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TABLE OF TITLES.

TREASON.

I. ELEMENTS OF THE CRIME.

1. Burden of Proof. — A. In General. — As in the trial of other prosecutions for crime, so in the trial of one accused of treason, it is incumbent upon the prosecution of proving the acts relied on as constituting the treason.[1]

B. Particular Elements. — a. *Intention.* — One of the indispensable elements necessary to be shown, in order to establish the crime of treason, is a treasonable intention.[2] And, in the case of an assemblage of men with ordinary appearances, there must be proof of a hostile intention in the body assembled.[3]

b. *Overt Act.* — But merely proving a treasonable intention is not enough; there must also be proof of an overt act committed for the purpose of carrying into effect that intention.[4] And indeed, as

1. United States *v.* Burr, 25 Fed. Cas. Nos. 14,693, and 14,694*a;* Reg. *v.* Deasy, 15 Cox C. C. (Eng.) 334; Reg. *v.* Frost, 9 Car. & P. 129, 38 E. C. L. 70; United States *v.* Hanway, 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299.

The Fact of Levying War is an act of public notoriety. It must exist in the view of the world or it cannot exist at all. The assembling of forces to levy war is a visible transaction; numbers must witness it; and it is therefore capable of proof, and must be established by the government. United States *v.* Burr, 4 Cranch 455, 25 Fed. Cas. No. 14,692*a*.

2. Respublica *v.* Weidle, 2 Dall. (U. S.) 88; Reg. *v.* Deasy, 15 Cox C. C. (Eng.) 334; Reg. *v.* Frost, 9 Car. & P. 129, 38 E. C. L. 70; Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

"The Intent Is the Gist of the Inquiry in a charge of treason; and is the great and leading object in trials for this crime. The description of crimes contained in the act commonly called the sedition act (Stat. 596) lose their character, and become but component parts of the greater crime, or evidence of treason, when the treasonable intent and overt act are proved. So it is with rescue of prisoners; which, in the present case, was not an independent offense, but an overt act of the treason. These were crimes—misdemeanors—at common law; and might have been punished by fine and imprisonment when substantive independent offenses. But, when committed with treasonable intent, they are merged in the treason, of which sedition, conspiracy and combination are always harbingers." Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

Although War May Be Levied Without a Battle, or the actual application of force to the object on which it was designed to act, and while a body of men assembled for the purpose of war and being in a posture of war, do levy war; nevertheless the intention is an indispensable ingredient in the composition of the fact; and if war may be levied without striking a blow, the intention to strike must be plainly proved. United States *v.* Burr, 25 Fed. Cas. No. 14,694*a*.

3. United States *v.* Burr, 25 Fed. Cas. No. 14,694*a*.

4. **Necessity of Proving Overt Act.** — United States *v.* Burr, 25 Fed. Cas. No. 14,693, 14,694*a;* United States *v.* Pryor, 3 Wash. (C. C.) 234, 27 Fed. Cas. No. 16,096; O'Brien *v.* Reg., 3 Cox C. C. (Eng.) 122; Trial of the Regicides, 5 How. St. Tr. 984, 1022; MacDonald's Case, Foster Crown L. (Eng.) 59; United States *v.* Mitchell, 2 Dall. 348, 26 Fed. Cas. No. 15,788.

Assembling Troops. — Evidence establishing an intention to commit treason against the United States by levying war, but not shown to have been carried out by the actual assembling of troops, is not sufficient to establish the charge of treason. United States *v.* Burr, 4 Cranch 455, 25 Fed. Cas. No. 14,692*a*. The court

has been well observed, no evidence has any bearing unless an overt act be proved.[5] And the evidence must establish the overt act as laid in the indictment.[6]

Interference With Execution of Public Law. — Where the treason charged is the interference with the execution of a public law, it is incumbent upon the government to show three things: (1) A combination or conspiracy, by which different individuals are united in one common purpose; (2) this purpose being to prevent the execution of some public law of the United States by force, and (3) the actual use of force, by such combination to prevent the execution of that law.[7]

2. Mode of Proof. — A. Indirect Evidence. — a. *In General.* However indisputably requisite it may be to prove by two witnesses the overt act relied upon,[8] yet the design or intention may be established by other than direct evidence;[9] in short, since the intention

said: "An intention to commit treason is an offense entirely distinct from the actual commission of that crime. War can only be levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war."

The Meaning of the Words "overt act," as used in the constitution and the statute, is an act of a character susceptible of proof, and not resting in mere conjecture or inference. They were intended to exclude the possibility of a conviction of the odious crime of treason upon proof of facts which were only treasonable by construction or inference, or which have no better foundation than mere suspicion. Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272.

Proof That a Body of Armed Men, however small or large, was mustered in military array for a treasonable purpose, every step which any one of them takes, by marching or otherwise, in part execution of such purpose, is sufficient to establish an overt act in levying war. United States *v.* Grenier, 4 Phila. 396, 26 Fed. Cas. No. 15,262. The particular overt act proved in this case was the capture of a fort and its detention until it was handed over to the permanent occupation of the authorities of a state then in rebellion; and the court said that the fact that no hostile resistance in the capture or detention was encountered was immaterial.

The Fact of Engaging or Enlisting Men to levy war against the United States, but not shown to have been followed by a future embodying or assembling the men so enlisted, is not enough. United States *v.* Burr, 4 Cranch 455, 25 Fed. Cas. No. 14,692*a*.

Proof of Having Purchased a Vessel, guns and ammunition; preparing her for sea and making her ready for service in aid of the rebellion of the citizens of the United States against the government thereof, and after war has been levied, with the purpose of attacking and destroying American vessels, is sufficient. United States *v.* Greathouse, 2 Abb. (U. S.) 364.

5. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

6. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

7. Charge to Grand Jury, 2 Curt. 630, 30 Fed. Cas. No. 18,269.

8. See *infra*, this section.

9. United States *v.* Lee, 2 Cranch (C. C.) 104, 26 Fed. Cas. No. 15,584. "No doubt it is for the Crown to make out their case; but it is often impossible to give direct evidence of a man's motives or intentions in a particular matter; and a jury must often look at the act itself, and judge from the nature of the act as to the character of the motive." Reg. *v.* Davitt, 11 Cox C. C. (Eng.) 676.

Purpose of Instruments and Instrumentalities. — In Reg. *v.* Deasy, 15 Cox C. C. (Eng.) 334, the defendants were charged under the British Treason Felony Act (11 and 12 Vict. ch. 12, § 3) with being in the posses-

is a hidden or obscure mental act, all evidence of its outward expression is admissible.[10] And of course it is open to the defendant to show by similar evidence the absence of treasonable intent.[11]

Proof of Conspiracy. — When the charge is combination forcibly to prevent the execution or enforcement of a public law, direct proof of such combination or purpose is not legally necessary; it may be established by circumstantial evidence.[12]

An Extrajudicial Confession by the prisoner may be given in evidence as corroboratory proof of the intent or *quo animo*. But, although proved by two witnesses, being made out of court, it is not of itself sufficient to convict.[13]

b. *Subsequent Events.* — Thus evidence may be given of other circumstances, or even other overt acts, connected with that on which the indictment is grounded, and occurring or committed elsewhere than the place named.[14] But acts of the accused in a differ-

sion of certain instruments and explosive materials, with intent to use them in carrying on the objects of certain treasonable combinations then existing in Great Britain and abroad. It was held that for the purpose of showing such intent, evidence might be given showing that the only known use theretofore made of such instruments and explosives had been in causing destructive explosions to property; and that the fact of some of those explosions having happened out of the jurisdiction of the court did not affect the admissibility of the evidence. It was further held that, for the purpose of showing a treasonable object on the part of the prisoners, and negativing any private object, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts, in the country from which the instruments and explosives came, of a treasonable conspiracy having for its object the alteration of the existing government by violent means, although such evidence did not establish that the prisoners were members of, or directly connected with, such conspiracy.

10. Fries' Case, 9 Fed. Cas. No. 5,127; The Homestead Case, 1 Pa. Dist. 785.

Any legal evidence which shows the expedition in question to be military in character, or to have been designed against the dominions of the nation as charged, is admissible. United States *v.* Burr, 25 Fed. Cas. No. 14,694.

Intent may be inferred from the acts committed. The Homestead Case, 1 Pa. Dist. 785.

The intent may be proved by one witness, collected from circumstances, or even by a single act. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

11. Upon the question of intent it is competent to show that for some time before the alleged treasonable occurrence (in this case nine months) facts had occurred and rumors were prevalent in the neighborhood which would explain certain matters relied on to show treasonable intent, and put upon them a different phase. United States *v.* Hanway, 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299.

12. Proof of the combination to prevent the enforcement of a public law may be found in the declared purposes of the individual party before the outbreak; or it may be derived from proceedings of meetings in which he took part openly, or which he either prompted or made effective by his countenance or sanction, commanding, counseling or instigating forcible resistance to the law. Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134, 30 Fed. Cas. No. 18,276.

13. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

14. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126, where Peters, J., said: "Although the prisoner be not on his trial, nor is he now punishable, for any other than the overt act laid, other overt acts and other circum-

ent district, which constitute in themselves substantive cause 10r a prosecution, cannot be given in evidence, unless they go directly to prove the charge laid in the indictment.[15] And this same rule applies so as to exclude evidence of another act, although in the same district, which constitutes in itself a substantive and independent crime, for which the defendant stands indicted.[16]

Acts After Arrest of Accused.— And it has been held proper even to admit acts of co-conspirators occurring subsequent to the arrest of the accused on trial.[17]

c. *Declarations.* — Declarations of the accused accompanying the overt act charged may be given in evidence to show the intent with which the act was done.[18] But declarations of third persons, not forming part of the transaction, and not made in the presence of the accused, are not admissible.[19]

B. Direct Testimony of Two Witnesses. — In the United States the federal constitution has not only defined the crime of treason, but has prescribed a rule of evidence that no person shall be convicted of treason unless on the testimony of two witnesses[20] to

stances, parts of the general design, may nevertheless be proved, to show the *quo animo*—the intent—with which the act laid was committed."

The intention to commit the treason charged may be shown by subsequent events to have been continued, and facts outside the district may be proved after the overt act, as corroborative testimony. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

15. United States *v.* Burr, 25 Fed. Cas. No. 14,694.

16. United States *v.* Mitchell, 2 Dall. 357, 26 Fed. Cas. No. 15,789.

17. Reg. *v.* M'Cafferty, 10 Cox C. C. 603, 15 W. R. 1022, Ir. Rep. 1 C. L. 363. In this case the defendant was proved to have been a member of the Fenian conspiracy; and also of a directory or governing body of that conspiracy, formed to bring about an insurrection in Ireland. It was proved that during the month of February, the directory was actively organizing an immediate rising in Ireland. The defendant was arrested on February 23d; and it was held proper to receive evidence of an actual rising taking place in Dublin on March 5th, there being evidence that this rising was the result of the action of the directory.

18. United States *v.* Lee, 2 Cranch (C. C.) 104, 26 Fed. Cas. No. 15,584. See also Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

19. United States *v.* Burr, 25 Fed. Cas. Nos. 14,694 and 14,694*a*.

20. U. S. Cont. Art. III, § 3. And see Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272; Charge to Grand Jury, 1 Spr. 60, where the court said: "The reason of these extraordinary safeguards is to be found in the nature of the offense, and in the pages of history. An attempt to overthrow the government excites the deepest indignation in great numbers, especially in those who are imbued with a warm and devoted patriotism, the cherished sentiment of a lifetime, strengthened by a matured conviction of the vastness of the interests which are wrapped up in the inviolability of the sovereign power, that power which is the guardian of their safety, the daily dispenser of blessings and the object of their progress. A traitorous assault upon it arouses the strongest passions, and in the keenness of their resentment, and the eager pursuit of the guilty, they are apt to break down the barriers which are essential to the protection of innocence. Our fathers, therefore, endeavored to render some of these safeguards impregnable, by imbedding them in the fundamental law."

This Constitutional Provision

the same overt act, or on confession in open court.[21] And this is also the rule in England.[22]

Where proof of the overt act has not been made by witnesses as required by the constitution, evidence as to the conduct and declarations of the accused elsewhere and subsequent to the act charged should not be received.[23] But this rule requiring proof of the overt act by two witnesses or by confession in open court has been held not to be applicable to preliminary hearings and commitments.[24]

The Presence of the Defendant, where presence is necessary, being part of the overt act, must be positively proved by two witnesses. "No presumptive evidence, no facts from which presence can be conjectured or inferred, will satisfy the constitution and the law."[25]

So, Too, if Procurement Take the Place of Presence and become part of the overt act, the fact must be proved by two witnesses.[26]

In England, It Is Held That Where the Overt Act Is a Composite Thing, made up of several circumstances and passing through various stages, it is not necessary that there be two witnesses to each circumstance and at each stage. It is enough if two or more witnesses establish the act as a whole.[27]

3. Order of Proof. — The trial court cannot be required on the trial of one accused of treason in levying war, to control the order of proof so as to require the government to prove the overt act charged before adducing evidence as to the intention with which the act was committed.[28] It is held, however, that evidence which

"was in consequence of a construction which had prevailed in England, that two witnesses were required to prove an act of treason, yet if one witness proved one act, and another witness another act of the same species of treason (as for instance that of levying war) it was sufficient; a decision which has always appeared to be contrary to the true intention of the law which made two witnesses necessary—this provision being, as I conceived, intended to guard against fictitious charges of treason, which an unprincipled government might be tempted to support and encourage, even at the expense of perjury, a thing much more difficult to be effected by two witnesses than one." Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126, *per* Iredell, J.

21. Confession of the Accused made on arraignment may be given in evidence and may be sufficient. Respublica *v.* M'Carty, 2 Dall. (U. S.) 86.

An Extrajudicial Confession of the accused cannot be given in evidence for the purpose of proving the overt act charged. United States *v.* Lee, 2 Cranch (C. C.) 104, 26 Fed. Cas. No. 15,584.

22. Chichester *v.* Philips, T. Raym. (Eng.) 404, 83 Eng. Reprint 211; Reg. *v.* M'Cafferty, 10 Cox C. C. 603, 15 W. R. 1022, Ir. Rep. 1 C. L. 363.

23. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

24. Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134, 30 Fed. Cas. No. 18,276; United States *v.* Greiner, 4 Phila. 396, 26 Fed. Cas. No. 15,262. The court said that "a person should not, however, be indicted or imprisoned under a charge of treason when there was no rational probability that the charge, if true, can be proved by two witnesses on the future trial."

25. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

26. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

27. Reg. *v.* M'Cafferty, 10 Cox C. C. 603, Ir. Rep. 1 C. L. 363, 15 W. R. 1022. See also Trial of the Regicides, 5 How. St. Tr. 984, 1142.

28. United States *v.* Burr, 25

is part of the government's case in chief should not be received in rebuttal.[29]

4. Nature and Sufficiency of Proof. — A. In General. — In order to convict of treason the evidence on the part of the government must show one of two things, either that the defendant levied war against them, or that he adhered to their enemies, giving them aid and comfort.[30]

B. Particular Kinds of Treason. — a. *Levying War.* — **(1.) Generally.** — In order to convict of the crime of treason in levying war against the United States, the evidence adduced by, and relied upon by, the government must show that there was an actual levying of war.[31] It is not sufficient to show merely a levying of war

Fed. Cas. No. 14,692*h*. The court said: "It has been truly stated that the crime alleged in the indictment consists of the fact, and of the intention with which that fact was committed. The testimony disclosing both the fact and the intention must be relevant. The court finds no express rule stating the order in which the attorney is to adduce relevant testimony, nor any case in which a court has interfered with the arrangement he has made. No alteration of that arrangement, therefore, will now be directed."

And in United States *v.* Burr, 25 Fed. Cas. No. 14,693, the court while he said "it would certainly be better if the evidence was produced to prove the fact first, and to show their coloring afterwards; for no evidence certainly has any bearing on the present case unless an overt act is proved," held that if the government thought the chronological order of the events the best, they might pursue their own course.

The Declaration of the Accused as to his intention concerning any of the overt acts charged may be given in evidence before proof of such overt acts is made. United States *v.* Lee, 2 Cranch (C. C.) 104, 26 Fed. Cas. No. 15,584.

29. United States *v.* Hanway, 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299, *holding* that all the evidence on the part of the government to show a treasonable intention, such as public resistance to a law of the United States, should be put in by the government in making its case in chief, and not be held back and put in as rebuttal.

30. U. S. Const. art. III, § 3. And see United States *v.* Greiner, 4 Phila. 396, 26 Fed. Cas. No. 15,262. And see cases cited *infra*.

31. Charge to Grand Jury, 5 Blatchf. 549, 30 Fed. Cas. No. 18,271; Charge to Grand Jury, 1 Story 614, 30 Fed. Cas. No. 18,275; *Ex parte* Bollman, 4 Cranch (U. S.) 75.

To Establish the Fact of a Levying of War, the proof must show an assemblage of men with force and arms to overthrow the government or resist the laws. United States *v.* Greathouse, 2 Abb. (U. S.) 364.

Proof That a Body of Men Assembled for the Purpose of Revolutionizing by force the government established by the United States in any of the territories, although as a step to, or means of executing some greater projects, is sufficient to establish a levying of war. *Ex parte* Bollman, 4 Cranch (U. S.) 75.

Proof of Merely Traveling to the place of rendezvous is not enough. *Ex parte* Bollman, 4 Cranch (U. S.) 75.

In Reg. *v.* Gallagher, 15 Cox C. C. (Eng.) 291, it was argued that in order to establish a levying of war within the meaning of the English statute, the evidence must show a mustering of forces or an irregular mass of men equivalent to a number of troops. But the court refused to sanction this contention, holding that it was sufficient to show that one or more of the defendants "did compass, devise and intend to force the Queen to change her counsels, and to overawe the Houses of Parliament by violent measures directed against either the property of the Queen, the

exclusively against the sovereignty merely of a particular state.[32]

Proof of Mere Words, whether oral, written or printed, is not enough, however treasonable or criminal they may be of themselves.[33]

(2.) Distinction Between Riot and War. — A distinction is to be noted, in respect to the sufficiency of the proof, between riot and war; that is to say, if the evidence shows that the intention was merely to satisfy a particular grievance the case is one of riot,[34] while if the evidence shows that the intention was general and public in its nature, the purpose being to overthrow or resist the government, the case is one of treason or war.[35]

(3.) Conspiracy To Levy War.— Proof of a mere conspiracy to subvert the government by force is not enough.[36] The rule is otherwise, however, in England.[37]

(4.) Use of Military Weapons.— It is not necessary, in order to establish treason by levying war against the United States, that the evidence should show the use of military weapons or military array.[38]

(5.) Force, Degree, Etc. — While proof of force is necessary,[39] the courts do not lay down any rule as to degree or quantum of force

public property, or the lives of the Queen's subjects, and directed against them for those public purposes, and not with the view of repaying any mere private spite or enmity against any particular subject of the Queen." See also Reg. *v.* Deasy, 15 Cox C. C. (Eng.) 334.

32. Charge to Grand Jury, 1 Story 614, 30 Fed. Cas. No. 18,275.

33. Charge to Grand Jury, 5 Blatchf. 549, 30 Fed. Cas. No. 18,271; Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272.

34. United States *v.* Hoxie, 1 Paine (U. S.) 265; The Homestead Case, 1 Pa. Dist. 785.

35. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

The True Test in Such Case is: what does the evidence show as to the intention with which the people assembled? If the evidence shows that the intention was universal or general, as to effect some object of a general public nature, it is sufficient to establish treason, and not mere riot. Fries' Case, 9 Fed. Cas. No. 5,127.

36. Charge to Grand Jury, 4 Blatchf. 518, 30 Fed. Cas. No. 18,270; Charge to Grand Jury, 5 Blatchf. 549, 30 Fed. Cas. No. 18,271; Charge to Grand Jury, 2 Spr. 292, 30 Fed. Cas. No. 18,274; Charge to Grand Jury, 1 Spr. 602, 30 Fed. Cas. No. 18,273.

Proof merely that a body of people conspire and meditate an insurrection to oppose or resist the execution of any general law of the United States, although by force, is not sufficient to convict of treason. Fries' Case, 9 Fed. Cas. No. 5,127.

37. Hardy's Trial, 24 How. St. Tr. 202; Trial of the Regicides, 5 How. St. Tr. 984; Reg. *v.* M'Cafferty, 10 Cox C. C. 603, Ir. Rep. 1 C. L. 363, 15 W. R. 1022; Freind's Trial, 13 How. St. Tr. 61; Essex's Trial, 1 How. St. Tr. 1355.

38. Fries' Case, 9 Fed. Cas. No. 5,127; Charge to Grand Jury, 2 Spr. 292, 30 Fed. Cas. No. 18,274; United States *v.* Burr, 25 Fed. Cas. No. 14,693.

39. Fries' Case, 3 Dall. 515. 9 Fed. Cas. No. 5,126; Fries' Case, 9 Fed. Cas. No. 5,127; United States *v.* Hanway, 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299. *Compare* Charge to Grand Jury, 1 Story 614, 30 Fed. Cas. No. 18,275.

necessary to be shown;[40] indeed, most of them state that this is not material.[41]

Defendant as Actor in Violence.— And while it is essential to show some act of violence, it is not necessary to prove that the accused was a direct personal actor therein.[42]

(6.) Interfering With Execution of Laws.— To convict of "levying war" it is not necessary, however, that the proof be restricted to showing the actual making of war for the purpose of entirely overturning the government; but it is also held that evidence showing a combination forcibly to attempt to coerce the adoption[43] or repeal[44] or to oppose the execution of any public law of the United States[45] is sufficient to establish treason provided it shows further that there was an act of forcible opposition to such law in pursuance of such combination. And it has been declared that such proof does not establish merely a constructive treason, but in truth establishes an open and direct treason, within the plain and evident meaning and

40. In order that the assemblage of a body of men for the purpose of making war may be regarded as levying war, the evidence must show that it was a warlike assemblage, carrying the appearance of force and in a position to practice hostility. United States *v.* Burr, 25 Fed. Cas. No. 14,693. The court said: "War (can) not be levied without the employment and exhibition of force. War is an appeal from reason to the sword; and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words; but the actual going to war is a fact which is to be proved by open deed."

41. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126; Fries' Case, 9 Fed. Cas. No. 5,127; Hardy's Trial, 24 How. St. Tr. 202; United States *v.* Hanway, 2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299.

42. It is sufficient to show that he was present, directing, aiding, abetting, counseling or countenancing it. Charge to Grand Jury, 2 Wall. Jr. 134, 30 Fed. Cas. No. 18,276.

43. See United States *v.* Burr, 25 Fed. Cas. No. 14,693.

44. Rex *v.* Gordon, 2 Dougl. (Eng.) 590; Trials of Regicides, 5 How. St. Tr. 984; Freind's Trial, 13 How. St. Tr. 61. And see Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

45. Charge to Grand Jury, 2 Curt. 630, 30 Fed. Cas. No. 18,269; Charge to Grand Jury, 2 Spr. 292, 30 Fed. Cas. No. 18,274; Charge to Grand Jury, 1 Story 614, 30 Fed. Cas. No. 18,275; Charge to Grand Jury, 2 Wall. Jr. 134, 30 Fed. Cas. No. 18,276; United States *v.* Vigol, 2 Dall. (U. S.) 346; United States *v.* Mitchell, 2 Dall. 348, 26 Fed. Cas. No. 15,788; Charge to Grand Jury, 1 Spr. 602, 30 Fed. Cas. No. 18,273.

Proof of Opposition, by force and numbers, or intimidation with intent to defeat, delay, or prevent the execution of a general law of the United States, or to procure, or with a hope of procuring, by force and numbers, or intimidation, its repeal is sufficient to convict of treason by levying war against the United States. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126; Fries' Case, 9 Fed. Cas. No. 5,127.

Proof of Any Forcible Opposition calculated to carry into effect an intention of preventing the execution of any act of the Congress of the United States altogether is sufficient to convict of treason. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126. In this case Peters, J., in charging the jury said: "It is treason 'in levying war against the United States' for persons who have none but a common interest with their fellows — citizens, to oppose or prevent, by force, numbers or intimidation, a public or general law of the United States with intent to prevent its operation, or compel its repeal."

intent of the constitution.[46] But if the evidence is to the effect merely of an intention to defeat its operation in a particular instance, or through the agency of a particular officer, it is not sufficient.[47] It must be shown that the object of the resistance was of a public and general character.[48]

(7.) Presence of Accused. — It is not essential that the evidence shall show that the accused was actually and physically present at the commission of the overt act of levying war charged in the indictment;[49] it is enough to show that the act was committed at his procurement,— or a constructive presence, as it has been termed.[50] But proof of mere advising the levying of war is not enough.[51]

b. *Adhering and Giving Aid to Enemies.* — **(1.) Generally.** — As to what proof is sufficient to establish adhering to and giving aid and comfort to enemies, it is difficult to state a rule applicable to all cases; but certainly proof of having furnished them with arms or munitions of war, vessels or other means of transportation, or any materials which will aid them in carrying out their hostile designs, with a knowledge that the things so furnished are intended for such purpose; or of having incited and encouraged others to engage in or aid the enemies in any way, is sufficient.[52] But it is not essential

The proof must establish a conspiracy to resist generally and publicly by force — an actual resistance by force or intimidation, by numbers,— of a law of the United States. United States *v.* Hanway, 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299.

46. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

47. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126; United States *v.* Hanway, 2 Wall. Jr. 136, 26 Fed. Cas. No. 15,299; Charge to Grand Jury, 2 Curt. 630, 30 Fed. Cas. No. 18,269; United States *v.* Hoxie, 1 Paine (U. S.) 265.

48. United States *v.* Hoxie, 1 Paine (U. S.) 265.

49. Charge to Grand Jury, 2 Curt. 630, 30 Fed. Cas. No. 18,269; Charge to Grand Jury, 2 Spr. 262, 30 Fed. Cas. No. 18,274; Charge to Grand Jury, 2 Wall. Jr. 134, 30 Fed. Cas. No. 18,276; *Ex parte* Bollman, 4 Cranch (U. S.) 75; United States *v.* Greathouse, 2 Abb. (U. S.) 364; Charge to Grand Jury, 1 Spr. 602, 30 Fed. Cas. No. 18,273.

50. United States *v.* Burr, 25 Fed. Cas. No. 14,693. The court in this connection, and also for the purpose of distinguishing between constructive presence and mere conspiracy to levy war, said: "It is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. That part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy."

51. United States *v.* Burr, 25 Fed. Cas. No. 14,693.

52. Charge to Grand Jury, 4 Blatchf. 518, 30 Fed. Cas. No. 18,270; Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272; Carlisle *v.* United States, 16 Wall. (U. S.) 147; Hanauer *v.* Doane, 12 Wall. (U. S.) 342. See also Reg. *v.* Davitt, 11 Cox C. C. 676. *Compare* United States *v.* Pryor, 3 Wash. (U. S.) 234.

Proof of Communication of Intelligence to the Enemy, by letter, telegraph or otherwise, relating to the strength, movements or position of the army, is sufficient. Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272.

Expressions of Opinion Indicating

to the proving of giving aid and comfort that the evidence should show that the enterprise commenced was successful and actually rendered assistance; it is enough that it be shown that the acts, if successful, would advance the interests of the enemy.[53]

(2.) Joining Enemy. — Proof that the defendant, during a time of war, joined the enemy is sufficient to convict of treason in giving aid and comfort to an enemy.[54] But it is not essential to show that the defendant actively engaged in hostilities.[55]

(3.) Motive. — The motive with which the act charged was done is immaterial, and hence need not be established as part of the government's case.[56] Nor is it material that the evidence does not show that such acts were induced by sympathy with the rebellion, hostility to the government, or a desire for gain.[57]

II. DEFENSES.

1. Compulsion. — A private soldier, or subordinate officer, serving under the command of a military superior, cannot excuse a treasonable act by showing compulsion, unless he shows further that he was forced into the service under a personal fear of death, and quitted it as soon as he could.[58]

2. Drunkenness. — A person accused of the crime of treason cannot excuse or justify his acts by showing that at the time he was drunk.[59]

3. Ignorance of the Law. — Ignorance of the law cannot be shown and relied upon as a defense to a charge of treason.[60]

Sympathy. — Proof of mere expressions of opinion indicating sympathy with the public enemy is not enough, although such expressions may well justify a strong feeling of indignation against the individual, and the suspicion that he is a traitor. Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272.

In Sprott *v.* United States, 20 Wall. (U. S.) 459, it was held that proof that a person purchased cotton from the confederate government and paid for it in money was evidence of giving aid and comfort to the rebellion.

53. United States *v.* Greathouse, 2 Abb. (U. S.) 364. See also United States *v.* Pryor, 3 Wash. (U. S.) 234.

54. M'Growther's Case, 1 East P. C. (Eng.) 71; Gordon's Case, 1 East P. C. (Eng.) 71; United States *v.* Greiner, 4 Phila. 396, 26 Fed. Cas. No. 15,262.

55. Vaughan's Trial, 13 How. St. Tr. 531.

56. Vaughan's Trial, 13 How. St. Tr. 530; Carlisle *v.* United States, 16 Wall. (U. S.) 147; Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272.

57. Charge to Grand Jury, 4 Blatchf. 518, 30 Fed. Cas. No. 18,270.

58. United States *v.* Greiner, 4 Phila. 396, 26 Fed. Cas. No. 15,262. See also Respublica *v.* McCarty, 2 Dall. (U. S.) 86; Growthier's Trial, 18 How. St. Tr. 393.

59. Respublica *v.* Weidle, 2 Dall. (U. S.) 88; Dammaree's Trial, 15 How. St. Tr. 609.

60. Fries' Case, 3 Dall. 515, 9 Fed. Cas. No. 5,126.

TREATIES.—See Judicial Notice.

TRESPASS.

By C. R. Mahan.

I. MATTERS ESSENTIAL TO RECOVERY.

1. Title or Possession of Plaintiff To Support Action. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *Title.* — **(1.) Real Property.** The general rule is that in order to maintain an action of trespass upon real estate it is incumbent upon the plaintiff to prove either a good paper title to the land, or actual possession thereof, either by himself or by his duly authorized representative.[1] And this

1. *Alabama.* — Jackson *v.* State, 136 Ala. 22, 34 So. 188.
Arkansas. — Newman *v.* Mountain Park L. Co., 85 Ark. 208, 107 S. W. 391.
California. — Kimball *v.* McKee, 149 Cal. 435, 86 Pac. 1089.
Connecticut. — Waterbury Clock Co. *v.* Irion, 71 Conn. 254, 41 Atl. 827.
Delaware. — Covington *v.* Simpson, 3 Penne. 269, 52 Atl. 349.
Georgia. — Georgia R. & E. Co. *v.* Knight, 122 Ga. 290, 50 S. E. 124; Ault v. Meager, 112 Ga. 148, 37 S. E. 185; Moore *v.* Vickers, 126 Ga. 42, 54 S. E. 814; Clower *v.* Maynard, 112 Ga. 340, 37 S. E. 370.
Illinois. — Clay *v.* Boyer, 10 Ill. 506; Mississippi R. Bridge Co. *v.* Lonergan, 91 Ill. 508; Rockwell *v.* Jones, 21 Ill. 279.
Iowa. — Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171.
Kentucky. — Lemoyne *v.* Anderson, 29 Ky. L. Rep. 1017, 96 S. W. 843.
Maryland. — Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558.
Michigan. — Newcomb *v.* Love, 112 Mich. 115, 70 N. W. 443.

rule applies not only to an individual, but also to a state seeking to recover damages for trespass upon lands of which it claims to be the owner.[2] It is especially applicable to a case where title is put in issue by the defendant's pleadings.[3] The plaintiff in such

Minnesota. — Moon *v.* Avery, 42 Minn. 405, 44 N. W. 257.

Mississippi. — Darrill *v.* Dodds, 78 Miss. 912, 30 So. 4; Dejarnett *v.* Haynes, 23 Miss. 600; Gathings *v.* Miller, 76 Miss. 651, 24 So. 964.

New Hampshire. — Dyer *v.* Hartshorn, 73 N. H. 509, 63 Atl. 231.

New Jersey. — Rollins *v.* Atlantic City R. Co., 70 N. J. L. 664, 58 Atl. 344.

New York. — Price *v.* Brown, 101 N. Y. 669, 5 N. E. 434, *reversing* 32 Hun 66; Country Club Land Assn. *v.* Lohbauer, 187 N. Y. 106, 79 N. E. 844; Gardner *v.* Heart, 1 N. Y. 528.

North Carolina. — Monk *v.* Wilmington, 137 N. C. 322, 49 S. E. 345; State *v.* Reynolds, 95 N. C. 616; Latham *v.* Roanoke R. & L. Co., 139 N. C. 9, 51 S. E. 780; Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539.

Oklahoma. — Casey *v.* Mason, 8 Okla. 665, 59 Pac. 252.

Rhode Island. — Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288.

West Virginia. — High's Heirs *v.* Pancake, 42 W. Va. 602, 26 S. E. 536; Buck *v.* Newberry, 55 W. Va. 681, 47 S. E. 889.

Wisconsin. — Stoltz *v.* Kretschmar, 24 Wis. 283.

Where it appeared that plaintiff's deed described his land as "bounded on the north by unseated mountain land," and that there were no marks on the ground nor corners fixed, and it also appeared that the plaintiff did not know where his north line was, it was held that the evidence was insufficient to sustain the action. Hess *v.* Sutton, 33 Pa. Super. 530.

Where two patents cover the same land, the person holding under the earlier one, although not holding the entire patent, is not liable to the holder of the later patent for trees cut on the land covered by both patents but not within the portion to which the person cutting has title, his liability being to the owner of such portion under the earlier patent. Burt & Brabb Lumb. Co. *v.* Hurst, 33 Ky. L. Rep. 270, 110 S. W. 242.

Where the Statute Provides a Penalty (David *v.* Correll, 68 Ill. App. 123, reversed on other grounds, 74 Ill. App. 47; Behymer *v.* Odell, 31 Ill. App. 350), or allows treble damages (Reynolds *v.* Maynard, 137 Mich. 42, 100 N. W. 174), for the cutting of timber upon the land of another the plaintiff in an action for such penalty or damages must prove title in himself. Proof of possession alone is insufficient. Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331.

Where a plaintiff had laid off a strip of land as a street and recognized the same in deeds to lots which he conveyed to sundry parties abutting on both sides of said street, and afterwards for years permitted his grantees to use it as a street, he is not in a position to maintain trespass against the grantees of one of the lots for placing a woodpile in the street. Davis *v.* Morris, 132 N. C. 435, 43 S. E. 950.

To maintain an action for trespass upon lands of which plaintiff is not in the actual possession he must show a valid title, or that the *locus in quo* is part of premises, to all of which plaintiff claims title under a written instrument which purports to give him title to the whole, and of a portion of which he is in the actual possession. Edwards *v.* Noyes, 65 N. Y. 125.

2. Taylor *v.* State, 65 Ark. 595, 47 S. W. 1055, which was an action of trespass for damages caused by cutting and removing timber and ties from land claimed by the state. The court said: "When the sovereign assumes the attitude of a litigant, in the absence of some statutory provisions to the contrary, she is subject to the same rules and principles as apply to other litigants." See Jackson *v.* State, 136 Ala. 22, 34 So. 188.

3. Tabor *v.* Judd, 62 N. H. 288;

case must recover on the strength of his own title, and not upon the weakness of that of the defendant.[4]

Matters Excusing Strict Proof of Title. — Where defendant admits the plaintiff's possession, but claims title to the property in himself, it is not incumbent upon the plaintiff to prove his title or actual possession; in which case the burden is upon the defendant to prove his title.[5] Nor, where the defendant makes out no title, is it incumbent upon the plaintiff to show title as well as possession.[6] Nor, as against a mere wrongdoer, is it necessary for a plaintiff in possession of the property to show title thereto.[7]

(2.) Personal Property. — So, too, in trespass *de bonis asportatis,* or to personal property, the plaintiff must show that at the time of the alleged trespass he was the owner of the property, or that he either had actual possession thereof, or a constructive possession.[8]

b. *Possession or Right of Possession.* — **(1.) Generally. — Real Property.** — The general rule is that in order to maintain trespass *quare clausum fregit,* the plaintiff must show that at the time of the alleged trespass he was in possession of the property, either actually or constructively.[9]

Nelson *v.* Jenkins, 42 Neb. 133, 60 N. W. 311.

In Bullard *v.* Hollingsworth, 140 N. C. 634, 53 S. E. 441, where plaintiff's title was directly put in issue, the court said: "Plaintiff assumes the burden of proving by a preponderance of the evidence every fact necessary to establish his title to the land as well as the trespass upon his possession before he can recover. If the plaintiff recovers at all he must do so upon the strength of his own title and not the weakness of his adversary's. The burden of proof did not at any stage of the trial shift to the defendants upon either the first issue as to title or the second issue as to trespass."

4. Lemoyne *v.* Anderson, 29 Ky. L. Rep. 1017, 96 S. W. 843.

5. Tison *v.* Broward, 17 Fla. 465.

If the defendant sets up a claim of title under the person through whom the plaintiff claims, it is not necessary for the plaintiff to prove title in such person; defendant by relying on him as a source of title admits that he had title. Garbutt Lumb. Co. *v.* Wall, 126 Ga. 172, 54 S. E. 944; *quoting* with approval from McBurney *v.* Cutler, 18 Barb. (N. Y.) 203.

6. Shoup *v.* Shields, 116 Ill. 488, 6 N. E. 502; Dewey *v.* Bordwell, 9 Wend. (N. Y.) 65; Dexter *v.* Billings, 110 Pa. St. 135, 1 Atl. 180.

7. Field *v.* Apple River Log D. Co., 67 Wis. 569, 31 N. W. 17.

8. *United States.* — Wilson *v.* Haley Live Stock Co., 153 U. S. 39.

Alabama. — Dunlap *v.* Steele, 80 Ala. 424; White *v.* Brantley, 37 Ala. 430.

Arkansas. — Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Warner *v.* Capps, 37 Ark. 32; Gracie *v.* Morris, 22 Ark. 415.

Delaware. — Coe *v.* English, 6 Houst. 456.

Illinois. — Miller *v.* Kirby, 74 Ill. 242.

Massachusetts. — Winship *v.* Neale, 10 Gray 382.

New Jersey. — Haythorn *v.* Rushforth, 19 N. J. L. 160, 38 Am. Dec. 540.

New York. — Carter *v.* Simpson, 7 Johns. 535.

Pennsylvania. — Dixon *v.* White Sew. Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683.

Vermont. — Edwards *v.* Edwards, 11 Vt. 587, 34 Am. Dec. 711.

9. *Alabama.* — Holman *v.* Ketcham, 45 So. 206.

Personal Property. — So, too, in order to maintain trespass as to personal property, it is incumbent upon the plaintiff to show that

Arkansas. — Newman *v.* Mountain Park L. Co., 85 Ark. 208, 107 S. W. 391.

Connecticut. — Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855; Waterbury Clock Co. *v.* Irion, 71 Conn. 254, 41 Atl. 827.

Delaware. — Pennington *v.* Lewis, 4 Penne. 447, 56 Atl. 378; Quillen *v.* Betts, 1 Penne. 53, 39 Atl. 595.

Georgia. — Clower *v.* Maynard, 112 Ga. 340, 37 S. E. 370; Ault *v.* Meager, 112 Ga. 148, 37 S. E. 185.

Illinois. — Gauche *v.* Mayer, 27 Ill. 134; Galt *v.* Chicago & N. W. R. Co., 157 Ill. 125, 41 N. E. 643; Halligan *v.* Chicago & R. I. R. Co., 15 Ill. 558; Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; American Tel. & T. Co. *v.* Jones, 78 Ill. App. 372; Rockwell *v.* Jones, 21 Ill. 279.

Indiana. — Hume *v.* Tufts, 6 Blackf. 136.

Iowa. — Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171.

Kentucky. — Walden *v.* Conn, 84 Ky. 312, 4 Am. St. Rep. 204; Owings *v.* Gibson, 2 A. K. Marsh. 515; Wilsons *v.* Bibb, 1 Dana 7, 25 Am. Dec. 118.

Maine. — Munsey *v.* Hanly, 102 Me. 423, 67 Atl. 217.

Michigan. — Hayward *v.* School Dist. No. 9, 139 Mich. 539, 102 N. W. 999; Newcomb *v.* Love, 112 Mich. 115, 70 N. W. 443.

Minnesota. — Moon *v.* Avery, 42 Minn. 405, 44 N. W. 257.

Mississippi. — Gathings *v.* Miller, 76 Miss. 651, 24 So. 964; Dejarnett *v.* Haynes, 23 Miss. 600; Darrill *v.* Dodds, 78 Miss. 912, 30 So. 4.

Missouri. — Brown *v.* Hartzell, 87 Mo. 564.

Nebraska. — Nelson *v.* Jenkins, 42 Neb. 133, 60 N. W. 311.

New Hampshire. — Brown *v.* Manter, 22 N. H. 468.

New York. — Houghtaling *v.* Houghtaling, 56 Barb. 194; Putnam *v.* Wyley, 8 Johns. 432, 5 Am. Dec. 346; Holmes *v.* Seely, 19 Wend. 507; Zorn *v.* Haake, 75 Hun 235, 27 N. Y. Supp. 38; Gardner *v.* Heart, 1 N. Y. 528; Frost *v.* Duncan, 19 Barb. 560.

North Carolina. — State *v.* Reynolds, 95 N. C. 616; Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539.

Oklahoma. — Casey *v.* Mason, 8 Okla. 665, 59 Pac. 252.

Pennsylvania. — Vanderslice *v.* Donner, 26 Pa. Super. 319; Wilkinson *v.* Connell, 158 Pa. St. 126, 27 Atl. 870; Tustin *v.* Sammons, 23 Pa. Super. 175.

South Carolina. — Skinner *v.* McDowell, 2 Nott & McC. 68; Rhodes *v.* Bunch, 3 McCord 66; Davis *v.* Clancy, 3 McCord 422; Bell *v.* Monahan, Dudley 38.

West Virginia. — High's Heirs *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

In Carter *v.* Pitcher, 87 Hun 580, 34 N. Y. Supp. 549, an action of trespass for wrongfully cutting down certain trees, evidence showing that plaintiff had sold some trees growing on the premises to the defendant was held insufficient to raise a presumption of possession of the premises in the plaintiff.

The plaintiff must show that the portion of the land upon which the wrongful act was committed was in his enclosure, or that he had the paramount title if it was vacant, or that he was in the actual possession of a part under a deed for the whole, embracing the part upon which the act was committed. Winkler *v.* Meister, 40 Ill. 349. He must show that at the time of the alleged trespass he had the actual possession, or that being then disseised he had since regained the possession by entry, or had the judgment of a competent court awarding it to him. Cowenhoven *v.* Brooklyn, 38 Barb. (N. Y.) 9.

In Pearson *v.* Dansby, 2 Hill (S. C.) 466, it is held that to maintain trespass *quare clausum fregit*, plaintiff must show either an actual or a constructive possession. In the case of actual possession he is entitled to recover upon his possession alone. In the case of constructive possession, the right to recover is derived from his title from which his pos-

at the time of the alleged trespass he was in either actual or constructive possession of the property in question.[10]

B. Mode of Proof. — a. *In General.* — *Title.* — The general rules of evidence in respect of the mode of proving title or possession of property, whether real or personal, are applicable in an action of trespass. Thus the fact of possession may be established by parol evidence.[11]

A Deed or Other Written Instrument, under which one of the parties claims or holds, although defective for the purpose of passing title may be received in evidence for the purpose of showing color of title, the nature and extent of his claim, etc.[12]

session is presumed until an adverse possession is clearly made out.

A Reversioner Having Neither Possession nor right of possession may maintain trespass on the case for a trespass causing permanent damage to the estate committed by a stranger. Cherry *v.* Lake Drummond C. & W. Co., 140 N. C. 422, 53 S. E. 138.

Where in trespass *quare clausum* the general issue is pleaded, plaintiff is only required to prove possession at the time of the trespass. Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288.

10. *United States.* — Wilson *v.* Haley Live Stock Co., 153 U. S. 39.

Alabama. — Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52; Dunlap v. Steele, 80 Ala. 424.

Arkansas. — Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057.

Delaware. — Coe *v.* English, 6 Houst. 456.

Maine. — Howe *v.* Farrar, 44 Me. 233.

Massachusetts. — Winship *v.* Neale, 10 Gray 382.

Pennsylvania. — Dixon *v.* White Sew. Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659.

Vermont. — Cilley *v.* Cushman, 12 Vt. 494.

11. Pacific Exp. Co. *v.* Dunn, 81 Tex. 85, 16 S. W. 792.

In an action for damages for trespass and destruction of property, the title to the property may be shown as evidence of peaceable possession. Nicol *v.* Illinois C. R. Co., 44 La. Ann. 816, 11 So. 34.

In trespass *quare clausum fregit,* plea of *liberum tenementum,* and issue thereon, evidence of paramount title in either party is admissible. Wilsons *v.* Bibb, 1 Dana (Ky.) 7, 25 Am. Dec. 118.

The plaintiffs cannot show that after the commencement of the action they built a cabin on the land and installed a tenant therein. Jones *v.* Patterson, 23 Ky. L. Rep. 1838, 66 S. W. 377.

12. Higdon *v.* Kennemer, 112 Ala. 351, 20 So. 470; Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911; Wylie *v.* Railes, 8 Kan. App. 856, 55 Pac. 523; Hoffman *v.* Harrington, 28 Mich. 90; Garner *v.* Lasker, 71 Tex. 431, 9 S. W. 332; Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; Grimes *v.* Butts, 65 Ill. 347 (defective record of partition proceedings).

In an action of trespass *vi et armis,* in which it is alleged by the plaintiff that he had title to, and was in lawful possession of, personal property, which, without his consent and against his protest, was forcibly seized and taken from him by defendant, a written contract between the parties, by virtue of which the plaintiff acquired his title, is admissible in evidence in his behalf. Especially is this true when defendant denies plaintiff's title and right of possession. Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911.

In trespass by a tenant against one claiming the premises, title deeds of a plaintiff's lessor are admissible to show that plaintiff had an honest claim to the land. Wylie *v.* Railes, 8 Kan. App. 856, 55 Pac. 523.

In an action to recover damages for an alleged trespass to a right of way, as tending to show plaintiff's title, an agreement between a prior

Parol Evidence. — But where plaintiff relies upon paper title, he must produce the proper title deeds.[13] Parol evidence may, however, be received to characterize plaintiff's possession.[14]

Admissions and Declarations. — Admissions against the interest of the party making them, in respect of his interest or title to the property in question, are admissible.[15] So also are declarations in disparagement of the title of the declarant.[16]

C. Nature and Sufficiency of Proof. — a. *In General.* — As has been previously stated, when the plaintiff's title is one of the issues of fact to be determined, he must prove it.[17] This does not mean, however, that in all cases he must make strict proof of legal title to the premises in controversy. In many cases the question of legal title, strictly speaking, is not involved; and hence of course need not be proved.[18] And in this regard there is a marked dis-

owner and plaintiff's predecessors in title granting a passage over such land to the latter was held admissible. Bassett *v.* Pennsylvania Co., 201 Pa. St. 226, 50 Atl. 772.

Recitals in an ancient deed, admissible in evidence without proof of contemporaneous possession, may be proved as against persons who are not parties to it, and who do not claim under it. Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730.

But in an action for trespass upon realty to recover damages to the freehold, it was held error to admit, in plaintiff's behalf a bond for title in which he was named as obligee, and to which the name of the person from whom he claimed to have purchased such realty had been apparently signed by an attorney in fact, when there was no evidence of the alleged attorney's authority. Southern R. Co. v. Ethridge, 108 Ga. 121, 33 S. E. 850. See also article "Title," Vol. XII. p. 536.

13. Broker *v.* Scobey, 56 Ind. 588; Mayo *v.* Spartanburg, etc. Co., 40 S. C. 517, 19 S. E. 73.

14. In Rose *v.* Ruyle, 46 Ill. App. 17, which was an action of trespass *quare clausum*, it was held that parol testimony as to an arrangement between the owner and the plaintiff under which plaintiff entered into possession was admissible to characterize plaintiff's possession.

In Houghtaling *v.* Houghtaling, 56 Barb. (N. Y.) 194, plaintiff testified that he had put up the fence along the road whenever it was taken down to drive through the land in question. Since such testimony, unexplained, tended to show plaintiff's possession, it was held competent for defendant to show, by cross-examination, that such action was taken by plaintiff at the request and the benefit of the defendant and not as the owner or possessor of the soil.

15. Lawrence *v.* Wilson, 160 Mass. 304, 35 N. E. 858; Gilbert *v.* Felton, 5 Gray (Mass.) 406; Gordon *v.* Cook, 47 Mich. 248, 10 N. W. 357; Copley *v.* Rose, 2 N. Y. 115.

16. Pike *v.* Hayes, 14 N. H. 19, 40 Am. Dec. 171. See articles "Admissions," Vol. I, p. 348; "Title," Vol. XII, p. 536.

17. Hays *v.* Ison, 24 Ky. L. Rep. 1947, 72 S. W. 733; Tabor *v.* Judd, 62 N. H. 288.

18. *Alabama.* — Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684.

Arkansas. — Thornton *v.* St. Louis Refrig. & W. G. Co., 69 Ark. 424, 65 S. W. 113.

Georgia. — Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

Illinois. — Shoup *v.* Shields, 116 Ill. 488, 6 N. E. 502; Mason *v.* Park, 4 Ill. 532; Illinois & St. L. R. & C. Co. *v.* Cobb, 94 Ill. 55.

Kansas. — Powers *v.* Clarkson, 17 Kan. 218; Nelson *v.* Mather, 5 Kan. 151.

Kentucky. — Crate *v.* Strong, 24 Ky. L. Rep. 710, 69 S. W. 957.

Maine. — Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55.

tinction between an action of trespass and an action of ejectment.[19] So, as will accordingly be shown in succeeding sections, there are many cases in which proof of title less than strict legal title will suffice.

In the Absence of Proof That Dower Has Been Assigned, the widow's right is a mere chose in action; it confers on her no title to or seizin of the land itself; and the rule is accordingly that proof of mere continuance of the occupation which she had during the life of her husband is not sufficient to entitle her to maintain trespass.[20]

Mississippi. — Carpenter *v.* Savage, 46 So. 537.

New Hampshire. — Jenkins *v.* Palmer, 72 N. H. 592, 58 Atl. 42; Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588.

New York. — Price *v.* Brown, 101 N. Y. 669, 5 N. E. 434; Bogert *v.* Haight, 20 Barb. 251; Miller *v.* Decker, 40 Barb. 228.

North Carolina. — Frisbee *v.* Marshall, 122 N. C. 760, 30 S. E. 21; Gordner *v.* Blades Lumb. Co., 144 N. C. 110, 56 S. E. 695.

Oklahoma. — City of Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242.

Pennsylvania. — Omensetter *v.* Kemper, 6 Pa. Super. 309.

Rhode Island. — Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288; Schaeffer *v.* Brown, 23 R. I. 364, 50 Atl. 640; Sayles *v.* Mitchell, 22 R. I. 238, 47 Atl. 320.

South Carolina. — Skinner *v.* M'Dowell, 2 Nott & McC. 68.

Texas. — Forst *v.* Rothe (Tex. Civ. App.), 66 S. W. 575.

Vermont. — Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087.

Where the evidence shows that one has a parol license to maintain a sewer from his land across that of an adjoining owner he may maintain an action for damages against a stranger who destroys or injures the sewer. Miller *v.* Inhab. of Greenwich Twp., 62 N. J. L. 771, 42 Atl. 735.

An Admission of the plaintiff's ownership and of the act constituting the alleged trespass places upon defendant the burden of showing a license. McRae *v.* Blakeley, 3 Cal. App. 171, 84 Pac. 679.

A wife has an interest in the homestead of herself and husband although the legal title thereto is in him, and she is entitled to the peaceful and quiet enjoyment thereof; and proof of any unlawful invasion of such right is sufficient on which to base an action of trespass. Lesch *v.* Great Northern R. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. (N. S.) 93.

Where it appeared that the plaintiff, a married woman, purchased a farm under a written executory contract, and entered into and continued in possession for a year, the legal presumption arising from the contract was that the plaintiff, and not her husband, was in possession of the farm as owner and occupant. Van Nostrand *v.* Hubbard, 35 App. Div. 201, 54 N. Y. Supp. 739.

19. Distinction Between Trespass and Ejectment. — The action of trespass *quare clausum fregit* differs widely from the action of ejectment. In the former the gist of the action is injury to the possession, while in the latter the plaintiff, in order to recover, must have the legal title to the land and a possessory right not barred by the statute of limitations. In the first, title need not be shown to be in the plaintiff; in the second, not only must title be shown to be in the plaintiff, but the title relied on must be a legal title, superior to that of any other person. Burgess, etc. of New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596. See Gardere *v.* Blanton, 35 La. Ann. 811.

20. Munsey *v.* Hanly, 102 Me. 423, 67 Atl. 217.

A trespasser or person in possession of land as a wrongdoer, as, a widow in possession before the assignment of her dower, cannot recover in trespass against another

There is authority, however, to the contrary;[21] though the cases so holding and those of similar import have been characterized as departures, under statutory provisions, from the weight of authority.[22]

b. *Title by Adverse Possession.* — Thus where the evidence shows that plaintiff in an action of trespass has had possession for more than the statutory period, this of itself is *prima facie* evidence of title, sufficient to entitle him to maintain the action.[23]

c. *Tax Title.* — Even though the tax deed be shown to be in fact invalid, nevertheless possession taken and held under it, either personally or by tenant, being claim and color of title, is sufficient evidence of title to sustain a recovery of damages against a mere trespasser.[24]

d. *Equitable Title.* — So, too, where the evidence shows that plaintiff has an equitable title and full right to call for a legal title, he may, as against a trespasser, maintain trespass.[25]

where the evidence shows that the latter is the owner of the fee, who has a right to the possession. Hoots *v.* Graham, 23 Ill. 79.

21. Stevens *v.* Stevens, 96 Ga. 374, 23 S. E. 312; Frisbee *v.* Marshall, 122 N. C. 760, 30 S. E. 21.

22. Munsey *v.* Hanly, 102 Me. 423, 67 Atl. 217. See also Johnson *v.* Shields, 32 Me. 424; Clarke *v.* Hilton, 75 Me. 426; Hildreth *v.* Thompson, 16 Mass. 191.

23. Hart *v.* Doyle, 128 Mich. 257, 87 N. W. 219. And see Cook *v.* Foster, 7 Ill. 652; Mississippi R. Bridge Co. *v.* Lonergan, 91 Ill. 508.

Where plaintiffs claim title by adverse possession they must show that at the time of the trespass their possession was adverse, exclusive and hostile to the right of ownership of all other persons. Pennington *v.* Lewis, 4 Penne. (Del.) 447, 56 Atl. 378.

They must show continuous adverse possession (Monk *v.* Wilmington, 137 N. C. 322, 49 S. E. 345. See also Macauley *v.* Kamp, 60 Ill. App. 31) for the statutory period. Courtney *v.* Ashcraft, 31 Ky. L. Rep. 1324, 105 S. W. 106.

24. Kunkel *v.* Utah Lumb. Co., 29 Utah 13, 81 Pac. 897, *citing* Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668; Cardoza *v.* Calkins, 117 Cal. 106, 48 Pac. 1010; Bileu *v.* Paisley, 18 Or. 47, 21 Pac. 934; Douglass *v.* Dixon, 31 Kan. 310, 1 Pac. 541; Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588; Boyington *v.* Squires, 71 Wis. 276, 37 N. W. 227; McFarlane *v.* Ray, 14 Mich. 465; Blaisdell *v.* Roberts, 37 Me. 239.

Evidence that the plaintiff was in actual possession of the premises under a tax deed is sufficient to maintain trespass *quare clausum fregit*, unless the defendant shows a legal title with an immediate right of possession, although the tax deed may for some reason be invalid. Maxfield *v.* White River Lumb. Co., 74 N. H. 158, 65 Atl. 832.

Where the evidence showed that a plaintiff was vested with a tax deed to wild, uncultivated and unoccupied land, he thereby had constructive possession of the land, so as to enable him to sue for the cutting and removal of timber therefrom. Thornton *v.* St. Louis Refrig. & W. G. Co., 69 Ark. 424, 65 S. W. 113.

Where it appears from the evidence that the trespass in question was committed on land which had been sold to the state for non-payment of taxes and after the expiration of the time for redemption, the state, and not the original owner, may maintain an action of trespass. Blake *v.* Grondin, 141 Mich. 104, 104 N. W. 423.

25. Arnold *v.* Pfoutz, 117 Pa. St. 103, 11 Atl. 871; Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Russell *v.*

Possession Under Contract of Purchase. — Thus evidence that the plaintiff was in possession of the real estate in question under a contract of purchase from the owner is sufficient proof of title in him to entitle him to maintain trespass.[26] Nor is it necessary in such case for the plaintiff to show the precise nature of his contract, so long as it sufficiently appears that at the time the damage accrued he was in fact in possession under such a contract.[27]

e. *Title Acquired Subsequent to Trespass.* — It is not sufficient, however, for plaintiff in an action of trespass to show and rely upon a title acquired subsequent to the alleged trespass.[28]

f. *Possession.* — **(1.) Generally. — Real Property.** — The general rule is that proof of possession is, at least in the absence of contrary evidence, *prima facie* evidence of ownership, and accordingly in an action to recover damages for an alleged trespass upon real estate, the general rule is that proof that plaintiff was at the time of the alleged trespass in possession of the premises in controversy is *prima facie* evidence of ownership in him and generally regarded as sufficient to entitle him to maintain the action, at least as against a mere tortfeasor,[29] or one unable to show better title than the

Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637.

The holder of an equitable title under a decree for specific performance may maintain an action of trespass for an injury to his possession. Skinner *v.* Terry, 134 N. C. 305, 46 S. E. 517.

A Homestead Entryman in possession may maintain an action against a subsequent trespasser to recover damages in cropping the land. It is immaterial that the possession of the trespasser commenced prior to the issuing of the homestead entry, if such possession was not acquired and continued by virtue of any individual right of entry. Matthews *v.* O'Brien, 84 Minn. 505, 88 N. W. 12. Such an entryman who has obtained a receipt from the receiver of the land office, may maintain trespass for causing land to be washed away through maintaining a dike in a river. Gulf, C. & S. F. R. Co. v. Clark, 2 Ind. Ter. 319, 51 S. W. 962.

26. Gartner *v.* Chicago, R. I. & P. R. Co., 71 Neb. 444, 98 N. W. 1052. See also Hunt *v.* Taylor, 22 Vt. 556; Beach *v.* Sutton, 5 Vt. 209; Rood *v.* New York & E. R. Co., 18 Barb. (N. Y.) 80; Young *v.* Shulenberg, 35 App. Div. 79, 54 N. Y. Supp. 419.

27. Gartner *v.* Chicago, R. I. & P. R. Co., 71 Neb. 444, 98 N. W. 1052.

28. Dean *v.* Metropolitan El. R. Co., 119 N. Y. 540, 23 N. E. 1054; Gordner *v.* Blades Lumb. Co., 144 N. C. 110, 56 S. E. 695; Blake *v.* Grondin, 141 Mich. 104, 104 N. W. 423.

This rule, however, is not universal in its application. Thus the grantee of an applicant under a soldier's additional homestead certificate may, on proof of his title and that the patent from the federal government has issued, maintain trespass for wrongful acts committed upon the land after the date of the application and before confirmation thereof. Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712.

29. *Alabama.* — Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684; Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439.

California. — Golden Gate Mill & M. Co. *v.* Joshua Hendy Mach. Wks., 82 Cal. 184, 23 Pac. 45.

Connecticut. — Branch *v.* Doane, 18 Conn. 233.

Georgia. — Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; Southern R. Co. *v.* Horine, 121 Ga. 386, 49 S. E. 285, 104 Am. St. Rep. 151; McDonough *v.* Carter, 98 Ga. 703, 25 S. E. 938; Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

Illinois. — Bedden *v.* Clark, 76 Ill. 338; Welch *v.* Louis, 31 Ill. 446;

Illinois, etc. R. & C. Co. *v.* Cobb, 94 Ill. 55; Illinois & St. L. R. Co. *v.* Cobb, 68 Ill. 53; Advance Elev. & W. Co. *v.* Eddy, 23 Ill. App. 352; Johnson *v.* Stinger, 39 Ill. App. 180; Chicago *v.* McGraw, 75 Ill. 566; Webb *v.* Sturtevant, 2 Ill. 181; Mason *v.* Park, 4 Ill. 532; Shoup *v.* Shields, 116 Ill. 488, 6 N. E. 502.

Iowa. — Blunck *v.* Chicago & N. W. R. Co., 115 N. W. 1013.

Kansas. — Powers *v.* Clarkson, 17 Kan. 218; Nelson *v.* Mather, 5 Kan. 151; Pacific R. Co. *v.* Walker, 12 Kan. 601; Hefley *v.* Baker, 19 Kan. 9.

Kentucky. — Gatewood *v.* Head, 2 Litt. 60; Hall *v.* Deaton, 24 Ky. L. Rep. 314, 68 S. W. 672; Crate *v.* Strong, 24 Ky. L. Rep. 710, 69 S. W. 957.

Maine. — Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55; Look *v.* Norton, 55 Me. 103.

Maryland. — Burgess, etc. of New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596.

Massachusetts. — First Parish *v.* Smith, 14 Pick. 297.

Minnesota. — Blew *v.* Ritz, 82 Minn. 530, 85 N. W. 548.

Mississippi. — Carpenter *v.* Savage, 46 So. 537. See McCleary *v.* Anthony, 54 Miss. 708.

Missouri. — Reed *v.* Price, 30 Mo. 442; Masterson *v.* West End. N. G. R. Co., 5 Mo. App. 64.

Nebraska. — Dold *v.* Knudsen, 70 Neb. 373, 97 N. W. 482.

New Hampshire. — Jenkins *v.* Palmer, 72 N. H. 592, 58 Atl. 42; Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588.

New Jersey. — Bloom *v.* Stenner, 50 N. J. L. 59, 11 Atl. 131.

New York. — Price *v.* Brown, 101 N. Y. 669, 5 N. E. 434, *reversing* 32 Hun 66; Bogert *v.* Haight, 20 Barb. 251; Fagan *v.* Scott, 14 Hun 162; Evertson *v.* Sutton, 5 Wend. 281, 21 Am. Dec. 217; Walker *v.* Wilson, 8 Bosw. (N. Y. Super.) 586; Miller *v.* Decker, 40 Barb. 228.

North Carolina. — Gordner *v.* Blades Lumb. Co., 144 N. C. 110, 56 S. E. 695; Frisbee *v.* Marshall, 122 N. C. 760, 30 S. E. 21.

Pennsylvania. — Omensetter *v.* Kemper, 6 Pa. Super. 309.

Rhode Island. — Sayles *v.* Mitchell, 22 R. I. 238, 47 Atl. 320.

South Carolina. — Johnson *v.* M'Ilwain, Rice Eq. 368; Brandon *v.* Grimke, 1 Nott & McC. 356; Davis *v.* Clancy, 3 McCord 422.

Texas. — Forst *v.* Rothe (Tex. Civ. App.), 66 S. W. 575; Bonner *v.* Wiggins, 52 Tex. 125.

Vermont. — Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087.

In trespass *quare clausum*, evidence showing possession alone is sufficient to maintain the action, unless the defendant defends upon the ground that the title was in him, and hence that there was no trespass, in which case the defendant must specially plead title in himself. Schaeffer *v.* Brown, 23 R. I. 364, 50 Atl. 640.

Though it appear in evidence that the legal owner of land is not in the actual possession thereof, he may, perhaps, in this country, maintain an action of trespass upon the land where there is no actual adverse possession, but he cannot where there is an actual adverse holding against his title. Polk *v.* Henderson, 9 Yerg. (Tenn.) 310.

Where the evidence shows that a person was only placed in possession of land to prevent the trespasses of others, his possession is the possession of the landlord, who may maintain his action of *quare clausum fregit*, notwithstanding such an agent may be allowed to cultivate a part of the land for himself. Davis *v.* Clancy, 3 McCord (S. C.) 422.

Where the evidence showed that a tenant had possession pending an appeal from a judgment against him in an action of forcible detainer, such possession was lawful and sufficient to enable him to maintain an action of trespass for disturbing him in the peaceable enjoyment of the demised premises. Tobin *v.* French, 93 Ill. App. 18.

Possession of land under claim and color of title by the plaintiff is sufficient proof of title to enable him to recover the penalty imposed by the Mississippi statutes (§§ 4411-4415) for cutting trees thereon; but possession alone is not. Dejarnett *v.* Haynes, 23 Miss. 600; Ware *v.* Collins, 35 Miss. 223, 72 Am. Dec. 122; McCleary *v.* Anthony, 54 Miss. 708.

In the case of a tenant seeking to recover for crops injured or de-

plaintiff himself.[30] And even though the trespasser himself may have the better title to the premises, proof of peaceable possession is sufficient to maintain trespass for an injury done to the possession.[31]

Where Plaintiff Alleges Both Ownership and Possession on the day of the trespass, proof of possession, without proof of title in plaintiff, either by deed or adverse possession, is sufficient to sustain the action, in the absence of any title in the defendant.[32]

Personal Property. — And this rule recognizing possession as *prima facie* evidence of ownership and sufficient to maintain trespass as against a tortfeasor applies also in the case of personal property.[33]

(2.) Nature of Possession. — (A.) POSSESSION WITHOUT TITLE. — But where the plaintiff in trespass relies upon possession as proof of title, and does not rely upon strict legal title, the general rule is that the evidence must show that the possession was an actual[34] *bona*

stroyed, it is not material that within the range of possibilities he may be holden to his landlord or some third person for an interest in such crops. Blunck *v.* Chicago & N. W. R. Co. (Iowa), 115 N. W. 1013.

30. Cardoza *v.* Calkins, 117 Cal. 106, 48 Pac. 1010; Moore *v.* Moore, 21 Me. 350; Sweetland *v.* Stetson, 115 Mass. 49; Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; Stratton *v.* Lyons, 53 Vt. 641; Spurlock *v.* Port Townsend So. R. Co., 13 Wash. 29, 42 Pac. 520; Miller *v.* Decker, 40 Barb. (N. Y.) 228; Omensetter *v.* Kemper, 6 Pa. Super. 309.

31. Larue *v.* Russell, 26 Ind. 386.

32. Merwin *v.* Backer, 80 Conn. 338, 68 Atl. 373.

33. *Alabama.* — Miller *v.* Clay, 57 Ala. 162.

Arkansas. — Warner *v.* Capps, 37 Ark. 32.

Illinois. — Gilson *v.* Wood, 20 Ill. 37; Cannon *v.* Kinney, 4 Ill. 9.

Minnesota. — Laing *v.* Nelson, 41 Minn. 521, 43 N. W. 476.

New York. — Kissam *v.* Roberts, 6 Bosw. (N. Y. Super.) 154; Hanmer *v.* Wilsey, 17 Wend. 91; Aikin *v.* Buck, 1 Wend. 466, 19 Am. Dec. 535; Hoyt *v.* Gelston, 13 Johns. 141, *affirmed*, 13 Johns. 561; Ely *v.* Ehle, N. Y. 506; Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360.

Pennsylvania. — Entriken *v.* Brown, 32 Pa. St. 364.

South Carolina. — Hillhouse *v.* Jennings, 60 S. C. 392, 38 S. E. 596; Champion *v.* Smith, 1 Brev. 243; Skinner *v.* M'Dowell, 2 Nott & McC. 68.

Vermont. — Taylor *v.* Hayes, 63 Vt. 475, 21 Atl. 610.

West Virginia. — Wustland *v.* Potterfield, 9 W. Va. 438.

34. *Colorado.* — Patrick *v.* Brown, 36 Colo. 298, 85 Pac. 325; Sullivan *v.* Clements, 1 Colo. 261.

Delaware. — Pennington *v.* Lewis, 4 Penne. 447, 56 Atl. 378.

Illinois. — Gauche *v.* Mayer, 27 Ill. 134; Webb *v.* Sturtevant, 2 Ill. 181.

Kentucky. — Walton *v.* Clarke, 4 Bibb 218; Meehan *v.* Edwards, 92 Ky. 574, 18 S. W. 519.

Michigan. — Hayward *v.* School Dist. No. 9, 139 Mich. 539, 102 N. W. 999.

Minnesota. — Olson *v.* Minnesota, etc. R. Co., 89 Minn. 280, 94 N. W. 871.

North Carolina. — Gordner *v.* Blades Lumb. Co., 144 N. C. 110, 56 S. E. 695.

Proof that premises were used as a wood lot, for the purpose of fuel and fencing, is sufficient evidence of actual possession to sustain an action for trespass. Machin *v.* Geortner, 14 Wend. (N. Y.) 239.

To maintain trespass *quare clausum fregit*, actual possession must be shown. A mere legal or constructive possession is not sufficient. McClain *v.* Todd's Heirs, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37; Quillen *v.* Betts, 1 Penne. (Del.) 53, 39 Atl.

fide possession, either in person or through an agent or servant.[35]

Personal Property. — And this is also the rule where the subject of the trespass is personal property.[36]

(B.) Constructive Possession. — Where, however, the plaintiff does not rely on possession alone as proof of title, but makes proof of legal title, proof of actual physical possession or occupancy need not be made;[37] the rule being that simple proof of title to the *locus in quo* draws with it a constructive possession sufficient to main-

595; Johnson *v.* M'Ilwain, Rice Eq. (S. C.) 368.

But this rule has been changed in many states by statutes allowing the holder of the legal title to maintain the action. Ault *v.* Meager, 112 Ga. 148, 37 S. E. 185.

Actual occupancy of a tract or parcel of land is necessary to enable a plaintiff without title to recover against a trespasser; actual occupancy for the statutory period is necessary to vest title; mere claim of ownership, with frequent cutting and removing of timber from a tract of land, does not constitute actual occupancy or possession, within the meaning of the law. Ohio & B. S. R. Co. *v.* Wooten, 20 Ky. L. Rep. 383, 46 S. W. 681.

35. Uttendorffer *v.* Saegers, 50 Cal. 496; Bryce *v.* State, 113 Ga. 705, 39 S. E. 282; Field *v.* Lang, 89 Me. 454, 36 Atl. 984; Lamb *v.* Swain, 48 N. C. (3 Jones' L.) 370.

36. Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Putnam *v.* Wiley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346; Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52; Vanderslice *v.* Donner, 26 Pa. Super. 319.

37. *Arkansas.* — Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391.

Connecticut. — Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855.

Illinois. — Gauche *v.* Mayer, 27 Ill. 134.

Kentucky. — Taylor & Crate *v.* Burt & B. Lumb. Co., 33 Ky. L. Rep. 191, 109 S. W. 348; Goff *v.* Lowe, 25 Ky. L. Rep. 2176, 80 S. W. 219.

Louisiana. — Union Sawmill Co. *v.* Starnes, 121 La. 554, 46 So. 649.

Maryland. — Tasker *v.* Ridgeley, 4 Har. & M. 497.

Pennsylvania. — Trexler *v.* Africa, 33 Pa. Super. 395.

Rhode Island. — Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288.

South Carolina. — Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515; Brandon *v.* Grimke, 1 Nott & McC. 356; Davis *v.* Clancy, 3 McCord 422; Vance *v.* Beatty, 4 Rich. L. 104.

West Virginia. — Snider *v.* Myers, 3 W. Va. 195.

If the land in question is wild and unimproved, possession will be presumed to accompany title, and this constructive possession will support an action. Tustin *v.* Sammons, 23 Pa. Super. 175. See also Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288; McGraw *v.* Bookman, 3 Hill (S. C.) 265. But if the land is improved, that fact shows that it is in the actual possession of some one. In such case the plaintiff cannot rest on his title but must show his possession. Tustin *v.* Sammons, 23 Pa. Super. 175.

In Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800, which was an action for a continuing trespass in maintaining a wall, it appeared in evidence that the plaintiff had the title and the defendant the possession. *Held*, that by entering the premises and tearing down the wall, the plaintiff acquired the necessary possession so as to enable him to maintain the action.

In Darrill *v.* Dodds, 78 Miss. 912, 30 So. 4, which was an action to recover a statutory penalty for cutting trees, the court said: "The plaintiff showed no title in herself, because she showed none in the state, under whom she derivatively claims. Her conveyances would constitute color of title which would ripen, by a ten years' actual possession of the lands, into a title, and, with evidence of possession thereunder, would support this action, but of themselves they imported nothing.

tain trespass, at least in the absence of proof of an adverse possession.[38]

Proof of actual possession is not necessary; on the contrary, proof of constructive possession has been held sufficient as against a third person.[39] And in such case the fact that the boundary line of the land has for a long time been in dispute is immaterial, there not being shown any actual adverse possession or any other constructive possession.[40]

(3.) Legality of Possession. — Proof of possession, although not legally, has been held sufficient to maintain trespass, except of course as against the real owner.[41]

(4.) Time of Possession. — The evidence must show the possession to have been at the time of the alleged trespass.[42]

2. The Trespass. — A. Presumptions and Burden of Proof. In an action of trespass, whether the subject of the trespass is real or personal property, the burden of proof is upon the plaintiff to establish the acts relied upon as constituting the trespass.[43]

Nor did the payment of taxes or the mere claim of ownership amount to possession. There was no possession of the land shown in the plaintiff, and, without possession, her suit is not sustainable. Actual possession is sufficient evidence of title to support trespass, and, of course, title will support the action. But, where there is neither title nor actual possession, the plaintiff must not only show color and claim of title, but also possession thereunder."

Plaintiff's ownership of the timber in an action for cutting and removing standing timber is not established by proof that he and the defendant's grantor had asserted independent and conflicting titles to the same land and that a compromise was effected whereby the plaintiff conveyed to the defendant's grantor the land, reserving to himself the timber thereon. Moore *v.* Vickers, 126 Ga. 42, 54 S. E. 814.

38. Smith *v.* Yell, 8 Ark. 470; Broker *v.* Scobey, 56 Ind. 588; M'Graw *v.* Bookman, 3 Hill (S. C.) 265; Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558; Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637; Hart *v.* Adams, 86 Mo. App. 73.

39. As where the evidence shows that a grantee has color of title and it appears that subsequent acts of ownership by his grantor were done by the authority of the grantee. Capen's Admr. *v.* Sheldon, 78 Vt. 39, 61 Atl. 864.

40. Capen's Admr. *v.* Sheldon, 78 Vt. 39, 61 Atl. 864.

41. Evertson *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; Miller *v.* Decker, 40 Barb. (N. Y.) 228; Crimer *v.* Pike, 2 Head (Tenn.) 398; City of Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242.

42. *Alabama.* — Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

Connecticut. — Imlay *v.* Sage, 5 Conn. 489.

Illinois. — Faith *v.* Yocum, 51 Ill. App. 620.

Massachusetts. — Greve *v.* Wood-Harmon Co., 173 Mass. 45, 52 N. E. 1070.

Missouri. — Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877.

New York. — Wood *v.* Lafayette, 68 N. Y. 181.

North Carolina. — Presnell *v.* Ramsour, 30 N. C. (8 Ired. L.) 505.

Pennsylvania. — Collins *v.* Beatty, 148 Pa. St. 65, 23 Atl. 982.

Vermont. — Kidder *v.* Kennedy, 43 Vt. 717.

43. *Delaware.* — Covington *v.* Simpson, 3 Penne. 269, 52 Atl. 349.

Illinois. — Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; Mead *v.* Pollock, 99 Ill. App. 151; Hudson *v.* Miller, 97 Ill. App. 74.

Kentucky. — Walden *v.* Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep.

B. Mode of Proof. — The general rules of evidence as to competency, relevancy, materiality, etc., apply of course as to evidence sought to be adduced for the purpose of proving the trespass.[44]

Acts Subsequent to Action Begun. — As to whether or not evidence of acts committed subsequent to the beginning of the action is admissible, the courts do not agree.[45]

But Evidence of Any Trespass Committed Before the Commencement of the action may be received.[46]

C. Nature and Sufficiency of Proof. — a. *In General.* — The general rule is that every man's land is, in the eye of the law, in-

204; Jennings *v.* Maddox, 8 B. Mon. 430; France *v.* Four-Mile L. & C. Co., 17 Ky. L. Rep. 665, 32 S. W. 283.

Michigan. — Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609.

New York. — See Rightmire *v.* Shepard, 59 Hun 620, 12 N. Y. Supp. 800.

North Carolina. — Berry *v.* Ritter Lumb. Co., 141 N. C. 386, 54 S. E. 278.

Vermont. — Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788.

44. See Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112.

Where the trespass was by an agent, his declarations accompanying and explaining the act are admissible against the principal. Brickel *v.* Camp Mfg. Co., 147 N. C. 118, 60 S. E. 905. So acts performed by the authority of the principal, though in his absence, may be shown. McAllin *v.* McAllin, 77 Conn. 398, 59 Atl. 413.

In Haines *v.* Haines, 104 Md. 208, 64 Atl. 1044, an action of trespass for enlarging a race across the plaintiff's premises beyond the condition of its existence for twenty years prior thereto, it was held proper to admit evidence taken on cross-examination of the defendant and his son as to the different uses to which they had put the water flowing through the race and as to the manner in which they cleaned the race; such evidence reflecting on the character of the alleged trespass.

Where action was brought for taking ore from another's mine, evidence showing that after the commencement of the suit an unknown person took out ore, was held not competent to prove that defendant's trespass was wilful. Durant Min. Co. *v.* Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252.

In an action of trespass for personal injuries, evidence of injury to property is inadmissible except to the extent that it may be necessary to explain the assault on the person. Reeder *v.* Purdy, 41 Ill. 279.

It is competent in an action of trespass for damages to realty to show that defendant had defended an action of trespass by plaintiff against one who claimed to be defendant's tenant on such land, and acted under his authority. Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588.

When a lessor has put a party in possession of land, and the occupant relies entirely on his landlord's right to such property as his defense to an action of trespass, a judgment to determine the interest of the lessor therein is binding and conclusive upon the tenant, and competent evidence in a suit against the latter. Blew *v.* Ritz, 82 Minn. 530, 85 N. W. 548.

In trespass *quare clausum fregit*, insulting words used by the defendant to the plaintiff's wife, at the time of the trespass complained of, are admissible in evidence to show the character of the transaction. Golding *v.* Williams, Dudley (S. C.) 92.

45. **Held Admissible.** — See Keane *v.* Old Colony R. Co., 161 Mass. 203, 36 N. E. 788; Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164.

Not Admissible. — See Chappell *v.* State, 86 Ala. 54, 5 So. 419.

46. Knapp *v.* Slocomb, 9 Gray (Mass.) 73.

closed and set apart from another's either by visible and material fences, or by an ideal, invisible boundary; and in either case, proof of any entry or breach carries with it some damages for which compensation can be obtained by action.[47] But there must be proof that the right of possession was in some way invaded or violated; otherwise the action will fail.[48]

Trespasser by Relation. — And to constitute one a trespasser by relation, it is necessary that the evidence should show that he subsequently assented to the trespass and that it was committed for his use and benefit.[49]

b. *Extent of Damage, Etc.* — To constitute trespass to land, neither the extent of the damage nor the form of the instrumentality by which the close is broken is material, and hence need not be shown.[50]

47. *Georgia.* — Postal Tel. Co. *v.* Kuhnen, 127 Ga. 20, 55 S. E. 967; Baker *v.* Davis, 127 Ga. 649, 57 S. E. 62.

Illinois. — Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112; Wahl *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860.

Iowa. — Bever *v.* Swecker, 116 N. W. 704; Watson *v.* Dilts, 124 Iowa 344, 100 N. W. 50.

Massachusetts. — Kennedy *v.* Hoyt, 197 Mass. 361, 83 N. E. 862; O'Brien *v.* Murphy, 189 Mass. 353, 75 N. E. 700.

New York. — Lane *v.* Lamke, 53 App. Div. 395, 65 N. Y. Supp. 1090; Wood *v.* Snider, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912.

Rhode Island. — Charron *v.* Thivierge, 67 Atl. 585.

South Carolina. — Burnett *v.* Postal Tel. C. Co., 79 S. C. 462, 60 S. E. 1116.

Texas. — Hooper *v.* Smith (Tex. Civ. App.), 53 S. W. 65.

In Bollinger *v.* McMinn (Tex. Civ. App.), 104 S. W. 1079, it appeared that the plaintiff had by mistake built a house on the boundary line of the adjoining owner and remained through a tenant in peaceable possession for several years, and it was held that an entry by the adjoining owner upon the land and cutting the house in two and removing it was an actionable trespass.

Where a boundary line is in dispute and one party cuts timber up to the line claimed by him, he cannot assert that a trespass thereby committed was casual or involuntary. Heybook *v.* Index Lumb. Co. (Wash.), 95 Pac. 324.

48. Bever *v.* Swecker (Iowa), 116 N. W. 704.

49. If the evidence shows that defendant was not present when a trespass was committed, and that it was not committed for his benefit, by one in his employment, or otherwise for his use, he is not liable as a trespasser *ab initio*, because he afterwards, even with the knowledge that it was tortiously taken by another, receives the possession of the property of the plaintiff. Justice *v.* Mendell, 14 B. Mon. (Ky.) 12. And see Harper *v.* Baker, 3 T. B. Mon. (Ky.) 421, 16 Am. Dec. 112.

50. Whittaker *v.* Stangvick, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N. S.) 921. The court said: "With respect to damage as an essential the common law recognizes two kinds of actions. In the first class there is a direct invasion of another's person or property without permission, which is actionable *per se*, or which gives rise to a presumption of at least some damage, without proof of any actual damage. Unpermitted contact with the person constitutes assault and battery. Unpermitted invasion of premises constitutes a trespass *quare clausum fregit*. In the second class, actions on the case, in which damages are indirect and consequential, there can be no recovery unless the plaintiff shows as an essential part of his case, that damages, pecuniary in

c. *Force.* — So, too, ordinarily, force is not regarded as an element of the trespass necessary to be shown.[51]

d. *Motive, Intent, Etc.* — Again, in so far at least as regards the plaintiff's case, the intent or motive with which the acts constituting the alleged trespass were done is not a material element, and need not be established,[52] unless expressly so made by statute,[53]

kind, proximate in sequence, and substantial in extent have resulted. In trespass *quare clausum fregit*, it is immaterial whether the quantum of harm suffered be great, little or unappreciable."

Where the evidence shows direct and immediate force employed by one person against another without permission, with malice, an action of trespass will lie and it is immaterial that the injury produced is slight; but the rule is otherwise where force is used with permission. Cadwell *v.* Farrell, 28 Ill. 438.

51. *United States.* — Guttner *v.* Pacific Steam W. Co., 96 Fed. 617.

Arkansas. — Hardy *v.* Clendening, 25 Ark. 436.

Georgia. — Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

Illinois. — Chicago Title & Tr. Co. *v.* Core, 223 Ill. 58, 79 N. E. 108; Donovan *v.* Consolidated Coal Co., 88 Ill. App. 589.

Kentucky. — Tyson *v.* Ewing, 3 J. J. Marsh. 186.

Maine. — Hatch *v.* Donnell, 74 Me. 163.

Massachusetts. — Brown *v.* Perkins, 1 Allen 89.

New Hampshire. — Morse *v.* Hurd, 17 N. H. 246.

New York. — Allen v. Crary, 10 Wend. 349, 25 Am. Dec. 566.

Pennsylvania. — Welsh *v.* Bell, 32 Pa. St. 12.

A peaceful entry is not one merely unaccompanied with actual violence or breach of the peace; but every entry upon the soil of another, in the absence of a lawful authority, is a trespass, and it matters not that there is no evidence of actual force, for the law in such case implies force. Norvell *v.* Gray's Lessee, 1 Swan (Tenn.) 96.

Where it is not pretended that an entry was made with plaintiff's consent, and the evidence showed that one of defendant's employes, acting under defendant's orders, first demanded of plaintiff's employes possession of the premises, which was refused, and afterwards returned with other employes of defendant and renewed the demand, whereupon they surrendered the premises under compulsion, as one of them testified, and because they thought it would not be proper to remain, such evidence tended to prove a forcible entry. Robertson *v.* Mineral Land Co., 70 Mo. App. 262.

52. *Alabama.* — Allison *v.* Little, 85 Ala. 512, 5 So. 221.

California. — Maye *v.* Yappen, 23 Cal. 306.

Delaware. — Quillen *v.* Betts, 1 Penne. 53, 39 Atl. 595.

Illinois. — Watkins *v.* Gale, 13 Ill. 152; Kirton *v.* North Chicago St. R. Co., 91 Ill. App. 554.

Indiana. — Schuer *v.* Veeder, 7 Blackf. 342.

Mississippi. — Keirn *v.* Warfield, 60 Miss. 799.

New Hampshire. — Cate *v.* Cate, 44 N. H. 211.

New Jersey. — Bruch *v.* Carter, 32 N. J. L. 554.

New York. — Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234.

Tennessee. — Luttrell *v.* Hazen, 3 Sneed 20.

Vermont. — Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96.

In Hull *v.* Harker, 130 Iowa 190, 106 N. W. 629, the evidence showed that the defendants had, without authority, gone onto the plaintiff's land and cleaned out a ditch which already existed, there being nothing however to show an intention to continue such trespass; and it was held that plaintiff was not entitled to any judgment for damages.

53. In an action for the penalty imposed by statute for cutting, destroying, removing, etc., timber or trees without the owner's consent, the plaintiff must show a wilful or

or unless plaintiff himself has by his pleadings raised such an issue.[54]

e. *Negligence.* — Neither wilfulness nor negligence are necessary to be established in order to make trespass on real estate a tort; and where the owner brings action therefor, alleging merely that it was done wilfully and oppressively, and the proof fails to sustain this allegation, he is nevertheless entitled to recover actual damages on proof of the unintentional trespass.[55]

f. *Wrongful Acts Done After Rightful Entry.* — Evidence that after a rightful entry by the plaintiff on the plaintiff's premises, he committed acts resulting in injury to the premises, is not sufficient to make him a trespasser *ab initio*, so as to entitle the plaintiff to maintain trespass *quare clausum*.[56] This rule, however, does not apply in the case of an officer who, while ostensibly performing a duty devolving upon him, exceeds his authority.[57]

II. DEFENSES.

1. In General. — Various matters are regarded by law as sufficient to justify or excuse the acts constituting the alleged trespass, and accordingly evidence thereof may be introduced in defense of the action;[58] but of course in order that such evidence may be

malicious trespass, or neglect to take proper care and caution to avoid the trespass. Perkins *v.* Hackleman, 26 Miss. 41, 59 Am. Dec. 243; Mhoon *v.* Greenfield, 52 Miss. 434; McCleary *v.* Anthony, 54 Miss 708; Keirn *v.* Warfield, 60 Miss 799; Cumberland Tel. & T. Co. *v.* Martin (Miss.), 46 So. 247. See also Rector *v.* Shippey (Miss.), 46 So. 408; Therrell *v.* Ellis, 83 Miss. 494, 35 So. 826; David *v.* Correll, 74 Ill. App. 47, *reversing* on other grounds, *s. c.*, 68 Ill. App. 123.

54. The evidence is insufficient to sustain an action for malicious trespass where there is no showing of malice or wilfulness. Cookman *v.* Nill, 81 Mo. App. 297.

55. Baldwin *v.* Postal Tel. C. Co., 78 S. C. 419, 59 S. E. 67; Betz *v.* Kansas City H. T. Co., 121 Mo. App. 473, 97 S. W. 207.

But in Enid & A. R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96, a railroad company under color or pretense of proceedings to condemn land for public use entered the lands and constructed embankments, excavated ditches and tore up and removed the soil during the pendency of such proceedings. It was held that the right given by the statutes was a license which became lost and revoked by subsequent dismissal of the proceedings and abandonment of the claim for a right of way, and that thereupon the railroad company became a tresspasser *ab initio*.

56. Beers *v.* McGinnis, 191 Mass. 279, 77 N. E. 768; Pike *v.* Heinzemann, 89 Ill. App. 642; Adams *v.* Rivers, 11 Barb. (N. Y.) 390.

57. Walsh *v.* Brown, 194 Mass. 317, 80 N. E. 465.

58. Hudson *v.* Miller, 97 Ill. App. 74; Carpenter *v.* Logee, 24 R. I. 383, 53 Atl. 288; Shibley *v.* Gendron, 25 R. I. 519, 57 Atl. 304; Wilbur *v.* Peckham, 22 R. I. 284, 47 Atl. 597.

In an action for treble damages for trespass in carrying away grain, it is competent to show where the lines of plaintiff's farm are situated, for the purpose of showing that he is not the party injured. Newlin *v.* Rogers, 6 Kan. App. 910, 51 Pac. 315.

