Ala. 749; Davis *v.* State, 17 Ala. 354; Clealand *v.* Huey, 18 Ala. 343; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Lett *v.* State, 124 Ala. 64, 27 So. 256.

Georgia. — Code 1895, § 5186 (Code 1882, § 3782); Trammell *v.* Hemphill, 27 Ga. 525.

Indiana. — Horn *v.* Williams, 23 Ind. 37. *Contra.* — Ephraims *v.* Murdock, 7 Blackf. 10; Ward *v.* State, 8 Blackf. 101.

Iowa. — Rivereau *v.* St. Ament, 3 Greene 118; Woods *v.* Gevecke, 28 Iowa 561; Small *v.* Chicago, R. I. & P. R. Co., 55 Iowa 582, 8 N. W. 437; State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752.

Kansas. — Gannon *v.* Stevens, 13 Kan. 447; Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730.

Kentucky. — Thompson *v.* Blackwell, 17 B. Mon. 609; Johnson *v.* Com., 24 Ky. L. Rep. 842, 70 S. W. 44.

Louisiana. — State *v.* Cook, 23 La. Ann. 347. See Reynolds *v.* Rowley, 2 La. Ann. 890, where it was said that if the testimony of an absent witness is "loosely taken down" on a former trial, "it ought to be again taken."

Maine. — Lime Rock Bank *v.* Hewett, 52 Me. 531.

Michigan. — Burson *v.* Huntington, 21 Mich. 415; Lucker *v.* Liske, 111 Mich. 683, 70 N. W. 421.

Mississippi. — Smith *v.* Natchez S. Co., 1 How. 479; Dukes *v.* State, 80 Miss. 353, 31 So. 744.

Missouri. — Morris *v.* Hammerle, 40 Mo. 489; State *v.* Able, 65 Mo. 357; Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654.

New Hampshire. — Young *v.* Dearborn, 22 N. H. 372.

New Jersey. — Sloan *v.* Somers, 20 N. J. L. 66.

New York. — Crawford *v.* Loper, 25 Barb. 449; Martin *v.* Cope, 3 Abb. Dec. 182. *Contra.* — Wilbur *v.* Selden, 6 Cow. 162.

North Carolina. — Ballenger *v.* Barnes, 14 N. C. 460; Jones *v.* Ward, 48 N. C. 24.

Ohio. — Summons *v.* State, 5 Ohio St. 325; Hoover *v.* Jennings, 11 Ohio St. 624; Bonnet *v.* Dickson, 14 Ohio

where only the effect of the former testimony can be shown, proof thereof cannot be received.[26]

St. 434; Donald *v.* State, 21 Ohio Cir. Ct. Rep. 124, 11 O. C. D. 483. *Contra.* — Bliss *v.* Long, Wright 351; Smith *v.* Smith, Wright 643.

Pennsylvania. — Cornell *v.* Green, 10 Serg. & R. 14; Wolf *v.* Wyeth, 11 Serg. & R. 149; Watson *v.* Gilday, 11 Serg. & R. 337; Chess *v.* Chess, 17 Serg. & R. 409; Moore *v.* Pearson, 6 Watts & S. 51; Flanagin *v.* Leibert, Brightly N. P. 61; Gould *v.* Crawford, 2 Pa. St. 89; Philadelphia & R. R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544; Hapler *v.* Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813.

South Carolina. — State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

Tennessee. — Kendrick *v.* State, 10 Humph. 479; Wade *v.* State, 7 Baxt. 80.

Texas. — Thurmond *v.* Trammell, 28 Tex. 372, 91 Am. Dec. 321; Greenwood *v.* State, 35 Tex. 587; Black *v.* State, 1 Tex. App. 368; Simms *v.* State, 10 Tex. App. 131; Potts *v.* State, 26 Tex. App. 663, 14 S. W. 456.

Vermont. — State *v.* Hooker, 17 Vt. 658. See Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67.

Virginia. — Caton *v.* Lenox, 5 Rand. 31.

Wisconsin. — Jackson *v.* State, 81 Wis. 127, 51 N. W. 89; McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116.

Wyoming. — Foley *v.* State (Wyo.), 72 Pac. 627.

"The substance is not the words identically, but the substantial expressions of the witness, and must admit of some change from the mouth to the paper" on which the testimony was in this case taken down. Philadelphia & R. R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

"Indeed, to hold that the witness testifying to the evidence given by the deceased witness must from *mere memory* state the *precise words* of the deceased witness would practically exclude the evidence altogether, for it would be difficult to find a person claiming to possess a memory of such remarkable power, and perhaps still more difficult to find a jury who would give much credit to the claim." People *v.* Murphy, 45 Cal. 137.

"I have never heard a witness in twenty years who could give any man's evidence in his precise words. . . . His assertion that he could narrate *verbatim* from memory the whole of a witness' statement would, in ninety-nine cases in a hundred, be convincing evidence to men of sense that his word was not to be relied on." Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467.

In two states it is held that the *words* of the former witness must be substantially given, although not all the very words.

Kinney *v.* Hosea, 3 Har. (Del.) 397; Marshall *v.* Adams, 11 Ill. 37; but see Chicago, R. I. & P. R. Co. *v.* Harmon, 17 Ill. App. 640.

In Maryland the facts as testified to by the former witness must be detailed — not merely the effect thereof or inferences to be drawn therefrom. Garrott *v.* Johnson, 11 Gill & J. 173, 35 Am. Dec. 272; Black *v.* Woodrow, 39 Md. 194. The difference between the Maryland rule and the general rule seems to be more in method of expression than in anything else.

In Massachusetts the language of the former witness must be repeated substantially and in all material particulars; the exact words not, however, being required. Costigan *v.* Lunt, 127 Mass. 354. See also Warren *v.* Nichols, 6 Metc. 261; Corey *v.* Janes, 15 Gray 543; Yale *v.* Comstock, 112 Mass. 267.

Compare Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608.

26. *England.* — See Kenyon, C. J., in Rex *v.* Jolliffe, 4 T. R. 285.

United States. — United States *v.* Wood, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756; Bennett *v.* Adams, 2 Cranch C. C. 551, 3 Fed. Cas. No. 1316.

Alabama. — Tharp *v.* State, 15 Ala. 749.

Illinois. — Marshall *v.* Adams, 11 Ill. 37.

Maryland. — Bowie *v.* O'Neale, 5 Har. & J. 226.

b. *Completeness in Possibility of Proof.* — The substance of all the testimony of the former witness on the particular issue in respect to which the former testimony is offered,[27] and not only on the direct examination, but also on the cross-examination,[28] must be shown to be available as evidence; otherwise the former testimony cannot be proved at all.

Where Materially Aided by Photographs. — Where the former testimony of a witness was materially aided by photographs, a stenographic report thereof, when not accompanied with the photographs, is too incomplete to be admissible.[29]

As to Substance on Other Issues. — It is not requisite, however, that testimony given by the former witness on other issues should also be available.[30]

Massachusetts. — Costigan *v.* Lunt, 127 Mass. 354.

New Jersey. — Sloan *v.* Somers, 20 N. J. L. 66.

North Carolina. — Ballenger *v.* Barnes, 14 N. C. 460; Jones *v.* Ward, 48 N. C. 24.

Ohio. — Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467; Summons *v.* State, 5 Ohio St. 325.

27. *United States.* — Chicago, St. P. M. & O. R. Co. *v.* Myers, 25 C. C. A. 486, 80 Fed. 361.

Georgia. — Denson *v.* Denson, 111 Ga. 809, 35 S. E. 680.

Kansas. — State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

Maine. — Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

Maryland. — Black *v.* Woodrow, 39 Md. 194.

Massachusetts. — Woods *v.* Keyes, 14 Allen 236, 92 Am. Dec. 765.

Missouri. — Jaccard *v.* Anderson, 37 Mo. 91.

New Jersey. — Jessup *v.* Cook, 6 N. J. L. 434.

Ohio. — Summons *v.* State, 5 Ohio St. 325.

Pennsylvania. — Wolf *v.* Wyeth, 11 Serg. & R. 149; Watson *v.* Gilday, 11 Serg. & R. 337; Bemus *v.* Howard, 3 Watts 255.

Tennessee. — Kendrick *v.* State, 10 Humph. 479; Wade *v.* State, 7 Baxt. 80.

Wyoming. — Foley *v.* State (Wyo.), 72 Pac. 627.

It seems that where a person has taken down the substance of all the testimony given by a former witness, using only such words of his as may be necessary, the notes are admissible; but where he not only omits words, but thoughts also of the former witness, the notes cannot be proved. Philadelphia & R. R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

28. *Alabama.* — Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485.

Iowa. — Harrison *v.* Charlton, 42 Iowa 573; Fell *v.* Burlington C. R. & M. R. Co., 43 Iowa 177; State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752.

Maryland. — Black *v.* Woodrow, 39 Md. 194.

Pennsylvania. — Wolf *v.* Wyeth, 11 Serg. & R. 149; Watson *v.* Gilday, 11 Serg. & R. 337.

Tennessee. — Kendrick *v.* State, 10 Humph. 479; Wade *v.* State, 7 Baxt. 80.

Texas. — See Bennett *v.* State, 32 Tex. Crim. 216, 22 S. W. 684.

Vermont. — Whitcher *v.* Morey, 39 Vt. 459.

Scope of Rule. — Where former testimony is reproduced from the memory of a witness, all that is required is that the recollection of the witness be reasonably clear as to the facts testified to, and how, if at all, such testimony was affected by the cross-examination. Hepler *v.* Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813.

29. Chicago, St. P. M. & O. R. Co. *v.* Myers, 25 C. C. A. 486, 80 Fed. 361.

30. *Georgia.* — Mitchell *v.* State, 71 Ga. 128.

Contra. — Puryear *v.* State, 63 Ga. 692.

c. *Completeness Requisite in Actual Proof.* — In a few states the substance of all the former testimony on the particular issue not only must be available, but must be put in evidence.[31]

In other states, so long as the requisite testimony is shown to be available, the party need only put in evidence so much thereof as he desires.[32] It is then the right of the party against whom it is offered, at his option, to put in evidence further proof of the former testimony.[33] By failing to introduce such further proof, he cannot deprive the other party of the evidence to which he is entitled.[34]

d. *Irrelevant Statement Struck Out on Former Trial.* — A remark made by the former witness while testifying, which was immediately struck out, cannot on the subsequent hearing be proved as part of his former testimony.[35]

Illinois. — Graffenried *v.* Kundert, 31 Ill. App. 394.

Indiana. — Horne *v.* Williams, 23 Ind. 37; Bass *v.* State, 136 Ind. 165, 36 N. E. 124.

Kansas. — State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

Maryland. — See Black *v.* Woodrow, 39 Md. 194.

Missouri. — Jaccard *v.* Anderson, 37 Mo. 91; Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654.

Ohio. — Summons *v.* State, 5 Ohio St. 325; Donald *v.* State, 21 Ohio Cir. Ct. R. 124, 11 O. C. D. 483.

North Carolina. — Bryan *v.* Malloy, 90 N. C. 508.

Pennsylvania. — Norris *v.* Monen, 3 Watts 465; Sample *v.* Coulson, 9 Watts & S. 62; Harger *v.* Thomas, 44 Pa. St. 128; Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708.

South Carolina. — Mathews *v.* Colburn, 1 Strob. 258.

Tennessee. — Kendrick *v.* State, 10 Humph. 479.

Texas. — Bennett *v.* State, 32 Tex. Crim. 216, 22 S. W. 684.

See Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; Iowa Laws 27th Gen. Assem., c 9; Crawford *v.* Loper, 25 Barb. (N. Y.) 449; Odell *v.* Solomon, 23 Jones & S. 410, 16 N. Y. St. 577, 4 N. Y. Supp. 440; Doe d. Ingram *v.* Watkins, 18 N. C. 442; Wright *v.* Stowe, 49 N. C. 516.

The jury "must have all or none, as the whole is to be explained by the whole and by every part." Ballenger *v.* Barnes, 14 N. C. 460.

It is within the province of the court to reject such portions as are irrelevant, but it is not for the witness to determine the relevancy of any portion. Magee *v.* Hallett, 22 Ala. 699.

31. Gildersleeve, *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485; State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036; Summons *v.* State, 5 Ohio St. 325.

32. *Georgia.* — Burnett *v.* State, 87 Ga. 622, 13 S. E. 552; Waller *v.* State, 102 Ga. 684, 28 S. E. 284. *Contra.* — See Denson *v.* Denson, 111 Ga. 809, 35 S. E. 680 (a memorandum decision).

Indiana. — See Bass *v.* State, 136 Ind. 165, 36 N. E. 124.

Iowa. — Henderson *v.* Chicago, R. I. & P. R. Co., 48 Iowa 216; Laws 27th Gen. Assem., c. 9.

Missouri. — Dessaunier *v.* Murphy, 33 Mo. 184.

Tennessee. — Wade *v.* State, 7 Baxt. 80.

Under a stipulation that "either party might read from the testimony taken on the former trial, subject to all exceptions," it is the privilege of a party to read from the testimony of a former witness such parts as he desires, omitting other parts. Parmenter *v.* Boston H. T. & W. R. Co., 37 Hun (N. Y.) 354.

33. Bass *v.* State, 136 Ind. 165, 36 N. E. 124; Henderson *v.* Chicago, R. I. & P. R. Co., 48 Iowa 216.

34. Waller *v.* State, 102 Ga. 684, 28 S. E. 284.

35. Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643; *affirming* 78 App. Div. 633, 79 N. Y. Supp. 536.

B. Manner of Proof in General. — a. *By Testimony.* — In most states, former testimony may be proved by a witness able to detail the substance thereof with the requisite completeness.[36] In a few states this method of proof is exclusive of others.[37]

Deposition of Witness. — The deposition of a witness competent to prove former testimony may be used under the circumstances usually permitting a deposition in lieu of personal presence.[38]

Effect of Lapse of Time. — The fact that considerable time has

36. *England.* — See Rex *v.* Carpenter (K. B.), 2 Shower 47; Anonymous (K. B.), 2 Shower 163; Strutt *v.* Bovington, 5 Esp. 56.

Illinois. — Marshall *v.* Adams, 11 Ill. 37; City of Elgin *v.* Welsh, 23 Ill. App. 185; Loughry *v.* Mail, 34 Ill. App. 523.

Iowa. — State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746.

Kentucky. — Cantrell *v.* Hewlett, 2 Bush 311.

Maryland. — Black *v.* Woodrow, 39 Md. 194; Ecker *v.* McAllister, 54 Md. 362; Herrick *v.* Swomley, 56 Md. 439.

Missouri. — State *v.* Able, 65 Mo. 357.

New York. — Jackson *v.* Bailey, 2 Johns. 17; Ward *v.* Sire, 52 App. Div. 443, 65 N. Y. Supp. 101.

South Carolina. — State *v.* DeWitt, 2 Hill L. 282, 27 Am. Dec. 371; Bently *v.* Page, 2 McMul. 52; Yancey *v.* Stone, 9 Rich. Eq. 429.

Tennessee. — Kinnard *v.* Willmore, 2 Heisk. 619.

Texas. — Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668; Houston & T. C. R. Co. *v.* Smith (Tex. Civ. App.), 51 S. W. 506.

37. *Illinois.* — Marshall *v.* Adams, 11 Ill. 37; City of Elgin *v.* Welsh, 23 Ill. App. 185. *Contra.* — Mineral Point R. R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Maryland. — Ecker *v.* McAllister, 54 Md. 362; Herrick *v.* Swomley, 56 Md. 439.

New York. — Jackson *v.* Bailey, 2 Johns. 17; Ward *v.* Sire, 52 App. Div. 443, 65 N. Y. Supp. 101.

South Carolina. — State *v.* DeWitt, 2 Hill L. 282, 27 Am. Dec. 371; Bentley *v.* Page, 2 McMul. 52; Yancey *v.* Stone, 9 Rich. Eq. 429.

Thus where there is no one who has a recollection of former testimony, it cannot be proved. Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668.

Contra. — In order to prove former testimony it is not necessary to produce a witness who heard the deceased swear on the former trial, in order that he may testify orally as to the former testimony, where written proof is available. Walker *v.* Walker, 14 Ga. 242.

In Missouri it seems that where a former witness is rendered incompetent by the death of the adverse party intermediate the two trials, the former testimony of such witness must be proved by his own oral testimony or deposition in a proper case, notwithstanding his incompetency to testify generally. Corbey *v.* Wright, 9 Mo. App. 5. In Coughlin *v.* Haeussler, 50 Mo. 126, however, the court said that the use of such testimony in proof of the former testimony might embarrass the proceeding. An objection to the use of the former witness' deposition in proof of his former testimony, because it covers different points from those he testified to on the former trial, or because it materially varies from his former testimony, is sound.

In New York, such former testimony need not be proved by the former witness' deposition, and it is no objection that such method of proof is not resorted to. Lawson *v.* Jones, 61 How. Pr. 424, 1 Civ. Proc. 247, 12 Wkly. Dig. 551.

38. So where at the time of a second trial the stenographer who reported the testimony of a certain witness on the former trial is absent from the state, her deposition may be used. Robbins *v.* Barton, 9 Kan. App. 558, 58 Pac. 279.

elapsed since the former testimony was given does not render oral proof inadmissible.[39]

b. *By Writing.* — The fact that the former testimony, or the substance thereof, has been reduced to writing, whether in the form of a memorandum, of stenographic notes, of a bill of exceptions, or of a deposition, does not render oral proof of the former testimony inadmissible,[40] except where the stenographic notes, or a longhand transcript thereof, have by law been made primary evidence.[41] Where the best evidence is inadequate to convey the meaning conveyed by the former witness, the defect may be supplied by a witness.[42]

Failure to Use Best Evidence. — A resort to other proof of former testimony instead of the best evidence is harmless error where there is no variance between the proof given and the best evidence.[43]

Supplementation of Writing. — Material testimony given by the former witness, but not contained in the writing placed in evidence, may be proved.[44]

39. Lime Rock Bank *v.* Hewett, 52 Me. 531.

40. *Illinois.* — Hutchings *v.* Corgan, 59 Ill. 70.

Iowa. — State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746 (stenographic notes).

Maine. — State *v.* McDonald, 65 Me. 466 (stenographic notes). *Compare* State *v.* Frederic, 69 Me. 400.

Massachusetts. — See Com. *v.* McCarty, 152 Mass. 577, 26 N. E. 140.

Missouri. — Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78 (bill of exceptions). *Contra.* — Corbey *v.* Wright, 9 Mo. App. 5.

Nebraska. — German Nat. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107 (stenographic notes).

New York. — Trimmer *v.* Trimmer, 90 N. Y. 675 (referee's notes, the referee having since died).

South Carolina. — Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272; Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341; both cases of stenographic notes. *Compare* State *v.* Branham, 13 S. C. 389; State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

Vermont. — Earl *v.* Tupper, 45 Vt. 275 (judge's notes).

"The rule which requires the production of the best evidence is not applicable. Nothing more is intended by that rule than that evidence which is merely substitutionary in its nature shall not be received so long as the original evidence can be had. It does not allow secondary evidence to be substituted for that which is primary. It will not permit the contents of a deed or other written instrument to be proved by parol when the instrument itself can be produced. It has nothing to do with the choice of witnesses." State *v.* McDonald, 65 Me. 466.

Contra. — It seems that a bill of exceptions is the best evidence. Rev. Stat., § 5242*a*.

See statement in Wilson *v.* Noonan, 35 Wis. 321, that a "bill of exceptions is the highest and best evidence" in such case.

41. Bright. Purd. Dig. Pa., Act of May 8, 1876, § 2; Carrico *v.* West Virginia C. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; Code 1899, p. 1135, § 3.

42. So where the former witness illustrated his testimony by the position of his body, a person who saw the former witness testify may properly explain such position to the jury, the shorthand notes at this point merely containing the word "illustrates." Carrico *v.* West Virginia, C. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

43. Carrico *v.* West Virginia, C. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

44. Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517; City of Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Loss of Writing. — Where the original writing is lost or mislaid, a copy shown to be correct may be used with the same effect as the original.[45]

Former Witness Dumb. — The fact that the former witness was dumb does not render a writing in which his signs were described in words inadmissible in proof.[46]

c. *In Criminal Cases.* — *Oral Testimony.* — On the hearing of a criminal cause former testimony may properly be proved by oral testimony.[47]

Writing. — The use of a writing to prove it would seem to infringe the right of an accused person to be confronted with the witnesses against him,[48] but in some states such proof is nevertheless admissible.[49]

d. *Testimony Given in Foreign Language.* —It seems that former testimony given in a foreign language must be proved by one who heard and understood the language of the former witness;[50] and that it cannot be proved by a person who heard the interpreter or by a writing setting forth the interpretation,[51] except in Indiana in

See also Corbey *v.* Wright, 9 Mo. App. 5.

45. Where the original transcript of a stenographer's notes of former testimony is mislaid or lost, counsel may properly read in proof of the former testimony a carbon copy of the transcript which the stenographer testified he had examined and identified as a correct copy. Molloy *v.* United States Exp. Co., 22 Pa. Super. Ct. 173.

Where original minutes of former testimony which would have been admissible were lost, a copy of the minutes shown to be an accurate transcript may be read to the jury. Whitcher *v.* Morey, 39 Vt. 459.

46. Quinn *v.* Halbert, 57 Vt. 178.

47. Kean *v.* Com., 10 Bush (Ky.) 190, 19 Am. Rep. 63; Com. *v.* Richards, 18 Pick. (Mass.) 434, 29 Am. Dec. 608.

The accused is thereby given the right of confronting the witnesses against him and of cross-examining them. People *v.* Lee Fat, 54 Cal. 527; Greenwood *v.* State, 35 Tex. 587.

Contra. — State *v.* Oliver, 43 La. Ann. 1003, 10 So. 201.

48. People *v.* Lee Fat, 54 Cal. 527.

"The accused has the right to cross-examine and to know or ascertain from the witness that he is detailing in substance all that was spoken by the deceased witness; without this he is deprived of any oral examination, or of even knowing who is to testify against him. It is the presence of the witness that this provision of the bill of rights entitles the accused to have . . . the right of the accused to see or confront the witness is an indispensable requirement." Kean *v.* Com., 10 (Ky.) 190, 19 Am. Rep. 63.

49. State *v.* Frederick, 69 Me. 400; Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740.

"The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

50. People *v.* Ah Yute, 56 Cal. 119.

51. The shorthand reporter cannot read from his notes the former testimony of a former witness who testified through an interpreter. "In taking them down the reporter received them from the lips of the interpreter, and not from the defendant [the former witness]. It is, therefore, evident that the reporter did not understand the language in which the defendant spoke, and that he did not pretend to testify from

cases of necessity.[52]

C. Proof by Writing. — a. *In General.* — **(1.) Identification of Writing.** — A party called to identify a writing as setting forth the testimony of a former witness may, before identifying it, properly refresh his memory as to the name of the witness by looking at the writing.[53]

(2.) Showing of Correctness. — Offer of Proof. — An offer merely to prove that a writing purports to contain certain former testimony is not equivalent to an offer to prove that such writing sets forth such testimony correctly and is insufficient.[54]

Proof That Writing Sets Forth Transcript. — Proof that a writing correctly sets forth the substance of the court reporter's longhand transcript does not amount to proof that it correctly sets forth the former testimony.[55]

Consent. — An unauthenticated writing may be read by consent.[56]

b. *Particular Writings.* — **(1.) Memoranda. — Authenticated Notes as Independent Evidence.** — While notes or minutes of former testimony are not of themselves competent evidence thereof,[57] yet when shown to be a correct statement of the former testimony they may be admitted in proof thereof.[58]

his own knowledge or recollection of what the witness said, but from the shorthand notes of what the interpreter had said." People *v.* Ah Yute, 56 Cal. 119.