Records, Plates and Papers bearing upon the question of possession are admissible, under an issue on a plea of *liberum tenementum*. Wilsons *v.* Bibb, 1 Dana (Ky.) 7, 25 Am. Dec. 118.

received, the matters relied upon must be in law sufficient to excuse or justify the trespass.[59]

2. Absence of Wrongful Intent, Good Faith, Etc. — That the defendant committed the acts in question in good faith and with the honest belief that he had a right to do so, will not excuse the trespass, and hence evidence to that effect cannot be introduced in defense of the action.[60] On the question of punitive or exemplary damages, however, such evidence is regarded as proper.[61] And such evidence may also be received for the purpose of defeating the right to statutory penalty.[62] But it cannot be received to mitigate actual damages.[63]

3. Mistake, Accident, Etc. — Nor can evidence of mere mistake be adduced in defense of an action of trespass.[64] But it seems

59. See Kunkel *v.* Utah Lumb. Co., 29 Utah 13, 81 Pac. 897; Wheeler *v.* Norton, 84 N. Y. Supp. 524; Toledo, etc. R. Co. *v.* Loop, 139 Ind. 542, 39 N. E. 306.

Evidence is not admissible as a defense showing that the defendants were in pursuit of wolves or other animals *ferae naturae*, and dangerous to mankind, for the purpose of destroying them. Glenn *v.* Kays, 1 Ill. App. 479.

A Custom cannot be shown to justify an unlawful act constituting a trespass. Evans *v.* Hesler, 1 Bibb (Ky.) 561.

60. *Alabama.* — Allison *v.* Little, 85 Ala. 512, 5 So. 221.

Illinois. — Farwell *v.* Warren, 51 Ill. 467; Jasper *v.* Purnell, 67 Ill. 358.

Indiana. — Richwine *v.* Presbyterian Church, 135 Ind. 80, 34 N. E. 737.

Kentucky. — Johnson *v.* Park, 13 Ky. L. Rep. 437, 17 S. W. 273.

Massachusetts. — Fitzgerald *v.* Lewis, 164 Mass. 495, 41 N. E. 687.

Michigan. — Cubit *v.* O'Dett, 51 Mich. 347, 16 N. W. 679.

Mississippi. — Keirn v. Warfield, 60 Miss. 799.

Missouri. — Pitt *v.* Daniel, 82 Mo. App. 168.

New Jersey. — Bruch v. Carter, 32 N. J. L. 554.

New York. — Snow *v.* Pulitzer, 142 N. Y. 263, 36 N. E. 1059.

South Carolina. — Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

Tennessee. — Kirkwood v. Miller, 5 Sneed 455, 73 Am. Dec. 134; Luttrell *v.* Hazen, 3 Sneed 20.

Wisconsin. — Hazelton v. Week, 49 Wis. 661, 6 N. W. 309, 35 Am. Rep. 796.

61. *United States.* — United States *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; United States *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

Illinois. — Farwell *v.* Warren, 51 Ill. 467; Roth *v.* Smith, 41 Ill. 314.

Kentucky. — Columbia Land & M. Co. *v.* Tinsley, 22 Ky. L. Rep. 1082, 60 S. W. 10.

Maine. — Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525.

Missouri. — Pitt *v.* Daniel, 82 Mo. App. 168.

Texas. — Jackel *v.* Reiman, 78 Tex. 588, 14 S. W. 1001.

Wisconsin. — Scheer *v.* Kriesel, 109 Wis. 125, 85 N. W. 138.

62. Glenn *v.* Adams, 129 Ala. 189, 29 So. 836; Roth *v.* Smith, 41 Ill. 314; Wagstaff *v.* Schippel, 27 Kan. 450; Batchelder *v.* Kelly, 10 N. H. 436, 34 Am. Dec. 174; Allsup *v.* State (Tex. Crim.), 62 S. W. 1062.

In an action of trespass under the statute for treble damages, evidence tending to show that the alleged trespass was committed under belief of right is admissible not to defeat a recovery, but for the consideration of the court on the trebling of damages. Pitt *v.* Daniel, 82 Mo. App. 168.

63. Maye *v.* Yappen, 23 Cal. 306. See also Bruch *v.* Carter, 32 N. J. L. 554. And see *infra*, this article, "Damages."

64. Jeffries *v.* Hargis, 50 Ark. 65,

that evidence that the injuries were caused by unavoidable accident may be so received.[65]

4. Contributory Negligence. — Evidence of contributory negligence on the part of the plaintiff cannot be received in defense of the action unless it is further shown that it, together with defendant's conduct, directly caused the injury.[66]

5. Illegal Use of Premises by Plaintiff. — That the plaintiff was at the time making an illegal use of the premises cannot be shown in defense of the trespass.[67]

6. Recovery or Return of Property. — Mere recovery or return of the property in controversy cannot be shown for the purpose of defeating recovery,[68] although it may be available to mitigate the damages.[69]

7. Necessity. — The fact that the committing of the act relied upon as the trespass was necessary may be shown in defense of the action.[70]

8. Exercising Authority or Duty. — Recovery of damages for what would otherwise be a trespass may sometimes be defeated by

6 S. W. 328; Maye *v.* Yappen, 23 Cal. 306; Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560; Hobart *v.* Hagget, 12 Me. 67, 28 Am. Dec. 159. But see Keirn *v.* Warfield, 60 Miss. 799.

65. Brown *v.* Kendall, 6 Cush. (Mass.) 292; Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145. But see Quillen *v.* Betts, 1 Penne. (Del.) 53, 39 Atl. 595.

To excuse a trespass on the ground of accident, it must appear from the evidence that the trespass occurred without the least fault on the part of the defendant. Jennings *v.* Fundeburg, 4 McCord (S. C.) 161.

Defendant in an action to recover the penalty imposed by the statute for cutting trees without the owner's consent, may defeat a recovery by showing that the cutting was done through accident, inadvertence, or mistake, and that reasonable care was taken to avoid the same. And the burden of proving this is upon the defendant. Keirn *v.* Warfield, 60 Miss. 799. See also Cumberland Tel. & T. Co. *v.* Martin (Miss.), 46 So. 247; Rector *v.* Shippey (Miss.), 46 So. 408.

66. Cool *v.* Crommet, 13 Me. 250; Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546. See also Emmons *v.* Quade, 176 Mo. 22, 75 S. W. 103; Henley *v.* Wilson, 81 N. C. 405.

67. Earp *v.* Lee, 71 Ill. 193; Fetter *v.* Wilt, 46 Pa. St. 457.

In trespass to recover damages for entering a dwelling house and carrying away goods, evidence is not admissible in defense, that the plaintiff kept a bawdy house. Love *v.* Moynehan, 16 Ill. 277, 63 Am. Dec. 306.

68. Walker *v.* Fuller, 29 Ark. 448; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91; Ford *v.* Williams, 24 N. Y. 359.

69. Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

Compare Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788, *holding* that defendant, in an action of trespass *de bonis asportatis* where the plaintiff claims on the trial that the goods were carelessly and negligently removed and thereby greatly damaged, cannot move the court for an order to return the goods in mitigation of damages for their taking to a nominal sum.

70. American Print Wks. *v.* Lawrence, 21 N. J. L. 248; Gulf, C. & S. F. R. Co. *v.* Clark, 101 Fed. 678, 41 C. C. A. 597; Cool *v.* Crommet, 13 Me. 250; Buck *v.* Weeks, 194 Pa. St. 522, 45 Atl. 325. *Compare* Ellis *v.* Blue Mountain Forest Assn., 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570.

showing authority of law therefor.[71] Otherwise, however, where it appears that although in the first instance defendant acted under an authority vested in him by law, he afterwards abused it.[72]

9. Acting Under Process or Protection. — Again, it may be shown in defense of an action of trespass that the defendant was acting under a process regularly issued by a court of competent jurisdiction.[73] And it is sufficient for this purpose if the writ or process is regular on its face, although there may have been an irregularity in issuing it;[74] but the process must be regular on its face.[75]

Void Process. — But acting under a void process does not come within this rule.[76]

10. Advice of Counsel. — That the defendant was acting under advice of counsel cannot be shown for the purpose of defeating the action.[77]

11. Defense of Property. — An act which would otherwise be a

71. Keene *v.* Chapman, 25 Me. 126; Brown *v.* Beatty, 34 Miss. 227; 69 Am. Dec. 389; Woods *v.* Nashua Mfg. Co., 4 N. H. 527; American Print Wks. *v.* Lawrence, 21 N. J. L. 248; Thompson *v.* Lyle, 3 Watts & S. (Pa.) 166, Young *v.* Gooch, 2 Leigh (Va.) 596; Mulligan *v.* Martin, 125 Mo. App. 630, 102 S. W. 59; Navin *v.* Martin (Mo. App.), 102 S. W. 61; Harriman *v.* Whitney, 196 Mass. 466, 82 N. E. 671. Walrath *v.* Barton, 11 Barb. (N. Y.) 382.

The law invests the rights of private property with some sanctity, and when they are invaded by one whose acts would constitute a trespass, unless such person can show that he was justified by legal authority to do the act, he must be regarded as a trespasser. *Prima facie* he is liable, and the burden is upon him to show, not design or intention to perform an official duty, but an authority of law for the act complained of. Linblom *v.* Ramsey, 75 Ill. 246. But where the authority is exceeded, to the extent of such excess there is an actionable trespass. Shoup *v.* Shields, 116 Ill. 488, 6 N. E. 502.

Acting Under Lawful Orders From President and secretary of the navy. See Durand *v.* Hollins, 4 Blatchf. (U. S.) 451.

Where the holder of a lien on crops knew when a warrant for the seizure of the crops was issued by the magistrate that the debt had been actually paid, he cannot rely upon the issuance of the warrant as a defense to his liability for the trespass. Barfield *v.* Coker & Co., 73 S. C. 181, 53 S. E. 170.

72. He is in such case a trespasser *ab initio*. Burton *v.* Calaway, 20 Ind. 469.

73. Eavans' Admr. *v.* Cleaver, 18 Ky. L. Rep. 715, 38 S. W. 133; Wall *v.* Farnham, 46 Me. 525; Twitchell *v.* Shaw, 10 Cush. (Mass.) 46, 57 Am. Dec. 80; Fitzgerald *v.* Elliott, 162 Pa. St. 118, 29 Atl. 346, 42 Am. St. Rep. 812.

74. Averett *v.* Thompson, 15 Ala. 678; Donahoe *v.* Shed, 8 Met. (Mass.) 326; Woods *v.* Davis, 34 N. H. 328; Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242; Yeager *v.* Carpenter, 8 Leigh (Va.) 454, 31 Am. Dec. 665.

75. Peed *v.* Barker, 61 Mo. App. 556.

76. Huddleston *v.* Spear, 8 Ark. 406; Mecartney *v.* Smith, 10 Kan. App. 580, 62 Pac. 540; Guerin *v.* Hunt, 8 Minn. 477; Bond *v.* Wilder, 16 Vt. 393.

77. See Jasper *v.* Purnell, 67 Ill. 358.

Defendant sued for a forcible seizure and carrying away of plaintiff's property cannot prevent a recovery by showing that he acted under the advice of counsel. Medairy *v.* McAllister, 97 Md. 488, 55 Atl. 461.

trespass may sometimes be justified by showing that it was done in defense or protection of the defendant's property.[78]

12. Entry To Remove Property of Defendant. — A trespass cannot be justified by showing that the entry was made by the defendant for the purpose of removing his own property.[79] But where it appears that the property was in the first instance wrongfully taken from the defendant by the plaintiff, the rule is otherwise.[80]

13. Acquiescence. — An act which would otherwise be a trespass may be justified by showing that the plaintiff acquiesced in its doing.[81] This rule does not apply, however, where it appears that the plaintiff had been deceived by a pretense of legal authority.[82]

14. Consent or License. — A. In General. — So, too, the trespass may be justified by showing that the entry was made with the consent of or under a license from the plaintiff.[83] Nor is it neces-

78. Grier *v.* Ward, 23 Ga. 145; Keating *v.* Hayden, 30 Ill. App. 433; Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127; Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864. *Compare* Toledo, etc. R. Co. *v.* Loop, 139 Ind. 542, 39 N. E. 306.

79. *Delaware.* — Chase *v.* Jefferson, 1 Houst. 257.

Indiana. — Chess *v.* Kelly, 3 Blackf. 438.

Maine. — Crocker *v.* Carson, 33 Me. 436.

New Hampshire. — Town *v.* Hazen, 51 N. H. 596.

New York. — Jackson *v.* Walsh, 14 Johns. 407; Newkirk *v.* Sabler, 9 Barb. 652.

Rhode Island. — Salisbury *v.* Green, 17 R. I. 758, 24 Atl. 787.

Wisconsin. — Hazelton *v.* Week, 49 Wis. 661, 6 N. W. 309, 35 Am. Rep. 796.

Contra, Allen *v.* Feland, 10 B. Mon. (Ky.) 306; Chambers *v.* Bedell, 2 Watts & S. (Pa.) 225, 37 Am. Dec. 508.

80. White *v.* Elwell, 48 Me. 360, 77 Am. Dec. 231; McLeod *v.* Jones, 105 Mass. 403, 7 Am. Rep. 439.

81. Cadwell *v.* Farrell, 28 Ill. 438; Ashcraft *v.* Cox, 21 Ky. L. Rep. 31, 50 S. W. 986. See also Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672. *Compare* Currie *v.* Natchez, etc. R. Co., 61 Miss. 725.

82. Bagwell *v.* Jamison, Cheves L. (S. C.) 249.

83. *Alabama.* — Ladd *v.* Shattock, 90 Ala. 134, 7 So. 764.

Georgia. — Wrightsville & T. R. Co. *v.* Holmes, 85 Ga. 668, 11 S. E. 658.

Illinois. — Blake *v.* Dow, 18 Ill. 261; Northern Tr. Co. *v.* Palmer, 171 Ill. 383, 49 N. E. 553.

Indiana. — Bennett *v.* McIntire, 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 736; Wheeler *v.* Me-shing-go-me-sia, 30 Ind. 402.

Kentucky. — Ashcraft *v.* Cox, 21 Ky. L. Rep. 31, 50 S. W. 986; Louisville & N. R. Co. *v.* Thompson, 18 B. Mon. 735.

Maine. — Dingley *v.* Buffum, 57 Me. 379; Danforth *v.* Briggs, 89 Me. 316, 36 Atl. 452; Whittier *v.* Sanborn, 38 Me. 32; Shaw *v.* Mussey, 48 Me. 247.

Massachusetts. — Lambert *v.* Robinson, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326; McLeod *v.* Jones, 105 Mass. 403, 7 Am. Rep. 439.

Michigan. — Bigelow *v.* Reynolds, 68 Mich. 344, 36 N. W. 95.

New York. — Smith *v.* Morse, 70 App. Div. 318, 75 N. Y. Supp. 126; Walter *v.* Post, 6 Duer 363.

North Carolina. — Williford *v.* Williams, 127 N. C. 60, 37 S. E. 74.

Rhode Island. — Collier *v.* Jenks, 19 R. I. 493, 34 Atl. 998.

Defendant may, by way of defense, show license from the plaintiff to do the acts complained of as a trespass; and it is not necessary that the evidence show that it was an express license; it may be an implied license, within the rule that a license to do a particular thing carries with it, by implication, the right to do those things necessary to be done in order

sary that such license shall be in writing; a parol license is sufficient.[84] But a void license,[85], or one obtained by fraud,[86] is not sufficient.

B. Authority of Third Person. — But a trespass cannot be justified by showing authority of third persons.[87]

C. Revocation or Expiration of License. — And where it appears that the license relied upon had been revoked or had expired, it is not available as a defense.[88]

15. Defects in or Failure of Plaintiff's Title. — Whether a defendant in trespass may show in defense of the action that at the time of the alleged trespass the plaintiff had no title to the *locus in quo* or property, the courts do not agree. Some of them hold that where the plaintiff is in possession of the property the

to avail the licensee of his rights under the license. Newberry *v.* Bunda, 137 Mich. 69, 100 N. W. 277.

Even if an entry upon land can be justified by a parol agreement of purchase such agreement is not a license to cut timber and is not sufficient to justify such an act. Suffern *v.* Townsend, 9 Johns. (N. Y.) 35.

A license from a tenant in common is sufficient defense to an action by another cotenant. Granger *v.* Postal Tel. Co., 70 S. C. 528, 50 S. E. 193, 106 Am. St. Rep. 750.

A license from one without authority or right to give it is no defense. Maryland Tel. & T. Co. *v.* Ruth, 106 Md. 644, 68 Atl. 358, 14 L. R. A. (N. S.) 427.

If the General Issue alone is pleaded and the license is not specially pleaded, it cannot be used in justification, but only in mitigation of damages. Hendrix *v.* Trapp, 2 Rich. L. (S. C.) 93.

A License to a Third Person with which plaintiff does not connect himself, cannot be shown. Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106.

84. Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; Sampson *v.* Burnside, 13 N. H. 264; Syron *v.* Blakeman, 22 Barb. (N. Y.) 336; French *v.* Owen, 2 Wis. 250. See also Adams *v.* Freeman, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327.

85. Chandler *v.* Edson, 9 Johns. (N. Y.) 362.

86. Voyles *v.* Postal Tel. C. Co., 78 S. C. 430, 59 S. E. 68.

Where the defendant, sued for unlawful entry and construction of a telegraph line on plaintiff's land, introduces in evidence a written permit authorizing such entry and construction, but which the plaintiff claims was induced by a false and fraudulent promise, the burden is on the plaintiff to prove such false and fraudulent promise. Mason *v.* Postal Tel. C. Co., 74 S. C. 557, 54 S. E. 763, *reaffirming s. c.*, 71 S. C. 150 50 S. E. 781.

87. Allison *v.* Little, 85 Ala. 512, 5 So. 221; Essington *v.* Neill, 21 Ill. 139; Hood *v.* Stewart, 2 La. Ann. 219; Huling *v.* Henderson, 161 Pa. St. 553, 29 Atl. 276; Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106. *Compare* Hendrix *v.* Trapp, 2 Rich. L. (S. C.) 93.

88. *Maine.* — Pease *v.* Gibson, 6 Greenl. 81; Howard *v.* Lincoln, 13 Me. 122.

Massachusetts. — Bacon *v.* Hooker, 177 Mass. 335, 58 N. E. 1078, 83 Am. St. Rep. 279.

Minnesota. — Mitchell *v.* Mitchell, 54 Minn. 301, 55 N. W. 1134.

Mississippi. — Walton *v.* Lowrey, 74 Miss. 484, 21 So. 243.

Missouri. — Green *v.* Evans, 38 Mo. App. 517.

New Hampshire. — Hoit *v.* Stratton Mills, 54 N. H. 452; Ockington *v.* Richey, 41 N. H. 275.

New York. — Bogert *v.* Haight, 20 Barb. 251.

Compare Barnes *v.* Barnes, 6 Vt. 388.

defendant may show that plaintiff has no possessory right.[89] Others holds that he cannot do so unless he shows a better right to the possession in himself or those under whom he claims.[90]

16. Title or Right of Possession of Defendant. — A defendant in an action of trespass may show by way of defense that the title and possessory right to the property were vested in himself,[91] provided, of course, that the entry was made without actual force or

89. Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484.

In an action by a vendor to recover damages for the removal of a building standing upon premises sold under executory contract, while the premises were in possession of the vendee, it is competent for the defendants to prove that the plaintiff had no title to the premises in question at the time of making the contract or at any time afterwards, and no power or means of procuring such title. Smith *v.* Babcock, 36 N. Y. 167, 93 Am. Dec. 498.

In an action of trespass defendant may show in defense that the plaintiff has no title. Walrath *v.* Barton, 11 Barb. (N. Y.) 382.

90. Stephenson *v.* Goff, 10 Rob. (La.) 99, 43 Am. Dec. 171; Bonis *v.* James, 7 Rob. (La.) 149; Hebert *v.* Lege, 29 La. Ann. 511; Wilson *v.* Hinsley, 13 Md. 64; Reed *v.* Price, 30 Mo. 442; Bigelow *v.* Lehr, 4 Watts (Pa.) 377; Toothaker *v.* Greer, 92 Me. 546, 43 Atl. 498; Louk *v.*Woods, 15 Ill. 256.

Where defendant claimed the right to cut timber under a void contract from one who afterwards deeded the land to plaintiff, he was estopped from offering evidence denying plaintiff's title. Monds *v.* Elizabeth City Lumb. Co., 131 N. C. 20, 42 S. E. 334.

In Essington *v.* Neill, 21 Ill. 139, the defendant justified as a servant of a third party, and produced in evidence a tax deed to such party and tax receipts for seven successive years, and showed that such third party's wife had built a house on the premises in question and had authorized defendant to commit the trespass. It appeared that the sale for taxes had been on a different day than that prescribed by statute. It was held that since this was so the sale was void, and that the deed derived under it could not be set up as outstanding paramount title to defeat plaintiff's recovery, even though a license was shown.

91. *California.* — Burnham *v.* Stone, 101 Cal. 164, 35 Pac. 627; Canavan *v.* Gray, 64 Cal. 5, 27 Pac. 788; Henderson *v.* Grewell, 8 Cal. 581.

Delaware. — Cann *v.* Warren, 1 Houst. 188.

Georgia. — Clower *v.* Maynard, 112 Ga. 340, 37 S. E. 370.

Illinois. — Ryan *v.* Sun Sing Chow Poy, 164 Ill. 259, 45 N. E. 497; White *v.* Naerup, 57 Ill. App. 114.

Indiana. — Culver *v.* Smart, 1 Ind. 65.

Kentucky. — Stillwell *v.* Duncan, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; Yeates *v.* Allin, 2 Dana 134.

Maine. — Paine *v.* Marr, 35 Me. 181; Freeman *v.* Thayer, 29 Me. 369.

Maryland. — Burgess, etc. of New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. 596.

Massachusetts. — Langdon *v.* Potter, 3 Mass. 215; Lackey *v.* Holbrook, 11 Met. 458.

Minnesota. — Sharon *v.* Wooldrick, 18 Minn. 354.

Missouri. — Cox *v.* Barker, 81 Mo. App. 181; Barbarick *v.* Anderson, 45 Mo. App. 270.

New Hampshire. — Drown *v.* Foss, 39 N. H. 525.

New Jersey. — Wilson *v.* Clark, 4 N. J. L. 379.

North Carolina. — Walton *v.* File, 18 N. C. (1 Dev. & B.) 567.

South Carolina. — Champion *v.* Smith, 1 Brev. 243; Muldrow *v.* Jones, Rice 64.

Texas. — Baker *v.* Cornelius, 6 Tex. Civ. App. 27, 24 S. W. 949.

Vermont. — McGrady *v.* Miller, 14 Vt. 128.

Fraud. — Where plaintiff claims ownership under a deed from the defendant's grantee, it may be shown

committing a breach of the peace.[92] But defendant cannot show a title acquired subsequent to the trespass.[93] Nor is an equitable title available as such defense as against plaintiff's legal title.[94]

17. Title or Right of Possession of Third Person. — In trespass *quare clausum,* the defendant cannot justify by showing title in a third person unless he also connects himself therewith or shows that he was acting under authority from such third person.[95] So, too, in trespass *de bonis asportatis,* defendant cannot justify by

in defense that the conveyance executed by defendant was procured by fraud, unless it appears that plaintiff was a bona fide purchaser. Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. 331. So, where a defense of adverse possession under color of title is interposed, plaintiff may show that defendant's title was procured by fraud. White *v.* Farris, 124 Ala. 461, 27 So. 259.

In an action of trespass *quare clausum fregit* defendant may show title to the land or an entry under a license. Turner *v.* Poston, 63 S. C. 244, 41 S. E. 296.

Where the defendant claims as a defense title to a right of way by prescription he must establish by a preponderance of the evidence that he and those under whom he claims used the way continuously and adversely to plaintiff under a claim of right for at least twenty years next before the alleged trespass. Pennington *v.* Lewis, 4 Penne. (Del.) 447, 56 Atl. 378.

In Town of Newcastle *v.* Haywood, 68 N. H. 179, 44 Atl. 132, which was an action for breaking and entering plaintiff's close, it was held that the mere production by defendant of a recorded deed with no evidence of possession was insufficient to establish a *prima facie* title, and thus constitute a defense to plaintiff's action.

In an action for damages by one who has been dispossessed of land held by him without right, the defendant may show title in himself as evidence that the plaintiff has not been injured. Vinson *v.* Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415.

92. Bliss *v.* Bange, 6 Conn. 78; Illinois & St. L. R. & C. Co. v. Cobb, 68 Ill. 53. *Compare* Johnson *v.* Hannahan, 1 Strobh. L. (S. C.) 313.

93. Moore *v.* Crose, 43 Ind. 30; Davis *v.* Elmore, 40 S. C. 533, 19 S. E. 204.

94. Anderson *v.* Darby, 1 Nott & McC. (S. C.) 369; Watt *v.* Rogers, 2 Abb. Prac. (N. Y.) 261.

95. *Alabama.* — Finch's Exrs. *v.* Alston, 2 Stew. & P. 83, 23 Am. Dec. 299.

California. — Weimer *v.* Lowery, 11 Cal. 104.

Georgia. — Ford *v.* Rountree, 3 Ga. App. 80, 59 S. E. 325.

Illinois. — Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837; Illinois & St. L. R. Co. *v.* Cobb, 94 Ill. 55.

Indiana. — State *v.* Burns, 123 Ind. 427, 24 N. E. 154.

Kentucky. — Jones *v.* Patterson, 23 Ky. L. Rep. 1838, 66 S. W. 377.

Maine. — Dunlap *v.* Glidden, 31 Me. 510; Danforth *v.* Briggs, 89 Me. 316, 36 Atl. 452. See also Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55.

New Jersey. — Todd *v.* Jackson, 26 N. J. L. 525.

New York. — Aikin *v.* Buck, 1 Wend. 466, 19 Am. Dec. 535; Smith *v.* Bingham, 55 Hun 612, 9 N. Y. Supp. 97; Kissam *v.* Roberts, 6 Bosw. (N. Y. Super.) 154.

Texas. — Beaumont Lumb. Co. *v.* Ballard (Tex. Civ. App.), 23 S. W. 920.

It is no defense in an action of trespass *de bonis asportatis* to show property out of the plaintiff in a stranger. Hammer *v.* Wilsey, 17 Wend. (N. Y.) 91.

But in Miller *v.* Decker, 40 Barb. (N. Y.) 228, it was held that evidence was admissible showing that another person was in possession for the purpose of rebutting and contradicting the evidence given by the plaintiff of constructive possession in

proof that the goods belonged to a third person without showing authority from him.[96]

III. DAMAGES.

1. Grounds and Elements of Compensatory Damages in General. A. To Real Estate. — a. *In General.* — The authorities are not harmonious as to what is the proper measure of damages in cases of trespass on real estate. Some of the courts hold that the true and only rule is the difference in value to the whole tract before and after the injury. Others hold that the cost of restoring the land to its original condition is the true criterion by which to measure the damages. Another class of cases holds that neither rule is inflexible, but that the extent and nature of the injuries must determine the rule as to the measure of damages and that the amount of damages must in no event be in excess of the diminution in value caused by the injuries complained of.[97]

b. *Difference in Value Before and After.* — In an action by the owner of the fee of land for an injury thereto, to determine the measure of his damages evidence is admissible showing the difference between the market value of the land immediately before the injury and immediately thereafter.[98]

For the injury resulting to the land from the destruction of the trees, which, as part of the land, have a pecuniary value as shade or ornamental trees, the reduction in the pecuniary value of the land occasioned by the act complained of furnishes the test by which to measure the damages.[99] And in addition to this, evidence is also

himself, although not set up in the answer as a special defense. See also Davis *v.* Alexander, 99 Me. 40, 58 Atl. 55.

96. Fiske *v.* Small, 25 Me. 453; Aikin *v.* Buck, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535; Kissam *v.* Roberts, 6 Bosw. (N. Y. Super.) 154. See also Searles *v.* Crombie, 28 Ill. 396.

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

98. Brinkmeyer *v.* Bethea, 139 Ala. 376, 35 So. 996; Blunck *v.* Chicago & N. W. R. Co. (Iowa), 115 N. W. 1013; Drake *v.* Chicago etc. R. Co., 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746; Sullens *v.* Chicago etc. R. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501; Harvey *v.* Mason City etc. R. Co., 129 Iowa 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973; Brickell *v.* Camp Mfg. Co., 147 N. C. 118, 60 S. E. 905; Bollinger *v.* McMinn (Tex. Civ. App.), 104 S. W. 1079.

In Southern R. Co. *v.* Herrington, 128 Ga. 438, 57 S. E. 694, an action to recover damages for the destruction of growing timber claimed to have resulted from a fire communicated from a locomotive engine the court said: "If the plaintiff was entitled to recover, the measure of damages was the difference between the value of the land as timber land before the fire occurred and its value as timber land afterwards. The value of the land as such without respect to the timber may not have been affected by the fire; but she was the owner of timber land which in that condition had a value, and if the effect of the fire was to diminish its value she would be entitled to recover the difference. The character of timber upon the land, the quantity of it and all such facts and circumstances were proper matter for the jury to consider in determining the question presented to them."

99. Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643. See also Delaware

admissible showing the nature and amount of the different items of damage which go to make up the whole.[1] Of course witnesses testifying as to the difference in value before and after the inquiry complained of must be competent to so testify.[2]

c. *Value of the Thing Destroyed.* — If the thing destroyed, although it is a part of the realty, had a value which could be accurately measured and ascertained without reference to the soil on which it stood or out of which it grew, it is sufficient to show the value of the thing thus destroyed.[3] Evidence is admissible on defendant's behalf as to the value of the thing destroyed as well as on the part of the plaintiff.[4]

It has been held that it is not proper to permit a witness to give his estimate or judgment of the damages in exact figures; he should be permitted to go no further than to state the facts within his

& M. C. Tel. Co. *v.* Fisk, 40 Ind. App. 348, 81 N. E. 1100; Toledo, St. L. & W. R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561; Gorham *v.* Eastchester Elec. Co., 80 Hun 290, 30 N. Y. Supp. 125; Dwight *v.* Elmira, C. & N. R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612; Nixon *v.* Stillwell, 52 Hun 353, 5 N. Y. Supp. 248.

1. Hueston *v.* Mississippi & R. R. Boom Co., 76 Minn. 251, 79 N. W. 92.

In Chase *v.* Clearfield Lumb. Co., 209 Pa. St. 422, 58 Atl. 813, the evidence showed that the defendant, through a mistake as to boundary lines, entered plaintiff's land, cut timber thereon, opened roads through it, and piled underbrush alongside the road; and it was held that the value of the timber, compensation for the loss of the use of the land occupied by the roads, and the cost of removing and destroying the brush, were proper to be shown on the question of damages. See also Lindsay *v.* Latham, 32 Ky. L. Rep. 867, 107 S. W. 267; Brickell *v.* Camp Mfg. Co., 147 N. C. 118, 60 S. E. 905.

2. In Park *v.* Northport S. & R. Co., 47 Wash. 597, 92 Pac. 442, an action for the destruction of timber caused by the smoke and fumes from the defendant's smelter, it was held that testimony of witnesses as to the value of the land before and after the injury to the timber for the purpose of ascertaining the market value of the timber was not competent, inas much as it appeared that the witnesses were qualified merely as to land values, there being nothing to show that they had any knowledge concerning the amount, quantity, quality or value of the timber in controversy.

3. Brinkmeyer *v.* Bethea, 139 Ala. 376, 35 So. 996; Smith *v.* Chicago etc. R. Co., 38 Iowa 518; McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143; Harvey *v.* Mason City etc. R. Co., 129 Iowa 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973; Jefcoat *v.* Knotts, 13 Rich. L. (S. C.) 50. See also Bever *v.* Swecker (Iowa), 116 N. W. 704; Blunck *v.* Chicago & N. W. R. Co. (Iowa), 115 N. W. 1013 (matured hay crop; Piper *v.* Connelly, 108 Ill. 646 (ice); Washington Ice Co. *v.* Shortall, 101 Ill. 46, 40 Am. Rep. 196 (same).

And where the land has been appropriated to a particular use, as by converting it into a meadow, or planting it to a crop which is already growing at the time of the injury, the loss must be determined with reference to such existing conditions. Blunck *v.* Chicago & N. W. R. Co. (Iowa), 115 N. W. 1013; *citing* Black v. Minneapolis etc. R. Co., 122 Iowa 32, 96 N. W. 984; Willitts v. Chicago etc. R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608; Rowe *v.* Chicago & N. W. R. Co., 102 Iowa 286, 71 N. W. 409.

4. In Martin *v.* Erwin, 74 N. J. L. 337, 65 Atl. 888, an action for damages caused by defendant cutting vines on plaintiff's premises, plaintiff had given evidence as to the value

knowledge as to the cause of the injury and that damage resulted. To allow the witness to state the amount of damages in exact figures, he is thereby not only placed in the position of the jury, but is permitted to indulge in mere speculation.[5] Nor is it necessary or proper in an action to recover for injuries to growing crops that the plaintiff should introduce evidence as to possible chances of loss or injury incident to the harvesting thereof.[6]

Measure of Damages for Cutting Timber.— Where one cuts timber upon the land of another in good faith, believing it to be his own, the stumpage value of the timber and not its value as manufactured lumber, furnishes the measure of damages.[7] But where the facts and circumstances warrant the inference that the cutting was not done through mere mistake, accident or inadvertence, but deliberately done or done through gross negligence, or wilful disregard of the plaintiff's rights, evidence is admissible showing the value of the manufactured timber.[8]

d. *Basis of Damage Most Beneficial to Injured Party.* — Where the wrong complained of consists in the removal or destruction of some addition, fixture or part of the real property, that valuation

of the vines and their ornamental effect upon the premises; and it was held error to reject evidence offered by the defendant upon the same question.

In Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912, which was an action of trespass and for diverting a stream crossing plaintiff's land, it was held that evidence was admissible in defendant's behalf showing the probable cost of returning the stream to its old channel, and restoring the premises to substantially the condition in which they were prior to the trespass, as the measure of damages would be the expense of such restoration.

5. Western U. Tel. Co. *v.* Ring, 102 Md. 677, 62 Atl. 801; Baltimore Belt R. Co. *v.* Sattler, 100 Md. 306, 59 Atl. 654. *Compare* Mason *v.* Postal Tel. C. Co., 74 S. C. 557, 54 S. E. 763, But see Vol. 5, pp. 206, 688; Vol. 4, p. 14.

6. In Blunck *v.* Chicago & N. W. R. Co. (Iowa), 115 N. W. 1013, an action to recover for a hay crop lost, as alleged, because of the negligent flooding of the land by the defendant railroad company, the court said: "It was not necessary, nor would it have been proper, to have gone into the question of the possible chances of loss or injury incident to the cutting and stacking of the hay. This is a world of chances, but the law does not take into consideration, in estimating damages for an injury actually inflicted, the possible chances that had such injury not have occurred the like or some other misfortune to the subject might have arisen out of some other and independent operating cause. Rather the law of damage as here related deals in presumptions, and courts will assume that in due and ordinary course a growing crop will mature and will be harvested without loss, just as they will assume that the ordinary man will live to fill the period of his expectancy."

7. Ball & Bro. L. Co. *v.* Simms Lumb. Co., 121 La. 627, 46 So. 674; Pettit *v.* Frothingham (Tex. Civ. App.), 106 S. W. 907.

8. Emporia L. Co. *v.* League (Tex. Civ. App.), 105 S. W. 1167.

The measure of damages for the taking of timber by a trespasser is determined by proving the value of the wood in its converted condition. Brown *v.* Pope, 27 Tex. Civ. App. 225, 65 S. W. 42.

should be adopted which will prove most beneficial to the injured party, since he is entitled to the benefit of his property intact.[9]

c. *Rule of Avoidable Consequences.* — In view of the rule of avoidable consequences requiring the injured party to minimize his loss, the proper measure of damages is the cost of restoring the land to its former condition together with compensation for the loss of its use, unless the damages so computed would exceed the diminution in the market value of the land, in which case the latter furnishes the proper criterion.[10]

B. To Personalty. — a. *In General.* — In trespass to personal property the plaintiff is entitled to introduce evidence of damages not only for the injury done in taking away the goods,[11] but also for the value of the property.[12]

b. *Trouble and Expense.* — In a suit for damages on account of a trespass to personalty, evidence is admissible showing the trouble

9. Park *v.* Northport S. & R. Co., 47 Wash. 597, 92 Pac. 442.

10. Enid & A. R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96; Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426.

In an action of trespass to recover damages for injuries to land, the measure of damages is the cost of remedying the injury, unless such cost exceeds the value of the property injured, in which case the value of the property becomes the measure of damages. It is not therefore improper to admit evidence as to the value of the land so that the jury may not return a verdict in excess thereof. Welliver *v.* Pennsylvania Canal Co., 23 Pa. Super. 79.

Where Restoration Impossible. Rental Value. — And in measuring the loss accruing to the owner of the fee for an injury thereto, a distinction must, of course, be drawn between those things which can readily be replaced, and those things concerning which restoration is impossible. As to the former, the cost of reproduction is regarded as a proper basis of computation; while in the latter rental value must be taken as the basis. It is to be remarked, however, that the term "rental value," as applied to lands covered with a growing crop, means not what the lands may be rented for in the vicinity for ordinary purposes, but the value of the use of the lands for the purposes of maturing and harvesting the crop. And, of necessity, the value of the crop in the condition in which it exists at the time of the injury is the prime factor in the ascertainment of the value of the use. Blunck *v.* Chicago & N. W. R. Co. (Iowa), 115 N. W. 1013; *citing* Lommeland *v.* St. Paul etc. R. Co., 35 Minn. 412, 29 N. W. 119; Galveston etc. R. Co. *v.* Ryan (Tex. Civ. App.), 21 S. W. 1013; Folsom *v.* Apple River L. D. Co., 41 Wis. 602; Shotwell *v.* Dodge, 8 Wash. 337, 36 Pac. 254.

11. Johnson *v.* Packer, 1 Nott & McC. (S. C.) 1; Shibley *v.* Gendron, 25 R. I. 519, 57 Atl. 304; Von Storch *v.* Winslow, 13 R. I. 23, 43 Am. Rep. 10.

12. Johnson *v.* Packer, 1 Nott & McC. (S. C.) 1.

Where the purpose of the action is only to recover the value of the trees as chattels after severance from the soil, the market value of the trees for timber or fuel is the true test. Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643.

Value Before and After. — To determine the measure of damages for malicious trespass to personal property, evidence is admissible to show the difference in value before and after the injury. Cookman *v.* Nill, 81 Mo. App. 297. See also Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788 (value sixteen months before coupled with evidence that the goods remained substantially the same).

Cost as Evidence of Value. — Grif-

and expense that plaintiff has been put to,[13] including the expense of mending and curing the chattel which is the subject of the controversy.[14] But evidence is not admissible showing injury to feelings for the purpose of recovering compensation therefor.[15]

2. Direct and Remote Consequences of Trespass. — It has been held that in actions of trespass the evidence must be limited to the proof of such facts in aggravation of damages, as occurred in the perpetration of the trespass; while injuries consequent upon the trespass could not be inquired into.[16] But the better rule seems to be that the plaintiff may prove special damages, if they are strictly the consequence of the trespass committed, since the causing of such special damages constitutes a part of one entire transaction, of which the principal trespass was the commencement.[17] But where the injury complained of is remote, evidence is not admissible showing consequential injury.[18]

Damage Sustained After Action Begun.— In actions to recover damages for trespasses upon real estate, evidence is not admissible to show damages sustained after the action was begun.[19]

fin *v.* Martel, 77 Vt. 19, 58 Atl. 788; *citing* Crampton *v.* Valido M. Co., 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120.

13. **Attorney's Fees** are a part of such expense and may be proved, even when they have not been specifically alleged. Cooper *v.* Cappel, 29 La. Ann. 213.

14. Cookman *v.* Nill, 81 Mo. App. 297.

15. Williams *v.* Yoe, 19 Tex. Civ. App. 289, 46 S. W. 659.

16. Damron *v.* Roach, 4 Humph. (Tenn.) 134.

17. Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Hardin *v.* Kennedy, 2 McCord (S. C.) 277 (loss of crop due to removal of fence).

In Damron *v.* Roach, 4 Humph. (Tenn.) 134, an action of trespass for throwing down plaintiff's fence, plaintiff's evidence that he had cattle in the field when the fence was thrown down, and that they escaped in consequence thereof, was held admissible.

In Johnson *v.* Perry, 2 Humph. (Tenn.) 569, an action of trespass for breaking a slave's leg, damages were given for the deteriorated value of the slave in consequence of this permanent injury. Evidence of medical bills and other collateral damages arising after suit instituted was excluded; but evidence that the slave died after suit was instituted, or that the injury proved to be greater by lapse of time, was held admissible, being the immediate consequences of the trespass.

18. Johnson *v.* Perry, 2 Humph. (Tenn.) 569; Wrightsville & T. R. Co. *v.* Holmes, 85 Ga. 668, 11 S. E. 658; Sims *v.* Glazener, 14 Ala. 695, 48 Am. Dec. 120; Thomas *v.* Isett, 1 Greene (Iowa) 470 (loss of credit not allowed to be proved, though loss of profits was).

In Chase *v.* Clearfield Lumb. Co., 209 Pa. St. 422, 58 Atl. 813, the evidence showed that the defendant, through a mistake as to the boundary line, entered plaintiff's land, cut timber thereon, opened roads through it, and piled underbrush alongside the roadway; and it was held that evidence as to danger from fire by reason of the brush heaps was not admissible, because entirely speculative and too remote and uncertain.

19. Kenyon *v.* New York Cent. & H. R. R. Co., 29 App. Div. 80, 51 N. Y. Supp. 386.

Where action is brought for injuries to premises as a result of salt water leaking from a pipe laid without authority by defendant in an adjacent highway, in which plaintiff owned the fee, the measure of recovery is the damage sustained up to the

3. Nominal Damages. — Some damage, at least nominal, is always presumed from a trespass on land; so that an action is maintainable on mere proof of the trespass.[20] Proof of trespass will warrant nominal damages, even though substantial damages are not shown to have resulted therefrom.[21]

4. Enhancement or Aggravation of Damages. — Evidence is admissible showing the circumstances under which the trespass was committed for the purpose of determining the proper amount of damages to be allowed.[22]

Where personal property, in the actual use of the owner, is injured by a trespasser, so that the owner is deprived of its use, the special loss or damage necessarily and proximately attendant upon such privation may be shown to augment the damages beyond the diminution in value of the thing injured.[23] But a matter alleged in

time of the action, and evidence as to the permanent depreciation in the value of the premises because of the presence of the leaking pipe is inadmissible. Hartman *v.* Tully Pipe-Line Co., 71 Hun 367, 25 N. Y. Supp. 24.

But see Chicago & N. W. R. Co. *v.* Hoag, 90 Ill. 339, *holding* that where a railroad company, before suit brought, wrongfully allowed water escaping from its tank to flow upon plaintiff's lot, where it spread and froze several feet deep, and the ice did not melt until after the commencement of the suit, it was held that the plaintiff might introduce evidence showing damages occurring after suit brought as well as for the wrongful act of defendant before suit.

20. Pierce *v.* Hosmer, 66 Barb. (N. Y.) 345; Norvell *v.* Thompson, 2 Hill (S. C.) 470; Eldridge *v.* Gorman, 77 Conn. 699, 60 Atl. 643; Dixon v. Clow, 24 Wend. (N. Y.) 188.

21. Puorto *v.* Chieppa, 78 Conn. 401, 62 Atl. 664; Nafe *v.* Hudson, 19 Tex. Civ. App. 381, 47 S. W. 675; Quillen *v.* Betts, 1 Penne. (Del.) 53, 39 Atl. 595; McCarthy *v.* Miller (Tex. Civ. App.), 57 S. W. 973.

It is held that plaintiffs in an action of trespass are entitled to nominal damages only where no other damages are claimed or proved. Pennington *v.* Lewis, 4 Penne. (Del.) 447, 56 Atl. 378; Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181; Rogers *v.* Fales, 5 Pa. St. 154; Rich *v.* Rich, 16 Wend. (N. Y.) 663; Keirn *v.* Warfield, 60 Miss. 799. See also Kidder *v.* Kennedy, 43 Vt. 717.

22. *Alabama.* — Anonymous, Minor 52, 12 Am. Dec. 31.

California. — Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56.

Connecticut. — Barnum *v.* Vandusen, 16 Conn. 200.

Georgia. — Stevens *v.* Stevens, 96 Ga. 374, 23 S. E. 312.

Indiana. — Taber *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96.

Kentucky. — Sodousky *v.* McGee, 4 J. J. Marsh. 267.

Maryland. — Snively *v.* Fahnestock, 18 Md. 391; Young *v.* Mertens, 27 Md. 114.

New Jersey. — Martin *v.* Erwin, 74 N. J. L. 337, 65 Atl. 888; Ogden *v.* Gibbons, 5 N. J. L. 518; Romaine *v.* Norris, 8 N. J. L. 80.

North Carolina. — Duncan *v.* Stalcup, 18 N. C. (1 Dev. & B.) 440; Sawyer *v.* Jarvis, 35 N. C. (13 Ired. L.) 179.

23. Graves *v.* Baltimore & N. Y. R. Co. (N. J.), 69 Atl. 971, *holding* that it was proper to receive evidence showing loss of sales in plaintiff's business by reason of the injury to his wagon, and to charge the jury that they might find damages for loss of profits on goods which the plaintiff had orders to deliver on the morning of the accident, and was unable to procure and deliver by reason of the injury to his wagon. *Citing* Post *v.* Munn, 4 N. J. L. 61, 7 Am. Dec. 570; Luse *v.* Jones, 39 N.

aggravation of damages need not be proved in order that the plaintiff may be entitled to recover for the trespass itself.[24]

Evidence is not admissible showing facts in aggravation which might be the subject of a separate action,[25] though there are contrary holdings.[26]

5. Exemplary Damages. — A. In General. — A plaintiff in an action of trespass is entitled to exemplary damages when, under proper allegations, he proves a wanton, wilful or malicious violation of his rights;[27] in the absence of such proof his recovery is confined

J. L. 707; Shelbyville L. B. R. Co. *v.* Lewark, 4 Ind. 471.

24. In Rucker *v.* M'Neely, 4 Blackf. (Ind.) 179.

25. Lawrence *v.* Phelps, 2 Root (Conn.) 334; Sampson *v.* Coy, 15 Mass. 493; Fisher *v.* Conway, 21 Kan. 18, 30 Am. Rep. 419.

26. Pendleton *v.* Davis, 46 N. C. (1 Jones L.) 98; Druse *v.* Wheeler, 22 Mich. 439.

Where the foundation of an action is a trespass on realty, the plaintiff may aver and prove as a ground for special damages, resulting from the trespass, that at the same time the defendant beat and assaulted him, although a separate action might lie for the injuries to his person, and although the statute of limitations barring the action of assault and battery may in this way be evaded. Therefore, where a declaration alleges a trespass in entering plaintiff's dwelling in a violent and lawless manner, breaking the locks and hinges from his doors, etc., assaulting and beating plaintiff, this latter averment may be proven in aggravation of damages, and if the proof sustains it the plaintiff is entitled to recover for all the injuries inflicted on him by the defendant while on his premises. Burson *v.* Cox, 6 Baxt. (Tenn.) 360.

27. *United States.* — Murray *v.* Pannaci, 130 Fed. 529, 65 C. C. A. 153.

Illinois. — Stillwell *v.* Barnett, 60 Ill. 210; Williams *v.* Reil, 20 Ill. 147; Becker *v.* Dupree, 75 Ill. 167; Chicago Title & Tr. Co. *v.* Core, 223 Ill. 58, 79 N. E. 108.

Indiana. — Anthony *v.* Gilbert, 4 Blackf. 348.

Maryland. — Maryland Tel. & T. Co. *v.* Ruth, 106 Md. 644, 68 Atl. 358, 14 L. R. A. (N. S.) 427.

New Jersey. — Hollister *v.* Ruddy, 66 N. J. L. 68, 48 Atl. 520; Miller *v.* Rambo, 73 N. J. L. 726, 64 Atl. 1053.

Pennsylvania. — Sperry *v.* Seidel, 218 Pa. St. 16, 66 Atl. 853.

South Carolina. — Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106; Dobson *v.* Postal Tel. C. Co., 79 S. C. 429, 60 S. E. 948.

Wisconsin. — Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227.

Punitive damages may be recovered in an action of trespass where the evidence shows that the wrongful act was purposely done, evincing malice, fraud, oppression, or wilful wrong. Cumberland Tel. & T. Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762. See also Jasper *v.* Parnell, 67 Ill. 358.

In an action for damages for cutting and disfiguring trees, punitive damages will be allowed where the evidence shows gross negligence and wantonness. Cumberland Tel. & T. Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040.

In Bollinger *v.* McMinn (Tex. Civ. App.), 104 S. W. 1079, where the evidence showed that the plaintiff had built a house partly on his own land and partly on the land of an adjoining owner and through a tenant had remained in peaceable possession for several years when the adjoining owner cut the house in two and removed it from the land leaving one exposed room, it was held to be a proper case for vindictive damages.

Evidence that plaintiff had, prior to the trespass, warned the defendant not to go on the lands in question is sufficient to warrant exemplary damages. Goodson *v.* Stewart (Ala.), 46 So. 239, where the court said: "This condition of fact, if found, cannot be distinguished from that presented in Louisville & N. R.

to actual damages, determined in accordance with the rules heretofore stated.[28]

B. Vindication of Private Right. — Exemplary damages, though formerly regarded as merely a punishment for wrongdoing, have now come to be looked upon as a vindication of private right.[29]

C. Actual Damage Must Be Shown. — In an action of trespass, in order that the plaintiff may recover exemplary damages the evidence must show that some actual damage has been sustained.[30]

D. Financial and Other Circumstances of the Parties. In awarding punitive damages for a wanton and wilful trespass, evidence is admissible showing the pecuniary circumstances of the defendant,[31] and the age, sex, position in society of the plaintiff, and the injuries received together with all the circumstances in relation thereto.[32] Evidence as to the effect upon the health of the plaintiff may also be received.[33]

E. Good Faith as a Defense. — A defendant in an action of trespass is not liable in punitive damages where the evidence shows that he acted in good faith.[34] But a trespasser although acting in an honest belief as to his rights may be so grossly negligent in ascertaining his rights that his attempt to enforce his claim by force will

Co. *v.* Smith, 141 Ala. 335, 37 So. 490, upon which this court based the announcement that it was open for the jury to find that legal malice, essential to the imposition of exemplary damages, accompanied the trespass."

Express Malice Need Not Be Shown. — Farwell *v.* Warren, 51 Ill. 467.

28. Mead *v.* Pollock, 99 Ill. App. 151; Doty *v.* Chicago & N. W. R. Co. (Iowa), 114 N. W. 522; Andrews *v.* Singer Mfg. Co., 19 Ky. L. Rep. 1089, 48 S. W. 976; Herreshoff *v.* Tripp, 15 R. I. 92, 23 Atl. 104; Lawandoski *v.* Wilkes-Barre & H. R. Co., 35 Pa. Super. 10; Ives *v.* Humphreys, 1 E. D. Smith (N. Y. Super.) 196.

Where it appeared that the damage was caused by the breaking of a bulkhead following a period of wet weather two years after it had been constructed, it was held that there was not sufficient evidence of gross negligence to warrant exemplary damages under § 3294 Civ. Code, allowing such damages where the defendent has been guilty of oppression, fraud or malice, express or implied. Spencer *v.* S. F. Brick Co., 5 Cal. App. 126, 89 Pac. 851.

29. Beaudrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106.

30. McCarthy *v.* Miller (Tex. Civ. App.), 57 S. W. 973. See also Anthony *v.* Gilbert, 4 Blackf. (Ind.) 348; Munsey *v.* Hanly, 102 Me. 423, 67 Atl. 217. But see Goodson *v.* Stewart (Ala.), 46 So. 239; Louisville & N. R. Co. *v.* Smith, 141 Ala. 335, 37 So. 490, *holding* that actual damages, other than nominal, to which for a trespass the plaintiff is entitled, need not be shown in order to sustain the infliction of exemplary damages.

31. Jones *v.* Jones, 71 Ill. 562; Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227; Cumberland Tel. & T. Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040.

32. Jones *v.* Jones, 71 Ill. 562.

33. Evidence as to the effect upon the health of plaintiff of the acts done by the defendant in aggravation of the trespass may be received on the question of exemplary damages. Munsey *v.* Hanly, 102 Me. 423, 67 Atl. 217.

34. Scheer *v.* Kriesel, 109 Wis. 125, 85 N. W. 138; Georgia R. & Bkg. Co. *v.* Gardner, 115 Ga. 954, 42 S. E. 250. See Yahoola R. etc. Min. Co. *v.* Irby, 40 Ga. 479; Carli *v.* Union Depot Co., 32 Minn. 101, 20 N. W. 89.

be regarded as a wanton invasion of the possession of the real owner entitling him to punitive damages.[35]

6. Mitigation of Damages. — A. What Evidence Admissible. a. *Circumstances Causing Trespass.* — Evidence is admissible in mitigation of damages showing the facts and circumstances which caused the trespass complained of,[36] providing such facts and circumstances were of a recent date[37] and do not involve the character of the plaintiff.[38]

b. *Good Faith and Good-Will.* — Evidence of good faith is admissible in defense of exemplary damages,[39] except where want of malice is admitted;[40] but not in mitigation of actual damages.[41] So also in defense of punitive damages, defendant may introduce evidence showing his good-will toward plaintiff.[42]

c. *Possession or Ownership.* — Defendant may show, in mitigation of damages, that at the time of the trespass the title was in himself, or that he had a right of possession,[43] and that plaintiff's

35. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

36. *England.* — Wells *v.* Head, 4 Car. & P. 568, 19 E. C. L. 531.

Alabama. — Boling *v.* Wright, 16 Ala. 664; Boggan *v.* Bennett, 102 Ala. 400, 14 So. 742.

Illinois. — Huftalin *v.* Misner, 70 Ill. 55.

Indiana. — Wasson *v.* Canfield, 6 Blackf. 406.

Michigan. — Carter *v.* Bedortha, 124 Mich. 548, 83 N. W. 277.

North Carolina. — Sawyer *v.* Jarvis, 35 N. C. (13 Ired. L.) 179.

Ohio. — Simpson *v.* McCaffrey, 13 Ohio 508.

Pennsylvania. — Reed *v.* Bias, 8 Watts & S. 189.

Where a party purchased a lot for the purpose of building thereon and removed and destroyed personal property of a tenant of the purchaser's vendor, in an action of trespass by the tenant it was competent for the defendant to show in mitigation of damages that the work upon the lot was commenced in pursuance of what the plaintiff said in reference to his possession not preventing it. Farwell *v.* Warren, 51 Ill. 467.

In trespass *quare donum fregit* the defendants may show in mitigation of damages their motives and inducements to enter the house, as that it was to search for furniture which they had been informed was missing. Bohun *v.* Taylor, 6 Cow. (N. Y.) 313.

37. Rochester *v.* Anderson, 1 Bibb (Ky.) 428; Avery *v.* Ray, 1 Mass. 12; Collins *v.* Todd, 17 Mo. 537; Coxe *v.* Whitney, 9 Mo. 531; Willis *v.* Forrest, 2 Duer (N. Y.) 310; Lee *v.* Woolsey, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230.

Provoking Acts or statements must have been so recent as fairly to be considered part of the same transaction, in analogy with the rule in the case of assault and battery. Huftalin *v.* Misner, 70 Ill. 55.

38. Corning *v.* Corning, 6 N. Y. 97; Willis *v.* Forrest, 2 Duer (N. Y.) 310. But see Rhodes *v.* Bunch, 3 McCord L. (S. C.) 66.

39. In trespass *quare clausum fregit*, the defendant may prove that the trespass was not wilful and malicious, that he entered under an honest though mistaken belief that his entry was lawful. Machin *v.* Geortner, 14 Wend. (N. Y.) 239.

40. Hoyt *v.* Gelston, 13 Johns. (N. Y.) 141, *affirmed*, 13 Johns. 561.

41. O'Horo *v.* Kelsey, 60 App. Div. 604, 70 N. Y. Supp. 14.

42. Cannon *v.* Overstreet, 2 Baxt. (Tenn.) 464.

43. M'Donald *v.* Lightfoot, Morris (Iowa) 450; Caston *v.* Perry, 2 Bailey L. (S. C.) 104; Rhodes *v.* Bunch, 3 McCord (S. C.) 66.

In an action of trespass for mesne profits the defendant may show, in mitigation of damages, that his possession was under a judgment of a

original possession was unlawfully obtained by a trespass.[44]

d. *Ownership in Third Person.* — Defendant may show that at the time of the trespass the ownership of the subject-matter of the trespass was in one other than the plaintiff and that he was not liable to the latter.[45]

e. *Value of Improvements.* — In an action of trespass against a bona fide purchaser to recover for mesne profits, defendant may show value of improvements made in good faith.[46] This rule does not apply to a wilful trespasser.[47]

f. *Benefits to Plaintiff.* — A defendant in an action of trespass cannot show in mitigation of damages that the property in controversy was applied to the owner's use,[48] unless it was so applied at the latter's instance.[49] Nor can defendant show that the acts complained of were to some extent beneficial to plaintiff.[50] But evidence is admissible showing that an application to the owner's use was made by a third person, and by operation of law.[51] And in an action of trespass to land against one who occupied it under a lease of strangers to the title, the defendant, although shown to be a tres-

competent tribunal. Buntin *v.* Duchane, 1 Blackf. (Ind.) 56.

In Turner *v.* Poston, 63 S. C. 244, 41 S. E. 296, which was an action of trespass *quare clausum fregit*, it was held that it was competent for defendant to introduce in evidence, in mitigation of damages, a foreign deed under which defendant claimed, though such deed had no seal of the probating notary, or a certificate of a court of record that the notary was empowered to probate the deed.

In Williams *v.* Hathaway, 20 R. I. 534, 40 Atl. 418, where one of the plaintiffs testified that the defendant entered without license or permission, it was held that the defendant had the right to cross-examine on that point and to show the fact in mitigation of damages.

44. M'Donald *v.* Lightfoot, Morris (Iowa) 450; Caston *v.* Perry, 2 Bailey L. (S. C.) 104; Rhodes *v.* Bunch, 3 McCord (S. C.) 66.

45. Anthony *v.* Gilbert, 4 Blackf. (Ind.) 348; Ballard *v.* Leavell, 5 Call (Va.) 531; Criner *v.* Pike, 39 Tenn. 398.

46. Jackson *v.* Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347.

47. Loomis *v.* Green, 7 Greenl. (Me.) 386; Russell *v.* Blake, 2 Pick. (Mass.) 505.

48. Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91; Bird *v.* Womack, 69 Ala. 390; Dallam *v.* Fitler, 6 Watts & S. (Pa.) 323.

49. Goodrich *v.* Foster, 20 N. H. 177.

Benefits to Tenants Not Admissible. — In an action to recover damages for the unlawful occupation of land for the use of a tramway, defendant should not be allowed to prove in mitigation of damages, that he hauled, free of charge, freight belonging to some of the plaintiff's tenants, since such evidence did not tend to show that the plaintiff himself derived any benefit therefrom. Leigh *v.* Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632.

50. Where trespass is brought for cutting wheat, the trespasser cannot be allowed to introduce evidence as to his labor while trespassing for the purpose of having the value thereof deducted from the value of the wheat. The plaintiff should be allowed to recover as if he himself had performed the whole labor of harvesting. Bull *v.* Griswold, 19 Ill. 631.

51. *Massachusetts.* — Kaley *v.* Shed, 10 Met. 317; Perry *v.* Chandler, 2 Cush. 237.

New Jersey. — Hopple *v.* Higbee, 23 N. J. L. 342.

New York. — Higgins *v.* Whitney, 24 Wend. 379; Sherry *v.* Schuyler, 2 Hill 204.

passer, may show and be entitled to credit for such sums as had been paid by him as rent and received by the plaintiff.[52]

g. *Return of or Payment for the Thing Removed.* — Evidence showing that defendant, on complaint being made, replaced the thing inadvertently taken is admissible;[53] and likewise where a part was returned.[54] But where a chattel was wrongfully taken, evidence showing an unaccepted offer to return is not admissible.[55]

Evidence showing payments in part satisfaction is admissible for the purpose of diminishing claim *pro tanto*.[56]

B. What Evidence Not Admissible. — Evidence is not admissible showing that a house which was pulled down had been used as a house of ill-fame.[57] Nor can defendant show, in mitigation of actual damages, that the trespass complained of was done under proceedings of the local governing body, where such proceedings were invalid.[58] But such evidence is admissible to defeat a recovery of punitive damages.[59]

7. Double and Treble Damages. — A. Sufficiency of Evidence in Plaintiff's Behalf. — Double[60] and sometimes treble[61] dam-

Tennessee. — Crimer *v.* Pike, 2 Head 398.

Vermont. — Stewart *v.* Martin, 16 Vt. 397; Collins *v.* Perkins, 31 Vt. 624.

52. Hendrickson *v.* Dwyer, 70 N. J. L. 223, 57 Atl. 420.

53. Flynt *v.* Chicago, etc. R. Co., 38 Mo. App. 94.

54. Loewenberg *v.* Rosenthal, 18 Or. 178, 22 Pac. 601.

55. Powers *v.* Florance, 7 La. Ann. 524.

56. Chamberlin *v.* Murphy, 41 Vt. 110.

57. Weston *v.* Gravlin, 49 Vt. 507; Johnson *v.* Farwell, 7 Greenl. (Me.) 370, 22 Am. Dec. 203. *Contra,* Simpson *v.* McCaffrey, 13 Ohio 508.

58. Barnard *v.* Haworth, 9 Ind. 103; Gray *v.* Waterman, 40 Ill. 522.

59. In Gray *v.* Waterman, 40 Ill. 522, it was held error to reject evidence that defendants, in removing a fence from what was supposed to be a public way, acted under a resolution adopted at a town meeting. Such evidence though not admissible as a bar to the action, nor in mitigation of the actual damages sustained, is admissible as tending to repel malice and thus to defeat punitive damages.

60. Macey *v.* Carter, 76 Mo. App. 490.

61. *Arkansas.* — Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391.

California. — Barnes *v.* Jones, 51 Cal. 303.

Idaho. — Eklund *v.* Lewis Lumb. Co., 13 Idaho 581, 92 Pac. 532.

Illinois. — Campbell *v.* Conover, 26 Ill. 64.

Iowa. — Wilson *v.* Gunning, 80 Iowa 331, 45 N. W. 920.

Kansas. — Chicago etc. R. Co. *v.* Watkins, 43 Kan. 50, 22 Pac. 985; Newlin *v.* Rogers, 6 Kan. App. 910, 51 Pac. 315; Atchison etc. R. Co. *v.* Grant, 75 Kan. 344, 89 Pac. 658.

Massachusetts. — Pierce *v.* Spring, 15 Mass. 489.

Michigan. — Russell *v.* Myers, 32 Mich. 522.

Missouri. — Lowe *v.* Harrison, 8 Mo. 350; Avitt *v.* Farrell, 68 Mo. App. 665; Caris *v.* Nimmons, 92 Mo. App. 66; Cox *v.* St. Louis etc. R. Co., 111 Mo. App. 394, 85 S. W. 989; O'Bannon *v.* St. Louis etc. R. Co., 111 Mo. App. 202, 85 S. W. 603.

New York. — Newcomb *v.* Butterfield, 8 Johns. 342; Kellar *v.* Central Tel. & T. Co., 53 Misc. 523, 105 N. Y. Supp. 63; Schrier *v.* Shaffer, 123 App. Div. 543, 107 N. Y. Supp. 1107.

Oregon. — Loewenberg *v.* Rosenthal, 18 Or. 178, 22 Pac. 601.

Pennsylvania. — Welsh *v.* Anthony, 16 Pa. St. 254.

ages are allowed by statute. To entitle plaintiff to recover it is generally necessary that he should show ownership and not merely possession of the property alleged to have been trespassed upon.[62] But it is sometimes held that proof should be made of actual or constructive possession as well.[63] It is sometimes held that he must also show that the act complained of was wilful.[64] And in some cases he must show that he was dispossessed in a forcible manner.[65]

South Dakota. — Scott *v.* Trebilcock, 112 N. W. 847.

62. *Alabama.* — Gravlee *v.* Williams, 112 Ala. 539, 20 So. 952; Rogers *v.* Brooks, 99 Ala. 31, 11 So. 753; Allison *v.* Little, 93 Ala. 150, 9 So. 388; Clifton Iron Co. *v.* Jemison Lumb. Co., 108 Ala. 581, 18 So. 554 (*holding* that a grantee of standing timber is not an owner within the meaning of the statute).

Illinois. — David *v.* Correll, 68 Ill. App. 123; Behymer *v.* Odell, 31 Ill. App. 350; Whiteside *v.* Divers, 5 Ill. 336; Wright *v.* Bennett, 4 Ill. 258.

Kansas. — Newlin *v.* Rogers, 6 Kan. App. 910, 51 Pac. 315.

Kentucky. — Coppage *v.* Griffith, 19 Ky. L. Rep. 459, 40 S. W. 908.

Michigan. — Miller *v.* Wellman, 75 Mich. 353, 42 N. W. 843.

New York. — Kellar *v.* Central Tel. & T. Co., 53 Misc. 523, 105 N. Y. Supp. 63. But see Willard *v.* Warren, 17 Wend. 257.

South Dakota. — Scott *v.* Trebilcock, 112 N. W. 847.

Vermont. — Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087.

A Lessee for a term of years can not maintain the action. Lewis *v.* Thompson, 3 App. Div. 329, 38 N. Y. Supp. 316.

Possession under claim and color of title is sufficient proof of title for a recovery. Dejarnett *v.* Haynes, 23 Miss. 600; Ware *v.* Collins, 22 Miss. 223, 72 Am. Dec. 122; McCleary *v.* Anthony, 54 Miss. 708. But proof of possession is not essential. Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65. But see Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391.

63. See Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, where it was held that a contract purchaser of land who was not in actual possession of it could not maintain an action of trespass for cutting and carrying away timber from the land until he had fulfilled all of the conditions of his contract and was entitled to a conveyance.

64. Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421; Cox *v.* St. Louis, etc. R. Co., 111 Mo. App. 394, 85 S. W. 989.

In the absence of proof of wilfulness the plaintiff is confined to his common law remedy. Belt *v.* Reid, 84 Ill. App. 501.

Wilful and Malicious. — Stewart *v.* Sefton, 108 Cal. 197, 41 Pac. 293; Miller *v.* Clark, 78 Mo. App. 447. But see Wright *v.* Brown, 5 Kan. 600, *holding* that even though the evidence does not show malicious motive or vicious intent on the part of defendant, plaintiff may recover treble damages for certain trespasses expressly set forth in the statute. (§ 1, ch. 114 Gen. St.)

"Wilful" Embodies Element of Malice. — Price *v.* Denison, 95 Minn. 106, 103 N. W. 728.

65. The evidence must show something beyond a mere trespass; it must appear that the entry or detainer was riotous, or that personal violence was used, or that there were threats or menaces of violence, or that there were other circumstances inducing alarm or terror in the occupant of the premises. The mere breaking of the lock of an outhouse and even, it seems, of a dwelling house, is not *per se* sufficient to sustain the action. Willard *v.* Warren, 17 Wend. (N. Y.) 257.

Burden of Proving Act Unauthorized. — Where treble damages are authorized by statute for cutting trees without leave, the burden is upon plaintiff to show that the act complained of was not authorized. Padman *v.* Rhodes, 126 Mich. 434, 85 N. W. 1130.

Only those injuries directly resulting from the trespass can be shown.[66]

B. DEFENSES. — It is generally held that defendant may be relieved from the statutory penalty upon proof of probable cause combined with honest belief.[67]

IV. CRIMINAL TRESPASS.

1. Malice or Wilfulness. — Statutes have been enacted in most of the states providing for criminal actions of trespass. Upon the question whether or not there must be proof of malice in order to convict one of a criminal trespass, the cases are by no means in harmony. Under some of the statutes it is held that the legislature intended to punish only those trespasses which are in fact malicious, as distinguished from acts which would constitute a trespass as a matter of law; and hence of course in these jurisdictions there must be proof of malice.[68] Under other statutes it is held that proof of an intentional trespass, though committed in good faith and in the

66. Atchison, T. & S. F. R. Co. *v.* Grant, 75 Kan. 344, 89 Pac. 658.

67. *Alabama.* — Glenn *v.* Adams, 129 Ala. 189, 29 So. 836.

Illinois. — Belt *v.* Reid, 84 Ill. App. 501; David *v.* Correll, 74 Ill. App. 47.

Michigan. — Russell *v.* Myers, 32 Mich. 522.

Minnesota. — Price *v.* Denison, 95 Minn. 106, 103 N. W. 728.

Missouri. — Lindell *v.* Hannibal & St. J. R. Co., 25 Mo. 550. But see Rousey *v.* Wood, 57 Mo. App. 651; Macey *v.* Carter, 76 Mo. App. 490.

Vermont. — Brown *v.* Mead, 68 Vt. 215, 34 Atl. 950.

Washington. — Gardner *v.* Lovegren, 27 Wash. 356, 67 Pac. 615.

Where it appears in evidence that a trespass has been committed upon land, the plaintiff is entitled, under the statute, to treble damages, unless the defendant shows that the trespass was casual or involuntary. Hart *v.* Doyle, 128 Mich. 257, 87 N. W. 219.

In Keirn *v.* Warfield, 60 Miss. 799, the court said: "The true view of the law on this subject is thus: 'The letter of the statute gives the penalty upon proof of any cutting upon the land of another.' The courts have modified its rigor by holding that the defendant may defeat a recovery by showing that it occurred through accident, inadvertence, and mistake; provided reasonable care and caution were taken to avoid the mistake."

In trespass for cutting timber on another's land, treble damages are a legal consequence of the finding of damages by the jury, unless there is an affirmative finding by it, as provided in Code Civ. Proc. § 1668, that the injury was casual or involuntary, or that defendant had probable cause to believe the land his own, or that the timber was taken to repair a public road by authority of road officers; and that these facts appear from the evidence is immaterial, if they are not affirmatively found by the jury. Humes *v.* Proctor, 73 Hun 265, 26 N. Y. Supp. 315.

Evidence Showing Possession Under Invalid Tax Title Not Sufficient. Sullivan *v.* Davis, 29 Kan. 28.

68. *Alabama.* — Pippen *v.* State, 77 Ala. 81; Hill *v.* State, 104 Ala. 64, 16 So. 114.

Florida. — Preston *v.* State, 41 Fla. 627, 26 So. 736 (wilfulness).

Georgia. — Black *v.* State, 3 Ga. App. 297, 59 S. E. 823.

Indiana. — Hughes *v.* State, 103 Ind. 344, 2 N. E. 956; Palmer *v.* State, 45 Ind. 388; Lossen *v.* State, 62 Ind. 437.

Louisiana. — State *v.* Prince, 42 La. Ann. 817, 8 So. 591.

Minnesota. — Price *v.* Denison, 95 Minn. 106, 103 N. W. 728.

Missouri. — State *v.* Zinn, 26 Mo.

honest belief in a legal right so to do, is sufficient on which to base a conviction.[69]

2. Force. — To constitute the offense of forcible trespass, the evidence must show a demonstration of force, as with weapons or a multitude of people, so as to involve a breach of the peace, or di-

App. 17; State *v.* Newkirk, 49 Mo. 84.

Rhode Island. — State *v.* Luther, 8 R. I. 151 (although the words "maliciously" or "wantonly" are not used in the statute).

Tennessee. — Hampton *v.* State, 10 Lea 639.

Texas. — Allsup *v.* State (Tex. Crim.), 62 S. W. 1062 (a conviction will not be sustained where it appears that the defendant acted in good faith); State *v.* Arnold, 39 Tex. 75; Lackey *v.* State, 14 Tex. App. 164, 42 S. W. 376.

Wyoming. — State *v.* Johnson, 6 Wyo. 512, 52 Pac. 502.

The Presumption of Criminal Intent arising from the act itself may be sufficiently rebutted by the circumstances of the case. Campbell *v.* State, 127 Ga. 307, 56 S. E. 417.

Evidence of Title in the defendant tends to show his good faith and is admissible for that purpose. Hateley *v.* State, 118 Ga. 79, 44 S. E. 852.

One Who Was Bona Fide Claiming to be the true owner of land, and entitled to the possession thereof cannot be convicted of trespass under Pen. Code, § 220. Wiggins *v.* State, 119 Ga. 216, 46 S. E. 86.

69. *Alabama.* — Thompson *v.* State, 67 Ala. 106, 42 Am. Rep. 101 (malice need not be shown in an action for "unlawfully and wantonly" killing the hogs of another); Bellinger *v.* State, 92 Ala. 86, 9 So. 399 (malice need not be shown in an action of trespass for taking and using temporarily "any animal or vehicle without the consent of the owner").

Arkansas. — State *v.* Malone, 46 Ark. 140 (intent need not be shown in an action for carrying away cut wood or timber from another's land). But see Boarman *v.* State, 66 Ark. 65, 48 S. W. 899; Clark *v.* State, 50 Ark. 570, 9 S. W. 431 (in a personal action for destroying fences, evidence showing mistake as to boundary lines is not an excuse on the ground of want of intent, where such mistake is the result of negligence).

Connecticut. — State *v.* Turner, 60 Conn. 222, 22 Atl. 542 (lack of guilty intent is no defense to a violation of the statute fining one who enters the enclosed land of another without permission for the purpose of hunting or fishing).

Mississippi. — Knight *v.* State, 64 Miss. 802, 2 So. 252 (good faith no defense); Perkins *v.* Hackleman, 4 Cushm. 41, 59 Am. Dec. 243.

New York. — See Anderson *v.* Howe, 116 N. Y. 336, 22 N. E. 695 (it is sufficient to show that the act was intentionally done — malice need not be proved).

North Carolina. — State *v.* Sneed, 121 N. C. 614, 28 S. E. 365 (malice need not be shown although the statute uses the words "wantonly and wilfully." State *v.* Howell, 107 N. C. 835, 12 S. E. 569 (a trespass is wilful where the injury is deliberately done).

Good Faith as Defense. — Under some of the statutes it is held that it is a defense to show that the entry was made in good faith under a bona fide claim of right for which there was a reasonable basis. State *v.* Mallard, 143 N. C. 666, 57 S. E. 351; State *v.* Crawley, 103 N. C. 353, 9 S. E. 409; State *v.* Durham, 121 N. C. 546, 28 S. E. 22; State *v.* Hanks, 66 N. C. 612; State *v.* Hause, 71 N. C. 518; State *v.* Wells, 142 N. C. 590, 55 S. E. 210. See also Wise *v.* Com., 98 Va. 837, 36 S. E. 479. There is not a sufficient showing of a bona fide claim where the entry is upon public lands without a survey or grant from the state. State *v.* Calloway, 119 N. C. 864, 26 S. E. 46. Nor can reasonable grounds for such a claim exist in the face of an adverse decision unreversed. State *v.* Glenn, 118 N. C. 1194, 23 S. E. 1004.

rectly tend to it, and be calculated to intimidate or put in fear.[70] The evidence is sufficient to make out a case of forcible trespass where it appears that an outer door has been broken for the purpose of serving civil process.[71] Evidence showing a mere use of words, in the absence of any demonstration of force, is not sufficient.[72]

3. Possession or Ownership. — In some states evidence showing possession alone is sufficient upon which to base an action of criminal trespass;[73] while in others the prosecutor must also show his

70. State *v.* Smith, 100 N. C. 466, 6 S. E. 84; State *v.* Davis, 109 N. C. 809, 13 S. E. 883; State *v.* Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841; State *v.* Hawkins, 125 N. C. 690, 34 S. E. 537, 74 Am. St. Rep. 669; State *v.* Woodward, 119 N. C. 836, 25 S. E. 868; State *v.* Barefoot, 89 N. C. 565; State *v.* Ray, 32 N. C. (10 Ired. L.) 39; State *v.* Mills, 104 N. C. 905, 10 S. E. 676, 17 Am. St. Rep. 706; State *v.* Pollok, 26 N. C. (4 Ired. L.) 305, 42 Am. Dec. 140; State *v.* Jacobs, 94 N. C. 950; State *v.* Tolever, 27 N. C. (5 Ired. L.) 452; State *v.* Covington, 70 N. C. 71; State *v.* Armfield, 27 N. C. (5 Ired. L.) 207.

The gist of the offense of forcible trespass is the violence and intimidation, and no hostility need appear; and proof of such violence, threats and cursing towards a female as to cause her against her will to sign an order cancelling a mortgage held by her against the defendant is sufficient to establish forcible trespass. State *v.* Tuttle, 145 N. C. 487, 59 S. E. 542.

To constitute forcible trespass the evidence must show actual violence, or such an exhibition of force as would be calculated to intimidate a man of ordinary firmness. State *v.* Conder, 126 N. C. 985, 35 S. E. 249.

Demonstration Sufficient Without Weapons. — State *v.* Hinson, 83 N. C. 640.

71. State *v.* Armfield, 9 N. C. (2 Hawks) 246, 11 Am. Dec. 762; State *v.* Whitaker, 107 N. C. 802, 12 S. E. 456. See also Sutton *v.* Allison, 47 N. C. (2 Jones L.) 339.

72. State *v.* King, 74 N. C. 177; State *v.* Covington, 70 N. C. 71; State *v.* Ray, 32 N. C. (10 Ired. L.) 39.

Where it appeared that defendant went into prosecutrix's house, was not forbidden, used indecent language, but left when told, it was held that the evidence was insufficient to sustain an indictment for forcible trespass. State *v.* Hawkins, 125 N. C. 690, 34 S. E. 537. But see State *v.* Widenhouse, 71 N. C. 279; *citing* and *approving* State *v.* Buckner, 61 N. C. (Phillips L.) 558, 98 Am. Dec. 83. And *compare* State *v.* Hinson, 83 N. C. 640.

73. Hurlbut *v.* State, 12 Tex. App. 252. See also Carter *v.* State, 18 Tex. App. 573.

Since forcible trespass is essentially an offense against the possession of another and does not depend upon title, evidence is inadmissible showing title in defendant. State *v.* Webster, 121 N. C. 586, 28 S. E. 254; State *v.* Bennett, 20 N. C. (4 Dev. & B.) 43; State *v.* McCauless, 31 N. C. (9 Ired. L.) 375; State *v.* Davis, 109 N. C. 809, 13 S. E. 883; Wright *v.* State, 136 Ala. 139, 34 So. 233; Burks *v.* State, 117 Ala. 148, 23 So. 530; Putnam *v.* State, 117 Ala. 694, 23 So. 1007; Withers *v.* State, 117 Ala. 89, 23 So. 147; Lawson *v.* State, 100 Ala. 7, 14 So. 870; Watson *v.* State, 63 Ala. 19. But see Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127, *holding* that defendant may prove title or right of possession in himself for the purpose of showing that his entry or presence upon the land was not unlawful.

Possession May Mean Mere Occupancy, extending to an exclusive right to possession. A master is deemed to be in possession through the occupancy of a servant. Maddox *v.* State, 122 Ala. 110, 26 So. 305.

Actual Use and Enjoyment. — The

ownership of the property alleged to have been trespassed upon.[74]

4. Owner's Presence. — In North Carolina while in order to constitute forcible trespass the evidence must show that the possessor was present forbidding or objecting,[75] it is not necessary that it should appear that he was present all the time. It is sufficient if the evidence shows that he was present before the trespass was completed.[76]

5. Prior Warning. — In Alabama and Georgia in some instances in order to establish the offense it has been held necessary to show that the offender had had a prior warning against trespassing.[77] The evidence must show that actual notice of the warning was given to defendant, but circumstantial evidence is sufficient for this purpose.[78] It need not appear that the owner himself gave the warning; it is sufficient if the evidence shows that it was given by the owner's authorized agent.[79]

evidence must show that the prosecutor was in the actual use and enjoyment. State *v.* Newbury, 122 N. C. 1077, 29 S. E. 367; State *v.* Bryant, 103 N. C. 436, 9 S. E. 1. See also State *v.* Jones, 129 N. C. 508, 39 S. E. 795; State *v.* Childs, 119 N. C. 858, 26 S. E. 36.

A Tenant's Possession under a lease is sufficient to sustain the prosecution since he is deemed to be the owner in law. State *v.* Burns, 123 Ind. 427, 24 N. E. 154. See also State *v.* Gay, 76 S. C. 83, 56 S. E. 668.

A Mere Equitable Title is not a sufficient basis for a prosecution against one put into possession by the owner. State *v.* Mays, 24 S. C. 190.

A Mere License by the prosecutor is not sufficient exclusive possession. State *v.* Gadsden, 20 S. C. 456.

Deeds tending to show the extent of the possession of both parties were held admissible for that purpose in Parham *v.* State, 125 Ala. 57, 27 So. 778.

74. Padgett *v.* State, 81 Ga. 466, 8 S. E. 445; Gilreath *v.* State, 96 Ga. 303, 22 S. E. 907. See also Wellington *v.* State, 52 Ark. 266, 12 S. W. 562.

75. State *v.* Laney, 87 N. C. 535; State *v.* Walker, 32 N. C. (10 Ired. L.) 234; State *v.* McCauless, 31 N. C. (9 Ired. L.) 375; State *v.* Smith, 24 N. C. (2 Ired. L.) 127; State *v.* Fort, 20 N. C. (4 Dev. & B.) 192; State *v.* Bennett, 20 N. C. (4 Dev. & B.) 43; State *v.* Mills, 19 N. C. (2 Dev. & B. L.) 552; State *v.* Love, 19 N. C. (2 Dev. & B. L.) 267.

76. State *v.* Elks, 125 N. C. 603, 34 S. E. 109; State *v.* Robbins, 123 N. C. 730, 31 S. E. 609; State *v.* Webster, 121 N. C. 586, 28 S. E. 254; State *v.* Gray, 109 N. C. 790, 14 S. E. 55; State *v.* McAdden, 71 N. C. 207.

77. Morrison *v.* State (Ala.), 46 So. 646.

Sufficiency of Evidence and Variance. — Under an indictment charging that defendant "without legal cause or good excuse, entered upon the premises" of another, "after having been warned within six months preceding not to do so," evidence that after having entered upon said premises without having been warned thereto, the defendant refused to leave said premises after being warned, is sufficient to authorize a conviction. Brunson *v.* State, 140 Ala. 201, 37 So. 197.

78. Owens *v.* State, 74 Ala. 401.

79. Bryce *v.* State, 113 Ga. 705, 39 S. E. 282.

TRESPASS TO TRY TITLE.

CROSS-REFERENCES:

Title;

Trespass.

I. THE TRESPASS.

Burden of Proof. — The rule in Texas is that in an action of trespass to try title, an actual trespass need not be proved except where the controversy is not about the title, but only as to boundaries, and the plaintiff, having the superior title, charges the defendant with having trespassed upon his land.[1] But in South Carolina proof of an actual trespass is necessary.[2]

II. TITLE TO SUPPORT ACTION.

1. Burden of Proof. — A. In General. — The general rule is that plaintiff, in an action of trespass to try title, must show absolute ownership of the land in controversy in himself, at the commencement of the suit, not only as against the defendant, but as against all other persons;[3] and until he makes a *prima facie* case,

1. Viesca *v.* Wyche, 3 Woods 336, 28 Fed. Cas. No. 16,940; Stroud *v.* Springfield, 28 Tex. 649, 672. *Compare* Corrigan *v.* Fitzsimmons (Tex. Civ. App.), 76 S. W. 69.

Where the defendant had obtained judgment in a forcible entry and detainer suit, the right of possession was thus considered adjudicated, and defendant could not be considered a mere trespasser in a suit to try title. Corrigan *v.* Fitzsimmons (Tex. Civ. App.), 76 S. W. 69.

2. Massey *v.* Trantham, 2 Bay (S. C.) 421; Underwood *v.* Sims, 2 Bailey (S. C.) 81; Cornneil *v.* Bickley, 1 McCord (S. C.) 466.

Proof of an Entry by the Son and Tenant of the defendant is sufficient to charge the defendant as a trespasser by relation. Binda *v.* Benbow, 11 Rich. L. (S. C.) 24.

3. *South Carolina.* — Young *v.* Watson, 1 McMull. 449; Mazyck *v.* Birt, 2 Brev. 155.

Texas. — Brown *v.* Roberts, 75 Tex. 103, 12 S. W. 807; Tally *v.* Thorn, 35 Tex. 727; Allen *v.* Worsham (Tex. Civ. App.), 50 S. W. 157; Goethal *v.* Reed, 35 Tex. Civ. App. 461, 81 S. W. 592; Freeman *v.* Slay, 99 Tex. 514, 91 S. W. 6; Davis *v.* Ragland, 42 Tex. Civ. App. 400, 93 S. W. 1099; Ball *v.* Carroll, 42 Tex. Civ. App. 323, 92 S. W. 1023; Elcan *v.* Childress, 40 Tex. Civ. App. 193, 89 S. W. 84; Smith *v.* Hughes, 39 Tex. Civ. App. 113, 86 S. W. 936; Fellers *v.* McFatter (Tex. Civ. App.), 101 S. W. 1065; Stith *v.* Moore, 42 Tex. Civ. App. 528, 95 S. W. 587; Gorham *v.* Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665; Carlisle *v.* Gibbs, 44 Tex. Civ. App. 189, 98 S. W. 192; Newnom *v.* Williamson (Tex. Civ. App.), 103 S. W. 656; Cochran *v.* Kapner (Tex. Civ. App.), 103 S. W. 469; Simpson *v.* McLemore, 8 Tex. 448; Taylor *v.* Doom, 43 Tex. Civ. App. 59, 95 S. W. 4; Bogart *v.* Moody, 35 Tex. Civ. App. 1, 79 S. W. 633; Goethal *v.* Read (Tex. Civ. App.), 81 S. W. 592; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064; Cochran *v.* Kapner (Tex. Civ. App.), 103 S. W. 469; McDonald *v.* Downs (Tex. Civ. App.), 99 S. W. 892.

In Freeman *v.* Slay (Tex. Civ. App.), 88 S. W. 404, defendant alleged that he had leased the premises from plaintiff and that he had been wrongfully evicted and claimed damages. *Held*, the burden of proof was upon the plaintiff to establish by a preponderance of the evidence his right of possession, which depended upon whether or not he had leased the premises to defendant, although the defendant may have failed to establish by a preponderance his right to recover damages.

Where the party in possession holds a tax deed of the premises, it is incumbent on the person who controverts the right of such possession to show affirmatively the facts rendering such tax sale a nullity. Lynn *v.* Burnett, 34 Tex. Civ. App. 335, 79 S. W. 64.

the defendant need adduce no evidence whatever.[4] In short, the plaintiff must recover upon the strength of his own title and not upon the weakness of that of the defendant.[5] And of course if the plaintiff is shown not to have any title to the land his action must fail.[6]

B. Common Source of Title. — Where both plaintiff and defendant, in an action of trespass to try title, claim title under a common source, it is then incumbent upon the plaintiff to establish a superior title.[7] But the plaintiff need not show the defendant's title and its invalidity,[8] nor is it necessary for him to establish the title of the common grantor,[9] nor need he prove a regular chain of title from the government, where he shows a superior title to that of defendant.[10]

2. Mode of Proof. — Of course the rules of evidence as to the mode of proving title are not necessarily different from those applicable in any case simply by reason of the fact that the action is one of trespass to try title; the general rules of evidence applicable to such an issue govern.[11] And of course the evidence must be

Where it appears that both plaintiff and defendant claim under applications to purchase from the state, and that defendant is in possession and enjoyment of the land under a sale made and recognized by the proper government officials, such sale is presumptively valid, the burden being upon the plaintiff to show the contrary. Jones *v.* Wright, 98 Tex. 457, 84 S. W. 1053.

4. Sims *v.* Randal, 1 Brev. (S. C.) 85; Hill *v.* Grant (Tex. Civ. App.), 44 S. W. 1016; State Nat. Bank *v.* Roberts (Tex. Civ. App.), 103 S. W. 454. See also Camp *v.* League (Tex. Civ. App.), 92 S. W. 1062.

Where one party shows that he purchased the land at a legal execution sale under a judgment against a former owner, he establishes a *prima facie* case, and the burden of proving a superior title is on the adverse party. Taylor *v.* Doom, 43 Tex. Civ. App. 59, 95 S. W. 4.

5. *South Carolina.* — Gambling *v.* Prince, 2 Nott & McC. 138; Harlock *v.* Jackson, 1 Treadw. 135.