Where a former witness testified in Chinese, and on a subsequent trial the interpreter was called and testified that he accurately stated the former testimony in English, after which the shorthand reporter testified from his notes as to the former testimony, the admission of the testimony of the shorthand reporter was erroneous, it being hearsay. People *v.* John, 137 Cal. 220, 69 Pac. 1063.

52. What an interpreter testified on a former trial was said in a foreign language by a former witness, must be proved by the interpreter himself, and any other person is incompetent to prove such former testimony unless the interpreter is dead or insane or out of the jurisdiction, or having been summoned is kept away by the adverse party. Schearer *v.* Harber, 36 Ind. 536.

53. State *v.* Able, 65 Mo. 357.

54. Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236.

55. Odell *v.* Solomon, 23 Jones & S. 410, 16 N. Y. St. 577, 4 N. Y. Supp. 440.

56. Fertig *v.* State, 100 Wis. 301, 75 N. W. 960 (criminal case).

57. *England.* — *In re* Griffin's Divorce Bill (1896), A. C. 133 (judge's notes).

Florida. — Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343 (see 1 So. 860) (judge's notes).

Maryland. — Waters *v.* Waters, 35 Md. 531 (counsel notes).

Missouri. — State *v.* Evans, 65 Mo. 574.

New York. — See Green *v.* Brown, 3 Barb. 119.

North Carolina. — Jones *v.* Ward, 48 N. C. 24 (counsel notes); Mott *v.* Ramsay, 92 N. C. 152 (referee's notes).

South Carolina. — State *v.* DeWitt, 2 Hill L. 282, 27 Am. Dec. 371; Bentley *v.* Page, 2 McMul. 52; Yancey *v.* Stone, 9 Rich. Eq. 429.

Wisconsin. — Elberfeldt *v.* Waite, 79 Wis. 284, 48 N. W. 525; McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116, all cases of judge's notes.

"The minutes of testimony taken by a justice . . . are made in the haste and confusion of trials, generally by men who are quite unused to the business, and no power to make corrections after the trial is vested in any one." Zitske *v.* Goldberg, 38 Wis. 216.

58. *England.* — Mayor of Don-

Authentication by Judge's Certificate. — The certificate of a judge stating that his notes are in substance correct does not sufficiently authenticate them.[59]

By Oral Testimony. — But testimony of a person that he took full minutes of the former testimony with substantial correctness is sufficient.[60]

Death of Judge as Excusing Authentication. — The death of the judge does not render the authentication of his notes unnecessary.[61]

(2.) Stenographic Notes. — (A.) First Group of States. — Certified Transcript Independent Evidence. In some states a longhand transcript of the official reporter's shorthand notes of former testimony, certified as a correct statement of the testimony, is of itself admis-

caster *v.* Day, 3 Taunt. 262; *In re* Griffin's Divorce Bill (1896), A. C. 133.

United States. — Ruch *v.* Rock Island, 97 U. S. 693.

Illinois. — Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124. *Contra.* — Marshall *v.* Adams, 11 Ill. 37; City of Elgin *v.* Welch, 23 Ill. App. 185.

Missouri. — Morris *v.* Hammerle, 40 Mo. 489; Coughlin *v.* Haeussler, 50 Mo. 126.

New York. — See Oakley *v.* Sears, 2 Rob. 440. *Contra.* — See note 37, *supra.*

North Carolina. — Jones *v.* Ward, 48 N. C. 24.

Pennsylvania. — Bright. Purd. Dig., p. 818, § 37; Cornell *v.* Green, 10 Serg. & R. 14; Evans *v.* Reed, 78 Pa. St. 415; Rothrock *v.* Gallaher, 91 Pa. St. 108; Walbridge *v.* Knipper, 96 Pa. St. 48.

Tennessee. — Kinnard *v.* Willmore, 2 Heisk. 619.

Vermont. — Glass *v.* Beach, 5 Vt. 172; Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67; Whitcher *v.* Morey, 39 Vt. 459.

Counsel notes are more reliable than testimony resting in memory merely, tinged though they be by the prejudices of the counsel taking them. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124. *Contra.* Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731. See also note 37, *supra.*

Proof of the correctness of the notes must be given as prerequisite to their admission. Morris *v.* Hammerle, 40 Mo. 489; Coughlin *v.* Haeussler, 50 Mo. 126.

See Oakley *v.* Sears, 2 Rob. (N. Y.) 440. *Compare* note 37, *supra.* Lightner *v.* Wike, 4 Serg. & R. (Pa.) 203; Livingston *v.* Cox, 8 Watts & S. (Pa.) 61.

"The judge's notes of testimony are taken for his own guidance and are not so required of him as part of his official duty as to make them admissible in evidence without the usual proof of their accuracy." Whitcher *v.* Morey, 39 Vt. 459.

59. *England.* — *In re* Griffin's Divorce Bill (1896), A. C. 133.

"Notes of evidence, taken by the judge in the course of a trial, are like notes of counsel — memoranda for private use. They are no part of the record, except where they are incorporated in a bill of exceptions; and then only for purposes of review. It is no part of the judge's duty to take down the testimony accurately, or at all; and his notes, therefore, have not the sanction of his official oath. But testimony is to be received only when it comes under the sanction of a judicial oath, which is dispensed with only in a very few cases." Livingston *v.* Cox, 8 Watts & S. (Pa.) 61. See to the same effect, Miles *v.* O'Hara, 4 Binn. (Pa.) 108.

60. Proof Given by Deposition. "A more complete verification of minutes taken upon a trial could seldom be made. A prudent man would not be likely to profess to a greater accuracy in taking notes of the evidence." Whitcher *v.* Morey, 39 Vt. 459.

61. Foster *v.* Shaw, 7 Serg. & R. (Pa.) 156; Livingston *v.* Cox, 8 Watts & S. (Pa.) 61.

sible as independent evidence thereof.[62] In Iowa the transcript constitutes such evidence only on a retrial of the same proceeding,[63] and where the reporter who took the former testimony has since ceased to be the official reporter, the transcript must be proven to be correct.[64] In Ohio it seems that the transcript can only be used where the former testimony is not incorporated into a bill of exceptions.[65]

The fact that the transcript neither was made under order of court, nor was filed in the clerk's office, does not render it inadmissible.[66]

(B.) Second Group of States. — Authenticated Transcript Independent Evidence. — In other states, such transcript is admissible as independent evidence only where shown to be correct by extrinsic evidence.[67]

62. *Arizona.* — See Rev. Stat. 1901, § 2537.

Connecticut. — Rev. Stat. 1902, § 694.

Iowa. — See notes 63 and 64, *infra.*

Kentucky. — Sievers Carson Hardware Co. *v.* Curd, 24 Ky. L. Rep. 1317, 71 S. W. 506.

Maine. — Rev. Stat. 1903, ch. 84, § 162; State *v.* Frederic, 69 Me. 400.

Ohio. — See note 85, *infra.*

South Dakota. — Merchants' National Bank *v.* Stebins, 10 S. D. 466, 74 N. W. 199.

Vermont. — Rev. Law, § 816 (1889).

Sufficiency of Certificate. — A certificate that a transcript is "a full, true and correct transcript of the shorthand notes taken by me" does not amount to a certificate that the transcript is a correct statement of the former testimony. "There is no affirmation that such notes were correct. . . . They may have been purely or partly a freak of the reporter's imagination." People *v.* Carty, 77 Cal. 213, 19 Pac. 490.

63. Walker *v.* Walker, 117 Iowa 609, 91 N. W. 908; *In re* Wiltsey's Will (Iowa), 98 N. W. 294; Laws 27th Gen. Assem., c. 9.

Formerly it was necessary to show a sufficient ground for the non-production of the shorthand notes before the transcript was admissible. State *v.* Maloy, 44 Iowa 104.

64. Laws 27th Gen. Assem., c. 9.

65. Rev. Stat. 1902, § 5242; State *v.* Wing, 66 Ohio 407, 64 N. E. 514.

66. Bridgeman *v.* Estate of Corey, 62 Vt. 1, 20 Atl. 273.

67. *United States.* — Chicago, St. P., M. & Or. Co. *v.* Myers, 25 C. C. A. 486, 80 Fed. 361; Mattox *v.* United States, 156 U. S. 237.

Georgia. — Hardeman *v.* English, 79 Ga. 387, 5 S. E. 70; Burnett *v.* State, 87 Ga. 622, 13 S. E. 552; Lathorp *v.* Adkisson, 87 Ga. 339, 13 S. E. 517.

Illinois. — Chicago, R. I. & P. R. Co. *v.* Harman, 17 Ill. App. 640; Luetgert *v.* Volker, 153 Ill. 385, 39 N. W. 113; Bredt *v.* Simpson, 95 Ill. App. 333.

Kansas. — Robbins *v.* Barton, 9 Kan. App. 558, 58 Pac. 279; Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249.

Michigan. — Stewart *v.* First Nat. Bank, 43 Mich. 257, 5 N. W. 302; Misner *v.* Darling, 44 Mich. 438, 7 N. W. 77; Edwards *v.* Hewer, 46 Mich. 95, 8 N. W. 717; People *v.* Sligh, 48 Mich. 54, 11 N. W. 782; Toohey *v.* Plummer, 69 Mich. 345, 37 N. W. 297; Barker *v.* Hebbard, 81 Mich. 267, 45 N. W. 964.

Montana. — Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

Testimony Held to Show Correctness. — Testimony of a shorthand reporter that he wrote up the testimony, dictated it to two copyists, that the transcript of the testimony of the witnesses was correct, and that they were sworn and testified as therein stated, is sufficient to render the transcript of former testimony admissible in a subsequent trial. Brown *v.* Luchrs, 79 Ill. 575. See, to the same effect, Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113.

(C.) Third Group of States. — Neither Transcript Nor Notes Admissible. — In yet other states neither the shorthand notes nor a correct longhand transcript thereof can be used as independent evidence.[68]

Particular Grounds Urged for Admission. — A certified transcript is not admissible either as *res gestae*,[69] or as a public document,[70] nor because declared by statute *prima facie* a correct statement of the former testimony.[71] Where the former trial was held in another state, a duly-certified transcript of former testimony of a witness is not admissible as a record of a judicial proceeding within the meaning of the act of congress making such a record evidence.[72]

(3.) Bill of Exceptions. — (A.) As Independent Evidence. — In some states a bill of exceptions or other similar writing, approved by the judge and agreed upon by the parties as a correct statement of the former testimony, is of itself evidence thereof,[73] notwithstanding it

68. *California.* — Reid *v.* Reid, 73 Cal. 206, 14 Pac. 781; People *v.* Carty, 77 Cal. 213, 19 Pac. 490. *Contra.* — See Hix *v.* Lovell, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 679.

Colorado. — Cerrusite Min. Co. *v.* Steele (Col. App.), 70 Pac. 1091.

Indiana. — See Stayner *v.* Joyce, 120 Ind. 99, 22 N. E. 89.

Maryland. — Herrick *v.* Swomley, 56 Md. 462.

Missouri. — Byrd *v.* Hartman, 70 Mo. App. 57.

Nebraska. — Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731; Smith *v.* State, 42 Neb. 356, 60 N. W. 585; State *v.* Ambrose, 47 Neb. 235, 66 N. W. 306; Jordan *v.* Howe (Neb.), 95 N. W. 853. *Contra.* — Hair *v.* State, 16 Neb. 601, 21 N. W. 464; Spielman *v.* Flynn, 19 Neb. 342, 27 N. W. 224.

See Lyon *v.* Brown, 31 App. Div. 67, 52 N. Y. Supp. 531; State *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055; Kellogg *v.* Scheurman, 18 Wash. 293, 51 Pac. 344; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

69. Transcript Not Admissible as Res Gestae. — The court does not know when it was written up. Reid *v.* Reid, 73 Cal. 206, 14 Pac. 781.

70. Transcript Not Admissible as Public Document. — Reid *v.* Reid, 73 Cal. 206, 14 Pac. 781; Smith *v.* State, 42 Neb. 356, 60 N. W. 585; State *v.* Ambrose, 47 Neb. 235, 66 N. W. 306.

Contra. — Spielman *v.* Flynn, 19 Neb. 342, 27 N. W. 224, *per* Maxwell, C. J., Cobb, J., Reese, J., dissenting.

"The reporter's stenographic notes are preserved, not for the benefit of the community at large, but of the parties to the action or proceeding in which they were taken. The information which they impart is not intrusted to the public, but, aside from the prosecuting attorney, is confined to the parties directly interested." Smith *v.* State, 42 Neb. 356, 60 N. W. 585.

71. Reid *v.* Reid, 73 Cal. 206, 14 Pac. 781; Estate of Benton, 131 Cal. 472, 63 Pac. 775.

72. Herrick *v.* Swomley, 56 Md. 462.

73. *Georgia.* — Walker *v.* Walker, 14 Ga. 242; Smith *v.* State, 28 Ga. 19; Adair *v.* Adair, 39 Ga. 75; Jackson *v.* Jackson, 49 Ga. 99; Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517; City of Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749; Owen *v.* Palmour, 111 Ga. 885, 36 S. E. 969. *Compare* Riggins *v.* Brown, 12 Ga. 271, where it is said to be admissible after proof of its correctness.

Illinois. — Certificate of evidence made in equity may be used: O'Conner *v.* Mahoney, 159 Ill. 69, 42 N. E. 378. *Contra.* — Asher *v.* Mitchell, 9 Ill. App. 335.

But a bill of exceptions made at law is inadmissible.

Kentucky. — Baylor *v.* Smithers, 1 T. B. Mon. 6; Cantrell *v.* Hewlett, 2 Bush 311; Kean *v.* Com., 10 Bush 190, 19 Am. Rep. 63; Reynolds *v.*

was made merely for the purpose of a motion for new trial or of an appeal.[74]

Statement by Reference. — A recital in a bill of exceptions that a former witness testified to the same facts substantially as another witness, makes it proper to treat the testimony of the other witness as written out in the bill as the testimony of the former witness.[75]

Bill Not Independent Evidence. — In other states a bill of exceptions is not of itself competent evidence of former testimony.[76]

(B.) As Memorandum. — Where proved to be substantially correct, a bill of exceptions may be used in the same manner as other notes

Powers, 96 Ky. 481, 29 S. W. 299.

Louisiana. — Conway *v.* Erwin, 1 La. Ann. 391.

Minnesota. — Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605.

Missouri. — Rev. Stat. 1899, § 3149; Leeser *v.* Boekhoff, 38 Mo. App. 445; State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136.

Before the enactment of the statutory provision, proof of the correctness of the bill of exceptions was essential. Jaccard *v.* Anderson, 37 Mo. 91; Morris *v.* Hammerle, 40 Mo. 489; Scoville *v.* Hannibal & St. J. R. Co., 94 Mo. 84, 6 S. W. 654; Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78.

Ohio. — Rev. Stat., § 5242*a*. *Contra.* — Kirk *v.* Mowry, 24 Ohio St. 581.

Wisconsin. — Wilson *v.* Noonan, 35 Wis. 321.

In Conway *v.* Erwin, 1 La. Ann. 391, the record of the former action was certified by the clerk as a true and faithful record of all the testimony deduced. The court also considered the formal requisites of certification.

"Surely all will agree that a paper thus agreed to by the parties, and approved by the court, will be more trustworthy on the question what was the evidence delivered on the trial, than the daily fading recollection of persons who happened to hear the evidence when it was so delivered." Smith *v.* State, 28 Ga. 19; Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517.

74. Smith *v.* State, 28 Ga. 19.

75. Denson *v.* Denson, 111 Ga. 809, 35 S. E. 680.

76. *District of Columbia.* — Anderson *v.* Reid, 10 App. D. C. 426.

Florida. — Simmons *v.* Spratt, 26 Fla. 449, 1 So. 860, 8 So. 123, 9 L. R. A. 343.

Illinois. — Roth *v.* Smith, 54 Ill. 431; O'Neall *v.* Calhoun, 67 Ill. 219; Sargeant *v.* Marshall, 38 Ill. App. 642; Stern *v.* People, 102 Ill. 540, *affirming* 9 Ill. App. 411; Kankakee & S. R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621; Illinois C. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; City of Elgin *v.* Welch, 23 Ill. App. 185; Plano Mfg. Co. *v.* Parmenter, 56 Ill. App. 258.

Contra. — Iglehart *v.* Jernegan, 16 Ill. 513.

But a certificate of evidence made in equity is admissible. See note 73, *supra*.

Indiana. — Woollen *v.* Whitacre, 91 Ind. 502; Fisher *v.* Fisher, 131 Ind. 462, 29 N. E. 31.

Iowa. — See Boyd *v.* First Nat. Bank, 25 Iowa 255.

Kansas. — Ireton *v.* Ireton, 59 Kan. 92, 52 Pac. 74.

Maryland. — See Ecker *v.* McAllister, 54 Md. 362.

Michigan. — See Breitenwischer *v.* Clough, 116 Mich. 340, 74 N. W. 507.

Mississippi. — Shockwell *v.* Hamblin, 23 Miss. 156; Green *v.* Irving, 54 Miss. 450; Montgomery *v.* Handy, 63 Miss. 43.

New Jersey. — Sloan *v.* Somers, 20 N. J. L. 66.

New York. — Neilson *v.* Columbian Ins. Co., 1 Johns. 301; Elting *v.* Scott, 2 Johns. 157; O'Dell *v.* Solomon, 23 Jones & S. 410, 16 N. Y. St. 577, 4 N. Y. Supp. 440; Ward *v.* Sire, 52 App. Div. 443, 65 N. Y. Supp. 101.

Pennsylvania. — Edwards *v.* Gimbel, 202 Pa. St. 30, 51 Atl. 357.

Texas. — Dwyer *v.* Rippetoe, 72

of former testimony, although not admissible as independent evidence.[77]

(4.) **Recital in Opinion.** — A recital and statement of the former testimony which preceded an opinion of a court on motion for new trial cannot be read in proof of former testimony.[78]

D. Testifying From a Writing. — Where a witness who heard the former testimony given has forgotten it, but nevertheless gives satisfactory proof that a certain memorandum thereof contains a substantially correct statement of the former testimony, he may properly read it in proof of the former testimony,[79] although con-

Tex. 520, 10 S. W. 668; Houston & T. C. R. Co. *v.* Smith (Tex. Civ. App.), 51 S. W. 506.

77. Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Pittsburg, C. C. & St. L. R. Co. *v.* Story, 104 Ill. App. 132; Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730; Oakley *v.* Sears, 2 Rob. (N. Y.) 440; Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621.

Preliminary proof of correctness, or waiver thereof, is prerequisite. Woollen *v.* Whitacre, 91 Ind. 502.

78. Drayton *v.* Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718.

79. *England.* — Tod *v.* Winchelsea (Earl), 3 Car. & P. 387.

Alabama. — Mims *v.* Sturdevant, 36 Ala. 636.

California. — Code Civ. Proc., § 2047; People *v.* Murphy, 45 Cal. 137; People *v.* Gardner, 98 Cal. 127, 32 Pac. 880.

Idaho. — Code Civ. Proc., § 4485.

Illinois. — Dady *v.* Condit, 104 Ill. App. 507.

Indiana. — Bass *v.* State, 136 Ind. 165, 36 N. E. 124. *Compare* Sage *v.* State, 127 Ind. 15, 26 N. E. 667.

Iowa. — State *v.* Smith, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219.

Kansas. — Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444; Robbins *v.* Barton, 9 Kan. App. 558, 58 Pac. 279.

Maine. — See Lime Rock Bank, 52 Me. 531.

Massachusetts. — See Yale *v.* Comstock, 11 Mass. 267.

Michigan. — Fisher *v.* Kyle, 27 Mich. 454 (where attorney's notes were read to impeach a witness); Lucker *v.* Liske, 111 Mich. 683, 70 N. W. 421 (where shorthand notes were read for a purpose not disclosed).

Minnesota. — State *v.* George, 60 Minn. 503, 63 N. W. 100; Stahl *v.* City of Duluth, 71 Minn. 341, 74 N. W. 143; Amor *v.* Stoeckele, 76 Minn. 180, 78 N. W. 1046.

Montana. — Code Civ. Proc., § 3375; Du Vivier *v.* Phillips, 18 Mont. 370, 45 Pac. 554.

Nebraska. — Hair *v.* State, 16 Neb. 601, 21 N. W. 464; Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731.

New Hampshire. — See Bartlett *v.* Hoyt, 33 N. H. 151.

New York. — Van Buren *v.* Cockburn, 14 Barb. 118; Halsey *v.* Sinsebaugh, 15 N. Y. 485; Crawford *v.* Loper, 25 Barb. 449; Martin *v.* Cope, 3 Abb. Dec. 182; Lawson *v.* Jones, 61 How. Pr. 424, 1 Civ. Proc. 247, 12 Wkly. Dig. 551. *Contra.* — An independent memory is necessary. Lawrence *v.* Barker, 5 Wend. 301; Green *v.* Brown, 3 Barb. 119.

North Carolina. — Jones *v.* Ward, 48 N. C. 24; Ashe *v.* DeRossett, 50 N. C. 299, 72 Am. Dec. 552.

Oregon. — Bel. & C. Anno. Codes & Stat., § 848.

Pennsylvania. — Moore *v.* Pearson, 6 Watts & S. 51; Rhine *v.* Robinson, 27 Pa. St. 30; Knights of Pythias Benev. Ass'n *v.* Leadbeter, 2 Pa. Super. Ct. 461, 27 Pitts. Leg. J. (N. S.) 188; Com. *v.* House, 41 Wkly. Notes Cas. 246, 28 Pitts. Leg. J. 210.

Texas. — Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. 487.

Vermont. — Downer *v.* Rowell, 24 Vt. 343; Whitcher *v.* Morey, 39 Vt. 459.

Wisconsin. — Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

Contra. — Where there is no inde-

sisting of shorthand notes.[80]

Knowledge of Correctness of Memorandum Necessary. — Testimony by a witness without any independent recollection of the former testimony that he intended to take the notes with requisite correctness and believes he did, or that he remembers the former testimony was correctly reported, is sufficient to permit his reading of the memorandum.[81] The witness cannot, however, use memorandum

pendent recollection, witness cannot read notes. United States *v.* Wood, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756; Byrd *v.* Hartman, 70 Mo. App. 57; Yancey *v.* Stone, 9 Rich. Eq. (S. C.) 429; State *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055; Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 354.