Texas. — Dalby *v.* Booth, 16 Tex. 563; McCoy *v.* Pease, 17 Tex. Civ. App. 303, 42 S. W. 659; Soape *v.* Doss, 18 Tex. Civ. App. 649, 45 S. W. 387; Devine *v.* Keller, 73 Tex. 364, 11 S. W. 379; Sullivan *v.* Dimmitt, 34 Tex. 114; Caplen *v.* Drew, 54 Tex. 493; Mann *v.* Hossack (Tex. Civ. App.), 96 S. W. 767; Fellers *v.* McFatter (Tex. Civ. App.), 101 S. W. 1065.

6. Jones *v.* Lee (Tex. Civ. App.), 41 S. W. 195; State Nat. Bank *v.* Roberts (Tex. Civ. App.), 103 S. W. 454. See also Ortiz *v.* State (Tex. Civ. App.), 86 S. W. 45. See also Ball *v.* Carroll, 42 Texas Civ. App. 323, 92 S. W. 1023.

7. Parker *v.* Campbell (Tex. Civ. App.), 65 S. W. 484; Collins *v.* Davidson, 6 Tex. Civ. App. 73, 24 S. W. 858; Simmons Hdw. Co. *v.* Davis (Tex. Civ. App.), 27 S. W. 426, *reversed*, 87 Tex. 146, 27 S. W. 62. See also Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705.

8. Simmons Hdw. Co. *v.* Davis, 87 Tex. 146, 27 S. W. 62, *reversing* (Tex. Civ. App.), 27 S. W. 426.

9. Martin *v.* Ranlett, 5 Rich. L. (S. C.) 541; Byne *v.* Wise (Tex. Civ. App.), 31 S. W. 1069; Lasater *v.* Van Hook, 77 Tex. 650, 14 S. W. 270; Stegall *v.* Huff, 54 Tex. 193; Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20. See also Tiemann *v.* Cobb, 35 Tex. Civ. App. 289, 80 S. W. 250; Cocke *v.* Texas & O. R. Co. (Tex. Civ. App.), 103 S. W. 407.

10. Young *v.* Trahan, 43 Tex. Civ. App. 611, 97 S. W. 147.

11. In Cobb *v.* Bryan (Tex. Civ. App.), 97 S. W. 513, it was held that a deed given by plaintiff's grantor, together with an agreement

competent as well as relevant and material to the issue involved.[12]

3. Nature and Sufficiency of Proof. — A. In General. — While as stated in a previous section the plaintiff must show that he is the absolute owner of the land in controversy at the commencement of the suit, this does not of necessity mean that proof of title must in all cases be made by the introduction of a deed vesting the legal title in the plaintiff.[13]

B. Prior Possession. — Thus proof of prior possession is sufficient as against a wrongdoer having no title in himself,[14] but it is

to convey, formally given, were properly admitted in evidence for the purpose of showing title in plaintiff.

In Teague *v.* Swasey (Tex. Civ. App.), 102 S. W. 458, an order for a guardian's sale of land gave a minute description thereof; and it was held that although the order confirming the sale of land failed to contain a repetition thereof, its admissibility in evidence in an action of trespass to try title was not affected.

The field-notes of the tract in controversy are admissible to show mistake in a name in the patent. New York & Tex. L. & C. Co. *v.* Dooley, 33 Tex. Civ. App. 636, 77 S. W. 1030. See also Camp *v.* League (Tex. Civ. App.), 92 S. W. 1062; Warner *v.* Sapp (Tex. Civ. App.), 97 S. W. 125.

In Goethal *v.* Reed, 35 Tex. Civ. App. 461, 81 S. W. 592, the plaintiff's application to purchase school-lands was marked, "Rejected." *Held*, that it was proper for him to have the same admitted in evidence with other evidence explaining the reason for such rejection.

In Making Proof of Common Source of Title the plaintiff has the right to introduce his evidence for that purpose only, and, when so introduced, it will not be considered for the purpose of showing title in defendant unless introduced by him. Young *v.* Trahan, 43 Tex. Civ. App. 611, 97 S. W. 147.

12. See Smith *v.* Hughes, 39 Tex. Civ. App. 113, 86 S. W. 936; Stubblefield *v.* Hanson (Tex. Civ. App.), 94 S. W. 406.

In Staley *v.* Stone, 41 Tex. Civ. App. 299, 92 S. W. 1017, the testimony of a witness showed that he had purchased land from the common source of title, that vendor's lien notes were retained, that the same had been paid and that no release had been taken, and plaintiffs were threatening to revoke the conveyance, claiming that the said notes had not been paid. It was held that this testimony pertained to an entirely different transaction to the one in controversy; it was a collateral issue, and in no way germane to the controversy and was not a legitimate inquiry, and hence not admissible. In this case it was also held no error to admit in evidence tax receipts showing the payment of taxes on the land by the plaintiff. This evidence was pertinent as a circumstance showing the claim of plaintiff, that he had asserted claim to the land to the exclusion of the defendant.

In Smithers *v.* Laurance, 100 Tex. 77, 93 S. W. 1064, where the issue was as to the validity of a purchase of school-lands, evidence that the commissioner of the general land office canceled the award to the purchaser, and evidence of the endorsements on the file wrappers of his application showing that they had been marked "canceled", was held inadmissible.

13. See Brandon *v.* McNelly, 43 Tex. 76; Walker *v.* Stroud (Tex.), 6 S. W. 202; Cook *v.* Caswell, 81 Tex. 678, 17 S. W. 385.

A Person Claiming by Regular Chain of Title need not go behind the patent in the investigation of the title, unless put upon inquiry by some means, fact or recitals of the patent itself. Bogart *v.* Moody, 35 Tex. Civ. App. 1, 79 S. W. 633.

14. *Alabama.* — Hallet *v.* Eslava, 3 Stew. & P. 105.

Texas. — Lockett *v.* Glenn (Tex.), 65 S. W. 482; Mann *v.* Hossack

necessary that the evidence should show actual possession when prior possession is so relied on.[15] But this rule as to the sufficiency of proof of prior possession does not apply where it appears that the land is part of the public domain.[16]

C. Adverse Possession. — So, too, proof of title by adverse possession is sufficient to support an action of trespass to try title.[17]

D. Equitable Title. — Again, it is held in many cases that proof of an equitable title is sufficient to support the action,[18] except as against a legal title, in which case the plaintiff must show that the defendant purchased with notice of the former's claim, or is not a purchaser for value.[19]

E. Undivided or Common Interests. — Proof that plaintiff is the owner of an undivided interest, or of an interest in common, is sufficient;[20] and some cases hold that plaintiff may on such proof recover the entire tract, unless the defendant shows title in himself.[21]

F. Title Acquired After Suit Begun. — A title acquired after the commencement of the action is not sufficient to maintain the action; nor indeed is it admissible.[22]

(Tex. Civ. App.), 96 S. W. 767; Lynn *v.* Burnett, 34 Tex. Civ. App. 335, 79 S. W. 64; Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560; Boston *v.* McMenamy, 29 Tex. Civ. App. 272, 68 S. W. 201; Caplen *v.* Drew, 54 Tex. 493; Estes *v.* Turner, 30 Tex. Civ. App. 365, 70 S. W. 1007; Webster *v.* Mann, 52 Tex. 416; Edrington *v.* Butler (Tex. Civ. App.), 33 S. W. 143.

15. Lea *v.* Hernandez, 10 Tex. 137. See also Lynn *v.* Burnett, 34 Tex. Civ. App. 335, 79 S. W. 64.

16. Austin *v.* Espuela L. & C. Co., 34 Tex. Civ. App. 39, 77 S. W. 830.

17. Scott *v.* Woodward, 2 McCord (S. C.) 161; Bishop *v.* Lusk, 8 Tex. Civ. App. 30, 27 S. W. 306; Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643. See also City of El Paso *v.* Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21; Weisman *v.* Thomson (Tex. Civ. App.), 78 S. W. 728; Hood *v.* Palmer, 7 Rich. L. (S. C.) 138; Buster *v.* Warren (Tex. Civ. App.), 80 S. W. 1063; Giddings *v.* Fischer (Tex. Civ. App.), 77 S. W. 209.

18. Craig *v.* Harless, 33 Tex. Civ. App. 257, 76 S. W. 594; Bullock *v.* Sprowls (Tex. Civ. App.), 54 S. W. 657; O'Connor *v.* Vineyard (Tex. Civ. App.), 43 S. W. 55; Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; Martin *v* Parker, 26 Tex. 253; Hermann *v.* Reynolds, 52 Tex. 391; Easterling *v.* Blythe, 7 Tex. 210; Titus *v.* Johnson, 50 Tex. 224.

Proof That Plaintiff Paid the Purchase Money under a valid sale, is sufficient as against a trespasser. Erhart *v.* Bass, 54 Tex. 97.

19. Fordtran *v.* Perry (Tex. Civ. App.), 60 S. W. 1000.

In Texas the rule under the laws of 1836, 1840, and 1895 (Laws 1895, p. 157, c. 99) has always been the same, and the junior purchaser attempting to defeat the title of the holder of a prior unrecorded deed has the burden of proving that he was a bona fide purchaser. Kimball *v.* Houston Oil Co. (Tex. Civ. App.), 94 S. W. 423.

20. Hintze *v.* Krabbenschnidt (Tex. Civ. App.), 44 S. W. 38; Leland *v.* Eckert, 81 Tex. 226, 16 S. W. 897; Roosevelt *v.* Davis, 49 Tex. 463; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

21. Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; City of El Paso *v.* Ft. Dearborn Nat. Bank (Tex. Civ. App.), 71 S. W. 799. *Compare* Perkins *v.* Davidson, 23 Tex. Civ. App. 31, 56 S. W. 121.

22. Bank of State *v.* South Carolina Mfg. Co., 3 Strobh. (S. C.) 190; Teal *v.* Terrell, 48 Tex. 491; Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612.

III. DEFENSES.

1. In General. — The defendant, in an action of trespass to try title, may defeat plaintiff's right to recover by showing the invalidity of his title, or by showing that plaintiff had no title to the land in controversy.[23]

Where Both Parties Claim Under a Common Source, defendant cannot defeat recovery by merely showing that a person other than the common source at one time held title; he must show *prima facie* at least that the common source was without title.[24]

Where Defendant Disclaims Title, claiming merely an easement over the land, the plaintiff need not prove his title; but the defendant must establish the easement claimed.[25]

2. Superior Outstanding Title. — So, too, the defendant may defeat a recovery by the plaintiff by showing a superior outstanding title either in himself or in a third person.[26] And where this out-

23. Austin *v.* Espuela L. & C. Co., 34 Tex. Civ. App. 39, 77 S. W. 830. See McKeen *v.* James, 87 Tex. 193, 25 S. W. 408, 27 S. W. 59; Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794.

Defendant may show that the conveyance under which plaintiff claims was obtained by duress or fraud, or that the consideration was compounding a felony. Price *v.* McGee, 1 Brev. (S. C.) 373.

The defendant, in order to rebut the presumption of right of possession arising from plaintiff's title, alleged the contract under which he claimed such right. *Held*, that the burden was upon the defendant to prove his allegations. Freeman *v.* Slay, 99 Tex. 514, 91 S. W. 6.

Where the defendant admits the plaintiff's title, he has the burden of proving an alleged contract of sale to himself by the plaintiff. Freeman *v.* Slay, 99 Tex. 514, 91 S. W. 6.

In Catrett *v.* Brown Hdw. Co. (Tex. Civ. App.), 86 S. W. 1045, the court said: "We are not unmindful of the rule which places the burden upon the party asserting an equity against a legal title to show that the purchaser of the legal title did not pay value therefor, or that he bought with notice of the equity. Plaintiff having purchased the legal title to the property in controversy, the burden was upon the defendants to show that it was not a purchaser for value."

In Irvin *v.* Johnson (Tex. Civ. App.), 98 S. W. 405, where the defendants claimed the property as heir of their deceased mother, who had during her marriage acquired the land, it was held that the burden was on the minors to show facts which gave the mother's property its separate character.

24. Cocke *v.* Texas & N. O. R. Co. (Tex. Civ. App.), 103 S. W. 407; Cochran *v.* Kapner (Tex. Civ. App.), 103 S. W. 469; Ellis *v.* Lewis (Tex. Civ. App.), 81 S. W. 1034.

In Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907, it was held that where the plaintiff has proved that both he and the defendant claimed from the same grantor, and that he has the superior title emanating from that source, he has made out a *prima facie* case. The *prima facie* case, however, thus made out does not estop defendant from showing a claim through another source. The question is one of burden of proof only.

25. City of Antonio *v.* Ostrom, 18 Tex. Civ. App. 678, 45 S. W. 961.

26. Jones *v.* Perkins, 1 Stew. (Ala.) 512; Mazyck *v.* Birt, 2 Brev. (S. C.) 155; Capp *v.* Terry, 75 Tex. 391, 13 S. W. 52; Riddle *v.* Bickerstaff, 50 Tex. 155; Lynn *v.* Burnett, 34 Tex. Civ. App. 335, 79 S. W. 64; Kauffman *v.* Shellworth, 64 Tex. 179; Branch *v.* Baker, 70 Tex. 190, 7 S. W. 808.

standing title is a legal one, the defendant need not connect himself therewith;[27] although in the case of mere equitable title he must so connect himself.[28] But defendant cannot show paramount title in another in order to defeat a purchaser of his own title at sheriff's sale.[29]

3. Possession by Defendant. — Proof that at the time of the commencement of the action defendant was in peaceable possession of the land establishes a defense good until the plaintiff shows a sufficient title in himself.[30]

IV. DAMAGES.

1. Measure of Recovery. — In the absence of any statute on the subject, the mesne profits down to the time of the trial furnish the measure of plaintiff's damages, and evidence thereof is accordingly properly received.[31]

Under the Texas Statutes, however, damages are measured by the value of the use and occupation of the premises, or injuries done over two years before action begun.[32]

2. Improvements by Defendant. — Under the Texas statute, the defendant may show and be allowed for improvements made by him while in possession in good faith.[33] In order to invoke the provisions of the statute, however, he must show the value of the im-

Plaintiff must recover upon the strength of his own title, and where there is proof of a superior outstanding title in a third person it is a good defense, although the defendant may not claim under such title. Mann *v.* Hossack (Tex. Civ. App.), 96 S. W. 767.

27. Tenzler *v.* Tyrrell, 32 Tex. Civ. App. 443, 75 S. W. 57; Meyer *v.* Hale (Tex. Civ. App.), 23 S. W. 990; Lockwood *v.* Ogden (Tex. Civ. App.), 50 S. W. 1077.

While it is a general rule that prior possession of land affords such *prima facie* evidence of title as warrants a recovery in a suit of this character against a mere trespasser, still this is only a rule of evidence, and the *prima facie* inference that such possessor is the owner of the property is rebutted and overthrown by proof of a superior outstanding title in another. Mann *v.* Hossack (Tex. Civ. App.), 96 S. W. 767.

28. Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551; Fitch *v.* Boyer, 51 Tex. 336; Meyer *v.* Hale (Tex. Civ. App.), 23 S. W. 990; Goode *v.* Jasper, 71 Tex. 48, 9 S. W. 132; Shields *v.* Hunt, 45 Tex. 424. *Compare* Robertson *v.* DuBose, 76 Tex. 1, 13 S. W. 300; Hallett *v.* Eslava, 2 Stew. (Ala.) 115.

29. McElwee *v.* Beason, 2 Rich. L. (S. C.) 26.

30. Linthicum *v.* March, 37 Tex. 349; Dalby *v.* Booth, 16 Tex. 563.

31. Masters *v.* Eastis, 3 Port. (Ala.) 368; Avent *v.* Read, 2 Port. (Ala.) 480; Shumake *v.* Nelm's Admr., 25 Ala. 126; Duff *v.* Hutson, 2 Bailey (S. C.) 215. *Compare* Bullock *v.* Wilson, 3 Port. (Ala.) 382.

32. Tex. Rev. Stat. art. 5273. See O'Mahoney *v.* Flanagan, 34 Tex. Civ. App. 244, 78 S. W. 245; Robert *v.* Ezell, 11 Tex. Civ. App. 176, 32 S. W. 362; St. Louis Cattle Co. *v.* Vaught, 1 Tex. Civ. App. 388, 20 S. W. 855; Durst *v.* Mann (Tex. Civ. App.), 35 S. W. 949.

The Period of Defendant's Possession must be established; proof merely of possession is not enough under the Texas statute. Hart *v.* Meredith, 27 Tex. Civ. App. 271, 65 S. W. 507.

33. O'Mahoney *v.* Flanagan, 34 Tex. Civ. App. 244, 78 S. W. 245; Wilson *v.* Wilson, 35 Tex. Civ. App. 192, 79 S. W. 839; Ferguson *v.* Cochran (Tex. Civ. App.), 45 S. W. 30; Roche *v.* Lovell, 74 Tex. 191, 11 S.

provements for which he claims compensation,[34] and that he believed he had good title.[35] And defendant may, in such case, show that he had acquired a better title than the common source.[36] So, too, he may show a superior outstanding title, with which he is not connected, provided of course such title never vested in the common origin.[37]

W. 1079; Devine *v.* Keller, 73 Tex. 364, 11 S. W. 379; Rowan *v.* Rainey, 25 Tex. Civ. App. 593, 63 S. W. 1031; Hill *v.* Spear, 48 Tex. 583; Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637; Franklin *v.* Campbell, 5 Tex. Civ. App. 174, 23 S. W. 1003; Robert *v.* Ezell, 11 Tex. Civ. App. 176, 32 S. W. 362.

In Staley *v.* Stone, 41 Tex. Civ. App. 299, 92 S. W. 1017, where defendant did not obtain land in good faith but was expecting to secure a perfect title in himself by the statute of limitations, it was held that he was not entitled to recover for improvements made by him.

34. Wilson *v.* Wilson, 35 Tex. Civ. App. 192, 79 S. W. 839. *Compare* McCown *v.* McCafferty, 14 Tex. Civ. App. 77, 36 S. W. 517, *holding* that mere proof of the value of the improvements alone is not enough; that there must also be proof of the value of the land with and without the improvements.

The value of the rents and damages being the same as the value of the improvements, it may be inferred the jury set off one against the other. O'Mahoney *v.* Flanagan, 34 Tex. Civ. App. 244, 78 S. W. 245.

35. Settegast *v.* O'Donnell, 16 Tex. Civ. App. 56, 41 S. W. 84. See also Greenwood *v.* McLeary (Tex. Civ. App.), 25 S. W. 708.

A Tax Deed to defendant, though void on its face, is admissible on the question of good faith. Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120. See also Traylor *v.* Lide (Tex.), 7 S. W. 58.

Ignorance on the part of the defendant of the plaintiff's existence, and of her claim to the land may be shown by defendant. Polk *v.* Chaison, 72 Tex. 500, 10 S. W. 581.

Where a title was accepted without examination or inquiry, there being record evidence of the fact that it was void, and the improvements were made after notice by letter that the title was in other persons and still no inquiry was made, it was held that the defendant did not make the improvements in good faith, notwithstanding his testimony that he thought he had good title. Texas & N. O. R. Co. *v.* Barber, 31 Tex. Civ. App. 84, 71 S. W. 393.

36. Linthicum *v.* March, 37 Tex. 349.

37. Ferguson *v.* Ricketts, 93 Tex. 565, 57 S. W. 19. See also Gann *v.* Roberts, 32 Tex. Civ. App. 561, 74 S. W. 950. *Compare* Pfouts *v.* Thompson (Tex. Civ. App.), 27 S. W. 904; Hintze *v.* Krabbenschmidt (Tex. Civ. App.), 44 S. W. 38.

TRIAL.—See Admissions; Attendance of Witnesses; Best and Secondary Evidence; Competency; Confessions; Cross-Examination; Direct Examination; Leading Questions; New Trial; Objections; Offer of Evidence; Order of Proof; Rebuttal; Striking Out and Withdrawal of Evidence; Witnesses, and numerous other articles dealing with matters that may arise in trials generally as distinguished from trials of a certain kind of action. See also Arson; Assault and Battery; Burglary; Replevin, and other articles dealing with particular actions.

TROVER AND CONVERSION.

By C. R. Mahan.

I. MATTERS PERTAINING TO RIGHT OF ACTION OR RECOVERY.

1. Title or Right of Possession. — A. Burden of Proof and Presumption. — a. *In General.* — The general rule is that, in an action of trover for the conversion of personal property, the plaintiff must prove either a general or a special ownership in the property in controversy and either actual possession or a right to the immediate possession thereof.[1] And the plaintiff must prove the title and right

1. *United States.* — Eiseman *v.* Maul, 8 Fed. Cas. No. 4,322.

Alabama. — Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Hawkins Lumb. Co. *v.* Bray, 105 Ala. 655, 17 So. 96; Draper *v.* Walker, 98 Ala. 310, 13 So. 595; Nations *v.* Hawkins, 11 Ala. 859; Whitlock *v.* Heard, 13 Ala. 776; Kemp *v.* Thompson, 17 Ala. 9; Glaze *v.* McMillion, 7 Port. 279.

Arkansas. — Dauley *v.* Rector, 10 Ark. 211; Warner *v.* Capps, 37 Ark. 32.

Connecticut. — Wilson *v.* Griswold, 79 Conn. 18, 66 Atl. 783; Morey *v.* Hoyt, 65 Conn. 516, 33 Atl. 496; Clark *v.* Hale, 34 Conn. 398; Calhoun *v.* Richardson, 30 Conn. 210.

Georgia. — Liptrot *v.* Holmes, 1 Ga. 381; Wallis *v.* Osteen, 38 Ga. 250; Tribble *v.* Laird, 92 Ga. 686, 19 S. E. 26.

Illinois. — Poppers *v.* Peterson, 33 Ill. App. 384; Owens *v.* Weedman, 82 Ill. 409; Davidson *v.* Waldron, 31 Ill. 120.

Indiana. — Burton *v.* Tannehill, 6 Blackf. 470; Traylor *v.* Horrall, 4 Blackf. 317; Redman *v.* Gould, 7 Blackf. 361; Hunter *v.* Cronkhite, 9 Ind. App. 470, 36 N. E. 924; Grady *v.* Newby, 6 Blackf. 442; Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908.

Iowa. — Himmelman *v.* Des Moines Ins. Co., 132 Iowa 668, 110 N. W. 155; Munier *v.* Zachary, 114 N. W. 525.

Kansas. — Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295; Guernsey *v.* Fulmer, 66 Kan. 767, 71 Pac. 578.

Kentucky. — Geohagan *v.* Baker, 3 Bibb 284; Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83.

Maine. — Ames *v.* Palmer, 42 Me. 197; Boobier *v.* Boobier, 39 Me. 406; Clapp *v.* Glidden, 39 Me. 448; Hagar *v.* Randall, 62 Me. 439.

Maryland. — Stewart *v.* Spedden, 5 Md. 433; Dungan *v.* Mutual B. L. Ins. Co., 38 Md. 242; Bryson *v.* Rayner, 25 Md. 424.

Massachusetts. — Winship *v.* Neale, 10 Gray 382; Fairbank *v.* Phelps, 22 Pick. 535.

Michigan. — Stephenson *v.* Little, 10 Mich. 433; Edwards *v.* Frank, 40 Mich. 616; Stevenson *v.* Fitzgerald, 47 Mich. 166, 10 N. W. 185; Ribble *v.* Lawrence, 51 Mich. 569, 17 N. W. 60; Henry *v.* Manistique Iron Co., 147 Mich. 509, 111 N. W. 79.

Minnesota. — Bibb *v.* Roth, 101 Minn. 111, 111 N. W. 919; Vanderburgh *v.* Bassett, 4 Minn. 242.

Montana. — Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884; Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419; Harrington *v.* Stromberg-Mullins Co., 29 Mont. 157, 74 Pac. 418; Glass *v.* Basin & B. S. M. Co., 31 Mont. 21, 77 Pac. 302.

Nebraska. — Holmes *v.* Bailey, 16 Neb. 300, 20 N. W. 304.

New Hampshire. — Odiorne *v.* Colley, 2 N. H. 66; Cheshire R. Co. *v.* Foster, 51 N. H. 490; Bartlett *v.* Hoyt, 29 N. H. 317.

New Jersey. — Debow *v.* Colfax, 10 N. J. L. 128.

New York. — Bushman *v.* Brown, 57 Hun 592, 11 N. Y. Supp. 1; Green *v.* Clark, 5 Denio 497, 12 N. Y. 343; Knight *v.* Sackett & W. L. Co., 141 N. Y. 404, 36 N. E. 392, *affirmed* 19 N. Y. Supp. 712; 46 N. Y. St. 866; Coldwell *v.* Bodine, 18 N. Y. Supp. 627; Putnam *v.* Wyley, 8 Johns. 432; Tuthill *v.* Wheeler, 6 Barb. 362; Cobb *v.* Dows, 9 Barb. 230; Van Brunt *v.* Schenck, 11 Johns. 377.

North Carolina. — Herring *v.* Tilghman, 35 N. C. (13 Ired. L.)

of possession set up and relied upon by him.[2] Indeed, as in other cases where the title to property is involved as an essential element or the right of the plaintiff to recover, the plaintiff in an action of trover must recover upon the strength of his own title, and not upon the weakness of that of his adversary.[3]

Equitable Title. — It has been held that it is not enough for plaintiff in an action of trover to show an equitable title, such as a right to redeem, or a reversionary interest, subject to the present legal title and actual possession in another.[4]

Joint Ownership. — And in the case of several plaintiffs, claiming joint ownership of the property in controversy, it is not enough for them to show ownership in one; they must prove ownership in all;[5] although a joint owner may maintain an action on his own behalf upon proof of his separate interest.[6]

b. *Possession.* — As in other cases where the ownership of personal property is involved, so in an action of trover, evidence of possession by the plaintiff of the property in controversy at the time of the alleged conversion is regarded as *prima facie* proof of

392; Andrews *v.* Shaw, 15 N. C. 70; Lewis *v.* Mobley, 20 N. C. 323; Barwick *v.* Barwick, 33 N. C. (11 Ired.) 80.

North Dakota. — Parker *v.* First Nat. Bank, 3 N. D. 87, 54 N. W. 313.

Oklahoma. — Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883.

Oregon. — Walker *v.* First Nat. Bank, 43 Or. 102, 72 Pac. 635.

Pennsylvania. — Purdy *v.* McCullough, 3 Pa. St. 466.

Rhode Island. — Rexroth *v.* Coon, 15 R. I. 35, 23 Atl. 37.

South Carolina. — Slack *v.* Littlefield, Harp. L. 298.

South Dakota. — Mosteller *v.* Holborn, 114 N. W. 693.

Tennessee. — Caldwell *v.* Cowan, 9 Yerg. 262.

Vermont. — Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. 157; Swift *v.* Moseley, 10 Vt. 208; White *v.* Norton, 22 Vt. 15.

Virginia. — Harvey *v.* Epes, 12 Gratt. 153.

Washington. — Greenwood *v.* Corbin, 93 Pac. 433.

Wisconsin. — Walworth Co. Bank *v.* Farmers' L. & T. Co., 14 Wis. 325.

Wyoming. — DeClark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

Proof of Ownership Includes Right to Possession. — Guernsey *v.* Fulmer, 66 Kan. 767, 71 Pac. 578.

The Consignee Named in a Bill of Lading is, in the absence of evidence showing to the contrary, presumed to be the owner of the goods embraced therein. Benjamin *v.* Levy, 39 Minn. 11, 38 N. W. 702.

2. Gregory Point M. R. Co. *v.* Selleck, 43 Conn. 320, where the plaintiff set up and relied upon title by virtue of a lien, and it was held that he could not rest his case upon proof of a mere possessory right. See also Debow *v.* Colfax, 10 N. J. L. 128; Yoner *v.* Neidig, 1 Yeates (Pa.) 19.

3. Holmes *v.* Bailey, 16 Neb. 300, 20 N. W. 304; Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295. See also Zunkle *v.* Cunningham, 10 Neb. 162, 4 N. W. 951, (he must recover upon the strength of his right to the possession of the goods).

4. Ring *v.* Neale, 114 Mass. 111. See also Draper *v.* Walker, 98 Ala. 310, 13 So. 595; Halleck *v.* Mixer, 16 Cal. 574; Ames *v.* Palmer, 42 Me. 197; Edwards *v.* Welton, 25 Mo. 379; Myers *v.* Hale, 17 Mo. App. 204; Clark *v.* Rideout, 39 N. H. 238; Byam *v.* Hampton, 57 Hun 585, 10 N. Y. Supp. 372; Harlan *v.* Harlan, 15 Pa. St. 507.

5. Pettibone *v.* Phelps, 13 Conn. 445.

6. Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471.

ownership,[7] and is ordinarily held to be sufficient proof of ownership as against a wrongdoer.[8] But where the possession of the defendant is under a claim or color of title, proof of mere possession in the plaintiff at the time of the alleged conversion is not enough; proof of some title in the plaintiff is then indispensable.[9]

So, too, if the plaintiff has never had possession of the property, or if the contest be not with a mere stranger, but with one who will succeed in his proof of title unless the plaintiff can prove a better,

7. Cook *v.* Patterson, 35 Ala. 102; Gilson *v.* Wood, 20 Ill. 37; Adams *v.* McGlinchy, 66 Me. 474; Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27; Final *v.* Backus, 18 Mich. 218; Jones *v.* Sinclair, 2 N. H. 319; Hoyt *v.* Gelston, 13 Johns. (N. Y.) 141.

Possession of a Note is *prima facie* evidence of ownership in an action of trover by the holder against one who shows no title to it. Donnell *v.* Thompson, 13 Ala. 440.

8. *Alabama.* — Cook *v.* Patterson, 35 Ala. 102; Draper *v.* Walker, 98 Ala. 310, 13 So. 595.

Arkansas. — Warner *v.* Capps, 37 Ark. 32.

Colorado. — Omaha & G. S. & R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925.

Connecticut. — Morey *v.* Hoyt, 65 Conn. 516, 33 Atl. 496; Ashmead *v.* Kellogg, 23 Conn. 70.

Florida. — Carter *v.* Bennett, 4 Fla. 283.

Illinois. — Montgomery *v.* Brush, 121 Ill. 513, 13 N. E. 230; Lapp *v.* Pinover, 27 Ill. App. 169.

Maine. — Vining *v.* Baker, 53 Me. 544; Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27; Moulton *v.* Witherell, 52 Me. 237.

Michigan. — Parkhurst *v.* Jacobs, 17 Mich. 302.

Missouri. — Deland *v.* Vanstone, 26 Mo. App. 297.

Nebraska. — Grand I. Bkg. Co. *v.* First Nat. Bank, 34 Neb. 93, 51 N. W. 596.

New York. — Goodrich *v.* Houghton, 55 Hun 526, 9 N. Y. Supp. 214; Burt *v.* Dutcher, 34 N. Y. 493.

Oregon. — Harvey *v.* Lidvall, 48 Or. 558, 87 Pac. 895.

Proof of Possession of Land is, as against a person having neither title nor possession, sufficient to sustain an action of trover for the value of grass (Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27), or logs (Skinner *v.* Pinney, 19 Fla. 42) cut thereon.

The Mere Possession of a Chattel, although without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession. Harpes *v.* Harpes, 62 Ga. 394.

Proof of a Levy upon personal property by an officer gives him such possession as enables him to maintain trover for its conversion while in his possession (Williams *v.* Herndon, 12 B. Mon. (Ky.) 484); and his return is competent, and *prima facie* sufficient evidence to prove that the levy was duly and legally made and in such manner as to vest the possession in him. Williams *v.* Herndon, 12 B. Mon. (Ky.) 484.

Prior Actual Possession, although there may be a better title in another, is sufficient to maintain trover against one who afterwards comes into the possession without title, or one who received the possession from one who then came into possession without title, unless the defendant can connect his possession with the better title. Simmons *v.* Knight, 35 Ala. 102; Lowremore *v.* Berry, 19 Ala. 130.

Possession by the State, of drafts of county treasurers, sent by them to the state treasurer for the purpose of paying taxes, is sufficient evidence of title in the state to support an action of trover as against a mere wrongdoer without title. People *v.* Sherwin, 2 Thomp. & C. (N. Y.) 528.

9. Fightmaster *v.* Beasly, 7 J. J. Marsh. (Ky.) 410.

it is necessary for the latter to resort to strict evidence of title.[10]

Actual Possession on the part of the plaintiff is not always necessary to be shown;[11] evidence establishing a right of possession at the time of the alleged conversion is frequently sufficient.[12]

In an Action by a Lienholder for the conversion of the property covered by the lien, it is not necessary, in order to entitle him to maintain the action, to show that at the time of the alleged conversion he was in possession of the property.[13]

c. *Special Interest in Property.* — **(1.) In General. — Legal Title Not Necessary.** — Proof of legal title to the property in controversy is not always necessary in order to maintain trover for its conversion; on the contrary, in many cases, proof of any special valuable interest in the property, accompanied with the right of possession, is regarded as sufficient on which to base the action.[14]

(2.) Mortgagee. — Thus where plaintiff claims a right of possession under a mortgage vesting the whole legal title in him, proof of that

10. Nations *v.* Hawkins, 11 Ala. 859.

11. Moulton *v.* Witherell, 52 Me. 237.

12. *Iowa.* — Dorcey *v.* Patterson, 7 Iowa 420.

Michigan. — Harris *v.* Cable, 104 Mich. 365, 62 N. W. 582.

Minnesota. — Derby *v.* Gallop, 5 Minn. 119.

New York. — Barker *v.* Miller, 6 Johns. 195; Alexander *v.* Mahon, 11 Johns. 185; Van Houten *v.* Pye, 87 Hun 19, 33 N. Y. Supp. 838; Thorp *v.* Burling, 11 Johns. 285; Kerner *v.* Boardman, 14 N. Y. Supp. 787, 39 N. Y. St. 61.

Where a creditor has been notified that goods have been shipped to him in part payment of a debt, his assent will be presumed, so as to authorize the person to whom they were sent to bring an action against one converting the goods. Berly *v.* Taylor, 5 Hill (N. Y.) 577.

Constructive Possession which follows the title to land is sufficient in the absence of proof of an adverse possession to support an action for the conversion of chattels taken from the land. White *v.* Yawkey, 108 Ala. 270, 19 So. 360. See also Cooper *v.* Watson, 73 Ala. 252; Pedroni *v.* Eppstein, 17 Colo. App. 424, 68 Pac. 794; Russell *v.* Willett, 80 Hun 497, 30 N. Y. Supp. 490 (possession under claim of title).

The Naked Possession of Property for a Short Time, and the exercise of the acts of ownership over it, will not authorize a jury to find a transfer of property, where there is no proof of acquiescence of the former owner in such possession. Tompkins *v.* Haile, 3 Wend. (N. Y.) 406.

13. Hahn *v.* Sleepy Eye Mill. Co. (S. D.), 112 N. W. 843.

14. *Georgia.* — Wallis *v.* Osteen, 38 Ga. 250.

Maine. — Ripley *v.* Dolbier, 18 Me. 382.

Massachusetts. — Hardy *v.* Reed, 6 Cush. 252; Morgan *v.* Ide, 8 Cush. 420.

Mississippi. — Baldwin *v.* McKay, 41 Miss. 358.

New Hampshire. — Bartlett *v.* Hoyt, 29 N. H. 317.

New York. — Hyde *v.* Cookson, 21 Barb. 92; Burt *v.* Dutcher, 34 N. Y. 493; Smith *v.* James, 7 Cow. 328; Lane *v.* Rosenberg, 56 N. Y. Super. 604, 7 N. Y. Supp. 906, judgment *affirmed*, 121 N. Y. 696, 24 N. E. 1099; Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827; Mayer *v.* Kilpatrick, 7 Misc. 689, 28 N. Y. Supp. 145; Phillips *v.* McNab, 9 N. Y. Supp. 526, 30 N. Y. St. 853.

North Carolina. — Hughes *v.* Giles, 2 N. C. (1 Hayw.) 26.

Pennsylvania. — Horn *v.* Davis, 155 Pa. St. 57, 25 Atl. 828.

Texas. — Texas & P. R. Co. *v.* Beard, 68 Tex. 264, 4 S. W. 483.

Vermont. — Buckmaster *v.* Mower, 21 Vt. 204.

fact will enable him to maintain trover, although it does not appear that he ever had possession of the property nor foreclosed.[15]

(3.) Lienee, Bailee, Pledgee or Lessee. — So evidence that the possession of the plaintiff was as lienee,[16] bailee,[17] pledgee[18] or lessee[19] is sufficient to establish a special property in him entitling him to maintain trover for its conversion.

(4.) Officer Attaching Property. — The attachment of property by an officer in the mode prescribed by law[20] furnishes sufficient evidence of a special interest in the property so as to enable the officer to

15. *United States.* — Wood *v.* Weimar, 104 U. S. 786.

Alabama. — Elmore *v.* Simon, 67 Ala. 526; Collier *v.* Faulk, 69 Ala. 58; Evington *v.* Smith, 66 Ala. 398; Corbitt *v.* Reynolds, 68 Ala. 378.

Arkansas. — McClure *v.* Hill, 36 Ark. 268.

Illinois. — Dunning *v.* Fitch, 66 Ill. 51.

Kansas. — Brookover *v.* Esterly, 12 Kan. 149.

Maine. — Treat *v.* Gilmore, 49 Me. 34.

Massachusetts. — Wells *v.* Connable, 138 Mass. 513; Leonard *v.* Hair, 133 Mass. 455; Ring *v.* Neale, 114 Mass. 111; Landon *v.* Emmons, 97 Mass. 37.

Michigan. — Wright *v.* Starks, 77 Mich. 221, 43 N. W. 868; Grove *v.* Wise, 39 Mich. 161.

New York. — Hall *v.* Lampson, 35 N. Y. 274; Smith *v.* Beattie, 31 N. Y. 542; Ford *v.* Ransom, 39 How. Prac. 429.

Rhode Island. — Cook *v.* Corthell, 11 R. I. 482.

South Carolina. — Wolff *v.* Farrel, 1 Tread. Const. 68.

Wisconsin. — Bates *v.* Wilbur, 10 Wis. 415; Cotton *v.* Watkins, 6 Wis. 629.

Thus, In the Case of a Chattel Mortgage, the mortgage providing that upon default in the payment of the indebtedness secured thereby. Mathew *v.* Mathew, 138 Cal. 334, 71 Pac. 344. See also Smith *v.* Konst, 50 Wis. 360, 7 N. W. 293; Miles *v.* North Pacific Lumb. Co., 38 Or. 556, 64 Pac. 303, *holding* that the admission in the mortgage of the making of the note, was sufficient to take the case to the jury on the question of title, although the note was not introduced, there being no evidence of any transfer from the plaintiff.

16. Legg *v.* Evans, 6 Mees. & W. (Eng.) 36, 8 D. P. C. 177, 9 L. J. Ex. 102. See also Grinnell *v.* Cook, 3 Hill (N. Y.) 485; Black *v.* Brennan, 5 Dana (Ky.) 310.

17. *Alabama.* — Bird *v.* Womack, 69 Ala. 390; Nations *v.* Hawkins, 11 Ala. 859; Spence *v.* Mitchell, 9 Ala. 744.

Arkansas. — Overby *v.* McGee, 15 Ark. 459.

Georgia. — Clark *v.* Bell, 61 Ga. 147; Booth *v.* Terrell, 16 Ga. 20.

Maine. — Moran *v.* Portland St. Pkt. Co., 35 Me. 55.

Massachusetts. — Fairbank *v.* Phelps, 22 Pick. 535; Bryant *v.* Clifford, 13 Metc. 138; Morgan *v.* Ide, 8 Cush. 420.

New Hampshire. — Hyde *v.* Noble, 13 N. H. 494; Drake *v.* Redington, 9 N. H. 243.

New York. — Ely *v.* Ehle, 3 N. Y. 506; Root *v.* Chandler, 10 Wend. 110; Smith *v.* James, 7 Cow. 328; Hurd *v.* West, 7 Cow. 752.

North Carolina. — Hopper *v.* Miller, 76 N. C. 402.

Pennsylvania. — Brown *v.* Dempsey, 95 Pa. St. 243.

Vermont. — Strong *v.* Adams, 30 Vt. 221.

18. Jones *v.* Baldwin, 12 Pick. (Mass.) 316; Garlick *v.* James, 12 Johns. (N. Y.) 146; Treadwell *v.* Davis, 34 Cal. 601; Noles *v.* Marable, 50 Ala. 366; Brownell *v.* Hawkins, 4 Barb. (N. Y.) 491; Southworth *v.* Sebring, 2 Hill (S. C.) 587.

19. Ayer *v.* Bartlett, 9 Pick. (Mass.) 156. See also Chamberlain *v.* Neale, 9 Allen (Mass.) 410.

20. That the evidence must show an actual and lawful levy, see Brian *v.* Strait, Dudley (S. C.) 19.

maintain trover for its conversion;[21] but not as to the person in whose favor the writ was issued.[22]

d. *Matters Affecting Plaintiff's Right of Possession.* — Sometimes the right of possession to the property in controversy involves an obligation upon the part of the party claiming the same for the benefit of the party rightfully in possession; and of course, in such case, in order to maintain trover as against such party in possession for an alleged conversion, there must be evidence of a discharge of such obligation, unless the circumstances are such as in law will excuse performance thereof.[23] Thus a buyer of chattels for cash suing his seller for the alleged conversion before delivery must show payment of the purchase price.[24]

Bailee's Lien. — Against a bailee for hire, the bailor must, in order to maintain his action, establish the fact of the extinguishment of the bailee's right to a lien by proving payment, or tender of payment, of the charges for which the lien is given, except where there has been an unauthorized use of the goods.[25] But as against a mere wrongdoer who has wrongfully procured possession of the property

21. Huntley *v.* Bacon, 15 Conn. 267; Gibbs *v.* Chase, 10 Mass. 125; Lathrop *v.* Blake, 23 N. H. 46; Tuttle *v.* Jackson, 4 N. J. L. 115; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322; Blodgett *v.* Adams, 24 Vt. 23.

Proof of a Legal Seizure, although not shown to have been accompanied by actual possession, is sufficient, since in such case the officer is invested with constructive possession. Mulheisen *v.* Lane, 82 Ill. 117.

22. Baker *v.* Beers, 64 N. H. 102, 6 Atl. 35.

23. Where the possession of property is obtained by contract of purchase while the owner is incapable, because of intoxication, to make the contract, it is not necessary to prove rescission or return of the consideration. Baird *v.* Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846.

The owner of a chattel, to maintain trover against a bailee for hire for a conversion, in having used it to an extent not permitted by the contract of hiring, need not prove that he tendered back the money received for the hire. Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397.

24. Conway *v.* Bush, 4 Barb. (N. Y.) 564. See also McDonough *v.* Sutton, 35 Mich. 1; Collins *v.* Manning, 56 Hun 640, 8 N. Y. Supp. 927; Farmers' Bank *v.* McKee, 2 Pa. St. 318.

25. A Tender of Charges must be made before an action of trover can be maintained where it appears that a lien exists, unless the goods have been parted with. Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541. But when it appears that a pledgee has, by an unauthorized sale, put it out of his power to restore the pledged property, it is not necessary to prove that a tender of the principal debt was made. Winchester *v.* Joslyn, 31 Colo. 220, 72 Pac. 1079.

Action for Conversion of Money on which the defendant has a lien as attorney cannot be maintained, unless plaintiff shows that he had paid or tendered to the defendant the amount due to him on his lien. Gunning *v.* Quinn, 81 Hun 522, 30 N. Y. Supp. 1015, *affirmed,* 153 N. Y. 659, 48 N. E. 1104.

Where a Carrier Has a Lien for charges on goods in his possession, in the absence of proof that he would have refused to deliver on offer of the amount of his lien, there is no conversion. Coller *v.* Shepard, 19 Barb. (N. Y.) 305. But where the damages occasioned by delay exceed the freight charges, tender of the latter is unnecessary. Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp.

from the bailee, the bailor need not show such extinguishment.[26]

B. Mode of Proof. — a. *In General.* — The mode of proving title and right of possession to personal property involved in an action of trover is governed by the same general rules of evidence as apply in other cases where such fact is material and necessary to be established.[27]

b. *Direct Testimony.* — The plaintiff in an action of trover may testify directly to his possession of the property in controversy.[28] But defendant cannot be asked whether he or the plaintiff owned the property, since such a question calls for a conclusion of law.[29]

c. *Documentary Evidence of Title.* — Where title or right of possession to the property in controversy was acquired by a bill of sale, or other written instrument, such instrument should be produced or its nonproduction be explained.[30] But if the plaintiff's title was acquired by an oral sale, the production of writings pertaining thereto, subsequently made, is not necessary.[31]

Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80. And the rule is the same where the charges are excessive. Gates *v.* Bekins, 44 Wash. 422, 87 Pac. 545.

26. As against a mere wrongdoer who has wrongfully taken the property from a carrier, it is not incumbent on the plaintiff to show payment of the carrier's lien for freight. Ames *v.* Palmer, 42 Me. 197.

27. See article "Ownership," Vol. IX.

Property Taken From an Agent. A contract of agency between the plaintiff and the person from whom the goods were taken is admissible to rebut the presumption of ownership arising from the latter's possession; but plaintiff's letters ordering the goods to be shipped and billed to such agent, with duplicate bills to himself, are mere self-serving declarations and incompetent. Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884. All of the circumstances showing the attitude of the agent towards the property at the time plaintiff claimed to have bought it are admissible. Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.

Acts and Statements of defendant in attachment, with respect to the property attached, made and done about the time the writ was served, are competent evidence in an action of trover for the property levied on. Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.

Where the goods were attached by the defendant as the property of his debtor, plaintiff may show that when so attached they were in transit and that he had subsequently exercised his right of stoppage *in transitu.* Frame *v.* Oregon L. Co., 48 Or. 272, 85 Pac. 1009, 86 Pac. 791.

28. Rand *v.* Freeman, 1 Allen (Mass.) 517.

29. Cate *v.* Fife, 80 Vt. 404, 68 Atl. 1.

30. Dunn *v.* Hewitt, 2 Denio (N. Y.) 637.

Mortgage. — Where plaintiff relies upon a mortgage for his title, the mortgage should be produced. Bissell *v.* Pearce, 28 N. Y. 252.

31. Dunn *v.* Hewitt, 2 Denio (N. Y.) 637, so holding of written acknowledgments and receipts; and that evidence of the transaction which they are designed to evidence may be received, although the nonproduction of such writings is not explained.

In the case of an oral sale perfected by delivery, although a bill of sale is subsequently made and delivered by the seller, the writing need not be produced; the sale may be shown by any competent evidence. Sanders *v.* Stokes, 30 Ala. 432.

d. *Parol Evidence.* — And of course parol evidence cannot be received for the purpose of controlling or varying the terms of a writing on which plaintiff's title depends.[32]

e. *Acts and Declarations.* — Evidence of conduct by the plaintiff himself inconsistent with his ownership may be introduced.[33]

Declarations of a Person in Possession are admissible for the purpose of explaining his possession,[34] such as that he holds in subordination to another.[35] But such declarations are not admissible against the owner for the purpose of divesting him of his property.[36]

Acts and Declarations of the Defendant in respect of the property in controversy are admissible in evidence against him.[37]

2. The Fact of Conversion. — A. Presumptions and Burden and Cogency of Proof. — a. *In General.* — In an action for the conversion of personal property, the burden is upon the plaintiff to prove the acts relied upon by him as constituting the alleged conversion.[38] Without proof of this fact, which is the gist of such

32. Ripley *v.* Paige, 12 Vt. 353. See also Richardson *v.* Wellington, 66 N. Y. 308.

Where Plaintiff Relies Upon a Mortgage for his title, evidence of a parol agreement cannot be received to control the effect or construction of the mortgage. Clark *v.* Houghton, 12 Gray (Mass.) 38. See also Underwood *v.* Simonds, 12 Metc. (Mass.) 275.

33. Taylor *v.* Tigerton Lumb. Co., 134 Wis. 24, 114 N. W. 122.

34. Nelson *v.* Iverson, 17 Ala. 216, *holding* that such declarations are admissible as part of the *res gestae* to prove the character of his possession.

Upon the question of the ownership of a note for the conversion of which recovery is sought, it is competent for the holder, claiming ownership, to prove statements made by him at the time of handing it to another for collection, to show his ownership thereof. Donnell *v.* Thompson, 13 Ala. 440.

Statements by a third person in whom ownership is alleged, made after he has parted with his ownership and possession, are not admissible against either party. Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432. But his declarations while in possession and use of the chattel in question as to his ownership and desire to sell, together with his statement that he had repaired it at his own expense, are admissible, the former as tending to prove ownership, and the latter as tending to characterize the act referred to, although not otherwise proving the facts stated. Avery *v.* Clemons, 18 Conn. 306.

In Goltra *v.* Penland, 45 Or. 254, 77 Pac. 129, an action for the conversion of sheep by one caring for them on shares, it was held that declarations of a person who delivered wool for the defendant to a warehouseman, as to the ownership of the sheep from which the wool was clipped, were outside of the scope of his authority as agent and were not admissible as against the defendant.

35. Mobley *v.* Bilberry, 17 Ala. 428; Thomas *v.* De Graffenreid, 17 Ala. 602; White *v.* Dinkins, 19 Ga. 285; Spence *v.* Smith, 18 N. H. 587; Putnam *v.* Osgood, 52 N. H. 148.

36. Carter *v.* Feland, 17 Mo. 383.

37. Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.

38. *Alabama.* — Hawkins Lumb. Co. *v.* Bray, 105 Ala. 655, 17 So. 96; Glaze *v.* McMillion, 7 Port. 279; Whitlock *v.* Heard, 13 Ala. 776.

Arkansas. — Zachary *v.* Pace, 9 Ark. 212.

California. — Allsopp *v.* J. Hendy Mach. Wks., 5 Cal. App. 228, 90 Pac. 39; Steele *v.* Marsicano, 102 Cal. 666, 36 Pac. 920; Lowe *v.* Ozmun, 3 Cal. App. 387, 86 Pac. 729.

Colorado. — Beaton *v.* Wade, 14 Colo. 4, 22 Pac. 1093.

an action,[39] the plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action.[40] And not only is it incumbent on the plaintiff to establish the fact of the conversion, but he must further show that it occurred before the institution of the action.[41] It is not necessary, however, to show this fact beyond a reasonable doubt.[42]

Joint Conversion. — Where two persons are jointly charged with an alleged conversion, to obtain a judgment it is sufficient to show the liability of but one of the defendants.[43]

Partnership. — To authorize a recovery in trover as against a copartnership, it is only necessary to show that the conversion complained of was a transaction in the course of the partnership dealings, or in the conduct of the affairs of the concern.[44]

Connecticut. — Gilbert *v.* Walker, 64 Conn. 390, 30 Atl. 132; Parker *v.* Middlebrook, 24 Conn. 207.

Georgia. — Forehand *v.* Jones, 84 Ga. 508, 10 S. E. 1090; Smith *v.* Kershaw, 1 Ga. 259.

Iowa. — Himmelman *v.* Des Moines Ins. Co., 132 Iowa 668, 110 N. W. 155.

Kentucky. — Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83; Kennet *v.* Robinson, 2 J. J. Marsh. 84.

Maine. — Eames *v.* Trickey, 62 Me. 126; Fuller *v.* Tabor, 39 Me. 519; Boobier *v.* Boobier, 39 Me. 406; Hagar *v.* Randall, 62 Me. 439; Dearbourn *v.* Union Nat. Bank, 58 Me. 273.

Massachusetts. — Johnson *v.* Couillard, 4 Allen 446.

Minnesota. — Merz *v.* Croxen, 102 Minn. 69, 112 N. W. 890.

Montana. — Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

Nebraska. — Nelson *v.* Schmoller, 77 Neb. 717, 110 N. W. 658.

New Jersey. — New York & N. J. S. Co. *v.* N. J. P. Co., 68 Atl. 209.

New York. — Panama R. Co. *v.* Johnson, 63 Hun 629, 17 N. Y. Supp. 777; Boyle *v.* Roche, 2 E. D. Smith 335; Gillet *v.* Roberts, 57 N. Y. 28; Storm *v.* Livingston, 6 Johns. 44; Andrews *v.* Shattuck, 32 Barb. 396; Frank *v.* Mut. L. Ins. Co., 102 N. Y. 266, 6 N. E. 667.

Ohio. — Morris *v.* Bills, Wright 343.

Oregon. — Walker *v.* First Nat. Bank, 43 Or. 102, 72 Pac. 635.

Pennsylvania. — Yeager *v.* Wallace, 57 Pa. St. 365.

Tennessee. — Moore v. Fitzpatrick, 7 Baxt. 350.

Wisconsin. — Pierce *v.* O'Keefe, 11 Wis. 180.

Wyoming. — DeClark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

In an action of conversion for money alleged to have been embezzled by defendant, the burden of proof is upon plaintiff to show not only the receipt of the money by defendant, but the embezzlement or misappropriation thereof. Panama R. Co. *v.* Johnson, 63 Hun 629, 17 N. Y. Supp. 777.

The Original Tortious Taking Is Presumptive Evidence of conversion in an action of trover, as against any one in whose possession the property may be found; and the burden of proof is on the defendant to show that he came honestly by the property as a *bona fide* purchaser for value. Cormier *v.* Batty, 9 Jones & S. (N. Y.) 70.

39. Platt *v.* Tuttle, 23 Conn. 233.

40. Conner *v.* Allen, 33 Ala. 515; Harris *v.* Hillman, 26 Ala. 380; Central R. & B. Co. *v.* Lampley, 76 Ala. 357.

41. Hawkins Lumb. Co. *v.* Bray, 105 Ala. 655, 17 So. 96; Central R. & B. Co. *v.* Lampley, 76 Ala. 357; Storm *v.* Livingston, 6 Johns. (N. Y.) 44.

42. Sinclair *v.* Jackson, 47 Me. 102; Kruse *v.* Seeger, 16 N. Y. Supp. 529, 42 N. Y. St. 35.

43. Bell *v.* Layman, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83.

44. St. John *v.* O'Connel, 7 Port. (Ala.) 466; Beaton *v.* Wade, 14 Colo. 4, 22 Pac. 1093.

Partnership. — Recovery cannot be

b. *Nature and Sufficiency of Acts Constituting Conversion.* — **(1.) Generally.** — Broadly stated, the acts ordinarily regarded in law as being sufficient to constitute conversion fall within the limits of one of four classes, viz.: a taking from the owner without his consent; an assumption of ownership; an illegal use or abuse of the property in controversy, or an unlawful detention after demand and refusal; and accordingly the evidence adduced by and on behalf of the plaintiff in an action of trover, will be regarded as sufficient to establish a conversion if it shows acts on the part of the defendant coming within one or more of the classes enumerated and relied on by the plaintiff, as the case may be.[45]

(2.) Proof of Tortious Act Necessary. — But the evidence must establish a positive tortious act on the part of the defendant.[46] It is not enough to show mere nonfeasance, or neglect of duty, mere failure

had against a co-partnership for the conversion of property on which plaintiff claims an equitable lien merely on proof that one of the co-partners bought it, unaccompanied by proof that he bought on partnership account, or that the partnership had anything to do with it. Paden *v.* Bellenger, 87 Ala. 575, 6 So. 351.

45. *Alabama.* — Glazer *v.* McMillion, 7 Port. 279.

Colorado. — Ilfeld *v.* Ziegler, 40 Colo. 401, 91 Pac. 825.

Georgia. — Branch *v.* Planters' L. & S. Bank, 75 Ga. 342.

Kentucky. — Kennet *v.* Robinson, 2 J. J. Marsh. 84.

Maine. — Fernald *v.* Chase, 37 Me. 289.

Michigan. — Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154.

Minnesota. — Merz *v.* Croxen, 102 Minn. 69, 112 N. W. 890.

New York. — Dyckman *v.* Valiente, 42 N. Y. 549; People *v.* Bank of North America, 75 N. Y. 547; Thomson *v.* British N. A. Bank, 13 Jones & S. 1; Northampton Bank *v.* Kidder, 13 Abb. N. C. 376; Roe *v.* Campbell, 40 Hun 49; Everett *v.* Coffin, 6 Wend. 603, 22 Am. Dec. 551.

Ohio. — Baltimore & O. R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

Wisconsin. — Millard *v.* McDonald Lumb. Co., 64 Wis. 626, 25 N. W. 656.

Proof that the plaintiff authorized the defendants to forward a note for collection to a corporation where the note was payable, which was done, that such corporation collected the note, notified the defendants thereof but neglected to remit the proceeds, and while retaining same became insolvent, does not establish a conversion. Gilbert *v.* Walker, 64 Conn. 390, 30 Atl. 132.

46. *Alabama.* — Conner *v.* Allen, 33 Ala. 515.

Arkansas. — Zachary *v.* Pace, 9 Ark. 212.

Connecticut. — Thompson *v.* Rose, 16 Conn. 71; Parker *v.* Middlebrook, 24 Conn. 207.

Georgia. — Smith *v.* Kershaw, 1 Ga. 259.

Kansas. — Lewis *v.* Metcalf, 53 Kan. 217, 36 Pac. 345.

New York. — Van Valkenburgh *v.* Thayer, 57 Barb. 196; Matteawan Co. *v.* Bentley, 13 Barb. 641; Dudley *v.* Hawley, 40 Barb. 397; Fitch *v.* Beach, 15 Wend. 221.

In Toledo Sav. Bank *v.* Johnston, 94 Iowa 212, 62 N. W. 748, it was held that evidence that a plaintiff in garnishment of goods claimed by the garnishee under a mortgage from the defendant in garnishment, dismissed the suit and subsequently attached the goods in the mortgagee's hands, was not sufficient to establish a conversion.

Evidence merely that a vendor of personal property took possession thereof under the terms of the contract of sale giving him the right so to do when deeming himself insecure, is not sufficient to prove a conversion by him. McClelland *v.* Nichols, 24 Minn. 176.

to perform an act made obligatory by contract, or by which the property was lost to plaintiff.[47]

(3.) Unlawful Taking by Defendant. — (A.) GENERALLY. — Thus within the general rule just stated, evidence that the defendant took from the plaintiff's possession the property in controversy without the plaintiff's consent and with intent to deprive the plaintiff of his rights as owner thereof, is sufficient to establish a conversion by the defendant.[48] Nor is it necessary that the evidence show that the defendant asserted an absolute title to the property; it is enough if it shows an intention on his part to acquire a special interest

47. Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914. See also Sturges *v.* Keith, 57 Ill. 451; Bailey *v.* Moulthrop, 55 Vt. 13; Hunt *v.* Cane, 40 Barb. (N. Y.) 638.

In the case of bailee it is not enough to show mere negligence on his part. The evidence must show a conversion in one of the various manners usually regarded as constituting a conversion. Dearbourn *v.* Union Nat. Bank, 58 Me. 273.

In Lewis *v.* Metcalf, 53 Kan. 217, 36 Pac. 345, where certain property had been delivered to the defendant for sale by him as broker, it was held that evidence merely of his having failed to remit the proceeds was not enough to maintain trover as for having wrongfully obtained possession of the property.

48. *Alabama.* — Freeman *v.* Scurlock, 27 Ala. 407.

Arkansas. — Sadler *v.* Sadler, 16 Ark. 628.

California. — Allsopp *v.* J. Hendy Mach. Wks., 5 Cal. App. 228, 90 Pac. 39; Steele *v.* Marsicano, 102 Cal. 666, 36 Pac. 920.

Colorado. — Hughes *v.* Coors, 3 Colo. App. 303, 33 Pac. 77.

Connecticut. — Hartford Ice Co. *v.* Greenwoods Co., 61 Conn. 166, 23 Atl. 91.

Illinois. — Bane *v.* Detrick, 52 Ill. 19.

Indiana. — Valentine *v.* Duff (Ind. App.), 33 N. E. 529.

Iowa. — Allison *v.* King, 25 Iowa 56; Krager *v.* Pierce, 73 Iowa 359, 35 N. W. 477.

Kansas. — Oakley *v.* Randolph, 54 Kan. 779, 39 Pac. 699.

Kentucky. — Pharis *v.* Carver, 13 B. Mon. 236; Kennet *v.* Robinson, 2 J. J. Marsh. 84.

Maine. — Fernald *v.* Chase, 37 Me. 289.

Massachusetts. — McPartland *v.* Read, 11 Allen 231; Robinson *v.* Bird, 158 Mass. 357, 33 N. E. 391.

Michigan. — Rolfe *v.* Dudley, 58 Mich. 208, 24 N. W. 657; Carroll *v.* McCleary, 19 Mich. 93; Mathews *v.* Stewart, 44 Mich. 209, 6 N. W. 633.

Minnesota. — Stickney *v.* Smith, 5 Minn. 486; Reynolds *v.* St. Paul Trust Co., 51 Minn. 236, 53 N. W. 457; Holland *v.* Bishop, 60 Minn. 23, 61 N. W. 681; Norman *v.* Eckern, 60 Minn. 531, 63 N. W. 170.

Missouri. — Waverly Timb. Co. *v.* St. Louis, 112 Mo. 383, 20 S. W. 566; Kramer *v.* Faulkner, 9 Mo. App. 34.

Nebraska. — McCormick *v.* Stevenson, 13 Neb. 70, 12 N. W. 828; Murphey *v.* Virgin, 47 Neb. 692, 66 N. W. 652; Watson *v.* Coburn, 35 Neb. 492, 53 N. W. 477; Johnson *v.* Walker, 23 Neb. 736, 37 N. W. 639.

New Hampshire. — Clark *v.* Rideout, 39 N. H. 238.

New Jersey. — West Jersey R. Co. *v.* Trenton Car Wks., 32 N. J. L. 517.

New York. — Lawatsch *v.* Cooney, 86 Hun 546, 33 N. Y. Supp. 775; Everett *v.* Coffin, 6 Wend. 603; Connah *v.* Hale, 23 Wend. 462; Cook *v.* Kelly, 9 Bosw. 358; Brady *v.* Smith, 9 Misc. 716, 29 N. Y. Supp. 607; Caywood *v.* Van Ness, 74 Hun 28, 26 N. Y. Supp. 379; Prescott *v.* De Forest, 16 Johns. 159; Pierrepont *v.* Barnard, 5 Barb. 364; Anderson *v.* Nicholas, 28 N. Y. 600.

Oregon. — Miles *v.* North Pac. L. Co., 38 Or. 556, 64 Pac. 303.

Pennsylvania. — Ryman *v.* Gerlach, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302; Williams *v.* Smith, 153 Pa. St. 462, 25 Atl. 1122.

South Dakota. — Feury *v.* McCormick Harv. Mach. Co., 6 S. D. 396, 61 N. W. 162.

therein.[49] Nor is it material how the defendant obtained possession of the property.[50]

(B.) Sale by Auctioneer, Broker or Factor. — Evidence that an auctioneer, broker or factor, although acting in good faith, sold property belonging to a third person, and paid over the proceeds to the person from whom he received it for sale, is sufficient evidence of conversion to entitle the real owner to maintain trover against such auctioneer.[51]

(C.) Obtaining Possession by Fraud. — So, too, evidence that de-

Utah. — Dee *v.* Hyland, 3 Utah 308, 3 Pac. 388.

The action of trover being founded on a conjunct right of property and possession, proof of any act of the defendant which negatives or is inconsistent with such right is sufficient in law to establish a conversion. Liptrot *v.* Holmes, 1 Ga. 381.

Where household furniture belonging to the plaintiff was in his absence and without his consent or knowledge taken and used by the defendant as his own and partially sold and consumed by him, these facts were held sufficient proof of conversion. Clark *v.* Whitaker, 19 Conn. 319.

Evidence that a seller of goods on credit, after delivery, retook and disposed of them without the buyer's consent, establishes a conversion. Huelet *v.* Reyus, 1 Abb. Prac. N. S. (N. Y.) 27.

The Taking by Attachment of personalty not the property of the defendant in attachment, constitutes conversion. Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. 813. See also Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680.

Proof that a mortgagee took possession of and sold any of the mortgaged property in any manner other than that provided by law, establishes a conversion on his part. Marchand *v.* Ronaghan (Idaho), 72 Pac. 731.

Evidence that the plaintiff, when the passengers of a steamer were landed in tugboats, was prevented by the defendants from taking her trunk with her into the boat in which she was landed, and was told that it must go in the other boat, and that she therefore took it to the other side of the steamer, and had it put on board of the other boat, is not sufficient evidence of a "forcible taking." Tolano *v.* National Steam Nav. Co., 5 Robt. (N. Y.) 318.

49. Tear *v.* Freebody, 4 C. B. (N. S.) 228, 93 E. C. L. 227.

50. Platt *v.* Tuttle, 23 Conn. 233.

51. *England.* — Delaney *v.* Wallis, 15 Cox C. C. 525, 13 L. R. Ir. 31; Perkins *v.* Smith, 1 Wils. 328.

Alabama. — Perminter *v.* Kelly, 18 Ala. 716, 54 Am Dec. 177.

Arkansas. — Merchants' etc. Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406.

California. — Swim *v.* Wilson, 90 Cal. 126, 27 Pac. 33, 25 Am. St. Rep. 110; Cerkel *v.* Waterman, 63 Cal. 34. *Contra,* Rogers *v.* Huie, 2 Cal. 571.

Georgia. — Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765.

Illinois. — Cassidy *v.* Elk Grove Land etc. Co., 58 Ill. App. 39.

Kentucky. — Poole *v.* Adkinson, 1 Dana 110.

Maine. — McPheters *v.* Page, 83 Me. 234, 23 Am. St. Rep. 772; Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581.

Massachusetts. — Hills *v.* Snell, 104 Mass. 173; Robinson *v.* Bird, 158 Mass. 357, 33 N. E. 391.

Michigan. — Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419.

Missouri. — Thompson *v.* Irwin, 76 Mo. App. 418; LaFayette County Bank *v.* Metcalf, 40 Mo. App. 494; Arkansas City Bank *v.* Cassidy, 71 Mo. App. 186.

New York. — Anderson *v.* Nicholas, 5 Bosw. 121; Dudley *v.* Hawley, 40 Barb. 397; Williams *v.* Merle, 11 Wend. 80; Dudley *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452, *affirming* 40 Barb. 397.

Tennessee. — Taylor *v.* Pope, 5 Coldw. 413. But see Roach *v.* Turk, 9 Heisk. 708, 24 Am. Rep. 360, *overruling* Taylor *v.* Pope, *supra.*

fendant obtained possession of the property by means of a fraud practiced upon the plaintiff is sufficient to maintain trover.[52]

(4.) Assumption of Ownership, Etc. — (A.) GENERALLY. — While, as has just been shown, the proof of the fact of conversion may be sufficient when showing an unlawful taking from the plaintiff's possession, it is by no means essential that the evidence shall establish that the defendant had complete manucaption of the property.[53] Proof of an intermeddling with, or dominion over, the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner and in denial of his rights as such, is sufficient.[54]

Proof Merely That a Person Declared That He Was the Owner of the

Texas. — Kempner *v.* Thompson (Tex. Civ. App.), 100 S. W. 351.

52. Norman *v.* Eckern, 60 Minn. 531, 63 N. W. 170; Holland *v.* Bishop, 60 Minn. 23, 61 N. W. 681.

Evidence that defendant obtained possession of the property, knowing that the plaintiff was incapable, because of intoxication, to make a valid contract, and retained possession of to the exclusion of the plaintiff, establishes conversion. Baird *v.* Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846.

In trover for goods obtained by fraud, plaintiff need not show that he accepted every statement made by the defendant as literally true. Heineman v. Steiger, 54 Mich. 232, 19 N. W. 965.

53. Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914; Gentry *v.* Madden, 3 Ark. 127; Webber *v.* Davis, 44 Me. 147.

If the proof shows that defendant exercised a dominion over the property in exclusion or in defiance of plaintiff's rights, that is sufficient in law to establish a conversion. Lowe *v.* Ozmun, 3 Cal. App. 387, 86 Pac. 729; Fernald *v.* Chase, 37 Me. 289; Woodis *v.* Jordan, 62 Me. 490; Adams *v.* Mizell, 11 Ga. 106.

54. *England.* — McCombie *v.* Davis, 6 East 538, 8 R. R. 534.

Alabama. — St. John *v.* O'Connel, 7 Port. 466; Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914.

Arkansas. — Gentry *v.* Madden, 3 Ark. 127.

California. — Allsopp *v.* J. Hendy Mach. Wks., 5 Cal. App. 228, 90 Pac. 39; Steele *v.* Marsicano, 102 Cal. 666, 36 Pac. 920; New Liverpool S. Co. *v.* Western S. Co., 151 Cal. 479, 91 Pac. 152.

Connecticut. — Gilbert *v.* Walker, 64 Conn. 390, 30 Atl. 132.

Iowa. — Himmelman *v.* Des Moines Ins. Co., 132 Iowa 668, 110 N. W. 155.

Kansas. — Oakley *v.* Randolph, 54 Kan. 779, 39 Pac. 699; Meixell *v.* Kirkpatrick, 33 Kan. 282, 6 Pac. 241.

Kentucky. — Newcomb-B. Co. *v.* Baskett, 14 Bush 658; Kennet *v.* Robinson, 2 J. J. Marsh. 84.

Maine. — Fuller *v.* Tabor, 39 Me. 519; McPheters *v.* Page, 83 Me. 234, 22 Atl. 101; Badger *v.* Hatch, 71 Me. 562; Fernald *v.* Chase, 37 Me. 289.

Michigan. — Wilson *v.* Hoffman, 93 Mich. 72, 52 N. W. 1037; Moret *v.* Mason, 106 Mich. 340, 64 N. W. 193.

Minnesota. — Molm *v.* Barton, 27 Minn. 530, 8 N. W. 765; Merz *v.* Croxen, 102 Minn. 69, 112 N. W. 890.

Montana. — Glass *v.* Basin & B. S. M. Co., 31 Mont. 21, 77 Pac. 302.

Nebraska. — Johnson *v.* Walker, 23 Neb. 736, 37 N. W. 639; Nelson *v.* Schmoller, 77 Neb. 717, 110 N. W. 658.

New York. — Boyce *v.* Brockway, 31 N. Y. 490; Carroll *v.* Mix, 51 Barb. 212; Schroeppel *v.* Corning, 5 Denio 236; Osborn *v.* Schenck, 83 N. Y. 201; Knapp *v.* Willetts, 1 Thomp. & C. 206; Richardson *v.* Stevens, 53 Hun 631, 6 N. Y. Supp. 361.

Ohio. — Baltimore & O. R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

property, unaccompanied by any evidence that he took possession of it, or exercised any dominion over it, while of course competent, is not sufficient to establish the fact of conversion.[55]

(B.) Benefit to Defendant Immaterial. — It is not essential that

Wisconsin. — Taylor *v.* Tigerton Lumb. Co., 134 Wis. 24, 114 N. W. 112; School Dist. *v.* Zink, 25 Wis. 636.

Wyoming. — DeClark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

Where it is admitted or proved that the defendant without authority has sold property and received the money therefor, no other evidence of conversion is necessary. Robinson *v.* Hartridge, 13 Fla. 501.

Evidence merely that the defendant withstood the efforts of the plaintiff to obtain possession of the property, and prevented him by force, unaccompanied by any evidence that he had possession actual or constructive, or that he had wrongfully possessed or withheld it, is not enough. Boobier *v.* Boobier, 39 Me. 406.

To maintain trover for a chattel purchased of one who, although not actually owning the same, yet, as the apparent owner, was in possession thereof at the time of the sale, it must be shown that the purchaser assumed dominion over the property after the lawful ownership was made known to him. Parker *v.* Middlebrook, 24 Conn. 207.

In the case of property owned by several persons in common, proof that any one of them appropriated the whole to the absolute exclusion of the others is enough. Boobier *v.* Boobier, 39 Me. 406.

Conversion is sufficiently established by proving that the defendant claimed the property as his own and attempted to dispose of it for his own benefit. Dickey *v.* Franklin Bank, 32 Me. 572.

Before the defendants, or either of them, can be held liable for a conversion, it must appear from the testimony that they have exercised some act of dominion or control over the property in controversy inconsistent with, or in defiance of plaintiff's right, or have aided or assisted some other person so to do. Walker *v.* First Nat. Bank, 43 Or. 102, 72 Pac. 635.

In Cuckson *v.* Winter, 2 Man. & R. 313, 17 E. C. L. 306, the evidence was to the effect that defendants had distrained plaintiff's goods and had proceeded to sell them; but none of them were removed from his premises; and they were all finally restored to him under an arrangement for that purpose. It was held that a conversion was not proved, because the goods though sold were never removed to the interruption of the plaintiff's possession, and were ultimately left in his possession.

Proof that a pledgee of personal property renounced such relationship and notified the pledgor that he no longer held the property in pledge, but asserted ownership thereof, and acting on that claim thereafter sold the property as his own, is sufficient to establish a conversion. Lowe *v.* Ozmun, 3 Cal. App. 387, 86 Pac. 729.

A statement in a bond given by the defendant to release from attachment property alleged to have been converted which tends to contradict the defendant's denial of the conversion declared on, or his claim and testimony at the trial in relation to the title to the property, and which in fact asserts a claim of ownership in himself, is an admission by him and should be received in evidence against him. Southern Car Mfg. Co. *v.* Wagner (N. M.), 89 Pac. 259.

55. Gillet *v.* Roberts, 57 N. Y. 28, Andrews *v.* Shattuck, 32 Barb. (N. Y.) 396; Bishop *v.* Hendrick, 82 Hun 323, 31 N. Y. Supp. 502.

The element is wanting, in such case, of actual possession or of the exercise of dominion. Fernald *v.* Chase, 37 Me. 289, *holding* that evidence of a declaration by an officer that he has attached the property, without further evidence that he took possession of it or exercised any actual control or dominion over it, was not enough; that at any rate such evidence established "but a claim of special property in it, or of a lien upon it, which is less than a claim to be the owner of it."

the evidence show whether the conversion or appropriation was for the sole benefit of the defendant, or for a third person.[56]

(C.) Possession of Defendant Not Necessary. — Where exercise of dominion, within the rule just stated, is relied on as constituting the conversion charged, it is not necessary for the plaintiff to show that the defendant was in possession of the property at the commencement of the action, since parting with possession is often evidence of conversion.[57]

(5.) Illegal Use or Abuse of the Property. — (A.) Generally. — Again, evidence showing that the defendant, although lawfully in possession of the property at the time, has made an illegal use of the property, or has abused the condition under which he holds possession thereof, is sufficient to establish the fact of conversion.[58]

(B.) Misuse of Property Hired. — Thus, within this rule, where the evidence shows that the chattel hired was used for a different pur-

56. Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914; Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637; Platt *v.* Tuttle, 23 Conn. 233; McPheters *v.* Page, 83 Me. 234, 22 Atl. 101; Badger *v.* Hatch, 71 Me. 562.

57. Zachary *v.* Pace, 9 Ark. 212; Hall *v.* Amos, 5 T. B. Mon. (Ky.) 89; Easley *v.* Easley, 18 B. Mon. (Ky.) 86. See also Fernald *v.* Chase, 37 Me. 289.

58. *Alabama.* — St. John *v.* O'Connel, 7 Port. 466; Louisville & N. R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534.

Delaware. — Maguyer *v.* Hawthorn, 2 Harr. 71.

Georgia. — Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200; Adams *v.* Mizell, 11 Ga. 106.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Schriver, 72 Kan. 550, 84 P. 119.

Kentucky. — Lowry *v.* Beckner, 5 B. Mon. 41.

Maine. — Neal *v.* Hanson, 60 Me. 84; Badger *v.* Hatch, 71 Me. 562; Crocker *v.* Gullifer, 44 Me. 491.

Massachusetts. — Perham *v.* Covey, 117 Mass. 102.

Michigan. — Johnston *v.* Whittemore, 27 Mich. 463; Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502; Green *v.* Bennett, 23 Mich. 464.

Mississippi. — Crump *v.* Mitchell, 34 Miss. 449.

New York. — Rightmyer *v.* Raymond, 12 Wend. 51; American Exch. *v.* Robertson, 20 Jones & S. 44; Muller *v.* Ryan, 2 N. Y. Supp. 736; Murray *v.* Burling, 10 Johns. 172; Decker *v.* Mathews, 12 N. Y. 313, *affirmed*, 5 Sandf. 439; Nauman *v.* Caldwell, 2 Sweeney 212; Putnam *v.* Mathewson, 50 Hun 600, 2 N. Y. Supp. 579; Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 137 N. Y. 542, 32 N. E. 1001; Coykendall *v.* Eaton, 55 Barb. 188.

North Carolina. — Martin *v.* Cuthbertson, 64 N. C. 328.

Tennessee. — Bedford *v.* Flowers, 11 Humph. 242.

Vermont. — Buckmaster *v.* Mower, 21 Vt. 204; Ray *v.* Tubbs, 50 Vt. 688.

Wisconsin. — DeVoin *v.* Michigan Lumb. Co., 64 Wis. 616, 25 N. W. 552.

Evidence of the unauthorized transfer by the secretary of a corporation, of promissory notes and bills of exchange belonging to the company, establishes a conversion by him. Firemen's Ins. Co. *v.* Cochran, 27 Ala. 228.

Evidence that one to whom property has been entrusted to sell for account of the owner, delivered it to his own creditor in payment of a pre-existing debt is sufficient to maintain trover. Rodick *v.* Coburn, 68 Me. 170. See also Birdsall *v.* Davenport, 43 Hun (N. Y.) 552, where it was held that evidence that one to whom certain bonds had been lent for temporary use and to be returned when demanded, had pledged them as collateral security for his own debt, established a conversion. *Compare* Dickinson *v.* Dudley, 17 Hun (N. Y.) 569.

pose, or in a different manner, or for a longer time than the contract of hiring provided for, a conversion on the part of the hirer will be deemed to have been established, rendering him answerable for all damages resulting therefrom.[59]

(C.) Sale of Property by Bailee. — So, too, evidence that a bailee sold the property bailed without the consent of the owner establishes a conversion.[60]

(D.) Failure to Restore or Redeliver Property Bailed. — Again, proof that a bailee, having knowledge of the claim of the true owner,

Evidence that a consignee having authority to sell property for the true owner, sold it as the property of another person, establishes a conversion. Covell *v.* Hill, 6 N. Y. 374.

59. *Alabama.* — Fail *v.* McArthur, 31 Ala. 26; Jones *v.* Fort, 36 Ala. 449; Moseley *v.* Wilkinson, 24 Ala. 411; Wilkinson *v.* Moseley, 30 Ala. 562.

Arkansas. — Stewart *v.* Davis, 31 Ark. 518.

Connecticut. — Frost *v.* Plumb, 40 Conn. 111.

Georgia. — Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200; Malone *v.* Robinson, 77 Ga. 719; Gorman *v.* Campbell, 14 Ga. 137.

Iowa. — Doolittle *v.* Shaw, 92 Iowa 348, 60 N. W. 621.

Kentucky. — Kelly *v.* White, 17 B. Mon. 124.

Maine. — Crocker *v.* Gullifer, 44 Me. 491; Badger *v.* Hatch, 71 Me. 562.

Massachusetts. — Perham *v.* Coney, 117 Mass. 102; Hall *v.* Corcoran, 107 Mass. 251; Rotch *v.* Hawes, 12 Pick. 136.

Michigan. — Fisher *v.* Kyle, 27 Mich. 454.

New Hampshire. — Gove *v.* Watson, 61 N. H. 136; Woodman *v.* Hubbard, 25 N. H. 67.

New York. — Fish *v.* Ferris, 5 Duer 49; Buchanan *v.* Smith, 10 Hun 474.

North Carolina. — Martin *v.* Cuthbertson, 64 N. C. 328; Bell *v.* Bowen, 46 N. C. (1 Jones L.) 316.

South Carolina. — Richardson *v.* Dingle, 11 Rich. L. 405; Duncan *v.* South Carolina R. Co., 2 Rich. L. 613.

Tennessee. — Bedford *v.* Flowers, 11 Humph. 242; Horsely *v.* Branch, 1 Humph. 199; McNeill *v.* Brooks, 1 Yerg. 73.

Texas. — Mills *v.* Ashe, 16 Tex. 295.

Vermont. — Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326; Ray *v.* Tubbs, 50 Vt. 688.

Virginia. — Harvey *v.* Skipwith, 16 Gratt. 393.

Wisconsin. — DeVoin *v.* Michigan Lumb. Co., 64 Wis. 616, 25 N. W. 552.

Driving or riding a hired horse more than the agreed distance constitutes a conversion. Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200. But in such case the contract forms no part of the plaintiff's cause of action and hence need not necessarily be shown. Frost *v.* Plumb, 40 Conn. 111, *citing* Hall *v.* Corcoran, 107 Mass. 251, which last case overruled Gregg *v.* Wyman, 4 Cush. (Mass.) 322; and *following* Morton *v.* Gloster, 46 Me. 520; Woodman *v.* Hubbard, 25 N. H. 67.

Failure by a bailee to properly care for a portion of the bailed goods does not render him liable for conversion of all of them. Thompson v. Moesta, 27 Mich. 182.

60. *Maine.* — Emerson *v.* Fisk, 6 Me. 200.

Michigan. — Baylis *v.* Cronkite, 39 Mich. 413; Rolfe *v.* Dudley, 58 Mich. 208, 24 N. W. 657.

New Hampshire. — Sanborn *v.* Colman, 6 N. H. 14.

New York. — Boyce *v.* Brockway, 31 N. Y. 490; Kruse *v.* Seeger & G. Co., 42 N. Y. St. 35, 16 N. Y. Supp. 529, *affirming* 15 N. Y. Supp. 825; Koon *v.* Brinkerhoff, 39 Hun 130.

Vermont. — Buckmaster *v.* Mower, 21 Vt. 204.

Evidence of a disposition by mortgage or otherwise of property bought on conditional sale, before the purchaser has fully paid therefor, is sufficient to establish a conversion.

failed to restore the property bailed to the rightful owner, but delivered it to, or permitted it to be taken by, the person not authorized to receive it, is sufficient to charge him with conversion.[61] But proof merely that the bailee lost the property by accident or theft is not enough.[62]

(E.) Change in Nature of Property. — Evidence that a bailee of property changed the nature of the property, thereby depriving the rightful owner of his rights, is sufficient to establish a conversion.[63]

(6.) Detention of Property. — (A.) Generally. — Where the plaintiff relies, for his right of action, upon the fact of detention by the defendant, proof of mere detention is not always regarded as sufficient; the evidence must go further and show a wrongful detention, that is, a detention under such circumstances as shows an intention on the part of the defendant to deprive the plaintiff of his right of property;[64] the mere detention not of itself furnishing any evidence of such intention to convert the property to the defendant's own use, or to divest the true owner of his property.[65]

(B.) Demand and Refusal. — (a.) *Necessity.* — Accordingly it is a rule of general application that where the possession of the defendant was at first lawful, the plaintiff, in order to establish the wrongful character of the detention must show a timely and sufficient demand on the defendant for the delivery of the property in

Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun 545, 11 N. Y. Supp. 448.

61. *Alabama.* — Louisville & N. R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534; Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914; Alabama & T. R. Co. *v.* Kidd, 35 Ala. 209.

Georgia. — Phillips *v.* Brigham, 26 Ga. 617.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Schriver, 72 Kan. 550, 84 Pac. 119.

Maine. — Dearbourn *v.* Union Nat. Bank, 58 Me. 273.

Michigan. — Hicks *v.* Lyle, 46 Mich. 488, 9 N. W. 529; Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502.

New York. — Esmay *v.* Fanning, 9 Barb. 176, 5 How. Prac. 228; Lockwood *v.* Bull, 1 Cow. 322; Coykendall *v.* Eaton, 55 Barb. 188, 37 How. Prac. 438; Muller *v.* Ryan, 2 N. Y. Supp. 736, 19 N. Y. St. 109.

The fact that the bailee does not notify the bailor that goods have been taken in replevin does not render him liable for conversion of the same, it not being shown that he had knowledge that the goods were so taken. Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394.

62. Central R. & B. Co. *v.* Lampley, 76 Ala. 357. See also Salt Springs Nat. Bank *v.* Wheeler, 48 N. Y. 492, 8 Am. Rep. 564.

63. Fryatt *v.* Sullivan Co., 7 Hill (N. Y.) 529, *affirmed*, 5 Hill 116; Silsbury *v.* McCoon, 6 Hill (N. Y.) 425, *reversing* 3 N. Y. 379; Brown *v.* Sax, 7 Cow. (N. Y.) 95.

64. *Arkansas.* — Estes *v.* Boothe, 20 Ark. 583.

Delaware. — Vaughan *v.* Webster, 5 Har. 256; Donlin *v.* McQuade, 61 Mich. 275, 28 N. W. 114.

Missouri. — Allgear *v.* Walsh, 24 Mo. App. 134.

New Jersey. — Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

New York. — Montanye *v.* Montgomery, 19 N. Y. Supp. 655, 47 N. Y. St. 114; Carroll *v.* Mix, 51 Barb. 212; Whitney *v.* Slauson, 30 Barb. 276.

Texas. — Young *v.* Lewis, 9 Tex. 73.

Vermont. — Doherty *v.* Madgett, 58 Vt. 323, 2 Atl. 115.

65. Thompson *v.* Rose, 16 Conn. 71; Strauss *v.* Schwab, 104 Ala. 669, 16 So. 692 (where the property came into defendant's possession under a valid contract of sale).

controversy, and the defendant's refusal to comply therewith.[66] Thus, where property is left with another under an agreement to deliver it when demanded, or account for it, even though the bailee had the right to elect to retain and pay for it, his refusal to deliver

66. *England.* — Lee *v.* Bayes, 18 C. B. 599, 86 E. C. L. 597; Weeks *v.* Goode, 6 C. B. N. S. 367, 95 E. C. L. 365; Thompson *v.* Trail, 6 Barn. & C. 36, 13 E. C. L. 103; Clements *v.* Flight, 16 Mees. & W. 42, 4 D. & L. 261, 16 L. J. Ex. 11.

United States. — Blakely *v.* Ruddell, 30 Fed. Cas. No. 18,241.

Alabama. — Central R. & B. Co. *v.* Lampley, 76 Ala. 357; Strauss *v.* Schwab, 104 Ala. 669, 16 So. 692.

Arizona. — Ramirez *v.* Main, 89 Pac. 508.

Arkansas. — Zachary *v.* Pace, 9 Ark. 212; McLain *v.* Huffman, 30 Ark. 428.

Connecticut. — Hartford Ice Co. *v.* Greenwoods Co., 61 Conn. 166, 23 Atl. 91; Thompson *v.* Rose, 16 Conn. 71.

Georgia. — Dunn *v.* Cox, 85 Ga. 141, 11 S. E. 582; Loveless *v.* Fowler, 79 Ga. 134, 4 S. E. 103; Adams *v.* Mizell, 11 Ga. 106.

Illinois. — Ogden *v.* Lucas, 48 Ill. 492; Sherry *v.* Picken, 10 Ind. 375.

Iowa. — Tepple *v.* Hawkeye Gold D. Co., 114 N. W. 906.

Kansas. — Auld *v.* Butcher, 22 Kan. 400.

Kentucky. — Lexington R. Co. *v.* Kidd, 7 Dana 245; Kennet *v.* Robinson, 2 J. J. Marsh. 84.

Maine. — Carleton *v.* Lovejoy, 54 Me. 445; Hotchkiss *v.* Hunt, 49 Me. 213; Weston *v.* Carr, 71 Me. 356.

Michigan. — Mattice *v.* Brinkman, 74 Mich. 705, 42 N. W. 172; Lamb *v.* Utley, 146 Mich. 654, 110 N. W. 50.

Minnesota. — Plano Mfg. Co. *v.* Northern P. Elev. Co., 51 Minn. 167, 53 N. W. 202.

Missouri. — Polk *v.* Allen, 19 Mo. 467.

New Hampshire. — Town *v.* Hazen, 51 N. H. 596; Jillson *v.* Wilbur, 41 N. H. 106; Durgin *v.* Gage, 40 N. H. 302.

New York. — Sibley *v.* Ives, 21 Barb. 284; Whitney *v.* Slauson, 30 Barb. 276; Tripp *v.* Pulver, 2 Hun 511; Brown *v.* Cook, 9 Johns. 361; Donohue *v.* Henry, 4 E. D. Smith 162; Howell *v.* Kroose, 4 E. D. Smith 357; Dodge *v.* Johnson, 3 Thomp. & C. 237; Castle *v.* Corn Exch. Bank, 75 Hun 89, 26 N. Y. Supp. 1035; Andrews *v.* Shattuck, 32 Barb. 396; Schofield *v.* Kreiser, 3 N. Y. Supp. 803; Hovey *v.* Bromley, 85 Hun 540, 33 N. Y. Supp. 400.

Ohio. — Morris *v.* Bills, Wright 343.

Oklahoma. — Phelps, D. & P. Co. *v.* Halsell, 11 Okla. 1, 65 Pac. 340.

Pennsylvania. — Prentiss *v.* Hannay, 4 Whart. 508; Yeager *v.* Wallace, 57 Pa. St. 365.

Rhode Island. — Buffington *v.* Clarke, 15 R. I. 437, 8 Atl. 247.