80. *California.* — People *v.* Gardner, 98 Cal. 127, 32 Pac. 880.

Illinois. — Dady *v.* Condit, 104 Ill. App. 507.

Indiana. — Bass *v.* State, 136 Ind. 165, 36 N. E. 124.

Iowa. — State *v.* Smith, 99 Iowa 26, 68 N. W. 428.

Kansas. — Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444; Robbins *v.* Barton, 9 Kan. App. 558, 58 Pac. 279.

Minnesota. — State *v.* George, 60 Minn. 503, 63 N. W. 100; Stahl *v.* City of Duluth, 71 Minn. 341, 74 N. W. 143; Amor *v.* Stoeckele, 76 Minn. 180, 78 N. W. 1046.

Montana. — Du Vivier *v.* Phillips, 18 Mont. 370, 45 Pac. 554.

Nebraska. — Hair *v.* State, 16 Neb. 601, 21 N. W. 464; Lipscomb *v.* Lyon, 19 Neb. 511, 27 N. W. 731.

New York. — Lawson *v.* Jones, 61 How. Pr. 424, 1 Civ. Proc. 247, 12 Wkly. Dig. 551.

Pennsylvania. — Knights of Pythias Benev. Ass'n *v.* Leadbeter, 2 Pa. Super. Ct. 461, 27 Pitts. Leg. J. (N. S.) 188; Com. *v.* House, 41 Wkly. Notes Cas. 246, 28 Pitts. Leg. J. 210.

Contra. — *Missouri.* — Byrd *v.* Hartman, 70 Mo. App. 57.

81. *Alabama.* — Mims *v.* Sturdevant, 36 Ala. 636, where the witness swore that he knew the memorandum to be correct when he made it.

California. — People *v.* Murphy, 45 Cal. 137, where the witness testified that to the best of his recollection the minutes taken by him contained the substance of the former testimony, both on direct and cross-examination, and that the witness had testified slowly and he had endeavored to write it down as given, although it might vary in little particulars.

Illinois. — Dady *v.* Condit, 104 Ill. App. 507, where the witness states that he took down the former testimony accurately and to the best of his ability and remembers that at the time he wrote his notes they were correct.

Kansas. — Robbins *v.* Barton, 9 Kan. App. 558, 58 Pac. 279, where the witness testified that the former testimony was correctly reported in his stenographic notes.

Massachusetts. — Yale *v.* Comstock, 112 Mass. 267, where the witness testified that he intended to state the exact language of the former witness, and believed it was so stated in the writing.

Nebraska. — Hair *v.* State, 16 Neb. 601, 21 N. W. 464, where the witness testified that the former testimony was accurately reported in his notes.

New York. — Crawford *v.* Loper, 25 Barb. 449, where the witness testifies that he intended to take down the substance of all the material testimony of a former witness, and thinks he did so.

North Carolina. — Jones *v.* Ward, 48 N. C. 24, where the witness testifies he intended to take down the substance of former testimony; Ashe *v.* De Rossett, 50 N. C. 299, 72 Am. Dec. 552, where the witness believes he took down the substance.

Pennsylvania. — Moore *v.* Pearson, 6 Watts & S. 51, where the witness believes that his notes of former testimony contain the substance thereof.

Vermont. — Downer *v.* Rowell, 24 Vt. 343; Whitcher *v.* Morey, 39 Vt. 459, *holding* that it is sufficient that

which he never knew to be substantially correct.[82]

Right of Reporter to Use Notes. — The fact that a reporter's shorthand notes of former testimony are not intelligible to persons generally, is no objection to the reporter's reading therefrom in testifying as to the former testimony of a witness.[83]

Use of Notes After Reporter's Death. — Where the reporter who took down the former testimony has died or become incompetent, his notes thereof may be read by any competent person.[84]

E. Proof by Oral Testimony. — a. *Competency of Witness.* Any person who was present at the former trial and heard the testimony of the witness whose testimony he is called to detail, whether judge, juror, party, counsel, stenographer, or bystander, is competent to detail the same.[85] To call the sole counsel of accused as

the witness is able to give proof that the notes were taken correctly.

82. Robinson *v.* Gilman, 43 N. H. 295.

83. State *v.* Smith, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219. See also note 79, *supra.*

84. Code Civ. Proc. N. Y., § 830, last sentence.

85. *England.* — Rex *v.* Carpenter, 2 Shower 47; Pyke *v.* Crouch, 1 Ld. Raym. 730; Mayor of Doncaster *v.* Day, 3 Taunt. 262.

Alabama. — Jeffries *v.* Castleman, 75 Ala. 262.

District of Columbia. — See Anderson *v.* Reid, 10 App. D. C. 426.

Georgia. — Code 1895, § 5186 (Code 1882, § 3782); Jackson *v.* Soude, R. M. Charlt. 38.

Illinois. — Roth *v.* Smith, 54 Ill. 431; Hutchings *v.* Corgan, 59 Ill. 70 (juror); Stern *v.* People, 102 Ill. 540, *affirming* 9 Ill. App. 411; Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

Iowa. — State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746 (juror).

Kentucky. — Kean *v.* Com., 10 Bush 190, 19 Am. Rep. 63.

Louisiana. — State *v.* Cook, 23 La. Ann. 347 (accused's counsel).

Maine. — Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627 (magistrate); State *v.* McDonald, 65 Me. 466.

Maryland. — Bladen *v.* Cockey, Har. & McH. 230 (juror); Garrott *v.* Johnson, 11 Gill & J. 173, 35 Am. Dec. 272; Price *v.* Lawson, 74 Md. 499, 22 Atl. 206 (plaintiff).

Massachusetts. — Costigan *v.* Lunt, 127 Mass. 354 (counsel).

Michigan. — Barker *v.* Hebbard, 81 Mich. 267, 45 N. W. 964; Detroit Baseball Club *v.* Preston Nat. Bank, 113 Mich. 470, 71 N. W. 833 (plaintiff's counsel).

Minnesota. — Amor *v.* Stoeckele, 76 Minn. 180, 78 N. W. 1046 (official stenographer).

Missouri. — Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Byrd *v.* Hartman, 70 Mo. App. 57 (official stenographer).

Nebraska. — German Nat. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107.

New York. — Trimmer *v.* Trimmer, 90 N. Y. 675. See Jackson *v.* Bailey, 2 Johns. 17.

North Carolina. — Harper *v.* Burrow, 28 N. C. 30.

Ohio. — Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467; Summons *v.* State, 5 Ohio St. 325.

Pennsylvania. — Watson *v.* Gilday, 11 Serg. & R. 337; Ottinger *v.* Ottinger, 17 Serg. & R. 142 (bystander); Beers *v.* Cornelius (supreme court), 1 Pittsb. R. 274.

South Carolina. — State *v.* De Witt, 2 Hill L. 282, 27 Am. Dec. 371; Bentley *v.* Page, 2 McMul. 52.

Tennessee. — Kendrick *v.* State, 10 Humph. 479 (judge or counsel or juror or bystander may prove the former testimony).

Texas. — Greenwood *v.* State, 35 Tex. 587.

Vermont. — Glass *v.* Beach, 5 Vt. 172 (justice of the peace); Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67.

Virginia. — Caton *v.* Lenox, 5 Rand. 31 (juror).

Washington. — State *v.* Fetterly

a witness for the state to prove certain former testimony is not objectionable as depriving accused of counsel while such person is testifying.[86]

Must Have Heard All Testimony of Former Witness. — A person who did not hear all the testimony of the former witness is incompetent.[87] The witness called to give the former testimony need only profess under oath to be able and undertake to narrate the substance of the former testimony with the requisite completeness;[88] the witness need not be able to distinguish the former testimony given on direct and cross-examination, stating each separately, but may state generally the substance of the whole;[89] yet he cannot state the substance of the direct examination except as affected by the cross-examination;[90] where the witness in fact manifests an ability to so narrate the former testimony, the fact that he does not expressly state his ability to do so in so many words is immaterial.[91]

(Wash.), 74 Pac. 810 (official stenographer).

Wisconsin. — Zitske *v.* Goldberg, 38 Wis. 216; McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116; in both of which cases the justice of the peace was called.

86. "It is not likely that the counsel for the prisoner, able and efficient as he is, would have forgotten an important fact in favor of his client." State *v.* Cook, 23 La. Ann. 347.

87. A witness who testifies that he is hard of hearing and did not hear all that was said by a former witness, but did hear all on a particular subject, is incompetent. Buie *v.* Carver, 73 N. C. 264.

In order that a witness may be competent to detail former testimony, he must have been present and heard the former witness testify. Summons *v.* State, 5 Ohio St. 325.

88. *Georgia.* — Code 1895, § 5186 (Code 1882, § 3782); Puryear *v.* State, 63 Ga. 692.

Indiana. — Schafer *v.* Schafer, 93 Ind. 586.

Kentucky. — Bush *v.* Com., 80 Ky. 244, 3 Ky. L. Rep. 740.

Maine. — Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

Missouri. — See Morris *v.* Hammerle, 40 Mo. 489.

New Jersey. — Sloan *v.* Somers, 20 N. J. L. 66.

New York. — See Clark *v.* Vorce, 15 Wend. 193, 30 Am. Dec. 53, 19 Wend. 232.

Ohio. — Summons *v.* State, 5 Ohio St. 325.

Tennessee. — Kendrick *v.* State, 10 Humph. 479; Wade *v.* State, 7 Baxt. 80.

Texas. — Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. 487.

Vermont. — Williams *v.* Willard, 23 Vt. 369.

Wyoming. — Foley *v.* State, 72 Pac. 627.

89. State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752; Thompson *v.* Blackwell, 17 B. Mon. (Ky.) 609; Hepler *v.* Mount Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813; Williams *v.* Willard, 23 Vt. 369.

A witness who is able to give the substance of the direct examination of a former witness and of the material parts of the cross-examination, but who is not able to state the details of a long and rapid cross-examination, is competent. Chicago, R. I. & P. R. Co. *v.* Harmon, 17 Ill. App. 640.

90. A witness who states that he can give the substance of former testimony as to certain points, but does not recollect any of the cross-examination except on a single point, is not competent to detail former testimony. Hepler *v.* Mount Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813.

91. Burton *v.* State, 115 Ala. 1, 22 So. 585; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

Refreshing the Witness' Memory. — The witness called to give the former testimony may refer to a memorandum thereof to refresh his memory when he is thereby enabled to speak from his own recollection.[92] The memorandum is governed by the same rules as to its use as any other memorandum.[93]

Use of Memorandum by Former Witness. — Although the former witness testified from a memorandum, the witness called to detail his former testimony may do so without the necessity of producing the memorandum so referred to.[94]

92. *United States.* — United States *v.* Wood, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756 (the witness may use notes taken by him when former testimony given, or a newspaper printed by himself, containing the testimony as taken down by himself, as memorandum); Ruch *v.* Rock Island, 97 U. S. 693 (may use notes taken by him when former testimony given).

Alabama. — Torrey *v.* Burney, 113 Ala. 496, 21 So. 348 (may use stenographic report which he formerly knew to be correct).

California. — People *v.* Durrant, 116 Cal. 179, 48 Pac. 75 (may use certified transcript of shorthand notes of former testimony).

District of Columbia. — Anderson *v.* Reid, 10 App. D. C. 426.

Florida. — Simmons *v.* Spratt, 26 Fla. 449, 1 So. 860, 8 So. 123, 9 L. R. A. 343 (may use judge's notes, or a bill of exceptions as memorandum).

Maryland. — Waters *v.* Waters, 35 Md. 531 (use of his notes by counsel).

Massachusetts. — Costigan *v.* Lunt, 127 Mass. 354 (use by witness of his own notes).