Tennessee. — Moore *v.* Fitzpatrick, 7 Baxt. 350.

Wisconsin. — Nay *v.* Crook, 1 Pin. 546.

Wyoming. — DeClark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

This is the rule where the defendant finds the property or where he gets possession of it by the consent of the plaintiff. Liptrot *v.* Holmes, 1 Ga. 381.

The Mortgagor's Possession of the mortgaged property being rightful, a purchaser thereof from the mortgagor acquires the same right to possession until there has been a breach of the condition of the mortgage and a demand for possession by the mortgagee. Catlett *v.* Stokes (S. D.), 110 N. W. 84. See also First Nat. Bank *v.* Minneapolis & N. Elev. Co., 11 N. D. 280, 91 N. W. 436.

Where a chattel mortgage provides that upon default in the payment of the debt secured, the mortgagor may take possession of the property, proof of a refusal to give possession on demand by the mortgagor made after default establishes a conversion. Mathew *v.* Mathew, 138 Cal. 334, 71 Pac. 344.

Where a pledgee agrees to cancel the principal debt and surrender the property pledged in consideration of services rendered and to be rendered, proof of a demand and refusal is necessary in order to estab-

and denial of the bailor's title, show a conversion of the property.[67]

Bona Fide Purchaser. — Where a bona fide purchaser of the property is sought to be charged with conversion, proof of demand on him is necessary.[68]

Matters Obviating Necessity of Proof of Demand. — Demand and refusal constitute, not the conversion, but merely evidence thereof; and, while proof thereof is generally required, when the defendant has lawfully or without fault come into possession of the property, yet a positive act of conversion capable of being shown independent of a demand and refusal renders unnecessary proof of demand and refusal, even though the original possession was rightful.[69] Thus, where the evidence shows that the defendant took to himself the right and assumed the control of the property, to the exclusion of the plaintiff's rights,[70] or sells the property and receives the proceeds to his own use,[71] proof of a demand and refusal is unnecessary.

lish a conversion. Scrivner *v.* Woodward, 139 Cal. 314, 73 Pac. 863.

67. Boothe *v.* Estes, 16 Ark. 104.

68. Metcalfe *v.* Dickman, 43 Ill. App. 284; Gillet *v.* Roberts, 57 N. Y. 28; Gurney *v.* Kenny, 2 E. D. Smith (N. Y.) 132.

69. *Alabama.* — Kyle *v.* Gray, 11 Ala. 233; Brown *v.* Beason, 24 Ala. 466.

Arkansas. — Strayhorn *v.* Giles, 22 Ark. 517; Gentry *v.* Madden, 3 Ark. 127.

California. — Allsopp *v.* J. Hendy Mach. Wks., 5 Cal. App. 228, 90 Pac. 39.

Colorado. — Salida Bldg. & L. Assn. *v.* Davis, 16 Colo. App. 294, 64 Pac. 1046.

Connecticut. — Luckey *v.* Roberts, 25 Conn. 486.

Florida. — Robinson *v.* Hartridge, 13 Fla. 501.

Kentucky. — Easley *v.* Easley, 18 B. Mon. 86; Lowry *v.* Beckner, 5 B. Mon. 41.

Maine. — Hotchkiss *v.* Hunt, 49 Me. 213; Webber *v.* Davis, 44 Me. 147; Rodick *v.* Coburn, 68 Me. 170.

Michigan. — Iler *v.* Baker, 82 Mich. 226, 46 N. W. 377.

Minnesota. — Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637.

New York. — Andrews *v.* Shattuck, 32 Barb. 396; Durell *v.* Mosher, 8 Johns. 445; Schroeppel *v.* Corning, 5 Denio 236; Pease *v.* Smith, 61 N. Y. 477; Marine Bank *v.* Fiske, 71 N. Y. 353; Hynes *v.* Patterson, 28 Hun 528, *affirmed*, 95 N. Y. 1; Thompson *v.* Vrooman, 66 Hun 245, 21 N. Y. Supp. 179; Heald *v.* MacGowan, 15 Daly 233, 5 N. Y. Supp. 450; Esmay *v.* Fanning, 9 Barb. 176; Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun 545, 11 N. Y. Supp. 448; Purves v. Moltz, 5 Robt. 653.

Wisconsin. — First Nat. Bank *v.* Kickbusch, 78 Wis. 218, 47 N. W. 267.

Wyoming. — DeClark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

A repudiation by the mortgagor of the mortgagee's right in the chattels evidenced by the exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattels, is a conversion of the chattels such as will obviate the necessity of proving a demand on the part of plaintiff. Kitchen *v.* Schuster (N. M.), 89 Pac. 261.

Proof of the mere fact that the defendant received in pledge the property in controversy from the plaintiff's bailee, obviates the necessity of establishing a demand and refusal. Kinkead *v.* Holmes & Bull Furn. Co., 24 Wash. 216, 64 Pac. 157.

The collection of a note, by one not entitled to it, is evidence of a conversion, and renders proof of a demand unnecessary. Donnell *v.* Thompson, 13 Ala. 440.

70. Brown *v.* Beason, 24 Ala. 466; Gentry *v.* Madden, 3 Ark. 127.

71. Branch *v.* Planters' L. & S.

Where the Original Taking and Possession by Defendant was unlawful, proof of demand and refusal is not necessary.[72]

Where a Demand Evidently Would Have Been Ineffectual or unavailing, it is not necessary that a demand be shown.[73]

(b.) *Sufficiency.* — (AA.) DEMAND. — Of course, the rule requiring proof of demand necessarily carries with it the requirement that the evidence shall show a demand deemed in law sufficient in all respects.[74]

Bank, 75 Ga. 342; Kyle *v.* Gray, 11 Ala. 233. See also Haas *v.* Taylor, 80 Ala. 459.

Where it appears that a pledgee has, by an unauthorized sale of the pledged property, put it out of his power to restore the property, it is not necessary to prove a demand for the return of the property. Winchester *v.* Joslyn, 31 Colo. 220, 72 Pac. 1079.

72. *United States.* — Carr *v.* Gale, 5 Fed. Cas. No. 2,434.

Alabama. — Scott *v.* Hodges, 62 Ala. 337; Rhodes *v.* Lowry, 54 Ala. 4; Nelson *v.* Beck, 54 Ala. 329; Freeman *v.* Scurlock, 27 Ala. 407.

Arkansas. — Gentry *v.* Madden, 3 Ark. 127; Dunnahoe *v.* Williams, 24 Ark. 264.

California. — Paige *v.* O'Neal, 12 Cal. 483.

Colorado. — Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. 707; Rhoades *v.* Drummond, 3 Colo. 374.

Illinois. — Howitt *v.* Estelle, 92 Ill. 218; Hardy *v.* Keeler, 56 Ill. 152; Forth *v.* Pursley, 82 Ill. 152; Camp *v.* Unger, 54 Ill. App. 653.

Iowa. — Haas *v.* Damon, 9 Iowa 589; Zimmerman *v.* Nat. Bank, 56 Iowa 133, 8 N. W. 807.

Maine. — Jewett *v.* Patridge, 12 Me. 243.

Massachusetts. — Baker *v.* Lothrop, 155 Mass. 376, 29 N. E. 643; Woodbury *v.* Long, 8 Pick. 543.

Michigan. — Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384; Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193.

Minnesota. — Kenrick *v.* Rogers, 26 Minn. 344, 4 N. W. 46; Kronschnable *v.* Knoblauch, 21 Minn. 56.

Montana. — Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 753.

New Hampshire. — Fisk *v.* Ewen, 46 N. H. 173; Walcott *v.* Keith, 22 N. H. 196.

New York. — Farrington *v.* Payne, 15 Johns. 431; Adams *v.* Loomis, 54 Hun 638, 8 N. Y. Supp. 17; Pease *v.* Smith, 61 N. Y. 477; Foshay *v.* Ferguson, 5 Hill 154; Hallett *v.* Carter, 19 Hun 629; Tallman *v.* Turck, 26 Barb. 167; Pilsbury *v.* Webb, 33 Barb. 213.

South Carolina. — McPherson *v.* Neuffer, 11 Rich. L. 267.

South Dakota. — Rosum *v.* Hodges, 1 S. D. 308, 47 N. W. 140.

Tennessee. — Hunt *v.* Walker, 12 Heisk. 551.

Virginia. — Newsum *v.* Newsum, 1 Leigh 86.

Wisconsin. — Couillard *v.* Johnson, 24 Wis. 533; Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671.

Where the Possession Was Obtained by Fraud or was otherwise wrongful, proof of a demand is not necessary. Ramirez *v.* Main (Ariz.), 89 Pac. 508.

73. Gottlieb *v.* Hartman, 3 Colo. 53; Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268; Consolidated Land & Irrig. Co. *v.* Hawley, 7 S. D. 229, 63 N. W. 904.

Where grain upon which a thresher has a lien for the value of his services has been received by the defendant into its elevator, a demand for its return is unnecessary because it would be ineffectual. Hahn *v.* Sleepy Eye Mill. Co. (S. D.), 112 N. W. 843.

74. Kendrick *v.* Beard, 90 Mich. 589, 51 N. W. 645; Smith *v.* Colby, 67 Me. 169; Tingley *v.* Parshall, 11 Neb. 443, 9 N. W. 571 (demand by purported attorney for owner, without order in writing from such owner, held not sufficient).

The demand must have been made after the plaintiff's right of possession accrued. Haas *v.* Taylor, 80 Ala. 459; Hagar *v.* Randall, 62 Me. 439.

In case of the alleged refusal of a

Demand by Letter is not regarded as sufficient to support an action of trover.[75]

(BB.) Refusal. — The general rule is that the evidence as to the refusal of the defendant to deliver the property to the plaintiff must show it to have been unconditional.[76] So, too, refusal of a party in possession of property, the title to which is in dispute, to give up the property until he has satisfied himself as to the title, does not establish a conversion.[77]

(c.) *Ability of Defendant To Comply With Demand.* — And this rule requiring proof of a demand and refusal requires further that it must be shown that the demand was made while the defendant was in possession of the property and able to comply with the demand;[78] unless it appears that the defendant fraudulently disposed of the goods before the demand could reasonably have been made, or that

corporation to issue certificates of stock to one entitled thereto, the evidence must show that the demand for the stock was made upon the officer or governing body authorized to act in the premises. Teeple *v.* Hawkeye Gold Dredg. Co. (Iowa), 114 N. W. 906.

75. Teeple *v.* Hawkeye Gold Dredg. Co. (Iowa), 114 N. W. 906. The court said: "And, in reason, this would seem to be sound doctrine, because it is universally held that a demandant may not require the party in possession — without wrong in the first instance — to perform any other act than that of making manual delivery when called upon for such purpose. A demand which requires the person upon whom made to transport or carry the thing which is the subject of the demand to the demandant is not sufficient."

76. Hartford Ice Co. *v.* Greenwoods Co., 61 Conn. 166, 23 Atl. 91; Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

Proof of a refusal to abide by the conditions of special property is not sufficient to establish a conversion where it also appears that a reasonable qualification was annexed to the refusal. Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

77. Flannery *v.* Brewer, 66 Mich. 509, 33 N. W. 522; Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888; Rogers *v.* Weir, 34 N. Y. 463. See also Ball *v.* Liney, 48 N. Y. 6, 8 Am. Rep. 511.

Where the evidence shows that upon demand by the plaintiff the defendant disclaimed any right in himself, but stated that he would not deliver the property until he ascertained to whom it belonged; that the property was in fact in dispute and that defendant had reasonable grounds to doubt the title of plaintiff, the refusal to surrender the property under such circumstances cannot be regarded as sufficient evidence of conversion. Zachary *v.* Pace, 9 Ark. 212; Mills *v.* Britton, 64 Conn. 4, 29 Atl. 231.

78. *Florida.* — Robinson *v.* Hartridge, 13 Fla. 501.

Illinois. — Hill *v.* Belasco, 17 Ill. App. 194.

Maine. — Davis *v.* Buffum, 51 Me. 160; Boobier *v.* Boobier, 39 Me. 406; Hagar *v.* Randall, 62 Me. 439.

Massachusetts. — Gilmore *v.* Newton, 9 Allen 171.

Michigan. — McDonald *v.* McKinnon, 104 Mich. 428, 62 N. W. 560.

Missouri. — Johnson *v.* Strader, 3 Mo. 359.

New Hampshire. — Carr *v.* Clough, 26 N. H. 280.

New Jersey. — Frome *v.* Dennis, 45 N. J. L. 515.

New York. — Hunt *v.* Kane, 40 Barb. 638; Kelsey *v.* Griswold, 6 Barb. 436; Cushman *v.* Oothout, 88 Hun 54, 34 N. Y. Supp. 516; Donohue *v.* Henry, 4 E. D. Smith 162; Whitney *v.* Slauson, 30 Barb. 276; Salt Sprgs. Nat. Bank *v.* Wheeler, 48 N. Y. 492; Gregory *v.* Fichtner, 14 N. Y. Supp. 891, 38 N. Y. St. 192, *reversing* 13 N. Y. Supp. 593, 38 N.

the defendant parted with possession of the property for the purpose of evading the demand.[79]

(d.) *Effect of Demand and Refusal, and Proof of Conversion.* — As previously stated, demand and refusal, while not of themselves constituting conversion, are evidence of that fact, and proof thereof makes out a *prima facie* case for the plaintiff, and is regarded as sufficient evidence to sustain a recovery, unless the defendant adduces evidence to negative the presumption.[80] Ordinarily a defendant in trover will not be permitted to give in evidence the answer made by him to a demand by the plaintiff for the property in controversy.[81] In the case of a demand by an agent, however, where

Y. St. 460; Kruse *v.* Seeger & G. Co., 15 N. Y. Supp. 825, 40 N. Y. St. 285, *affirmed*, 16 N. Y. Supp. 529, 42 N. Y. St. 35.

Oklahoma. — Phelps, Dodge & P. Co. *v.* Halsell, 11 Okla. 1, 65 Pac. 340.

South Carolina. — Barber *v.* Anderson, 1 Bailey 358; Morris *v.* Thomson, 1 Rich. L. 65.

Vermont. — Buck *v.* Ashley, 37 Vt. 475; Yale *v.* Saunders, 16 Vt. 243.

Proof of a demand upon an agent, servant or bailee to deliver to the true owner, and a neglect to comply therewith is not sufficient, if it appears that at the time of the demand it is not within the power of such person to deliver the property. Smith *v.* Colby, 67 Me. 169. See also Davis *v.* Buffum, 51 Me. 160.

79. Phelps, Dodge & P. Co. *v.* Halsell, 11 Okla. 1, 65 Pac. 340.

80. *England.* — Isaac *v.* Clark, 2 Bulstr. 314.

United States. — Watt *v.* Potter, 2 Mason 77.

Arkansas. — Zachary *v.* Pace, 9 Ark. 212; Estes *v.* Boothe, 20 Ark. 583.

Connecticut. — Clark *v.* Hale, 34 Conn. 398; Thompson *v.* Rose, 16 Conn. 71; Hartford Ice Co. *v.* Greenwoods Co., 61 Conn. 166, 23 Atl. 91.

Delaware. — Vaughan *v.* Webster, 5 Har. 256.

Illinois. — Race *v.* Chandler, 15 Ill. App. 532.

Indiana. — Hanna *v.* Phelps, 7 Ind. 21.

Maine. — Weston *v.* Carr, 71 Me. 356; Dearbourn *v.* Union Nat. Bank, 58 Me. 273.

Michigan. — Lamb *v.* Utley, 146 Mich. 654, 110 N. W. 50; Donlin *v.* McQuade, 61 Mich. 275, 28 N. W. 114.

New Jersey. — Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

New York. — Bissel *v.* Drake, 19 Johns. 66; Lockwood *v.* Bull, 1 Cow. 322; Boyle *v.* Roche, 2 E. D. Smith 335.

North Carolina. — Setzar *v.* Butler, 27 N. C. (5 Ired. L.) 212.

Oklahoma. — Oklahoma City *v.* Richardson L. Co., 3 Okla. 5, 39 Pac. 386.

South Carolina. — Dealy *v.* Lance, 2 Speer 487.

Texas. — Young *v.* Lewis, 9 Tex. 73.

Wisconsin. — Anderson *v.* Sutherland, 91 Wis. 585, 65 N. W. 365; Huxley *v.* Hartzell, 44 Mo. 370; Lander *v.* Bechtel, 55 Wis. 593, 13 N. W. 483.

Wyoming. — DeClark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

Evidence that persons in possession of stolen property, although not parties to the original conversion thereof, refused to return the property upon notice of the facts and a demand by the true owner for its return, is sufficient to establish a conversion as against them. Rector *v.* Thompson, 26 Wash. 400, 67 Pac. 86.

A refusal to deliver plaintiff's property to him upon demand may be left to the jury as presumptive evidence of a conversion before bringing the action, although the demand was made after the papers in the action were delivered to the sheriff. Jessop *v.* Miller, 2 Abb. Dec. (N. Y.) 449.

81. St. John *v.* O'Connel, 7 Port.

the defendant insists upon the production of the agent's authority, and refuses a delivery because such authority is not shown, evidence of the excuse for non-compliance with the demand, although coming from the defendant, is admissible.[82]

(C.) Evidence of Agent's Failure To Account — When Sufficient To Maintain Trover. — As a general rule, evidence of mere failure of an agent to pay over or account for money collected by him for and on account of his principal is not sufficient to establish a conversion which will support an action of trover, where the agent is not required to turn over specific money, even though a demand for an accounting has been made.[83] But where it appears that the principal is entitled to receive, and the terms of the employment of the agent require him to pay over the identical money received by him, evidence of such failure on his part so to turn over or account for the money, when coupled with evidence of demand and refusal, is sufficient.[84]

B. Nature and Competency of Evidence. — The general rules of evidence as to competency, materiality, relevancy, etc., apply in respect of the evidence sought to be adduced by the plaintiff in an action of trover to establish the conversion charged,[85] as well as in

(Ala.) 466; Dent *v.* Chiles, 5 Stew. & P. (Ala.) 383.

82. St. John *v.* O'Connel, 7 Port. (Ala.) 466.

83. Hartman *v.* Hicks, 28 Misc. 527, 59 N. Y. Supp. 529; Vandelle *v.* Rohan, 36 Misc. 239, 73 N. Y. Supp. 285; Walter *v.* Bennett, 16 N. Y. 250; Borland *v.* Stokes, 120 Pa. St. 278, 14 Atl. 61; Royce *v.* Oakes, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845.

84. *England.* — Jackson *v.* Anderson, 4 Taunt. 24.

Indiana. — Bunger *v.* Roddy, 70 Ind. 26.

Minnesota. — Farrand *v.* Hurlbut, 7 Minn. 477; American Exp. Co. *v.* Piatt, 51 Minn. 568, 53 N. W. 877.

Missouri. — Petit *v.* Bouju, 1 Mo. 46.

New York. — Donohue *v.* Henry, 4 E. D. Smith 162.

Oregon. — Salem Light & T. Co. *v.* Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675.

Wisconsin. — Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

85. See Groveland Imp. Co. *v.* Farmers' Supply Co., 25 Wash. 344, 65 Pac. 529; Daggett *v.* Gray, 110 Cal. 169, 42 Pac. 568; Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 753; Little *v.* Williams, 107 Mich. 652, 65 N. W. 568; Newman *v.* Goddard, 5 Thomp. & C. (N. Y.) 299; Leavitt *v.* Stansell, 44 Mich. 424, 6 N. W. 855.

Where plaintiff has proved conversion by demand and refusal, there is no objection to proof of a conversion by other evidence, although but one conversion is alleged. Clark *v.* Hale, 34 Conn. 398.

In an action for trover, for service of a writ of attachment against another upon the property of the plaintiff, it is competent for the plaintiff to disprove the alleged indebtedness of the defendant in attachment for the purpose of bringing in question the *bona fides* of the transaction. Cook *v.* Hopper, 23 Mich. 511.

In Rosellen *v.* Herzog, 64 Hun 639, 19 N. Y. Supp. 314, where defendants justified the taking on the ground that they had been induced to sell the property to plaintiff's assignors by false statements as to their solvency, it was held error to permit one of the assignors to testify that if their creditors had extended the time of payment they would have been paid in full.

As tending to prove an admission of liability, it may be shown that the defendant spoke of procuring a doc-

respect of the evidence sought to be adduced by defendant to disprove the charge.[86]

II. DEFENSES.

1. In General. — The defendant in an action of trover is, of course, entitled to show any fact or facts which will negative a wrongful taking,[87] or which tend to justify the acts complained

tor for the horse, the subject of the conversion, offered to buy another horse for the plaintiff and to pay for the carriage. Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997.

Mere declarations by a party, in the absence of the owner, that the property belongs to him, unaccompanied by acts of ownership, is not admissible as evidence of a conversion. Irish *v.* Cloyes, 8 Vt. 30.

In Purves *v.* Moltz, 5 Robt. (N. Y.) 653, where it appeared that the property had been delivered to the defendant by mistake, it was held proper to show his subsequent conduct in repairing it and claiming a lien upon it, for the purpose of showing his motive in receiving the property and thereby establishing a tortious conversion, the complaint not having alleged a demand.

In Baylis *v.* Cronkite, 39 Mich. 413, an action for the conversion of a portion of certain wheat by one of the parties to a contract under which the proceeds of its sale were to be shared, it was held that evidence that the barn containing the rest of the wheat had been burned and that the plaintiff had received the insurance money, was not admissible.

Similar Transactions. — Luckey *v.* Roberts, 25 Conn. 486; Hall *v.* Brown, 30 Conn. 551; Allison *v.* Matthieu, 3 Johns. (N. Y.) 235.

86. In trover by a mortgagee against the buyer of the mortgaged chattels, evidence that similar sales of mortgaged chattels by the mortgagor had been approved by the mortgagee is not admissible for the purpose of showing that the sale in question was authorized, unless accompanied by evidence that the buyer knew thereof at the time he made the purchase. Ilfeld *v.* Ziegler, 40 Colo. 401, 91 Pac. 825.

87. Welton *v.* DeYarman, 26 Neb. 59, 42 N. W. 338; McDonald *v.* McKinnon, 104 Mich. 428, 62 N. W. 560. See also Gorder *v.* Hilliboe (N. D.), 115 N. W. 843; Walker *v.* Wetherbee, 65 N. H. 656, 23 Atl. 621 (that his action was reasonably necessary to protect his own property); Huntington *v.* Douglass, 1 Robt. (N. Y.) 204 (a bailee may excuse his failure to redeliver by showing that the property had been taken from him by a third person with a paramount claim).

It is competent for a defendant in trover for the conversion of specific property to testify in general terms that he has settled or accounted therefor, and his testimony should go to the jury for what it may be worth. The fact that the witness does not remember or cannot state the details may affect the probative value of the testimony but does not authorize the court to instruct the jury to disregard the testimony altogether. Bell *v.* Ober & Sons Co., 96 Ga. 214, 23 S. E. 7.

In Young *v.* New Standard Con. Co., 148 Cal. 306, 83 Pac. 28, an action against the defendant corporation for the conversion of stock consisting of its refusal to register and transfer the stock to the plaintiff's vendee, it was held proper to show as an excuse or justification that the plaintiff who had purchased the stock at an assessment sale, had previously held it as security for a debt and had purchased it for much less than its value because of lack of competition on the sale owing to his statement that he intended to hold the stock as security and that he had agreed with the corporation so to do.

The fact that the contract by which persons in possession of goods acquired them was illegal or void

of;[88] and where a *prima facie* case has been made out, the burden is upon the defendant to show a want of liability.[89] But defendant is not entitled to offer evidence to the effect that the plaintiff has in his possession a portion of the property alleged to have been converted for the purpose of defeating the action;[90] nor can a conversion be justified by proof that subsequently thereto the property in controversy was taken from the defendant on an attachment against the plaintiff in trover, although such proof may be considered in mitigation of damages.[91]

2. Benefits. — Where one appropriates the property of another without his consent, and without process of law, he cannot, in an action for conversion, claim that he has conferred benefits on the plaintiff by making voluntary payments on the latter's obligations.[92]

3. Good Faith. — Good faith, in an action of trover, cannot be shown as matter of defense. It is matter going in mitigation of damages, and properly admissible on that question only.[93]

On the question of good faith on the part of the defendant in doing the act relied upon as constituting the conversion, the defendant himself is a competent witness to the fact of his own belief and good faith.[94]

4. Motive. — Nor is the motive by which the defendant was controlled of any avail as a defense.[95]

5. Restoration of, or Offer To Restore, Property. — A return of the property in controversy cannot be shown for the purpose of defeating the plaintiff's cause of action; that fact can be shown only for the purpose of mitigating the damages.[96] And the same rule

cannot be shown in justification of another person's wrongfully taking possession of the goods or in retaining possession thereof. Standard Furn. Co. *v.* Van Alstine, 31 Wash. 499, 72 Pac. 119.

88. Haynes *v.* Kettenbach Co., 10 Idaho 73, 81 Pac. 114 (authorization by plaintiff).

89. Dieterle *v.* Bekin, 143 Cal. 683, 77 Pac. 664.

90. Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795.

91. Erie Pres. Co. *v.* Witherspoon, 49 Mich. 377, 13 N. W. 781. See also Coburn *v.* Watson, 48 Neb. 257, 67 N. W. 171.

92. Frank *v.* Tatum (Tex. Civ. App.), 26 S. W. 900.

93. Hoyt *v.* Duluth & I. R. Co., 103 Minn. 396, 115 N. W. 263; White *v.* Yawkey, 108 Ala. 270, 19 So. 360; Hotchkiss *v.* Hunt, 49 Me. 213. But see Grant *v.* Smith, 26 Mich. 201.

In Imhoff *v.* Richards, 48 Neb. 590, 67 N. W. 483, it was held that evidence of the careful conduct of the sale, which as to the plaintiff's rights constituted the conversion, was properly excluded.

94. Hoyt *v.* Duluth & I. R. Co., 103 Minn. 396, 115 N. W. 263, where the alleged conversion consisted of cutting timber from land owned by the plaintiff, but which the defendant believed he had the right to cut.

95. Baltimore & O. R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; West Jersey R. Co. *v.* Trenton Car Wks. Co., 32 N. J. L. 517; Stough *v.* Stefani, 19 Neb. 468, 27 N. W. 445.

96. *United States.* — Western Land & Cattle Co. *v.* Hall, 33 Fed. 236.

Arkansas. — Norman *v.* Rogers, 29 Ark. 365.

Colorado. — Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637.

applies in respect of evidence of an offer by the defendant to return the property.[97] Notwithstanding the property in controversy may have been returned, the plaintiff is nevertheless entitled to an award of nominal damages for its conversion.[98]

6. Acting as Agent or Servant for Another. — The fact that the defendant was the agent or servant of others who were themselves wrongdoers, and acted under their authority, cannot avail him, although he may in fact have been ignorant of their want of title to the property in question.[99]

District of Columbia. — Whittingham *v.* Owen, 19 D. C. 277.

Georgia. — Bodega *v.* Perkerson, 60 Ga. 516.

Indiana. — Smith *v.* Downing, 6 Ind. 374.

Massachusetts. — Greenfield Bank *v.* Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Gibbs *v.* Chase, 10 Mass. 125.

Missouri. — Sparks *v.* Purdy, 11 Mo. 219.

Nebraska. — Coburn *v.* Watson, 48 Neb. 257, 67 N. W. 171.

New York. — Murray *v.* Burling, 10 Johns. 172; Smith *v.* Hoose, 22 How. Pr. 402; Robinson *v.* Lewis, 6 Misc. 37, 25 N. Y. Supp. 1004, *affirmed*, 7 Misc. 536, 27 N. Y. Supp. 989; Pinckney *v.* Darling, 3 App. Div. 553, 38 N. Y. Supp. 411.

Pennsylvania. — Whitaker *v.* Houghton, 86 Pa. St. 48.

Vermont. — Park *v.* McDaniels, 37 Vt. 594.

West Virginia. — Arnold *v.* Kelly, 4 W. Va. 642.

The receipt by the owner of the whole or a portion of the converted goods, or the proceeds arising from their sale, cannot be shown in defense of the cause of action accruing for their wrongful taking. Watson *v.* Coburn, 35 Neb. 492, 53 N. W. 477.

97. Munier *v.* Zachary (Iowa), 114 N. W. 525; *citing* Colby *v.* Kimball Co., 99 Iowa 321, 68 N. W. 786; Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778; Baltimore & O. R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; Carpenter *v.* Dresser, 72 Me. 377; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91; Carpenter *v.* American B. & L. Assn., 54 Minn. 403, 56 N. W. 95.

In an action against a corporation for the conversion of its stock by refusing to register a transfer upon demand by the transferee, the defendant cannot, as matter of defense, show that he tendered to the plaintiff during the trial the certificates demanded. Dooley *v.* Gladiator etc. Co., 134 Iowa 468, 109 N. W. 864.

In Carpenter *v.* American B. & L. Assn., 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345, an action against the defendant by a shareholder for the alleged conversion of his stock, which had been illegally sold and bought in by the defendant, it was held that the defendant could not defeat the plaintiff's action by showing that, after a similar action was determined against it, it offered to reinstate the plaintiff on payment by him of the accrued dues and fees.

98. Warner *v.* Capps, 37 Ark. 32; Cardwill *v.* Gilmore, 86 Ind. 428; Oleson *v.* Newell, 12 Minn. 186; Watson *v.* Coburn, 35 Neb. 492, 53 N. W. 477.

99. *Arkansas.* — Gaines *v.* Briggs, 9 Ark. 46.

Maine. — McPheters *v.* Page, 83 Me. 234, 22 Atl. 101; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581; Freeman *v.* Underwood, 66 Me. 229; Smith *v.* Colby, 67 Me. 169.

Massachusetts. — Coles *v.* Clark, 3 Cush. 399; Gilmore *v.* Newton, 9 Allen 171.

Nebraska. — Cook *v.* Monroe, 45 Neb. 349, 63 N. W. 800.

New York. — Hoffman *v.* Carow, 22 Wend. 285.

Compare Smith *v.* Colby, 67 Me. 169, where the court said: "It is true, as contended, that a person acting under the direction of another as servant or bailee might not be guilty of conversion merely by carrying articles from place to place,

7. Taking or Holding Under Legal Process. — A. As Between Officer and Owner. — An officer who seeks to justify a seizure of property under process, and to defend his position on the ground that a fraudulent transfer had been made, in an action against him by a stranger to the writ who claims title anterior to the levy, must show, if he acted under an execution, that it was issued on a valid judgment; and, if a writ of attachment, that the party at whose instance it was issued, was a creditor of the defendant named therein.[1]

Defendant in trover cannot justify his taking the property in question by introducing in evidence a writ of replevin unlawfully sued out in the name of another by the defendant, and irregularly served by his procurement.[2]

Burden of Proving Plaintiff's Possession Fraudulent as to Creditors. Where the defendant, in an action for conversion, justifies the taking from plaintiff's possession by legal process on the ground that the sale to plaintiff was fraudulent as to the creditors, the burden of proving the fraud is upon him.[3]

B. As Between Execution Creditor or Purchaser at Sale and Owner. — Where a creditor having had goods sold under execution is sued in trover therefor and sets up, as a defense, fraud on plaintiff's part, the burden of proof is upon him to establish the same.[4] And where a purchaser at an official sale seeks to justify his possession under a judgment, if the property has been exempted by virtue of having been set aside by the ordinary, the burden is upon

without any knowledge of wrongdoing, supposing the articles to belong to or to be rightfully in the possession of the person from whom the same are received. It is usually a protection to such person that the chattels are received from one in possession of them, possession being deemed *prima facie* evidence that he is the owner thereof. A different rule would impose innumerable burdens and liabilities upon servants, trustees, bailees, carriers and other agents."

1. Mills *v.* Talbott, 63 Kan. 14, 64 Pac. 964. See also Thatcher *v.* Maack, 7 Ill. App. 635; Johnson *v.* Holloway, 82 Ill. 334; James *v.* Van Duyn, 45 Wis. 512, where the court quoting with approval from Bogert *v.* Phelps, 14 Wis. 88, said: "In case of an action by the party against whom the process issued, the process itself, being valid on its face, constitutes a complete justification. In case of suit by another claiming title to the property seized under such party, which title is contested on the ground of fraud, he must, in addition to showing that he acted under such process, show that he acted for a creditor. When he acts under process of execution, this is done by producing the judgment on which it issued. If it be mesne process, then the debt must be proved by other competent evidence. This proof, however, is required, not because it affects the process, or is in that respect necessary to protect the officer, but because it affects the title to the property in question. No one but a creditor can question the title of the fraudulent vendee, and hence he must show that the relation of debtor and creditor exists between the party against whom the attachment or execution ran and the person in whose behalf it is issued. It is a necessary link in the chain of evidence by which the fraud is to be established."

2. Baldwin *v.* Whittier, 16 Me. 33.

3. Derby *v.* Gallup, 5 Minn. 119.

4. Freedman *v.* Campfield, 92 Mich. 118, 52 N. W. 630.

the defendant to show that the levy was in every respect legal.[5]

8. Outstanding Lien. — A defendant in trover who is a mere wrongdoer himself, cannot by way of defense and justification for his detention, show an outstanding lien in favor of a third person.[6]

9. Matters Pertaining to Title to or Ownership of Property. — A. In General. — It is held that in trover the tortfeasors may dispute the title of the person from whose possession the property was taken.[7] But, though this may be true in principle, evidence of title in some person other than the plaintiff is not always held admissible, as will be more fully shown.

B. Title or Right of Defendant. — Where plaintiff sues as holder of a special property, as a lien, giving right of possession, defendant may not defend by showing title unless he also disproves the lien or right of possession thereunder; but in other cases defendant may defend by showing title in himself,[8] except in case of property *in custodia legis*.[9]

Possession by the Defendant Subsequent to that of the plaintiff and lawfully obtained is a good defense in trover until the plaintiff shows title in himself.[10]

5. Gillespie *v.* Chastain, 57 Ga. 218.

6. Moulton *v.* Witherell, 52 Me. 237. See also Clapp *v.* Glidden, 39 Me. 448; Gaines *v.* Briggs, 9 Ark. 46.

7. Rose *v.* Coble, 61 N. C. (Phill. L.) 517. *Compare* Steele *v.* Schricker, 55 Wis. 134, 12 N. W. 396, *holding* that where defendant has obtained possession of the property from the same person under whom the plaintiff claims, he cannot question such person's title unless some third person having a better title has deprived defendant of his possession.

8. In trover by a mortgagor for the value of property mortgaged, the defendant may show by way of defense that subsequent to the institution of the action he purchased the mortgage and holds the legal title to the property by virtue of a right of possession after a default in payment as provided in the mortgage. Hurt *v.* Hubbard, 41 Colo. 505, 92 Pac. 908.

In trover the defendant can show that he sold the property to one from whom plaintiff claims title on the condition that title should not pass until payment was made, and that nothing had been paid on the purchase price. Fifield *v.* Elmer, 25 Mich. 48.

In Hampton *v.* Swisher, 4 N. J. L. 66, certain goods taken on execution were left by the officer with the defendant for safekeeping. The defendant refused to redeliver, claiming that the goods were and had been his before the levy. It was held that in an action of trover against him, he might, in defense of the action, show his own right, but not the right of a third person.

In trover for stolen negotiable securities, mere proof that they were in the possession of another from whom defendant or his immediate bailor received them is no defense. He must show that he took them in the usual course of business and for value. Robinson *v.* Hodson, 73 Pa. St. 202.

Defendant cannot set up title acquired since the commencement of the action. Clapp *v.* Glidden, 39 Me. 448. But see Hurt *v.* Hubbard, 41 Colo. 505, 92 Pac. 908.

9. In an action of trover by a sheriff for personal property taken and converted by the defendant, after being levied on under an execution against a third person, the fact that the defendant was the real owner of the property is no defense, and evidence to that effect is not admissible. Weidensaul *v.* Reynolds, 49 Pa. St. 73.

10. Smoot *v.* Cook, 3 W. Va. 172.

C. Title or Right of Third Person. — In an action of trover for the alleged conversion of personal property, the defendant cannot by way of defense to the plaintiff's right of action, show title in a third person, unless he in some manner connects himself with such third person, or claims under him.[11] But this rule is not universally applied. It is frequently held that the defendant may show title in any third person even though a stranger.[12] In justifying under a third person, the defendant must show both the title and right of possession of such person.[13]

III. DAMAGES.

1. Actual or Compensatory. — A. Presumptions and Burden of Proof. — Although trover may be maintained upon proof of an actual conversion, even though the value of the property be not

See also Knapp *v.* Winchester, 11 Vt. 351. *Compare* Weston *v.* Higgins, 40 Me. 102, *holding* that in trover when the property of plaintiff is once established, possession by the defendant will not draw after it the presumptive evidence of ownership which will excuse him from otherwise proving title in himself.

11. *Arkansas.* — Gaines *v.* Briggs, 9 Ark. 46; Estes *v.* Boothe, 20 Ark. 583.

Colorado. — Omaha & G. S. & R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925.

Connecticut. — Morey *v.* Hoyt, 65 Conn. 516, 33 Atl. 496.

Florida. — Skinner *v.* Pinney, 19 Fla. 42.

Kansas. — Huffman *v.* Parsons, 21 Kan. 467 (as agent).

Maine. — Fiske *v.* Small, 25 Me. 453; Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27.

Maryland. — Harker *v.* Dement, 9 Gill 7.

Michigan. — Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62; Ribble *v.* Lawrence, 51 Mich. 569, 17 N. W. 60; See Stearns *v.* Vincent, 50 Mich. 209, 15 N. W. 86.

Montana. — Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

New Jersey. — Glenn *v.* Garrison, 2 Har. 1.

New York. — Rotan *v.* Fletcher, 15 Johns. 207.

Oklahoma. — Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883.

Oregon. — Krewson *v.* Purdom, 13 Or. 563, 11 Pac. 281.

Texas. — O'Brien *v.* Hilburn, 22 Tex. 616.

Wisconsin. — Weymouth *v.* Chicago & N. W. R. Co., 17 Wis. 550; Terry *v.* Allis, 20 Wis. 32.

In Ward *v.* Carson River Wood Co., 13 Nev. 44, an action of trover for the value of timber cut by the defendant under a contract with the plaintiff upon land to which the plaintiff claimed possessory title, it was held that the defendant could not defeat a recovery by showing title to be in the United States unless he connected himself with that title.

12. Smoot *v.* Cook, 3 W. Va. 172; Hannon *v.* Bramley, 65 Conn. 193, 32 Atl. 336; Nations *v.* Hawkins, 11 Ala. 859; Southern Car Mfg. Co. *v.* Wagner (N. M.), 89 Pac. 259; Boyce *v.* Williams, 84 N. C. 275. See Geo. R. Dickinson Paper Co. *v.* Mail Pub. Co. (Tex. Civ. App.), 31 S. W. 1083; Sweeney *v.* Frank Waterhouse & Co., 39 Wash. 507, 81 Pac. 1005.

Defendant in trover may prove that the title to the property was, when the action was commenced, in a third person. "If he could not, he might subsequently be compelled to pay for the same property to such third person, he being a stranger to the first suit." Clapp *v.* Glidden, 39 Me. 448.

13. Omaha & G. S. & R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925.

established,[14] plaintiff's recovery in such case being limited to nominal damages,[15] nevertheless before the plaintiff is entitled to an award of actual or compensatory damages it is incumbent upon him to establish the damages claimed,—in other words, the value of the property must be shown.[16]

B. Rules as to Propriety and Scope of Inquiry. — a. *In General.* — Since in an action of trover for the conversion of personal property the purpose is, not to secure a return of the property, but to secure a money indemnity to the plaintiff for the property converted, the general rule is that the inquiry as to what sum of money will so indemnify him should be directed to the value of the property at the time of the conversion with legal interest from such time to the entry of judgment,[17] unless the case is a proper one for special

14. Connoss *v.* Meir, 2 E. D. Smith (N. Y.) 314.

15. Wheeler *v.* Pereles, 40 Wis. 424.

Where the theory, on which an action to recover the value of stock certificates is based, is a complete and absolute deprivation of property, but after issue joined the defendant returns the certificates to the plaintiff who accepts them, plaintiff's recovery will be confined to nominal damages. Owen *v.* Williams, 38 Colo. 79, 89 Pac. 778.

16. Danley *v.* Rector, 10 Ark. 211; Starr *v.* Cragin, 24 Hun (N. Y.) 177; Cohnfield *v.* Walsh, 2 App. Div. 190, 37 N. Y. Supp. 833; Harrow *v.* St. Paul & D. R. Co., 43 Minn. 71, 44 N. W. 881. See also Imhorst *v.* Burke, 7 Daly (N. Y.) 54; Beaton *v.* Wade, 14 Colo. 4, 22 Pac. 1093; Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

To authorize the assessment of property illegally taken and detained there must be some evidence of the value of the property, or at least some description to enable the triors of the fact to determine the value from their own knowledge upon the subject. Pharis *v.* Carver, 13 B. Mon. (Ky.) 236.

17. *Alabama.* — Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386; Burks *v.* Hubbard, 69 Ala. 379; Linam *v.* Reeves, 68 Ala. 89; Renfro *v.* Hughes, 69 Ala. 581.

Arkansas. — Danley *v.* Rector, 10 Ark. 211; Jefferson *v.* Hale, 31 Ark. 286; Kelly *v.* McDonald, 39 Ark. 387.

Colorado. — Beaman *v.* Stewart, 19 Colo. App. 222, 74 Pac. 342; Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. 813; Burchinell *v.* Butters, 7 Colo. App. 294, 43 Pac. 459; Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705.

Connecticut. — Baldwin *v.* Porter, 12 Conn. 473; Clark *v.* Whitaker, 19 Conn. 319; Curtis *v.* Ward, 20 Conn. 204; Lewis *v.* Morse, 20 Conn. 211; Hurd *v.* Hubbell, 26 Conn. 389; Cook *v.* Loomis, 26 Conn. 483.

Delaware. — Vaughan *v.* Webster, 5 Har. 256.

Florida. — Wright *v.* Skinner, 34 Fla. 453, 16 So. 335; Skinner *v.* Pinney, 19 Fla. 42; Moody *v.* Caulk, 14 Fla. 50; Robinson *v.* Hartridge, 13 Fla. 501.

Georgia. — Dorsett *v.* Frith, 25 Ga. 537.

Illinois. — Sturges *v.* Keith, 57 Ill. 451; Cassidy *v.* Elk Grove L. & C. Co., 58 Ill. App. 39.

Indiana. — Yater *v.* Mullen, 24 Ind. 277.

Kansas. — Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80; Simpson *v.* Alexander, 35 Kan. 225, 11 Pac. 171; Prinz *v.* Moses, 66 Pac. 1009; Shepard *v.* Pratt, 16 Kan. 209.

Kentucky. — Newcomb-B. Co. *v.* Baskett, 14 Bush 658; Lillard *v.* Whittaker, 3 Bibb 92; Greer *v.* Powell, 1 Bush 489; Sanders *v.* Vance, 7 T. B. Mon. 209.

Maine. — Wyman *v.* Bowman, 71 Me. 121; Robinson *v.* Barrows, 48 Me. 186; Weston *v.* Carr, 71 Me. 356.

Maryland. — Heinekamp *v.* Beaty, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67; Stirling *v.* Garritee, 18 Md. 468.

Massachusetts. — Kennedy *v.*

or exemplary damages, and subject of course to the rules permitting proof of matters in mitigation of damages. And if before the con-

Whitwell, 4 Pick. 466; Greenfield Bank *v.* Leavitt, 17 Pick. 1; Parsons *v.* Martin, 11 Gray 111; Johnson *v.* Sumner, 1 Metc. 172; Selkirk *v.* Cobb, 13 Gray 313.

Michigan. — Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863; Ripley *v.* Davis, 15 Mich. 75; Davidson *v.* Kolb, 95 Mich. 469, 55 N. W. 373; Denton *v.* Smith, 61 Mich. 431, 28 N. W. 160.

Minnesota. — Derby *v.* Gallup, 5 Minn. 119; Zimmerman *v.* Lamb, 7 Minn. 421; Nesbitt *v.* St. Paul Lumb. Co., 21 Minn. 491; Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815; Chase *v.* Blaisdell, 4 Minn. 90.

Missouri. — Funk *v.* Dillon, 21 Mo. 294; Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124; Green *v.* Stephens, 37 Mo. App. 641.

Nevada. — Boylan *v.* Huguet, 8 Nev. 345; Carlyon *v.* Lannan, 4 Nev. 156.

New York. — Wehle *v.* Haviland, 69 N. Y. 448; Hendricks *v.* Decker, 35 Barb. 298; Hallett *v.* Novion, 14 Johns. 273; Heald *v.* MacGowan, 5 N. Y. Supp. 450, 25 N. Y. St. 579; Griswold *v.* Haven, 25 N. Y. 595; Anderson *v.* Nicholas, 28 N. Y. 600; Kelly *v.* Archer, 48 Barb. 68.

North Carolina. — Waller *v.* Bowling, 108 N. C. 289, 12 S. E. 990.

Oregon. — Austin *v.* Vanderbilt, 48 Or. 206, 85 Pac. 519.

Pennsylvania. — Hill *v.* Canfield, 56 Pa. St. 454.

Texas. — Masterson *v.* Goodlett, 46 Tex. 402; Houghten *v.* Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583; Smith *v.* Bates (Tex. Civ. App.), 27 S. W. 1044.

Vermont. — Boutwell *v.* Harriman, 58 Vt. 516, 2 Atl. 159; Grant *v.* King, 14 Vt. 367.

Wisconsin. — Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755.

The measure of damages in an action of trover for logs cut and taken from land in plaintiff's possession is the value of the logs at the time and place of the conversion with interest, and not the value of the standing trees. Skinner *v.* Pinney, 19 Fla. 42.

In Allsopp *v.* J. Hendy Mach. Wks., 5 Cal. App. 228, 90 Pac. 39, where it appeared that the defendant had received property belonging to the plaintiff for sale on account, and the defendant's president had testified that the fair market value of the property when so received was the same as when previously sold by it to the plaintiff for $5050, it was held that the evidence was sufficient to sustain a finding that the property when received by the defendant was worth $4040, under §§ 2228 and 2237 of the Civil Code, making a trustee who wrongfully uses or disposes of trust property liable at the option of the beneficiary to account for all profits so made, or to pay the value of its use, and, if he disposes thereof, to replace it with its fruits or account for its proceeds with interest.

In the case of a consignment of goods for sale on commission which the consignee thereafter converts to his own use, the consignor is entitled to show the total value of the goods consigned, in the absence of proof by the consignee as to what portion, if any, he had disposed of under the agency and accounted for the proceeds thereof. Mouat *v.* Wood, 4 Colo. App. 118, 35 Pac. 58.

In Bell *v.* Ober & Sons Co., 96 Ga. 214, 23 S. E. 7, an action for converting collaterals pledged to the plaintiff by the defendant to secure a note payable in cotton it was held that since the plaintiff could in no event recover more than the amount of the debt he should have shown the value of the cotton at the time when and the place where the note was due and payable.

In Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, an action against a carrier by the consignee of certain machines, who had sold them as agent for the consignor and was entitled to a commission from the proceeds, it appeared that the sale was rescinded and the commission lost, by reason of the carrier's conversion of the goods. The price at which the sale had been made was held the proper measure of damages.

Where the refusal by a corpora-

version the plaintiff, as vendee, had paid the defendant for the property, and he, before trial, resold it at an advanced price, the general rule just stated still applies.[18]

Statutes. — In some of the states there are statutes expressly recognizing the above rule and in some instances the plaintiff is entitled to show the amount of time and money expended in pursuit of the property.[19]

In Cases of Mere Technical Conversion, where the property was returned in the same condition as before the unlawful act, not only when the owner voluntarily received back the property, but also when he took them back against his will, nominal damages and costs should be the limit of the award.[20] And in trover against an unintentional trespasser on his innocent vendee for the conversion of severed portions of the realty, when the value has been enhanced by the labor of the trespasser and preparing and transporting the chat-

tion to register a transfer of its stock is regarded as a conversion, the transferee is entitled to show as his damages therefor the full value of the stock at the time the demand was made, with interest to the date of the trial. Dooley *v.* Gladiator, etc. Co., 134 Iowa 468, 109 N. W. 864.

18. Lillard *v.* Whittaker, 3 Bibb (Ky.) 92.

The rule is well settled that where it appears that the defendant has converted property belonging to the plaintiff, and has put it out of the power of the plaintiff to show the quality and value of the property by any artifice or concealment, the value of the best quality of such property may be shown and received as constituting the true criterion by which to measure the plaintiff's damages. Goltra *v.* Penland, 42 Or. 18, 69 Pac. 925; Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241. See also Kavanaugh *v.* Taylor, 2 Ind. App. 502, 28 N. E. 553; Tea *v.* Gates, 10 Ind. 164; Clark *v.* Miller, 4 Wend. (N. Y.) 628.

In actions for damages for the conversion of goods, where the goods have been confused by defendant with other goods, the damages are to be given to the utmost value the articles will bear. Starr *v.* Winegar, 3 Hun (N. Y.) 491, 6 Thomp. & C. 33.

19. Lynch *v.* McGhan (Cal. App.), 93 Pac. 1044; New Liverpool S. Co. *v.* Western S. Co., 151 Cal. 479, 91 Pac. 152; Florence *v.* Helms, 136 Cal. 613, 69 Pac. 429; Thornton-Thomas Merc. Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10; Doll *v.* Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625; Drumm-Flato Com. Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311; Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883.

In Catlett *v.* Stokes (S. D.), 110 N. W. 84, it was held that under the provisions of the South Dakota statute, providing that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, with interest from that time; or where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest at the option of the injured party, proof of the value of the property before the conversion is not sufficient; there must be proof of the value at the time of the conversion or subsequent thereto.

20. Sutton *v.* Great Northern R. Co., 99 Minn. 376, 109 N. W. 815, where the court said: "To award more would be to exceed compensation under circumstances not justifying any other measure of damages; to award less would be to justify a wrong. 'A conversion cannot be purged.'" The court cites Hiort *v.* Railway Co., 48 L. J. Ex. 545, 40 L. T. 674, 4 Ex. Div. 188; Warder *v.* Baldwin, 51 Wis. 450, 8 N. W. 257; Farr *v.* Bank, 87 Wis. 223, 58 N. W. 377; Bigelow Co. *v.*

tel to market, the value of the property immediately after the severance, when it becomes a chattel, with interest, is the measure of damages; the trespasser in such case being entitled to an abatement from the enhanced value for his labor, etc.[21]

There is authority, however, to the effect that the value of property in place should be allowed as if it had been purchased *in situ* by the defendant at the fair market value of the district, as for instance, the value of timber standing, or for coal or ore mined.[22]

b. *Special Property or Interest of Plaintiff.* — **(1.) As Between General and Special Owner.** — (A.) IN GENERAL. — Where the plaintiff in an action of trover has but a special property or interest in the property in controversy, in an action against the general owner, or one claiming under him, the inquiry as to damages should go only to the value of such special interest.[23]

(B.) ACTION BY MORTGAGOR AGAINST MORTGAGEE. — Thus the mortgagor, suing his mortgagee for conversion, can show only the value of

Heintze, 53 N. J. L. 69, 21 Atl. 109; Delano *v.* Curtis, 7 Allen (Mass.) 470.

21. White *v.* Yawkey, 108 Ala. 270, 19 So. 360; Wooden-Ware Co. *v.* United States, 106 U. S. 432. See also Riddle *v.* Driver, 12 Ala. 590.

In King *v.* Merriman, 38 Minn. 47, 35 N. W. 570, the court lays down the rule substantially as follows: "Where defendant is an unintentional trespasser or mistaken trespasser, or where he honestly and reasonably believed that his conduct was rightful, the value of the property at the time it was taken, that is, the value of the timber standing, furnishes the true test.

In Beede *v.* Lamprey, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426, the court, after reviewing many cases, said: "The weight of authority, however, in this country, is in favor of the rule which gives compensation for the loss,—that is, the value of the property at the time and place of conversion with interest after, allowing nothing for value subsequently added by the defendant,—when the conversion does not proceed from wilful trespass, but from the wrongdoer's mistake, or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner, or a contemplated special use of the property by him."

In the case of a purchaser of standing timber continuing to remove it after his contract for so doing has expired, under the belief in good faith that he is still the owner thereof, the value of the timber standing at the time of the conversion furnishes the true test on the question of damages. Chappell *v.* Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391.

22. Forsyth *v.* Wells, 41 Pa. St. 295, 80 Am. Dec. 617.

23. *United States.* — Hurst *v.* Coley, 15 Fed. 645.

Alabama. — Strong *v.* Strong, 6 Ala. 345.

Arkansas. — Cocke *v.* Cross, 57 Ark. 87, 20 S. W. 913.

Massachusetts. — White *v.* Allen, 133 Mass. 423; King *v.* Bangs, 120 Mass. 514; Chamberlin *v.* Shaw, 18 Pick. 278.

Nebraska. — Haverly *v.* Elliott, 39 Neb. 201, 57 N. W. 1010.

New York. — Spoor *v.* Holland, 8 Wend. 445, 24 Am. Dec. 37; Meeks *v.* Simon, 2 Misc. 241, 21 N. Y. Supp. 1004. See also Frost *v.* Willard, 9 Barb. 440.

North Dakota. — Oronson *v.* Oppegard, 16 N. D. 595, 114 N. W. 377.

Rhode Island. — Warner *v.* Vallily, 13 R. I. 483.

Texas. — Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748.

Vermont. — Hill *v.* Larro, 53 Vt. 629.

An Officer suing for the conversion of goods seized by him under execution, can, on the question of dam-

the property converted, less the mortgage debt, or in other words, the value of his interest.[24]

(C.) Action by Mortgagee Against Mortgagor. — And a mortgagee suing the mortgagor or one claiming under him for conversion, is, in respect of damages proper to be shown, limited to the value of his mortgage debt.[25]

(D.) Action by Pledgee Against Pledgor. — Where a conversion has been made by a pledgor, or by any one claiming in his right, the pledgee is limited to showing the value of his interest in the property.[26]

(2.) As Between Special Owner and Stranger to Title. — (A.) In General. — Where trover is brought against a stranger to the title, the rule then is that the inquiry is not limited merely to the value of the special interest, but goes to the value of the property.[27]

(B.) Action by Mortgagor or Mortgagee. — Thus a mortgagor or mortgagee entitled to possession, may in an action of trover against a stranger, show the full value of the property converted.[28]

ages, show only the amount of the execution. Spoor *v.* Holland, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37.

24. Street *v.* Sinclair, 71 Ala. 110; Jones *v.* Horn, 51 Ark. 19, 9 S. W. 309; Brown *v.* Phillips, 3 Bush (Ky.) 656; Brink *v.* Freoff, 40 Mich. 610; Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249; Ball *v.* Liney, 48 N. Y. 6; Craig *v.* McHenry, 35 Pa. St. 120; Lusch *v.* Huber Mfg. Co. (Neb.), 112 N. W. 284; Richter *v.* Buchanan (Wash.), 92 Pac. 782.

In the case of a mortgagee having wrongfully converted the mortgagor's property, the latter is entitled to recover the amount found as the value of the property, and any additional amount realized by the mortgagee on the sale of the property over and above the value of the property as found after deducting the amount of the indebtedness. Jacobson *v.* Aberdeen Pack. Co., 26 Wash. 175, 66 Pac. 419.

25. Becker *v.* Dunham, 27 Minn. 32, 6 N. W. 406; Fowler *v.* Haynes, 91 N. Y. 346; Parish *v.* Wheeler, 22 N. Y. 494; Ward *v.* Henry, 15 Wis. 239. See also Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

26. Cramer *v.* Marsh, 5 Colo. App. 302, 38 Pac. 612 (*holding* that this is the rule in case of seizure by an officer under attachment sued out by creditors of the pledgor; and *citing* Sheldon *v.* Express Co., 48 Ga. 625; Warner *v.* Matthews, 18 Ill. 83; Chamberlin *v.* Shaw, 18 Pick. (Mass.) 278; Burk *v.* Webb, 32 Mich. 173; Davidson *v.* Gunsolly, 1 Mich. 388; Russell *v.* Butterfield, 21 Wend. (N. Y.) 300; Seaman *v.* Luce, 23 Barb. (N. Y.) 240; Levan *v.* Wilten, 135 Pa. St. 61, 19 Atl. 945).

27. Schley *v.* Lyon, 6 Ga. 530; Warren *v.* Kelley, 80 Me. 512, 15 Atl. 49; Harker *v.* Dement, 9 Gill (Md.) 7; Pomeroy *v.* Smith, 17 Pick. (Mass.) 85; Burk *v.* Webb, 32 Mich. 173; Smith *v.* James, 7 Cow. (N. Y.) 328. See also Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498; Thew *v.* Miller, 73 Iowa 742, 36 N. W. 771.

In Messenger *v.* Murphy, 33 Wash. 353, 74 Pac. 480, the property in controversy, which was exempt from execution but which had been seized and sold under execution on a judgment against plaintiff in favor of defendant, had been purchased by plaintiff on an installment contract containing an unqualified promise by plaintiff to pay the full sum, although title was reserved in the vendor until payment in full was made, and the plaintiff had paid only a portion of the contract price. But it was held that the plaintiff's interest in the property, in so far as defendant was concerned, was the contract value of the property, and that this furnished plaintiff's measure of damages.

28. White *v.* Webb, 15 Conn. 302;

(C.) Action by Pledgee. — And the same rule holds good in an action by a pledgee against a stranger for the conversion of pledged property.[29]

c. *Place of Inquiry.* — Ordinarily, of course, the place of conversion is regarded as the proper place to which the inquiry of value should be directed,[30] although this rule is not recognized as absolutely binding in all cases.[31] Thus, where there is no market at the place of the conversion, the market value of the property at some nearby convenient market, less the cost of transportation, may be shown.[32]

d. *Time of Value.* — So again, generally speaking, the inquiry as to the value of the converted property, should be directed to the time of the alleged conversion;[33] and this is the rule although it may appear that the defendant has sold the property at a price greater

Byrom *v.* Chapin, 113 Mass. 308; Allen *v.* Butman, 138 Mass. 586; Densmore *v.* Mathews, 58 Mich. 616, 26 N. W. 146; Marsden *v.* Cornell, 62 N. Y. 215. *Compare* Roberts *v.* Kain, 6 Robt. (N. Y.) 354, *holding* that a mortgagee, who has never been in possession, is limited to proof of the amount due on the mortgage.

29. Thompson *v.* Toland, 48 Cal. 99, 117; Adams *v.* O'Connor, 100 Mass. 515; Codman *v.* Freeman, 3 Cush. (Mass.) 306; St. Louis *v.* Bissell, 46 Mo. 157; Clark *v.* Pinney, 7 Cow. (N. Y.) 681; Cramer *v.* Marsh, 5 Colo. App. 302, 38 Pac. 612.

30. Hamer *v.* Hathaway, 33 Cal. 117; Hill *v.* Canfield, 56 Pa. St. 454; Gentry *v.* Kelley, 49 Kan. 82, 30 Pac. 186.

Where plaintiff alleged the conversion of a horse at a place to which he had hired it to be driven, it was competent to show the value of the horse when it left the stable, under instructions to the jury that they should inquire whether its condition had changed before it had arrived at the place where it was converted. Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243.

31. Spicer *v.* Waters, 65 Barb. (N. Y.) 227. See also Selkirk *v.* Cobb, 13 Gray (Mass.) 313, where the court in approving a refusal to instruct the jury that the market value of the property at the place where it was converted should be taken into consideration, said: "'Place,' as used in this connection, was indefinite and uncertain. If adopted, it might have misled the jury by its being supposed to limit them in ascertaining the value of the property to inquiries as to sales made on the precise spot where the conversion took place, or its immediate vicinity. Within such a circumscribed range, it may have been impossible to find that the property had there acquired any marketable value."

32. Hallett *v.* Novion, 14 Johns. (N. Y.) 273; Hodson *v.* Goodale, 22 Or. 68, 29 Pac. 70; Dyer *v.* Rosenthal, 45 Mich. 588, 8 N. W. 560. *Compare* Hill *v.* Canfield, 56 Pa. St. 454.

In Peterson *v.* Gresham, 25 Ark. 380, trover for the conversion of cotton in Union county during the early part of the year 1865, it was held proper to permit evidence of the value of cotton in Camden, in June of that year.

33. *Alabama.* — Linam *v.* Reeves, 68 Ala. 89; Loeb *v.* Flash, 65 Ala. 526; Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386.

Arkansas. — Jefferson *v.* Hale, 31 Ark. 286.

California. — Cassin *v.* Marshall, 18 Cal. 689; Sherman *v.* Finch, 71 Cal. 68, 11 Pac. 847.

Colorado. — Beaman *v.* Stewart, 19 Colo. App. 222, 74 Pac. 342.

Connecticut. — Curtis *v.* Ward, 20 Conn. 204; Cook *v.* Loomis, 26 Conn. 483.

Delaware. — Vaughan *v.* Webster, 5 Har. 256.

Florida. — Robinson *v.* Hartridge,

than the value of the property when converted.[34] Nor is it material that the property has since the conversion declined in value.[35] Nor is the rule changed by reason of the fact that an unnecessary demand was made subsequent to the conversion.[36]

Where Demand and Refusal Are Relied Upon as establishing the conversion, the time when they were made may be regarded as the time of the conversion within the rule under consideration.[37]

e. *Property of Fluctuating Value.* — **(1.) Value at Time and Place of Conversion.** — In the case of property of fluctuating value, such as stocks, bonds, etc., many of the courts adhere to the rule restricting proof of the value of the property to the time and place of the conversion.[38]

13 Fla. 501; Wright *v.* Skinner, 34 Fla. 453, 16 So. 335.

Illinois. — Sturges *v.* Keith, 57 Ill. 451.

Indiana. — Yate *v.* Mullen, 24 Ind. 277.

Kansas. — Gentry *v.* Kelley, 49 Kan. 82, 30 Pac. 186; Shepard *v.* Pratt, 16 Kan. 209.

Kentucky. — Greer *v.* Powell, 1 Bush 489; Sanders *v.* Vance, 7 T. B. Mon. 209.

Louisiana. — Arrowsmith *v.* Gordon, 3 La. Ann. 110.

Maryland. — Hepburn *v.* Sewell, 5 Har. & J. 211; Stirling *v.* Garritee, 18 Md. 468; Heinekamp *v.* Beaty, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67.

Massachusetts. — Parsons *v.* Martin, 11 Gray 111; Johnson *v.* Sumner, 1 Metc. 172; Selkirk *v.* Cobb, 13 Gray 313.

Michigan. — Davidson *v.* Kolb, 95 Mich. 469, 55 N. W. 373; Tuttle *v.* White, 46 Mich. 485, 9 N. W. 528; Burk *v.* Webb, 32 Mich. 173; Greeley *v.* Stilson, 27 Mich. 153.

Minnesota. — Nesbitt *v.* St. Paul Lumb. Co., 21 Minn. 491.

Missouri. — Hendricks *v.* Evans, 46 Mo. App. 313; Green *v.* Stephens, 37 Mo. App. 641.

New York. — Sonneberg *v.* Levy, 12 Misc. 154, 32 N. Y. Supp. 1130; Scott *v.* Rogers, 31 N. Y. 676; Heald *v.* MacGowan, 5 N. Y. Supp. 450, 25 N. Y. St. 579.

North Carolina. — Waller *v.* Bowling, 108 N. C. 289, 12 S. E. 990.

Oklahoma. — Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883; Robinson *v.* Peru Plow & W. Co., 1 Okla. 140, 31 Pac. 988.

Pennsylvania. — Hill *v.* Canfield, 56 Pa. St. 454.

Texas. — Tucker *v.* Hamlin, 60 Tex. 171.

Vermont. — Boutwell *v.* Harriman, 58 Vt. 516, 2 Atl. 159.

Wisconsin. — Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755.

34. Hepburn *v.* Sewell, 5 Har. & J. (Md.) 211; Baker *v.* Wheeler, 8 Wend. (N. Y.) 505. See also Block *v.* Coombs, 63 Tex. 419.

35. Kingsbury *v.* Smith, 13 N. H. 109; Mott *v.* Pettit, 1 N. J. L. 298.

36. Zindorf *v.* Western Am. Co., 26 Wash. 695, 67 Pac. 355.

37. Garrard *v.* Dawson, 49 Ga. 434; Northern Transp. Co. *v.* Sellick, 52 Ill. 249; Hendricks *v.* Evans, 46 Mo. App. 313.

38. *United States.* — Watt *v.* Potter, 2 Mason 77.

Connecticut. — Hurd *v.* Hubbell, 26 Conn. 389; St. Peter's Church *v.* Beach, 26 Conn. 356.

Delaware. — Stewart *v.* Bright, 6 Houst. 344.

Illinois. — Sturges *v.* Keith, 57 Ill. 451; Brewster *v.* Van Liew, 119 Ill. 554, 8 N. E. 842.

Iowa. — Gravel *v.* Clough, 81 Iowa 272, 46 N. W. 1092.

Kentucky. — Lillard *v.* Whittaker, 3 Bibb 92.

Louisiana. — Vance *v.* Towne, 13 La. 225.

Maine. — McKenney *v.* Haines, 63 Me. 74.

Massachusetts. — Wyman *v.* American P. Co., 8 Cush. 168; Fisher *v.* Brown, 104 Mass. 259; Coolidge *v.* Choate, 11 Metc. 79; Pierce *v.* Benjamin, 14 Pick. 356.

(2.) Highest Market Value. — In other jurisdictions, however, the plaintiff in trover is permitted to prove, on the question of damages, the highest market value of the property between the time of the

Michigan. — Hubbell *v.* Blandy, 87 Mich. 209, 49 N. W. 502; Bates *v.* Stansell, 19 Mich. 91.

Nevada. — Bowker *v.* Goodwin, 7 Nev. 135; Boylan *v.* Huguet, 8 Nev. 345.

New Hampshire. — Frothingham *v.* Morse, 45 N. H. 545.

North Carolina. — Arrington *v.* Wilmington R. Co., 51 N. C. (6 Jones L.) 68.

Ohio. — Fosdick *v.* Greene, 27 Ohio St. 484.

Virginia. — Enders *v.* Board of Pub. Wks., 1 Gratt. 364.

Wisconsin. — Noonan *v.* Isley, 17 Wis. 314.

Compare Peterson *v.* Gresham, 25 Ark. 380; Third Nat. Bank *v.* Boyd, 44 Md. 47; Harris *v.* Franklin Bank, 77 Md. 423, 26 Atl. 523.

Statement of Rule. — In Pinkerton *v.* Manchester etc. R. Co., 42 N. H. 424, the court said: "There being, then, much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock. The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that, in some cases, the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that, in a large number of cases, and, perhaps, generally, it would not be so. In that large class of cases where the articles to be delivered entered into the common consumption of the country, in the shape of provisions, perishable or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dye stuffs, &c., to hold that the plaintiff might elect as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For, in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause, by review, new trial, or otherwise. Shall there be a different measure of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before the trial, which might often be several years, would be giving him not indemnity merely, but a power, in many instances, of unjust extortion, which no court could contemplate without pain."

In Pennsylvania the rule is that where the case does not involve an actually wrongful conversion or breach of trust, the value of the stock at the time of the technical conversion, with interest, fixes the damages. Pennsylvania Ins. Co. *v.* Philadelphia R. Co., 153 Pa. St. 160, 25 Atl. 1043; Work *v.* Bennett, 70 Pa. St. 484; Neiler *v.* Kelley, 69 Pa. St. 403, where the court said: "The rule, however, is not changed but only modified to this extent, that

conversion and the time of trial;[39] although even in these jurisdictions it is held that the jury are not concluded by such proof, but the question is left to their discretion.[40]

Statutes. — And in some of the states this rule permitting proof of the highest intermediate value is expressly recognized by statute.[41]

Doctrine Modified. — In some jurisdictions, however, the courts have modified this doctrine to the extent of holding that proof of such intermediate value is to be confined to the time between the time of the conversion and a reasonable time after notice of the conversion within which the plaintiff may replace his property.[42]

wherever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market between that time and the time of the trial. The grounds of this exception are that such securities are limited in quantity, are not always to be obtained at any price, and are of a very fluctuating value."

39. *Alabama.* — Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299; Ewing *v.* Blount, 20 Ala. 694; Renfro *v.* Hughes, 69 Ala. 581; Street *v.* Nelson, 67 Ala. 504; Linam *v.* Reeves, 68 Ala. 89; Burks *v.* Hubbard, 69 Ala. 379.

California. — Douglass *v.* Kraft, 9 Cal. 562; Hamer *v.* Hathaway, 33 Cal. 117.

Florida. — Moody *v.* Caulk, 14 Fla. 50.

Indiana. — Ellis *v.* Wire, 33 Ind. 127.

Oklahoma. — Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883.

Oregon. — Eldridge *v.* Hoefer, 45 Or. 239, 77 Pac. 874.

South Carolina. — Carter *v.* DuPre, 18 S. C. 179.

Wyoming. — Hilliard Flume & L. Co. *v.* Woods, 1 Wyo. 396.

In Texas the courts have not uniformly followed the rule stated in the text. See Calvit *v.* McFadden, 13 Tex. 324; Stephenson *v.* Price, 30 Tex. 715, where the court followed the rule. But see Randon *v.* Barton, 4 Tex. 289 (where the court doubted the propriety of the rule); Gresham *v.* Island City S. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556, where the court applied the rule adhering to value at the time of the conversion without reference to other cases holding otherwise.

40. As in Alabama. — See Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299; Lee *v.* Mathews, 10 Ala. 682; Jenkins *v.* McConico, 26 Ala. 213. See also Moody *v.* Caulk, 14 Fla. 50.

In Mississippi this seems to be the rule. Whitfield *v.* Whitfield, 40 Miss. 352.

41. California Civil Code § 3366. See Fromm *v.* Sierra Nevada S. Min. Co., 61 Cal. 629; Dent *v.* Holbrook, 54 Cal. 145; Himmelmann *v.* Hotaling, 40 Cal. 114.

In Georgia the plaintiff may elect to show the value of the property at the time of the conversion with interest, or the highest intermediate value. Jaques *v.* Stewart, 81 Ga. 81, 6 S. E. 815; Ware *v.* Simmons, 55 Ga. 94.

North Dakota Comp. Laws, § 4603, subd. 2, permits such proof where the action has been prosecuted with reasonable diligence. Pickert *v.* Rugg, 1 N. D. 230, 46 N. W. 446, *holding* a delay of eleven months to be fatal.

The South Dakota Statute (Comp. Laws, § 4603) is the same as that of North Dakota. Rosum *v.* Hodges, 1 S. D. 308, 47 N. W. 140.

42. Galigher *v.* Jones, 129 U. S. 193; Dimock *v.* U. S. Nat. Bank, 55 N. J. L. 296, 25 Atl. 926.

In New York the early cases adhered to the rule permitting proof of intermediate value to the time of trial. Cortelyou *v.* Lansing, 2 Caines Cas. (N. Y.) 200; Wilson *v.* Mathews, 24 Barb. (N. Y.) 295; Bennett *v.* Lockwood, 20 Wend. (N. Y.) 223; West *v.* Wentworth, 3 Cow. (N. Y.)

f. *Choses in Action.* — In an action of trover for the conversion of a chose in action, such as a promissory note, bill, etc., the face value thereof is *prima facie* the test of the quantum of damages to which the plaintiff is entitled.[43]

g. *Accession or Increase of Value by Act of Wrongdoer.* — The rule is that plaintiff in an action of trover is not entitled to show, as an item of damages to which he is entitled, any increase after the time of the conversion,[44] as for example, he cannot prove and recover for an increased value of the property due to the defendant's

82. But after much discussion the courts of that state have adopted the rule stated in the text as the most equitable doctrine. Barnes *v.* Brown, 130 N. Y. 372, 29 N. E. 760; Wright *v.* Bank of Metropolis, 110 N. Y. 237, 18 N. E. 79; Colt *v.* Owens, 90 N. Y. 368; Gruman *v.* Smith, 81 N. Y. 25; Baker *v.* Drake, 66 N. Y. 518.

43. *England.* — Delegal *v.* Naylor, 7 Bing. 460, 20 E. C. L. 199.

Alabama. — St. John *v.* O'Connel 7 Port. 466; McPeters *v.* Phillips, 46 Ala. 496; Walker *v.* Forbes, 25 Ala. 139.

Arkansas. — Ray *v.* Light, 34 Ark. 421.

Illinois. — Garvin *v.* Wiswell, 83 Ill. 215.

Iowa. — Latham *v.* Brown, 16 Iowa 118; Griffith *v.* Burden, 35 Iowa 138.

Minnesota. — Hersey *v.* Walsh, 38 Minn. 521, 38 N. W. 613; Nininger *v.* Banning, 7 Minn. 274.

Missouri. — State *v.* Berning, 74 Mo. 87.

New York. — Booth *v.* Powers, 56 N. Y. 22; Metropolitan El. R. Co. *v.* Kneeland, 120 N. Y. 134, 24 N. E. 381; Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308; Decker *v.* Mathews, 12 N. Y. 313; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

Ohio. — Woodborne *v.* Scarborough, 20 Ohio St. 57.

Wisconsin. — Kalckhoff *v.* Zoehrlaut, 43 Wis. 373.

Compare Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 137 N. Y. 542, 32 N. E. 1001; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67. In the latter case where plaintiff sold to a national bank bonds of a municipal corporation issued in aid of a railroad under an agreement that the bank would, upon demand, replace them to him at the price paid, or less, upon refusal of the bank to comply with this agreement it was held that the difference between the price for which plaintiff sold the bonds and their value at the time of the demand therefor fixed the damages. See also Allison *v.* King, 25 Iowa 56.

In an action for the conversion of a note, the presumption is that the maker is solvent and able to pay the note, in the absence of any showing of want of ability. Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273. Nor is the plaintiff, in such case, required to make affirmative proof of the value of the notes. If they are worthless, that is a matter to be shown in defense. Burrows *v.* Keays, 37 Mich. 430.

In a suit for the conversion of negotiable paper, its value is not to be absolutely determined by the amount of property liable to execution possessed by its maker. Rose *v.* Lewis, 10 Mich. 483.

In an action for the conversion of municipal bonds, the measure of damages is their market value, established by public or ordinary business sales, and not by sales under anomalous circumstances, or the sale of one overdue coupon. Meixell *v.* Kirkpatrick, 33 Kan. 282, 6 Pac. 241.

Mitigation of Damages by proof of insolvency of obligor, etc., see *infra*, "Mitigation of Damages."

44. Scott *v.* McAlpine, 6 U. C. C. P. 302, *holding* that the value of colts bred by the mares in controversy subsequent to the conversion could not enter into the question of damages. See also Lee *v.* Mathews, 10 Ala. 682.

labor.[45] Where defendant took the property at one place and transported it to another, he may be allowed the expense of transportation.[46]

h. *Property Having no Market Value.* — The measure of damages, as has been stated, is the amount of loss or injury suffered by the plaintiff, and as has been shown this is usually to be determined according to the value of the property. But this rule is not of universal application, as for example, where the property has no market value. In such case resort must necessarily be had to evidence other than value of the property to aid in the determination of the amount of damages to which plaintiff is entitled, such as the cost of replacing it and its value to the owner for a particular use.[47]

C. Mode of Proof. — Of course in proving the value of the property in question the same general rules apply as in other cases where that fact is material and necessary to be established. The mere fact that the action is one in trover is immaterial.[48]

2. Special Damages. — A. In General. — We have thus far been considering the question of damages from the standpoint of the actual value of the property. In many cases, however, the actual value of the property does not represent the full loss or injury which the plaintiff has suffered, in which event the plaintiff is permitted to show such special damage or loss as he has suffered.[49] Of course such special damage must be the proximate result of the injury.[50]

45. Aborn *v.* Mason, 14 Blatchf. (U. S.) 405; Woodenware Co. *v.* U. S., 106 U. S. 432; Saunders *v.* Clark, 106 Mass. 331; Tuttle *v.* White, 46 Mich. 485, 9 N. W. 528; Hyde *v.* Cookson, 21 Barb. (N. Y.) 92. *Compare* Starkey *v.* Kelly, 50 N. Y. 676. **In the Case of Ore Mined and Converted,** the measure of damages is the value of the ore less the cost of raising it from the mine after it was broken and hauling to the defendant's place of business. Omaha & G. S. & R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925.

46. Hill *v.* Canfield, 56 Pa. St. 454; Omaha & G. S. & R. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925.

47. Leoncini *v.* Post, 13 N. Y. Supp. 825, 37 N. Y. St. 255; Scattergood *v.* Wood, 14 Hun (N. Y.) 269; Heald *v.* MacGowan, 15 Daly 233, 5 N. Y. Supp. 450, *affirmed,* 117 N. Y. 643, 22 N. E. 1131.

Compare Burchine *v.* Butters, 7 Colo. App. 294, 43 Pac. 459. The court said, however, that the cost of replacing them might perhaps be one method of arriving at the value; but that it must be of the same kind of goods, have been in use for the same length of time and in the same condition as the goods in question, and not new goods.

In Burr *v.* Woodrow, 1 Bush (Ky.) 602, it was held that the court did not err in permitting the plaintiffs to prove that the timber cut by the defendants on the lands described was of value to the plaintiffs for use on the adjoining tract in their possession.

48. See article "Value," and Lowry *v.* Walker, 5 Vt. 181; Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863; Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. 157; Norton *v.* Willis, 73 Me. 580.

In an action against a sheriff for the conversion of goods, the value being in question, it is error to admit evidence as to what was said by prospective bidders at a sheriff's sale concerning the quality. Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483.

49. Mowry *v.* Wood, 12 Wis. 413. *Compare* Seymour *v.* Ives, 46 Conn. 109; Hurd *v.* Hubbell, 26 Conn. 389.

50. Juchter *v.* Boehm, 67 Ga. 534;

B. Expenditures. — Thus, it has been held proper to permit the plaintiff in trover to prove the value of his time and money properly expended by him in pursuit of the property.[51]

Attorney's Fees for prosecuting the action in trover are not allowable.[52]

3. Exemplary Damages. —In trover, exemplary damages should not be allowed unless the evidence shows an intentional violation of the plaintiff's rights, or that the act, although proper, was done with an excess of force or violence, or with malicious intent to injure the plaintiff in his person or property.[53] There is authority, however, to the effect that vindictive damages are never allowable in the action of trover.[54]

4. Mitigation of Damages. — Thus the rule giving the plaintiff in trover the benefit of the value of the property as the measure of his damages does not apply where it appears that subsequently to the conversion he has had the benefit of the property,[55] as for ex-

Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249.

51. Hopkins *v.* Dipert, 11 Okla. 630, 69 Pac. 883; McDonald *v.* North, 47 Barb. (N. Y.) 530. *Compare* Dean *v.* Nichols & S. Co., 95 Iowa 89, 63 N. W. 582; Hurd *v.* Hubbell, 26 Conn. 389.

In case the plaintiff has recovered possession of the property, the measure of damages is the actual injury the plaintiff has sustained at the hands of the defendant; and this will include any diminution in the value of the property caused by the defendant's detention or use, the value of the use of the property during the detention, and all reasonable and necessary expense incurred in recovering possession. But the latter does not include traveling expenses from plaintiff's home to the place where the property was found. Renfro *v.* Hughes, 69 Ala. 581.

Expenses incurred on account of a lien filed by a farm laborer for wages do not come within the meaning of a statute allowing "a fair compensation for the time and money properly expended in pursuit of the property." Aronson *v.* Oppegard, 16 N. D. 595, 114 N. W. 377.

52. Renfro *v.* Hughes, 69 Ala. 581.

The California Statute does not authorize the recovery of attorney's fees either as damages or as costs. Nicholls *v.* Mapes, 1 Cal. App. 349, 82 Pac. 265.

53. Kelly *v.* McDonald, 39 Ark. 387. See also Chamberlain *v.* Worrell, 38 La. Ann. 347; Jones *v.* Allen, 1 Head (Tenn.) 626; Waller *v.* Waller, 76 Iowa 513, 41 N. W. 307; Peckham Iron Co. *v.* Harper, 41 Ohio St. 100; Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506.

Under a statute authorizing the recovery by an administrator, of double damages for the conversion of property belonging to his decedent, he must show that the defendant acted in bad faith; evidence merely that he was mistaken in his rights and ill advised is not enough. Springer *v.* Jenkins, 47 Or. 502, 84 Pac. 479.

54. Baldwin *v.* Porter, 12 Conn. 473. See also McDowell *v.* Murdock, 1 Nott & McC. (S. C.) 237.

55. Where the conversion consists of a seizure and sale on execution and the plaintiff buys in the property at less than its actual value, his damages in an action of trover are the sum paid at the execution sale and not the value of the property. Baldwin *v.* Porter, 12 Conn. 473.

In trover by a mortgagor for the conversion of the mortgaged property the defendant may show that he is the assignee of the mortgage debt and hence entitled to recoup the amount of his debt. Cocke *v.* Cross, 57 Ark. 87, 20 S. W. 913. See also Jones *v.* Horn, 51 Ark. 19, 9 S. W. 309.

In an action by the grantee to recover the value of certain crops alleged to have been converted to the

ample, when the property has been taken from the defendant under legal process against the plaintiff,[56] even at the suit of the defendant himself.[57] In such case the seizure of the property in payment of the amount of the claim against the plaintiff is of course an appropriation of the property for plaintiff's benefit, and is to be considered in mitigation of damages. But the mere fact of seizure under legal process does not of itself mitigate the damages; it must be shown that the plaintiff in trover had the benefit thereof.[58]

Seizure Without Color of Authority. — Where it appears that the defendant seized the property without color of authority, his unauthorized and unsanctioned application of the property to an alleged debt of his against the plaintiff, cannot be shown in mitigation of damages.[59]

Return, or Offer of Return, of Property. — A mere offer to return

use of the grantor, the latter may show, at least in mitigation of damages, that the crops, for the value of which plaintiff sues, were the products of defendant's labor and toil, whereby they had been brought to a mature condition, and that his labor had been performed with the knowledge and consent of the plaintiff. Johnson *v.* Tantlinger, 31 Iowa 500.

56. *Illinois.* — Bates *v.* Courtwright, 36 Ill. 518; Tripp *v.* Grouner, 60 Ill. 474.

Maryland. — Wanamaker *v.* Bowes, 36 Md. 42.

Massachusetts. — Squire *v.* Hollenbeck, 9 Pick. 551.

Michigan. — Erie Preserving Co. *v.* Witherspoon, 49 Mich. 377, 13 N. W. 781.

New Hampshire. — Howard *v.* Cooper, 45 N. H. 340.

New York. — Higgins *v.* Whitney, 24 Wend. 379.

Texas. — Koyer *v.* White, 6 Tex. Civ. App. 381, 25 S. W. 46.

Vermont. — Yale *v.* Saunders, 16 Vt. 243.

57. Board *v.* Head, 3 Dana (Ky.) 489; Daggett *v.* Adams, 1 Me. 198; Prescott *v.* Wright, 6 Mass. 20; Hopple *v.* Higbee, 23 N. J. L. 342; Morrison *v.* Crawford, 7 Or. 472; Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748; Lamb *v.* Day, 8 Vt. 407, 30 Am. Dec. 479.

In Curtis *v.* Ward, 20 Conn. 204, it appeared that subsequently to the conversion complained of the defendant had attached the same property in an action against the plaintiff, and having obtained judgment levied execution on the property and had it applied in satisfaction of his debt against the plaintiff all in due course of law; and it was held that the plaintiff was entitled to damages only for the original taking of the goods and their detention until they were regularly attached. *Compare* Otis *v.* Jones, 21 Wend. (N. Y.) 394; Dalton *v.* Laudahn, 27 Mich. 529; Erie Preserving Co. *v.* Witherspoon, 49 Mich. 377, 13 N. W. 781.

58. Wehle *v.* Butler, 61 N. Y. 245; Roberts *v.* Stuyvesant Safe-Dep. Co., 123 N. Y. 57, 25 N. E. 294. *Contra* Kaley *v.* Shed, 10 Metc. (Mass.) 317.

Rule Stated. — In Ball *v.* Liney, 48 N. Y. 6, the court said: "After a conversion of property, the title still remains in the owner, and the property can be taken from the wrongdoer upon an execution against the owner and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property; and in such case the wrongdoer can set up his seizure and sale, not as an entire defense, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defense, but that it has been seized under such circumstances that the owner has had, or could have, the benefit of it."

59. Bringard *v.* Stellwagen, 41 Mich. 54, 1 N. W. 909; Northrup *v.* McGill, 27 Mich. 234.

the property to the plaintiff cannot be shown in mitigation of damages.[60]

Where Plaintiff, However, Accepts the Property, the cases are not in harmony as to what is the rule. Some of the authorities hold that where the property has been returned to and accepted by the plaintiff the measure of damages is the value of the use of the property during the time it was in the defendant's possession.[61]

5. Negativing Damage. — A. In General. — As in the case of evidence on behalf of the defendant to negative the fact of conversion, so it is competent for the defendant to give in evidence matter showing that notwithstanding the fact of conversion, the plaintiff has not suffered the full loss claimed by him.[62]

B. Insolvency of Obligee of Chose in Action. — In trover for the conversion of a chose in action, such as a promissory note, etc., the insolvency of the obligee or maker,[63] or any other fact impugning its value,[64] may be shown for the purpose of negativing the fact of damage.

60. Norman *v.* Rogers, 29 Ark. 365; Carpenter *v.* Dresser, 72 Me. 377; Stickney *v.* Allen, 10 Gray (Mass.) 352; Reynolds *v.* Shuler, 5 Cow. (N. Y.) 323; Morgan *v.* Kidder, 55 Vt. 367; Bromley *v.* Goodrich, 40 Wis. 131.

61. *United States.* — United States *v.* Pine River L. & I. Co., 78 Fed. 319, 24 C. C. A. 101.

Alabama. — Ewing *v.* Blount, 20 Ala. 694; Fields *v.* Williams, 91 Ala. 502, 8 So. 349, *Compare* Renfro *v.* Hughes, 69 Ala. 581.

Colorado. — Murphy *v.* Hobbs, 8 Colo. 17, 5 Pac. 637.

Connecticut. — Curtis *v.* Ward, 20 Conn. 204; Baldwin *v.* Porter, 12 Conn. 473.

Illinois. — Barrelett *v.* Bellgard, 71 Ill. 280.

Massachusetts. — Greenfield Bank *v.* Leavett, 17 Pick. 1; Hall *v.* Corcoran, 107 Mass. 251; Long *v.* Lamkin, 9 Cush. 361; Harrington *v.* Lincoln, 4 Gray 563.

Missouri. — Sparks *v.* Purdy, 11 Mo. 219.

New Hampshire. — Gove *v.* Watson, 61 N. H. 136.

New Jersey. — McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62; Bigelow Co. *v.* Heintze, 53 N. J. L. 69, 21 Atl. 109.

New York. — Flagler *v.* Hearst, 91 App. Div. 12, 86 N. Y. Supp. 308; Torry *v.* Black, 58 N. Y. 185; Brewster *v.* Silliman, 38 N. Y. 423.

Oregon. — Eldridge *v.* Hoefer, 45 Or. 239, 77 Pac. 874.

Wisconsin. — Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755.

Where the property has been returned, the measure of damages is the difference between the market value of the property at the time of the conversion and its market value when returned, with interest. Prinz *v.* Moses (Kan.), 66 Pac. 1009. See also Ford *v.* Roberts, 14 Colo. 291, 23 Pac. 322.

62. Collins *v.* Smith, 16 Vt. 9. See also Duffus *v.* Bangs, 61 Hun. 23, 15 N. Y. Supp. 444; Reynolds *v.* Cridge, 131 Pa. St. 189, 18 Atl. 1010.

Where the Conversion of a Part of an article does not leave the residue wholly valueless, though it may no longer be of value for the purpose for which it was intended, the measure of damages is the difference between the article entire and the value of the part remaining after such conversion. Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632.

63. Zeigler *v.* Wells Fargo & Co., 23 Cal. 179.

64. McPeters *v.* Phillips, 46 Ala. 496; First National Bank *v.* Dickson, 5 Dak. 286, 40 N. W. 351; Callanan *v.* Brown, 31 Iowa 333; Potter *v.* Merchants' Bank, 28 N. Y. 641; Booth *v.* Powers, 56 N. Y. 22; Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612; O'Donoghue *v.* Corby, 22 Mo. 393.

But in Trover by the Payee Against the Maker for the conversion of promissory notes, the insolvency of the defendant cannot be shown and considered.[65]

Compare Kellogg *v.* Tompson, 142 Mass. 76, 6 N. E. 860.

Evidence of a Neglect or Refusal of the maker of a note to pay it according to its terms is proper in an action for its conversion upon the question of value, as tending to show inability of the maker to pay. Booth *v.* Powers, 56 N. Y. 22.