Mississippi. — Green *v.* Irving, 54 Miss. 450 (may use bill of exceptions as memorandum).

Nebraska. — German Nat. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107.

New York. — Green *v.* Brown, 3 Barb. 119; Trimmer *v.* Trimmer, 90 N. Y. 675 (use of printed case on appeal); Lyon *v.* Brown, 31 App. Div. 67, 52 N. Y. Supp. 531 (may use his stenograghic notes).

North Carolina. — Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831.

Ohio. — Summons *v.* State, 5 Ohio St. 325.

South Carolina. — Yancey *v.* Stone, 9 Rich. Eq. 429 (may use notes taken by himself or another person).

Texas. — Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668 (may use statement of facts [bill of exceptions]).

Vermont. — Glass *v.* Beach, 5 Vt. 172 (use of his notes by justice); Earl *v.* Tupper, 45 Vt. 275.

Washington. — State *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055; Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344 (may use his stenographic notes).

Wisconsin. — Zitske *v.* Goldberg, 38 Wis. 216 (use of his notes by justice); Rounds *v.* State, 57 Wis. 45, 14 N. W. 865 (use by stenographer of his stenographic notes); McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116 (use of his notes by justice).

93. Halsey *v.* Sinsebaugh, 15 N. Y. 485.

Thus some preliminary testimony should be given as to the memorandum.

It is sufficient that the witness testifies that he made the memorandum about the time the former testimony was given, that he intended it to be correct, and believes it to be so. He need not say positively that it is correct. Green *v.* Brown, 3 Barb. (N. Y.) 119.

Where a witness states that on a former trial he took full notes of the evidence offered, it is proper for him to refresh his memory from them. Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831.

94. Where a former witness testified that from an entry in a book, which was then open before him, he knew that an occurrence had taken place on a certain day, in a subsequent proceeding, a witness called to

Contradiction by Witness for Adverse Party. — Where the witness apparently details the former testimony with requisite completeness, the fact that another witness testifies that he omitted certain material parts affects the credibility, not the competency, of his testimony.[95]

Incidental Mistakes and Contradictions in Testimony. — Likewise incidental mistakes and contradictions in the testimony of the witness called to give the former testimony affect only the credibility of his testimony.[96]

b. *Combined Testimony of Several Witnesses.* — Sufficient proof of former testimony may be derived from the combined testimony of several witnesses, although no one of them by himself testifies in respect thereto with sufficient certainty and completeness.[97]

Divergencies Between Witnesses. — Divergencies between the testimony of the various witnesses do not affect the admissibility thereof, but only its weight.[98]

3. Proof of Former Depositions. — On a subsequent trial of the same cause a deposition may be identified by certificate,[99] but on the trial of another cause must be identified by the testimony of witnesses.[1]

Incompetent Parts May Be Excluded. — The court in which a former deposition is offered may properly exclude from evidence such portions thereof as may be incompetent.[2]

Where Former Deposition Cannot Be Produced. — Where a former deposition cannot be produced, it may be proved by certified copy[3]

detail his former testimony may do so without the necessity of producing the book. What the former witness said was to be proved, not the ground of his belief and why he said so. The present witness might not know the writing of the former witness; might never have seen the inside of this book; nor know it again if produced. All that he offered to do was to prove in court the testimony of the former witness. Cox *v.* Norton, 1 Penn. & W. (Pa.) 412.

95. Ballenger *v.* Barnes, 14 N. C. 460.

96. Bush *v.* Com., 80 Ky. 244, 3 Ky. L. Rep. 740; State *v.* Hooker, 17 Vt. 658.

97. Summons *v.* State, 5 Ohio St. 325, *per* Bartley, C. J., Swan, Brinkerhoff and Scott, JJ.; Bowen, J., *dissenting.*

98. Bush *v.* Com., 80 Ky. 244, 3 Ky. L. Rep. 740; Wade *v.* State, 7 Baxt. (Tenn.), 80.

99. Ross *v.* Cobb, 9 Yerg. (Tenn.) 463, *holding* that the certificate of the magistrate who took the deposition proves that fact only in the suit in which it was taken.

1. As prerequisite to the admission of a deposition taken in a former suit, it must be proved to be the statement of the former deponent by some one present when it was taken. Ross *v.* Cobb, 9 Yerg. (Tenn.) 463.

An objection that a former deposition, read in evidence on a subsequent trial, is not properly identified as the one which counsel had stipulated might be read from the record of a former cause on file in the appellate court is not well taken, where the transcript of the record sent to the appellate court in the former cause, and which contained the deposition, is identified by the circuit clerk. Parlin *v.* Hutson, 198 Ill. 389, 65 N. E. 93.

2. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

3. In Camden & A. R. Co. *v.* Stewart, 19 N. J. Eq. 343, *affirmed* 21 N. J. Eq. 484, it was held that a certified copy was the best and exclusive evidence, excluding proof by affidavit.

or, except where the re-examination of the former witness would be necessary,[4] in like manner as former oral testimony.[5]

4. Objections to Proof of Former Testimony. — How Taken. — A general objection to the admission of proof of former testimony does not reach the manner of proving it.[6]

To Completeness of Proof Offered. — Where it is not shown that the former witness was cross-examined nor that the cross-examination produced anything worth remembering, the objection that the witness called to prove the former testimony does not remember the cross-examination is unavailing.[7]

5. Determination of Admissibility and Competency. — The sufficiency of the predicate laid for the introduction of former testimony is solely a question for the trial judge.[8] In determining the sufficiency the judge must exercise his reasonable discretion,[9] basing his conclusions on proper evidence after reasonable and satisfactory investigations.[10]

In Gilmore *v.* Butts, 61 Kan. 315, 59 Pac. 645, a copy preserved in the case-made was used.

4. It seems that where the person who deposed to the former deposition, which has been lost, is living [and available], oral proof of its contents cannot be given. Aulger *v.* Smith, 34 Ill. 534.

5. Ruch *v.* Rock Island, 97 U. S. 693, where the contents of the deposition were proved by counsel who was present when it was taken, and the commissioner taking it, or in a proper case a deposition of a witness as to its contents is proper.

Aulger *v.* Smith, 34 Ill. 534 (it may be proved by any person who knew and could testify as to the contents).

6. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; St. Louis, Iron Mt. & S. R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

7. Chess *v.* Chess, 17 Serg. & R. (Pa.) 409.

8. *England.* — Ernest *v.* Weiss, 1 N. R. 6.

United States. — Reynolds *v.* United States, 98 U. S. 145.

Alabama. — Burton *v.* State, 107 Ala. 68, 18 So. 240; Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

Arkansas. — Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

Connecticut. — Rev. Stat. 1902, § 694.

Georgia. — Atlanta & C. A. L. R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553.

Idaho. — Code Civ. Proc., § 4518.

Iowa. — Spaulding *v.* Chicago, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227. *Contra.* — State *v.* Wright, 70 Iowa 152, 30 N. W. 388.

Kentucky. — Stat. 1899, § 4643.

Maine. — Chase *v.* Springvale Mills Co., 75 Me. 156.

Maryland. — Jones *v.* Jones, 45 Md. 144.

Michigan. — See Mawich *v.* Elsey, 47 Mich. 10, 10 N. W. 57.

Pennsylvania. — Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048; Molloy *v.* United States Exp. Co., 22 Pa. Super. Ct. 173.

9. *Arkansas.* — Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

Georgia. — Atlanta & C. A. L. R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553, stating that court should exercise sound discretion.

Kentucky. — See Kercheval *v.* Ambler, 4 Dana 166.

Maryland. — Calvert *v.* Coxe, 1 Gill 95.

New York. — People *v.* Hill, 65 Hun 420, 20 N. Y. Supp. 187.

Pennsylvania. — See Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048, 28 Wkly. Notes Cas. 467, where some of the factors that should govern the court in determining the question are laid down.

10. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

Competency of Proof Introduced. — It seems that when the competency of the proof of former testimony given is doubtful, it is to be determined by the jury.[11]

III. EFFECT OF INTRODUCTION.

1. Of Preliminary Proof. — Its Use as Evidence. — Counsel in his address to the jury cannot use the proof introduced merely to establish a predicate for the admission of former testimony as evidence in the cause.[12]

2. Further Proof by Adverse Party. — Where one party to a proceeding introduces any portion of the former testimony of a witness, the adverse party is entitled to put in evidence such other portions of such testimony as are material to that already introduced,[13] and in some states the whole remainder thereof.[14]

Rebuttal of Such Proof. — In rebuttal the party in whose behalf the former testimony was given may use only such portions of the former testimony as are related to those introduced by the adverse party.[15]

Introducing New Deposition of Former Witness. — The adverse party may also, where practicable, cause the deposition of the former witness to be taken anew, and put in evidence.[16]

3. Contesting Proof Already Put in. — The adverse party may properly contest the correctness of the proof of former testimony put in by such other proof thereof as is competent.[17]

Calvert *v.* Coxe, 1 Gill (Md.) 95, *holding* that objections to the admissibility of former testimony, offered to be proved, must be accorded a like hearing.

11. Where the competency of a witness to detail former testimony is merely doubtful, the well-established practice is to admit the evidence and allow the jury to pass upon the circumstances affecting its competency in determining its weight and credibility. Mitchell *v.* State, 71 Ga. 128.

Where it becomes a question in a case whether or not the substance of all the material testimony of a former witness has been stated (failure to prove all the substance being a ground for the exclusion of the whole), the determination of that question falls properly within the province of the jury, and is a question for them preliminary to the consideration by them of the former testimony as evidence in the case. Summons *v.* State, 5 Ohio St. 325.

Where it appears that the witness called to detail former testimony "is conscious of having omitted any important part of the testimony, or if that fact should be made to appear in any other way, the jury may reject the whole of the testimony as being unsatisfactory; but for this the court cannot reject it." State *v.* Hooker, 17 Vt. 658.

12. Chappell *v.* Purday, 14 Mees. & W. (Eng.) 303, 14 L. J. Eq. 258.

13. Burnett *v.* State, 87 Ga. 622, 13 S. E. 552; Waller *v.* State, 102 Ga. 684, 28 S. E. 284; Parmenter *v.* Boston H. T. & W. R. Co., 37 Hun (N. Y.) 354.

14. Hobart *v.* Tyrrell, 68 Cal. 12, 8 Pac. 525; Kendrick *v.* State, 10 Humph. (Tenn.) 479.

15. Dessaunier *v.* Murphy, 33 Mo. 184.

16. Lowe *v.* State, 86 Ala. 47, 5 So. 435; Tindall *v.* Johnson, 4 Mo. 113; Leviston *v.* French, 45 N. H. 21. See Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713.

17. Cave *v.* Cave, 13 Bush (Ky.) 452; Chess *v.* Chess, 17 Serg. & R. (Pa.) 409; Flanagin *v.* Leibert, Bright. N. P. (Pa.) 61.

Competency of Witness to Give Contradictory Proof. — A witness called to give such proof need at most only be able to testify to a portion of the former testimony material to that already put in; nor need he have any better qualifications as a witness than those possessed by the witness who made the proof already put in.[18]

4. Impeachment of Former Testimony. — The testimony of a former witness, when put in evidence, may be impeached by showing his want of character,[19] but in most states such testimony cannot be impeached by proof of contradictory statements made by the former witness,[20] although in a few states these may be proved.[21]

Thus where one party introduced counsel's notes in proof of former testimony, the adverse party may introduce the notes of the opposite counsel, of the judge who tried the cause, or of a juror, or of a bystander who heard the testimony in opposition thereto. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

18. Crawford *v.* Loper, 25 Barb. (N. Y.) 449.

19. Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459.