65. Robbins *v.* Packard, 31 Vt. 570.

In Stephenson *v.* Thayer, 63 Me. 143 the court said: "A debtor cannot, after wrongfully depriving his creditors of the evidence of his indebtment, mitigate the damages to be recovered against him for this act by setting up his own worthlessness. The sum which the defendant himself realizes by the act of conversion must surely be the lowest measure of damages. If a man takes up his own paper in that manner, the amount which he would have been legally bound to pay to retire it regularly, is surely the amount which he has realized by its conversion."

TRUSTS AND TRUSTEES.

By Roscoe G. Clark.

CROSS-REFERENCES:

Accounts, Accounting and Accounts Stated;
Admissions;
Executors and Administrators;
Fraudulent Conveyances;
Gifts;
Husband and Wife;
Parent and Child;
Parol Evidence;
Wills.

I. CLASSIFICATIONS AND DEFINITIONS.

Trusts have sometimes been divided into four general classes, viz.: express, implied, resulting, and constructive.[1] Most text writers, and the courts generally, divide trusts into two main classes or subdivisions, viz.: express, and implied, and further subdivide implied trusts into resulting and constructive trusts.[2] From an examination of the note, it will be seen that according to the latter classification an implied trust is entirely different from that which is classified as such in the first.[3] The latter classification will be adopted for the purposes of this article.

An Express Trust, sometimes called a direct trust, is generally defined as one which is created by the direct and positive acts of the

1. Perry on Trusts, §§ 24, 27. See Beach on Trusts and Trustees, § 2; Gorrell *v.* Alspaugh, 120 N. C. 362, 27 S. E. 85.

2. Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329. "The subject of trusts under equity jurisprudence is a very complicated and difficult one. the fountain of inexhaustible litigation. The books on trusts in their definitions are, necessarily perhaps, variant and confused. I think that for simplicity's sake we should divide trusts into two classes, calling one direct or express trusts (that is, trusts springing from the agreement of the parties), and the other constructive or implied trusts, (that is, trusts created by equity law). Under the latter subdivision will fall all trusts, that are called implied trusts, constructive trusts, trusts arising from fraud or otherwise; in short, all trusts that do not spring from the agreement of the parties. Underh. Trusts, p. 10; Rice, Real Prop. p. 595 and 2 Pom. Eq. Jur. p. 1447, so classify trusts."

3. "If the term 'implied trust' is used generically to embrace resulting and constructive trusts as distinguished from express trusts, further comment is unnecessary. If, however, it is used, as it often is, to designate those trusts which are not strictly express, but which, not being clearly expressed, are inferred from construction of the language of a will or other instrument, then clearly this case presents none of the elements of an implied trust." Verzier *v.* Convard, 75 Conn. 1, 52 Atl. 255.

parties, by a deed, will or other writing.[4] But this definition is somewhat misleading, since, as will hereinafter appear, an express trust may be created by parol.[5]

The Term "Implied Trust" includes, as already indicated, all trusts which are not express. Such a trust arises by operation of law, either to carry into effect the manifest or apparent intention of the parties, or without regard to such intention, for the purpose of effectuating the rights of the parties to the transaction.[6]

A Resulting Trust is a trust which the courts presume to arise out of the transactions of the parties, as, if one man furnishes money for an estate, and the deed is taken in the name of another, courts presume in such a case that a trust is intended for the person who pays the money.[7]

A Constructive Trust, sometimes referred to as a trust *ex maleficio*, arises when one person, occupying a fiduciary position, or having placed himself in such position in relation to another that good faith requires him to act for the other and not for himself, acquires the title to property in himself, in place of in the *cestui que trust*. These cases involve fraud, or a breach of trust.[8]

A "Trustee," in the widest meaning of the term, is defined to be "a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another."[9]

4. *United States.* — McMonagle *v.* McGlinn, 85 Fed. 88.

Alabama. — McCarthy *v.* McCarthy, 74 Ala. 546.

Colorado. — Learned *v.* Tritch, 6 Colo. 432.

Illinois. — Russell *v.* Peyton, 4 Ill. App. 473.

Kansas. — Caldwell *v.* Matthewson, 57 Kan. 258, 45 Pac. 614; State *v.* Campbell, 59 Kan. 246, 52 Pac. 454.

Minnesota. — Wilson *v.* Welles, 79 Minn. 53, 81 N. W. 549.

New Jersey. — Lovett *v.* Taylor (N. J. Eq.), 34 Atl. 896.

New York. — Brown *v.* Cherry, 38 How. Pr. 352.

Texas. — Olcott *v.* Gabert, 86 Tex. 121, 23 S. W. 985.

West Virginia. — Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329.

5. See notes 28 and 30, *post.*

6. Gorrell *v.* Alspaugh, 120 N. C. 362, 27 S. E. 85; Cone *v.* Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647; Caldwell *v.* Matthewson, 57 Kan. 258, 45 Pac. 614; Wilson *v.* Welles, 79 Minn. 53, 81 N. W. 549; Burks *v.* Burks, 7 Baxt. (Tenn.) 353; *In re* Morgan, 34 Hun. (N. Y.) 217; Kaphan *v.* Toney (Tenn. Ch. App.), 58 S. W. 909.

Implied Trusts are such as are inferred by law from the nature of the transaction or the conduct of the parties. Ga. Civ. Code 1895, § 3152.

In North Carolina implied trusts are all generally denominated "parol trusts," referring to their origin and nature of proof, rather than to their incidents and results. Gorrell *v.* Alspaugh, 120 N. C. 362, 27 S. E. 85.

7. Malin *v.* Malin, 1 Wend. (N. Y.) 625, 649; Bates *v.* Kelly, 80 Ala. 142; Burks *v.* Burks, 7 Baxt. (Tenn.) 353; Keller *v.* Kunkel, 46 Md. 565; Tiedeman *v.* Imperial Fertilizer Co., 109 Ga. 661, 34 S. E. 999.

8. Butts *v.* Cooper (Ala.), 44 So. 616; Kaphan *v.* Toney (Tenn.), 58 S. W. 909; Olcott *v.* Gabert, 86 Tex. 121, 23 S. W. 985; Preston *v.* Beall, 14 Ky. L. Rep. 61, 19 S. W. 175; Burks *v.* Burks, 7 Baxt. (Tenn.) 353.

9. Taylor *v.* Davis, 110 U. S. 330; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 101; St. Louis Piano Mfg. Co. *v.* Merkel, 1 Mo. App. 305; Truesdale *v.* Philadelphia Ins. Co., 63 Minn. 49, 65 N. W. 133.

II. CREATION, EXISTENCE AND VALIDITY.

1. Express Trusts. — A. Burden of Proof and Presumptions. a. *In General.* — The burden of proof is upon the party seeking to establish the existence of a trust to prove its existence,[10] by a preponderance of the evidence[11] of a clear and satisfactory character.[12]

b. *As Affecting the Terms of a Written Instrument.* — Where a deed or other written instrument is absolute in form, the parties thereto must be presumed to have intended the legal effect of its terms.[13] A strong presumption arises against the existence of a trust.[14] The burden of proof is upon the party seeking to establish a trust with respect to such an instrument,[15] and a greater weight of evidence is necessary than a mere preponderance.[16]

c. *Presumption as to Acceptance.* — To perfect an express trust, it must be accepted by the *cestui que trust* when knowledge of its

10. Prevost *v.* Gratz, 1 Pet. C. C. 364, 19 Fed. Cas. No. 11,406 (judgment *reversed* on other points, 19 U. S. 481); Shepard *v.* Pratt, 32 Iowa 296; Leonard *v.* White Cloud F. Co., 11 Neb. 338, 7 N. W. 538; Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497; Shelly *v.* Heater, 17 Neb. 505, 23 N. W. 521; Jackson *v.* Poole, 73 Ga. 801.

Where an express parol trust is alleged and denied, the burden of proving its creation and the terms is upon the party who sets it up and claims rights under it. That burden is not carried where the proof offered to show the creation of the trust is that of the complainant alone, which is directly denied by the defendant, and the attending circumstances tend to disprove, rather than to support, the complainant's claim. Carrard *v.* Niles (N. J. Eq.), 45 Atl. 266.

11. Lide *v.* American Guild, 69 S. C. 275, 48 S. E. 222.

12. Shepard *v.* Pratt, 32 Iowa 296.

13. Wallis *v.* Wood (Tex.), 7 S. W. 852.

The parties to a conveyance absolute on its face, must be presumed to have intended the legal effect of its terms, unless it is clearly and satisfactorily shown by a preponderance of the evidence that at the time of the conveyance there was an oral agreement that the subject-matter of the conveyance should be held in trust. Sherman *v.* Sandell, 106 Cal. 373, 39 Pac. 797.

14. Prevost *v.* Gratz, 19 U. S. 481, *reversing s. c.* 1 Pet. C. C. 364, 19 Fed. Cas. No. 11,406, 3 W. C. C. 434; Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775.

An intent to create an express trust will not be presumed in the absence of an express declaration to that effect, where the whole purpose of the deed, without peril to the rights of any one, can be accomplished under a power conferred by the deed. Heermans *v.* Robertson, 64 N. Y. 332.

15. Shepard *v.* Pratt, 32 Iowa 296; Childs *v.* Cemetery Assn., 4 Mo. App. 74; Hinton *v.* Pritchard, 107 N. C. 128, 12 S. E. 242, 10 L. R. A. 401; Fleming *v.* Donahoe, 5 Ohio 255; Robinson *v.* Powell, 210 Pa. St. 232, 59 Atl. 1078; Wallis *v.* Wood (Tex.), 7 S. W. 852.

16. Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775; Robinson *v.* Powell, 210 Pa. St. 232, 59 Atl. 1078.

Where an action was brought for the possession of certain lands, the defendant answering and alleging that the plaintiff, pursuant to a previous understanding, purchased them for the defendant at a judicial sale, but took title, to be held in his own name until he could pay the purchase-money advanced, it was held that, since the trust was in derogation of what was expressed in the deed, the burden was on the party alleging its existence to make it appear by certain, strong and convincing proof. Hinton *v.* Pritchard, 107 N. C. 128, 12 S. E. 242, 10 L. R. A. 401. See also Childs *v.* Cemetery Assn., 4 Mo. App. 74. But see Sherman *v.* Sandell, 106 Cal. 373, 39

existence is received by the beneficiary. In the absence of evidence to the contrary, acceptance is presumed, where it is for the benefit of the *cestui,* but this presumption may be overcome.[17]

d. *Presumption as to Discharge and Extinguishment.* — It has been held in equity that after the lapse of forty years, and the death of all the original parties, a presumption arises as to the discharge and extinguishment of a trust, proved by strong circumstances once to have existed, by analogy to the rule of law, which, after a time, presumes the payment of a debt, surrender of a deed, etc., where circumstances require it.[18]

B. Admissibility of Evidence. — a. *In General.* — As will appear hereinafter, written evidence is always admissible to prove an express trust. Parol evidence is admissible for this purpose at common law in all cases and is yet in a few jurisdictions where the common law has not been changed by statute.[19] Parol evidence is also always admissible in certain cases.[20]

A trust may be proved by circumstantial evidence.[21] It is the only way, perhaps, that a secret trust can be proved.[22]

b. *Parol Evidence.* — **(1.) In General.** — At common law it was not necessary that a use or trust should be declared in any particular form, and therefore parol evidence was admissible.[23] The seventh section of the English statute of frauds enacted that all declarations or creations of trusts or confidences in lands, tenements, or hereditaments " should be manifested and proved by some writing signed by the party who was by law to declare such trust, or by his last will in writing."[24] Most of the American states have enacted statutes modeled after the seventh section of the English statute, and in such states it is indispensable that a trust in land, founded on the agreement of the parties, should be manifested and proved

Pac. 797, *holding* that a preponderance of evidence is sufficient.

17. Libby *v.* Frost, 98 Me. 288, 56 Atl. 906. See also Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478; Shepard *v.* McEvers, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 561; Witzel *v.* Chapin, 3 Bradf. Sur. (N. Y.) 386.

18. Prevost *v.* Gratz, 19 U. S. 481, *reversing judgment, s. c.,* 1 Pet. C. C. 364; 19 Fed. Cas. No. 11,406.

19. See notes 23 and 28, *post.*

20. See note 30, *post.*

21. Lamb *v.* Girtman, 26 Ga. 625; Haxton *v.* McClaren, 132 Ind. 235, 31 N. E. 48; Chase *v.* Perley, 148 Mass. 289, 19 N. E. 398; Ferguson *v.* Haas, 64 N. C. 772; Gadsden *v.* Whaley, 14 S. C. 210.

22. Lamb *v.* Girtman, 26 Ga. 625.

23. *Alabama.* — Patton *v.* Beecher, 62 Ala. 579.

Maryland. — Gordon *v.* McCulloh, 66 Md. 245, 7 Atl. 457.

Mississippi. — Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658.

New York. — Swinburne *v.* Swinburne, 28 N. Y. 568.

North Carolina. — Shelton *v.* Shelton, 58 N. C. 292; Pittman *v.* Pittman, 107 N. C. 159, 12 S. E. 61; Foy *v.* Foy, 3 N. C. 131.

Ohio. — Fleming *v.* Donahoe, 5 Ohio 255; Harvey *v.* Gardner, 41 Ohio St. 642.

Texas. — James *v.* Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

West Virginia. — Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329.

24. 1 Perry, Trusts (5th Ed.) § 78; Shelton *v.* Shelton, 58 N. C. 292.

by some writing, signed by the party creating it. The trust need not be created,[25] but must be proved[26] by writing.

25. *Indiana.* — Shaw *v.* Jones, 156 Ind. 60, 59 N. E. 166; Brown *v.* White, 32 Ind. App. 100, 67 N. E. 273.

Maryland. — Hertle *v.* McDonald, 2 Md. Ch. 128; Gordon *v.* McCulloh, 66 Md. 245, 7 Atl. 457.

Missouri. — Mulock *v.* Mulock, 156 Mo. 431, 57 S. W. 122; Lane *v.* Ewing, 31 Mo. 75, 77 Am. Dec. 632.

New Jersey. — McVay *v.* McVay, 43 N. J. Eq. 47, 10 Atl. 178; Newkirk *v.* Place, 47 N. J. Eq. 477, 21 Atl. 124; Jamison *v.* Miller, 27 N. J. Eq. 586; Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584; Aller *v.* Crouter, 64 N. J. Eq. 381, 54 Atl. 426; Smith *v.* Howell, 11 N. J. Eq. 349.

New Mexico. — Eagle Min. & I. Co. *v.* Hamilton, 91 Pac. 718.

New York. — Steere *v.* Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256.

Vermont. — Pinney *v.* Fellows, 15 Vt. 525.

The provision of the code of California which requires an express trust in lands to be in writing has no application after the trust has been executed. Polk *v.* Boggs, 122 Cal. 114, 54 Pac. 536.

Where parties have voluntarily executed a trust, the authorities are that it may be proved by parol for the purpose of showing that the apparent owner had no interest which was subject to a lien of a judgment against him. Hays *v.* Reger, 102 Ind. 524, 1 N. E. 386. See also Gottstein *v.* Wist, 22 Wash. 581, 61 Pac. 715; Sieman *v.* Austin, 33 Barb. (N. Y.) 9, a judgment creditor sought to subject the interest of an apparent owner of land to the lien of his judgment after such owner had conveyed it to the real owner in execution of a trust with which he had been invested by parol. The trust seems to have been an express trust, and the direct question was made, whether parol evidence was, under the circumstances, admissible to show the nature of the transaction. It was there said: "The law refuses its aid to enforce agreements creating trusts or charges upon lands, when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to lands purchased for the benefit of another, although without having declared the fact in writing, recognizes and fulfills the trust, it is not the duty of the court to deny its existence. . . . A debtor will not be permitted to convey away his property, either real or personal, and relieve it from the encumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property if it has been placed in his hands. Nor is there any reason why the property of others should be subjected to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose." See also, Borst *v.* Nalle, 28 Gratt. (Va.) 423.

If the honesty of a declaration of trust, which is not put in writing at the time of the creation of the trust but subsequently, is assailed, parol evidence is admissible to show that it was created contemporaneously with the making of the title under which it is declared. McVay *v.* McVay, 43 N. J. Eq. 47, 10 Atl. 178.

Trust May Be Defeated or Rebutted by Parol. — The statute of frauds does not prevent a declaration of trust from being made by parol and it follows that such trust may also be defeated or rebutted by parol. Wiser *v.* Allen, 92 Pa. St. 317.

Part Performance. — Parol proof of an express trust in the purchase of land, is not excluded by the statute of frauds where there has been part performance, not only by the payment of the purchase money but also by an entry and occupation under the contract, and expensive improvements upon the land. Church *v.* Sterling, 16 Conn. 388.

26. *Alabama.* — Jacoby *v.* Funkhouser, 147 Ala. 254, 40 So. 291.

Connecticut. — Verzier *v.* Conyard, 75 Conn. 1, 52 Atl. 255; Todd *v.* Munson, 53 Conn. 579, 4 Atl. 99.

Georgia. — Miller *v.* Cotten, 5 Ga. 341.

Illinois. — Euans *v.* Curtis, 190 Ill.

Oral Evidence Introduced Without Objection. — Though a statute provides that a declaration of an express trust shall be in writing,

197, 60 N. E. 56; Dick *v.* Dick, 172 Ill. 578, 50 N. E. 142.

Indiana. — Columbus, etc. R. Co. *v.* Braden, 110 Ind. 558, 11 N. E. 357; Stonehill *v.* Swartz, 129 Ind. 310, 28 N. E. 620; Mescall *v.* Tully, 91 Ind. 96; Miller *v.* Blackburn, 14 Ind. 62; Montgomery *v.* Craig, 128 Ind. 48, 27 N. E. 427.

Iowa. — Dunn *v.* Zwilling, 94 Iowa 233, 62 N. W. 746; Hain *v.* Robinson, 72 Iowa 735, 32 N. W. 417; Heddleston *v.* Stoner, 128 Iowa 525, 105 N. W. 56; Hoon *v.* Hoon, 126 Iowa 391, 102 N. W. 105; Ostenson *v.* Severson, 126 Iowa 197, 101 N. W. 789; Byers *v.* McEniry, 117 Iowa 499, 91 N. W. 797; McClenahan *v.* Stevenson, 118 Iowa 106, 91 N. W. 925; Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 461; Maroney *v.* Maroney, 97 Iowa 711, 66 N. W. 911; Bergman *v.* Guthrie, 89 Iowa 290, 56 N. W. 502; Richardson *v.* Haney, 76 Iowa 101, 40 N. W. 115; Ratliff *v.* Ellis, 2 Iowa 59, 63 Am. Dec. 471; Willis *v.* Robertson, 121 Iowa 380, 96 N. W. 900; Andrew *v.* Concannon, 76 Iowa 251, 41 N. W. 8.

Maine. — Gerry *v.* Stimson, 60 Me. 186; Philbrook *v.* Delano, 29 Me. 410.

Maryland. — Hertle *v.* McDonald, 2 Md. Ch. 128; Gordon *v.* McCulloh, 66 Md. 245, 7 Atl. 457; Keller *v.* Kunkel, 46 Md. 565.

Massachusetts. — Black *v.* Black, 4 Pick. 234; Tripp *v.* Hathaway, 15 Pick. 47.

Missouri. — Dexter *v.* Macdonald, 196 Mo. 373, 95 S. W. 359; Heil *v.* Heil, 184 Mo. 665, 84 S. W. 45; Mulock *v.* Mulock, 156 Mo. 431, 57 S. W. 122; Price *v.* Kane, 112 Mo. 412, 20 S. W. 609; Crawley *v.* Crafton, 193 Mo. 421, 91 S. W. 1027; Lane *v.* Ewing, 31 Mo. 75, 77 Am. Dec. 632.

Nevada. — White *v.* Sheldon, 4 Nev. 280.

New Hampshire. — Hall *v.* Congdon, 55 N. H. 104; Moore *v.* Moore, 38 N. H. 382; Taylor *v.* Sayles, 57 N. H. 465.

New Jersey. — Newkirk *v.* Place, 47 N. J. Eq. 477, 21 Atl. 124; McVay *v.* McVay, 43 N. J. Eq. 47, 10 Atl. 178; Slocum *v.* Wooley, 43 N. J. Eq. 451, 11 Atl. 264; Osborn *v.* Osborn, 29 N. J. Eq. 385; Marshman *v.* Conklin, 21 N. J. Eq. 546; Baldwin *v.* Campfield, 8 N. J. Eq. 891; Hutchinson *v.* Tindall, 3 N. J. Eq. 357; Hoagland *v.* Hoagland, 2 N. J. Eq. 501; Aller *v.* Crouter, 64 N. J. Eq. 381, 54 Atl. 426; Smith *v.* Howell, 11 N. J. Eq. 349.

New Mexico. — Eagle Min. & I. Co. *v.* Hamilton, 91 Pac. 718.

New York. — Duke of Cumberland *v.* Graves, 9 Barb. 595; Heacock *v.* Coatesworth, Clark Ch. 84.

Pennsylvania. — Leshey *v.* Gardner, 3 Watts & S. 314, 38 Am. Dec. 764; Barnet *v.* Dougherty, 32 Pa. St. 371; Longdon *v.* Clouse, 1 Atl. 600 (prior to the passage of the act of April 22, 1856, parol evidence was available to establish a trust in lands). See Wetherell *v.* Hamilton, 15 Pa. St. 195; Tritt *v.* Crotzer, 13 Pa. St. 451.

Rhode Island. — Taft *v.* Dimond, 16 R. I. 584, 18 Atl. 183; Rogers *v.* Rogers, 20 R. I. 400, 30 Atl. 755.

South Carolina. — Bell *v.* Edwards, 78 S. C. 490, 59 S. E. 535; Pruitt *v.* Pruitt, 57 S. C. 155, 35 S. E. 485.

Utah. — Skeen *v.* Marriott, 22 Utah 73, 61 Pac. 296.

Vermont. — Pinney *v.* Fellows, 15 Vt. 525.

Wisconsin. — Orton *v.* Knab, 3 Wis. 576; Whiting *v.* Gould, 2 Wis. 552; Pratt *v.* Ayer, 3 Pin. 236.

An express trust in real estate cannot be proved by parol. Property held in trust, like other property, may be the subject of contracts, of mistakes, and of fraud. In suits to enforce contracts, correct mistakes, and punish or prevent fraud, it is often necessary to show incidentally an express trust by parol. In considering this subject the distinction between such cases and cases brought simply to establish or enforce a trust, must be borne in mind; and this distinction will reconcile the cases. Todd *v.* Munson, 53 Conn. 579, 4 Atl. 99.

Though a trust need not be created by writing, yet, to take the case out

such a trust may be proved by oral evidence introduced without objection.[27]

English Statute Not Adopted in Certain Jurisdictions. — In some states, notably, North Carolina, Ohio, Tennessee, Texas and West Virginia, the seventh section of the English statute concerning the proof of an express trust, has not been adopted or reënacted in any form. The common law rule governs, and express trusts in real estate may be proved by parol.[28]

of the statute of frauds, its terms and conditions must be clearly manifested and proved in writing, under the hand of the party to be charged, before the court will carry it into execution. Steere *v.* Steere, 5 Johns. Ch. (N. Y.) 1.

Where a party pays his own money for land, and takes the title thereto in his own name under an agreement that he will hold it for the use and benefit of another, and later convey it to him, such an agreement creates an express trust which must be executed in the same manner as deeds, and hence cannot be proved by parol. Krebs *v.* Lauser, 133 Iowa 241, 110 N. W. 443; McClain *v.* McClain, 57 Iowa 167, 10 N. W. 333.

Declarations. — A trust in lands cannot be shown by the declarations of the grantee that he holds the lands in trust. Moore *v.* Moore, 38 N. H. 382; Brooks *v.* Dent, 1 Md. Ch. 523. See also Sample *v.* Coulson, 9 Watts & S. (Pa.) 62.

27. Forest *v.* Rogers, 128 Mo. App. 6, 106 S. W. 1105.

28. *United States.* — Osterman *v.* Baldwin, 73 U. S. 116.

North Carolina. — Leggett *v.* Leggett, 88 N. C. 108; Hinton *v.* Pritchard, 107 N. C. 128, 12 S. E. 242, 10 L. R. A. 401; Shelton *v.* Shelton, 58 N. C. 292.

Ohio. — Harvey *v.* Gardner, 41 Ohio St. 642.

Tennessee. — Mee *v.* Mee, 113 Tenn. 453, 82 S. W. 830, 106 Am. St. Rep. 865; Thompson *v.* Thompson (Tenn. Ch. App.), 54 S. W. 145; McLellan *v.* McLean, 2 Head 684.

Texas. — Allen *v.* Allen (Tex. Civ. App.), 105 S. W. 53; Lucia *v.* Adams (Tex. Civ. App.), 82 S. W. 335; Gardner *v.* Randell, 70 Tex. 453, 7 S. W. 781; Branch *v.* DeBlanc (Tex. Civ. App.), 62 S. W. 134; Miller *v.* Thatcher, 9 Tex. 482, 60 Am. Dec. 172; Leakey *v.* Gunter, 25 Tex. 400; Hawkins *v.* Willard (Tex. Civ. App.), 38 S. W. 365; Brotherton *v.* Weathersby, 73 Tex. 471, 11 S. W. 505; Sullivan *v.* Fant (Tex. Civ. App.), 110 S. W. 507; Clark *v.* Haney, 62 Tex. 511, 50 Am. Rep. 536; Moreland *v.* Barnhart, 44 Tex. 275; Henderson *v.* Rushing (Tex. Civ. App.), 105 S. W. 840.

West Virginia. — Hamilton *v.* McKinney, 52 W. Va. 317, 43 S. E. 82; Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329; Murry *v.* Sell, 23 W. Va. 475; Seiler *v.* Mohn, 37 W. Va. 507, 16 S. E. 496. But see Crawford *v.* Workman (W. Va.), 61 S. E. 322, holding that where land is conveyed to one for valuable consideration paid by him, coupled with a trust to hold for the use of a third person, who pays nothing, such trust must be declared or proven by a writing signed by the grantee. An oral trust will not do. See also Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704; Troll *v.* Carter, 15 W. Va. 567; Pusey *v.* Gardner, 21 W. Va. 469.

Where it is proved satisfactorily that the purchaser at a judicial sale of land agreed with another previously in contemplation of, or at the time of bidding it off that he would buy and hold it when bought subject to the right of the latter to repay the purchase money and demand a reconveyance, it has been repeatedly held by this court that the beneficial interest to which the agreement relates passes with the transmutation of the legal estate, because there is no such requirement in our statute as that contained in 29 Car. II, that declarations of trust shall be manifested and proved by some writing. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241.

In Connecticut and Kentucky, where the seventh section of the English statute has not been reënacted, it has been held that a parol declaration of a trust in land cannot be set up.[29]

(2.) Trusts in Personalty. — Since trusts of personal property are not within the statute of frauds, it may be laid down as a general rule that a valid trust of that nature may be created verbally and proved by parol evidence showing with sufficient clearness the intention of the party to create a trust.[30]

(3.) As Varying the Terms of a Written Instrument. — When an express trust is set up, the written evidence thereof, signed by the party holding the legal title, should contain within itself all that is necessary to enable the court to declare the trust, and make a decree

A Grantee's Declarations Against Interest are admissible in evidence in an action seeking to impress the land with a trust. Mixon *v.* Miles (Tex. Civ. App.), 46 S. W. 105.

29. *Connecticut.* — Verzier *v.* Convard, 75 Conn. 1, 52 Atl. 255; Brown *v.* Brown, 66 Conn. 493, 34 Atl. 490; Todd *v.* Munson, 53 Conn. 579, 4 Atl. 99; Vail's Appeal, 37 Conn. 185; Dean *v.* Dean, 6 Conn. 285.

Kentucky. — Chiles *v.* Woodson, 2 Bibb 71; Parker *v.* Bodley, 4 Bibb 102; Sherley *v.* Sherley, 97 Ky. 512, 31 S. W. 275.

30. *California.* — Noble *v.* Learned, 94 Pac. 1047 (a valid trust in personal property may be created by parol, under Civ. Code § 1052, which provides that a transfer may be made without writing, when not expressly required by statute); Roach *v.* Caraffa, 85 Cal. 436, 25 Pac. 22; Silvey *v.* Hodgdon, 52 Cal. 363; Austin *v.* Wilcoxson, 149 Cal. 24, 84 Pac. 417.

Georgia. — Gordon *v.* Green, 10 Ga. 534; Kirkpatrick *v.* Davidson, 2 Ga. 297.

Illinois. — Maher *v.* Aldrich, 205 Ill. 242, 68 N. E. 810.

Indiana. — Woods *v.* Matlock, 19 Ind. App. 364, 48 N. E. 384; Mohn *v.* Mohn, 112 Ind. 285, 13 N. E. 859; Thornburg *v.* Buck, 13 Ind. App. 446, 41 N. E. 85; Talbot *v.* Barber, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491.

Iowa. — Merritt *v.* Torrence, 129 Iowa 310, 105 N. W. 585, *affirming* 102 N. W. 154; *In re* Fisher's Estate, 128 Iowa 18, 102 N. W. 797.

Kentucky. — Bohannon *v.* Bohannon's Admx., 29 Ky. L. Rep. 143, 92 S. W. 597; Berry *v.* Norris, 1 Duv. 302.

Massachusetts. — Mee *v.* Fay, 190 Mass. 40, 76 N. E. 229; Chase *v.* Perley, 148 Mass. 289, 19 N. E. 398; Chace *v.* Chapin, 130 Mass. 128.

Michigan. — Rapley *v.* McKinney, 143 Mich. 508, 107 N. W. 101.

Missouri. — Zeideman *v.* Molasky, 118 Mo. App. 106, 94 S. W. 754; Huetteman *v.* Viesselmann, 48 Mo. App. 582; Crowley *v.* Crowley, 111 S. W. 1100; Pitts *v.* Weakley, 155 Mo. 109, 55 S. W. 1055.

New Jersey. — Pitney *v.* Bolton, 45 N. J. Eq. 639, 18 Atl. 211.

New York. — Barry *v.* Lambert, 98 N. Y. 300, 50 Am. Rep. 677.

North Dakota. — Berry *v.* Evendon, 14 N. D. 1, 103 N. W. 748.

Oregon. — Martin *v.* Martin, 43 Or. 119, 72 Pac. 639.

South Carolina. — Pearlstine *v.* Phoenix Ins. Co., 74 S. C. 246, 54 S. E. 372; Lord *v.* Lowry, Bailey Eq. 510.

Texas. — Thompson *v.* Caruthers, 92 Tex. 530, 50 S. W. 331.

Utah. — Skeen *v.* Marriott, 22 Utah 73, 61 Pac. 296.

Vermont. — Porter *v.* Bank of Rutland, 19 Vt. 410.

Admissions of an Alleged Donor that there has been an executed gift or a completed trust may be proved against him or his representatives, and may be found to include admissions that there has been an actual delivery of the article or an effectual communication of the trust to the intended beneficiary and an acceptance of it by the latter. Supple *v.* Savings Bank (Mass.), 84 N. E. 432;

in favor of the beneficiaries. Oral evidence cannot be introduced to supply any missing links in the chain of the evidence,[31] or to vary the terms of the instrument in any manner.[32]

Parol Testimony Is Incompetent To Vary a Trust in Chattels, which is manifested in writing;[33] where, however, the trust is discretionary, parol evidence may be admitted to show how that discretion was exercised.[34]

(4.) To Determine Intention With Relation to an Absolute Conveyance. It is generally held that in the absence of fraud, mistake or accident, that the grantor in an absolute conveyance, reciting a valuable consideration, cannot show by parol evidence that the grantee was to hold the lands conveyed in trust for his benefit.[35] But parol evi-

McMahon *v.* Lawler, 190 Mass. 343, 77 N. E. 489.

31. Martin *v.* Baird, 175 Pa. St. 540, 34 Atl. 809; *In re* Dyer, 107 Pa. St. 446; Braun *v.* First Ger. Church, 198 Pa. St. 152, 47 Atl. 963; Cook *v.* Barr, 44 N. Y. 156. *Compare* Steere *v.* Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256, *holding* that where written documents manifesting a trust are loose and ambiguous, parol evidence is admissible to explain the obscurity of the case and to show what was the understanding of the parties concerned.

32. Gale *v.* Sulloway, 62 N. H. 57. The terms of the declaration of trust cannot be varied or affected by statements made by the creator of the trust after it has been executed and carried into effect, in the absence and without the knowledge or assent of the other parties interested. Richardson *v.* Adams, 171 Mass. 447, 50 N. E. 941, *citing* Dodge *v.* Nichols, 5 Allen (Mass.) 548.

33. Simms *v.* Smith, 11 Ga. 195. **Declarations** of a party who created a voluntary trust are not admissible to annul the same, unless a power of revocation was reserved for that purpose. Connecticut River Sav. Bank *v.* Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

34. Simms *v.* Smith, 11 Ga. 195.

35. *Alabama.* — Smith *v.* Smith, 45 So. 168.

Arkansas. — McDonald *v.* Hooker, 57 Ark. 632, 22 S. W. 655, 23 S. W. 678.

California. — Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, 4 L. R. A. 826.

Connecticut. — Potter *v.* Yale College, 8 Conn. 52.

Illinois. — Phillips *v.* South Park Comrs., 119 Ill. 626, 10 N. E. 230.

Indiana. — Shaw *v.* Jones, 156 Ind. 60, 59 N. E. 166; Montgomery *v.* Craig, 128 Ind. 48, 27 N. E. 427; Gowdy *v.* Gordon, 122 Ind. 533, 24 N. E. 226.

Iowa. — *In re* Hall's Estate, 132 Iowa 664, 110 N. W. 148; Willis *v.* Robertson, 121 Iowa 380, 96 N. W. 900; Ratliff *v.* Ellis, 2 Iowa 59, 63 Am. Dec. 471.

Kansas. — Morrall *v.* Waterson, 7 Kan. 199.

Minnesota. — Pillsbury-W. Flour Mills Co. *v.* Kistler, 53 Minn. 123, 54 N. W. 1063.

Nebraska. — Veeder *v.* McKinley-L. L. & T. Co., 61 Neb. 892, 86 N. W. 982; Thomas *v.* Churchill, 48 Neb. 266, 67 N. W. 182.

New Jersey. — Whyte *v.* Arthur, 17 N. J. Eq. 521.

New York. — Sturtevant *v.* Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Movan *v.* Hays, 1 Johns. Ch. 339.

Wisconsin. — Fillingham *v.* Nichols, 108 Wis. 49, 84 N. W. 15; Rasdall *v.* Rasdall, 9 Wis. 379.

The promise of a grantee in a deed, absolute upon its face, to hold the property for the benefit of the grantor's heirs, cannot be shown by parol; nor will his subsequent refusal to fulfil the promise constitute a fraud converting the deed into a trust, where the execution of the same and delivery was not induced by the wrongful act or promise of the grantee. Willis *v.* Robertson, 121 Ia. 380, 96 N. W. 900.

dence is competent to show that the transfer of personal property by a conveyance absolute in form was in trust for the assignor.[36]

Where it Appears That Personal Property Has Been Transferred by a Donor, in order to establish a trust therein it must appear from the evidence that the donor declared the trust at the time of the delivery of the property, and designated the terms thereof and the beneficiaries.[37]

Declarations of Grantor and Grantee. — Declarations made by a grantor in a deed conveying absolute estate in land, made after such conveyance, that another person is owner of the land, or that the grantee holds in trust for him, or for some other person, are not admissible to impair the rights of the grantee conferred by such conveyance.[38] But declarations of the grantee to the effect that he holds the property in question in trust for the grantor or some other person are admissible.[39]

In Other Jurisdictions where an express trust in relation to land is not within the statute of frauds, and can therefore be established by parol evidence, declarations by a grantor before or at the time of the execution of the trust or of a grantee at any time are always admissible to engraft a trust upon a deed absolute in terms.[40]

In Tennessee if a deed, upon its face and by its terms is absolute and conveys to the grantee a fee simple estate, without more, a trust character may be shown by parol, because this would not in any way

36. Martin *v.* Martin, 43 Or. 119, 72 Pac. 639.

37. Pitts *v.* Weakley, 155 Mo. 109, 55 S. W. 1055.

38. Crawford *v.* Workman (W. Va.), 61 S. E. 322; Sherman *v.* Sandell, 106 Cal. 373, 39 Pac. 797; Crow *v.* Watkins, 48 Ark. 169, 2 S. W. 659; Phillips *v.* South Park Comrs., 119 Ill. 626, 10 N. E. 230.

Parol evidence of a grantor's declarations and intentions, is inadmissible to raise a trust inconsistent, or at variance with, the express intention of a deed, where the facts and circumstances would not of themselves, by implication or construction of law, be sufficient to do so. Jones *v.* Slubey, 5 Har. & J. (Md.) 372.

39. Raybold *v.* Raybold, 20 Pa. St. 308; *In re* Washington's Estate, 220 Pa. St. 204, 69 Atl. 747. See also Elizalde *v.* Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

40. *North Carolina.* — Shields *v.* Whitaker, 82 N. C. 516. But see Dickenson *v.* Dickenson, 6 N. C. 279.

Ohio. — Russell *v.* Bruer, 64 Ohio St. 1, 59 N. E. 740.

Tennessee. — Mee *v.* Mee, 113 Tenn. 453, 82 S. W. 830, 106 Am. St. Rep. 865; Thompson *v.* Thompson (Tenn. Ch. App.), 54 S. W. 145. See McClellan *v.* McClean, 2 Head 684.

Texas. — Holland *v.* Farthing, 2 Tex. Civ. App. 155, 21 S. W. 67; Smith *v.* Eckford, 18 S. W. 210; Millican *v.* Millican, 24 Tex. 426; Clark *v.* Haney, 62 Tex. 511, 50 Am. Rep. 536; Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595; Whitfield *v.* Diffie (Tex. Civ. App.), 105 S. W. 324; McClenny *v.* Floyd, 10 Tex. 159; Cuney *v.* Dupree, 21 Tex. 211; Mead *v.* Randolph, 8 Tex. 191; Diffie *v.* Thompson (Tex. Civ. App.), 90 S. W. 193.

Compare Lott *v.* Kaiser, 61 Tex. 665.

In Reeves *v.* Bass, 39 Tex. 619, it was held that though a deed be upon its face an absolute conveyance of the fee, parol evidence is admissible to prove that it was intended at the time of its execution as a conveyance in trust that the grantor should enjoy the exclusive use and control of the property during his life, and that on his death it should operate as a testamentary devise to the grantee.

contradict the terms of the deed; but if the deed contains provisions which expressly, or by clear imputation, give the grantee a power or discretion to defeat a trust, or are inconsistent with it, then the trust does not exist in such shape as to be mandatory upon the grantee.[41]

Declarations of Grantor and Grantee. — In the states adhering to the rule that parol evidence is admissible to establish an express trust, to determine the question as to whose benefit a verbal trust arising on a deed absolute on its face should inure all the declarations of the grantor made before the deed was executed and the subsequent declarations of the vendee or trustee may be considered.[42]

Grantor's Declarations Must Be Contemporaneous With Execution. Where a grantor by a mere declaration engrafts upon his deed a trust, the declaration must be neither prior nor subsequent to, but contemporaneous with its execution.[43]

C. Weight and Sufficiency of Evidence. — a. *Trusts in Lands.* — **(1.) Written Evidence.** — An express trust in real estate can be established only by clear, certain and conclusive evidence, not only of the existence of the trust at the time of the conveyance, but also of its terms and conditions.[44] Although it is settled in most

41. In Mee *v.* Mee, 113 Tenn. 453, 82 S. W. 830, 106 Am. St. Rep. 865, it was sought to set up a trust and beneficial ownership in a tract of land held by the defendant Frances T. Mee under a deed from her husband, Columbus A. Mee, which upon its face had no declaration or expression of trust. It was sought to impress this trust and set up the beneficial interest by parol proof. The habendum part of the deed, which is the only part necessary to be specially noted was in these words: "'To have and to hold said lands herein conveyed unto the said Frances T. Mee herself and her lawful assigns forever in fee simple, and said Frances T. Mee is hereby authorized and empowered to sell, to dispose of and convey any or all of said property by sale or by will, or otherwise, as she may see fit to do, and for such purposes as she may deem best.' The contention is that Columbus A. Mee, when he made this deed, intended that the property should be held in trust by his wife, the grantee, for the benefit of his nephews Columbus A. Mee and Paul Mee, and that there was an agreement on her part that upon his death she would convey the same to them. It is properly conceded that a trust may be impressed upon property held under a deed absolute upon its face by parol proof of an agreement made at the time the deed is executed that the property should be held and impressed with such trust. . . . But it is said that it is not competent or allowable to set up such a trust in opposition to the provisions of the deed. . . . The real question in the case, which presents itself, is whether this deed, upon its face, contains any provisions or stipulations inconsistent with the trust attempted to be set up, and whether the imposition of such a trust would be a contradiction of the terms of the deed." The court was of the opinion that such trust, if declared to be mandatory, and not a matter of discretion on the part of Mrs. Mee, would be a direct contradiction, and the two cannot consist together.

42. Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258; Ferguson *v.* Haas, 64 N. C. 772.

43. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241; Russell *v.* Bruer, 64 Ohio St. 1, 59 N. E. 740; Boughman *v.* Boughman, 69 Ohio St. 273, 69 N. E. 430; Harvey *v.* Gardner, 41 Ohio St. 642.

44. Duvelmeyer *v.* Duvelmeyer, 7 Ohio Dec. 426; Miller *v.* Stokely, 5 Ohio St. 195; Keefe *v.* Railway Co., 11 Ohio Dec. 568; Kraig *v.* Hughes, 11 Ohio Dec. 960; Eldridge *v.* See

jurisdictions that a writing is necessary to prove an express trust, the question often arises as to whether a given instrument is or is not sufficient for that purpose.[45] It is not sufficient that the circumstances proved are calculated to excite a suspicion, or even a probability, in the minds of some persons that there might have been a trust; but the proof must show the existence of the trust *affirmatively* and so conclusively as to remove all reasonable and well-founded doubt.[46] It has been said that the evidence must be clear,[47] clear and convincing,[48] and clear and explicit.[49]

(2.) Parol Evidence. — Parol evidence to establish an express trust

Yup Co., 17 Cal. 44; Reed *v.* Munn, 148 Fed. 737, 80 C. C. A. 215.

A trust must be reasonably certain in its terms, as to the property embraced, the beneficiaries, the nature of the estate, and the manner in which it is to be executed, and, when either of these elements is indefinite or uncertain, the trust must fail, and there can be no judgment declaring and enforcing the trust unless the evidence is convincing beyond a reasonable doubt. Crowley *v.* Crowley (Mo.), 110 S. W. 1100.

Evidence Held Sufficient To Establish a Trust. — Forster *v.* Hale, 3 Ves. Jr. 696, 30 Eng. Reprint 1226, *affirmed* 5 Ves. Jr. 308, 31 Eng. Reprint 603; Nesbitt *v.* Stevens, 161 Ind. 519, 69 N. E. 256.

45. Russell *v.* Bruer, 64 Ohio St. 1, 59 N. E. 740; Miller *v.* Stokely, 5 Ohio St. 195; Keefe *v.* Railway Co., 11 Ohio Dec. 568. See Hollinshead's Appeal, 103 Pa. St. 158.

In Keith *v.* Miller, 174 Ill. 64, 51 N. E. 151, a declaration by a wife in her will that the land in question belonged to herself and her husband was held a sufficient written declaration of trust in his behalf.

An acknowledgment of the trust in a letter is sufficient. Ransdel *v.* Moore, 153 Ind. 393, 53 N. E. 767. See also Nolan *v.* Garrison, 151 Mich. 138, 115 N. W. 59; Lee *v.* Hamilton, 218 Pa. St. 468, 67 Atl. 780; Bacon's Appeal, 57 Pa. St. 504. But see Russell *v.* Switzer, 63 Ga. 711 (holding a letter insufficient where it was merely of a testamentary character).

Evidence Held Insufficient. — Ostheimer *v.* Single (N. J. Eq.), 68 Atl. 231; Loomis *v.* Loomis, 148 Cal. 149, 82 Pac. 679, 1 L. R. A. (N. S.) 312; Stodder *v.* Hoffman, 158 Ill. 486, 41 N. E. 1082.

In Humphrey *v.* Hudnall, 233 Ill. 185, 84 N. E. 203, it was sought by a mother and son to establish an express trust as to a house and lot, purchased in the name of another son. It appeared that after the latter's death a memorandum book containing entries in his handwriting was found in a desk of his mother which he used. These entries referred to the house and purported to set forth amounts contributed by his mother and brother toward its construction. There was no signature anywhere in the book. These memoranda did not purport to state any agreement in reference to the money or the property, or any liability or understanding in that regard. *Held,* that these entries had no tendency to manifest or prove a trust even if they had been signed by the decedent.

46. In South Carolina, it is well settled that the writing, as evidence of a trust or acknowledgment thereof, must manifest a previous trust, and such is the language of the statute. Hence, mere vague and ambiguous words capable of an inference which negatives a trust cannot be regarded as a compliance with the statute. Barrett *v.* Cochran, 11 S. C. 29. See also Bell *v.* Edwards, 78 S. C. 490, 59 S. E. 535; Kennedy *v.* Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676.

47. Collins *v.* Collins, 98 Md. 473, 57 Atl. 597, 103 Am. St. Rep. 408.

48. Williams *v.* Snebly, 92 Md. 9, 48 Atl. 43.

49. Berry *v.* Berry's Admr., 4 Bibb (Ky.) 528.

as to land by oral agreement, where such evidence is allowed, must be clear, full, strong and unquestionable.[50] This rule is applied rigidly where the rights of creditors are involved,[51] or in cases where it is sought to set up by oral evidence a trust as to land by verbal admission of one since deceased.[52] In the note hereto are cited several cases where the evidence was held insufficient.[53]

(3.) Ingrafting Trust on a Deed. — A trust ingrafted on an absolute deed may be shown in certain jurisdictions by parol evidence, but the evidence must be beyond a reasonable doubt as to the existence of the trust, and must be clear, certain and conclusive as to its terms and conditions;[54] though it has been held that evidence of a

50. *Pennsylvania.* — Emerick *v.* Emerick, 3 Phila. 94.

Texas. — Moreland *v.* Barnhart, 44 Tex. 275.

West Virginia. — Hudkins *v.* Crim., 61 S. E. 166; Troll *v.* Carter, 15 W. Va. 567; Craig *v.* Craig, 54 W. Va. 183, 46 S. E. 371; Hamilton *v.* McKinney, 52 W. Va. 317, 43 S. E. 82; Armstrong *v.* Bailey, 43 W. Va. 778, 28 S. E. 766; Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329; Shaffer *v.* Fetty, 30 W. Va. 248, 4 S. E. 278; Woods *v.* Ward, 48 W. Va. 652, 37 S. E. 520; Hatfield *v.* Allison, 57 W. Va. 374, 50 S. E. 729.

Must Be Clear and Satisfactory. Where suit is brought to enforce an express trust based on a verbal contract, proof of the contract must be clear and satisfactory, and failure to prove that one of the alleged parties participated in the contract is fatal. Kelly *v.* Short (Tex. Civ. App.), 75 S. W. 877. See also Agricultural Assn. *v.* Brewster, 51 Tex. 257.

Clear, Convincing and Irrefragable, but not necessarily convincing beyond a reasonable doubt. Stone *v.* Manning, 103 Tenn. 232, 52 S. W. 990.

51. Pickens *v.* Wood, 57 W. Va. 480, 50 S. E. 818; Cheuvrout *v.* Horner (W. Va.), 59 S. E. 964.

52. Hudkins *v.* Crim (W. Va.), 61 S. E. 166 (as to the unreliability of this kind of evidence, the court cited 1 Encyc. of Ev., p. 611, note); Emerick *v.* Emerick, 3 Grant. Cas. (Pa.) 295.

Uncorroborated Testimony of a Husband. — Where a husband buys land in his own name, and suit is brought by his creditor to subject the land to the payment of the husband's debts, the uncorroborated evidence of the husband alone is insufficient to establish an express trust in favor of his wife in such land arising by parol agreement between such husband and wife. Pickens *v.* Wood, 57 W. Va. 480, 50 S. E. 818.

53. The Uncorroborated Testimony of Husband and Wife is insufficient to establish an express trust in favor of the wife in property purchased in the name of the husband against a creditor of the husband seeking to subject such property to the payment of his debt. Cheuvrout *v.* Horner (W. Va.), 59 S. E. 964.

54. *Ohio.* — Russell *v.* Bruer, 64 Ohio St. 1, 59 N. E. 740; Stall *v.* Cincinnati, 16 Ohio St. 169; Goodrich *v.* French, 8 Ohio Dec. 351; Harvey *v.* Gardner, 41 Ohio St. 642.

Texas. — Rogers *v.* Tompkins (Tex. Civ. App.), 87 S. W. 379; Mead *v.* Randolph, 8 Tex. 191; Cuney *v.* Dupree, 21 Tex. 211; Henslee *v.* Henslee, 5 Tex. Civ. App. 367, 24 S. W. 321; Grooms *v.* Rust, 27 Tex. 231.

After Lapse of Many Years. — To sustain an express trust by oral testimony against an absolute deed, after a lapse of over thirty years, the grantee being dead, and having exercised complete control over the property during his lifetime, the evidence must be full, clear and explicit, and not open to grave doubts, contradictions, and circumstances of suspicion. Faulkner *v.* Grantham, 55 W. Va. 317, 47 S. E. 78. But see Baylor *v.* Hopf, 81 Tex. 637, 17 S. W. 230; Stubblefield *v.* Stubblefield (Tex. Civ. App.), 45 S. W. 965, (*holding* that to ingraft a parol trust upon a deed, a preponderance of tes-

single witness is sufficient to ingraft a trust on an absolute deed, where the trust is not in favor of the witness.[55]

(A.) Declaration Contemporaneous With Execution. — Equity requires that parol evidence to ingraft an express trust in lands upon a deed absolute shall clearly and convincingly show that contemporaneously with the execution of the deed the terms of the trust were declared, and the beneficiaries designated.[56]

(B.) Declarations and Admissions of Parties Holding Legal Title. Evidence of admissions or declarations by a person to establish against him an express trust for land in favor of another against his legal title is unreliable and weak, and should be received with great caution, unless corroborated by circumstantial evidence.[57]

b. *Trusts in Personalty.* — **(1.) Written Evidence.** — Written evidence to show an express trust in personalty must be clear and certain.[58]

timony only is necessary); Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497, *holding* that it is error to charge that a parol trust can only be ingrafted on a deed absolute by the clearest and most positive evidence. Evidence that satisfies a jury of the existence of the parol trust is sufficient. And see Markham *v.* Carothers, 47 Tex. 21.

55. Ingenhuett *v.* Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310. *Compare* Grace *v.* Hanks, 57 Tex. 14 (*holding* that such evidence is not sufficient unless corroborated by circumstantial evidence); Reeves *v.* Bass, 39 Tex. 618; Moreland *v.* Barnhart, 44 Tex. 275.

56. Boughman *v.* Boughman, 69 Ohio St. 273, 69 N. E. 430.

57. Hudkins *v.* Crim (W. Va.), 61 S. E. 166; Miller *v.* Thatcher, 9 Tex. 482, 60 Am. Dec. 172.

In Holtheide *v.* Smith, 24 Ky. L. Rep. 2535, 74 S. W. 689, it seemed that declarations had been made by the grantee of certain property to the effect that she was holding the property for the grantor, who was her brother, for the purpose of keeping his wife from getting it. It was held that this evidence was insufficient, after the grantee's death, and more than eleven years after the conveyance, to bring about a cancelation of the deed on the ground that the grantee held the property in trust for the grantor, in the absence of evidence showing that the grantee did not in fact pay the consideration named in the deed.

Corroborated Testimony of Single Witness to Declarations. — Though the testimony of a single witness to the declarations of a deceased person alleged to be a trustee, holding the legal title for another, is not sufficient to establish title to land in an alleged *cestui que trust,* in opposition to a deed which upon its face purports to convey the legal title to such trustee, yet if the issue is raised that the deed was without consideration, and the vendee insolvent at the time of the purchase, and the evidence tends to establish these facts, the failure to produce evidence to the contrary, which, if true, was accessible, may authorize a verdict establishing the trust on such declarations. Grace *v.* Hanks, 57 Tex. 14. See also Reeves *v.* Bass, 39 Tex. 618; Vandever *v.* Freeman, 20 Tex. 334; Mead *v.* Randolph, 8 Tex. 191; Renshaw *v.* First Nat. Bank (Tenn. Ch. App.), 63 S. W. 194.

Declarations Not Sufficient Unless Corroborated. — Blount *v.* Washington, 108 N. C. 230, 12 S. E. 1008.

58. See McKee *v.* Allen, 204 Mo. 655, 103 S. W. 76.

In Wickford Sav. Bank *v.* Corey, 25 R. I. 217, 55 Atl. 684, the question was whether a bank deposit belonged to one Corey or to his mother. Corey relied on a letter from his mother containing this language: "Dear son, you spoke of coming home to see us. If you need any of that money you must send me word and I will try and send you some. I don't intend to use any of it. It's

(2.) Parol Evidence. — A trust of personal property may be created by parol, and its existence proved by parol testimony. Courts, however, do not permit such trusts to be established by evidence of a vague or uncertain character. The supporting testimony must be clear and explicit, and leave no room for a reasonable doubt that a trust was intended. There must be certainty as to subject-matter, parties, and purpose.[59]

(3.) Declarations of Deceased Persons. — In considering what evidence may be regarded as clear and convincing in the establishment of a trust in personalty, it must be borne in mind that caution must be exercised in the reception of evidence of the oral admissions even of a living person. When he is dead and when, from the very nature of the evidence offered, it is impossible generally to contradict the witnesses who testify, reason suggests even a greater degree of caution, and evidence so given under such circumstances is in its nature the weakest and most unsatisfactory.[60]

only to have it for you." It was held that while this language was consistent with the claim made by Corey, it did not establish it.

59. Down *v.* Ellis, 35 Beav. 578, 55 Eng. Reprint 1021; Austin *v.* Wilcoxson, 149 Cal. 24, 84 Pac. 417; *In re* Fisher's Estate, 128 Iowa 18, 102 N. W. 797; Carroll *v.* Woods (Mo.), 111 S. W. 885; Harris *v.* Bratton, 34 S. C. 259, 13 S. E. 447; Kramer *v.* McCaughey, 11 Mo. App. 426.

Clear and Explicit. — Bailey *v.* Irwin, 72 Ala. 505.

Clear and Satisfactory. — *In re* Fisher's Estate, 128 Iowa 18, 102 N. W. 797; Lurie *v.* Sabath, 208 Ill. 401, 70 N. E. 323.

Especially After Lapse of Considerable Time, the evidence must be very clear and satisfactory, and find some support in the surrounding circumstances and in the subsequent conduct of the parties. Crissman *v.* Crissman, 23 Mich. 217.

Clear and Convincing. — Allen *v.* Withrow, 110 U. S. 119; Rusling *v.* Moses (N. J. Eq.), 47 Atl. 1054.

Evidence Must Be Clear, Satisfactory and Conclusive. — Monroe *v.* Graves, 23 Iowa 597; Williams *v.* Lowe, 4 Neb. 382.

Clear, Precise and Unequivocal. *In re* Washington's Estate, 220 Pa. St. 204, 69 Atl. 747.

Evidence Held Insufficient. Flaherty *v.* O'Connor, 24 R. I. 587, 54 Atl. 376. This action was brought to prove a trust of certain money delivered by plaintiff to the defendant. The evidence relating thereto was conflicting. Some witnesses testified that plaintiff, on delivering the money, told the defendant to pay the bills incident to decedent's death, and use the balance for the interest of the children. By other witnesses it was stated that the balance was to "be divided between the young ones, and placed to their credit in the bank." Other witnesses stated that the defendant was to divide the rest with the children, and one witness stated that the defendant was to do whatever he wished with the balance. It was held that such evidence was not sufficiently definite to establish a valid trust. See also Pitts *v.* Weakley, 155 Mo. 109, 55 S. W. 1055.

Parol Agreement Creating a Trust Must Have Been at Time of Transaction; subsequent declarations of a trustee can have very little, if any, weight at all. Williams *v.* Lowe, 4 Neb. 382.

60. Austin *v.* Wilcoxson, 149 Cal. 24, 84 Pac. 417; Pitts *v.* Weakley, 155 Mo. 109, 55 S. W. 1055. See also Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

Where the evidence offered to sustain a trust resting on parol is indefinite, uncertain, and equivocal, and consists substantially of nothing more than statements of admissions

(4.) Trusts in Bank Deposits. — Where a trust created by a deposit in a bank is otherwise complete and in existence at the death of the trustee, it cannot be defeated because it appears in evidence that the donor retained the bank-book as trustee, or because there is no affirmative evidence that the donee had notice of it during the life of the donor.[61]

In Massachusetts the decisions are in apparent conflict with the rule stated above, as to the retention of the pass-book by the depositor and the failure to give notice of the trust to the donee in cases of this character.[62]

2. Implied Trusts. — A. RESULTING TRUSTS. — a. *Presumptions.* **(1.) General Rule.** — It is well established in this country, as it is in England, that when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.[63] This presumption raised by law in favor of him by whom or for whom payment is made, is based upon the

and declarations of defendant's intentions to provide for his first wife's children at some time in the future, or at his death, and proof of the admissions and declarations depends entirely upon the uncertain recollection of the witnesses as to the exact language used by the alleged trustee at a time long anterior to the giving of the testimony, the court will receive the evidence with great caution, and such evidence alone must be held to be insufficient to establish an express trust. Skeen *v.* Marriott, 22 Utah 73, 61 Pac. 296; Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192.

In Botsford *v.* Bradfield, 141 Mich. 370, 104 N. W. 620, plaintiff claimed the existence of a parol trust in her favor as to certain securities. It appeared from the evidence that the alleged trustor had declared that she thought of letting plaintiff take the property in question, but that she had kept it for the purpose of collecting the interest. It appeared further that she had stated to a witness that, in case anything happened to her, the witness should see to it that the plaintiff obtained the property as it belonged to her, and the trustor had retained the possession of the property up till the time of her death. It was held that this evidence was not sufficient to establish an executed trust.

61. Merigan *v.* McGonigle, 205 Pa. St. 321, 54 Atl. 994; *In re* Gaffney's Estate, 146 Pa. St. 49, 23 Atl. 163; Sayre *v.* Weil, 94 Ala. 466, 10 So. 546, 15 L. R. A. 544; Milholland *v.* Whalen, 89 Md. 212, 43 Atl. 43; Gardner *v.* Merritt, 32 Md. 78, 3 Am. Rep. 115. See also Hoboken Sav. Bank *v.* Schwoon, 62 N. J. Eq. 503, 50 Atl. 490.

In Connecticut River Sav. Bank *v.* Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944, it appeared from the evidence that a father deposited in a savings bank a sum of money to the credit of his son, and received a deposit book in which the son was named as the depositor, and he himself as trustee. The son did not know of the deposit and the father kept the book among his papers until his death. *Held,* that a voluntary trust was thereby created in favor of the son, unless some fact or declaration appeared to show a contrary intent.

62. Parkman *v.* Savings Bank, 151 Mass. 218, 24 N. E. 43; Welch *v.* Henshaw, 170 Mass. 409, 49 N. E. 659, 64 Am. St. Rep. 309; Sherman *v.* Savings Bank, 138 Mass. 581; Alger *v.* Savings Bank, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331; Cleveland *v.* Springfield Inst. for Sav., 182 Mass. 110, 65 N. E. 27.

63. *California.* — Tryon *v.* Huntoon, 67 Cal. 325, 7 Pac. 741; Costa

fundamental idea that the parties must have intended that he by whom, or for whom, the purchase price of land is paid should have an equitable interest therein.[64] Experience has found this intention to appear so uniformly in such cases as to warrant the inference or

v. Silva, 127 Cal. 351, 59 Pac. 695; Russ *v.* Mebios, 16 Cal. 350.

Colorado. — Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676; First Nat. Bank *v.* Campbell, 2 Colo. App. 271, 30 Pac. 357.

Connecticut. — Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149.

Georgia. — Scott *v.* Taylor, 64 Ga. 506.

Illinois. — Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210.

Indiana. — Marcilliat *v.* Marcilliat, 125 Ind. 472, 25 N. E. 597.

Iowa. — Cotton *v.* Wood, 25 Iowa 43.

Maine. — Baker *v.* Vining, 30 Me. 121, 1 Am. Rep. 617; Stevens *v.* Stevens, 70 Me. 92.

Maryland. — Johns *v.* Carroll, 69 Atl. 36.

Massachusetts. — Blodgett *v.* Hildreth, 103 Mass. 484.

Missouri. — Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395; Plumb *v.* Cooper, 121 Mo. 668, 26 S. W. 678.

New Hampshire. — Hutchins *v.* Heywood, 50 N. H. 491.

New Jersey. — Lipp *v.* Fielder, 66 Atl. 189; Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. 750, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440; Read *v.* Huff, 40 N. J. Eq. 229; Baldwin *v.* Campfield, 8 N. J. Eq. 891; Bacon *v.* Devinney, 55 N. J. Eq. 449, 37 Atl. 144; Schellinger *v.* Selover (N. J. Eq.), 46 Atl. 1058.

Ohio. — Kraig *v.* Hughes, 11 Ohio Dec. 662; Duvelmeyer *v.* Duvelmeyer, 7 Ohio Dec. 426; Creed *v.* Lancaster Bank, 1 Ohio St. 1; McGovern *v.* Knox, 21 Ohio St. 547.

Oklahoma. — Helvie *v.* Hoover, 11 Okla. 687, 69 Pac. 958.

Oregon. — DeRoboam *v.* Schmidtlin, 92 Pac. 1082; Snider *v.* Johnson, 25 Or. 328, 35 Pac. 846; Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246; Taylor *v.* Niles, 19 Or. 550, 25 Pac. 143.

South Carolina. — De Hihns *v.* Free, 70 S. C. 344, 49 S. E. 841.

South Dakota. — Sing You *v.* Wong Free Lee, 16 S. D. 383, 92 N. W. 1073.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9, 51 Am. Dec. 690.

Virginia. — Sinclair *v.* Sinclair, 79 Va. 40; Kane *v.* O'Conners, 78 Va. 76; Donaghe *v.* Tams, 81 Va. 132.

It is a general rule that the trust of a legal estate, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successively, results to the one who furnishes the purchase money, the presumption being against a gift. Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622.

Result the Same Where Purchase Is Made by Nominal Grantee or Agent. — Galbraith *v.* Galbraith, 190 Pa. St. 225, 42 Atl. 683.

64. Tryon *v.* Huntoon, 67 Cal. 325, 7 Pac. 741; Doll *v.* Gifford, 13 Cal. App. 67, 56 Pac. 676; Scott *v.* Taylor, 64 Ga. 506; Perkins *v.* Nichols, 11 Allen (Mass.) 542; Irvine *v.* Marshall, 7 Minn. 286; Dudley *v.* Bosworth, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837.

"The rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase-money intends the purchase for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes." Summers *v.* Moore, 113 N. C. 394, 18 S. E. 712, (*quoting* Perry on Trusts). See also Graham *v.* Selbie, 8 S. D. 604, 67 N. W. 831.

The ground of this doctrine is, that he who pays the consideration is to be deemed to be the owner of the land in equity, unless other presumptions arise (as may from the consanguinity of the parties) to repel the conclusion. Powell *v.* Monson, 3

presumption of its existence in all cases.[65] The only effect of this rule is that the presumption arises upon proof of the facts upon which it is predicated without further proof as to what the real intention of the parties may have been, but it is not irrebuttable. It may be removed or overcome by proof, by showing that between him who advanced the consideration and the grantee it was not intended that a trust should arise in favor of the former.[66]

(2.) Exceptional Rule. — The rule relating to the presumption of a resulting trust is not of universal application. An exception arises where the party making the purchase and paying the consideration money is under a natural or moral obligation to provide for the person in whose name the conveyance is taken. In such case no presumption of a resulting trust arises. On the contrary, the presumption of a resulting trust is rebutted, and the law will presume, until the contrary is shown, that a gift or advancement was intended for the benefit of the nominal purchaser.[67]

(A.) Purchase by Parent in Name of Child. — When a parent pays the purchase price of real estate, and directs the title to be made to his or her child, the presumption which arises in law is that an advancement or gift to the child is intended, and not a trust.[68]

Mason 347, 19 Fed. Cas. No. 11,356.

Resulting Trust Is Implied From the Transaction of the Parties, whereby it is enforced upon the notice of the court, and its recognition impelled. But the court never presumes a trust. Orton *v.* Knab, 3 Wis. 576.

No Presumption Where Contrary Intention Apparent. — Manning *v.* Screven, 56 S. C. 78, 34 S. E. 22; Bell *v.* Edwards, 78 S. C. 490, 59 S. E. 535.

65. Tryon *v.* Huntoon, 67 Cal. 325, 7 Pac. 741; Edwards *v.* Edwards, 39 Pa. St. 369; Scott *v.* Taylor, 64 Ga. 506.

66. Tryon *v.* Huntoon, 67 Cal. 325, 7 Pac. 741; Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599; Reynolds *v.* Blaisdell, 23 R. I. 16, 49 Atl. 42; Edwards *v.* Edwards, 39 Pa. St. 369. See notes 77 and 78 *post.*

67. *Colorado.* — Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676.

Connecticut. — Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149.

Iowa. — Cotton *v.* Wood, 25 Iowa 43.

Kansas. — Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599.

Ohio. — Goodrich *v.* French, 8 Ohio Dec. 351.

Oregon. — DeRoboam *v.* Schmidtlin, 92 Pac. 1082; Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9, 51 Am. Dec. 690.

In Whitten *v.* Whitten, 3 Cush. (Mass.) 191, it was said that there are exceptions to the general doctrine, which stand upon peculiar reasons. Thus if a parent purchase in the name of a son, the purchase is to be deemed *prima facie,* and intended as an advancement, so as to rebut the presumption of a resulting trust for the parent. The moral obligation of a parent to provide for his children is the foundation of this exception, or rather, of this rebutter of a presumption; since it is not only natural, but reasonable to presume that a parent by purchasing in the name of a child, means a benefit to the latter, in discharge of this moral obligation, and also as a token of parental affection.

68. *California.* — Russ *v.* Nebius, 16 Cal. 350.

Connecticut. — Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149.

Illinois. — Euans *v.* Curtis, 190 Ill. 197, 60 N. E. 56; Taylor *v.* Taylor, 9 Ill. 303; Smith *v.* Smith, 144 Ill. 299, 33 N. E. 35; Maxwell *v.* Maxwell, 109 Ill. 588; Skahen *v.* Irving, 206 Ill. 597, 69 N. E. 510.

(B.) Purchase by Husband in Name of Wife. — In case a conveyance is taken by a husband in the name of his wife, a presumption arises that the husband intended to confer upon her a provision, advancement, gift or settlement, in the absence of evidence showing a contrary intention.[69]

(C.) Purchase by Wife in Name of Husband. — Where a husband buys land in his own name and it is shown that the wife furnished to the husband out of her separate property the purchase money paid by him for the land, no presumption arises that the money fur-

Iowa. — Hoon *v.* Hoon, 126 Iowa 391, 102 N. W. 105; Culp *v.* Price, 107 Iowa 133, 77 N. W. 848.

Kansas. — Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599.

Maryland. — Mutual Fire Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

Massachusetts. — Perkins *v.* Nichols, 11 Allen 542; Whitten *v.* Whitten, 3 Cush. 191.

Michigan. — Waterman *v.* Seeley, 28 Mich. 77.

New Jersey. — Bacon *v.* Devinney, 55 N. J. Eq. 449, 37 Atl. 144; Read *v.* Huff, 40 N. J. Eq. 229.

Rhode Island. — Reynolds *v.* Blaisdell, 23 R. I. 16, 49 Atl. 42.

Texas. — Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622.

West Virginia. — McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816; Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837; Hamilton *v.* Steele, 22 W. Va. 348.

69. *Arkansas.* — Chambers *v.* Michael, 71 Ark. 373, 74 S. W. 516.

Colorado. — Rowe *v.* Johnson, 81 Pac. 268.

Connecticut. — Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149.

Illinois. — Deuter *v.* Deuter, 214 Ill. 308, 73 N. E. 453; Johnston *v.* Johnston, 138 Ill. 385, 27 N. E. 930; Maxwell *v.* Maxwell, 109 Ill. 588; Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Smith *v.* Smith, 144 Ill. 299, 33 N. E. 35; Skahen *v.* Irving, 206 Ill. 597, 69 N. E. 510; Fry *v.* Morrison, 159 Ill. 244, 42 N. E. 774.

Indiana. — See Montgomery *v.* Craig, 128 Ind. 48, 27 N. E. 427.

Maine. — Stevens *v.* Stevens, 70 Me. 92.

Maryland. — Mutual Fire Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

Massachusetts. — Perkins *v.* Nichols, 11 Allen 542; Whitten *v.* Whitten, 3 Cush. 191.

Michigan. — Waterman *v.* Seeley, 28 Mich. 77.

Missouri. — Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395; Curd *v.* Brown, 148 Mo. 82, 49 S. W. 990; Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105; Price *v.* Kane, 112 Mo. 412, 20 S. W. 609.

Nebraska. — Doane *v.* Dunham, 64 Neb. 135, 89 N. W. 640.

New Jersey. — Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. 750, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440; Lipp *v.* Fielder, 66 Atl. 189; Sing Bow *v.* Sing Bow (N. J. Eq.), 30 Atl. 867; Read *v.* Huff, 40 N. J. Eq. 229.

North Carolina. — Flanner *v.* Butler, 131 N. C. 155, 42 S. E. 547.

Ohio. — Duvelmeyer *v.* Duvelmeyer, 7 Ohio Dec. 426.

Oregon. — Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246; Taylor *v.* Niles, 19 Or. 550, 25 Pac. 143.

Rhode Island. — Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

South Dakota. — Hickson *v.* Culbert, 19 S. D. 207, 102 N. W. 774.

Texas. — Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. 825; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622.

Vermont. — Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Wallace *v.* Bowen, 28 Vt. 638; Bent *v.* Bent, 44 Vt. 555.

West Virginia. — McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816; Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837; Hamilton *v.* Steele, 22 W. Va. 348.

In Bacon *v.* Devinney, 55 N. J. Eq. 449, 37 Atl. 144, a husband and wife

nished by the wife was intended as a gift to the husband.[70] But the contrary has been held.[71]

(D.) Nominal Grantee Brother or Sister of Purchaser. — Where the nominal grantee is a brother or sister of the actual purchaser, the law will presume a trust and not an advancement, on the ground

both made payments to meet the dues of building association stock standing in the name of the wife. It was held that under these indefinite circumstances, when the husband made some payments out of his separate estate, and the wife some out of hers, and there was no evidence that the money was paid under any agreement or belief that the husband was to be benefited, no trust arose in his favor; nor could he rightfully claim to be entitled, either at law or in equity, to any interest in the property, the title to which he knew stood in his wife's name when he made the payments. In cases where the parties stand in such intimate relation to each other, the presumption is that the payments were intended to be a gift, until by satisfactory proof the contrary is established.

70. *United States.* — Stickney *v.* Stickney, 131 U. S. 227.

Alabama. — Smyley *v.* Reese, 53 Ala. 89, 101, 25 Am. Rep. 598.

Arkansas. — See Wyatt *v.* Scott, 84 Ark. 355, 105 S. W. 871.

Illinois. — Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298; Patten *v.* Patten, 75 Ill. 446; Francis *v.* Roades, 146 Ill. 635, 35 N. E. 232.

Indiana. — Denny *v.* Denny, 123 Ind. 240, 23 N. E. 519; King's Admr. *v.* King, 24 Ind. App. 598, 57 N. E. 275, 79 Am. St. Rep. 287.

Kansas. — Carter *v.* Becker, 69 Kan. 524, 77 Pac. 264.

Michigan. — Sykes *v.* City Sav. Bank, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562; Wales *v.* Newbould, 9 Mich. 45, 64.

Minnesota. — Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812. See also McNally *v.* Weld, 30 Minn. 209, 14 N. W. 895.

New Hampshire. — Houston *v.* Clark, 50 N. H. 479. See Connor *v.* Follansbee, 59 N. H. 124.

New Jersey. — Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817. See also Jones *v.* Davenport, 44 N. J. Eq. 33, 46, 13 Atl. 652.

North Carolina. — Toms *v.* Flack, 127 N. C. 420, 37 S. E. 471.

Pennsylvania. — Grabill *v.* Moyer, 45 Pa. St. 530; Bergey's Appeal, 60 Pa. St. 408, 100 Am. Dec. 578.

West Virginia. — See Berry *v.* Wiedman, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866.

In Carter *v.* Becker, 69 Kan. 524, 77 Pac. 264, it was held that if the heirs of an estate, three in number, one of whom is a married woman, make an amicable division of the real property they have inherited, and, for the purpose of consummating such arrangement, meet and exchange deeds, to the end that each one shall receive from the others a conveyance of a two-thirds interest in the lands he is to own in severalty, and after the woman's death it be discovered that the deed of her coheirs to her share of the land is in the name of her husband, the law will presume, in the absence of evidence to the contrary, that the husband took the deed in trust for the use and benefit of his wife, and not as a gift from her.

71. Pickens *v.* Wood, 57 W. Va. 480, 50 S. E. 818. See also Rotter *v.* Scott, 111 Iowa 31, 82 N. W. 437.

In Family Settlements the presumption is that a conveyance of a wife's share to a husband, or vice versa, is a gift, and this presumption can only be overcome by proof of fraud or mistake. The case in hand was obviously a family settlement. There was no evidence attempting to prove that the deed for the wife's share to the husband was a mistake. On the contrary, the acquiescence of the wife in the transaction for fifteen years during her husband's lifetime and for thirty-two years after his death, during the whole of the rest of her life, goes far to sustain the presumption which the law raises that the placing of the title to her

that there is no such obligation to support that the purchase can be presumed to be made for that purpose.[72]

b. *Burden of Proof.* — **(1.) In General.** — The burden of proof is upon the party who claims the existence of a resulting trust to establish the facts upon which it is based.[73]

(2.) Overcoming Presumption as to Truth of Terms of Absolute Conveyance. — Where a deed is absolute on its face and recites a consideration, the presumption is that the grantee is to take the beneficial estate.[74] Where one seeks to ingraft a resulting trust upon such a conveyance, the burden is upon him to overcome the presumption that the conveyance speaks the truth.[75]

share in her husband's name was no mistake, but a voluntary settlement. Schellinger *v.* Selover (N. J. Eq.), 46 Atl. 1058.

72. Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149. But see Goodrich *v.* French, 8 Ohio Dec. 351.

73. *Alabama.* — Lehman *v.* Lewis, 62 Ala. 129.

Arkansas. — Beardsley *v.* Nashville, 64 Ark. 240, 41 S. W. 853.

California. — Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152.

Iowa. — Shepard *v.* Pratt, 32 Iowa 296; Noel *v.* Noel, 1 Iowa 423.

Missouri. — Philpot *v.* Penn, 91 Mo. 38, 3 S. W. 386; Bradley *v.* Bradley, 119 Mo. 58, 24 S. W. 757.

Nebraska. — Veeder *v.* McKinley-L. L. & T. Co., 61 Neb. 892, 86 N. W. 982.

New Jersey. — Sing Bow *v.* Sing Bow (N. J. Eq.), 30 Atl. 867; McKeown *v.* McKeown, 33 N. J. Eq. 384, *affirmed*, 34 N. J. Eq. 560; Parker *v.* Snyder, 31 N. J. Eq. 164.

North Carolina. — Summers *v.* Moore, 113 N. C. 394, 18 S. E. 712.

Ohio. — Duvelmeyer *v.* Duvelmeyer, 7 Ohio Dec. 426.

Oregon. — Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246.

Rhode Island. — Hudson *v.* White, 17 R. I. 519, 23 Atl. 57; Reynolds *v.* Blaisdell, 23 R. I. 16, 49 Atl. 42.

In Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192, it was held that where a bill in equity seeks to convert a defendant, who purchased property and had the legal title thereto made in his own name by an instrument in writing, into a trustee for the plaintiff, upon the ground that the purchaser was acting as agent, and that plaintiff furnished the money, the burden is on the plaintiff to establish, by evidence dehors the instrument, such facts as will show that the purchaser was acting for the plaintiff, and such facts must be inconsistent with the idea that the purchaser acted solely for himself.

74. Ostenson *v.* Severson, 126 Iowa 197, 101 N. W. 789; Sing Bow *v.* Sing Bow (N. J. Eq.), 30 Atl. 867; Burke *v.* Andrews, 91 Ala. 360, 8 So. 369; Lehman *v.* Lewis, 62 Ala. 129.

75. Wilkins *v.* Stevens, 1 Y. & C. (C. C.) 431, 6 Jur. 253, 62 Eng. Reprint 957; Bibb *v.* Hunter, 79 Ala. 351; Burke *v.* Andrews, 91 Ala. 360, 8 So. 369; Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152; Cunningham *v.* Cunningham, 125 Iowa 681, 101 N. W. 470; Cotton *v.* Wood, 25 Iowa 43; Hickson *v.* Culbert, 19 S. D. 207, 102 N. W. 774.

Where real estate is purchased by a husband and wife, title being taken in the name of the wife, in an action brought by the husband to establish a trust therein, on the ground that the money used in the purchase was his own, it is held that the burden of proof is upon the complainant to show this, since the presumption arises from the recital in the deed that it was the wife's. Sing Bow *v.* Sing Bow (N. J. Eq.), 30 Atl. 867.

In Lehman *v.* Lewis, 62 Ala. 129, it was said that the presumption arising from a conveyance, that it fully speaks the whole truth, must prevail until the contrary is established beyond a reasonable doubt. The burden of removing this presumption rests upon the party asserting the contrary, and it is not enough for

(3.) Proving Payment of Consideration. — Since a resulting trust arises from the fact that the money of the real and not the nominal purchaser formed the consideration of the purchase, the burden is upon the party seeking to establish such trust to show that the purchase money or some aliquot part thereof belonged to him and was furnished by him at the time of the purchase.[76]

(4.) Rebutting Presumption as to Resulting Trust. — Though the facts warrant the presumption of a resulting trust, it may be rebutted, however, by proper evidence; but the burden of proof rests upon the nominal purchaser to show that the party from whom the consideration moved did not mean the purchase to be a trust for himself, but a gift either to the nominal purchaser himself[77] or to a stranger.[78]

In Michigan it is provided by statute that "no implied or resulting trust shall be alleged or established to defeat or prejudice the title

him to generate doubt and uncertainty.

76. *Alabama.* — Emfinger *v.* Emfinger, 137 Ala. 337, 34 So. 346; Culver *v.* Guyer, 129 Ala. 602, 29 So. 779.

California. — Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152; Millard *v.* Hathaway, 27 Cal. 119.

Colorado. — Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676.

Illinois. — Cline *v.* Cline, 204 Ill. 130, 68 N. E. 545; Strong *v.* Messenger, 148 Ill. 431, 36 N. E. 617.

Iowa. — Burden *v.* Sheridan, 36 Iowa 125, 14 Am. Rep. 505; Webb *v.* Webb, 104 N. W. 438.

Missouri. — Joerger *v.* Joerger, 193 Mo. 133, 91 S. W. 918; Curtis *v.* Moore, 162 Mo. 442, 63 S. W. 80.

Oregon. — Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246.

Rhode Island. — Reynolds *v.* Blaisdell, 23 R. I. 16, 49 Atl. 42; Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

South Carolina. — Jones *v.* Hughey, 46 S. C. 193, 24 S. E. 178; *Ex parte* Trenholm, 19 S. C. 126.

South Dakota. — Hickson *v.* Culbert, 19 S. D. 207, 102 N. W. 774.

When a party purchases land with his own money, and takes title in his own name, a trust cannot be raised in favor of another by reason of the existence of a parol agreement upon the part of the purchaser that he would make the purchase for the benefit of another, and permit the other to thereafter make payment. One who sets up a resulting trust in favor of himself, the conveyance being to another, must show that the land was bought with his money, and not merely that the purchase was made for his benefit or on his account. A subsequent payment of the money will not by relation attach a resulting trust to the original purchase, for a resulting trust arises from the fact that the money of the real, and not the nominal, owner, formed the consideration of the purchase at the time and became converted into land. Ostheimer *v.* Single (N. J. Eq.), 68 Atl. 231.

Beringer *v.* Lutz, 179 Pa. St. 1, 37 Atl. 640 was an action by a purchaser at sheriff's sale of land standing in the name of a husband, to recover the same. Defendant claimed that he held the title partly in trust for his wife who advanced a portion of the purchase price. It was held incumbent upon defendant to show by evidence that was clear and satisfactory, first, that his wife did pay a portion of the purchase money for the farm in controversy, as alleged; second, that it was paid upon an agreement that she was to have the title to the land, or such portion of it as she paid for; and, third, that the money so paid belonged to her as her separate estate.

77. Grabill *v.* Moyer, 45 Pa. St. 530; Carter *v.* Becker, 69 Kan. 524, 77 Pac. 264.

78. Dudley *v.* Bosworth, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

of a purchaser for a valuable consideration, and without notice of such trust;" and the burden of proof is upon a grantee in a quit-claim deed to show the facts necessary to bring him within the statute.[79]

(5.) Rebutting Presumption of Advancement. — The presumption arising in cases where the real purchaser is under obligations to provide for the nominal one may be overcome and rebutted, but the burden of proof is upon the party claiming a resulting trust to show that a gift, advancement or settlement was not intended, but that a trust was.[80]

c. *Admissibility of Evidence.* — **(1.) In General.** — (A.) Payment of Consideration. — Since a resulting trust may be established by evidence showing that another than the grantee in the deed furnished and paid the purchase money,[81] whatever occurs at the time of an alleged purchase relating to the payment of the consideration by the party claiming the beneficial interest, is properly admissible for the purpose of establishing the trust.[82]

(B.) Circumstantial Evidence. — Circumstantial evidence is admissible to establish the facts from which a resulting trust arises.[83]

(C.) Impoverished Circumstances of Grantee. — Where it is claimed that the purchase money was paid by one party and the conveyance taken to another, the fact that the grantee was in impoverished circumstances may be given in evidence for the purpose of showing who paid the consideration.[84]

79. Ripley *v.* Seligman, 88 Mich. 177, 50 N. W. 143, *citing* How. Stat. § 5572.

80. *Colorado.* — Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676.

Illinois. — Deuter *v.* Deuter, 214 Ill. 308, 73 N. E. 453; Johnston *v.* Johnston, 138 Ill. 385, 27 N. E. 930; Maxwell *v.* Maxwell, 109 Ill. 588; Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Smith *v.* Smith, 144 Ill. 299, 33 N. E. 35.

Iowa. — Hoon *v.* Hoon, 126 Iowa 391, 102 N. W. 105; Cotton *v.* Wood, 25 Iowa 43.

Maine. — Stevens *v.* Stevens, 70 Me. 92.

Rhode Island. — Hudson *v.* White, 17 R. I. 519, 23 Atl. 57; Reynolds *v.* Blaisdell, 23 R. I. 16, 49 Atl. 42.

South Dakota. — Hickson *v.* Culbert, 19 S. D. 207, 102 N. W. 774.

West Virginia. — Pickens *v.* Wood, 57 W. Va. 480, 50 S. E. 818.

Purchase by Husband in Name of Wife. — Where real estate is purchased by a husband and title is taken in the name of his wife, the presumption is that a settlement was intended. Where the husband seeks to overcome this presumption and establish a trust, the burden of proof is upon him, and a preponderance of evidence is not sufficient. Sing Bow *v.* Sing Bow (N. J. Eq.), 30 Atl. 867.

81. Scoby *v.* Blanchard, 3 N. H. 170; Connor *v.* Follansbee, 59 N. H. 124; Pritchard *v.* Brown, 4 N. H. 397; Corder *v.* Corder, 124 Ill. 229, 16 N. E. 107; Johns *v.* Carroll (Md.), 69 Atl. 36.

A resulting trust in land cannot be created by a parol agreement of the parties, but the ownership of the money from a payment of which a resulting trust arises may be shown by parol evidence. Converse *v.* Noyes, 66 N. H. 570, 22 Atl. 556.

82. Sutton *v.* Whetstone (S. D.), 112 N. W. 850.

83. Throckmorton *v.* Throckmorton, 91 Va. 42, 22 S. E. 162; Perkins *v.* Nichols, 11 Allen (Mass.) 542; Duvelmeyer *v.* Duvelmeyer, 7 Ohio Dec. 426; Pritchard *v.* Wallace, 4 Sneed (Tenn.) 405.

84. Willis *v.* Willis, 2 Atk. 71, 26

(D.) To Show Trust in Fraud of Creditors. — Where one to defraud his creditors, has a purchase made in the name of another, such person cannot introduce evidence to establish a resulting trust for his own benefit as against the grantee.[85]

(2.) Parol Evidence. — (A.) Historically and Generally. — In England prior to 29 Car. II. declarations of trusts by words only were theoretically allowable, although it may be supposed that such evidence by itself would be rarely deemed sufficient.[86] As late as 28 Car. II. (1676) it was held that express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These latter are commonly called presumptive trusts; and that is when the court upon consideration of all circumstances presumes there was a declaration either by word or writing, although the plain and direct proof thereof be not extant.[87]

The English Statute of Frauds avoided all declarations of trusts not evidenced by writing, and the earlier cases held that statute applied to resulting as well as to express trusts;[88] but the more recent authorities have gradually settled in favor of the proposition that the statute does not apply in its operation to trusts arising by operation of law.[89]

Eng. Reprint 443; Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Farrell *v.* Lloyd, 69 Pa. St. 239.

85. Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Miller *v.* Fraley, 21 Ark. 22; Clarkson *v.* White, 8 Dana (Ky.) 11; Stovall *v.* Bank, 8 Smed. & M. (Miss.) 305; Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38. See also State *v.* McBride, 105 Mo. 265, 15 S. W. 72; Levine *v.* Rouss (Tex. Civ. App.), 49 S. W. 1051.

Rule Applicable as to Heirs of Party to Fraud. — In McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816, a father purchased real estate, and had it conveyed to his son by a deed absolute on its face. In a suit in equity by the heirs after the father's death to set up a resulting trust in their favor they cannot be permitted to show that the conveyance to the son was made for a fraudulent purpose by the father, in order to rebut the presumption, that it was an advancement or gift to the son.

86. Ferguson *v.* Haas, 64 N. C. 772, *citing* 1 Spencer Eq. Jur. 495.

87. Cook *v.* Fountain, 3 Swanst. 585, 36 Eng. Reprint 984.

88. Kirk *v.* Webb, Prec. Ch. 84, 24 Eng. Reprint 41, *s. c.* 2 Freem. 229, 22 Eng. Reprint 1177; Newton *v.* Preston, Prec. Ch. 103, 2 Atk. 71, 24 Eng. Reprint 50; Skett *v.* Whitmore, 6 Brown Parl. Cas. 12, 2 Freem. 280, 22 Eng. Reprint 1211; Heron *v.* Heron, Prec. Ch. 163, 24 Eng. Reprint 78; Walcott *v.* Markaut, Prec. Ch. 168, 24 Eng. Reprint 81; Kinder *v.* Miller, Prec. Ch. 172; *s. c.* 2 Vern. 440, 24 Eng. Reprint 83; Deg *v.* Deg, 2 P. Wms. 412, 24 Eng. Reprint 791 (*per* Lord King).

89. Anonymous, 2 Vent. (Eng.) 361, 2 Salk. 676. See also Hutchins *v.* Lee, 1 Atk. 447, 26 Eng. Reprint 284.

Rule Applies Where Joint Purchase Is Made in Name of One. Lord Hardwicke is represented in Crop *v.* Norton, 2 Atk. 74, 9 Mod. 233, 88 Eng. Reprint 418, to have said: "Where a purchase is made, and the purchase-money is paid by one, and the conveyance taken in the name of another, there is a resulting trust for the person who paid the consideration; but this is where the whole consideration moved from such person; but I never knew it where the consideration moved from several persons, for this would intro-

Most of the American States have enacted similar statutes to that of England; but by these resulting trusts are generally expressly[90] or impliedly excepted.[91] Generally, parol evidence is admissible to establish a resulting trust,[92] although even some of the earlier American cases held that when a deed expressed the consideration to have

duce all the mischiefs which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase-money by the deed appears to be paid by him only, I do not know any case where such persons shall come into this court, and say, they paid the purchase-money; but it is expected there should be a declaration of trust." In Wray *v.* Steele, 2 Ves. & B. 388, 13 R. R. 124, the vice chancellor said: "Lord Hardwicke could not have used the language, ascribed to him. What is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances?" And in that case, which was of a joint purchase in the name of one, he overruled the distinction, and decreed in favor of the trust.