See Glass *v.* Beach, 5 Vt. 172, where the adverse party called four witnesses who testified that the character for truth of the former witness was not good, whereupon the party offering the proof of the former testimony called three others who testified contrawise.

20. *United States.* — Mattox *v.* United States, 156 U. S. 237.

Alabama. — Pruitt *v.* State, 92 Ala. 41, 9 So. 406.

Arkansas. — Griffith *v.* State, 37 Ark. 324.

Kentucky. — Craft *v.* Com., 81 Ky. 250, 50 Am. Rep. 160.

Louisiana. — State *v.* Johnson, 35 La. Ann. 871.

Ohio. — Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459.

Texas. — Stewart *v.* State (Tex. Crim.), 26 S. W. 203.

21. Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137.

Mo. Rev. Stat. 1899, § 3149, second portion.

In Massachusetts the rule that the witness to be impeached must first be interrogated in respect to the alleged contradictory statements is not imperative in any case.

The reason of the Missouri rule is well stated in the dissenting opinion in Mattox *v.* United States, 156 U. S. 237, by Shiras, Gray and White, JJ.:

"The rule that a witness must be cross-examined as to his contradictory statements before they are given in evidence to impeach his credit is a rule of convenient and orderly practice, and not a rule of the competency of the evidence.

"To press this rule so far as to exclude all proof of contradictory statements made by the witness since the former trial, in a case where the witness is dead, and the party offering the proof cannot, and never could, cross-examine him as to these statements, is to sacrifice substance of proof to orderliness of procedure, and the rights of the living party to consideration for the deceased witness.

"According to the rulings of the court below, the death of the witness deprived the accused of the opportunity of cross-examining him as to his conflicting statements, and the loss of this opportunity of cross-examination deprived the accused of the right to impeach the witness by independent proof of those statements; and thus, while the death of the witness did not deprive the government of the benefit of his testimony against the accused, it did deprive the latter of the right to prove that the testimony of the witness was untrustworthy. By this ruling the court below rejected evidence of a positive character, testified to by witnesses to be examined before the jury, upon a mere conjecture that a deceased witness might, if alive, reiterate his former testimony. It would seem a wiser policy to give the accused the benefit of evidence, competent in its character, than to reject it for

5. Objections to Former Testimony. — Preservation of Exceptions. An exception shown by the proof offered to have been duly taken and sustained to certain former testimony on the former trial is not equivalent to an exception on the subsequent trial, and may be preserved only by an objection properly taken on the subsequent trial.[22]

6. Writings and Things Referred to in Proof Given. — Any writing or thing referred to in the proof of former testimony which is put in evidence may be identified by any person who heard the former witness identify it, and is able to do so, and placed in evidence in a proper case.[23]

7. Weight as Evidence. — Determination in General. — The weight of the proof of former testimony given is a question for the jury under the direction of the court.[24]

Former Witness Dumb. — Where the former witness was dumb, the manner in which his testimony was reproduced may be considered by the jury in determining its weight.[25]

Irrelevant Former Testimony. — Such portions of the former testimony put in evidence as may be irrelevant can have no weight as evidence in the case.[26]

Admissible Only Against Certain Party. — Where certain former testimony, while admissible in favor of one accused person, is not admissible against another jointly tried under the same indictment, it cannot be considered against the latter.[27]

Relative Weight of Proof. — It seems that notes of former testimony outweigh the testimony of a person who speaks merely from memory.[28]

the sake of a supposition so doubtful."

22. State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508.

23. *Iowa.* — Laws 27th Gen. Assem., c. 9.

Where during his testimony as read from the stenographer's transcript a former witness identified a certain piece of lath after the testimony had been read it was proper for a deputy prosecuting attorney to be called as a witness and to testify that he was in court when the former witness testified and identified the lath, and that the lath then before him was the same lath identified by the former witness. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

24. Weight a Question for Jury Under Direction of Court. — Jackson *v.* Bailey, 2 Johns. (N. Y.) 17; Ballenger *v.* Barnes, 14 N. C. 460, where the adverse party calls a witness who professes to detail portions of the former testimony omitted by the prior witness. State *v.* Hooker, 17 Vt. 658; Quinn *v.* Halbert, 57 Vt. 178; State *v.* Fetterly (Wash.), 74 Pac. 810.

25. Quinn *v.* Halbert, 57 Vt. 178.

26. Former Testimony, Where Irrelevant, Can Have No Weight. In such case it is the duty of the court to instruct the jury what portions of the former testimony are irrelevant, and direct them not to consider such portions in evidence. Rucker *v.* Hamilton, 3 Dana (Ky.) 36; Willard *v.* Goodenough, 30 Vt. 393.

27. State *v.* Milam, 65 S. C. 321, 43 S. E. 677.

28. An instruction by the judge to the jury that stenographic notes of former testimony would outweigh the testimony of a person who speaks from memory only, goes quite as far as is proper (if not too far) in attaching superior weight to the stenographic notes. Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272.

IV. REVIEW.

When Objection Must Be Taken. — An objection to the admissibility or manner of proof of former testimony must be taken when the evidence is offered; otherwise cannot be availed of on appeal.[29]

Presumption as to Sufficiency of Predicate. — Whether proof of former testimony is offered or excluded, in the absence of a showing to the contrary, the appellate court will presume that the circumstances were such as to warrant, respectively, the admission or exclusion.[30]

Where Showing of Insufficiency of Predicate Made. — The court will reverse the holding of the trial judge as to the sufficiency of the predicate only where the evidence is shown to be palpably insufficient to sustain it.[31]

Predicate Not Established Until After Former Testimony Introduced. An insufficiency in the preliminary proof given is rendered harmless by subsequent sufficient proof thereof.[32]

29. Objection Must Be Taken When Evidence Offered. — Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113, where the objection was that the interpreter through whom the former testimony was given was not produced.

Beales *v.* Guernsey, 11 Johns. (N. Y.) 128, where the objection was that the former testimony was not taken in a pending trial.

30. Admission or exclusion will be presumed to be warranted in absence of contrary showing.

Alabama. — Patton *v.* Pitts, 80 Ala. 373, where the record on appeal did not affirmatively show the existence of the conditions on which the admissibility of the former testimony depends, and the court sustained its exclusion.

Arkansas. — Clinton *v.* Estes, 20 Ark. 216.

Colorado. — Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331, where it did not affirmatively appear on appeal that the party against whom the former testimony was offered had an opportunity to cross-examine the former witness, and the exclusion was sustained.

Minnesota. — State *v.* George, 60 Minn. 503, 63 N. W. 100.

Missouri. — Heyworth *v.* Miller Grain & Elevator Co., 174 Mo. 171, 73 S. W. 498, where an alleged difference in the issues not being shown, the admission of the former testimony was sustained.

So where proof of former testimony has been admitted on the trial of a criminal case, and the record on appeal is silent in respect thereto, it is presumed that the accused was present at the original examination of the former witness, was confronted by him, and had a reasonable opportunity to examine him. State *v.* George, 60 Minn. 503, 63 N. W. 100.

Contra. — Where an exception to the exclusion of certain former testimony was overruled, no ground for the exclusion being shown in the record on appeal, the holding of the trial court will be overruled. Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534.

31. To Warrant Reversal, Proof Must Be Palpably Insufficient to Sustain Trial Judge. — Reynolds *v.* United States, 98 U. S. 145. See Kercheval *v.* Ambler, 4 Dana (Ky.) 166; Chase *v.* Springvale Mills Co., 75 Me. 156; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048.

32. Insufficiency in Preliminary Proof Rendered Harmless by Subsequent Sufficient Proof. — The erroneous admission on an insufficient predicate of the former testimony of a now absent witness is remedied by subsequent proof of his absence from the state, and residence in another state. Dennis *v.* State, 118 Ala. 72, 23 So. 1002.

Illegal as Well as Sufficient Legal Testimony Introduced. — Where the predicate is sufficiently established by legal evidence, the fact that illegal preliminary proof, although properly objected to, was also received will be disregarded.[33]

Presumption as to Sufficiency of Proof. — The appellate court will likewise presume that the former testimony was correctly proved;[34] and an insufficiency in the proof given by the witness called to prove it, if alleged, must be affirmatively shown.[35]

Although the death of the former witness is not sufficiently proved before the proof of his former testimony is received, the error becomes immaterial when the death is afterward established. Gannon *v.* Stevens, 13 Kan. 447.

Where the proof of former testimony is erroneously admitted, without first proving that there was in fact a former trial, the error is cured by the subsequent proof thereof by the production of the record. Chambers *v.* Hunt, 22 N. J. L. 552.

33. The appellate court will presume that the trial judge acted only on the legal evidence, and his action will be affirmed wholly regardless of errors committed in receiving incompetent evidence against objection. Burton *v.* State, 107 Ala. 68, 18 So. 240; Jacobi *v.* State, 133 Ala. 1, 33 So. 158.

34. Woodworth *v.* Corsline, 30 Colo. 186, 69 Pac. 705.

35. Where defendant's objection that the witness called to detail the former testimony could not give the substance of all the material testimony of the former witness is overruled, he must state enough in his bill of exceptions to show that the portion of the former testimony which the witness would not detail was in fact material. Summons *v.* State, 5 Ohio St. 325.

FORNICATION.

By George P. Cook.

CROSS-REFERENCES:

Adultery;
Lewdness;
Seduction.

Scope Note. — Includes single acts of fornication as well as living together in a state of fornication. And excludes other crimes in which fornication is an element, such as "Adultery," "Incest," etc.

I. WEIGHT AND SUFFICIENCY OF EVIDENCE.

1. In General. — The general rule is, that as in fornication, as well as many other crimes of a similar nature, direct proof is

rarely attainable, the existence or non-existence of the crime must usually be inferred from surrounding facts and circumstances.[1]

2. Lascivious Cohabitation. — A. Proof of Single Acts of Insufficient. — Under statutes prohibiting lascivious cohabitation it is generally held insufficient to prove one or more acts of illegitimate sexual intercourse without proving a living together and cohabitation.[2]

1. Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182; Brown *v.* State, 108 Ala. 18, 18 So. 811.

Where there is no direct evidence to show that the defendants "bedded and cohabited together," they may be convicted on presumptive evidence, provided it is so strong as to leave no reasonable doubt in the minds of the jury that they were guilty. State *v.* Poteet, 30 N. C. 23; State *v.* Eliason, 91 N. C. 564; State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512; State *v.* Dukes, 119 N. C. 782, 25 S. E. 786.

"On trial of an indictment for fornication, the female with whom the offense was alleged to have been committed swore, on direct examination as a witness for the state, that she had sexual intercourse with the defendant less than six months before the birth of her child, and had never had sexual intercourse with any person prior thereto. On cross-examination, the defendant, insisting that the child was mature at its birth, asked the witness a question concerning her whereabouts nine months before that event, with the view of proving facts which might tend to show conception at that time. This question was overruled. *Held*, error, for which the conviction of the defendant should be reversed." Gaunt *v.* State, 52 N. J. L. 178, 19 Atl. 135.

In King *v.* People, 7 Colo. 224, 3 Pac. 223, it was held that the uncontradicted testimony of a witness to the effect that the defendant told him, after the indictment was found, "that he did not see, as she was a public woman, why he should be prosecuted for sleeping with her any more than other men who went to the row and slept with other women," was held sufficient evidence from which to infer that the overt act had actually been committed.

In Ells *v.* State, 20 Ga. 438, it was held that a charge to the jury to the effect, "that if the jury believed the parties were found on the bed together; that the door of the room was closed; that there was no one else present in the room; that the woman was a prostitute, and that the defendant was frequently in the habit of visiting her house, they were bound to find the defendant guilty,' was erroneous, since it amounted to holding that the circumstances above narrated would be conclusive evidence of guilt, and excluded from the consideration of the jury all the other circumstances in the case.