90. Bates *v.* Kelly, 80 Ala. 142; DeMallagh *v.* DeMallagh, 77 Cal. 126, 16 Pac. 535; Boswell *v.* Cunningham, 32 Fla. 277, 13 So. 354, 21 L. R. A. 54; Moore *v.* Stinson, 144 Mass. 594, 12 N. E. 410; Schrager *v.* Cool (Pa.), 70 Atl. 889; Hudson *v.* White, 17 R. I. 519, 23 Atl. 57; Crawley *v.* Crafton, 193 Mo. 421, 91 S. W. 1027.

In Alabama the code provides that no trust in lands not in writing is valid, "except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law." The inevitable result from the grammatical construction of the sentence is that this class of trusts is excepted entirely from the operation of the section, and parol declarations of the parties regarding the same are admissible. Long *v.* Mechem, 142 Ala. 405, 38 So. 262.

91. *Colorado.* — Knox *v.* McFarran, 4 Colo. 586.

Connecticut. — Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149.

Iowa. — Culp *v.* Price, 107 Iowa 133, 77 N. W. 848.

Massachusetts. — Livermore *v.* Aldrich, 5 Cush. 431.

Missouri. — Plumb *v.* Cooper, 121 Mo. 668, 26 S. W. 678; Rogers *v.* Rogers, 87 Mo. 257.

New York. — Malin *v.* Malin, 1 Wend. 625.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

92. *United States.* — Powell *v.* Monson, 3 Mason 347, 19 Fed. Cas. No. 11,356; Jenkins *v.* Eldredge, 3 Story 181, 13 Fed. Cas. No. 7,266; Wyman *v.* Babcock, 2 Curt. 386, 30 Fed. Cas. No. 18,113; *affirmed sub nom.* Babcock *v.* Wyman, 60 U. S. 299.

Alabama. — Tillman *v.* Murrell, 120 Ala. 239, 24 So. 712; Rhea *v.* Tucker, 56 Ala. 450; Bates *v.* Kelly, 80 Ala. 142; Lee *v.* Browder, 51 Ala. 288; Caple *v.* McCollum, 27 Ala. 461.

Arkansas. — McGuire *v.* Ramsey, 9 Ark. 518; Richardson *v.* Taylor, 45 Ark. 472; Crosby *v.* Henry, 76 Ark. 615, 88 S. W. 949.

California. — Millard *v.* Hathaway, 27 Cal. 119; DeMallagh *v.* DeMallagh, 77 Cal. 126, 16 Pac. 535; Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152.

Colorado. — Knox *v.* McFarran, 4 Colo. 586; Lipscomb *v.* Nichols, 6 Colo. 290; First Nat. Bank *v.* Campbell, 2 Colo. App. 271, 30 Pac. 357.

Connecticut. — Church *v.* Sterling, 16 Conn. 388; Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149; Booth's Appeal, 35 Conn. 165.

District of Columbia. — Cooksey *v.* Bryan, 2 App. D. C. 557.

Florida. — Gale *v.* Harby, 20 Fla. 171; Booth *v.* Lenox, 45 Fla. 191, 34 So. 566; Lofton *v.* Sterrett, 23 Fla. 565, 2 So. 837.

Georgia. — Scott *v.* Taylor, 64 Ga. 506; Johnson *v.* McComb, 49 Ga. 120.

Idaho. — Branstetter *v.* Mann, 6 Idaho 580, 57 Pac. 433.

Illinois. — Brown *v.* Pitney, 39 Ill. 468; Coates *v.* Woodworth, 13 Ill. 654; Strong *v.* Messinger, 148 Ill. 431, 36 N. E. 617; Towle *v.* Wadsworth, 147 Ill. 80, 30 N. E. 602, 35 N. E. 73; Collins *v.* Smith, 18 Ill. 160; Marie M. E. Church *v.* Trinity M. E. Church, 205 Ill. 601, 69 N. E. 73.

Indiana. — Miller *v.* Blackburn, 14 Ind. 62; Myers *v.* Jackson, 135 Ind. 136, 34 N. E. 810.

Iowa. — Cooper *v.* Skeel, 14 Iowa 578; Bryant *v.* Hendricks, 5 Iowa 255; Kincell *v.* Feldman, 22 Iowa 363.

Kansas. — Howard *v.* Howard, 52 Kan. 469, 34 Pac. 1114.

Kentucky. — Pool *v.* Thomas, 10 Ky. L. Rep. 92, 8 S. W. 198; Row *v.* Johnson, 25 Ky. L. Rep. 1799, 78 S. W. 906; Webb *v.* Foley, 20 Ky. L. Rep. 1207, 49 S. W. 40; Williams *v.* Williams, 8 Bush 241; Butler *v.* Prewitt, 21 Ky. L. Rep. 813, 53 S. W. 20; Letcher *v.* Letcher's Heirs, 4 J. J. Marsh. 590; Nelson *v.* Nelson, 29 Ky. L. Rep. 885, 96 S. W. 794; Brothers *v.* Porter, 6 B. Mon. 106; Faris *v.* Dunn, 7 Bush 276; Green *v.* Ball, 4 Bush 586; Martin *v.* Martin, 16 B. Mon. 8; Snelling *v.* Utterback, 1 Bibb 609, 4 Am. Dec. 661; Parker *v.* Catron, 120 Ky. 145, 85 S. W. 740; Stark's Heirs *v.* Cannady, 3 Litt. 399, 14 Am. Dec. 76.

Maine. — Whitmore *v.* Learned, 70 Me. 276; Baker *v.* Vining, 30 Me. 121, 1 Am. Rep. 617.

Maryland. — Witts *v.* Horney, 59 Md. 584; Mutual Fire Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Sewell *v.* Baxter, 2 Md. Ch. 447; Faringer *v.* Ramsay, 4 Md. Ch. 33; Dorsey *v.* Clarke, 4 Har. & J. 551; Keller *v.* Kunkel, 46 Md. 565.

Massachusetts. — Black *v.* Black, 4 Pick. 234; Kendall *v.* Mann, 11 Allen 15; Perkins *v.* Nichols, 11 Allen 542; Glass *v.* Hubbert, 102 Mass. 24.

Michigan. — Ripley *v.* Seligman, 88 Mich. 177, 50 N. W. 143.

Minnesota. — Irvine *v.* Marshall, 7 Minn. 286.

Mississippi. — Dismukes *v.* Terry, 1 Miss. 197.

Missouri. — Garrett *v.* Garrett, 171 Mo. 155, 71 S. W. 153; Philpot *v.* Penn, 91 Mo. 38, 3 S. W. 386; Rogers *v.* Rogers, 87 Mo. 257; Plumb *v.* Cooper, 121 Mo. 668, 26 S. W. 678; Johnson *v.* Quarles, 46 Mo. 423; Cloud *v.* Ivie, 28 Mo. 578; Heil *v.* Heil, 184 Mo. 665, 84 S. W. 45.

Nebraska. — Chicago, etc. R. Co. *v.* Bank of Omaha, 58 Neb. 548, 78 N. W. 1064.

Nevada. — Boskowitz *v.* Davis, 12 Nev. 446; White *v.* Sheldon, 4 Nev. 280.

New Hampshire. — Brooks *v.* Fowle, 14 N. H. 248; Connor *v.* Follansbee, 59 N. H. 124; Page *v.* Page, 8 N. H. 187; Farrington *v.* Barr, 36 N. H. 86; Scoby *v.* Blanchard, 3 N. H. 170.

New Jersey. — Hutchinson *v.* Tindall, 3 N. J. Eq. 357; Beck *v.* Beck, 43 N. J. Eq. 39, 10 Atl. 155.

New York. — Mason *v.* Libbey, 19 Hun 119, *affirming* 54 How. Pr. 104; Jackson *v.* Feller, 2 Wend. 465; Reid *v.* Fitch, 11 Barb. 399; Jackson *v.* Matsdorf, 11 Johns. 91, 6 Am. Dec. 355; Malin *v.* Malin, 1 Wend. 625; Swinburne *v.* Swinburne, 28 N. Y. 568; Clipperly *v.* Clipperly, 4 Thomp. & C. 342; Botsford *v.* Burr, 2 Johns. Ch. 405; Jackson *v.* Mills, 13 Johns. 463; Heacock *v.* Coatesworth, Clark Ch. 84; Harder *v.* Harder, 2 Sandf. Ch. 17.

Ohio. — Byers *v.* Wackman, 16 Ohio St. 440; Duvelmeyer *v.* Duvelmeyer, 7 Ohio Dec. 426.

Oregon. — Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246; DeRoboam *v.* Schmidtlin, 92 Pac. 1082; Snider *v.* Johnson, 25 Or. 328, 35 Pac. 846; Chenoweth *v.* Lewis, 9 Or. 150.

Pennsylvania. — Appeal of Jackson, 8 Atl. 870; Beck's Exrs. *v.* Graybill, 28 Pa. St. 66; Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Jackman *v.* Ringland, 4 Watts & S. 149; Lynch *v.* Cox, 23 Pa. St. 265; German *v.* Gabbold, 3 Binn. 302, 5 Am. Dec. 372; Schrager *v.* Cool, 70 Atl. 889; McGinity *v.* McGinity, 63 Pa. St. 38; Slaymaker *v.* St. John, 5 Watts 27; Lloyd *v.* Woods, 176 Pa. St. 63, 34 Atl. 926; Galbraith *v.* Galbraith, 190 Pa. St. 225, 42 Atl. 683; Lingenfelter *v.* Ritchey, 58 Pa. St. 485; Lloyd *v.* Carter, 17 Pa. St. 216.

Rhode Island. — Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

South Carolina. — Rogers *v.* Rogers,

been paid by the grantee, parol evidence was not admissible to show payment by a third person.[93]

In Louisiana, It Is Held That testimonial proof is not admissible for the purpose of proving that a third person was interposed to receive, or to be invested with, the title to real estate, for the use of, and instead of, the intended vendee, especially where there is no charge of fraud or other ill practice, because the effect of such proof would be to establish title to real estate by parol, contrary to the express provisions of the law.[94]

(B.) To Establish Trust for Third Person. — Though it is expressed in the deed that the consideration was paid by the grantee, yet parol evidence is admissible to show that the consideration was, in fact,

52 S. C. 388, 29 S. E. 812; Catoe *v.* Catoe, 32 S. C. 595, 10 S. E. 1078.

Tennessee. — Pritchard *v.* Wallace, 4 Sneed 405; Smitheal *v.* Gray, 1 Humph. 491, 34 Am. Dec. 664.

Texas. — Carleton *v.* Roberts, 1 Posey Unrep. Cas. 587; Mead *v.* Randolph, 8 Tex. 191; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622.

Utah. — Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192.

Vermont. — Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Pinney *v.* Fellows, 15 Vt. 525.

Virginia. — Borst *v.* Nalle, 28 Gratt. 423; Kane *v.* O'Conners, 78 Va. 76; Bank of U. S. *v.* Carrington, 7 Leigh 566; Jennings *v.* Shacklett, 30 Gratt. 765; Moorman *v.* Arthur, 90 Va. 455, 18 S. E. 869; Miller *v.* Blose, 30 Gratt. 744; Throckmorton *v.* Throckmorton, 91 Va. 42, 22 S. E. 162; Phelps *v.* Seely, 22 Gratt. 573.

West Virginia. — Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329; Hamilton *v.* McKinney, 52 W. Va. 317, 43 S. E. 82; Hardman *v.* Orr, 5 W. Va. 71; Smith *v.* Patton, 12 W. Va. 541; Murry *v.* Sell, 23 W. Va. 475; Bright *v.* Knight, 35 W. Va. 40, 13 S. E. 63; Seiler *v.* Mohn, 37 W. Va. 507, 16 S. E. 496.

Wisconsin. — Rogan *v.* Walker, 1 Wis. 527; Whiting *v.* Gould, 2 Wis. 552.

Although it is essential, where it clearly appears that the conveyance was taken in the name of a third person by the direction of the person who paid the purchase-money, that it should also appear that there was an agreement, made, without any fraudulent intent, to hold the title in trust for the benefit of the person so paying, the trust results from the payment of the purchase-money, or by implication or construction of law upon the whole transaction, rather than from the parol agreement, which is to be regarded as in the nature of an acknowledgment of the trust. Marcilliat *v.* Marcilliat, 125 Ind. 472, 25 N. E. 597.

Where One Acting as Agent of another in the purchase of lands, pays for them with the money of his principal, and takes title in his own name, there is a resulting trust in favor of the principal, and in a controversy between him and the creditors of the agent, he will be entitled to the lands, or their proceeds if they have been sold. Andrews *v.* Jones, 10 Ala. 400. But where the agent uses his own money no trust arises except by virtue of an express agreement, which cannot be proved by parol. Nestal *v.* Schmid, 29 N. J. Eq. 458, *citing* Perry on Trusts, § 135.

93. Groesbeck *v.* Seeley, 13 Mich. 329; Brewster *v.* Power, 10 Paige Ch. (N. Y.) 562. See Pool *v.* Thomas, 10 Ky. L. Rep. 92, 8 S. W. 198. See also Yerkes *v.* Perrin, 71 Mich. 567, 39 N. W. 758.

94. Heirs of Dohan *v.* Dohan, 42 La. Ann. 449, 7 So. 569; Barbin *v.* Gaspard, 15 La. Ann. 539; McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65.

In Fuselier *v.* Fuselier, 5 La. Ann. 132, it was held that when real property is adjudicated to a purchaser at a public sale, and the title made in the name of that purchaser, parol evidence is not admissible to show simulation or an agency to make the

paid by a third person, for the purpose of establishing a resulting trust in favor of such third person,[95] and this is true even after the death of the nominal purchaser.[96]

(C.) To Establish Trust for Grantor. — Where a deed purports to have been given upon a valuable consideration, and the receipt of a consideration is admitted therein, it cannot, in the absence of fraud or mistake, be contradicted by parol evidence for the purpose of raising a resulting trust for the grantor,[97] because such proof is in contravention of the statute of frauds and forbidden by the canon of evidence, which forbids the admission of oral testimony to vary

purchase for the benefit of other coheirs of the purchaser. See also Heiss *v.* Cronan, 12 La. Ann. 213; Linton *v.* Wikoff, 12 La. Ann. 878.

95. *Arkansas.* — Richardson *v.* Taylor, 45 Ark. 472.

California. — Brooks *v.* Union Tr. & R. Co., 146 Cal. 134, 79 Pac. 843; Polk *v.* Boggs, 122 Cal. 114, 54 Pac. 536.

Iowa. — Cooper *v.* Skeel, 14 Iowa 578.

Massachusetts. — Livermore *v.* Aldrich, 5 Cush. 431.

Ohio. — Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

Oregon — Snider *v.* Johnson, 25 Or. 328, 35 Pac. 846.

Pennsylvania. — Galbraith *v.* Galbraith, 190 Pa. St. 225, 42 Atl. 683; Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

Utah. — Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192.

Vermont. — Pinney *v.* Fellows, 15 Vt. 525.

It is no objection that the facts upon which a resulting trust is to be established must be made out by parol proof, even though the recital in the deed that the consideration was paid by the nominal purchaser is thereby contradicted. The facts being proved by any competent evidence, written, verbal or circumstantial, the trust follows by implication of law. Perkins *v.* Nichols, 11 Allen (Mass.) 542.

In Johnson *v.* Deloney, 35 Tex. 42, it is held that a resulting trust not being affected by the statute of frauds, it may be established by parol evidence against the language of the purchase deed, and in spite of a sworn denial by the defendant; early cases to the contrary having been overruled. And though such evidence is to be received with great caution, yet this caution should not be pressed to the degree of excluding the evidence, or impeaching the testimony of the witness who deposes to it.

96. Neil *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746; Bank of U. S. *v.* Carrington, 7 Leigh (Va.) 566; Richardson *v.* Taylor, 45 Ark. 472; Johnson *v.* Deloney, 35 Tex. 42.

97. *California.* — Russ *v.* Nebius, 16 Cal. 350.

Iowa. — Ostenson *v.* Severson, 126 Iowa 197, 101 N. W. 789; Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 461; Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604; Acker *v.* Priest, 92 Iowa 610, 61 N. W. 235.

Michigan. — Connolly *v.* Keating, 102 Mich. 1, 60 N. W. 289; Fisher *v.* Fobes, 22 Mich. 454; McCreary *v.* McCreary, 90 Mich. 478, 51 N. W. 545.

Minnesota. — McCusick *v.* County of Washington, 16 Minn. 172.

Missouri. — Hickman *v.* Hickman, 55 Mo. App. 303; Weiss *v.* Heitkamp, 127 Mo. 23, 29 S. W. 709; Rogers *v.* Ramey, 137 Mo. 598, 39 S. W. 66.

New Hampshire. — Graves *v.* Graves, 29 N. H. 129.

New Jersey. — Holton *v.* Holton (N. J. Eq.), 65 Atl. 481; Aller *v.* Crouter, 64 N. J. Eq. 381, 54 Atl. 426; Hogan *v.* Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644.

New York. — St. John *v.* Benedict, 6 Johns. Ch. 111.

See "Deeds," Vol. IV, p. 196, n. 27.

Where a husband conveyed real estate to his wife and the deed showed on its face that it was the

the effect of a written instrument. But the contrary has been held.[98]

(3.) Admissions and Declarations. — (A.) Of Nominal Purchaser or Trustee. — Admissions or declarations of the nominal purchaser, that he paid for the land with the money of another or others, are evidence to establish a resulting trust in favor of the latter.[99] But such evidence can affect only the title held by the declarant at the time the admission was made.[1] Whether the nominal purchaser be still living or is dead, is immaterial, so far as the competency of such evidence is concerned.[2] But the declarations of one holding

intention of the husband to convey the property therein described to the wife as her sole and separate property, it was held that parol evidence was not admissible for the purpose of imposing upon the wife a parol trust in relation to such property. Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. 825.

In Annis *v.* Wilson, 15 Colo. 236, 25 Pac. 304, the court says: "Deeds absolute on their face, . . . cannot be overthrown on the allegation of the grantor, in a suit to recover the property, that he did not intend to do what he unquestionably did do. There are many cases in the books where the grantor has been allowed to show by parol his intention in reserving a resulting trust to himself, but an examination of them will show that, in every instance, parol evidence was limited to the inquiry of the completion of the conveyance by the delivery or record of the deed to render it operative as a conveyance, and the grantor has been allowed to show non-delivery of the deed, or an intention to retain its possession to defeat its operation; but I can find no case where the grantor was allowed to assert by parol an intention prior to or at the time of the conveyance contradicting his intentions as expressed in the deed and abrogating it. Several cases have arisen where the father purchased and paid for land, and took the title in the name of the children, and the question was whether there was a resulting trust to the father, or whether it was an advancement to the children, and the grantor was made to show by clear and satisfactory evidence that it was intended as a trust and not intended as an advancement. But where the father having the title in himself conveys directly to a child, no case can be found where he was allowed by parol to show that he intended a resulting trust to himself."

98. Ryan *v.* O'Connor, 41 Ohio St. 368, *affirming* 6 Ohio Dec. 1095.

99. *United States.* — Jenkins *v.* Eldredge, 3 Story 181, 13 Fed. Cas. No. 7,266; Wyman *v.* Babcock, 2 Curt. 386, 30 Fed. Cas. No. 18,113; *affirmed sub nom* Babcock *v.* Wyman, 60 U. S. 299.

Illinois. — Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Corder *v.* Corder, 124 Ill. 229, 16 N. E. 107.

Indiana. — Baker *v.* Leathers, 3 Ind. 558.

Kentucky. — Williams *v.* Williams, 25 Ky. L. R. 836, 76 S. W. 413.

Missouri. — Ringo *v.* Richardson, 53 Mo. 385; Johnson *v.* Quarles, 46 Mo. 423; Garrett *v.* Garrett, 171 Mo. 155, 71 S. W. 153.

New Jersey. — Midmer *v.* Midmer, 26 N. J. Eq. 299.

New York. — Malin *v.* Malin, 1 Wend. 625.

Pennsylvania. — Lloyd *v.* Carter, 17 Pa. St. 216.

Tennessee. — Pillow *v.* Thomas, 1 Baxt. 120; Pritchard *v.* Wallace, 4 Sneed 405.

Texas. — Johnson *v.* Deloney, 35 Tex. 42.

Vermont. — Pinney *v.* Fellows, 15 Vt. 525; Drew *v.* Corliss, 65 Vt. 650, 27 Atl. 613.

1. Where the nominal grantee has executed a mortgage on the land, his subsequent declarations are not admissible against the mortgagee to show a resulting trust. Tilford *v.* Torrey, 53 Ala. 120.

2. Midmer *v.* Midmer, 26 N. J. Eq. 299. See Donaghe *v.* Tams, 81 Va. 132.

In Johnson *v.* Deloney, 35 Tex.

legal title to real estate, that another has no interest therein, are not admissible in evidence.[3]

(B.) Of Grantor. — The declarations of the grantor of land, made out of the presence of the grantee, being hearsay, are not competent evidence to establish a resulting trust against him.[4] Declarations of a grantor made some time after a conveyance are likewise not admissible to establish a trust.[5]

(C.) Of Cestui Que Trust. — The title or interest of a party in land in the possession of another claiming under a conveyance, cannot be established or shown by the parol declarations of the former, made when such other person is not present. Such declarations may be used against the person so making them, but not in his favor, or in favor of one claiming through him.[6]

(4.) To Rebut the Presumption of a Trust. — The presumption of a trust arising from the fact that the consideration for the purchase was paid by one while the land was conveyed to another, may be overcome or disproved by any competent evidence, oral or written, direct or circumstantial, showing the circumstances of the transaction and the expressed or probable intention of the parties.[7]

42, it was held that where the plaintiff had apparently waited until the death of the nominal purchaser before asserting his trust, this was a circumstance entitled to great weight in determining the existence of the trust.

3. Reese *v.* Murnan, 5 Wash. 373, 31 Pac. 1027.

4. Francis *v.* Roades, 146 Ill. 635, 35 N. E. 232.

5. Crow *v.* Watkins, 48 Ark. 169, 2 S. W. 659.

Declarations of a husband, made more than two years after a conveyance to his wife, are not admissible for the purpose of affecting the legal title conveyed to the wife, and of establishing a resulting trust in the husband. Mutual Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

6. Corder *v.* Corder, 124 Ill. 229, 16 N. E. 107.

7. *United States.* — Clark *v.* Burnham, 2 Story 1, 5 Fed. Cas. No. 2,816.

California. — Bayles *v.* Baxter, 22 Cal. 575.

Connecticut. — Ward *v.* Ward, 59 Conn. 188, 22 Atl. 149.

Illinois. — Taylor *v.* Taylor, 9 Ill. 303.

Massachusetts. — Livermore *v.* Aldrich, 5 Cush. 431.

Minnesota. — Irvine *v.* Marshall, 7 Minn. 286.

New Hampshire. — Page *v.* Page, 8 N. H. 187 (parol evidence); Blasdel *v.* Locke, 52 N. H. 238 (parol evidence).

New Jersey. — Warren *v.* Tynan, 54 N. J. Eq. 402, 34 Atl. 1065; Peer *v.* Peer, 11 N. J. Eq. 432 (parol evidence); Smith *v.* Howell, 11 N. J. Eq. 349.

New York. — Botsford *v.* Burr, 2 Johns. Ch. 405; Jackson *v.* Feller, 2 Wend. 465.

North Carolina. — Summers *v.* Moore, 113 N. C. 394, 18 S. E. 712.

Pennsylvania. — Warren *v.* Steer, 112 Pa. St. 634, 5 Atl. 4; Edwards *v.* Edwards, 39 Pa. St. 369; Zimmerman *v.* Barber, 176 Pa. St. 1, 34 Atl. 1002.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9, 51 Am. Dec. 690 (parol evidence).

Texas. — Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622 (parol evidence).

West Virginia. — Hamilton *v.* Steele, 22 W. Va. 348; Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837.

Wisconsin — Whiting *v.* Gould, 2 Wis. 552.

The defendant may show that the purchase price was advanced by a third person and not the plaintiff. Kelly *v.* Kelly, 126 Ill. 550, 18 N. E. 785.

(5.) To Rebut Presumption of Advancement. — As before stated where a parent, husband or wife, purchases real estate in the name of a child, wife or husband, as the case may be, a presumption arises that an advancement, settlement or gift was intended. Since this is merely a *prima facie* presumption, extrinsic evidence, either written or oral, is admissible on behalf of the parent, husband, or wife paying the consideration to rebut the presumption of an advancement, settlement or gift and to show that a trust was intended.[8]

In Phillips *v.* Swenson, 16 S. D. 357, 92 N. W. 1065, which was an action to compel a conveyance of land pursuant to an oral contract by which the defendant advanced the purchase price and took the title agreeing to convey to plaintiff on payment of the amount advanced, with interest, testimony that the parties thereafter had an accounting and settlement, at which defendant paid to the plaintiff a balance found due, and plaintiff relinquished all claim to the land, was held competent, the statute of frauds relating to realty having no application to such a case. "It is clear that whatever rights the plaintiff had acquired in this property were in the nature of a trust that was established by parol evidence only. It is well settled that parol evidence is admissible to rebut a resulting trust. If the plaintiff sets up an equity founded on parol proof, it may be rebutted by or discharged by parol proof."

Under the Arkansas statute the fact that a married woman permits her husband to have the custody and management of her separate property raises a presumption that he is acting as her agent or trustee, which may be rebutted by evidence showing a sale or gift to him. It is not necessary that the evidence show a formal gift, but a gift may be inferred where it appears that money was received by the husband and used with the knowledge and consent of the wife in such manner as to preclude the idea or inference that she expected him to account for the same as her agent or trustee. Wyatt *v.* Scott, 84 Ark. 355, 105 S. W. 871.

Fraudulent Purpose. — Such presumption may be rebutted by proof that the title was put in the grantee for the purpose of protecting the property from the creditors of him who furnished the purchase-money. Baldwin *v.* Campfield, 8 N. J. Eq. 891. See also Hutchins *v.* Heywood, 50 N. H. 491.

8. *Illinois.* — Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Maxwell *v.* Maxwell, 109 Ill. 588.

Iowa. — Hoon *v.* Hoon, 126 Iowa 391, 102 N. W. 105.

Maryland. — Mutual Fire Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

Massachusetts. — Perkins *v.* Nichols, 11 Allen 542.

Missouri. — Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395; Curd *v.* Brown, 148 Mo. 82, 49 S. W. 990.

New Jersey. — Peer *v.* Peer, 11 N. J. Eq. 432.

North Carolina. — Flanner *v.* Butler, 131 N. C. 155, 42 S. E. 547.

Oregon. — DeRoboam *v.* Schmidtlin, 92 Pac. 1082.

Texas. — Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. 825; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622.

Vermont. — Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Wallace *v.* Bowen, 28 Vt. 638.

West Virginia. — McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816; Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837.

Such presumption may be rebutted by parol testimony if the testimony is clear and satisfactory, or by proof of such acts and circumstances as clearly show that the intention was not to make an advancement. Deuter *v.* Deuter, 214 Ill. 308, 73 N. E. 453.

This presumption may be rebutted by evidence of antecedent or contemporaneous facts or circumstances connected with the purchase, or so soon thereafter as to be fairly considered a part of the transaction itself. Smith *v.* Smith, 144 Ill. 299,

An Exception to the Above Arises where a child in whose name property was purchased was an idiot; in such case it has been held that evidence is inadmissible to rebut the presumption of an advancement.[9]

d. *Weight and Sufficiency of Evidence.* — **(1.) In General.** — To establish and declare a resulting trust in respect to property conveyed by deed, it is a well settled principle that all the essential facts to entitle the plaintiff to relief must be made out and established in the most clear and decided manner and to the entire satisfaction of the court.[10]

33 N. E. 35. See also Peer *v.* Peer, 11 N. J. Eq. 432.

9. In Cartwright *v.* Wise, 14 Ill. 417, where a parent with his own money entered a tract of land in the name of his son, who was an idiot, the court said: "The question arises whether a father who purchases land with his own money, and takes the title to his idiot son, can file a bill for a resulting trust, and claim that he did not intend it for the benefit of his son, but for his own use. We are prepared to say that such a bill cannot be sustained. It must be held to be an advancement in favor of the child. The policy of the law requires that such an advancement so made to such a party should be held to be irrevocable by the father."

10. *Alabama.* — Lehman *v.* Lewis, 62 Ala. 129; Dooly *v.* Pinson, 145 Ala. 659, 39 So. 664; Bailey *v.* Irwin, 72 Ala. 505; Corprew *v.* Arthur, 15 Ala. 525; Kimbrough *v.* Nelms, 104 Ala. 554, 16 So. 619; Burke *v.* Andrews, 91 Ala. 360, 8 So. 369; Carter *v.* Challen, 83 Ala. 135, 3 So. 313; McVey *v.* Parker, 64 Ala. 493; Bibb *v.* Hunter, 79 Ala. 351.

Arkansas. — Beardsley *v.* Nashville, 64 Ark. 240, 41 S. W. 853; Crow *v.* Watkins, 48 Ark. 169, 2 S. W. 659; Leggett *v.* Sutton, 18 S. W. 125.

California. — Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152.

Colorado. — First Nat. Bank *v.* Campbell, 2 Colo. App. 271, 30 Pac. 357; Warren *v.* Adams, 19 Colo. 515, 36 Pac. 604.

Idaho. — Rice *v.* Rigley, 7 Idaho 115, 61 Pac. 290.

Illinois. — Lurie *v.* Sabath, 70 N. E. 323, *affirming* 108 Ill. App. 397; Furber *v.* Page, 143 Ill. 622, 32 N. E. 444; Francis *v.* Roades, 146 Ill. 635, 35 N. E. 232; Towle *v.* Wadsworth, 147 Ill. 80, 30 N. E. 602, 35 N. E. 73; Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298; Heneke *v.* Floring, 114 Ill. 554, 2 N. E. 529.

Iowa. — Shepard *v.* Pratt, 32 Iowa 296; Trout *v.* Trout, 44 Iowa 471; MacGregor *v.* Gardner, 14 Iowa 326; Nelson *v.* Worrall, 20 Iowa 469; Carr *v.* Craig, 116 N. W. 720.

Kentucky. — Pool *v.* Thomas, 10 Ky. L. Rep. 92, 8 S. W. 198.

Maryland. — Kennedy *v.* McCann, 101 Md. 643, 61 Atl. 625.

Missouri. — Adams *v.* Burns, 96 Mo. 361, 10 S. W. 26; Johnson *v.* Quarles, 46 Mo. 423; Allen *v.* Logan, 96 Mo. 591, 10 S. W. 149; Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056; King *v.* Isley, 116 Mo. 155, 22 S. W. 634; McFarland *v.* LaForce, 119 Mo. 585, 25 S. W. 530, 27 S. W. 1100; Plumb *v.* Cooper, 121 Mo. 668, 26 S. W. 678; Sharp *v.* Berry, 60 Mo. 575; Bradley *v.* Bradley, 119 Mo. 58, 24 S. W. 757; Darling *v.* Potts, 118 Mo. 506, 24 S. W. 461; Ringo *v.* Richardson, 53 Mo. 385; Forrester *v.* Scoville, 51 Mo. 268; Gillespie *v.* Stone, 70 Mo. 505.

Nebraska. — Veeder *v.* McKinley-L. L. & T. Co., 61 Neb. 892, 86 N. W. 982.

New Jersey. — Midmer *v.* Midmer, 26 N. J. Eq. 299; Tuite *v.* Tuite (N. J. Eq.), 66 Atl. 1090; Parker *v.* Snyder, 31 N. J. Eq. 164; Lowry *v.* Tivy, 69 Atl. 172; Jones *v.* Beekman (N. J. Eq.), 47 Atl. 71.

Ohio. — Duvelmeyer *v.* Duvelmeyer, 7 Ohio Dec. 426.

Oregon. — DeRoboam *v.* Schmidtlin, 92 Pac. 1082.

Pennsylvania. — In re Lau's Es-

Where the Evidence Is Doubtful, and not entirely clear and satisfactory, or is capable of reasonable explanation upon theories other

tate, 176 Pa. St. 100, 34 Atl. 969; Hay *v.* Martin, 14 Atl. 333.

Rhode Island. — Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

South Carolina. — Linnel *v.* Hudson, 59 S. C. 283, 37 S. E. 927; Feaster *v.* Kendall, 61 S. E. 200.

Tennessee. — Hall *v.* Fowlkes, 9 Heisk. 745; McCammon *v.* Pettitt, 3 Sneed 242; Pillow *v.* Thomas, 1 Baxt. 120.

Virginia. — Throckmorton *v.* Throckmorton, 91 Va. 42, 22 S. E. 162.

Washington. — Bluett *v.* Wilce, 43 Wash. 492, 86 Pac. 853.

West Virginia. — Smith *v.* Patton, 12 W. Va. 541; Shaffer *v.* Fetty, 30 W. Va. 248, 4 S. E. 278.

Rationale. — Lord Nottingham in Cook *v.* Fountain, 3 Swanst. 585, 36 Eng. Reprint 984, said: "There is one good, general, and infallible rule that goes to both these kinds of trusts (resulting and constructive); it is such a general rule as never deceives; a general rule to which there is no exception; and that is this; the law never implies, the court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico.*" See also Corder *v.* Corder, 124 Ill. 229, 16 N. E. 107.

In Johnson *v.* Quarles, 46 Mo. 423, per Bliss, J., it is said: "The insecurity of titles and the temptation to perjury, among the chief reasons demanding that contracts affecting lands should be made in writing, also imperatively require that trusts arising by operation of law should not be declared upon any doubtful evidence, or even upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon."

To establish a resulting trust the evidence must be "clear, certain and conclusive" (Mullen *v.* McKim, 22 Colo. 468, 45 Pac. 416); "so cogent as to leave no room for reasonable doubt in the mind of the chancellor." Rogers *v.* Rogers, 87 Mo. 257. "There should be no room for reasonable doubt as to the facts relied upon to establish the trust." Adams *v.* Burns, 96 Mo. 361, 10 S. W. 26. "The most convincing and irrefragable proof is necessary." Holder *v.* Nunnelly, 2 Coldw. (Tenn.) 288. "Proof must be very clear." Miller *v.* Blose, 30 Gratt. (Va.) 744. "Must be proved with great clearness and certainty." Sullivan *v.* Sullivan, 86 Tenn. 376, 6 S. W. 876. "Clear and cogent proof carrying conviction beyond a reasonable doubt." Crawford *v.* Jones, 163 Mo. 577, 63 S. W. 838. "So clear, strong and unequivocal as to banish every reasonable doubt from the mind of the chancellor." Smith *v.* Smith, 201 Mo. 533, 100 S. W. 579; Reed *v.* Sperry, 193 Mo. 167, 91 S. W. 62; Reed *v.* Painter, 129 Mo. 674, 31 S. W. 919. "So clear, precise and convincing a character as to satisfy the conscience of the chancellor." Laning *v.* Darling, 209 Pa. St. 254, 58 Atl. 477; Olinger *v.* Shultz, 183 Pa. St. 469, 38 Atl. 1024; Braun *v.* First Ger. Church, 198 Pa. St. 152, 47 Atl. 963. "So clear, cogent and impelling as to exclude every reasonable doubt from the chancellor's mind." Bunel *v.* Nester, 203 Mo. 429, 101 S. W. 69. "Clear and cogent, carrying conviction beyond a reasonable doubt." Reed *v.* Sperry, 193 Mo. 167, 91 S. W. 62. "Clear and convicing." Buddensiek *v.* Lipman, 58 N. J. Eq. 334, 43 Atl. 664; Feaster *v.* Kendall (S. C.), 61 S. E. 200. "Full, clear and convincing." Foster *v.* Beidler, 79 Ark. 418, 96 S. W. 175. "Full, clear and satisfactory." Bright *v.* Knight, 35 W. Va. 40, 13 S. E. 63; McVey *v.* Parker, 64 Ala. 493. "Clear, satisfactory and convincing." Harris *v.* Harris, 136 Cal. 379, 69 Pac. 23; McClenahan *v.* Stevenson, 118 Iowa 106, 91 N. W. 925; Sing

than that of the existence of a resulting trust, such trust will not be held to be sufficiently established to entitle the beneficiary to a decree declaring and enforcing the trust.[11]

After the Lapse of Many Years the evidence to establish the resulting trust must be clear, strong, unequivocal, unmistakable, and of the most satisfactory character, since the doctrine of laches is here applicable.[12]

Parol Evidence. — To establish a resulting trust in lands in opposition to the muniments of title, the parol evidence of the understand-

You *v.* Wong Free Lee, 16 S. D. 383, 92 N. W. 1073; Emfinger *v.* Emfinger, 137 Ala. 337, 34 So. 346. "Most clear and decided manner, and to the entire satisfaction of the court." McDonnell *v.* Milholland, 48 Md. 540. "Clear, distinct, satisfactory and direct." Willis *v.* Robertson, 121 Iowa 380, 96 N. W. 900. "Clear, definite and free from doubt." Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246. "Clear, strong and unequivocal." Owensby *v.* Chewning, 171 Mo. 226, 71 S. W. 122. "Clear, strong, unequivocal and unmistakable." Cline *v.* Cline, 204 Ill. 130, 68 N. E. 545; Pickler *v.* Pickler, 180 Ill. 168, 54 N. E. 311. "Clear, convincing and unambiguous testimony." Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152. "Explicit, decisive, and leave the existence of no essential element to conjecture or to remote or uncertain inference." Cunningham *v.* Cunningham, 125 Iowa 681, 101 N. W. 470. So "clear, positive, unequivocal and convincing as to leave no reasonable doubt in the mind of the chancellor." Brinkman *v.* Sunken, 174 Mo. 709, 74 S. W. 963. "Evidence of such trust must be clear, strong and unequivocal, and so definite and positive as to leave no room for doubt in the mind of the chancellor." Curd *v.* Brown, 148 Mo. 82, 49 S. W. 990; Mulock *v.* Mulock, 156 Mo. 431, 57 S. W. 122; McFarland *v.* LaForce, 119 Mo. 585, 25 S. W. 530, 27 S. W. 1100; King *v.* Isley, 116 Mo. 155, 22 S. W. 634.

11. *Alabama.* — Lehman *v.* Lewis, 62 Ala. 129; Dooly *v.* Pinson, 145 Ala. 659, 39 So. 664.

Illinois. — Stambaugh *v.* Lung, 232 Ill. 373, 83 N. E. 922; McGinnis *v.* Jacobs, 147 Ill. 24, 35 N. E. 214; Strong *v.* Messinger, 148 Ill. 431, 36 N. E. 617; Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756; Cline *v.* Cline, 204 Ill. 130, 68 N. E. 545; Dick *v.* Dick, 172 Ill. 578, 50 N. E. 142; Pickler *v.* Pickler, 180 Ill. 168, 54 N. E. 311.

Indiana. — Hutton *v.* Cunningham, 28 Ind. App. 295, 62 N. E. 644.

New Jersey. — Buddensiek *v.* Lipman, 58 N. J. Eq. 334, 43 Atl. 664; Lowry *v.* Tivy, 69 Atl. 172.

Oregon. — DeRoboam *v.* Schmidtlin, 92 Pac. 1082.

South Carolina. — Feaster *v.* Kendall, 61 S. E. 200.

Texas. — Goodrich *v.* Hicks, 19 Tex. Civ. App. 528, 48 S. W. 798.

Virginia. — Throckmorton *v.* Throckmorton, 91 Va. 42, 22 S. E. 162.

12. Strong *v.* Messinger, 148 Ill. 431, 36 N. E. 617; Collier *v.* Collier, 30 Ind. 32; Trout *v.* Trout, 44 Iowa 471; Wilson *v.* Campbell, 14 Ky. L. Rep. 512, 20 S. W. 609; Carey *v.* Callan's Exr., 6 B. Mon. (Ky.) 44; Byers *v.* Ferner, 216 Pa. St. 233, 65 Atl. 620.

The courts will not enforce resulting trusts where the evidence shows a long lapse of time or laches on the part of the supposed *cestui que trust,* especially when the evidence shows that the supposed nominal purchaser had occupied and enjoyed the estate. Hamilton *v.* Hamilton, 231 Ill. 128, 83 N. E. 125.

When a resulting trust is set up years after its alleged creation and long after the parties thereto have deceased, the proof should be received with the greatest caution and the relief asked should be granted only upon the most satisfactory evidence. And especially so when there is no circumstance explaining the delay or justifying the party in sleep-

ing of the parties ought to be very clear and distinct, and should leave no doubt regarding the precise terms of the agreement.[13]

(2.) Payment and Ownership of Consideration. — (A.) IN GENERAL. As a rule proof of payment alone is sufficient to raise a presumption

ing on his rights. Nelson *v.* Worrall, 20 Iowa 469.

13. *United States.* — Lauglin *v.* Mitchell, 14 Fed. 382.

Alabama. — Jordan *v.* Garner, 101 Ala. 411, 13 So. 678; Lehman *v.* Lewis, 62 Ala. 129; Larkins *v.* Rhodes, 5 Port. 195; Lee *v.* Browder, 51 Ala. 288; Reynolds *v.* Caldwell, 80 Ala. 232.

Arkansas. — Crow *v.* Watkins, 48 Ark. 169, 2 S. W. 659.

California. — Millard *v.* Hathaway, 27 Cal. 119.

Colorado. — Lundy *v.* Hanson, 16 Colo. 267, 26 Pac. 816.

Florida. — Lofton *v.* Sterrett, 23 Fla. 565, 2 So. 837.

Georgia. — Morrison *v.* Ball, 54 Ga. 212.

Illinois. — Enos *v.* Hunter, 9 Ill. 211.

Indiana. — Faysler *v.* Jones, 7 Ind. 277; Parmlee *v.* Sloan, 37 Ind. 469.

Iowa. — Sunderland *v.* Sunderland, 19 Iowa 325; Childs *v.* Griswold, 19 Iowa 362; Noel *v.* Noel, 1 Iowa 423; Kincell *v.* Feldman, 22 Iowa 363; Corbit *v.* Smith, 7 Iowa 60 (parol testimony should be clear, and even then should be received with great caution; Richardson *v.* Haney, 76 Iowa 101, 40 N. W. 115; Murphy *v.* Hanscome, 76 Iowa 192, 40 N. W. 717; Bergman *v.* Guthrie, 89 Iowa 290, 56 N. W. 502.

Maine. — Whitmore *v.* Learned, 70 Me. 276; Baker *v.* Vining, 30 Me. 121, 1 Am. Rep. 617.

Maryland. — Witts *v.* Horney, 59 Md. 584; Greer *v.* Baughman, 13 Md. 257; Sewell *v.* Baxter, 2 Md. Ch. 447; Faringer *v.* Ramsay, 4 Md. Ch. 33.

Michigan. — Van Wert *v.* Chidester, 31 Mich. 207.

Mississippi. — Dismukes *v.* Terry, 1 Miss. 197.

Missouri. — Philpot *v.* Penn, 91 Mo. 38, 3 S. W. 386; Ringo *v.* Richardson, 53 Mo. 385.

Nebraska. — Falsken *v.* Harkendorf, 11 Neb. 82, 17 N. W. 749.

Nevada. — Frederick *v.* Hass, 5 Nev. 389.

New Hampshire. — Page *v.* Page, 8 N. H. 187; Tunnard *v.* Littell, 23 N. J. Eq. 264; Baldwin *v.* Campfield, 8 N. J. Eq. 891.

New York. — Mason *v.* Libbey, 19 Hun 119, *affirming* 54 How. Pr. 104; Harrison *v.* McMennomy, 2 Edw. Ch. 251.

North Carolina. — Bank *v.* Gilmer, 117 N. C. 416, 23 S. E. 333.

Oregon. — Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246.

Pennsylvania. — Appeal of Jackson, 8 Atl. 870.

Rhode Island. — Reynolds *v.* Blaisdell, 23 R. I. 16, 49 Atl. 42.

Tennessee. — Sandford *v.* Weeden, 2 Heisk. 71; Hardison *v.* Billington, 14 Lea 346.

Utah. — Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192.

Virginia. — Throckmorton *v.* Throckmorton, 91 Va. 42, 22 S. E. 162; Jennings *v.* Shacklett, 30 Gratt. 765; Miller *v.* Blose, 30 Gratt. 744; Woodward *v.* Sibert, 82 Va. 441; Bank of U. S. *v.* Carrington, 7 Leigh 566; Sinclair *v.* Sinclair, 79 Va. 40; Kane *v.* O'Conners, 78 Va. 76; Donaghe *v.* Tams, 81 Va. 132.

As Indicating the Weight of Evidence necessary to establish a resulting trust by parol, the courts have expressed themselves in various manners. It has been said that the evidence should be "so clear, definite and probative as to leave no ground for reasonable doubt." Bradley *v.* Bradley, 119 Mo. 58, 24 S. W. 757. "Evidence must be clear and explicit" (Jennings *v.* Shacklett, 30 Gratt. (Va.) 765); "clear, cogent and explicit" (Moorman *v.* Arthur, 90 Va. 455, 18 S. E. 869); "clear, emphatic and convincing" (Plumb *v.* Cooper, 121 Mo. 668, 26 S. W. 678); "clear, strong and convincing" (Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753); "clear, strong, unequivocal and unmistak-

of a resulting trust;[14] and when a trust is sought to be raised as a resulting trust from the payment of the purchase money, the proof must be very clear of the ownership and the payment of the purchase money at the time of the purchase by the person in whose favor a trust by implication of law is sought to be raised; the fact must be distinctly established by satisfactory evidence.[15]

(B.) When Proof of Payment Not Sufficient. — Proof of payment alone will not raise a presumption of an intention to create a resulting trust, where the title is taken in the name of a wife or child, or

able" (Bell *v.* Edwards, 78 S. C. 490, 59 S. E. 535; Catoe *v.* Catoe, 32 S. C. 595, 10 S. E. 1078; Logan *v.* Johnson, 72 Miss. 185, 16 So. 231; Hutton *v.* Cunningham, 28 Ind. App. 295, 62 N. E. 644); "clear, convincing and satisfactory" (Carter *v.* Carter, 14 N. D. 66, 103 N. W. 425); "clear, full and convincing" (Mason *v.* Harkins, 82 Ark. 569, 102 S. W. 228); "clear, full and satisfactory" (Gilbert Bros. & Co. *v.* Lawrence Bros., 56 W. Va. 281, 49 S. E. 155; Capehart *v.* Capehart, 2 Phila. (Pa.) 134); "clear, unequivocal and convincing" (Columbia Nat. Bank *v.* Baldwin, 64 Neb. 732, 90 N. W. 890; Doane *v.* Dunham, 64 Neb. 135, 89 N. W. 640); "full, positive and satisfactory" (Cunio *v.* Burland, 1 Posey Unrep. Cas. (Tex.) 469); "full, clear and convincing." Snider *v.* Johnson, 25 Or. 328, 35 Pac. 846.

14. *Alabama.* — Butts *v.* Cooper, 44 So. 616; Winston *v.* Mitchell, 87 Ala. 395, 5 So. 741; Milner *v.* Stanford, 102 Ala. 277, 14 So. 644; Bibb *v.* Hunter, 79 Ala. 351.

Arizona. — Scribner *v.* Meade, 85 Pac. 477.

California. — Roberts *v.* Ware, 40 Cal. 634; Mattern *v.* Canavan, 3 Cal. App. 493, 86 Pac. 618.

Colorado. — First Nat. Bank *v.* Campbell, 2 Colo. App. 271, 30 Pac. 357.

District of Columbia. — Long *v.* Scott, 24 App. D. C. 1.

Idaho. — Whitmer *v.* Schenk, 11 Idaho 702, 83 Pac. 775.

Illinois. — Horn *v.* Ingraham, 125 Ill. 198, 16 N. E. 868; Remington *v.* Campbell, 60 Ill. 516; Walter *v.* Klock, 55 Ill. 362; Greene *v.* Cook, 29 Ill. 186; Pickler *v.* Pickler, 180 Ill. 168, 54 N. E. 311.

Maine. — Baker *v.* Vining, 30 Me. 121, 1 Am. Rep. 617; Dudley *v.* Bachelder, 53 Me. 403.

Massachusetts. — Fickett *v.* Durham, 109 Mass. 419; Livermore *v.* Aldrich, 5 Cush. 431.

Michigan. — Wright *v.* King, Harr. Ch. 12.

Mississippi. — Gibson *v.* Foote, 40 Miss. 788.

Missouri. — Shaw *v.* Shaw, 86 Mo. 594.

Nebraska. — Norton *v.* Brink, 75 Neb. 575, 110 N. W. 669, *overruling* former opinion 75 Neb. 566, 106 N. W. 668.

New Jersey. — Tunnard *v.* Littell, 23 N. J. Eq. 264; Thalman *v.* Canon, 24 N. J. Eq. 127.

New York. — White *v.* Carpenter, 2 Paige Ch. 217; Getman *v.* Getman, 1 Barb. Ch. 499.

North Dakota. — Currie *v.* Look, 14 N. D. 482, 106 N. W. 131.

Oregon. — Sloan *v.* Woodward, 25 Or. 223, 35 Pac. 450.

Pennsylvania. — Thompson's Appeal, 22 Pa. St. 16; Lynch *v.* Cox, 23 Pa. St. 265; Galbraith *v.* Galbraith, 190 Pa. St. 225, 42 Atl. 683.

South Carolina. — Miller *v.* Saxton, 75 S. C. 237, 55 S. E. 310; Crawford *v.* Crawford, 77 S. C. 205, 57 S. E. 837.

South Dakota. — Graham *v.* Selbie, 8 S. D. 604, 67 N. W. 831.

Texas. — Pearce *v.* Dyess (Tex. Civ. App.), 101 S. W. 549; Caldwell *v.* Bryan, 20 Tex. Civ. App. 168, 49 S. W. 240; O'Connor *v.* Vineyard, 91 Tex. 488, 44 S. W. 485, *reversing* 43 S. W. 55.

15. *England.* — Willis *v.* Willis, 2 Aik. 71, 26 Eng. Reprint 443.

United States. — Levi *v.* Evans, 57 Fed. 677, 6 C. C. A. 500.

Alabama. — Holloway *v.* Wilkerson, 150 Ala. 297, 43 So. 731; Jordan

of one to whom the person paying the purchase money stands *in loco parentis;* the presumption being in such case rather that the payment is intended as a donation or advancement.[16]

(C.) Payment of Part of Consideration. — A trust will not result to one who pays or furnishes a part only of the purchase money of

v. Garner, 101 Ala. 411, 13 So. 678; Taliaferro *v.* Taliaferro, 6 Ala. 404.

Illinois. — Dick *v.* Dick, 172 Ill. 578, 50 N. E. 142; Strong *v.* Messinger, 148 Ill. 431, 36 N. E. 617.

Indiana. — Pearson *v.* Pearson, 125 Ind. 341, 25 N. E. 342; Hutton *v.* Cunningham, 28 Ind. App. 295, 62 N. E. 644.

Iowa. — Kincell *v.* Feldman, 22 Iowa 363; Olive *v.* Dougherty, 3 G. Gr. 371.

Maine. — Baker *v.* Vining, 30 Me. 121, 1 Am. Rep. 617; Gerry *v.* Stimson, 60 Me. 186; Dudley *v.* Bachelder, 53 Me. 403; Buck *v.* Pike, 11 Me. 9.

Maryland. — Johns *v.* Carroll, 69 Atl. 36; Brawner *v.* Staup, 21 Md. 328.

Massachusetts. — Kendall *v.* Mann, 11 Allen 15.

Michigan. — Beebe *v.* Knapp, 28 Mich. 53.

Mississippi. — Logan *v.* Johnson, 72 Miss. 185, 16 So. 231.

Missouri. — Garrett *v.* Garrett, 171 Mo. 155, 71 S. W. 153; Reed *v.* Sperry, 193 Mo. 167, 91 S. W. 62.

Nevada. — White *v.* Sheldon, 4 Nev. 280.

New Jersey. — McKeown *v.* McKeown, 33 N. J. Eq. 384, *affirmed*, 34 N. J. Eq. 560; Graham *v.* Spence (N. J. Eq.), 63 Atl. 344; Cutler *v.* Tuttle, 19 N. J. Eq. 549.

New York. — Boyd *v.* McLean, 1 Johns. Ch. 582; Mason *v.* Libbey, 19 Hun 119, *affirming* 54 How. Pr. 104; Steere *v.* Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256; Malin *v.* Malin, 1 Wend. 625; Jackson *v.* Bateman, 2 Wend. 570.

Oregon. — Oregon Lumb. Co. *v.* Jones, 36 Or. 80, 58 Pac. 769.

Pennsylvania. — *In re* Cornman's Estate, 197 Pa. St. 125, 46 Atl. 940; Wolff's Appeal, 123 Pa. St. 438, 16 Atl. 470; Byers *v.* Ferner, 216 Pa. St. 233, 65 Atl. 620; Crawford *v.* Thompson, 142 Pa. St. 551, 21 Atl. 994.

South Carolina. — Bell *v.* Edwards, 78 S. C. 490, 59 S. E. 535; Catoe *v.* Catoe, 32 S. C. 595, 10 S. E. 1078.

South Dakota. — Graham *v.* Selbie, 8 S. D. 604, 67 N. W. 831.

Virginia. — Throckmorton *v.* Throckmorton, 91 Va. 42, 22 S. E. 162.

The money used must be demonstrated to have been the money of the party claiming the title. It must have been his at the very time of the purchase, and must have been used for that express object. Its identity must be traceable. First Nat. Bank *v.* Campbell, 2 Colo. App. 271, 30 Pac. 357.

That a husband used the funds of his wife in the purchase of real estate will not be inferred from the fact that he had in his hands enough of her money to make the purchase. Keith *v.* Miller, 174 Ill. 64, 51 N. E. 161. See also Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298.

Evidence That Payment Was Made on Cestui Que Account Not Sufficient. — The foundation of a resulting trust being the payment of the consideration price by the person claiming to be the beneficial owner, if the party who sets it up has made no payment, he cannot show by parol evidence that the purchase was made on his account, or for his benefit. There must be something more in the transaction than the breach of a parol agreement. Bibb *v.* Hunter, 79 Ala. 351. See also Taylor *v.* Miles, 19 Or. 550, 25 Pac. 143. A trust in favor of a wife, in lands purchased by her husband in his own name, cannot be established by oral evidence as to his intention to hold the title in trust for her. Shelby *v.* Tardy, 84 Ala. 327, 4 So. 276. To the same effect, see Johnson *v.* First Nat. Bank (Tex. Civ. App.), 40 S. W. 334.

16. Waterman *v.* Seeley, 28 Mich. 77; Miller *v.* Blose, 30 Gratt. (Va.)

land conveyed to another, unless it appears from the evidence that he paid some definite amount or some definite part of the whole consideration, as one-half, one-third, or the like.[17] And further it must be precisely shown what amount constituted the whole consideration for the purchase.[18]

(D.) Impoverished Circumstances of Grantee as Showing Non-Payment. — In case of a voluntary deed importing a consideration upon its face and for the beneficial use of the grantee, made deliberately, without fraud, mistake or connivance, evidence that the grantee is in mean circumstances and not able to pay the consideration, is not in itself sufficient evidence to show a trust in the grantee;[19] but in connection with other circumstances such evidence is sufficient.[20]

(3.) To Rebut Presumption of Ownership. — Where the legal title rests in one person, to establish a resulting trust for the benefit of

744; Hoon *v.* Hoon, 126 Iowa 391, 102 N. W. 105.

17. *England.* — See Dyer *v.* Dyer, 2 Cox 92, Lead. Cas. Eq. 314, 2 R. R. 14; Crop *v.* Norton, 2 Atk. 74, 9 Mod. 233, 26 Eng. Reprint 445.

United States. — Olcott *v.* Bynum, 17 Wall. 44.

California. — Plass *v.* Plass, 122 Cal. 3, 54 Pac. 372; Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152.

Illinois. — Onasch *v.* Zinkel, 213 Ill. 119, 72 N. E. 716; Stephenson *v.* McClintock, 141 Ill. 604, 31 N. E. 310; Cline *v.* Cline, 204 Ill. 130, 68 N. E. 545; Strong *v.* Messinger, 148 Ill. 431, 36 N. E. 617; Pickler *v.* Pickler, 180 Ill. 168, 54 N. E. 311.

Indiana. — Hutton *v.* Cunningham, 28 Ind. App. 295, 62 N. E. 644.

Iowa. — McClenahan *v.* Stevenson, 118 Iowa 106, 91 N. W. 925; Culp *v.* Price, 107 Iowa 133, 77 N. W. 848.

Maine. — Burleigh *v.* White, 64 Me. 23.

New York. — White *v.* Carpenter, 2 Paige Ch. 217; Sayre *v.* Townsends, 15 Wend. 647.

South Dakota. — Farmers' & T. Bank *v.* Kimball Mill. Co., 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739.

West Virginia. — Pickens *v.* Wood, 57 W. Va. 480, 50 S. E. 818; Currence *v.* Wood, 43 W. Va. 367, 27 S. E. 329.

In McKeown *v.* McKeown, 33 N. J. Eq. 384, *affirmed*, 34 N. J. Eq. 560, it was held that a resulting trust will not be held to arise upon payments made in common by one asserting his claim and the grantee in the deed, when the consideration is set forth in the deed as moving solely from the latter, unless satisfactory evidence is offered, exhibiting the portion which was really the property of each, and establishing the fact that the payment was made for some specific part or distinct interest in the estate.

It was said in Baker *v.* Vining, 30 Me. 121, 1 Am. Rep. 617: "No case has been found where a resulting trust has been held to arise upon payments made in common, by the one asserting his claim and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from the latter alone, when the amount belonging to one and the other is uncertain, and unknown even to those who make the payments; and no satisfactory evidence is offered exhibiting the portion, which was really the property of each. The trust springs from a presumption of law, because the alleged *cestui que trust has paid the money*. Such presumption must be attended with no uncertainty. The whole foundation is the payment, and this must be clearly established."

18. Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152; Baker *v.* Vining, 30 Me. 121, 1 Am. Rep. 617.

19. Wilkins *v.* Stevens, 1 Y. & C. (C. C.) 431, 6 Jur. 253, 62 Eng. Reprint 957.

20. Farrell *v.* Lloyd, 69 Pa. St. 239.

another against the presumption in favor of the legal title, the evidence must be clear and convincing, especially when an attempt is made to establish a resulting trust after the lapse of many years,[21] or where parol evidence alone is relied upon.[22]

(4.) To Rebut Presumption of Advancement. — (A.) In General. — It is well settled that the proof which shall rebut the presumption of a gift, shall be equally satisfactory and explicit with the proof required to establish a resulting trust;[23] the circumstances relied on must be convincing and leave no reasonable doubt as to the intention of the party.[24]

21. Where the legal title of land has stood for many years in the name of one, unquestioned, the establishment by parol evidence of a resulting trust for the benefit of another over the presumption in favor of the legal title must be clear and convincing testimony, and if the evidence is consistent with any reasonable theory which will allow the legal title to stand, no trust will be declared. Malley *v.* Malley, 121 Iowa 237, 96 N. W. 751.

22. Francis *v.* Roades, 146 Ill. 635, 35 N. E. 232.

23. Bacon *v.* Devinney, 55 N. J. Eq. 449, 37 Atl. 144; Peer *v.* Peer, 11 N. J. Eq. 432; Read *v.* Huff, 40 N. J. Eq. 229.

24. *Illinois.* — Evans *v.* Curtis, 190 Ill. 197, 60 N. E. 56; Taylor *v.* Taylor, 9 Ill. 303; Pool *v.* Phillips, 167 Ill. 432, 47 N. E. 758.

Missouri. — Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395.

New Jersey. — Lipp *v.* Fielder, 66 Atl. 189; Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. .750; Read *v.* Huff, 40 N. J. Eq. 229.

Oregon. — DeRoboam *v.* Schmidtlin, 92 Pac. 1082.

West Virginia. — Pickens *v.* Wood, 57 W. Va. 480, 50 S. E. 818; Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837; McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816.

In Doane *v.* Dunham, 64 Neb. 135, 89 N. W. 640, the court said: "It is undoubtedly true that proof of an issue by a preponderance of the evidence is all that is required of a plaintiff in any civil action. . . . But this is not a fixed or unvarying standard. What would be sufficient to constitute a preponderance of the evidence and to sustain a judgment in an ordinary case might not suffice in another, where, in addition to the burden resting upon the plaintiff in any case, particular presumptions are to be overcome. This is especially true where a plaintiff seeks by parol evidence to overcome the presumptions arising from the express terms of a conveyance, or from the relations of the parties concerned therein. It is obvious that what would ordinarily suffice may fall far short of the requisite *quantum* of proof in such a case, without in any degree infringing the general rule that only a preponderance of the evidence is demanded. In consequence, while we may not admit the statements often to be seen in the books, that more than a preponderance of the evidence is required to establish a trust, contrary to the purport of a written instrument, by parol, and that the trust in such cases must be proved beyond doubt, there is no occasion to repudiate or to qualify what has become a commonplace of the books, that the proof in such cases must be clear, unequivocal and convincing. . . . The very terms of the conveyance are evidence, and must be overcome. Hence much more certainty and conclusiveness are requisite than in ordinary cases. . . . In the case at bar, moreover, appellant's burden was increased by the presumption which arises in any case where a husband places the title to lands in his wife without consideration. Whether this is done by direct conveyance, or by procuring a conveyance to her by others, can make no difference. In either event a gift is presumed."

(B.) Evidence of Possession and Improvement Not Alone Sufficient. Where a parent or husband conveys real estate to a child or wife or pays the consideration and has such conveyance made, evidence showing that such parent or husband afterwards lived upon the lands in question and treated them as his own, paid taxes and made improvements, is insufficient in itself to rebut the presumption of an advancement.[25]

(5.) Declarations and Admissions. — (A.) Grantee's Declarations. To establish a resulting trust in one who has acquired the legal title to land, it is held that while the verbal admissions or declarations of the grantee are admissible against him, they should be received with great caution;[26] and, unless they are perfectly plain and consist-

25. *England.* — Lamplug *v.* Lamplug, 1 P. Wms. 111, 24 Eng. Reprint 316; Jeans *v.* Cooke, 24 Beav. 513, 53 Eng. Reprint 456.

Colorado. — Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676.

Illinois. — Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235; Maxwell *v.* Maxwell, 109 Ill. 588; Fry *v.* Morrison, 159 Ill. 244, 42 N. E. 774.

Texas. — See Hunter *v.* Hunter (Tex. Civ. App.), 45 S. W. 820.

West Virginia. — McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816.

Evidence that a son to whom land was conveyed by the father in fact paid no consideration, never had possession except as tenant, that the father managed it, made improvements, rented it, caused it to be assessed to him, mortgaged it and had possession of the deeds at the time of his death, is insufficient to establish a resulting trust in favor of the heirs of the father. Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 461.

In Maxwell *v.* Maxwell, 109 Ill. 588, an action was brought to have a trust declared in certain land held by the heirs of complainant's wife. It appeared that the complainant had purchased the land from the United States, and had had the patent issued to his wife. The defendants maintained that an advancement was intended to the wife, under the general rule of law that such a presumption exists. The court said: "The facts relied upon by complainant to overcome the presumption are, that he entered into the possession of the land, improved it, paid the taxes, and occupied it with his wife as a homestead, as his own property. There is nothing, however, in these facts inconsistent with the theory that the land was conveyed to the wife as an advancement to her. If she took the title by virtue of the patent, as she had children by complainant, he became tenant by the curtesy, and as such he had the right to the possession to the land, the rents and profits, during his natural life, and while occupying under this right, the law cast upon him the burden of paying the taxes. The possession and improvements of the complainant, as well as the payment of the taxes, may with the same propriety be presumed to have been under his life estate in the lands as under a claim of title in fee. The fact that the wife did not dispose of the land by will, as she did other property, is of but little significance. It often occurs that a person who executes a will leaves some property undisposed of, and yet we are not aware that an omission of that character has ever been regarded as evidence sufficient to defeat an absolute title standing of record in the name of a testator."

26. Corder *v.* Corder, 124 Ill. 229, 16 N. E. 107.

In Lench *v.* Lench, 10 Ves. (Eng.) 511, 518, Sir Wm. Grant, speaking of parol evidence of subsequent admissions or declarations to establish a trust, said: "The witness swears to no fact or circumstance capable of being investigated or contradicted, but merely to a naked declaration of the purchaser, admitting that the purchase was made with trust money. That is in all cases most unsatisfac-

ent,[27] or corroborated by circumstances,[28] should be regarded as an insufficient basis upon which to establish a trust.[29]

Especially Some Time After Death of Alleged Trustee will the declarations of the deceased be held insufficient evidence upon which to establish a trust, since at such time no explanation can be made of the meaning intended to be conveyed by him.[30]

tory evidence, on account of the facility with which it may be fabricated and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration."

27. Bibb *v.* Hunter, 79 Ala. 351; Midmer *v.* Midmer, 26 N. J. Eq. 299; Baker *v.* Leathers, 3 Ind. 558. See Bohannon *v.* Bohannon's Adm'r., 29 Ky. L. Rep. 143, 92 S. W. 597.

28. Bibb *v.* Hunter, 79 Ala. 351; Rogers *v.* Rogers, 52 S. C. 388, 29 S. E. 812; Hinton *v.* Pritchard, 107 N. C. 128, 12 S. E. 242, 10 L. R. A. 401; Ringo *v.* Richardson, 53 Mo. 385.

A resulting trust may be established by the parol declarations of the person to whom the conveyance is made. Such evidence is, however, most unsatisfactory, on account of the facility with which it may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce; yet if it is plain, consistent, and, especially, if corroborated by circumstances, it is competent ground for a decree. Baker *v.* Leathers, 3 Ind. 558.

In Hagan *v.* Powers, 103 Iowa 593, 72 N. W. 771, plaintiff purchased unimproved land near the farm on which he resided, and deeded it to his wife without her knowledge, with the intention thereby to create a trust. When informed of what he had done, she acquiesced therein; and the title remained in her until her death. In the meantime the husband improved, controlled and used the land as his own. *Held*, that the presumption that the land was an advancement to the wife was overcome by evidence of his control and improvement, and her repeated admissions that the land was his, and that she held the title in trust for her husband, and his own evidence as to his intentions.

29. *United States.* — Levi *v.* Evans, 57 Fed. 677, 6 C. C. A. 500.

Alabama. — Duval's Heirs *v.* The P. & M. Bank, 10 Ala. 636; Enfinger *v.* Enfinger, 137 Ala. 337, 34 So. 346.

Arizona. — Leatherwood *v.* Richardson, 89 Pac. 503.

Illinois. — Strong *v.* Messinger, 148 Ill. 431, 36 N. E. 617.

Iowa. — Ratliff *v.* Ellis, 2 Iowa 59, 63 Am. Dec. 471; Rotter *v.* Scott, 111 Iowa 31, 82 N. W. 437.

Missouri. — Ringo *v.* Richardson, 53 Mo. 385; Johnson *v.* Quarles, 46 Mo. 423; Reed *v.* Sperry, 193 Mo. 167, 91 S. W. 62; Curd *v.* Brown, 148 Mo. 82, 49 S. W. 990; Mulock *v.* Mulock, 156 Mo. 431, 57 S. W. 122; Garrett *v.* Garrett, 171 Mo. 155, 71 S. W. 153.

New York. — See Crouse *v.* Frothingham, 97 N. Y. 105.

North Carolina. — Williams *v.* Hodges, 95 N. C. 32; Clement *v.* Clement, 54 N. C. 184; Hinton *v.* Pritchard, 107 N. C. 128, 12 S. E. 242, 10 L. R. A. 401.

Pennsylvania. — Kline's Appeal, 39 Pa. St. 463.

Tennessee. — Newman *v.* Early, 3 Tenn. Ch. 714; Gates *v.* Card, 1 Sneed 334.

Virginia. — Jesser *v.* Armentrout's Exr., 100 Va. 666, 42 S. E. 681.

30. Midmer *v.* Midmer, 26 N. J. Eq. 299; Francis *v.* Roades, 146 Ill. 635, 35 N. E. 232. See also Heneke *v.* Floring, 114 Ill. 554, 2 N. E. 529.

In Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192, the court said: "Evidence of this class depends wholly upon the uncertain recollection of witnesses, who, through lapse of time, or mistake, or imperfect understanding, or improper or corrupt motives, may represent the deceased as having expressed an idea precisely the reverse of what

(B.) Grantor's Declarations. — A grantor's declarations in contravention of an absolute conveyance are not sufficient upon which to establish a resulting trust in favor of another than the grantor.[31]

B. Constructive Trusts. — a. *Presumptions and Burden of Proof.* — A constructive trust is presumed by operation of law where a person acting in a confidential relation to another purchases property in fraud, actual or constructive, of such other person's right.[32] One who sets up a constructive trust has the burden of proving the facts which give rise to the presumption,[33] which includes, of course, the burden of proving fraud.[34] One who alleges facts rebutting the presumption of a trust has the burden of proving the same.[35]

b. *Admissibility of Evidence.* — Under the statute of frauds a declaration of trust must ordinarily be proven by some writing signed by the declarant. But a constructive trust falls within a well established exception to the statute, and such a trust may be proven by circumstances,[36] and by parol evidence.[37] And even though a

was intended by him. Often, too, the slightest variation, by the witness, from the language employed by the deceased, or a different intonation or inflection, may impart an entirely different thought from that in the mind of the speaker at the time of the declaration. Reflection upon the inaccuracy of ordinary witnesses in the use of language, upon their want of original comprehension of a conversation, their liability to connect subsequent facts and circumstances with the original transaction, the impossibility of their recollecting, translating, and reproducing the exact terms employed in a conversation, especially after a considerable lapse of time, must impress upon every lawyer and jurist who has had experience in the trial of causes the danger of placing substantial reliance upon this class of testimony. It is so capable of inaccuracy, so susceptible of fabrication, so impossible of contradiction, where the person alleged to have made the admissions is dead, that it, of itself, cannot be held sufficient to overcome the strong presumption, arising from the terms of a written instrument showing title in the grantee, and establish a trust."

31. Rogers *v.* Rogers, 52 S. C. 388, 29 S. E. 812.

32. Kluender *v.* Fenske, 53 Wis. 118, 10 N. W. 370.

33. Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068; Sing Bow *v.* Sing Bow (N. J. Eq.), 30 Atl. 867.

34. Sing Bow *v.* Sing Bow (N. J. Eq.), 30 Atl. 867.

35. Where A, occupying a confidential relation to B, is entrusted by B with money to buy land, and, on making such purchase and paying the consideration from the money so furnished, takes the deed to himself but in the assumed surname of B, it must be presumed that he took such conveyance to himself by mistake or inadvertance and without B's knowledge or consent, or in fraud or in violation of the trust so imposed. One who claims that the money so furnished was in fact a loan, gift or advancement, has the burden of proving it. Kluender *v.* Fenske, 53 Wis. 118, 10 N. W. 370.

36. Marshall *v.* Fleming, 11 Colo. App. 515, 53 Pac. 620.

37. *United States.* — Freeman *v.* Freeman, 153 Fed. 337, 82 C. C. A. 413.

Arkansas. — Shelton *v.* Lewis, 27 Ark. 190; McDonald *v.* Tyner, 84 Ark. 189, 105 S. W. 74.

California. — De Mallagh *v.* De Mallagh, 77 Cal. 126, 16 Pac. 535; Crabtree *v.* Potter, 150 Cal. 710, 89 Pac. 971; Hays *v.* Gloster, 88 Cal. 560, 26 Pac. 367.

Connecticut. — Hayden *v.* Denslow, 27 Conn. 335.

consideration is recited in a conveyance, parol evidence is admissible for the purpose of establishing a constructive trust.[38]

c. *Weight and Sufficiency.* — (1.) **In General.** — Clear and convincing evidence is necessary to establish a constructive trust;[39] and

Florida. — Boswell *v.* Cunningham, 32 Fla. 277, 13 So. 354, 21 L. R. A. 54.

Illinois. — Pope *v.* Dapray, 176 Ill. 478, 52 N. E. 58.

Indiana. — Cox *v.* Arnsmann, 76 Ind. 210.

Maryland. — Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158.

Massachusetts. — Hills *v.* Eliot, 12 Mass. 26, 7 Am. Dec. 26.

Mississippi. — Moore *v.* Crump, 84 Miss. 612, 37 So. 109.

New York. — Norton *v.* Mallory, 3 Thomp. & C. 640, *affirmed,* 63 N. Y. 434.

North Carolina. — Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775; Russell *v.* Wade, 146 N. C. 116, 59 S. E. 345.

Pennsylvania. — Hoge *v.* Hoge, 1 Watts 163, 26 Am. Dec. 52; *In re* Simond's Estate, 201 Pa. St. 413, 50 Atl. 1005.

Texas. — Halsell *v.* Wise County Coal Co., 19 Tex. Civ. App. 564, 47 S. W. 1017.

Virginia. — Francis *v.* Cline, 95 Va. 201, 31 S. E. 10.

Washington. — Holly St. Land Co. *v.* Beyer, 93 Pac. 1065.

West Virginia. — Hamilton *v.* McKinney, 52 W. Va. 317, 43 S. E. 82.

It was aptly said in Brown *v.* Doane, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381: "There is no law which requires a fraudulent undertaking to be manifested by writing. Those who use promises, which they make deceitfully, for the purpose of accomplishing fraudulent designs, are generally careful not to furnish written evidence of their turpitude. Such promises, whatever may be their terms, do not, unless reduced to writing, raise express trusts, but the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust."

In West Virginia, under the statuse of frauds, as construed by its highest courts, both express and constructive trusts in lands made before a purchase, or which are held under an executory contract of purchase, can be created, declared and proved by oral evidence. *In re* Henderson, 142 Fed. 568.

Although the statute provides that no use or trust shall result in favor of the person furnishing the consideration for a conveyance, this applies only to cases where such person has consented to the title being taken in the name of another. It has no application to cases where the conveyance has been made to some person other than the purchaser by fraud or without his consent. Connolly *v.* Keating, 102 Mich. 1, 60 N. W. 289. See also Ammonette *v.* Black, 73 Ark. 310, 83 S. W. 910.

Declarations of a Testator, made contemporaneous with his will, are competent evidence to establish a trust in him to whom an absolute estate is devised, when followed by evidence that such devise was obtained by the fraudulent procurement of the devisee. Hoge *v.* Hoge, 1 Watts (Pa.) 163, 26 Am. Dec. 52.

The Declarations of a Deceased Grantee, made while he held the title, and when his attention was directed to the character of that title, are competent as against his heirs, for the purpose of showing that he was trustee of a constructive trust. McClellan *v.* Grant, 83 App. Div. 599, 82 N. Y. Supp. 208, *affirmed,* 181 N. Y. 581, 74 N. E. 1119.

38. Brooks *v.* Union Trust & R. Co., 146 Cal. 134, 79 Pac. 843; Norton *v.* Mallory, 3 Thomp. & C. 640, *affirmed* 63 N. Y. 434; Hall *v.* Livingston, 3 Del. Ch. 348.

Evidence Held Sufficient. — Butler *v.* Hyland, 89 Cal. 575, 26 Pac. 1108.

39. *England.* — Cook *v.* Fountain, 3 Swanst. 585, 36 Eng. Reprint 984.

Colorado. — Marshall *v.* Fleming, 11 Colo. App. 515, 53 Pac. 620.

Illinois. — Hencke *v.* Floring, 114 Ill. 554, 2 N. E. 529 (evidence held sufficient); Pope *v.* Dapray, 176 Ill. 478, 52 N. E. 58.

it has been held that a mere preponderance of evidence is insufficient.[40]

(2.) Parol Evidence. — Parol evidence is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory.[41]

(3.) Proof of Fraud. — Where an effort is made to have a court of equity impose a constructive trust upon real property, and to change the beneficial title to such property by parol evidence, in order to justify a court in granting such relief, the fraud alleged must be

Indiana. — Pillars *v.* McConnell, 140 Ind. 670, 40 N. E. 689.

Kentucky. — Carter *v.* Dotson, 29 Ky. L. Rep. 155, 92 S. W. 600 (evidence held sufficient).

Missouri. — Mead *v.* Robertson, 110 S. W. 1095.

New York. — Mackall *v.* Olcott, 93 App. Div. 282, 87 N. Y. Supp. 757, *affirmed*, 183 N. Y. 580, 76 N. E. 1100 (evidence held insufficient).

Pennsylvania. — Martin *v.* Baird, 175 Pa. St. 540, 34 Atl. 809; Schmidt *v.* Baizley, 184 Pa. St. 527, 39 Atl. 406.

Texas. — Bundren *v.* Lehr, Agriculture Co. (Tex. Civ. App.), 40 S. W. 205.

In an action to establish a constructive trust, evidence which satisfies the mind is sufficient. Courts in weighing evidence and reaching conclusions do not deal with possibilities but with probabilities. Valentine *v.* Richardt, 60 Hun 579, 14 N. Y. Supp. 483.

Holton *v.* Holton (N. J. Eq.), 65 Atl. 481. The fact that it appeared from the evidence that a conveyance was made by a father to his daughter, and that the father retained possession of the property conveyed and received its revenues and made improvements, standing alone, and without any evidence of fraud or mistake through undue influence or want of appreciation on the part of the grantor as to what he was doing or that the grantor was without ample means to warrant the gift, or was without the benefit of disinterested and competent advice, or entertained a purpose contrary to that expressed in the deed, is not sufficient to raise the presumption of a constructive trust, and to cast upon the grantee the burden of answering.

Verbal Admissions by Parties Charged, Sufficient. — Hall *v.* Livingston, 3 Del. Ch. 348.

40. Mead *v.* Robertson (Mo.), 110 S. W. 1095.

41. Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775.

"Clear, certain and conclusive proof, unequivocal in all its terms." Whitsett *v.* Kershow, 4 Colo. 419; Nesmith *v.* Martin, 32 Colo. 77, 75 Pac. 590.

In Hidden *v.* Jordan, 21 Cal. 92, which was an action to compel the defendant to convey to the plaintiff a certain tract of land, it appeared that the plaintiff had employed the defendant to purchase the land for him, advancing a portion of the purchase-money, and agreeing with the defendant as to the payment of the balance. The defendant paid upon the purchase, in addition to the amount advanced by the plaintiff, a certain sum, and executed his notes for a further sum, taking the deed in his own name. *Held*, that the money paid by the defendant was intended as a loan, and that he took the deed merely as security. His position was analogous to that of a mortgagee with a conveyance absolute on its face, and he had no higher or other rights than those of a creditor having a lien upon the property of his debtor. The evidence established conclusively the relation of debtor and creditor between the parties, and this relation, created at the inception of the transaction, determined its character ever afterwards. The proof consisted entirely of verbal testimony, but the facts were clearly made out, and it would be grossly inequitable to deprive the plaintiff of the fruits of his purchase.

Preponderating Evidence Not Sufficient. — Constructive trusts sought to be proved by parol evidence can not be established by slightly preponderating evidence, or anything short of evidence that is clear and satisfac-

clearly established.[42] A mere preponderance of the evidence is not sufficient.[43] Where the evidence does not show fraud, either actual or constructive, a trust *ex maleficio* cannot be established.[44]

(4.) Want of Fraud on Complainant's Part. — When a party makes an absolute conveyance of land to one standing in a confidential relation and afterwards seeks to impress the same with a constructive trust and avows that the motive of the conveyance was to screen property from the vigilance of creditors, and to prevent them from resorting to legal remedies to subject it to the payment of debts, he must expect his conduct to be closely and jealously scrutinized. If he would relieve himself from the imputation of fraud, while confessing that he designed it upon the ground that the property was not liable to the debts from which he intended to shelter it, he must be prepared to show clearly the absence of the liability.[45]

tory. Grosby *v.* Henry, 76 Ark. 615, 88 S. W. 949.

42. McNutt *v.* McNutt, 76 Ark. 14, 88 S. W. 589; Watson *v.* Young, 30 S. C. 144, 8 S. E. 706; Cort *v.* Skillin, 29 N. J. Eq. 70; Moore *v.* Crump, 84 Miss. 612, 37 So. 109; Smith *v.* Smith (Ala.), 45 So. 168; Braun *v.* First Ger. Church, 198 Pa. St. 152, 47 Atl. 963. See Nesbitt *v.* Cavender, 30 S. C. 33, 8 S. E. 193.

Evidence of Constructive Fraud Sufficient. — In order to constitute fraud, and suspend the operation of the statute of frauds, there need not be deceit, or misrepresentation, or evidence that the subsequent failure to fulfill the trust was the result of an original fraudulent design; and the failure to execute such a trust, from whatever cause, is a constructive fraud against which equity will grant relief. Barrell *v.* Hanrick, 42 Ala. 60. See also McClellan *v.* Grant, 83 App. Div. 599, 82 N. Y. Supp. 208, *affirmed,* 181 N. Y. 581, 74 N. E. 1119.

43. McNutt *v.* McNutt, 76 Ark. 14, 88 S. W. 589; Davis *v.* Davis, 216 Pa. St. 228, 65 Atl. 622.

44. Wright's Adm'r. *v.* Wright (Ky.), 108 S. W. 266.

In Cline *v.* Cline, 204 Ill. 130, 68 N. E. 545, it appeared that a husband and wife had purchased certain property, the title to which was taken in the name of the wife. The evidence did not show any fraud or mistake in relation to the transaction. On the contrary, it appeared that the husband had knowledge of and acquiesced in the same, having made no objection thereto for several years thereafter. The husband testified that he had allowed the wife to take the title to the property in question because of her imperious temper so as to keep peace in the family. He testified that he had been unduly subjected to her demands. *Held,* that such testimony was not sufficient to establish a constructive trust of the land in the husband's favor.

45. *United States.* — Hunter *v.* Marlboro, 2 Woodb. & M. 168, 12 Fed. Cas. No. 6,908; Kinney *v.* Consolidated V. Min. Co., 4 Sawy. 382, 14 Fed. Cas. No. 7,827.

Alabama. — Patton *v.* Beecher, 62 Ala. 579; Glover *v.* Walker, 107 Ala. 540, 18 So. 251; Smith *v.* Hall, 103 Ala. 235, 15 So. 525; Kelly *v.* Karsner, 72 Ala. 106; King *v.* King, 61 Ala. 479; Brantley *v.* West, 27 Ala. 542.

Illinois. — Springfield H. Assn. *v.* Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; McElroy *v.* Hiner, 133 Ill. 156, 24 N. E. 435; Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531; Kassing *v.* Durand, 41 Ill. App. 93.

Iowa. — Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604.

Mississippi. — Hemphill *v.* Hemphill, 34 Miss. 68.

Nebraska. — Bartlett *v.* Bartlett, 13 Neb. 456, 14 N. W. 385.

New Jersey. — Servis *v.* Nelson, 14 N. J. Eq. 94.

North Carolina. — Guthrie *v.* Bacon, 107 N. C. 337, 12 S. E. 204.

(5.) Payment of Aliquot Part of Consideration. — It is not necessary that a party seeking to establish a constructive trust should show that any definite or aliquot part of the property sought to be impressed was purchased with such party's funds,[46] though the rule is otherwise respecting resulting trusts.[47]

III. CONSTRUCTION.

1. In General. — Where in case of ambiguities it is sought to construe the terms of a trust expressed in a written instrument, extraneous evidence is admissible to prove every material fact known to the parties when the writing was executed.[48]

2. Parol Evidence. — In case of ambiguity, parol evidence is admissible for the purpose of showing the terms of the trust,[49] identifying the person intended as the beneficiary,[50] and to show upon

Pennsylvania. — *In re* Simon's Estate, 20 Pa. Super. 450.

Virginia. — Owen *v.* Sharp, 12 Leigh 427.

Washington. — Chantler *v.* Hubbell, 34 Wash. 211, 75 Pac. 802.

West Virginia. — McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816.

Wisconsin. — Fargo *v.* Ladd, 6 Wis. 106.

46. Farmers' and T. Bank *v.* Kimball Mill. Co., 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739.

47. See II, 2, A, d, (2.) (C.) note 17, *ante*.

48. Hinckley *v.* Hinckley, 79 Me. 320, 9 Atl. 897.

Where the language creating a trust in a religious society is ambiguous, evidence of the faith of the donor, like that of surrounding circumstances, may be received to aid in the construction. Robertson *v.* Bullions, 11 N. Y. 243.

Nesbitt *v.* Stevens, 161 Ind. 519, 69 N. E. 256, was a suit brought by appellee against appellant to enforce an alleged express trust. For this purpose a deed and a letter were introduced in evidence. During the progress of the trial below, the court, on objection of appellee, excluded evidence properly offered by appellant to prove the position, situation, circumstances, and surroundings of the parties to said deed and letter, in order that the same might be read and construed in the light thereof. The letter upon which the case depended was not so complete, definite and certain, it was held, as to justify the exclusion of such evidence.

49. Reid *v.* Reid, 12 Rich. Eq. (S. C.) 213.

50. Appeal of Newell, 24 Pa. St. 197; Wolf *v.* Pearce, 20 Ky. L. Rep. 296, 45 S. W. 865. See also Leonard *v.* Davenport, 58 How. Pr. 384; Hornbeck *v.* American B. Soc., 2 Sandf. Ch. (N. Y.) 133.

In Houston *v.* Bryan, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252, the widow of a slave, after emancipation, invested certain funds in property, having a deed made to certain trustees in trust for the sole and separate use of herself for life, and after her death to such child or children as she might leave living, share and share alike. She had no children of her own, and at the time of the making of the deed, she had reached a period of life at which there was no possibility of issue. Her deceased husband had a child by a former marriage, whom she had always treated as her own child from the date of her marriage and adopted and raised. There was some evidence showing that the money with which the purchase was made was derived from her husband, with direction to invest it for the use of the child and herself during life, with remainder to the child. *Held*, that this was sufficient evidence to show that the child of the deceased husband was the party to take in remainder. This was rather a latent ambiguity, explainable by parol, than a mistake, requiring

how much property the trust is intended to operate.[51] But there must be no ambiguity in the instrument creating a trust. Where there is no beneficiary designated, or where there is no person in existence answering to the name referred to as beneficiary in the instrument, parol evidence is not admissible to show the intent of the truster respecting the identity of the beneficiary.[52] And where a trust is created by will, and such instrument is clear and free from doubt, needing no construction, parol evidence is inadmissible to show that the trust intended was a spendthrift trust.[53]

Oral Evidence Showing the Position, Situation and Surroundings of the parties at the time writings alleged to constitute a trust are executed, may be admitted in order that they may be construed in the light of the circumstances of the case.[54]

3. Declarations. — Declarations of a truster, parol as well as written, if made prior to or contemporaneously with the execution of a trust, are admissible for the purpose of establishing the name of the beneficiary[55] and the terms of the trust.[56] But statements by the creator of a trust, after it has been executed and carried into effect, are inadmissible to vary or affect its terms, where made in the absence and without the knowledge or consent of the beneficiaries.[57]

clear, unequivocal and decisive evidence to correct it.

51. Collins *v.* Phillips, 91 Iowa 210, 59 N. W. 40.

In Bliss *v.* Fosdick, 24 N. Y. Supp. 939, it appeared that a statement relating to the conditions of a trust recited that the fund consisting of one hundred thousand dollars was to be apportioned "in sums of $5,000 each to the various charity organizations, of which a list is hereto annexed." The list named but ten beneficiaries. A young woman who acted as secretary to the donor testified that the list was at first made out to twenty beneficiaries, but that it was changed several times and that the number was finally reduced to ten, the donor having said that each charity should receive $10,000, instead of $5,000, as originally intended. It was held that each charity organization was entitled to $10,000.

52. Fairfield *v.* Lawson, 50 Conn. 501, 47 Am. Rep. 669; Boykin *v.* Pace's Exr., 64 Ala. 68.

53. Shoup's Estate, 31 Pa. Super. 162.

54. Ransdel *v.* Moore, 153 Ind. 393, 53 N. E. 767.

55. Kendrick *v.* Ray, 173 Mass. 305, 53 N. E. 823, 73 Am. St. Rep. 289; Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258.

In construing a declaration of trust: "I hereby cancel the above bond and give it voluntarily to Mrs. J. C. and her heirs," verbal declarations of the donor, made prior to and contemporaneously with the gift, and relating to it, are competent evidence as to whom she meant to designate by the words "her heirs." Eaton *v.* Cook, 25 N. J. Eq. 55.

56. Kendrick *v.* Ray, 173 Mass. 305, 53 N. E. 823, 73 Am. St. Rep. 289; Richardson *v.* Adams, 171 Mass. 447, 50 N. E. 941.

In parrish *v.* Mills (Tex. Civ. App.), 102 S. W. 184, judgment *affirmed*, 106 S. W. 882, in construing a trust deed, the question arose as to whether the trust terminated at the death of the last of the surviving trustees, or was to continue during the lives of the beneficiaries. Declarations of the grantor were held admissible, made almost contemporaneously with the execution of the instrument to the effect that he had provided for the beneficiaries during the remainder of their lives.

57. Putnam *v.* Lincoln Safe Dep. Co., 49 Misc. 578, 100 N. Y. Supp. 101; Habersham *v.* Hopkins, 4 Strobh. L. (S. C.) 238, 53 Am. Dec. 676. And see *In re* Hodges' Estate, 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820; Wistar's Appeal, 54 Pa.

IV. ESTABLISHMENT AND ENFORCEMENT.

1. Presumptions. — Trustees are presumed to have done their duty, and in an action brought by a *cestui que trust* against a trustee to establish and enforce a trust, if it is shown that trust funds have come into the trustee's possession, he will be presumed to have retained the same intact,[58] and to have paid the interest thereon to the *cestui que* according to the terms of the trust,[59] and to have surrendered the trust and conveyed the same when the object for which the trust was created has been accomplished.[60]

2. Burden of Proof. — The burden of proof rests upon the party seeking to establish and enforce a trust to show clearly all the facts upon which his cause of action is founded.[61] It is incumbent upon him to show that the trust was created for his benefit;[62] and to show the existence of[63] and to identify the trust property sought to be re-

St. 60; Bemmerly *v.* Woodward, 124 Cal. 568, 57 Pac. 561; Asay *v.* Allen, 124 Ill. 391, 16 N. E. 865; St. Paul Trust Co. *v.* Strong, 85 Minn. 1, 88 N. W. 256; Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609; Duffy *v.* Duncan, 35 N. Y. 187.

58. See *In re* Berry, 147 Fed. 208, 77 C. C. A. 434.

Where funds are deposited in the name of a party as trustee to an amount not exceeding the amount for which he is chargeable as trustee, and which funds are unidentified or accounted for by him, the law presumes, in the absence of proof that they did not arise from other sources, that such funds were either the original trust funds, or funds substituted by the trustee for the funds taken. And this presumption thus arising as to the character and origin of these unidentified funds deposited in the account is effective not only as against the trustee depositing them in the trustee account, but against the depositary, unless he is a *bona fide* depositary, without notice. Jeffray *v.* Towar, 63 N. J. Eq. 530, 53 Atl. 182.

In Kauffman *v.* Foster, 3 Cal. App. 741, 86 Pac. 1108, it appeared that a trustee had invested certain trust funds in securities as directed by a decree of court, and had tendered the same to the distributee specified in the will. Upon his death it was shown that investments of such character had come into the hands of his administrator. It was held that as such investments were shown once to have existed they would be presumed to continue to exist as long as usual with things of that nature.

59. Nobles *v.* Hogg, 36 S. C. 322, 15 S. E. 359.

60. Brown *v.* Combs, 29 N. J. L. 36.

61. Fague's Estate, 19 Pa. Super. 638; Kelly *v.* Short (Tex. Civ. App.), 75 S. W. 877; Emfinger *v.* Emfinger, 137 Ala. 337, 34 So. 346; Lide *v.* American Guild, 69 S. C. 275, 48 S. E. 222; McCreary *v.* Casey, 50 Cal. 349; Whyte *v.* Arthur, 17 N. J. Eq. 521; Putnam *v.* Lincoln Safe Dep. Co., 118 App. Div. 468, 104 N. Y. Supp. 4; Spence *v.* Spence, 17 Wis. 448.

In Briggs *v.* Morris, 54 N. C. 193, it was held that to convert a purchaser who takes a deed absolute upon its face into a trustee for another, it must be proved that the clause of redemption or the declaration of the trust was omitted either through ignorance, mistake, fraud or undue influence, and this must be established, not merely by proofs of declarations, but of facts and circumstances, dehors the deed, inconsistent with the idea of an absolute purchaser.

62. Dibrell *v.* Carlisle, 48 Miss. 691.

63. Where a bill was brought for the purpose of declaring a trust on a deposit of money in a bank, it appearing that a portion of the deposit had been paid over to one of the respondents before the bill was filed, it was held that it was incumbent upon the complainants to show that that sum was still *in esse* in his

covered,[64] as well as to show any misapplication of trust funds.[65] Where there are suspicious circumstances surrounding the creation of the trust it is incumbent upon plaintiff to show that the purpose of the trust was an honest one.[66] But the plaintiff need not establish the existence or non-existence of facts which are purely matters of defense.[67] As to these the burden of proof rests upon the trustee, his representatives or successors in interest.[68] If the trustee, in an action brought to enforce a trust against him, maintains that the

hands when the bill was filed, or how otherwise it had been disposed of by him in such manner as to be reached by him in such proceeding. The complainants having failed in this case, to make such showing, it was held that they must be remitted to their appropriate remedies at law for the recovery of its value. Gardner *v.* Whitford, 24 R. I. 253, 52 Atl. 1082.

64. Texas Moline Plow Co. *v.* Kingman Texas Imp. Co. (Tex. Civ. App.), 80 S. W. 1042; Culver *v.* Guyer, 129 Ala. 602, 29 So. 779.

One seeking to impress a trust upon property because of its purchase with trust funds must show that the particular funds in question were used for the purchase of the property. Hill *v.* Miles, 83 Ark. 486, 104 S. W. 198. To follow money into land and impress the land with a trust, the money must be distinctly traced and clearly proved to have been invested in the land. The conversion of the trust money specifically, as distinct from other money of the trustee, into the property sought to be subjected to the trust must be clearly shown. It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property, that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds. Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. 152.

65. Culver *v.* Guyer, 129 Ala. 602, 29 So. 779.

In Smith *v.* Mottley, 150 Fed. 266, 80 C. C. A. 154, *reversing* order, *In re* P. J. Potter's sons, 143 Fed. 407, claimant claimed that she was entitled to priority of payment from a certain fund which had passed into the hands of a bankrupt's trustee on the ground that the money of the claimant was held in trust by the bankrupt and had passed into the fund in question. It was held that the burden of showing that her property had been wrongfully mingled in the mass of property of the wrongdoer was upon the owner.

66. Patton *v.* Beecher, 62 Ala. 579.

67. Brown *v.* Sockwell, 26 Ga. 380; Aldridge *v.* Aldridge (Ky.), 109 S. W. 873; McDonald *v.* McDonald, 92 Ala. 537, 9 So. 195; Reade *v.* Continental Trust Co., 49 App. Div. 400, 63 N. Y. Supp. 395, *modifying* 28 Misc. 721, 60 N. Y. Supp. 258; Woodside *v.* Grafflin, 91 Md. 422, 46 Atl. 968.

The plaintiff is not required to anticipate a defense of lack of knowledge of the alleged trust. Lupo *v.* True, 16 S. C. 579.

68. Newman *v.* Schwerin, 109 Fed. 942, 48 C. C. A. 742; Lupo *v.* True, 16 S. C. 579.

In a suit by heirs at law for the recovery of their portion of a share of an estate, paid into the hands of another in trust for the heirs entitled, the claimants cannot be required to show that there were no creditors of the estate from which the share was received. The presumption of law is, that there are none, and the defendant, if he raises the objection, must prove it. Brown *v.* Sockwell, 26 Ga. 380.

Purchaser From Trustee Must Show Innocence. — Although the rule is that one claiming to be a *bona fide* purchaser of property impressed with the trust must show his ignorance of the existence of the trust, the mere fact that he may have had no notice that his grantor had mixed trust funds with his own does not require him to show further that the property in question had not been purchased with trust funds. Hathorn *v.* Maynard, 65 Ga. 168.

trust funds have passed out of his hands, the burden is upon him to show it.[69]

3. Admissibility of Evidence. — Where action is brought to establish and enforce a trust, any evidence legally competent and relevant to the issue is admissible on behalf of plaintiff.[70] The defendant may offer any competent evidence serving to relieve him of liability.[71]

69. Smith *v.* Mottley, 150 Fed. 266, 80 C. C. A. 154, *reversing In re* Potter's Sons, 143 Fed. 407.

70. Moyer *v.* Moyer, 21 Hun (N. Y.) 67; Smith *v.* Howell, 11 N. J. Eq. 349 (when the statute requires written evidence, parol evidence can not be substituted).

Explanation of Delay in Bringing Suit. — Where a suit was brought to establish and enforce a resulting trust and defendant sets up as a defense the fact that the claimant's claim had been delayed for an unreasonable length of time, it was held that it was a question of intention on the part of the claimant, and that testimony in explanation of the long delay and silence was admissible. House *v.* Harden, 52 Miss. 860.

Declarations and Admissions of Trustee. — Admissions by parties sought to be charged as trustees that they were trustees, sworn to by disinterested witnesses, such admissions being accompanied by corroborating circumstances, are evidence of the highest character. Gale *v.* Harby, 20 Fla. 171, and see Knorr *v.* Raymond, 73 Ga. 749. The trust agreement and declarations of the trustee at the time such agreement was made are competent to prove the trust against a subsequent purchaser to whom it is alleged the trustee has conspired to sell the property at less than its value. Shelly *v.* Heater, 17 Neb. 505, 23 N. W. 521.

Declarations of a Deceased Trustee showing the existence of the trust are competent evidence against his executors. Delmoe *v.* Long, 35 Mont. 139, 88 Pac. 778. Declarations and entries by a person, since deceased, against his interest, and not made with a view to pending litigation, are competent evidence, and this applies to a case where two sets of beneficiaries are in dispute as to whether their common trustee has invested certain trust funds in lands, taking a deed in his own name, and it is sought to show by the admissions of the deceased trustee, that the lands were bought with the funds of one of the sets of beneficiaries. Cunningham *v.* Schley, 41 Ga. 426.

71. In Brookhouse *v.* Union Pub. Co., 73 N. H. 368, 62 Atl. 219, the guardian of the plaintiff was the treasurer of the defendant corporation, which had a deposit in the Manchester National Bank. The guardian withdrew from other sources funds which belonged to the plaintiff, which funds consisted of certificates of deposit and a draft, all payable to him as guardian. These he gave to the defendant's assistant treasurer, who gave him credit therefor on the corporation's books, and deposited the papers in the above named bank. The guardian, as treasurer, afterwards drew checks on said bank to the amount of said deposits, and used the checks for his own personal benefit. It was held, in an action by plaintiff to have the defendant declared a trustee of said deposit, that evidence that the treasurer habitually availed himself of the bank account of the corporation for his own use by depositing and checking out his own funds, was admissible upon the question of his intent in withdrawing plaintiff's funds from the places where they were originally deposited.

In Davis *v.* Coburn, 128 Mass. 377, plaintiff sought to recover money alleged to have been received by the defendant in trust, but introduced no direct evidence of any conditions or contract under which the money was received, relying merely upon circumstantial evidence. It was held that in such a case the defendant might testify as to the purpose for which he presumed the money was given him and as to the understanding with which he received it.

4. Sufficiency of Evidence. — A. In General. — The party seeking to establish and enforce a trust must prove his case by clear and satisfactory evidence.[72] In the note will be found a collection of cases in which it was held that the evidence was sufficient to establish and enforce a trust.[73]

72. Roberts *v.* Broom, 1 Har. (Del.) 57. See United States *v.* Polhamus, 13 Blatchf. 200, 27 Fed. Cas. No. 16,062.

Where the answer to a bill to establish an alleged resulting trust is responsive, plaintiff is bound to prove his allegations by two witnesses, or by one witness and corroborating circumstances equivalent to the testimony of a second; but where he relies upon his own testimony and upon the presumption supposed to arise from the fact that he and defendant paid the purchase price equally, and defendant offers two witnesses in support of his claim that plaintiff's payments were in persuance of an agreement, certain conditions of which have not been fulfilled by plaintiff, a finding and decree in favor of the trust cannot be sustained. Appeal of Hayes, 123 Pa. St. 110, 16 Atl. 600.

Evidence Held Insufficient. — Carter *v.* Hopkins, 79 Cal. 82, 21 Pac. 549; Tierney *v.* Fitzpatrick, 122 App. Div. 623, 107 N. Y. Supp. 527; O'Brien *v.* Pentz, 48 Md. 562; Smith *v.* Stevenson, 204 Pa. St. 194, 53 Atl. 746.

Hogeboom *v.* Robertson, 41 Neb. 795, 60 N. W. 2. This action was brought to establish a trust in plaintiff's favor in land which he had, thirty years before, caused to be conveyed to his daughter, the mother of the defendant. It appeared that the plaintiff could not remember why he conveyed the land to his daughter, but "guessed" it was for convenience. It appeared from the evidence that, after the daughter's death, plaintiff, as guardian for defendants, petitioned for leave to mortgage the land in question. In this petition he alleged under oath that the land belonged to the defendants. He, in other ways, recognized defendants' interest therein. It was held that plaintiff could not recover.

73. *United States.* — Bank *v.* Flynn, 38 Fed. 798.

Alabama. — Waller *v.* Jones, 107 Ala. 331, 18 So. 277.

Arkansas. — Chambers *v.* Thompson, 81 Ark. 609, 100 S. W. 79.

California. — Allsopp *v.* Hendy Mach. Wks., 5 Cal. App. 228, 90 Pac. 39.

Georgia. — Houston *v.* Bryan, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252.

Illinois. — Thor *v.* Oleson, 125 Ill. 365, 17 N. E. 780, *affirming* 24 Ill. App. 132.

Louisiana. — Livingston *v.* Morgan, 26 La. Ann. 646.

New Jersey. — Natter *v.* Turner (N. J. Eq.), 52 Atl. 1105.

New York. — Robertson *v.* De-Brulatour, 188 N. Y. 301, 80 N. E. 938, *affirming* judgment, 111 App. Div. 882, 98 N. Y. Supp. 15.

Texas. — Scranton *v.* Campbell (Tex. Civ. App.), 101 S. W. 285.

In an action for an accounting wherein plaintiff claimed that defendant, under and by a deed to him of certain lands, became seized of and held an undivided one-half thereof, in trust for H., plaintiff's testator, plaintiff produced a power of attorney executed by defendant to P., authorizing him to sell the land, referring to the deed under which he held title, and giving its date and the parties thereto, and a letter written and signed by defendant, addressed to P., referring to the power of attorney, and stating that whatever was realized on the sale belonged to H. and defendant "jointly and equally;" also a paper unsigned, but in defendant's handwriting, which, after describing the land, contained this statement: "The above is a description of the property as contained in the deed to me; nothing about our being entitled to 600 inches." Plaintiff also produced letters written by defendant after the execution of the power of attorney to H. and a son of his in regard to taxes on the land; also a letter to one then a tenant of a part of the

Proof of Paramount Title. — A plaintiff who seeks to establish a trust in his own favor in land held by a defendant is not obliged to prove a paramount title against all the world. It is sufficient to establish that the defendant stands in the relation of a trustee to him.[74]

B. Delay in Bringing Suit. — Great delay in making application to enforce a trust will have great weight against its enforcement, and in such instances the trust should be proved more clearly and satisfactorily than in other cases.[75] Especially is this true where parol evidence alone is relied upon.[76]

V. TRUSTEES.

1. Management of Trust Property. — A. Presumptions and Burden of Proof. — a. *In General.* — The burden of proof is upon the party claiming that another is a trustee for his benefit.[77] Actual

land, in which defendant stated, that although the title to the whole property was in him, there was another party who had an interest. *Held,* that the proof was sufficient to authorize a finding that defendant took and held the land in trust for the benefit of himself and H. in equal shares as tenants in common; that the trust entitled H. in equity to a beneficial interest, and vested in him an estate of the same quality and duration as such interest and so, that plaintiff was entitled to the relief sought. Hutchins *v.* Van Vechten, 140 N. Y. 115, 35 N. E. 446, *affirming* 66 Hun 69, 20 N. Y. Supp. 751.

In Hinckley *v.* Hinckley, 79 Me. 320, 9 Atl. 897, it appeared that a son had conveyed to his mother an estate which he had inherited from his father, receiving from her an agreement to reconvey when a certain indebtedness had been paid her by him. Thereafter, she kept a strict and detailed account of the property and its income, and regularly paid her son the net income. She often spoke of it in her letters to him as his property. Upon her death she willed to another to hold in trust for her son. There was no account of any indebtedness of the son to his mother and no evidence of any except the paper she gave him when she received from him the conveyance. *Held,* that the mother held the property in trust for her son and that the trust terminated at her death.

Declarations and Admissions of the Party Charged, accompanying and contemporaneous with the transfer of the title to which the trust is alleged to be annexed, distinctly recognizing the trust, are sufficient to authorize the court to enforce the equity. It is otherwise when the admissions are in respect to a trust antecedently created. Smiley *v.* Pearce, 98 N. C. 185, 3 S. E. 631.

74. Leakey *v.* Gunter, 25 Tex. 400.

75. Attorney General *v.* Reformed P. D. Church, 33 Barb. (N. Y.) 303; Mitchell *v.* O'Neale, 4 Nev. 504; Robertson's Devisees *v.* Maclin, 3 Hayw. (Tenn.) 70. See also Horbach *v.* Marsh, 37 Neb. 22, 55 N. W. 286.

In Barnes *v.* Taylor, 27 N. J. Eq. 266, a trust was sought to be decreed in favor of the complainants, in lands purchased by the defendant at a sale under foreclosure proceedings more than twenty years before the filing of the bill, and over which, during all that time, the defendant had openly exercised acts of exclusive ownership, in the knowledge, and without challenge on the part of the complainants. On the ground of the unsatisfactory evidence of an express trust, the relief was denied.

76. Sunderland *v.* Sunderland, 19 Iowa 325; Brown *v.* Guthrie, 27 Tex. 610; Testerment *v.* Perkins, 3 Greene (Iowa) 209.

77. Especially where it appears

possession by a trustee is *prima facie* evidence of a legal seizin, and a stranger to the trust cannot alter the situation by proving the existence of a trust estate.[78] Where an action of debt is brought against a trustee in his capacity as such, the burden is upon the complainant to prove the existence of the trust estate, of what it consists and the specific facts which render it liable for the debt.[79]

In an Action for Damages against a trustee for negligent management of trust property, the burden is upon the plaintiff to show wherein and to what extent he has been damaged.[80]

b. *Presumption of Trustee's Good Faith.* — Upon the general question of fraudulent conduct of a trustee, he is entitled to the presumption of good faith, and of the rule of law that fraud must be clearly proved.[81] But where a trustee holding stock for a certain *cestui que trust,* makes a sale thereof for less than face value, the

that the party claiming the trust has grossly mistreated the party alleged to have created the trust. Clarke *v.* Quackenbos, 27 Ill. 260.

78. Newhall *v.* Wheeler, 7 Mass. 189.

79. Jackson *v.* Pool, 73 Ga. 801.

80. Fickett *v.* Cohu, 14 Daly 550, 1 N. Y. Supp. 436.

81. Mead *v.* Chesbrough, 151 Fed. 998, 81 C. C. A. 184.

Where it was the primary duty of a trustee, under the terms of a deed, to preserve the estate, in remainder, from being defeated or destroyed, it will not be presumed that, before its execution, he joined with the tenant for life in a feoffment to defeat it. Nothing dishonest or base is to be presumed in law. All presumptions are innocent and rightful; therefore a deed will not be presumed if it could only be in fraud and injury. Habersham *v.* Hopkins, 4 Strobh. L. (S. C.) 238, 53 Am. Dec. 676.

When moneys belonging to other persons are received and mingled in a general fund with moneys belonging to a trustee, and then such trustee pays out generally from such fund for his own purposes, there is a presumption of law that such payments are made from the moneys in said fund belonging to the trustee, and do not constitute wrongful misappropriations of the moneys of the *cestui que trust,* which he has no right to pay out in that way; but that they remain in the hands of the trustee. Of course this presumption is possible of complete effect only so long as the fund is large enough to contain all the moneys of the *cestui que trust,* and some of the moneys of the trustees. Emigh *v.* Earling (Wis.), 115 N. W. 128, *citing* Bromley *v.* Cleveland, etc. R. Co., 103 Wis. 562, 79 N. W. 741; Boyle *v.* Northwestern Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 110 Am. St. Rep. 844, 1 L. R. A. (N. S.) 1110. See also *In re* Berry, 147 Fed. 208, 77 C. C. A. 434.

Where one receives money in trust under a will, by the terms of which he is required to hold the same or invest it in real estate for the benefit of the beneficiary, it will be presumed upon the death of such trustee possessed of real estate but no funds, that he performed his duty and that the land standing in his name was purchased with the trust funds. Aldridge *v.* Aldridge, 33 Ky. L. Rep. 246, 109 S. W. 873.

One who sells to his brother, at private sale, goods of which he has taken possession under an agreement to account to the owner for the proceeds after satisfying certain indebtedness, has the burden of showing that he acted in entire good faith, when sued for the value of the goods; and, as bearing upon that question, all of the circumstances attending the prior transactions between himself and the owner relating to the property are material. Duffie *v.* Clark, 106 Mich. 262, 64 N. W. 57.

burden is upon the trustee to show that he exercised at least ordinary care to obtain the best possible price.[82]

c. *Presumption as to Purchase of Trust Property.* — Where a trustee buys the trust property even at a public sale which is brought about or in any way controlled by himself, he will be presumed to buy and hold for the benefit of the trust.[83]

d. *Presumption as to Purchase Completing Title Held in Trust.* If a trustee purchases a title that cures or completes one that he holds in trust, the presumption in equity will be that the later purchase was made in aid of the former trust.[84]

e. *Defenses. — Burden of Proving.* — The burden of proving acquiescence of a *cestui que trust* in the acts of a trustee must be made by the party relying upon it as a defense,[85] and the evidence thereof must be full, distinct and satisfactory.[86]

B. Admissibility of Evidence. — a. *In General.* — Where action is brought for repairs to real estate, evidence is admissible to show that the defendant held the property in trust, and that credit was given to the *cestui que trust.*[87]

b. *Conversion of Trust Funds.* — Assessment lists of a trustee during the period it is claimed that he has collected a trust fund and converted it to his own use, and showing an increase in his personal property, are admissible in evidence as tending to show that he had collected and converted said fund.[88]

c. *Good Faith or Negligence.* — A trustee's conduct in the management of a trust fund is to be judged by the situation at the time of the negligence as alleged; his conduct in the management of his own funds, of a similar character to the trust funds, is proper evidence upon the question of his good faith or negligence.[89]

d. *Trustee's Declarations and Admissions Against Interest of Cestui Que Trust.* — Statements made by a trustee cannot be treated as admissions of the *cestui que trust,* and are not binding on the latter

82. King *v.* Sullivan (Tex Civ. App.), 92 S. W. 51.

83. Kenworthy *v.* Equitable Trust Co., 218 Pa. St. 286, 67 Atl. 469; Church *v.* Winton, 196 Pa. St. 107, 46 Atl. 363.

84. Vulcan D. Co. *v.* American Can Co. (N. J.), 67 Atl. 339.

In McCormick *v.* Ocean City Assn., 45 N. J. Eq. 561, 18 Atl. 112, the court said: "It seems to me that, when a person accepts a conveyance of lands in which are created clear trusts, such as are indicated above, though there be an imperfection in the title, but he continues to hold under that conveyance for eight years and then buys at sheriff's sale and takes a title to the same lands for the nominal consideration of $1.50, and the title is thereby made complete in him, but takes it in his own name only, and he continues to hold the same lands, without renouncing his trusts or doing or saying anything in hostility thereto for over thirty years after such last conveyance, it affords the most violent presumption that everything was done under and in compliance with the terms of the trust."

85. Sherman *v.* White, 62 Ill. App. 271, *affirmed,* 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132.

86. Newman *v.* Schwerin, 109 Fed. 942, 48 C. C. A. 742.

87. Tripp *v.* Hathaway, 15 Pick. (Mass.) 47.

88. Haxton *v.* McClaren, 132 Ind. 235, 31 N. E. 48.

89. Johns *v.* Herbert, 2 App. D. C. 485.

unless made by his authority or in the performance of a duty as trustee.[90]

C. Sufficiency of Evidence. — A trustee, who brings suit as such, is not required to offer proof of his acceptance of the trust — the bringing of the suit and acting as such are sufficient.[91] Where suit is brought against a trustee for necessaries sold to the beneficiary under the trust, the evidence must clearly show who furnished the goods and of what they consisted.[92]

Proof of Trustee's Promise To Pay. — Though the law requires an express promise by a trustee to pay before the beneficiary can sue for the amount at law, the promise may be proven by facts and circumstances, and direct testimony is not necessary.[93]

2. Compensation of Trustees and Accounting. — A. Judicial Notice of Increased Responsibility. — In determining a trustee's commission, a court will take judicial notice of the increased responsibility of his office by the condition of affairs during the Civil War.[94]

B. Burden of Proof. — a. *In General.* — A trustee is held to a strict account, and, as such, the burden rests upon him to make a proper and satisfactory accounting of funds which have come into his hands,[95] and to make clear and remove every reasonable doubt as to the ownership of property which he holds ostensibly as his own.[96] The burden of proving credits against the trust estate,[97]

90. Eitelgeorge *v.* Bldg. Assn., 69 Mo. 52; Bragg *v.* Geddes, 93 Ill. 39; Thomas *v.* Bowman, 29 Ill. 426. See also Thompson *v.* Drake, 32 Ala. 99; Fargason *v.* Edrington, 49 Ark. 207, 4 S. W. 763.

In Knorr *v.* Raymond, 73 Ga. 749, it was held that where one is a continuing trustee for children, his admissions, while actually engaged in handling the subject-matter of the trust, in such acts as collecting rents, are good as against the *cestui que trust.* They are part of the *res gestae.*

A trustee holding the legal title to property, standing in a fiduciary relation to the *cestui que trust* and responsible for costs, is not to be presumed to make admissions adverse to the interest of those for whom he acts, and such admissions are therefore incompetent evidence. Helm *v.* Steele, 3 Humph. (Tenn.) 472.

91. O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568.

92. Pate *v.* Lochrane, 42 Ga. 57.

93. Nelson *v.* Howard, 5 Md. 327.

94. Lyon *v.* Foscue, 60 Ala. 468.

95. Chirurg *v.* Ames (Iowa), 116 N. W. 865.

96. Schwartz *v.* Gerhardt, 44 Or. 425, 75 Pac. 698; Parker's Adm'r. *v.* Parker (N. J. Eq.), 5 Atl. 586.

97. Where plaintiff in assumpsit declares on a special contract, by which defendant received money in trust for her use and benefit, and which authorized him to retain for certain probable expenses to be incurred by him for her, it was held that the burden of proof as to such expenses was on the defendant. Vincent *v.* Rogers, 30 Ala. 471.

When a trustee mingles his own funds with trust funds in purchasing property for the beneficiaries, the burden of proof is upon the trustee to show clearly the amount he used out of his own funds in order to have it credited to him. Vanatta *v.* Carr, 229 Ill. 47, 82 N. E. 267.

Where a trustee fails to keep clear accounts of his receipts and expenditures, the presumptions are against him. White *v.* Rankin, 18 App. Div. 293, 46 N. Y. Supp. 228, *affirmed*, 162 N. Y. 622, 57 N. E. 1128. See also McDonald *v.* McDonald, 92 Ala. 537, 9 So. 195.

or of excusing himself for failure to keep accounts and collect rents and profits due the estate,[98] or of segregating trust property after a commingling with other property,[99] or of proving losses,[1] or of showing a discharge from his accounts,[2] rests upon the trustee.

b. *As to Compensation.* — Where a trustee claims compensation for services rendered, it is incumbent upon him to show the duration of his trusteeship[3] and that he has discharged the trust; and if the agreement to pay him out of the fund is disputed, he must establish the fact by a preponderance of evidence.[4]

c. *Showing Falsification of Accounts.* — The burden of proof is on him who charges a trustee with surcharging and falsifying his accounts.[5]

C. Admissibility of Evidence. — Checks drawn by a trustee to third parties in payment of demands against the beneficiary, and coincident with charges on his books against such beneficiary, are admissible in evidence to show what disposition he has made of the trust funds.[6] But a return by a trustee to the ordinary, not examined, approved and ordered to be recorded, though sworn to, is not

98. An executor who without authority assumes the charge of the testator's real estate is liable to account to the divisees as a trustee or agent; and, as such, it is his duty to keep a regular account with his principals or *cestuis que trust.* If he neglect to keep such account, he assumes the burden of proving that he did not in fact, and could not, collect all the rents and profits of the premises. He is *prima facie* accountable for all the rents, and can only be discharged by proof that he did not collect them, and could not have done so by the faithful exercise of due diligence, within the limits of the powers which he possessed. Landis *v.* Scott, 32 Pa. St. 495.

99. Vanatta *v.* Carr, 229 Ill. 47, 82 N. E. 267.

If a trustee, under an express trust, commingles trust funds with his own, his entire estate, as against himself or those claiming under him, is thereby charged with the payment of the trust fund, and the burden is cast upon him or his representative of showing what part of the estate is not trust property. Drake *v.* Wild, 65 Vt. 611, 27 Atl. 427.

1. Montgomery *v.* Coldwell, 14 Lea (Tenn.) 29.

2. It is the duty of trustees to keep accounts, and to take and preserve vouchers for payments they make. The burden of proving a matter of discharge in their accounts is upon them, and obscurities and doubts which they should have guarded against, must be resolved against them. Dufford *v.* Smith, 46 N. J. Eq. 216, 18 Atl. 1052.

When a trustee seeks to show that the trust fund in his hands or a portion thereof, was converted into an ordinary debt, or a loan from his *cestui que trust* to himself, the burden of proof is upon him to establish the fact by clear and satisfactory evidence, the presumptions are all against him. Stewart's Estate, 140 Pa. St. 124, 21 Atl. 311.

3. Where one who is named as executor and trustee in a will takes possession of the property immediately upon his appointment as executor, and continues to administer the estate until the termination of the trust, the burden is upon him, if he would claim the compensation of a trustee, rather than that of an executor, to establish the point of time at which the change in his official character took place. Bemmerly *v.* Woodard, 136 Cal. 326, 68 Pac. 1017.

4. Jenkins *v.* Doolittle, 69 Ill. 415.

5. Campbell *v.* Campbell, 8 Fed. 460.

6. Smith *v.* Rentz, 60 Hun 85, 14 N. Y. Supp. 255, judgment *reversed,*

evidence in favor of the trustee.[7] A trustee's account books, showing receipts and disbursements are admissible in evidence as admissions of indebtedness,[8] and are also admissible on behalf of the trustee.[9]

D. Weight and Sufficiency of Evidence. — a. *In General.* When it is sought to be shown that trust money or property has been misapplied, and to trace or impress the trust upon property in another and different form, the recognized rules of law require that the identity be established by clear and cogent evidence before the courts will say that it is the property of the *cestui que trust,* and that it should be accounted for as such.[10] It is perhaps putting it strongly to say that the proofs should be convincing beyond a reasonable doubt, as though the guilt of a person accused of a crime was in the balance; but they should be such as to satisfy the mind fully from a consideration of all the evidence of the misapplication and of the identity of the trust property sought to be established in its transformed condition.[11]

To Charge a Third Person as a Party to a Misappropriation of a trust fund, it must be shown that such person knowingly partook in the breach of trust.[12]

b. *Disbursements, Losses, Etc.* — A trustee's disbursements must be proved by satisfactory evidence.[13] Disbursements may be proved

131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138.

7. Saxon *v.* Sheppard, 54 Ga. 286.

8. Nolan *v.* Garrison, 151 Mich. 138, 115 N. W. 58, (although they start with a balance brought forward, and it does not appear that every item related to the property in question).

9. The fact that his books are not kept in such a way as to be technically books of account within the meaning of the statute governing the use of such books does not serve to exclude them when offered in behalf of the trustee. Chirurg *v.* Ames (Iowa), 116 N. W. 865.

10. Schwartz *v.* Gerhardt, 44 Or. 425, 75 Pac. 698; Sisemore *v.* Pelton, 17 Or. 546, 21 Pac. 667; Barger *v.* Barger, 30 Or. 268, 47 Pac. 702. See also Myers *v.* Myers, 47 W. Va. 487, 35 S. E. 868.

11. Schwartz *v.* Gerhardt, 44 Or. 425, 75 Pac. 698.

12. Perry *v.* Oerman (W. Va.), 60 S. E. 604.

In Fifth Nat. Bank *v.* Hyde Park, 101 Ill. 595, 40 Am. Rep. 218, the court said: "To charge a stranger to a trust fund as a trustee, by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt to the payment of which it was applied, was, at the time of such application, in fact a private debt," or such a debt that payment thereof could not lawfully be made out of such fund.

13. Trustee's Own Testimony Not Sufficient To Prove Payment of Judgment. — Willis *v.* Clymer, 66 N. J. Eq. 284, 57 Atl. 803. The object of this suit was to require the defendant to account as trustee and to pay over to the complainants whatever might be found to be due to them on such accounting. Defendant claimed a credit for money alleged to have been paid for a judgment against the trust estate. Defendant testified as to this fact and as to the amount thereof, and this was the only evidence relating thereto. *Held,* that the trustee should not be allowed to discharge himself without a voucher or some proof of the payment other than his own testimony,

by a trustee's own oath, where from the very nature of the case, better evidence cannot be had, as for expenses incurred for refreshments at sale of estate of *cestui que trust,* or for postage, costs of law suits, and the like.[14] A trustee cannot establish the fact of the loss of a trust fund by theft or robbery by his own uncorroborated testimony.[15] For other cases regarding sufficiency of evidence, see the note.[16]

VI. ACTIONS ON TRUSTEE'S BONDS.

1. Presumptions and Burden of Proof. — To authorize a recovery against the sureties on a trustee's bond, it is incumbent on the plaintiff to show merely that the trustee at one time received and did not have in his possession at the required time, the estate entrusted to his care. It is not necessary to show the legality of a transfer made by the trustee.[17] The burden is on the sureties to show proper disposal of trust funds where they are unaccounted for.[18]

and certainly not without some proof of the circumstances connected with the payment. The judgment is a matter of record, and it would have been easy for the defendant to have produced the plaintiff in execution, and shown by him that some such payment had been made. This credit not allowed.

14. Miller *v.* Beverleys, 4 Hen. & M. (Va.) 415.

Disbursements for Repairs. Where a trustee has been appointed to take care of certain real estate, in an action brought to remove him and for an accounting, his uncontradicted testimony as to expenditures for repairs, and that expenditures were necessary, and that he believed the charges were reasonable, is sufficient evidence to justify an allowance of a credit for such an amount as was paid out, especially where the voucher showing payment is produced in evidence, and such testimony is sufficient for the purpose offered, without further proof of the details as to the nature of the repairs. Disbrow *v.* Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614, *affirmed,* 167 N. Y. 606, 60 N. E. 1110.

15. Seawell *v.* Greenway, 22 Tex. 691, 75 Am. Dec. 794.

16. Appeal of Schoch, 33 Pa. St. 351; Appeal of Moore, 10 Pa. St. 435; Jones *v.* Jones, 50 Hun 603, 2 N. Y. Supp. 844; Kelley *v.* Weymouth, 68 Me. 197.

17. State *v.* Thresher, 77 Conn. 70, 58 Atl. 460.

Presumptive Evidence of Receipt of Trust Fund. — An instrument signed by the principal in a trustee's bond, acknowledging the receipt of a certain fund, describing it, and stating further, "said sums of money to be invested in safe securities and paid over in accordance with the requirements of a last will and testament of Mrs. A. V. H.," is, as against the sureties on such trustee's bond, *prima facie* evidence that the fund was received by their principal. Thompson *v.* Rush, 66 Neb. 758, 92 N. W. 1060.

Presumption as to Loss of Trust Fund—Burden of Showing Existence. — Where the evidence shows that a trustee, who, under the terms of a will has been put in possession of a fund for investment and safe keeping, the income to be paid to one beneficiary, and the principal subsequently to be paid to the children of such beneficiary, receives the fund, paying over the income accordingly for many years, when he ceases longer so to do, refusing to make further payments, and finally dies insolvent, the presumption arises that the fund has been lost, and the burden is upon the sureties of the trustee's bond to show that the fund is still in existence; and, failing so to do, they will be held liable. Thompson *v.* Rush, 66 Neb. 758, 92 N. W. 1060.

18. Where an action was brought

2. Admissibility of Evidence. — It is well settled that the dealings of the trustee with the trust fund, and the acts done by him in the performance of his duty as trustee, while the surety remains liable, are admissible in evidence against the surety.[19]

An Order of a Probate Court appointing a trustee is properly admitted in evidence in an action against a surety on the former's bond.[20]

Evidence Showing Good Faith on the trustee's part is inadmissible.[21]

3. Sufficiency of Evidence. — To charge the sureties of a trustee because of a misappropriation of funds on the part of the trustee, such misappropriation must be clearly shown.[22]

against the sureties upon the bond of an executor, to whom the residuary clause of a will gave a fund to be disposed of by him for charitable purposes, it was held that no presumption arises that a residue unaccounted for by him was paid out in accordance with the terms of the trust. The burden of proof is upon the sureties to establish that fact. White *v.* Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473.

19. Accounts of Trustee. — In McKim *v.* Blake, 139 Mass. 593, 2 N. E. 157, which was an action against the executors of the will of one Blake upon the joint and several bond signed by him as one of the sureties of a trustee, it was sought by plaintiff to introduce in evidence the accounts of the trustee. The defendants contended that these accounts were not competent because it was shown that they were falsified and that the trustee had disposed of the property with which such accounts charged him. *Held,* that this did not render them inadmissible. They tended to show that at some time he had had in his hands such property as a part of the trust estate, and that the conversion to his own use was fraudulent.

Receipt Signed by Trustee Showing His Capacity as Such. — A receipt from the trustee as such to himself as curator of the *cestui que trust,* executed after the assumption of the trust and the giving of the trustee's bond and presented to the probate court on a settlement of his accounts as guardian and curator, was competent against the surety as evidence showing that thereafter the curator held the estate of his ward in a capacity of trustee. Tittman *v.* Green, 108 Mo. 22, 18 S. W. 885. See also Williamsburg Ins. Co. *v.* Frothingham, 122 Mass. 391; Choate *v.* Arrington, 116 Mass. 552; Brighton Bank *v.* Smith, 12 Allen (Mass.) 243.

20. Tittman *v.* Green, 108 Mo. 22, 18 S. W. 885.

21. Where action is brought on a probate bond against a trustee for failure to account for all the trust estate, and the defendants seek to prove good faith on the part of the trustee in paying out the money of the fund, and offers evidence to prove that he acted by the advice of and upon the oral orders of the court of probate, it is held that such evidence is inadmissible. The good faith of the trustee not being in issue, evidence to show it is irrelevant. Neither the advice or orders of the court of probate could protect him as trustee in disregarding the terms of his trust. State *v.* Thresher, 77 Conn. 70, 58 Atl. 460.

22. Woodside *v.* Grafflin, 91 Md. 422, 46 Atl. 968. Plaintiffs brought this action to enforce their rights to certain stock, as *cestuis que trustent.* It appeared from the evidence that a pledge of the stock has been made by the trustee for the benefit of a corporation in which the trustee and the plaintiffs were jointly and solely interested. On the trial it was urged that as there was evidence going to show that the proceeds of the pledge of the property in question went to the credit and benefit of a corporation in which the owners of this property were jointly interested with their agent, and of which they and he were practically the owners, the burden of proof was upon these owners to show that these proceeds were not used for their benefit. The court said: "To this proposition we can not yield assent. There is a distinct

As Showing Jurisdiction of Court Creating Trusteeship. — In an action against a surety upon the bond of a testamentary trustee, a recital in the certificate of probate of the will that the court proceeded "pursuant to notice duly published," together with the facts that the trustee accepted the appointment, and that the surety, by executing the bond, recognized the jurisdiction of the probate court, is sufficient to establish such jurisdiction, in the absence of evidence to the contrary.[23]

difference between this agent using the proceeds of the pledge of the property in the business of the corporation in which he and his *cestuis que trustent* were jointly interested, and using them for their benefit. For all that appears here in the proof, he may have been indebted at the time to the corporation for which the funds were so used to the full amount of such funds. To give probative force to the evidence in question, something ought to have appeared with reference to the state of account between this fiduciary and the corporation or its owners."

23. Richter *v.* Leiby's Estate, 101 Wis. 434, 77 N. W. 745.

TUGS.—See Admiralty; Salvage; Towage.

TURNPIKES AND TOLL ROADS. — See Eminent Domain; Highways.

TWICE IN JEOPARDY. — See Former Jeopardy.

ULTRA VIRES.—See Corporations.

UNCHASTITY. — See Chastity.

UNDERTAKINGS.—See Appeal Bonds; Attachment; Bonds; Injunction; Replevin.

UNDERWRITERS.—See Insurance.

UNDUE INFLUENCE.

By Willoughby Rodman.

I. DEFINITION.

1. No Precise Common Law Definition of the expression "Undue Influence," in its legal significance, has been formulated.[1] Whether or not a certain act was procured by undue influence is a question of fact to be determined by the circumstances of the case in which the validity of such act comes in question.[2]

1. Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697. In this case the court says: "The objection to a will that was obtained by undue influence is not one which it is easy to define with precision. The term seems to include both fraud and coercion. Sir John Nicholl defines it to be that degree of influence which takes away from the testator his free agency; such as he is too weak to resist; such as will render the act no longer that of a capable testator: Kinleside *v.* Harrison, 2 Phillim 551. Where influence has been exerted upon a person of feeble mind, or whose faculties are impaired by age or disease, it is not always easy to draw the line between the issues of sanity and of undue influence. So it is possible that in many cases the coercion might be such as to be available to set aside the will on the ground that it had not been executed by the testator."

"It must be admitted that the rules by which may be ascertained the existence of a mental force or power so subtle and intangible as that denominated as 'influence' or 'undue influence,' are not clearly defined, or perhaps definable. Certainly, no general rule may be laid down by which this obnoxious force may be detected." Hazelrig, J., in Fry *v.* Jones, 95 Ky. 148, 24 S. W. 5, 44 Am. St. Rep. 206. See Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446; Rollwagen *v.* Rollwagen, 63 N. Y. 504, 519.

"Insanity takes away testamentary capacity, while undue influence does not allow it to act." Rich *v.* Gilkey, 73 Me. 595.

In an English case the court speaks of undue influence as follows: "The undue influence and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility." Barry *v.* Butlin, 1 Curt. (Eng.) 637. See Hall *v.* Hall, L. R. 1 P. & D. 481, 37 L. J. P. 40, 18 L. T. 152, 16 W. R. 544.

"It is difficult to say, that a false conclusion reached by a testator, based on facts within his own knowledge, or which he believes he knows, is evidence of undue influence. Influence, to be undue, must have induced the testator to make a wrong conclusion. It must have been exercised by some one. If the conclusion reached is the result of erroneous convictions engendered in the mind of the testator on his own motion, it may possibly be he is of unsound mind, but clearly it cannot be said undue influence has been exercised." Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319.

"The non-intervention of a disinterested third party or independent professional adviser, 'especially when the donor is, from age or weakness of disposition, likely to be imposed upon; the statement of a consideration where there was none, or the improvidence of the transaction, furnish a probable, though not always a certain, test of undue influence.' (3 Wh. & Tud. Lead. Cas. Eq., in 70 Law Lib. 60; Harvey *v.* Morant, 8 Beav. 439)." Cadwallader *v.* West, 48 Mo. 483.

"Whatever influence was adequate to overcome the free agency of the testator is undue influence." McClure *v.* McClure, 86 Tenn. 173, 6 S. W. 44.

2. Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790; Lynch *v.* Clements, 24 N. J. Eq. 431; *In re* Will of Humphrey, 26 N. J. Eq. 513. 521; Haydock *v.* Haydock, 33 N. J. Eq. 494; McCoon *v.* Allen, 45 N. J. Eq. 708, 719, 17 Atl. 820.

"It is impossible to distinguish,

2. Reason for Not Defining. — It has been said that the courts following the same course as in case of fraud will not prescribe a defining rule, as to do so might indicate the very means by which the rule might be evaded.[3]

3. A Statutory Definition of the term has been attempted in one state.[4]

II. A QUESTION OF FACT.

As a general rule, it may be said that undue influence is an influence which destroys the free agency of a person acting, and constrains him to do that which he would not have done had such influence not been exercised.[5] Such influence may be exercised by

by a fixed rule, between acts which are within the bounds of legitimate influence, and acts which make the influence undue. Similar acts may be trifling and of no importance in the case of one person, and overmastering in the case of another. Their effect must depend upon the relations between the parties and the character, strength and condition of each." Elkinton *v.* Brick, 44 N. J. Eq. 154, 166, 15 Atl. 391, *quoted* and *approved* in Hampton *v.* Westcott, 49 N. J. Eq. 522, 25 Atl. 254.

3. "It (undue influence) is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger board pointing out the path by which it may be evaded." Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Maynard *v.* Vinton, 59 Mich. 139, 153, 26 N. W. 401, 60 Am. Rep. 276.

"I will not narrow the rule or run the risk of in any degree bettering the exercise of the beneficial jurisdiction of this court by any enumeration of the description of persons against whom it ought to be most freely exercised." Lord Chancellor Cottenham in Dent *v.* Bennett, 4 Myl. & C. 269, 41 Eng. Reprint 105, 7 Sim. 539, 5 L. J. Ch. (N. S.) 58, 8 L. J. Ch. (N. S.) 125. See also Conant *v.* Jackson, 16 Vt. 335, 350.

4. Cal. Civ. Code, § 1575.

5. *Alabama.* — Pool's Heirs *v.* Pool's Exr., 33 Ala. 145.

Georgia. — Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Illinois. — Peabody *v.* Kendall, 145 Ill. 519, 530, 32 N. E. 674.

Kentucky. — Fry *v.* Jones, 95 Ky. 148, 24 S. W. 5, 44 Am. St. Rep. 206.

New Jersey. — *In re* Will of Humphrey, 26 N. J. Eq. 513, 521.

New York. — Gardner *v.* Gardner, 22 Wend. 526, 34 Am. Dec. 340, 348.

North Carolina. — Eelbeck *v.* Granberry, 2 Hayw. 232, 2 Am. Dec. 624.

Ohio. — Monroe *v.* Barclay, 17 Ohio St. 302, 93 Am. Dec. 620.

South Carolina. — Tillman *v.* Hatcher, Rice 271, 280.

In Casborne *v.* Barsham, 2 Beav. 76, 48 Eng. Reprint 1108, it is said that, "When undue influence is to be inferred from the nature of the transaction, or when the transaction itself is contrary to the policy of the law, I apprehend that it is the province of the court to determine the point, and that the question ought not to be sent to a jury."

It is a question of fact whether a will makes such an unnatural disposition of testator's estate as to give rise to an inference of undue influence. Chandler *v.* Jost, 96 Ala. 596, 606, 11 So. 636.

In Farr *v.* Thompson, 1 Spears L. (S. C.) 93, the court says: "The jury, fully instructed as to the nature and degree of the influence which the law requires to impeach a will, and warned that certain acts of influence pointed out would not avail, were left to decide whether undue influence, as before explained, was proved; and this was a question of fact for the jury. The former

means of physical force, threats, importunity, or any other physical or mental constraint.[6]

Physical Force Not Essential. — Undue influence may be shown without evidence of physical force.[7]

Indictment Procured by. — If an attorney for a person claimed to have been wronged by a crime appears before the grand jury which is deliberating concerning the indictment of accused, and seeks to procure the bringing in of such indictment, an indictment afterwards brought in will be deemed to have been procured by undue influence.[8]

What Portion of Estate Affected. — When it can be held that an entire will was not obtained by undue influence, it is a question for the triers of fact to determine what portions of the estate disposed of were obtained by undue influence.[9]

Issue in Cases of Undue Influence. — In cases involving charges of undue influence the question is not, did the actor know what he was

opinion in this case (Chev., 37,) was not meant to overthrow the case of Tillman *v.* Hatcher, (Rice, 271,) and other cases preceding it, which had declared the question of undue influence a question for the jury. When it was said 'What facts, if proved, shall constitute undue or improper influence to avoid a will, I hold to be a question of law,' the intention was to declare that the law defined the nature of the influence which it considered undue or improper, and that the Judge should explain it, and give his opinion whether a certain state of facts (including the condition of the testator, and all the other circumstances of the case appearing to be proved,) amounted to it; but that the question, whether the proposed state of facts, in the form assumed existed, must be left to the jury; as must also the question, whether amidst the many various combinations which may be made of the circumstances of a case, any one existed which would show the required degree of influence, such as rendered the testator no longer a free agent. The question of influence is like the question of unsound mind; both are inquiries as to the *animus testandi,* and are embraced in the general question: Is the paper propounded the *will* of the testator?"

On question of taking case from jury, see Fischer *v.* Sperl, 94 Minn. 421, 103 N. W. 502.

6. *England.* — Smith *v.* Kay, 7 H. L. Cas. 779; Hall *v.* Hall, L. R. 1 P. & D. 481, 37 L. J. P. 40, 18 L. T. 152, 16 W. R. 544; Hacker *v.* Newborn, Style 427, 82 Eng. Reprint 834.

Georgia. — Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Missouri. — Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

Nebraska. — Munson *v.* Carter, 19 Neb. 293, 27 N. W. 208.

New Jersey. — Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469.

New York. — Marx *v.* McGlynn, 88 N. Y. 357, 370; *In re* Soule's Will, 3 N. Y. Supp. 259; *In re* De-Baun's Estate, 9 N. Y. Supp. 807.

Pennsylvania. — Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95.

7. Estes *v.* Bridgforth, 114 Ala. 221, 21 So. 512; Caspari *v.* First G. Church, 12 Mo. App. 293, 317, *affirmed,* 82 Mo. 649; Dingman *v.* Romine, 141 Mo. 466, 474, 42 S. W. 1087.

8. Wilson *v.* State, 70 Miss. 595, 13 So. 225, 35 Am. St. Rep. 664; Welch *v.* State, 68 Miss. 341, 8 So. 673, where an attorney employed to assist in a certain prosecution appeared before the grand jury and made an address urging the finding of an indictment against a certain person.

9. *In re* Widdowson's Estate, 189 Pa. St. 338, 41 Atl. 977.

doing, but — how was his intention produced.[10] The inquiry to be made in any given case goes to the effect of the influence in bringing about the testamentary act, and how the effect was produced; and includes, first, the existence of the influence; second, the opportunity for it to be exerted; and third, its actual exercise or operation to the extent and in such a way as to make the act in question the product of the influence uncontrolled by, and irrespective of, any volition on the part of the testator.[11] When undue influence is made an issue, two lines of inquiry are opened up. First, the conduct of those charged with the exercise of undue influence; second, the effect of this conduct upon the mind of the actor, that is, the mental state produced by it.[12]

III. ESSENTIALS.

1. Must Destroy Free Agency. — To obtain a verdict or finding that a certain act was procured by undue influence, it is necessary to show that its execution was the result of an influence which destroyed the free agency of the actor, and constrained him to act against his will.[13]

10. Allcard *v.* Skinner, L. R. 18 Ch. Div. 145, 182; Ashton *v.* Thompson, 32 Minn. 25, 43, 18 N. W. 918.

"The question is, not whether she (complainant) knew what she was doing, had done, or proposed to do, but how the intention was produced." Huguenin *v.* Baseley, 14 Ves. Jr. 273, 33 Eng. Reprint 526, *quoted* in Whitridge *v.* Whitridge, 76 Md. 54, 80, 24 Atl. 645, *followed* in Bergen *v.* Udall, 31 Barb. (N. Y.) 9, 23.

Actor. — In this article the word "actor" is, for the sake of brevity, employed as a general term to indicate the person whose act in a given case is alleged to have been procured by undue influence. The word as herein employed, includes "testator," "grantor," "donor", or person making a contract, executing an assignment or release, or doing any act.

11. Somers *v.* McCready, 96 Md. 437, 53 Atl. 1117; Potter *v.* Baldwin, 133 Mass. 427; Boggs *v.* Boggs, 62 Neb. 274, 284, 87 N. W. 39; Shailer *v.* Bumstead, 99 Mass. 112, 121.

12. Coghill *v.* Kennedy, 119 Ala. 641, 663, 24 So. 459; Rusling *v.* Rusling, 36 N. J. Eq. 603 (*affirming* 35 N. J. Eq. 120).

13. *England.* — Parfitt *v.* Lawless, L. R. 2 P. & D. 462, 470, 41 L. J. P. 68, 27 L. T. 215; Wingrove *v.* Wingrove, 55 L. J. P. 7, 11 P. D. 81, 50 J. P. 56; Boyse *v.* Rossborough, 6 H. L. Cas. 2, 48, 26 L. J. Ch. 256, 3 Jur. (N. S.) 373, 5 W. R. 414.

Canada. — Collins *v.* Kilroy, 1 Ont. L. 503.

United States. — Penn Mut. L. Ins. Co. *v.* Union Tr. Co., 83 Fed. 891.

Alabama. — Taylor *v.* Kelly, 31 Ala. 59, 70; Leeper *v.* Taylor, 47 Ala. 221; Chandler *v.* Jost, 96 Ala. 596, 11 So. 636; Reeves *v.* Lampley, 125 Ala. 449, 27 So. 840; Bulger *v.* Ross, 98 Ala. 267, 12 So. 803; Coghill *v.* Kennedy, 119 Ala. 641, 663, 24 So. 459; Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Knox *v.* Knox, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235; Dunlap *v.* Robinson, 28 Ala. 100.

Arkansas. — McCulloch *v.* Campbell, 49 Ark. 367, 5 S. W. 590.

California. — Motz's Estate, 136 Cal. 558, 69 Pac. 294; Keegan's Estate, 139 Cal. 123, 72 Pac. 828; Estate of Donovan, 140 Cal. 390, 73 Pac. 1081.

Colorado. — Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790.

Any Influence Undue Which Overpowers Will. — Any influence which

Connecticut. — *In re* Turner's Appeal, 72 Conn. 305, 319, 44 Atl. 310.

Delaware. — Chandler *v.* Ferris, 1 Har. 454, 464; Duffield *v.* Morris' Exr., 2 Har. 375, 384; Sutton *v.* Sutton, 5 Har. 459; Steele *v.* Helm, 2 Marv. 237, 248.

District of Columbia. — Nailor *v.* Nailor, 5 Mackey 93; Barbour *v.* Moore, 4 App. Cas. 535, 550.

Georgia. — Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329, 355.

Illinois. — Roe *v.* Taylor, 45 Ill. 485; Rutherford *v.* Morris, 77 Ill. 397, 413; Thompson *v.* Bennett, 194 Ill. 57, 65, 62 N. E. 321; England *v.* Fawbush, 204 Ill. 384, 294, 68 N. E. 526; Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; Compher *v.* Browning, 219 Ill. 429, 449, 76 N. E. 678; Allmon *v.* Pigg, 82 Ill. 149, 25 Am. Rep. 303.

Iowa. — McIntire *v.* McConn, 28 Iowa 480.

Kentucky. — Turley's Exrs. *v.* Johnson, 1 Bush 116; Lucas *v.* Cannon, 13 Bush 650; Wise *v.* Foote, 81 Ky. 10; Sherley *v.* Sherley's Exr., 81 Ky. 240.

Maine. — Barnes *v.* Barnes, 66 Me. 286, 297; Appeal of O'Brien, 100 Me. 156, 60 Atl. 880.

Maryland. — Wampler *v.* Wampler, 9 Md. 540, 552; Davis *v.* Colvert, 5 Gil[1] & J, 269, 25 Am. Dec. 282; Tyson *v.* Tyson's Exrs., 37 Md. 567, 582; Whitridge *v.* Barry, 42 Md. 140, 153; Layman *v.* Conrey, 60 Md. 286; Grove *v.* Spiker, 72 Md. 300, 20 Atl. 144; Hiss *v.* Weik, 78 Md. 439, 28 Atl. 400; Frush *v.* Green, 86 Md. 494, 39 Atl. 863; Somers *v.* McCready, 96 Md. 437, 53 Atl. 1117.

Massachusetts. — Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697.

Michigan. — Schofield *v.* Walker, 58 Mich. 96, 106, 24 N. W. 624; Maynard *v.* Vinton, 59 Mich. 139, 153, 26 N. W. 401.

Minnesota. — *In re* Nelson's Will, 39 Minn. 204, 39 N. W. 143; Schmidt *v.* Schmidt, 47 Minn. 451, 50 N. W. 598; Tyner *v.* Varien, 97 Minn. 181, 106 N. W. 898.

Missouri. — Jackson *v.* Hardin, 83 Mo. 175, 185; Sunderland *v.* Hood, 13 Mo. App. 232; *affirmed,* 84 Mo. 293; Norton *v.* Paxton, 110 Mo. 456, 467, 19 S. W. 807; McFadin *v.* Catron, 120 Mo. 252, 275, 25 S. W. 506; *s. c.,* 138 Mo. 197, 218, 38 S. W. 932, 39 S. W. 771; Carl *v.* Gabel, 120 Mo. 283, 296, 25 S. W. 214; Jones *v.* Roberts, 37 Mo. App. 163; Dingman *v.* Romine, 141 Mo. 466, 474, 42 S. W. 1087; Gordon *v.* Burris, 153 Mo. 223, 237, 54 S. W. 546; Sehr *v.* Lindemann, 153 Mo. 276, 289, 54 S. W. 537; Tibbe *v.* Kamp, 154 Mo. 545, 579, 54 S. W. 879, 55 S. W. 440; Martin *v.* Bowdern, 158 Mo. 379, 59 S. W. 227; Thompson *v.* Ish, 98 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Lorts *v.* Wash, 175 Mo. 487, 502, 75 S. W. 95; Crowson *v.* Crowson, 172 Mo. 691, 703, 72 S. W. 1065; Hughes *v.* Rader, 183 Mo. 630, 708, 82 S. W. 32; Dausman *v.* Rankin, 189 Mo. 677, 703, 88 S. W. 696.

Nebraska. — Seebrock *v.* Fedawa, 30 Neb. 424, 437, 46 N. W. 650; Boggs *v.* Boggs, 62 Neb. 274, 284, 87 N. W. 39.

New Jersey. — Waddington *v.* Buzby, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706; Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469; Trumbull *v.* Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253; Turner *v.* Cheesman, 15 N. J. Eq. 243, 265; Moore's Exrs. *v.* Blauvelt, 15 N. J. Eq. 367; Lynch *v.* Clements, 24 N. J. Eq. 431; Haydock *v.* Haydock, 33 N. J. Eq. 494; Earle *v.* Norfolk etc. Co., 36 N. J. Eq. 188, *affirmed,* 37 N. J. Eq. 315; Elkinton *v.* Brick, 44 N. J. Eq. 154, 165, 15 Atl. 391; Stoutenburgh *v.* Hopkins, 43 N. J. Eq. 577, 12 Atl. 689; Fritz *v.* Turner, 46 N. J. Eq. 515, 22 Atl. 125; White *v.* Starr, 47 N. J. Eq. 244, 260, 20 Atl. 875.

New York. — Gardiner *v.* Gardiner, 34 N. Y. 155; Rollwagen *v.* Rollwagen, 63 N. Y. 504, 519; Brick *v.* Brick, 66 N. Y. 144; Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387, 394; Coit *v.* Patchen, 77 N. Y. 533; Wood *v.* Bishop, 1 Dem. 512; Hazard *v.* Hefford, 2 Hun 445; Marvin *v.* Marvin, 3 Abb. N. Y. Ct. App. 192, (opinion also given in full in Rollwagen *v.* Rollwagen, 3 Hun 121); Wait *v.* Breeze, 18 Hun 403;

overpowers the will of actor and subordinates it to that of another

Van Kleeck *v.* Phipps, 4 Redf. 99; *s. c., affirmed*, 22 Hun 541; M'Coy *v.* M'Coy, 4 Redf. 54; *In re* Blair's Will, 16 N. Y. Supp. 874; *In re* Read's Will, 40 N. Y. Supp. 974.

North Carolina. — Wright *v.* Howe, 52 N. C. (7 Jones' L.) 412; *In re* Abee's Will, 146 N. C. 273, 59 S. E. 700.

Oregon. — Hubbard *v.* Hubbard, 7 Or. 42; *In re* Holman's Will, 42 Or. 345, 358, 70 Pac. 908.

Pennsylvania. — Browne *v.* Mollis-ton, 3 Whart. 129, 138; Zimmerman *v.* Zimmerman, 23 Pa. St. 375; Tawney *v.* Long, 76 Pa. St. 106, 114; Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95.

South Carolina. — Woodward *v.* James, 3 Strobh. L. 552, 51 Am. Dec. 649; Floyd *v.* Floyd, 3 Strobh. L. 44; Means *v.* Means, 6 Rich. L. 1, 21.

Tennessee. — Wisener *v.* Maupin, 2 Baxt. 342, 364; Nailing *v.* Nailing, 2 Sneed 630; Peery *v.* Peery, 94 Tenn. 328, 338, 29 S. W. 1.

Texas. — Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Millican *v.* Millican, 24 Tex. 426, 446.

Vermont. — Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 265, 24 Atl. 253.

Virginia. — Parramore *v.* Taylor, 11 Gratt. 220, 238; Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928; Hartman *v.* Strickler, 82 Va. 225; Davis *v.* Strange, 86 Va. 793, 807, 11 S. E. 406.

West Virginia. — Erwin *v.* Hedrick, 52 W. Va. 537, 44 S. E. 165; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

Wisconsin. — *In re* Jackman's Will, 26 Wis. 104; Drinkwine *v.* Gruelle, 120 Wis. 628, 98 N. W. 534; McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

Undue influence has been said to be a species of fraud or duress.

England. — Barry *v.* Butlin, 2 Moo. & P. 480, 491, 12 Eng. Reprint 89; *s. c.*, 1 Curt. 638; Kelly *v.* Thewles, 2 Ir. Ch. 510, 521; Palmer *v.* Wheeler, 2 Ball & B. 30, 12 R. R. 60; Boyce *v.* Rossborough, 6 H. L. Cas. 2, 48.

Alabama. — Knox *v.* Knox, 95 Ala. 495, 503, 11 So. 125; Coghill *v.* Kennedy, 119 Ala. 641, 667, 24 So. 459.

Georgia. — Thompson *v.* Davitte, 59 Ga. 472.

Illinois. — Roe *v.* Taylor, 45 Ill. 485; Yoe *v.* McCord, 74 Ill. 33, 44; Burt *v.* Quisenberry, 132 Ill. 385, 399, 24 N. E. 622.

Iowa. — Perkins *v.* Perkins, 116 Iowa 253, 90 N. W. 55.

Massachusetts. — Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697.

Michigan. — Potter's Appeal, 53 Mich. 106, 18 N. W. 575; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

Missouri. — Carl *v.* Gabel, 120 Mo. 283, 297, 25 S. W. 214; Sunderland *v.* Hood, 13 Mo. App. 238; *affirmed*, 84 Mo. 293; Jackson *v.* Hardy, 83 Mo. 185; Ketchum *v.* Stearns, 8 Mo. App. 70; Jones *v.* Roberts, 37 Mo. App. 163, 179.

Nebraska. — Boggs *v.* Boggs, 62 Neb. 274, 284, 87 N. W. 39; Latham *v.* Schaal, 25 Neb. 535.

New Jersey. — Fritz *v.* Turner, 46 N. J. Eq. 515, 22 Atl. 125.

New York. — Davis *v.* Culver, 13 How. Pr. 62; Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387, 394; *In re* White's Will, 5 N. Y. Supp. 295. *affirmed*, 121 N. Y. 406, 24 N. E. 935; Kinne *v.* Johnson, 60 Barb. 69; Gardiner *v.* Gardiner, 34 N. Y. 155.

North Carolina. — Wright *v.* Howe, 52 N. C. (7 Jones' L.) 412; *In re* Abee's Will, 146 N. C. 273, 59 S. E. 700; Myatt *v.* Myatt, 62 S. E. 887.

Texas. — Morrison *v.* Thoman (Tex. Civ. App.), 86 S. W. 1068; *s. c.*, 89 S. W. 409.

"In testamentary cases, undue influence is always defined as coercion or fraud, but, *inter vivos*, no such definition is applied." Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385.

"Such influence, if any was exerted, must amount to fraud." Stackhouse *v.* Horton, 15 N. J. Eq. 202, 231; Rabb *v.* Graham, 43 Ind. 1, 12; Bundy *v.* McKnight, 48 Ind. 502, 516.

But an instruction which states

that undue influence must result from coercion, imposition or fraud is erroneous. Lucas *v.* Cannon, 13 Bush (Ky.) 650.

To avoid a will upon this ground contestant must prove "force or coercion." *In re* Martin, 98 N. Y. 193.

"That undue influence which will invalidate a will must be such importunity, influence or power as deprives the testator of the free exercise of his intellectual powers." Heath *v.* Koch, 74 App. Div. 338, 77 N. Y. Supp. 513, *affirmed,* 173 N. Y. 629, 66 N. E. 1110.

"Undue influence, to avoid a will, must be an influence exercised by coercion, imposition or fraud." Leguine *v.* Leguine, 4 Abb. App. Dec. (N. Y.) 191; *s. c.,* 3 Keyes 663.

"Undue influence consists in destroying the freedom of the donor's will, so as to make his act rather the will and act of the donee than his own." Decker *v.* Waterman, 67 Barb. (N. Y.) 460, 469.

There is authority to the effect that influence, no matter how powerful, cannot be called undue, if it be exercised for the benefit of actor — even if weak-minded — and to impel him to do something beneficial to himself. Dailey *v.* Kastell, 56 Wis. 444, 453, 14 N. W. 635; Marking *v.* Marking, 106 Wis. 292, 82 N. W. 133. So it has been said that influence is not undue which impels actor to do that which is demanded by duty and natural affection. *In re* Barber's Will (N. J.), 49 Atl. 826; Cornwell *v.* Riker, 2 Dem. (N. Y.) 354, 383; Davis *v.* Culver, 13 How. Pr. (N. Y.) 62; Clarke *v.* Davis, 1 Redf. (N. Y.) 249; Ewen *v.* Perrine, 5 Redf. (N. Y.) 640; *In re* Lyddy's Will, 4 N. Y. Supp. 468, *affirmed,* 53 Hun 629, 5 N. Y. Supp. 636.

Distinguished From Fraud. "Strictly speaking, fraud and undue influence are not synonymous expressions. Undue influence is, in one sense, a species of fraud, and while there is sometimes, — perhaps usually — present elements of fraud, undue influence may exist without any positive fraud being shown." *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. Rep. 181. See also Boyd *v.* Boyd, 66 Pa. St. 283, 293.

Actual Duress Not Essential. Lomerson *v.* Johnston, 44 N. J. Eq. 93, 13 Atl. 8; McCandless *v.* Engle, 51 Pa. St. 309; Chappell *v.* Trent, 80 Va. 849, 928, 19 S. E. 314; Munson *v.* Carter, 19 Neb. 293, 27 N. W. 208.

Terror, Force or Unkindness Not Essential. — Turner *v.* Collins, 7 Ch. App. (Eng.) 329. See also Miskey's Appeal, 107 Pa. St. 611; Worrall's Appeal, 110 Pa. St. 349, 364, 1 Atl. 380, 765.

Moral Coercion. — "To make out a charge of undue influence, the contestant must show that an influence was exerted upon the mind of the testator, which was equivalent to moral coercion, and constrained him to do that which was against his will, but which, from fear, the desire of peace, or some other feeling than affection, he was unable to resist." Hall's Heirs *v.* Hall's Exr., 38 Ala. 131; Chappell *v.* Trent, 90 Va. 849, 19 S. E. 314; Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

Undue Influence Exercised in Procuring Deeds. — *United States.* Towson *v.* Moore, 173 U. S. 17; Conley *v.* Nailor, 118 U. S. 127.

Illinois. — Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Francis *v.* Wilkinson, 147 Ill. 370, 381, 35 N. E. 150; Burt *v.* Quisenberry, 132 Ill. 385, 399, 24 N. E. 622; Kimball *v.* Cuddy, 117 Ill. 213, 7 N. E. 589; Dorsey *v.* Wolcott, 173 Ill. 539, 550, 50 N. E. 1015.

Iowa. — Mallow *v.* Walker, 113 Iowa 238, 88 N. W. 452.

New Jersey. — Le Gendre *v.* Goodridge, 46 N. J. Eq. 419, 19 Atl. 543. See also Fuller's Admr. *v.* Fuller, 40 Ala. 301.

Mortgages. — Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

Limitation on Rule. — In Banta *v.* Willets, 6 Dem. (N. Y.) 84, it is said that the rule stated in the text is limited to cases in which actor and person influencing him are equal. The court says: "The rule, that undue influence must be sufficient to overcome free agency, is

is undue, although in its inception and means of acquisition it was lawful, reasonable and proper.[14]

A. Threats. — a. *Disgrace, Imprisonment, Suffering or Loss.* Influence is undue when acquired by threats to disgrace or imprison a member of the family of the person whose act is in question, or to do some act which will cause physical or mental suffering or financial loss to the person threatened.[15] To constitute undue influence by means of threats, it is not necessary that the person charged with exercising such influence state, in so many words, that criminal proceedings will be instituted if the demanded instrument is not executed, or act done; it is sufficient that his language or acts produce upon the mind of the actor the impression that such consequences will ensue upon refusal, and that the actor's mind is by

limited to cases where the testator and legatee stand on a level. It does not apply where there was a confidential relation, the testator being deponent, and the beneficiary holding the dominating situation." The judgment in this case was reversed in *In re* Harold's Will, 3 N. Y. Supp. 316, but the principle stated in this note is not discussed.

14. Schofield *v.* Walker, 58 Mich. 96, 24 N. W. 624.

15. Threats of Prosecution. — An agreement by a woman to pay money to save her husband from threatened arrest is invalid, on the ground of undue influence. Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447. To same effect, see Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Coffman *v.* Lookout Bk., 5 Lea (Tenn.) 232, 40 Am. Rep. 31; Rau *v.* Von Zedlitz, 132 Mass. 164; Lomerson *v.* Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Ingersoll *v.* Roe, 65 Barb. (N. Y.) 346, 355. See also Town of Sharon *v.* Gager, 46 Conn. 189; McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Bayley *v.* Williams, 4 Giff. 638, 11 Jur. (N. S.) 236, 11 L. T. 110, 66 Eng. Reprint 862; *affirmed* by House of Lords, L. R. 1 Eng. & Ir. App. Cas. 200; Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383; Foley *v.* Greene, 14 R. I. 618.

Second mortgage executed in renewal of mortgage so obtained, is affected by the original transaction, and therefore invalid. Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383.

For a case where a wife made a transfer of property to make good her husband's defalcations, but where no threats of imprisonment were made, and the wife had independent advice and acted with deliberation, and the transaction was upheld, see Holt *v.* Agnew, 67 Ala. 360.

Undue influence is not shown by proof that a woman borrowed money to renew a mortgage executed to secure repayment of money embezzled by her husband, and executed a mortgage to repay the sum so borrowed, it not appearing that the lendor had made any statements in regard to prosecuting the husband criminally. Reeves *v.* Lampley, 125 Ala. 449, 27 So. 840.

Threat To Abduct Children. Kellogg *v.* Kellogg, 21 Colo. 181, 40 Pac. 358; Wiley *v.* Prince, 21 Tex. 637.

Threat To Destroy Property. Central Bank *v.* Copeland, 18 Md. 305, 318, 81 Am. Dec. 597.

Threats To Kill and To Cause Financial Loss. — Ring *v.* Ring, (App. Div.) 111 N. Y. Supp. 713; *affirming*, 55 Misc. 420, 105 N. Y. Supp. 498.

Threat To Commit Suicide may constitute such influence. *In re* Van Houten's Will, 17 Misc. 445, 41 N. Y. Supp. 250. On subject of threats, see also: Edwards *v.* Bowden, 107 N. C. 58, 12 S. E. 58; Goodrich *v.* Shaw, 72 Mich. 109, 40 N. W. 187; Ellis *v.* Barker, L. R. 7 Ch. App. 104, 40 L. J. 603, 25 L. T. N. S. 688.

fear of such consequences, and by desire to avoid them, impelled to consent to the act in question.[16]

(1.) Taking Advantage of Ordinary Civil Remedy. — A deed procured by grantee's statement that he will avail himself of ordinary civil process or contract right, for the collection of a debt, and by his subsequent adoption of such course, will not be held to have been procured by undue influence.[17]

(2.) Statement of Legal Rights and Consequences of Their Assertion. A statement by person charged to the effect that such person has certain legal rights in regard to the subject of the transaction, and a statement that certain consequences will ensue upon the action contemplated by actor, unaccompanied by threats of legal proceedings or adverse action do not show undue influence.[18]

b. *Litigation Among Children.* — But influence acquired by means of threats that, unless testator made a certain testamentary disposition, his children will engage in litigation over his estate, has been held to be undue.[19]

c. *Prosecute Groundless Claim. — Actor Weak-Minded.* — Where a relative taking advantage of actor's weakness of mind, obtained a deed of all actor's land for an inadequate consideration, by exciting actor's fears in regard to a pretended claim against actor, asserted for the purpose, it will be held that such deed was procured by undue influence.[20]

16. Lomerson *v.* Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Peckham *v.* Van Bergen, 10 N. D. 43, 84 N. W. 566. Whitcomb *v.* Collier, 133 Iowa 303, 110 N. W. 836. In this case plaintiff, an ignorant, easily influenced man, was accused of having improper relations with a young girl. Plaintiff consulted S., an attorney, who accepted his employment and took down his statement. A friend to whom plaintiff had spoken of his relations with the girl, communicated plaintiff's statement to the girl's father, who then employed S. to prosecute a damage suit against plaintiff. Plaintiff, being informed that he was liable to criminal prosecution, negotiated for a settlement. He then found that S. was representing the girl's father. As the result of negotiations, a settlement was effected. *Held,* that plaintiff's settlement was caused by undue influence.

17. In Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431, the grantee held grantor's note, secured by a trust deed. Grantee, being about to sell under trust deed, paid grantor more money and took a conveyance of the land described in the trust deed. The grantor sued to set aside this deed on the ground, amongst others, of undue influence. Judgment for defendant was affirmed.

Power of Attorney to Sheriff Holding Executions has been held invalid, as being made by reason of the fact that the sheriff held a number of executions against the person executing the power. Gist *v.* Frazier, 2 Litt. (Ky.) 118.

18. Laughlin *v.* Mitchell, 14 Fed. 382, *affirmed,* 121 U. S. 411.

19. Moore's Exrs. *v.* Blauvelt, 15 N. J. Eq. 367.

20. Gaston *v.* Bennett, 30 S. C. 467, 9 S. E. 515.

Threat To Issue Illegal Process. Injury to Credit. — Thurman *v.* Burt, 53 Ill. 129; Kane *v.* Quillin, 104 Va. 309, 51 S. E. 353. To same general effect, see Parker *v.* Hill, 85 Ark. 363, 108 S. W. 208, where it was held that a deed from a woman of sixty-four, in feeble health, made to her brother under threats of involving her in a groundless lawsuit was obtained by undue influence. The

d. *Inflict Personal Violence.* — Influence acquired through fear inspired by threats to kill or injure actor is undue.[21]

e. *Slander.* — Also influence acquired by threats to circulate slanderous reports concerning actor.[22]

f. *Estrangement.* — Threat that permanent estrangement between testator and one of his children will be the result of refusal to make a certain testamentary provision is sufficient to constitute undue influence.[23]

g. *Desertion.* — So, in case of testator who, old and helpless, makes his home with one of his children, if proof shows that such child threatened to leave testator alone unless a will in favor of such child be permitted to remain unrevoked, and that testator was induced by such threat to abandon his intention of revocation, testator's conduct will be deemed to have been caused by undue influence.[24]

B. Grant Made To Secure Peace. — A grant or devise made by an aged person to his children for the purpose of avoiding future conflict with them, and for the sake of peace, will be set aside as made under undue influence.[25]

C. Withholding Consent to Marriage. — In an early English case it was held that an agreement between a man and the guardian of a young woman whom he desired to marry, by the terms of which the former agreed to release the guardian from all obligation to account for the ward's estate, would be set aside, the court saying that the situation was the same as if the guardian should make such release a condition precedent to consent to the marriage.[26]

D. Fraud. — Concealment. — It has been held that certain acts of fraud and concealment constitute undue influence.[27]

court quotes 2 Pomeroy's Eq. § 951.

21. Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Hartnett *v.* Hartnett, 42 Neb. 23, 32, 60 N. W. 362; Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Fagan *v.* Dugan, 2 Redf. (N. Y.) 341; Will of Farnsworth, 62 Wis. 474, 22 N. W. 523.

22. Gay *v.* Gillilan, 92 Mo. 250, 261, 5 S. W. 7, 1 Am. St. Rep. 712.

23. Moore's Exrs. *v.* Blauvelt, 15 N. J. Eq. 367, 383.

24. *In re* Sickles' Will, 63 N. J. Eq. 233, 50 Atl. 577, *affirmed*, 64 N. J. Eq. 791, 53 Atl. 1125; Edwards *v.* Bowden, 107 N. C. 58, 12 S. E. 58.

25. Moore's Exrs. *v.* Blauvelt, 15 N. J. Eq. 367.

Fuller's Admr. *v.* Fuller, 40 Ala. 301, grantor, an aged man of impaired mental and volitional powers, had expressed his determination of providing for his illegitimate children, and to effectuate this intention, was arranging a sale of certain personal property. His legitimate sons, resenting his solicitude for the illegitimate family, carried off the personal property in question. To obtain its restoration, and to avoid conflicts with his lawful sons, he made a grant conveying to them all of his estate. In grantor's action to set aside this grant, judgment was rendered for defendants. This judgment was reversed on appeal. Will of Farnsworth, 62 Wis. 474, 22 N. W. 523.

26. Duke of Hamilton *v.* Lord Mohun, 1 P. Wms. 118, 24 Eng. Reprint 319.

27. "The representation to a testatrix by her brother, who was also a lawyer and the draftsman of her will, that the residuary clause in a former will, giving the property to her brothers in trust, was ob-

E. Religion. — Appeal to Religious Feeling. — When, by appealing to actor's religious feelings, or exciting his fears of future punishment, a person occupying the position of spiritual adviser or religious superior, obtains such a mastery over him as to cause him to do an act which he would not have done otherwise, the act so done will be deemed to have been procured by undue influence.[28]

Vow. — Evidence that testatrix, on joining a certain religious order made a vow that she would devise and bequeath all her property to such order does not show undue influence.[29]

F. Spiritualism. — Influence of Medium. — So as to the influence obtained by a spirit medium over one who believes in spiritualism and who has employed the medium in holding communications with spirits.[30]

jectionable, because it threw a question upon the validity of the will, and that it would be better to leave the trust part out, and his concealment of the fact that the clause might be so drawn as to accomplish her purpose, with knowledge that she relied on him, constitute such undue influence as will avoid the will, which gave the residue to the brothers absolutely. Lyon *v.* Dada, 111 Mich. 340, 69 N. W. 654; Moore's Exrs. *v.* Blauvelt, 15 N. J. Eq. 367, 381.

28. Appeal to Religious Duty. Undue influence is exercised by a priest in stating to a dying parishioner that it is his duty to make a will, and that litigation will result from his failure to do so. Carroll *v.* House, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469. See Norton *v.* Relly, 2 Eden. 286, 28 Eng. Reprint 908; Nottidge *v.* Prince, 2 Giff. 246, 66 Eng. Reprint 103, 29 L. J. Ch. 857, 6 Jur. (N. S.) 1066. For a discussion of the subject of religious influence, see Allcard *v.* Skinner, L. R. 36 Ch. Div. (Eng.) 145; Morley *v.* Loughnan, 62 L. J. Ch. 515, (1893) 1 Ch. 736, 3 Coke 592, 68 L. T. 619; Ford *v.* Hennessy, 70 Mo. 580; Caspari *v.* First German Church, 12 Mo. App. 293, 314, *affirmed*, 82 Mo. 649.

Religious Influence. — It has been held that a gift to a religious institution to be used for charitable purposes, made by a person who is an enthusiast on the subject of religion, and under the influence of her spiritual adviser and the officers of the charitable institution, and who has made a vow to dedicate all her property to religious uses, is made under undue influence. Allcard *v.* Skinner, L. R. 36 Ch. Div. (Eng.) 145.

Religious Leader. — In case of a religious community, its spiritual and temporal leader having absolute power over its members, who believed he had power to save or condemn their souls, and that disobedience to his commands was a sin against the Holy Ghost, where each member was required to contribute his property to a common stock, parting with his title, if a certain member on being expelled from the community accept a small sum in full of all of his property, his receipt given therefor will be deemed to have been obtained by undue influence. Nachtrieb *v.* The Harmony Settlement, 3 Wall. Jr. (U. S.) 66, 81. The judgment in this case was reversed by the supreme court, on the ground that the bill did not directly impeach the so-called "receipt," which the supreme court holds was more than a receipt, that it constituted a contract of dissolution. Baker *v.* Nachtrieb, 19 How. (U. S.) 126.

29. Will *v.* Sisters, 67 Minn. 335, 69 N. W. 1090. The court says that, as the evidence showed testatrix was a free moral agent when she took the vow, and that she never repented it, the mere making of such vow was not sufficient to show undue influence.

30. Lyon *v.* Home, L. R. 6 Eq. 655, 37 L. J. 674, 18 L. T. 451.

G. Appeal to Filial Duty. — A grant made by a child to his parent by reason of appeals to the filial duty of grantor may, under some circumstances, be deemed to have been procured by undue influence.[31]

H. Charges Against Third Person. — A will will be held to have been executed under undue influence, when it appears that a person benefited acquired influence over the testator and induced the execution of the will in question by false representations as to the contestant's purpose to kill or injure the testator.[32]

I. Taking Advantage of Distress or Grief. — It is exercising undue influence to cause a person to perform an act when prostrated by distress or grief.[33]

J. Fear. — An act done under influence of fear created in actor by the person charged, is deemed done under undue influence.[34]

a. *Marital Displeasure.* — So, if a woman sign an instrument through fear of her husband's displeasure.[35]

For cases involving influence obtained by means of spiritualistic practices, see Orchardson *v.* Cofield, 171 Ill. 14, 49 N. E. 197, and Thompson *v.* Hawks, 14 Fed. 902.

Whether or not so called "revelations" of spirits to one who is a believer in spiritualism constitute undue influence is a question for the jury. Steinkuehler *v.* Wempner, 169 Ind. 154, 81 N. E. 482.

31. Where a young woman, shortly after attaining majority, conveys to her parents all property devised to her by a relative by will probated the day before the execution of her conveyance, being all of her estate, and the proof shows that her conveyance was obtained by reason of importunities, false statements, and appeals to the filial feelings of grantor, it will be set aside on the ground of undue influence. Taylor *v.* Taylor, 8 How. (U. S.) 183. To same general effect, see Brown *v.* Burbank, 59 Cal. 535; Whitridge *v.* Whitridge, 76 Md. 54, 81, 24 Atl. 645.

32. Estate of Kendrick, 130 Cal. 360, 62 Pac. 605 (that contestant was attempting to poison testatrix).

Confinement. — Statements to testator that contestants intended to confine him in an insane asylum. *In re* Alexander's Will, 27 N. J. Eq. 463, *affirmed*, 29 N. J. Eq. 649.

33. Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Moore *v.* Moore, 81 Cal. 195, 22 Pac. 589, 874; *s. c.*, on demurrer to complaint, 56 Cal. 89; Dolliver *v.* Dolliver, 94 Cal. 642, 30 Pac. 4.

34. Williams *v.* Williams, 63 Md. 371, 395; *In re* Alexander's Will, 27 N. J. Eq. 463, *affirmed*, 29 N. J. Eq. 649.

Undue influence is shown by proof that actor, who was aged and deaf, was secluded in residence of person charged, who excluded her other children, and threatened to place actor under guardianship, unless she executed the assignment in question. McKay *v.* Peterson (Tex. Civ. App.), 113 S. W. 981.

Influence of Detective and Police Officers. — Where a detective employed to arrest a person who had embezzled money from a corporation arrested the wrong man by mistake, kept him in irons, took him to a strange city where he had no friends and placed him in the custody of the police; when upon discovery of the mistake the person arrested was released but told to return the next day, and, upon his return, was induced by detectives and policemen to sign a paper releasing his captor's employer from liability for damages, such release was not voluntary. Harris *v.* Louisville, N. O. & T. R. Co., 35 Fed. 116.

35. Fowler *v.* Butterly, 78 N. Y. 68, *affirming* 53 How. Pr. (N. Y.) 471.

b. *Destruction of Property.* — A conveyance will be deemed to have been procured by undue influence, where grantor is induced to make it by the fact that grantee creates in grantor's mind the fear that certain property of the latter will be destroyed unless the conveyance be made.[36]

K. Influence Acquired Through Distress or Fear, Insufficient. — But the fact that actor was affected by distress, grief or apprehension is not, alone, sufficient to show undue influence.[37]

2. Influence Alone, Insufficient. — It is not sufficient to show that a certain person possessed influence, however powerful, over the actor.[38]

36. Davis *v.* Strange, 86 Va. 793, 11 S. E. 406.

37. Wilson *v.* Brown (Tenn. Ch. App.), 35 S. W. 1098.

38. *England.* — Barry *v.* Butlin, 1 Curt. 637; *In re* Metcalfe's Trusts, 2 De G., J. & S. 122, 46 Eng. Reprint 321, 33 L. J. Ch. 308, 10 L. T. 78, 10 Jus. (N. S.) 224; Parfitt *v.* Lawless, L. R. 2 P. 462, 472, 41 L. J. P. 68, 27 L. T. 215; Boyse *v.* Rossborough, 6 H. L. Cas. 2, 48.

United States. — Penn Mut. L. Ins. Co. *v.* Union Tr. Co., 83 Fed. 891.

Arkansas. — McCulloch *v.* Campbell, 49 Ark. 367, 5 S. W. 590; Boggianna *v.* Anderson, 78 Ark. 420, 94 S. W. 51.

California. — Estate of Donovan, 140 Cal. 390, 73 Pac. 1081.

Georgia. — Lindsey *v.* Lindsey, 62 Ga. 546.

Illinois. — Brownfield *v.* Brownfield, 43 Ill. 147; Rutherford *v.* Morris, 77 Ill. 397, 414; Sturtevant *v.* Sturtevant, 116 Ill. 340, 354, 6 N. E. 428; Francis *v.* Wilkinson, 147 Ill. 370, 382, 35 N. E. 150.

Kentucky. — Elliott's Will, 2 J. J. Marsh. 340; Kevil *v.* Kevil, 2 Bush 614.

Maine. — Small *v.* Small, 4 Greenl. 220, 16 Am. Dec. 253.

Massachusetts. — Bacon *v.* Bacon, 181 Mass. 18, 62 N. E. 990, 92 Am. St. Rep. 397.

Michigan. — Latham *v.* Udell, 38 Mich. 238; Maynard *v.* Vinton, 59 Mich. 139, 153, 26 N. W. 401, 60 Am. Rep. 276.

Missouri. — Brinkman *v.* Rueggesick, 71 Mo. 553; Appleby *v.* Brock, 76 Mo. 314; Myers *v.* Hauger, 98 Mo. 433, 11 S. W. 974; Berberet *v.* Berberet, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; Riley *v.* Sherwood, 144 Mo. 354, 45 S. W. 1077.

New Jersey. — Turner *v.* Cheesman, 15 N. J. Eq. 243, 265; McCoon *v.* Allen, 45 N. J. Eq. 708, 719, 17 Atl. 820.

New York. — Gardner *v.* Gardner, 22 Wend. 526, 34 Am. Dec. 340, 350; *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107; *In re* Blair's Will, 16 N. Y. Supp. 874.

South Carolina. — Martin *v.* Teague, 2 Spears 260; Woodward *v.* James, 3 Strobh. L. 552, 51 Am. Dec. 649.

Tennessee. — Simerly *v.* Hurley, 9 Lea 711.

Wisconsin. — *In re* Jackman's Will, 26 Wis. 104, 116; Will of Carroll, 50 Wis. 437, 7 N. W. 434.

Thus, in the contest of a will alleged to have been executed under undue influence of testator's wife, and which was prejudicial to a daughter of testator, it was held that proof that the wife had great influence over her husband was not sufficient to invalidate the will, but that it was incumbent upon contestant to show that the wife had exercised such influence to obtain a will acceptable to her and prejudicial to contestant. Small *v.* Small, 4 Greenl. (Me.) 220, 16 Am. Dec. 253.

Distinction Between "Influence" and "Control." — See Stulz *v.* Schaeffle, 16 Jur. (Eng.) 909.

Undue influence is not shown by proof that, in domestic matters, testator was controlled by his wife, and yielded to her demands. *In re* Langford, 108 Cal. 608, 615, 41 Pac. 701.