"From the very nature of the case the offense must generally be proved by circumstances, and the statute provides that it 'shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy;' but this presumption must be something more than a mere suspicion. It must amount to a reasonable belief or conviction of the judgment, not only of unlawful intimacy, but also of cohabitation." Searls *v.* People, 13 Ill. 597.

An instruction to the jury to the effect that, unless they believed the testimony of two witnesses who had sworn that they had seen the defendants in actual sexual intercourse, they were to bring in a verdict of acquittal, is properly refused when there is evidence of other circumstances from which the guilt of the parties might reasonably be inferred. State *v.* Austin, 108 N. C. 780, 13 S. E. 219.

2. Luster *v.* State, 23 Fla. 339, 2 So. 690; State *v.* Marvin, 12 Iowa 499; Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465; Jones *v.* Com., 80 Va. 18; Pruner *v.* Com., 82 Va. 115.

"The offense of lewdly and lasciviously abiding and cohabiting together of a man and woman, one or both of whom are married, and not to each other, as denounced in § 2221 of the General Statutes of 1901, is not shown by proving a single act, or

B. Single Acts May Serve to Corroborate. — But although single acts would be insufficient in themselves they may serve to corroborate other evidence of the crime;[3] and it has been held that, although necessary to prove cohabitation, it is not necessary to prove that it was open and notorious.[4]

C. Effect of Other Legal Relation Between Same Parties. The fact that a legal relation other than husband and wife exists between the parties, which would be an excuse for living together on the same premises or even in the same house, may not in itself be sufficient to rebut other evidence of unlawful relations.[5]

3. Presumptions as to Marriage of Parties. — It is held in some jurisdictions that it must be proved affirmatively that both the parties to the act were single and unmarried;[6] but in other jurisdictions it is sufficient to show that they were not married to

even occasional acts, of sexual intercourse between the parties, but the commission of such act or acts must be shown under such circumstances as to indicate an abiding or cohabiting together in a relationship like that of husband and wife." State *v.* Cassida, 67 Kan. 171, 72 Pac. 522.

Where the evidence showed that one of the defendants rented a room and had his place of abode in one town, but stopped over each night in another town, where he had habitual sexual intercourse with his co-defendant, it was held insufficient to support a charge of *living together* and having carnal intercourse with each other. Thomas *v.* State, 28 Tex. App. 300, 12 S. W. 1098.

In Texas, where the crime may consist either of habitual carnal intercourse or of living together in a state of fornication, evidence which would support the former charge will not generally be sufficient to support the latter. Ledbetter *v.* State, 21 Tex. App. 172, 17 S. W. 427; McCabe *v.* State, 34 Tex. Crim. 418, 30 S. W. 1063.

3. Although occasional acts of sexual intercourse, secretly indulged in, would not be sufficient in themselves, they at least show the disposition of the parties, and when taken in connection with other evidence showing cohabitation, are entitled to great weight. State *v.* Kirkpatrick, 63 Iowa 554, 19 N. W. 660.

4. "In a prosecution for the offense of living together in a state of fornication, it is not error to instruct the jury that it is not necessary that the cohabitation charged in the complaint should be either open or notorious." Musfelt *v.* State, 64 Neb. 445, 90 N. W. 237.

5. State *v.* Cassida, 67 Kan. 171, 72 Pac. 522.

Under a statute requiring that "The evidence must establish cohabitation, including one or more acts of sexual intercourse, between parties not lawfully occupying the situation of husband and wife to each other," it was held that where the evidence showed that the defendant and the woman named in the indictment lived together for about a year and a half, it was sufficient to sustain the verdict of guilty, notwithstanding the fact that the house in which they lived was also the home of the defendant's father, who was living apart from his wife, and that the woman with whom the offense was committed, during some portion of the time, acted in the capacity of a working girl or servant, receiving compensation from the defendant's father. Van Dolsen *v.* State, 1 Ind. App. 108, 27 N. E. 440.

6. Neil *v.* State, 117 Ga. 14, 43 S. E. 435; Bennett *v.* State, 103 Ga. 66, 29 S. E. 919; Montana *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740; Wells *v.* State, 9 Tex. App. 160.

"The evidence showing that the female was a married woman, and

each other at the date of the commission of the act, without showing that they were unmarried to third parties.[7]

4. Uncorroborated Testimony of Accomplice. — In some states it has been provided by statute that in certain crimes, among which fornication is included, the defendant cannot be convicted upon the uncorroborated testimony of an accomplice.[8]

5. Reputation in Neighborhood. — Fornication cannot be proved by general reputation in the neighborhood.[9]

6. Defense of Impotency. — Where the defense is impotency and the defendant is a person of mature years and in possession of his normal faculties, he has the burden of establishing such defense by affirmative proof.[10]

II. ADMISSIBILITY OF EVIDENCE.

1. Proof of Prior and Subsequent Conduct. — It is competent to give in evidence acts of the parties committed prior or subsequent

there being no legal testimony to show that her husband was dead at the time of the alleged criminal act, a verdict of guilty was contrary to the evidence." Williams *v.* State, 86 Ga. 548, 12 S. E. 743.

Where a defendant, indicted for fornication, proves that he was married to the woman named in the indictment, evidence showing that this woman had a husband living at the time the defendant married her, and that this was known to the defendant, is irrelevant and inadmissible, since, even if admitted, it would tend to show that the defendant was guilty of adultery and not fornication. State *v.* Pearce, 2 Blackf. (Ind.) 318.

7. Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600; State *v.* McDuffie, 107 N. C. 885, 12 S. E. 83.

When it is proved that the parties living together are not married to each other, this makes out a *prima facie* case of fornication. It will not be necessary to prove that neither of them was married to anybody else, since this would be requiring the prosecution to prove a negative The presumption, in the absence of proof of marriage, is that the parties were unmarried, and when it is proved that they were not married to each other this presumption attaches and the crime of fornication is made out. Territory *v.* Jaspar, 7 Mont. 1, 14 Pac. 647; *distinguishing* Montana *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740.

"The single state being presumed to exist till the contrary is shown, the prosecution is not called on to prove the defendants are not married. Such marriage being peculiarly within the knowledge of the defendants, the burden is on them to show it." State *v.* McDuffie, 107 N. C. 885, 12 N. E. 83.

But where there was no evidence that the woman with whom he fornication was alleged to have been committed was single, nor that her child, born while she was living at the house of defendant, was a bastard, and no evidence except indirect and inferential that she and the defendant were not husband and wife, it was held that there was no evidence sufficient to go to the jury, and that the defendant was entitled to a verdict of acquittal. State *v.* Pope, 109 N. C. 849, 13 S. E. 700.

Where no issue has been made as to the defendant being other than a single man, it is not reversible error to admit testimony to the effect that he passed himself off as a single man in the neighborhood and was generally understood to be single. McComant *v.* State (Tex. Crim.), 34 S. W. 610.

8. Mitchell *v.* State, 38 Tex. Crim. 325, 42 S. W. 989; State *v.* Collett, 20 Utah 290, 58 Pac. 684.

9. Overstreet *v.* State, 3 How. (Miss.) 328.

10. **Defense of Impotency.** "That a mature male of the human species has normal powers of virility

to those laid in the indictment, not as independent evidence, but to explain or corroborate evidence as to the act charged.[11]

2. Previous Character of Woman Irrelevant. — Evidence of the previous character of the woman, either for chastity[12] or unchastity,[13] is generally irrelevant and inadmissible.

A. Made Relevant by Statute. — In Wisconsin, on account of the peculiar wording of a statute, the previous chaste character of the woman becomes material, and in such cases it is held that her uncorroborated testimony, if not contradicted, is sufficient evidence of her previous chastity to go to the jury.[14]

3. Inculpatory Acts and Declarations. — Any acts or declarations of the defendant which are in the nature of admissions of guilt, or which tend to characterize his conduct and behavior as consistent with the theory of the prosecution, are generally admissible in evidence against him.[15]

is matter of legal presumption until the contrary appears, and the burden of making it appear by evidence satisfactory to the jury is on him who asserts it." Gardner *v.* State, 81 Ga. 144, 7 S. E. 144.

11. *Alabama.* — Alsabrooks *v.* State, 52 Ala. 24; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

Mississippi. — Stewart *v.* State, 64 Miss. 626, 2 So. 73.

North Carolina. — State *v.* Kemp, 87 N. C. 538; State *v.* Pippin, 88 N. C. 646; State *v.* Wheeler, 104 N. C. 893, 10 S. E. 491; State *v.* Dukes, 119 N. C. 782, 25 S. E. 786; State *v.* Raby, 121 N. C. 682, 28 S. E. 490.

Tennessee. — Mynatt *v.* State, 8 Lea 47; Cole *v.* State, 6 Baxt. 239.

"When, on a trial for fornication, there was evidence for the state tending to show that the accused and the other alleged guilty party were, on a designated occasion, in a position strongly indicating that the act charged in the indictment was being committed, it was competent for the state to supplement this evidence by proving lascivious conduct between these parties on a previous occasion, such proof being relevant as throwing light upon their relations toward each other, and as tending to illustrate the real nature of the conduct upon the occasion first above mentioned." Bass *v.* State, 103 Ga. 227, 29 S. E. 966.

But in Duncan *v.* State (Tex. Crim.), 45 S. W. 921, it was held error to admit evidence to the effect that the defendant had had habitual carnal intercourse with the woman for a period of eleven years prior to the trial, and that she had borne him six children.

12. Boatright *v.* State, 42 Tex. Crim. 442, 60 S. W. 760.

13. Proof that the woman alleged to have been *particeps criminis* had had carnal intercourse with other men would be irrelevant and immaterial on behalf of the defense, since it would rather tend to corroborate the state's case. Rodes *v.* State, 38 Tex. Crim. 328, 42 S. W. 990.

14. In a prosecution for a statutory crime of committing fornication with a sane female of previous chaste character, under the age of eighteen years, the uncorroborated testimony of the girl to the effect that she was of previous chaste character is sufficient proof of that fact to go to the jury. State *v.* Seiler, 106 Wis. 346, 82 N. W. 167; Seiler *v.* State, 112 Wis. 293, 87 N. W. 1072.

15. "When, before prosecution, and while not under restraint, parties are accused of living together in a state of fornication, and make no denial, or are silent, this may be shown in evidence as an inculpatory circumstance to be weighed and considered by the jury in determining the truth of the charge preferred against them." Musfelt *v.* State, 64 Neb. 415, 90 N. W. 237.

Where the defendant, a doctor, had received the girl with whom he was

alleged to have committed the offense, into his house for medical treatment, the fact that he would not and did not allow her to return whence she came, and gave a false account of her condition, was relevant and admissible evidence both as part of the *res gestae* and as showing the origin of his opportunity. Gardner *v.* State, 81 Ga. 144, 7 S. E. 144.

The testimony of a witness to the effect that defendant and one J. had come to the witness' house to see him in reference to a report in the neighborhood connecting members of the witness' family with the defendant's alleged accomplice, and that defendant had then said that "They were looked down on in the neighborhood, but because they were in the soak they did not propose to drag others into it," was held properly admissible as in the nature of a confession by the defendant and as tending to corroborate the testimony of his accomplice. McComant *v.* State (Tex. Crim.), 34 S. W. 610.

But the declarations of the *particeps criminis*, made to third parties and not in the presence of the defendant, acknowledging the improper relations, are inadmissible on behalf of the prosecution. Spencer *v.* State, 31 Tex. 65.

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