A. Influence of Recognized Relation. — The influence naturally created by a legal, recognized relation cannot be said to be undue; thus the mere fact that a person was under the influence of his legal adviser, does not establish the fact of undue influence.[39]

B. Not Undue Because Exerted To Procure Wrongful Act. Influence is not undue by reason of being exerted to procure wrongful acts; or to obtain an unfair or unjust advantage.[40]

3. Unlawful Influence, Insufficient. — While all undue influence is unlawful, in the sense that an act procured by its exercise will be held invalid, influence which is called "unlawful," that is influence exercised by a person sustaining unlawful relations with the person whose act is in question, is not necessarily undue.[41]

4. What Is Not Undue Influence. — A. Suggestion, Advice, Argument. — Suggestion and advice, or arguments addressed to the

In *In re* Metcalfe's Trusts, 2 De G., J. & S. 122, 33 L. J. Ch. 308, 10 Jur. (N. S.) 224, 10 L. T. 78, 46 Eng. Reprint 321, it is held that the mere fact that a nun is under the influence of her religious associates and superiors is not, alone, sufficient to invalidate a transfer of her estate for religious uses, when she petitions to have her conveyance effectuated.

39. *England.* — Casborne *v.* Barsham, 2 Beav. 76, 48 Eng. Reprint 1108.

Maryland. — Gunther *v.* Gunther, 69 Md. 560, 16 Atl. 219.

Minnesota. — Storer's Will, 28 Minn. 9, 8 N. W. 827.

Missouri. — Rankin *v.* Rankin, 61 Mo. 295; Jackson *v.* Hardin, 83 Mo. 175, 185; Hollocher *v.* Hollocher, 62 Mo. 267; Thompson *v.* Ish, 99 Mo. 160, 170, 12 S. W. 510, 17 Am. St. Rep. 552; Crowson *v.* Crowson, 172 Mo. 691, 703, 72 S. W. 1065.

New York. — Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387, 394.

As to "Natural Influence," generally, see Bundy *v.* McKnight, 48 Ind. 502, 516.

40. *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53; *affirmed,* 163 N. Y. 608, 57 N. E. 1107; Howe *v.* Howe, 99 Mass. 88, 99.

41. Wingrove *v.* Wingrove, 55 L. J. P. 7, 11 P. & D. (Eng.) 81; Dunlap *v.* Robinson, 28 Ala. 100; Porschet *v.* Porschet, 82 Ky. 93, 56 Am. Rep. 880; Sunderland *v.* Hood, 13 Mo. App. 232, *affirmed,* 84 Mo. 293; Small *v.* Small, 4 Greenl. (Me.) 220, 16 Am. Dec. 253; Myers *v.* Hauger, 98 Mo. 433, 11 S. W. 974; *In re* Ruffino, 116 Cal. 304, 314, 48 Pac. 127.

"The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions; for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relation, and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former it is right, because the relation is lawful; and in the latter it may be condemned, together with it effects, because the relation is unlawful. . . . If, then, there was such a relation between the testator and Mrs. Bolton, at the time of the making of the will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator, and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will." Dean *v.* Negley, 41 Pa. St. 312, 80 Am. Dec. 620; See also Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Porschet *v.* Porschet, 82 Ky. 93, 56 Am. Rep. 880; Rudy *v.* Ulrich, 69 Pa. St. 177, 8 Am. Rep. 238; Dickie *v.* Carter, 42 Ill. 376, 388; Smith *v.* Henline, 174 Ill. 184, 196, 51 N. E. 227; *In re* Rand's Will, 28 Misc. 465, 59 N. Y. Supp. 1082; *In re* Westerman's Will, 29 Misc. 409,

understanding and judgment do not constitute undue influence.[42]

Requesting Third Person To Suggest that actor perform the act in question does not show undue influence.[43]

61 N. Y. Supp. 1065; *In re* Hamilton's Will, 29 Misc. 724, 62 N. Y. Supp. 820; *In re* Eddy's Will, 41 Misc. 283, 84 N. Y. Supp. 218; *In re* Jones' Will, 85 N. Y. Supp. 294; Farr *v.* Thompson, Cheves L. (S. C.) 37, 48. See case involving same will, O'Neall *v.* Farr, 1 Rich. L. (S. C.) 80. *Compare* Monroe *v.* Barclay, 17 Ohio St. 302, 93 Am. Dec. 620. As to presumptions and burden of proof in such cases, see IV, 5, and V, *post*. See also Mountain *v.* Bennet, 1 Cox C. C. 353, 29 Eng. Reprint 1200.

Contra. — "Influence obtained by the use of lawful means by a wife or child is eminently right and proper, if exercised with proper and honest motives. But the influence obtained by the use of unlawful means, immoral and indecent conduct, is undue influence, and no one should be permitted to derive benefit or advantage therefrom." Leighton *v.* Orr, 44 Iowa 679, 689; Hanna *v.* Wilcox, 53 Iowa 547, 5 N. W. 717.

42. Argument, Suggestion and Advice. — *United States.* — President of Bowdoin College *v.* Merritt, 75 Fed. 480; Penn Mut. L. Ins. Co. *v.* Union Tr. Co., 83 Fed. 891.

Arkansas. — McCulloch *v.* Campbell, 49 Ark. 367, 5 S. W. 590.

Delaware. — Chandler *v.* Ferris, 1 Har. 454, 464.

Illinois. — Thompson *v.* Bennett, 194 Ill. 57, 64, 62 N. E. 321.

Indiana. — Bundy *v.* McKnight, 48 Ind. 502, 516.

Iowa. — Adams *v.* Adams, 70 Iowa 253, 30 N. W. 795; *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110; Parker *v.* Lambertz, 128 Iowa 496, 104 N. W. 452.

New York. — Blanchard *v.* Nestle, 3 Denio 37; Wait *v.* Breeze, 18 Hun 403; Burk's Will, 2 Redf. 239; Marx *v.* McGlynn, 4 Redf. 455, 482; Merrill *v.* Rolston, 4 Redf. 220, 235; *In re* McGill's Will, 26 Misc. 102, 56 N. Y. Supp. 856; Mairs *v.* Freeman, 3 Redf. 181.

North Carolina. — Taylor *v.* Taylor, 41 N. C. (6 Ired. Eq.) 26; Gilreath *v.* Gilreath, 57 N. C. (4 Jones' Eq.) 142.

Pennsylvania. — Miller *v.* Miller, 3 Serg. & R. 267.

Tennessee. — Peery *v.* Peery, 94 Tenn. 328, 339, 29 S. W. 1.

Virginia. — Jenkins *v.* Rhodes, 106 Va. 564, 56 S. E. 332.

West Virginia. — Woodville *v.* Woodville, 60 S. E. 140; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

Wisconsin. — Mueller *v.* Pew, 127 Wis. 288, 106 N. W. 840.

In Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788, it was attempted to set aside a deed because of undue influence exercised over grantor by L. It was shown that L. advised grantor to make a will, but the advice was not taken, grantor stating that he preferred making a deed. L. then consulted and acted with grantor in regard to the terms and preparation of the deed in question. *Held*, that these facts did not show undue influence. See also Ralston *v.* Turpin, 25 Fed. 7, *affirmed*, 129 U. S. 663.

Argument. — Harrison's Will, 1 B. Mon. (Ky.) 351; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322; Elkinton *v.* Brick, 44 N. J. Eq. 154, 165, 15 Atl. 391; Hammond *v.* Welton, 106 Mich. 244, 64 N. W. 25.

Arguments made to persuade testator to do that which it was his duty to do do not constitute undue influence. Schuchhardt *v.* Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485; Hughes *v.* Murtha, 32 N. J. Eq. 288.

In Elkinton *v.* Brick, 44 N. J. Eq. 154, 165, 15 Atl. 391, testator held a bond against one of his sons. Another son, believing that a son of obligor had stolen this bond, advised testator to so change his will as to make obligor equal with testator's other children. *Held*, that such conduct did not amount to undue influence.

43. Perkins *v.* Perkins, 116 Iowa 253, 262, 90 N. W. 55.

a. *That Advice and Argument Adopted, Insufficient.* — The fact that advice and arguments are adopted by actor, and that on that account his act is different from what it otherwise would have been, is not sufficient to show undue influence.[44]

b. *Advice and Argument Sufficient To Subdue Will.* — But the influence obtained through advice and argument is undue, if advice and argument be so importunate and persistent, or otherwise so operate, as to subordinate and subdue the will of actor to the will of another.[45]

B. KINDNESS. — AFFECTION. — Influence gained by kindness, affection or gratitude is not undue.[46]

44. Appeal of O'Brien, 100 Me. 156, 60 Atl. 880.

45. *In re* Blair's Will, 16 N. Y. Supp. 874.

46. *United States.* — Conley *v.* Nailor, 118 U. S. 127; Ralston *v.* Turpin, 129 U. S. 663, *affirming* 25 Fed. 7; Meyer *v.* Jacobs, 123 Fed. 900, 910.

Alabama. — Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Adair *v.* Craig, 135 Ala. 332, 33 So. 902.

Arkansas. — Boggianna *v.* Anderson, 78 Ark. 420, 94 S. W. 51.

Delaware. — Duffield *v.* Morris' Exr., 2 Har. 375, 384; Steele *v.* Helm, 2 Marv. 237, 248, 43 Atl. 153; Pritchard *v.* Henderson, 3 Penne. 128, 146, 50 Atl. 217.

District of Columbia. — Barbour *v.* Moore, 4 App. Cas. 535, 552; *s. c.*, 10 App. Cas. 30.

Florida. — Smith *v.* Curtis, 19 Fla. 786, 799.

Idaho. — Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295.

Illinois. — Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881; Waters *v.* Waters, 222 Ill. 26, 36, 78 N. E. 1; Rutherford *v.* Morris, 77 Ill. 397, 414; Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Nicewander *v.* Nicewander, 151 Ill. 156, 37 N. E. 698; Bevelot *v.* Lestrade, 153 Ill. 625, 38 N. E. 1056; Thompson *v.* Bennett, 194 Ill. 57, 62 N. E. 321.

Maine. — Small *v.* Small, 4 Greenl. 220, 16 Am. Dec. 253.

New York. — *In re* Snelling's Will, 136 N. Y. 515, 32 N. E. 1006; Cornwell *v.* Riker, 2 Dem. 354, 383; Beekman *v.* Beekman, 2 Dem. 635; Hazard *v.* Hefford, 2 Hun 445; Wait *v.* Breeze, 18 Hun 403; Clarke *v.* Davis, 1 Redf. 249; Hazard *v.* Hazard, 5 Thomp. & C. 79; Callery *v.* Miller, 48 Hun 619, 1 N. Y. Supp. 88; *In re* Thorne's Estate, 7 N. Y. Supp. 198; *In re* Birdsall's Will, 13 N. Y. Supp. 421.

Oregon. — *In re* Darst's Will, 34 Or. 58, 54 Pac. 947.

Pennsylvania. — Zimmerman *v.* Zimmerman, 23 Pa. St. 375; *In re* Tallman's Estate, 148 Pa. St. 286, 23 Atl. 986; Yeakel *v.* McAtee, 156 Pa. St. 600, 610, 27 Atl. 277.

South Carolina. — Lide's Admrs. *v.* Lide, 2 Brev. 403.

Tennessee. — Smith *v.* Harrison, 2 Heisk. 230, 249; Martin *v.* Winton (Tenn. Ch. App.), 62 S. W. 180.

Texas. — Millican *v.* Millican, 24 Tex. 426, 446.

Virginia. — Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

West Virginia. — Stewart *v.* Lyons, 54 W. Va. 665, 47 S. E. 442; Hall *v.* Cole, 31 W. Va. 576, 8 S. E. 516; Kerr *v.* Lunsford, 31 W. Va. 659, 680, 8 S. E. 493; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

Wisconsin. — Deck *v.* Deck, 106 Wis. 470, 82 N. W. 293; Drinkwine *v.* Gruelle, 120 Wis. 628, 98 N. W. 534.

Influence gained by kindness and affection growing out of family relations is not undue.

United States. — Mackall *v.* Mackall, 135 U. S. 167; Towson *v.* Moore, 173 U. S. 17.

California. — Soberanes *v.* Soberanes, 97 Cal. 140, 31 Pac. 910. See second appeal in this case, 106 Cal. 1, 39 Pac. 39, 527.

Iowa. — Mallow *v.* Walker, 115

Rule Applies Whether Affection Is Entertained for Member of Actor's Family, or for Another. — The rule is not limited to cases where a devise or grant is made from affection for a member of actor's family, but applies if such devise or grant is made from feelings of kindness toward any relative, or toward a friend.[47]

When Undue Influence. — But influence obtained by affection or gratitude becomes undue, if used to destroy actor's free agency, and obtain unjust advantage to the person possessing such influence.[48]

Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Kentucky. — Sechrest *v.* Edwards, 4 Met. 163, 173; Wise *v.* Foote, 81 Ky. 10; Bush *v.* Lisle, 89 Ky. 393, 12 S. W. 762.

New York. — Gardner *v.* Gardner, 22 Wend. 526, 34 Am. Dec. 340.

It is competent to prove that the influence exercised by a wife was but the ascendancy which her virtues gained over her husband. Roberts *v.* Trawick, 13 Ala. 68, 85; Boyse *v.* Rossborough, 6 H. L. Cas. (Eng.) 2.

In Gardner *v.* Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340, the court says: "The general influence arising from his affection for and deference to his wife, the learned judge refuses to admit as matter of suspicion. He says, in another place: 'Indeed, it would be extraordinary if the influence of affection and of warm attachment is to take away the power of benefiting the object of that regard. The influence, to vitiate an act, must amount to force and coercion destroying free agency, it must not be the influence of affection and attachment, it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion; by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear.'" See also:

Kentucky. — Hoerth *v.* Zable, 92 Ky. 202, 17 S. W. 360.

Maine. — Barnes *v.* Barnes, 66 Me. 286, 297.

Maryland. — Gunther *v.* Gunther, 69 Md. 560, 16 Atl. 219.

Missouri. — Norton *v.* Paxton, 110 Mo. 456, 467, 19 S. W. 807; McFadin *v.* Catron, 138 Mo. 197, 318, 38 S. W. 932, 39 S. W. 771; Riley *v.* Sherwood, 144 Mo. 354, 368, 45 S. W. 1077; Gordon *v.* Burris, 153 Mo. 223, 237, 54 S. W. 546; Kischman *v.* Scott, 166 Mo. 214, 227, 65 S. W. 1031; Jones *v.* Roberts, 37 Mo. App. 163, 182 ("gratitude or pity").

New Jersey. — Lowe *v.* Williamson, 2 N. J. Eq. 82; *In re* Will of Gleespin, 26 N. J. Eq. 523; Eddy's Case, 32 N. J. Eq. 701; Brick *v.* Brick, 43 N. J. Eq. 167, 10 Atl. 869; Dumont *v.* Dumont, 46 N. J. Eq. 223, 19 Atl. 467; White *v.* Starr, 47 N. J. Eq. 244, 272, 20 Atl. 875; Den d. Trumbull *v.* Gibbons, 22 N. J. L. 117, 136.

New York. — Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387; Coit *v.* Patchen, 77 N. Y. 533; Matter of Mondarf, 110 N. Y. 450, 18 N. E. 256; Kinne *v.* Johnson, 60 Barb. 69; Wood *v.* Bishop, 1 Dem. 512.

47. Campbell *v.* Carlisle, 162 Mo. 634, 646, 63 S. W. 701.

48. Darley *v.* Darley, 3 Bradf. Sur. (N. Y.) 481, 506; Mason *v.* Williams, 53 Hun 398, 6 N. Y. Supp. 479; *In re* Brough's Will, 41 Misc. 263, 84 N. Y. Supp. 41; Cornwell *v.* Riker, 2 Dem. (N. Y.) 354, 383; Schofield *v.* Walker, 58 Mich. 96, 24 N. W. 624.

In Rollwagen *v.* Rollwagen, 63 N. Y. 504, 520, *affirming s. c.*, 3 Hun 121, the court says: "It is not sufficient to avoid a will that it is obtained by the legitimate influence which affection or gratitude gives a relative over the testator. A competent testator may bestow his property upon the objects of his affection, and he may, from gratitude reward those who have rendered him services. But if one takes advantage of the affection or gratitude of another to obtain an unjust will in

C. Transfer To Protect Reputation of Third Person. — If through affection for a third person, or from a desire to protect his name or reputation, a person makes a transfer of personal property, no threats or advantage being shown, the transfer will not be set aside as the result of undue influence.[49]

D. Devise To Prevent Loss to Devisee. — So as to devise made to prevent devisee's incurring loss by reason of having rendered services to testator.[50]

E. Grant To Protect Grantor. — So as to grant obtained by grantee to protect grantor from the consequences of his own extravagance or dissipation.[51]

F. Action in Interest of Person Complaining. — Agreement. — Undue influence is not shown by testimony to the effect that testatrix and her husband agreed to make mutual wills, each devising his estate to the other for life, remainder to the children and grandchildren of testatrix, it being believed that such course was for the best interests of such children.[52]

G. Solicitation. — Persuasion. — Undue influence is not shown by proof that the person alleged to have exercised it solicited[53] or

his favor, using his position to subdue and control the mind of the testator so as, substantially, to deprive him of his free agency from the fact that affection or gratitude was the moving card, makes it no less a case of undue influence."

Natural Influence Substituting Will of Person Exercising it for Will of Actor. — Where the natural influence of a wife is possessed and exerted to such an extent as to substitute her will for her husband's, a change of an existing will made by her direction and in her favor will be held to have been procured by undue influence. Julke *v.* Adam, 1 Redf. (N. Y.) 454; Bailey *v.* Bailey, 26 Ky. L. Rep. 650, 82 S. W. 387. To same effect, see Baker's Will, 2 Redf. (N. Y.) 179; Campbell *v.* Barrera (Tex. Civ. App.), 32 S. W. 724.

49. Holt *v.* Agnew, 67 Ala. 360.

50. Berry *v.* Hamilton, 10 B. Mon. (Ky.) 129; Davis *v.* Culver, 13 How. Pr. (N. Y.) 62.

51. In Riddle *v.* Cutter, 49 Iowa 547, a man who was wasting his estate by dissipation was induced by his sister and her husband to convey his property to the latter in trust for grantor and his family. *Held*, that as the grant was obtained in the interest of grantor, and to protect him from the consequences of his own conduct, the influence employed would not be considered undue.

52. Morrison *v.* Thoman (Tex. Civ. App.), 86 S. W. 1069; *s. c.*, 99 Tex. 248, 89 S. W. 409.

53. *United States.* — Beyer *v.* LeFevre, 186 U. S. 114.

Alabama. — Lyons *v.* Campbell, 88 Ala. 462, 7 So. 250 (ruling on demurrer to bill charging undue influence).

California. — *In re* Langford, 108 Cal. 608, 623, 41 Pac. 701.

Idaho. — Kelly *v.* Perrault, 5 Idaho 221, 48 Pac. 45.

Illinois. — Burt *v.* Quisenberry, 132 Ill. 385, 399, 24 N. E. 622; Thompson *v.* Bennett, 194 Ill. 57, 64, 62 N. E. 321.

Iowa. — Beith *v.* Beith, 76 Iowa 601, 41 N. W. 371; Parker *v.* Lambertz, 128 Iowa 496, 104 N. W. 452; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110; Perkins *v.* Perkins, 116 Iowa 253, 262, 90 N. W. 55.

Minnesota. — Mitchell *v.* Mitchell, 43 Minn. 73, 44 N. W. 885.

New York. — Wait *v.* Breeze, 18 Hun 403; *In re* White's Will, 5 N. Y. Supp. 295, *affirmed*, 121 N. Y. 406, 24 N. E. 935; *In re* Journeay's Will, 80 Hun 315, 30 N. Y. Supp. 80;

persuaded[54] the actor to perform the act which is in question.

H. URGING CLAIM. — Nor is such influence shown by proof that a certain person having a claim upon actor urged him to recognize such claim.[55]

In re Richardson's Will, 51 App. Div. 637, 64 N. Y. Supp. 944.

Pennsylvania. — Trost *v.* Dingler, 118 Pa. St. 259, 270, 12 Atl. 296, 4 Am. St. Rep. 593; Doran *v.* M'Conlogue, 150 Pa. St. 98, 116, 24 Atl. 357; Englert *v.* Englert, 198 Pa. St. 326, 47 Atl. 940.

West Virginia. — Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779.

"Solicitations, however importunate, cannot of themselves constitute undue influence; for though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate." Trost *v.* Dingler, 118 Pa. St. 259, 12 Atl. 296, 4 Am. St. Rep. 593.

54. *England.* — Hall *v.* Hall, 37 L. J. Prob. 40, L. R. 1 P. & D. 481, 18 L. T. 152, 16 W. R. 544; Parfitt *v.* Lawless, L. R. 2 P. 462, 472, 41 L. J. P. 68, 27 L. T. 215.

Arkansas. — McDaniel *v.* Crosby, 19 Ark. 533, 551.

Delaware. — Chandler *v.* Ferris, 1 Har. 454, 464.

Georgia. — Lindsey *v.* Lindsey, 62 Ga. 546.

Illinois. — Pingree *v.* Jones, 80 Ill. 177; Dickie *v.* Carter, 42 Ill. 376, 388; Kimball *v.* Cuddy, 117 Ill. 213, 7 N. E. 589; Thompson *v.* Bennett, 194 Ill. 57, 64, 62 N. E. 321.

Indiana. — Rabb *v.* Graham, 43 Ind. 1, 12; Bundy *v.* McKnight, 48 Ind. 502, 516.

Iowa. — Beith *v.* Beith, 76 Iowa 601, 41 N. W. 371.

Kentucky. — Wise *v.* Foote, 81 Ky. 10; Barlow *v.* Waters, 16 Ky. L. Rep. 426, 28 S. W. 785.

Massachusetts. — Maynard *v.* Tyler, 168 Mass. 107, 114, 46 N. E. 413.

Michigan. — Schofield *v.* Walker, 58 Mich. 96, 106, 24 N. W. 624; Maynard *v.* Vinton, 59 Mich. 139, 153, 26 N. W. 401, 60 Am. Rep. 276; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

New Jersey. — McCoon *v.* Allen, 45 N. J. Eq. 708, 719, 17 Atl. 820.

New York. — *In re* McGill's Will, 26 Misc. 102, 56 N. Y. Supp. 856.

North Carolina. — Taylor *v.* Taylor, 6 Ired. Eq. 26, 51 Am. Dec. 412.

Pennsylvania. — Miller *v.* Miller, 3 Serg. & R. 267.

South Carolina. — Lide's Admrs. *v.* Lide, 2 Brev. 403.

In Miller *v.* Miller, 3 Serg. & R. (Pa.) 266, 8 Am. Dec. 651, the court says: "Influence and persuasion may be fairly used. A will may be honestly procured. Many wills indeed would be destroyed, if you inquire into the degrees of influence and persuasion. A will procured by circumvention will be set aside; but a will procured by honest means, by acts of kindness, attention, and by importunate persuasion, which delicate minds would shrink from, would not be set aside on this ground alone." See also McIntire *v.* McConn, 28 Iowa 480.

The fact that a clergyman to whom his parishioner has promised to execute a mortgage urges her to execute it and finally accepts it, does not show undue influence. Jackson *v.* Ashton, 11 Pet. (U. S.) 229.

The fact that the legatee was the spiritual adviser and confessor of testator is not, alone, sufficient to create a presumption of undue influence. Parfitt *v.* Lawless, L. R. 2 P. (Eng.) 462, 41 L. J. P. 68, 27 L. T. 215.

55. Undue influence is not shown by proof that a niece who had for years lived with testatrix as an adopted child urged her claims to recognition in testatrix's will, and stated that she would leave the house unless provision were made for her. Beyer *v.* LeFevre, 186 U. S. 114. Nor is such influence shown by proof that a wife urged upon her husband the propriety of leaving his property to her. *In re* Langford, 108 Cal. 608, 623, 41 Pac. 701; Hughes *v.* Murtha, 32 N. J. Eq. 288. See also Dale's Appeal, 57 Conn.

Influence Undue, if Persuasion Addressed to One Too Feeble To Resist. But if a persuasive appeal to generosity or gratitude is addressed to a mind too weak to resist, the influence thus exerted is undue.[56]

I. IMPORTUNITY. — Mere importunity does not constitute undue influence, unless it is carried to such an extent as to destroy free agency.[57] But when importunity is such that it cannot be resisted, and the act in question is done for the sake of peace, the person importuning will be held to have exercised undue influence.[58]

Importunity to Person in Enfeebled Condition. — When a person who is sick and enfeebled is subjected to constant persuasion and importunity to make a conveyance, and finally consents for the sake of peace, such consent is gained by undue influence.[59]

J. PROPER INFLUENCE USED FOR SELFISH PURPOSE. — Influence properly gained is not necessarily treated as undue because used for a selfish purpose.[60]

K. RELIGION. — The influence of the doctrines of the church to which actor belongs is not undue.[61]

Extent of Belief. — But where, instead of merely believing in a

127, 144, 17 Atl. 757; Gilham's Case, 64 N. J. Eq. 715, 52 Atl. 690.

In Cruger *v.* Cruger, 5 Barb. (N. Y.) 225, it was held that undue influence was not shown by proof that the friends and relatives of grantor urged and importuned her to make a settlement upon her husband, the deed in question being the means of making such settlement. See also Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295; Kennedy *v.* Dickey, 100 Md. 152, 59 Atl. 661; *In re* Gilham's Will (N. J.), 52 Atl. 690; Bicknell *v.* Bicknell, 2 Thomp. & C. (N. Y.) 96; Tucker *v.* Field, 5 Redf. (N. Y.) 139, 179; *In re* Bowman's Will, 133 Wis. 494, 113 N. W. 956.

56. VanKleeck *v.* Phipps, 4 Redf. (N. Y.) 99, *affirmed*, 22 Hun 541. See Appeal of O'Brien, 100 Me. 156, 60 Atl. 880; Hoffman *v.* Hoffman, 192 Mass. 416, 78 N. E. 492; Bailey *v.* Bailey, 26 Ky. L. Rep. 650, 82 S. W. 387.

57. Wittman *v.* Goodhand, 26 Md. 95, 104; Whitridge *v.* Barry, 42 Md. 140; *In re* Journeay's Will, 80 Hun 315, 30 N. Y. Supp. 80; Hindman *v.* Van Dyke, 153 Pa. St. 243, 25 Atl. 772.

Circumstance. — But importunity is a circumstance which may be considered by the jury in determining the character of the influence in question. Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90.

58. Gunther *v.* Gunther, 69 Md. 560, 16 Atl. 219; Somers *v.* McCready, 96 Md. 437, 53 Atl. 1117; Hampton *v.* Westcott, 49 N. J. Eq. 522, 25 Atl. 254. See also Gardner *v.* Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340, 350; Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329, 355; Baker *v.* Batt, 2 Moore P. C. 317, 12 Eng. Reprint 1026.

As to "unreasonable importunity," see Hall *v.* Hall, 37 L. J. Prob. (Eng.) 40, L. R. 1 P. & D. 481, 18 L. T. 152, 16 W. R. 544; Meyer *v.* Jacobs, 123 Fed. 900; Hazard *v.* Hefford, 2 Hun (N. Y.) 445; *In re* Blair's Will, 16 N. Y. Supp. 874; Zimmerman *v.* Zimmerman, 23 Pa. St. 375; Peery *v.* Peery, 94 Tenn. 328, 339, 29 S. W. 1; Campbell *v.* Barrera (Tex. Civ. App.), 32 S. W. 724.

59. Aldridge *v.* Aldridge, 120 N. Y. 614, 24 N. E. 1022; *In re* Blair's Will, 16 N. Y. Supp. 874. See discussion in Appeal of O'Brien, 100 Me. 156, 60 Atl. 880; Bailey *v.* Bailey, 26 Ky. L. Rep. 650, 82 S. W. 387.

60. Howe *v.* Howe, 99 Mass. 88; Rollwagen *v.* Rollwagen, 63 N. Y. 504, 520; Van Kleeck *v.* Phipps, 4 Redf. (N. Y.) 99, 124, *affirmed*, 22 Hun 541.

61. Newton *v.* Carbery, 5 Cranch C. C. (U. S.) 626.

certain doctrine or system, testator suffered his entire life and conduct to become dominated by it, and where his will was made in favor of persons who used his belief to alienate him from his family, such will will be held to have been procured by undue influence.[62]

5. Not Shown by Proof of. — A. Suspicion. — Undue influence is not shown by proof that testator entertained an unfounded suspicion that one of his children was illegitimate, and for that reason gave his property to another child.[63]

B. Prejudice. — Nor by proof that testator was prejudiced against a certain person,[64] or against the habits of such person,[65] or, prior to making his will, showed preference for one child.[66]

C. Complaints. — Or made complaints concerning treatment received from a certain person,[67] or complained of the habits of such person.[68]

The fact that testator complained that his children were annoying him by urging him to reduce bequests to his grandchildren does not show that a subsequent change of will making such reduction was obtained by undue influence.[69]

D. Failure To Object to Charges Against Heir. — Nor is such influence shown by proof that testator failed to object or dissent when third persons and the person charged complained and spoke harshly of the conduct of one of testator's children.[70]

E. Inadequacy of Consideration. — That consideration for a certain instrument was inadequate does not, alone, show that its execution was procured by undue influence.[71]

F. Beneficiary of Will Employing Draftsman. — Nor proof that the person alleged to have unduly influenced a testamentary disposition, employed the draftsman who drew the will in question.[72]

G. Father of Legatees Drawing Will. — Undue influence is not shown by proof that a will was drawn by the person who was

62. Thompson *v.* Hawks, 14 Fed. 902. In this case testator was a spiritualist. See note 30 under III, 1, F., *ante*.

63. **Suspicion.** — Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

64. **Prejudice.** — Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Trumbull *v.* Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253; Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

65. Defoe *v.* Defoe, 144 Mo. 458, 46 S. W. 433.

66. Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

67. **Complaints.** — Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681. *In re* McKenna's Will, 4 N. Y. Supp. 458.

68. Defoe *v.* Defoe, 144 Mo. 458, 46 S. W. 433.

69. *In re* McGill, 26 Misc. 102, 56 N. Y. Supp. 856.

70. Defoe *v.* Defoe, 144 Mo. 458, 46 S. W. 433.

71. Greedy *v.* McGee, 55 Iowa 759, 8 N. W. 651; Green *v.* Thompson, 37 N. C. (2 Ired. Eq.) 365.

72. **Employing Draftsman.** Trumbull *v.* Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253; Johnson *v.* Farrell, 215 Ill. 542, 74 N. E. 760; *In re* Westerman's Will, 29 Misc. 409, 61 N. Y. Supp. 1065; *In re* De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. Supp. 364.

Husband of Beneficiary Employing Draftsman. — So if the husband of the principal legatee employs draftsman. Henry *v.* Hall, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22.

Sister. — So as to draftsman employed by sister of beneficiary.

named as executor, and whose children were favored legatees.[73] Nor by proof that a legacy is bequeathed to the attorney or other person who drew the will.[74]

Such Circumstances Suspicious. — But it has been said that this circumstance forms a just ground of suspicion, and calls upon the court to be vigilant and jealous, and requires clear and satisfactory proof that the instrument contains the real intention of testator.[75]

H. Services Rendered Testator. — Nor by proof that a person benefited by a will read to testator a draft of such will prepared by testatrix's attorney, and assisted testatrix in the mechanical act of copying such draft.[76]

I. Beneficiary Testator's Agent. — Nor by proof that beneficiary acted as business agent of testator.[77]

J. Change of Will Caused by Exaggerated Statements. When testator revokes will in favor of a certain person, and makes a new will less favorable to him, by reason of reports made to him

Black *v.* Foljambe, 39 N. J. Eq. 234, 243.

73. Waddington *v.* Buzby, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706, *reversing* 43 N. J. Eq. 154, 10 Atl. 862; King *v.* Holmes, 84 Me. 219, 24 Atl. 819.

So as to the circumstance that part of a will was written by devisee's wife, it appearing that she was testator's daughter and acted reluctantly and only at her father's command, see Blanchard *v.* Nestle, 3 Denio (N. Y.) 37.

74. Attorney. — Hindson *v.* Weatherill, 5 De G., M. & G. 301, 23 L. J. Ch. 820, 18 Jur. 499, 43 Eng. Reprint 886; Rusling *v.* Rusling, 36 N. J. Eq. 603, *affirming* 35 N. J. Eq. 120; Bennett *v.* Bennett, 50 N. J. Eq. 439, 448, 26 Atl. 573; Coffin *v.* Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Post *v.* Mason, 91 N. Y. 539, 549, 43 Am. Rep. 689; Booth *v.* Kitchen, 3 Redf. (N. Y.) 52; Riddell *v.* Johnson's Exr., 26 Gratt. (Va.) 152, 173; Snodgrass *v.* Smith (Colo.), 94 Pac. 312.

75. Baker *v.* Batt, 2 Moore P. C. 317, 12 Eng. Reprint 1026; Barry *v.* Butlin, 2 Moo. P. C. 480, 12 Eng. Reprint 1089; Greville *v.* Tylee, 7 Moore P. C. 320, 351, 13 Eng. Reprint 904; McDaniel *v.* Crosby, 19 Ark. 533, 550.

76. Services. — A verdict against the validity of a will will not be sustained, when the only evidence in favor of contestant showed that the person alleged to have unduly influenced testatrix had an opportunity to exercise such influence, and an interest in so doing; that such person read to testatrix a draft of a codicil prepared by testatrix's attorney in pursuance of instructions previously given by testatrix, and showed her where to commence the lines in copying this draft; and that testatrix had caused contestant to be absent at the time of execution. Estate of Calef, 139 Cal. 673, 73 Pac. 539. To same effect, see Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; *s. c.*, 194 Ill. 408, 62 N. E. 907.

So as to the fact that devisee took draft of will, prepared by testator, to a lawyer with testator's instructions to prepare a will from such draft. Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869.

77. Rutherford *v.* Morris, 77 Ill. 397, 414; Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678.

Undue influence in the execution of a will is not shown by the fact that proponent acted as business agent of testatrix and signed her name to a title bond for land, and evidence of such fact is not admissible to show such influence. Eastis *v.* Montgomery, 95 Ala. 486, 11 So. 204, 36 Am. St. Rep. 227. See also Furlong *v.* Carraher, 108 Iowa 492, 79 N. W. 277; King *v.* Holmes, 84 Me. 219, 24 Atl. 819; Appleby *v.* Brock, 76 Mo. 314; Brick *v.* Brick,

concerning the conduct of devisee, the fact that the person making such reports exaggerated the conduct of devisee does not necessarily show that such person unduly influenced testator.[78]

K. Increased Control by Beneficiary Over Actor's Business. Nor is such influence shown by proof that about the time of the execution of a deed alleged to have been procured by undue influence of grantees, grantor gave to grantees — his sons — more control over his business than they had previously had.[79]

L. Legacy Payment for Inadequate Services. — Nor is undue influence shown by the fact that the will gives a legacy in payment for services inadequate to the amount bequeathed.[80]

M. Physical Weakness. — Unjust Discriminations. — The fact that a will makes unjust discriminations, coupled with the facts of old age and great debility of mind and body, are not sufficient to raise an inference that undue influence was used by one who obtains the greater part of testator's estate.[81]

N. Physical and Mental Weakness Combined. — The facts that grantor in a deed attacked on the ground of undue influence is physically unable to look after his property, and that his mind is enfeebled by age or disease, are not sufficient to set aside the deed, if he retains a full comprehension of the meaning, design and effect of his acts at the time of the execution of the deed.[82]

O. Actor Very Old. — Nor is undue influence shown by the fact that a person whose deed is alleged to have been procured by undue influence was very old.[83]

P. Unreasonable or Unequal Will. — Nor is undue influence

44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869; *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392.

78. Browning *v.* Budd, 6 Moore P. C. 430, 13 Eng. Reprint 749.

79. Francis *v.* Wilkinson, 147 Ill. 370, 381, 35 N. E. 150.

80. Spence *v.* Huckins, 208 Ill. 304, 70 N. E. 289.

81. Maddox *v.* Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Mooney *v.* Olsen, 22 Kan. 69; Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32; Coffin *v.* Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Ewen *v.* Perrine, 5 Redf. (N. Y.) 640; *In re* Barber's Will (N. J.), 49 Atl. 826.

82. Argo *v.* Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Jackson *v.* Hardin, 83 Mo. 175, 185; Lorts *v.* Wash, 175 Mo. 487, 75 S. W. 95; Stoutenburgh *v.* Hopkins, 43 N. J. Eq. 577, 12 Atl. 689.

Physical and Mental Weakness Together, Insufficient. — Nor is such influence shown by the facts that actor was both physically and mentally enfeebled. *In re* Shannon's Will, 11 App. Div. 581, 42 N. Y. Supp. 670; Suttles *v.* Hay, 41 N. C. (6 Ired. Eq.) 124; Thompson *v.* Kyner, 65 Pa. St. 368, 379; Messner *v.* Elliott, 184 Pa. St. 41, 39 Atl. 46; Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98.

Delusions. — Evidence that testator was superstitious and harbored delusions concerning witchcraft does not show undue influence. Schneitter *v.* Carman, 98 Iowa 276, 67 N. W. 249; Chambers *v.* Brady, 100 Iowa 622, 69 N. W. 1015.

83. Lewis *v.* Pead, 1 Ves. Jr. 19, 30 Eng. Reprint 210; Muir *v.* Miller, 72 Iowa 585, 34 N. W. 429; Wiltsey *v.* Wiltsey, 122 Iowa 423, 98 N. W. 294; Browne *v.* Molliston, 3 Whart. (Pa.) 129; Messner *v.* Elliott, 184 Pa. St. 41, 39 Atl. 46; Caughey *v.*

to be inferred from the fact that the provisions of a will are unreasonable and unequal.[84]

Q. Action Without Independent Advice. — In a will contest where testatrix having no relatives had devised her entire estate to her physician, it being shown that the will was prepared by an attorney employed by devisee, that, at a conversation between this attorney and devisee the will was read to testatrix, and by her affirmed, and that testatrix never asked for other advice and that she was of sound mind, a verdict upholding the will will not be disturbed because the proof fails to show that testatrix had independent advice.[85]

R. Fraudulent Purpose of Grantor. — In an action to set aside a deed on the ground of undue influence of the grantees, evidence that grantor made such deed for the purpose of defrauding his creditors is inadmissible.[86] Undue influence is shown by proof that grantor was induced to make deed in question by false statement of grantee that such action was necessary to protect her property from her creditors.[87]

S. Change of Intention. — Undue influence is not shown by fact that testator's will makes a disposition of his estate different from one which at one time he intended to make.[88]

T. Hostility and Threats Against Excluded Heir. — Undue influence in the making of a will is not shown by proof that person charged with having exercised such influence was hostile toward one attacking the will and made threats against him.[89]

6. Undue Influence Must Have Been Exercised. — The mere fact that the person charged possessed undue influence over actor is not sufficient. Such influence must have been exercised.[90]

Bridenbaugh, 208 Pa. St. 414, 428, 57 Atl. 821.

84. Rutherford *v.* Morris, 77 Ill. 397; Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319; Jackson *v.* Jackson, 39 N. Y. 153.

85. Estate of Wickes, 139 Cal. 195, 72 Pac. 902. To same effect, see Cooke *v.* Lamotte, 15 Beav. 234, 51 Eng. Reprint 527.

In Casborne *v.* Barsham, 2 Beav. 76, 48 Eng. Reprint 1108, the court seems to consider the fact that a person whose deed was attacked on the ground of undue influence had opportunities to consult, and did consult, with his family before executing such deed, as a circumstance negativing a charge of undue influence.

86. Francis *v.* Wilkinson, 147 Ill. 370, 384, 35 N. E. 150.

87. In Harper *v.* Harper, 85 Ky. 160, 3 S. W. 5, 7 Am. St. Rep. 583, an aged woman was induced by her son to believe that an action for slander was about to be brought against her, and that, to save her property from execution in such action it was necessary that she convey it to him, which she did. The action was never brought. *Held*, that the deed was procured by undue influence and should be set aside.

88. Succession of Jacobs, 109 La. Ann. 1012, 1022, 34 So. 59.

89. King *v.* Holmes, 84 Me. 219, 24 Atl. 819.

90. *Iowa.* — *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110.

Missouri. — McFadin *v.* Catron, 120 Mo. 252, 275, 25 S. W. 506; Cash *v.* Lust, 142 Mo. 630, 644, 44 S. W. 724, 64 Am. St. Rep. 576; Tibbe *v.* Kamp, 154 Mo. 545, 580, 54 S. W. 879, 55 S. W. 440; Hughes *v.* Rader, 183 Mo. 630, 708, 82 S. W. 32.

Intent Insufficient. — Proof that the person charged intended to procure the act in question is not sufficient to show undue influence.[91]

7. Must Have Succeeded in Controlling Actor's Will. — Influence must be shown not only to have been exercised, but to have been successful in subverting and controlling actor's will.[92]

8. Must Have Caused Act in Question. — The influence must have been the efficient cause without which the act in question would not have been done.[93]

9. Action by or on Behalf of Beneficiary Must Appear. — To invalidate an act on the ground of undue influence, it must appear that some action by the person benefited, or by some one in his behalf, was instrumental in procuring the performance of such act.[94]

10. Must Be Directly Connected With Act in Question. — To

Nebraska. — Latham *v.* Schaal, 25 Neb. 535, 41 N. W. 354.

New York. — Cudney *v.* Cudney, 68 N. Y. 148; Marx *v.* McGlynn, 88 N. Y. 357, 372; *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107; *In re* Munger's Will, 38 Misc. 268, 77 N. Y. Supp. 648.

Oregon. — Hubbard *v.* Hubbard, 7 Or. 42.

Pennsylvania. — Wingert's Estate, 199 Pa. St. 427, 49 Atl. 281.

Texas. — Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

Wisconsin. — Loennecker's Will, 112 Wis. 461, 88 N. W. 215.

"It is not the existence of undue influence, but the exercise of it in the execution of the will which invalidates it." Crowson *v.* Crowson, 172 Mo. 691, 703, 72 S. W. 1065.

91. *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110.

Nor is proof that undue influence was sought to be exercised. Trezevant *v.* Rains (Tex. Civ. App.), 25 S. W. 1092.

92. Loennecker's Will, 112 Wis. 461, 88 N. W. 215.

93. *In re* Holman's Will, 42 Or. 345, 358, 70 Pac. 908; Loennecker's Will, 112 Wis. 461, 88 N. W. 215.

94. *England.* — Allcard *v.* Skinner, L. R. 36 Ch. Div. 145, 185; Parfitt *v.* Lawless, L. R. 2 P. 462, 472, 41 L. J. P. 68, 27 L. T. 215; Casborne *v.* Barsham, 2 Beav. 76, 48 Eng. Reprint 1108.

United States. — Beyer *v.* LeFevre, 186 U. S. 114.

Alabama. — Leverett's Heirs *v.* Carlisle, 19 Ala. 80; Chandler *v.* Jost, 96 Ala. 596, 11 So. 636.

California. — *In re* McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Estate of Motz, 136 Cal. 558, 64 Pac. 294.

Georgia. — Lindsey *v.* Lindsey, 62 Ga. 546.

Illinois. — Lindsey *v.* Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Rutherford *v.* Morris, 77 Ill. 397, 414; Woodman *v.* Illinois Tr. & Sav. Bank, 211 Ill. 578, 71 N. E. 1099.

Indiana. — Stevens *v.* Leonard, 154 Ind. 67, 74, 56 N. E. 27, 77 Am. St. Rep. 446; Bundy *v.* McKnight, 48 Ind. 502, 517.

Iowa. — Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Perkins *v.* Perkins, 116 Iowa 253, 90 N. W. 55.

Maryland. — Tyson *v.* Tyson, 37 Md. 567; Schwanteck *v.* Berner, 96 Md. 138, 53 Atl. 670; Gunther *v.* Gunther, 69 Md. 560, 16 Atl. 219.

Michigan. — Kneisel *v.* Kneisel, 143 Mich. 384, 106 N. W. 1114.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

Missouri. — Berberet *v.* Berberet, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634.

North Carolina. — Taylor *v.* Taylor, 41 N. C. (6 Ired. Eq.) 26, 51 Am. Dec. 412.

Texas. — Wetz *v.* Schneider, 34 Tex. Civ. App. 201, 78 S. W. 394.

Wisconsin. — Cutler *v.* Cutler. 103 Wis. 258, 79 N. W. 240.

avoid a will or deed, undue influence must have been directly connected with its execution.[95]

A. Desire for Act Insufficient. — The exercise of undue influence is not shown by the fact that a certain legatee was anxious that testator make his will.[96] Nor by the fact that a child of testator was dissatisfied with a will made by testator.[97]

B. Participation Alone, Insufficient. — The fact that a person benefited by the will participated and assisted in its preparation is not, alone, sufficient to show undue influence.[98]

C. Immaterial That Person Influencing Not Benefited. It has been held that it is immaterial whether or not the person actually exercising the influence in question is benefited by the act procured.[99] But it has been held in England that the fact that in making a certain family settlement, the father whose influence over his son procured the settlement, received no direct benefit therefrom, was a material circumstance in determining whether or not the transaction was the result of undue influence.[1]

11. Must Destroy Free Agency as to Act in Question. — Proof must show an influence which destroyed free agency as to the very act in question.[2]

95. *Arkansas.* — McCulloch *v.* Campbell, 49 Ark. 367, 5 S. W. 590.
Illinois. — Rutherford *v.* Morris, 77 Ill. 397, 412; Guild *v.* Hull, 127 Ill. 523, 532, 20 N. E. 665; Pooler *v.* Cristman, 145 Ill. 405, 34 N. E. 57; Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Thompson *v.* Bennett, 194 Ill. 57, 62 N. E. 321; *In re* Will of Barry, 219 Ill. 391, 76 N. E. 577; Wickes *v.* Walden, 228 Ill. 56, 81 N. E. 798.
Iowa. — Perkins *v.* Perkins, 116 Iowa 253, 90 N. W. 55; Parker *v.* Lambertz, 128 Iowa 496, 104 N. W. 452.

96. Woodman *v.* Illinois Tr. & Sav. Bank, 211 Ill. 578, 71 N. E. 1099; Ryman *v.* Crawford, 86 Ind. 262.

97. Ryman *v.* Crawford, 86 Ind. 262.

98. Henry *v.* Hall, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22; Wilcoxon *v.* Wilcoxon, 165 Ill. 454, 46 N. E. 369; McMaster *v.* Scriver, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869.

99. Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469; *In re* Cahill, 74 Cal. 52, 15 Pac. 364; Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785; Vanvalkenbery *v.* Vanvalkenbery, 90 Ind. 433; Roberts *v.* Bartlett, 190 Mo. 680, 702, 89 S. W. 858; Dowie *v.* Driscoll, 203 Ill. 280, 68 N. E. 56.

But the fact that a person who possessed influence over testator and who procured the execution of his will was not benefited thereby is important in determining upon whom the burden of proof shall rest. Livingston's Appeal, 63 Conn. 68, 26 Atl. 470. To same effect, see Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459. See notes 28, 29 under V, 1, A, b.

1. Hartopp *v.* Hartopp, 21 Beav. 259, 52 Eng. Reprint 858.

2. *England.* — Parfitt *v.* Lawless, L. R. 2 P. & D. 462, 41 L. J. P. 68, 27 L. T. 215; Wingrove *v.* Wingrove, 55 L. J. P. 7, 11 P. D. 81, 50 J. P. 56; Boyse *v.* Rossborough, 6 H. L. Cas. 2, 51, 26 L. J. Ch. 256, 3 Jur. (N. S.) 373, 5 W. R. 414.
California. — *In re* McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Motz, 136 Cal. 558, 69 Pac. 294; *In re* Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179.
Illinois. — Brownfield *v.* Brownfield, 43 Ill. 147; Rutherford *v.* Morris, 77 Ill. 397.

12. Must Have Operated at Time of Act in Question. — To avoid a will or deed on the ground of undue influence, it must appear that such influence operated upon testator's or grantor's mind at the time of execution.[3] But proof as to the action of a person alleged to have exerted such influence is not confined to the time of execution. It is sufficient if the will was executed after the doing of the acts

Indiana. — Todd *v.* Fenton, 66 Ind. 25, 33; Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296.

Iowa. — *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110.

Kentucky. — Sechrest *v.* Edwards, 4 Met. 163, 173; Turley's Exrs. *v.* Johnson, 1 Bush 116.

Louisiana. — Succession of Jacobs, 109 La. Ann. 1012, 34 So. 59.

Maine. — Small *v.* Small, 4 Greenl. 220, 16 Am. Dec. 253.

Maryland. — Layman *v.* Conrey, 60 Md. 286.

Minnesota. — Storer's Will, 28 Minn. 9, 8 N. W. 827.

Missouri. — McKissock *v.* Groom, 148 Mo. 459, 50 S. W. 115.

Nebraska. — Seebrock *v.* Fedawa, 30 Neb. 424, 46 N. W. 650.

New York. — Mairs *v.* Freeman, 3 Redf. 181; Marx *v.* M'Glynn, 4 Redf. 455, 478; Clarke *v.* Davis, 1 Redf. 249; *In re* DeBaun's Estate, 9 N. Y. Supp. 807; *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392; Seguine *v.* Seguine, 4 Abb. App. Dec. 191, 3 Keyes 663.

Oregon. — *In re* Ames' Will, 40 Or. 495, 67 Pac. 737.

Pennsylvania. — McMahon *v.* Ryan, 20 Pa. St. 329; Eckert *v.* Flowry, 43 Pa. St. 46; Trost *v.* Dingler, 118 Pa. St. 259, 271, 12 Atl. 296, 4 Am. St. Rep. 593.

South Carolina. — Farr *v.* Thompson, Cheves L. 37, 48; Martin *v.* Teague, 2 Spear L. 260; Means *v.* Means, 6 Rich. L. 1, 21.

Tennessee. — Simerly *v.* Hurley, 9 Lea 711.

Texas. — Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98.

Vermont. — Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 265, 24 Atl. 253.

The fact that a partner, accused of obtaining a will by undue influence, had more influence than testator in the management of their partnership affairs does not tend to prove that he used undue influence in procuring the testamentary disposition in question. Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101, *citing* as authority, Goodwin *v.* Goodwin, 59 Cal. 560, which was decided upon a question of pleading.

"In order to show that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires." *In re* Calkins, 112 Cal. 296, 44 Pac. 577, *cited* in *In re* Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Black, 132 Cal. 392, 64 Pac. 695.

3. *Alabama.* — Knox *v.* Knox, 95 Ala. 495, 504, 11 So. 125, 36 Am. St. Rep. 235.

California. — *In re* Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *In re* Langford, 108 Cal. 608, 41 Pac. 701; Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Motz, 136 Cal. 558, 39 Pac. 294.

Colorado. — *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. Rep. 181.

Georgia. — Thompson *v.* Davitte, 59 Ga. 472.

Idaho. — Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295.

Illinois. — Rutherford *v.* Morris, 77 Ill. 397; Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881; Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712; Wickes *v.* Walden, 228 Ill. 56, 81 N. E. 798.

Iowa. — Gates *v.* Cole, 137 Iowa 613, 115 N. W. 236; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; Perkins *v.* Perkins, 116 Iowa 253, 90 N. W. 55; Parker *v.* Lambertz, 128 Iowa 496, 104 N. W. 452; *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110; Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319.

Massachusetts. — Shailer *v.* Bumstead, 99 Mass. 112, 121.

claimed to have influenced testator, if the will was executed under the control of such influence.[4]

A. Exerted Before and After Execution. — Proof of undue influence both before and after execution of the act in question is proper, as the exercise of influence at the time of execution may be inferred therefrom.[5]

B. Proof Must Be Connected in Point of Time. — A party offering proof of an act alleged to have constituted undue influence over a testator must show that such act is so connected, in point of time, with the making of the will in question as to furnish reasonable ground of inference that the testamentary act was influenced in whole or in part by the act offered to be proved.[6]

a. *Remote Circumstances Inadmissible.* — Circumstances occurr-

Missouri. — McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506; Tibbe *v.* Kamp, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; Tingley *v.* Cowgill, 48 Mo. 291; Sunderland *v.* Hood, 13 Mo. App. 232, *affirmed*, 84 Mo. 293.

New York. — Haight *v.* Haight, 112 N. Y. Supp. 144.

North Dakota. — Anderson *v.* Anderson, 115 N. W. 836.

Oregon. — Ames' Will, 40 Or. 495, 67 Pac. 737.

Pennsylvania. — McMahon *v.* Ryan, 20 Pa. St. 329; Eckert *v.* Flowry, 43 Pa. St. 46; Thompson *v.* Kyner, 65 Pa. St. 368, 380; Trost *v.* Dingler, 118 Pa. St. 259, 271, 12 Atl. 296, 4 Am. St. Rep. 593; Miles *v.* Treanor, 194 Pa. St. 430, 45 Atl. 368.

South Carolina. — Gable *v.* Rauch, 50 S. C. 95, 107, 27 S. E. 555.

Texas. — Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

West Virginia. — Forney *v.* Ferrell, 4 W. Va. 729, 738; Stewart *v.* Lyons, 54 W. Va. 665, 47 S. E. 442.

Circumstances Offered To Show Relations. — Testimony as to relations between testator and person alleged to have influenced him, offered as bearing upon question of undue influence, must show relations existing at or near the time such will was executed. Batchelder *v.* Batchelder, 139 Mass. 1, 29 N. E. 61; Pierce *v.* Pierce, 38 Mich. 412; *In re* Flint, 100 Cal. 391, 34 Pac. 863.

4. Roberts *v.* Trawick, 17 Ala. 55, 52 Am. Dec. 164; Tobin *v.* Jenkins, 29 Ark. 151; Taylor *v.* Wilburn, 20 Mo. 306, 64 Am. Dec. 186.

"While the investigation is directed to the particular time at which the will was executed, yet evidence of facts preceding and subsequent to that particular time is often competent and admissible." Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459. To same effect, Thompson *v.* Davitte, 59 Ga. 472; Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394; Reynolds *v.* Adams, 90 Ill. 134, 32 Am. Rep. 15; *In re* Potter's Appeal, 53 Mich. 106, 18 N. W. 575.

In Fagan *v.* Dugan, 2 Redf. (N. Y.) 341, the court says: "I do not understand that to prove that the influence was present at a particular time, it is necessary to show that the duress was visible, or physically exercised at the moment of the execution, but that there must be such evidence as will satisfy the mind of the court or jury, that the duress existed shortly before, and continued its domination over the mind of the testatrix at the time of execution." See also Hartman *v.* Strickler, 82 Va. 225, 238; Steadman *v.* Steadman (Pa.), 14 Atl. 406; Dunaway *v.* Smoot, 23 Ky. L. Rep. 2289, 67 S. W. 62; Mowry *v.* Norman, 204 Mo. 173, 103 S. W. 15; Goodloe *v.* Goodloe (Tex. Civ. App.), 105 S. W. 533.

5. Forney *v.* Ferrell, 4 W. Va. 729, 739.

Absence at Moment of Execution, Immaterial. — Influence being shown, the fact that person charged was not with actor at the very moment the act in question was done does not negative the inference of such influence. White *v.* Daly (N. J. Eq.), 58 Atl. 929.

6. Bunyard *v.* McElroy, 21 Ala. 310.

ing long prior to the execution of the act in question, relied upon as showing undue influence, are not admissible unless there is proof that such influence continued down to or near the time of such action.[7]

b. *Conditions Must Have Continued.* — Where proof of weakness of mind has been admitted for the purpose of showing that testator was thereby rendered susceptible to undue influence, it must be shown that such mental weakness existed at the time the will was executed.[8]

(1.) Influence Causing Will Must Continue When Codicil Executed. If it be claimed that a certain will was procured by undue influence, and a codicil was afterwards executed, it must be shown that such influence was operative when the codicil was executed, as it constituted a republication.[9]

(2.) Will Copied From Former Will. — If proof shows that the will in question was copied from a former will containing the same omissions of contestants, and that such former will was obtained by undue influence, evidence showing such fact will be available to defeat the second will.[10]

C. Wide Discretion Allowed as to Time. — It has been said that a somewhat wide discretion must be allowed the trial judge in fixing the limits of time within which inquiry may be made as to circumstances showing testator's mental condition, and his relations with his relatives and beneficiaries of his will.[11]

7. *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. Rep. 181.

8. Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95.

9. Campbell *v.* Barrera (Tex. Civ. App.), 32 S. W. 724.

10. Powers' Exr. *v.* Powers, 25 Ky. L. Rep. 1468, 78 S. W. 152. In this case the court says: "We do not regard the fact that the influence is not shown to have been exerted with reference to the execution of this particular will at the time when it was prepared as material, because the evidence does show that when the original will was prepared, of which this one is a copy in the particular of disinheriting these two sons, the influence of the wife is shown to have been exerted. If the testator had conceived that on account of the infidelity or apostasy of his sons they were not fit subjects of his bounty, his right to exclude them by his will is not doubted. But it is not shown in this case that the testator had such views of his own, but there was evidence to the effect that his wife was so bigoted in her religious belief that it induced her to believe that her children who were apostates ought not to share in the distribution of their father's property, and that, actuated by this belief, she brought her influence to bear upon her husband so that he yielded to her importunities, and made a will different from what he himself would have done if left to his own inclination. The discrimination was not just. The testator himself did not so regard it, but he yielded, according to some of the evidence, to influences which he could not withstand. The fact that this occurred many years ago, instead of weakening the case against the will, seems to us rather to strengthen it, because it tends to show the weight and the persistence of the influence that was brought to bear against the paternal instinct of affection and justice, so as not only to overturn it at the time, but to keep it suppressed until the last."

11. Barber *v.* Allen (R. I.), 68 Atl. 366.

13. Not Determined by Certain Matters. — A. Means of Acquisition of Influence. — It is immaterial how undue influence exercised in a given case was acquired.[12]

B. Character of Person Influencing. — Influence is not necessarily undue because exercised by a person of low social position, or degraded character.[13] But evidence of general good character of propounder is admissible when it is charged that the will was procured by his undue influence.[14]

Evidence of Bad Character Inadmissible. — It has been held that evidence that the character of the person charged was bad is not admissible.[15]

Specific Acts. — Also that evidence showing specific immoral or unwise acts is not admissible.[16]

C. Motive Immaterial. — It has been said that the motive of the person exercising undue influence is immaterial, and that an influence is none the less vicious because the finer feelings of our nature are made the instruments of design.[17]

D. Extent or Degree of Influence Immaterial. — The exact

12. Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Birdsong *v.* Birdsong, 2 Head (Tenn.) 289; Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447.

13. Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329, 356; Rogers *v.* Troost's Admr., 51 Mo. 470.

14. Hannah *v.* Anderson, 125 Ga. 407, 54 S. E. 131.

15. Thomas *v.* Stump, 62 Mo. 275.

In Rogers *v.* Troost's Admr., 51 Mo. 470, it was alleged that the will there in question was procured by the undue influence of testator's niece. It was not claimed that any improper relations existed between the parties, but contestant offered to prove that the niece's reputation for chastity was bad. This evidence was excluded by the trial court, and its ruling held correct. The supreme court says: "The only question presented by the record in this case, for the consideration of this court is, whether the court that tried the cause, properly or improperly excluded the evidence offered by the plaintiff to prove the general reputation of Mrs. Troost for chastity. It is contended by the appellant that in almost all cases like this where a will is contested on the ground that it has been procured by fraud and undue influence on the part of the principal devisee, the chief inquiry after ascertaining the character of the testator, is to ascertain the character of the devisee. This may be true to some extent; you may inquire into the relations that the testator and devisee bore to each other, and whether she was of strong will what influence she had over the testator; whether she was in the habit of exercising that influence; and their conduct and relations with each other, etc. But whether you can inquire into her general character for chastity, would depend in each case upon the question whether there was any issue made in the case involving the character of the devisee for chastity. I think that generally such evidence is not admissible."

16. Garland *v.* Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836.

17. Miller *v.* Simonds, 5 Mo. App. 33, 43, *affirmed*, 72 Mo. 669.

But in Davis *v.* Culver, 13 How. Pr. (N. Y.) 62, it is said that undue influence is so denominated "because it is unrighteous, illegal, and designed to perpetrate a wrong," and the same view is indicated in *In re* Lyddy's Will, 4 N. Y. Supp. 468, *affirmed*, 53 Hun 629, 5 N. Y. Supp. 636. See also *In re* Elster's Will, 39 Misc. 63, 78 N. Y. Supp. 871; Millican *v.* Millican, 24 Tex. 426, 445;

extent or degree of influence is immaterial, if it is sufficient to destroy free agency of the person acting.[18]

Must Be Sufficient To Overcome Actor's Will. — But the influence must be sufficient to overcome actor's will and power of resistance.[19]

E. Will or Deed Procured by Other Than Devisee or Grantee. — It is immaterial that the execution of the will or deed in question was procured by the influence of a person other than devisee or legatee.[20]

Mortgage Procured by Third Party. — But it has been held in regard to a mortgage alleged to have been procured by undue influence, that, if the mortgagee had no knowledge that his mortgage had been so obtained, the mortgagor could not attack its validity.[21] But the contrary has been held.[22]

IV. HOW SHOWN.

1. Circumstances. — Direct proof of undue influence is not re-

Myatt *v.* Myatt (N. C.), 62 S. E. 887.

In Dailey *v.* Kastell, 56 Wis. 444, 14 N. W. 635, it is said that an influence cannot be called undue which is exerted to promote the good of actor. The court says: "It is not unlawful to influence a weak-minded person to do that which is just and for the best good of such person. Such influence is not undue — in other words, is not fraudulent, and does not necessarily vitiate the act produced by it." This case is cited and quoted in Marking *v.* Marking, 106 Wis. 292, 82 N. W. 133. See also Seward *v.* Seward, 59 Kan. 387, 53 Pac. 63.

In Ingwaldson *v.* Skrivseth, 7 N. D. 388, 75 N. W. 772, it was held that undue influence was not shown by evidence showing that the pastor of a church induced one of his church members to accept a certain deed in full of claims which she had against her seducer.

18. Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469; Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785; Dolliver *v.* Dolliver, 94 Cal. 642, 30 Pac. 4; Morgan *v.* Minett, L. R. 6 Ch. Div. (Eng.) 638, 36 L. T. 948; Drake's Appeal, 45 Conn. 9, 20; Haydock *v.* Haydock, 33 N. J. Eq. 494. But see Hampson *v.* Guy, 64 L. T. N. S. (Eng.) 778; Riley *v.* Sherwood, 144 Mo. 354, 45 S. W. 1077; Turner *v.* Cheesman, 15 N. J. Eq. 265, *quoted* in Lynch *v.* Clements, 24 N. J. Eq. 243, 431; Appeal of O'Brien, 100 Me. 156, 60 Atl. 880; Rollwagen *v.* Rollwagen, 63 N. Y. 504, 519.

On the other hand it is said that "It is not necessary in order to sustain either a deed or a will that there should be an absolute freedom from influence shown. There is no testator or grantor under the circumstances shown in this case absolutely free from influence. The test is: Were such influences applied as to take away his freedom of disposition?" Schneider *v.* Vosburgh, 143 Mich. 476, 106 N. W. 1129.

19. *In re* Hawley's Will, 44 Misc. 186, 89 N. Y. Supp. 803, *affirmed*, without opinion, 100 App. Div. 513, 91 N. Y. Supp. 1097.

20. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Van Valkenberg *v.* Valkenberg, 90 Ind. 433; Yosti *v.* Laughran, 49 Mo. 594; Ranken *v.* Patton, 65 Mo. 378, 415; Miller *v.* Simonds, 5 Mo. App. 33, 43, *affirmed*, 72 Mo. 669, 687; Roberts *v.* Bartlett, 190 Mo. 680, 702, 89 S. W. 858. See Ford *v.* Hennessy, 70 Mo. 580.

In Hays *v.* Union Tr. Co., 27 Misc. 240, 57 N. Y. Supp. 801, it was held that the rule applied where a person obtained the execution of a deed in favor of his children.

21. Green *v.* Scranage, 19 Iowa 461, 87 Am. Dec. 447.

22. Central Bank *v.* Copeland, 18 Md. 305, 319, 81 Am. Dec. 597.

quired. Its existence and exercise may be shown by circumstances.[23] Undue influence is generally proved by a number of facts, each one

23. *England.* — Morley *v.* Loughnan, L. R. (1893), 1 Ch. 736.

Alabama. — O'Donnell *v.* Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Knox *v.* Knox, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235; Roberts *v.* Trawick, 17 Ala. 55, 52 Am. Dec. 164 (will); Kramer *v.* Weinert, 81 Ala. 414, 1 So. 26.

California. — *In re* McDevitt, 95 Cal. 17, 33, 30 Pac. 101.

Colorado. — Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790.

Connecticut. — Drake's Appeal, 45 Conn. 9; Saunder's Appeal, 54 Conn. 108, 6 Atl. 193; Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85.

Illinois. — McCommon *v.* McCommon, 151 Ill. 428, 440, 38 N. E. 145.

Kansas. — Mooney *v.* Olsen, 22 Kan. 69.

Kentucky. — Fry *v.* Jones, 95 Ky. 148, 24 S. W. 5, 44 Am. St. Rep. 206.

Maryland. — Davis *v.* Calvert, 5 Gill & J. 269, 308, 25 Am. Dec. 282; Cherbonnier *v.* Evitts, 56 Md. 276; Frush *v.* Green, 86 Md. 494, 39 Atl. 863; Grove *v.* Spiker, 72 Md. 300, 20 Atl. 144; Hiss *v.* Weik, 78 Md. 439, 447, 28 Atl. 400.

Massachusetts. — Davenport *v.* Johnson, 182 Mass. 269, 65 N. E. 392; Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479.

Michigan. — Rivard *v.* Rivard, 109 Mich. 98, 111, 66 N. W. 681, 63 Am. St. Rep. 566; Beaubien *v.* Cicotte, 12 Mich. 459; Wilson *v.* Parker, 130 Mich. 638, 90 N. W. 682.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

Missouri. — Carl *v.* Gabel, 120 Mo. 283, 296, 25 S. W. 214; Bradford *v.* Blossom, 190 Mo. 110, 139, 88 S. W. 721; King *v.* Gilson, 191 Mo. 307, 337, 90 S. W. 367; Hughes *v.* Rader, 183 Mo. 630, 708, 82 S. W. 32; Roberts *v.* Bartlett, 190 Mo. 680, 700, 89 S. W. 858; Maddox *v.* Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734.

New York. — Brick *v.* Brick, 66 N. Y. 144; Rider *v.* Miller, 86 N. Y. 507; O'Neil *v.* Murray, 4 Bradf. Sur. 311, 319; Rollwagen *v.* Rollwagen, 63 N. Y. 504; Swenarton *v.* Hancock, 22 Hun 38; Phipps *v.* Van Kleeck, 22 Hun 541, *affirming* 4 Redf. 99; *In re* Baker's Will, 2 Redf. 179, 193; Demmert *v.* Schnell, 4 Redf. 409; *In re* Blair's Will, 16 N. Y. Supp. 874.

Texas. — Campbell *v.* Barrera (Tex. Civ. App.), 32 S. W. 724; Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

Vermont. — Smith *v.* Smith, 67 Vt. 443, 32 Atl. 255.

Wisconsin. — Bryant *v.* Pierce, 95 Wis. 331, 340, 70 N. W. 297; Slinger's Will, 72 Wis. 22, 37 N. W. 236.

According to remarks of the high court of errors and appeals of Mississippi, the law does not require even "circumstantial proof" of undue influence, but will determine its existence upon presumptions alone. See Meek *v.* Perry, 36 Miss. 190, 244. The burden of proof was upon the guardian — residuary legatee — to show that the will there in question executed in his favor by his ward was not obtained by undue influence, and he having failed to discharge this burden, a verdict against the validity of the will was not disturbed.

In White *v.* Starr, 47 N. J. Eq. 244, 20 Atl. 875, the court says: "It is only in exceptional cases that direct proof of undue influence can be had. The proof of it is, generally, by presumptions raised by circumstances, or, in case fraud is an element of the undue influence, by inference from circumstances, which produces satisfactory conviction. There are well-recognized *indicia* of undue influence which the courts hold raise a presumption or justify an inference against the instrument, unless the proponent can show that the will was the testator's free act; such as the fact that the testator was enfeebled in mind; within the control of the principal beneficiary, who was the draughtsman of the will and present at its execution; that natural objects of the testator's bounty were

of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.[24]

A. Circumstances Not Admissible in Absence of Direct Proof. — It has been held that testimony as to circumstances is not admissible unless offered in connection with direct proof of the exercise of undue influence in securing execution of the act in question. Thus testimony as to the financial condition of heirs was held immaterial in the absence of other testimony establishing the fact of the exercise of undue influence.[25] In the absence of direct proof, testimony to the effect that a husband generally treated his wife badly has been held irrelevant.[26] So, testimony showing relation between testator and his family, and family disagreements, has been held immaterial.[27] Testimony showing inequality in the provisions of a will has been held incompetent.[28] The fact that the person charged had knowledge of testator's will, has been held irrelevant.[29] Testimony to the effect that testator, a married man, when absent

excluded from his society when the will was made by such person; clandestinity, and the like."

As to what circumstances may be shown, see the following cases:

United States. — President of Bowdoin College *v.* Merritt, 75 Fed. 480, 494.

Arkansas. — Sanger *v.* McDonald, 112 S. W. 365.

Delaware. — Lodge *v.* Lodge's Will, 2 Houst. 418.

District of Columbia. — Olmstead *v.* Webb, 5 App. Cas. 38.

New York. — Soverhill *v.* Post, 22 How. Pr. 386; *In re* De Baun's Estate, 9 N. Y. Supp. 807; *In re* Ellwanger's Will, 114 N. Y. Supp. 727.

North Carolina. — Horah *v.* Knox, 87 N. C. 483, 491.

Pennsylvania. — Reichenbach *v.* Ruddach, 127 Pa. St. 564, 591, 18 Atl. 432.

Tennessee. — Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

Wisconsin. — Will of Slinger, 72 Wis. 22, 37 N. W. 236.

24. Moore *v.* McDonald, 68 Md. 321, 339, 12 Atl. 117; Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 49.

25. Latham *v.* Schaal, 25 Neb. 535, 41 N. W. 354.

Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319, where the court says: "It is said the proposed evidence was admissible for the purpose of showing the recitals in the will are false, and the provisions thereof unjust and unreasonable. The evidence related to a time from fifteen to thirty years prior to the execution of the will, and the only statement therein the evidence tended to show was false was, that said children had received their 'equal proportion of my estate.' In the absence of any evidence tending to show undue influence on the part of Mrs. Bartlett, or that the testator had reached the conclusion he seems to have adopted by reason of false representations made by Mrs. Bartlett, the proposed evidence was immaterial. If undue influence has been shown, or the recitals in a will have been induced by false representations, or that it is unjust in its provisions, such matters may, in such event, become material. Under such circumstances they become make-weights and aids to the evidence which tends to show undue influence."

26. McMahon *v.* Ryan, 20 Pa. St. 329.

27. Ketchum *v.* Stearns, 8 Mo. App. 66, *affirmed*, 76 Mo. 396. In this case the court says: "We can see no ground for admissibility for any of this proposed testimony." The opinion indicates that the testimony was excluded on the ground of immateriality.

28. Bottom *v.* Bottom, 32 Ky. L. Rep. 494, 106 S. W. 216.

29. Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

from home, expressed a desire to call upon a young woman, has been held irrelevant, in the absence of direct proof.[30] In other cases testimony as to circumstances has been held inadmissible, the courts not stating the ground of exclusion.[31]

B. MUST NOT BE REMOTE. — Circumstances sought to be proven must be reasonably near in point of time to the act in question.[32]

a. *Prior Circumstances.* — Testimony showing actor's mental and physical condition, and his relations with his family and person charged, prior to execution of the act in question, and testimony as

30. Rice *v.* Rice, 108 Mich. 454, 66 N. W. 372.

31. In Storer's Will, 28 Minn. 9, 8 N. W. 827, it was held that testimony as to value of testator's estate, offered to show an unequal division of such estate, was "no evidence."

In Hauberger *v.* Root, 6 Watts & S. (Pa.) 431, testimony offered for the same purpose was said to be "inadmissible."

In Bauchens *v.* Davis, 229 Ill. 557, 82 N. E. 365, it was held that evidence showing the existence of a confidential relation between testator and person charged was properly excluded, in the absence of testimony showing that such person took any part in procuring execution of the will.

In *In re* Hall's Will, 3 N. Y. Supp. 288 (*affirmed*, without opinion, 117 N. Y. 643, 24 N. E. 455) it is said that in the absence of direct proof of undue influence, such testimony is "unimportant."

The circumstances of actual influence possessed by person charged, and inequality in the provisions of the will in question, have been held inadmissible. Storer *v.* Zimmerman, 28 Minn. 9, 8 N. W. 827.

32. *In re* Flint's Estate, 100 Cal. 391, 34 Pac. 863; Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319; Pierce *v.* Pierce, 38 Mich. 412; Ketchum *v.* Stearns, 8 Mo. App. 66, *affirmed*, 76 Mo. 396.

In *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. Rep. 181, to show undue influence of wife in procuring a will, it was sought to prove that, sixteen years prior to the execution of the will in question and five years prior to marriage, the wife estranged testator from his former wife and caused their divorce. *Held*, that these circumstances were too remote, and the testimony properly excluded.

In Shailer *v.* Bumstead, 99 Mass. 112, 129, it was held that the fact that two years after execution of the will in question testatrix caused the accounts of a person named as executor, who was her agent, to be audited, and expressed dissatisfaction with him, but continued him in her employ, was too remote.

In Tingley *v.* Cowgill, 48 Mo. 291, it was held that proof that long prior to execution of the will in question, the person charged — testator's wife, treated testator's children by a former marriage unkindly, is not sufficient in the absence of proof showing that such treatment affected testator's mind or influenced his conduct.

Conduct of Testatrix Ten Days After Making Will was held sufficiently near, in point of time, to the act of execution to be admissible. Gordan *v.* Burris, 141 Mo. 602, 613, 43 S. W. 642.

Family Disagreements. — Disagreements and fights between members of testator's family, long prior to execution of will in question, are inadmissible. Hughes *v.* Rader, 183 Mo. 630, 714, 82 S. W. 32.

Competent, if Connected, Although Remote. — But, although remote in point of time, circumstances bearing on the point in issue, illustrative of the conduct of person charged, or his relations with actor, are admissible. Remoteness in point of time is of little consequence compared with remoteness in point of causation. Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 49.

to alleged exercise of undue influence prior to execution of such act is admissible.[33]

b. *Subsequent Circumstances.* — It has been held that facts and circumstances occurring after the execution of the will may be shown relating to the condition of the testator's mind, and the question of fraud and undue influence claimed to have been exercised over him, for the purpose of proving, by inference or otherwise, that the same conditions existed before and at the time of the execution of the will as existed afterwards on these points.[34] Such circumstances are admissible as tending to identify the agency which produced the original result, and as tending to fortify antecedent indications.[35] Whether or not actor's condition was, at the time of the subsequent circumstances, so changed from its condition at the time of execution that such circumstances do not show his former condition is a question for the jury.[36]

Acts Showing Continuance of Plan To Influence Actor. — It is also proper to prove acts which show an intention to continue a course of conduct designed to control the conduct of the actor; thus, in a will contest, it is competent to show that, after the execution of the will in question, proponent remained in the sick room of testatrix, and excluded therefrom the friends and near relatives of testatrix.[37]

33. Staser *v.* Hagan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Steadman *v.* Steadman (Pa.), 14 Atl. 406; Forney *v.* Terrill, 4 W. Va. 729, 739.

Prior Circumstances. — It has been said that where a particular transaction is attacked on the ground of undue influence, evidence bearing on this issue derived from the history of the grantor prior to and outside the act in controversy, is obviously entitled to greater weight than what transpires at or about the date of the execution of the instrument. Cherbonnier *v.* Evits, 56 Md. 276.

34. Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; Walts *v.* Walts, 127 Mich. 607, 86 N. W. 1030.

Facts occurring subsequent to execution of will are insufficient, in absence of direct proof connecting them with an influence operating prior to or at the time of execution. Leffingwell *v.* Bettinghouse, 151 Mich. 513, 115 N. W. 731.

35. Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566, 575.

36. In Haines *v.* Hayden, 95 Mich. 332, 351, 54 N. W. 911, 35 Am. St. Rep. 566, proof of matters occurring and declarations made after the execution of the will was offered for the purpose of showing the condition of the testator's mind at the time of executing the will. It was contended that, as testator was suffering from senile decay at the time of such subsequent circumstances and declarations, they did not correctly show his condition at time of execution, and that, therefore, the offered proof was incompetent. The court held that the fact of senile decay did not render the subsequent circumstances and declarations incompetent.

37. Coghill *v.* Kennedy, 119 Ala. 641, 665, 24 So. 459.

Continuing Dominion Over Testator's Mind. — It is competent to prove facts showing that person exercising undue influence over testator possessed continuous dominion over his mind after the execution of his will, and that the conduct of such person was one continuous scheme to secure execution of the will and prevent its revocation. Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566, 574.

It may be shown that some time after the execution of the will in question, devisee, whose undue influence was alleged as the procuring

C. What Circumstances May Be Shown. — In determining the issue of undue influence, the following circumstances may be shown.

a. *Facts Relating to Actor.* — **(1.) Age.** — Age of actor at time undue influence is alleged to have been exercised.[38]

(2.) Physical Condition of actor at such time.[39]

(A.) Sobriety. — Influence of Drugs. — Thus, it may be shown that actor was intoxicated,[40] or that he was under the influence of opiates or narcotics.[41]

cause of the will in question, advised testatrix to undergo an operation, knowing that it would result in death. Thompson *v.* Bennett, 194 Ill. 57, 66, 62 N. E. 321.

Preventing Revocation of Will. That person charged, by making threats against testator, prevented his revoking a will in favor of such person is a circumstance showing undue influence in the execution of such will. *In re* Sickles' Will, 63 N. J. Eq. 233, 50 Atl. 577, *affirmed,* 64 N. J. Eq. 791, 53 Atl. 1125.

38. *Alabama.* — Roberts *v.* Trawick, 13 Ala. 68, 85, *affirmed,* 17 Ala. 55, 52 Am. Dec. 164.

Delaware. — Sutton *v.* Sutton, 5 Har. 459.

Illinois. — Smith *v.* Henline, 174 Ill. 184, 198, 51 N. E. 227.

Indiana. — Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326.

Iowa. — Semper *v.* Englehart, 118 N. W. 318.

Missouri. — Roberts *v.* Bartlett, 190 Mo. 680, 701, 89 S. W. 858.

New York. — Seiter *v.* Straub, 1 Dem. 264.

Pennsylvania. — Perret *v.* Perret, 184 Pa. St. 131, 144, 39 Atl. 33.

See remarks of Turner, L. J., to effect that, when a relation of trust and confidence is shown to have existed between donor and donee, the age and capacity of the former are not material. Rhodes *v.* Bate, L. R. 1 Ch. App. 252, 35 L. J. Ch. 267, 12 Jur. (N. S.) 178, 13 L. T. 778; Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

39. *Alabama.* — Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Roberts *v.* Trawick, 13 Ala. 68, 84, *affirmed,* 17 Ala. 55, 52 Am. Dec. 164.

Arkansas. — McDaniel *v.* Crosby, 19 Ark. 533; Jenkins *v.* Tobin, 31 Ark. 306.

California. — *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252 (eyesight).

Colorado. — Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790.

Delaware. — Sutton *v.* Sutton, 5 Har. 459.

District of Columbia. — Olmstead *v.* Webb, 5 App. Cas. 38, 56.

Illinois. — Willemin *v.* Dunn, 93 Ill. 511; Smith *v.* Henline, 174 Ill. 184, 198, 51 N. E. 227.

Indiana. — Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326.

Iowa. — Sim *v.* Russell, 90 Iowa 656, 57 N. W. 601; Semper *v.* Englehart, 118 N. W. 318; Lingle *v.* Lingle, 121 Iowa 133, 96 N. W. 708.

Michigan. — *In re* Hoffmann's Estate, 151 Mich. 595, 115 N. W. 690.

Missouri. — Cadwallader *v.* West, 48 Mo. 483; Myers *v.* Hauger, 98 Mo. 433, 11 S. W. 974; Cowan *v.* Shaver, 197 Mo. 203, 95 S. W. 200.

New Jersey. — Haydock *v.* Haydock, 33 N. J. Eq. 494; *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676.

New York. — Reynolds *v.* Root, 62 Barb. 250; Darley *v.* Darley, 3 Bradf. Sur. 481; *In re* Blair's Will, 16 N. Y. Supp. 874.

North Carolina. — Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

Pennsylvania. — Reichenbach *v.* Ruddach, 127 Pa. St. 564, 593, 18 Atl. 432.

40. Sobriety of Testator. — It is competent to show that testator was intoxicated at the time he executed his will, as that circumstance, in connection with others, is pertinent to show undue influence, a person in that condition being more easily subjected to undue influence than if sober. *In re* Cunningham, 52 Cal. 465.

41. Condition as Result of Use of Opiates and Narcotics. — Black-

(B.) Addicted to Intoxicants. — Also that he was addicted to the use of intoxicating liquors.[42]

(C.) Complaints of Physical Condition. — It is proper to show that actor complained of failing eyesight and other bodily ailments, as showing her condition and her dependence upon others.[43]

(D.) Age and Physical Condition Alone Inadmissible. — But age and physical condition cannot be considered, except in connection with other evidence.[44]

(3.) Mental Condition. — So as to actor's mental condition at the time of the exertion of influence, or at the time of execution of the act in question.[45]

(A.) Prior and Subsequent. — Also his mental condition prior and subsequent to the act in question when proof as to such prior or subsequent condition would tend to show his susceptibility to influence at the time of execution.[46]

man *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790.

42. *In re* Reed's Will, 20 N. Y. Supp. 91; Smith *v.* Smith, 67 Vt. 443, 32 Atl. 255.

43. *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252.

44. Muir *v.* Miller, 72 Iowa 585, 34 N. W. 429; Jackson *v.* Hardin, 83 Mo. 175, 185; Lorts *v.* Wash, 175 Mo. 487, 75 S. W. 95; Cowan *v.* Shaver, 197 Mo. 203, 95 S. W. 200.

45. *Alabama.* — Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Roberts *v.* Trawick, 13 Ala. 68, 85, *affirmed*, 17 Ala. 55, 62 Am. Dec. 164.

Arkansas. — Jenkins *v.* Tobin, 31 Ark. 306.

Colorado. — Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790.

District of Columbia. — Olmstead *v.* Webb, 5 App. Cas. 38, 56.

Iowa. — *In re* Convey's Will, 52 Iowa 197, 2 N. W. 1084; Lingle *v.* Lingle, 121 Iowa 133, 96 N. W. 708.

Maryland. — Kennedy *v.* Dickey, 100 Md. 152, 59 Atl. 661.

Massachusetts. — Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Somes *v.* Skinner, 16 Mass. 348, 358.

Michigan. — Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322; *In re* Hoffmann's Estate, 151 Mich. 595, 115 N. W. 690.

Missouri. — Cadwallader *v.* West, 48 Mo. 483; Myers *v.* Hauger, 98 Mo. 433, 11 S. W. 974; Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; McKissock *v.* Groom, 148 Mo. 459, 50 S. W. 115; Bradford *v.* Blossom, 190 Mo. 110, 88 S. W. 721; King *v.* Gilson, 191 Mo. 307, 90 S. W. 367; Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858.

Nebraska. — Meyer *v.* Fishburn, 65 Neb. 626, 91 N. W. 534.

New Jersey. — Haydock *v.* Haydock, 33 N. J. Eq. 494; White *v.* Starr, 47 N. J. Eq. 244, 20 Atl. 875; Hampton *v.* Westcott, 49 N. J. Eq. 522, 25 Atl. 254; *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676.

New York. — *In re* Blair's Will, 16 N. Y. Supp. 874; Reynolds *v.* Root, 62 Barb. 250.

North Carolina. — Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526; Riley *v.* Hall, 119 N. C. 406, 26 S. E. 47.

Pennsylvania. — Levis' Estate, 140 Pa. St. 179, 21 Atl. 242; Robinson *v.* Robinson, 203 Pa. St. 400, 417, 53 Atl. 253.

Texas. — Hart *v.* Hart (Tex. Civ. App.), 110 S. W. 91.

Vermont. — Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

West Virginia. — Bade *v.* Feay, 61 S. E. 348.

Mental Depression. — Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326.

Grief. — That grantor was oppressed with grief for a deceased member of his family is a circumstance to be considered in his action to set aside a deed. Willemin *v.* Dunn, 93 Ill. 511.

46. Coghill *v.* Kennedy, 119 Ala. 641, 663, 24 So. 459; McDaniel *v.*

(B.) In Issue in Every Will Contest. — It has been said that in every case in which a will is attacked upon the ground of undue influence, testator's mental condition is in issue.[47]

(C.) Weakness of Memory. — That testatrix failed to remember executing certain papers, which it was proved she had executed, is competent to show failing memory and mind; and in such connection the papers themselves are competent.[48]

(D.) Mental Incapacity Renders Proof Easier. — In a will contest where there is evidence of mental incapacity, it is easier to satisfy the court that undue influence was used, inasmuch as the degree of influence required to induce a person of strong mind and in good health is much greater than that which would induce a person of feeble mental capacity and in a weak state of health.[49] Weakness of intellect, although not amounting to insanity, when coupled with circumstances showing that such weakness was taken advantage of, may be sufficient to invalidate an act done by person whose weakness is shown.[50]

Crosby, 19 Ark. 533, 551; Kramer *v.* Weinert, 81 Ala. 414, 1 So. 26; Tobin *v.* Jenkins, 29 Ark. 151.

As to length of subsequent period which may be covered by such testimony, see Shailer *v.* Bumstead, 99 Mass. 112, 130.

Prior Condition. — Knox *v.* Knox, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235; Robinson *v.* Robinson, 203 Pa. St. 400, 424, 53 Atl. 253; Cherbonnier *v.* Evitts, 56 Md. 276.

Prior and Subsequent. — Michon *v.* Ayalla, 84 Tex. 685, 19 S. W. 878; Somes *v.* Skinner, 16 Mass. 348, 358.

"All competent evidence should be received which reasonably tends to prove the mental condition of the testator at a date sufficiently recent to affect his susceptibility to undue influence." Fischer *v.* Sperl, 94 Minn. 421, 103 N. W. 502.

See Hendrix *v.* Money, 1 Bush (Ky.) 306, where it was held proper to admit testimony showing grantor's mental condition from the time of his acknowledging deed in question to the time of his death.

Mental Condition. — The mental condition of a person whose act is in question may be inquired into, and whether or not it was such as to render him subject to the influence of another is a circumstance to be considered in determining the nature or extent of such influence. Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Kramer *v.* Weinert, 81 Ala. 414, 1 So. 26; Bates *v.* Bates, 27 Iowa 110, 2 Am. Rep. 260; Sim *v.* Russell, 90 Iowa 656, 57 N. W. 601; Hampson *v.* Guy, 64 L. T. N. S. (Eng.) 778; McDaniel *v.* Crosby, 19 Ark. 533, 551; Darley *v.* Darley, 3 Bradf. Sur. (N. Y.) 481; Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430.

In Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95, the court says: "It is a matter of common knowledge that a person of feeble intellect is much more easily influenced by undue means than is one of a vigorous mind; therefore, in passing upon a question of undue influence, the strength and condition of the mind may become a proper, indeed an essential, subject of inquiry; for although weakness, whether arising from age, infirmity, or other cause, may not be sufficient to create testamentary capacity, it may nevertheless form favorable conditions for the exercise of undue influence."

47. Waterman *v.* Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Shailer *v.* Bumstead, 99 Mass. 112; Reynolds *v.* Adams, 90 Ill. 134, 32 Am. Rep. 15; Hampton *v.* Westcott, 49 N. J. Eq. 522, 25 Atl. 254.

48. *In re* Arnold's Estate, 147 Cal. 583, 595, 82 Pac. 252.

49. Hamspon *v.* Guy, 64 L. T. N. S. (Eng.) 778.

50. Juzan *v.* Toulmin, 9 Ala. 662,

(E.) Mental Weakness Alone Insufficient. — But unless there be evidence of an actual exercise of influence, proof of mental weakness is not sufficient.[51]

(4.) Belief. — Spiritualism. — Wills. — Deeds. — It is proper, in a will contest, to show that testator believed in spiritualism, it being proper to show to what extent his mind was influenced by such belief, or by practices connected therewith.[52] The same is true of an action to set aside a deed on the ground of influence exercised by a medium.[53]

(5.) Knowledge of Relations Between Parties. — It has been held that in a will contest it is proper to show that testator knew that contestant disliked the person charged with having unduly influenced testator.[54] It has also been held proper to rebut such testimony by showing that there was no ground for such dislike.[55]

(6.) Knowledge of Feelings of Relatives Toward Himself. — It is proper to show that testator knew of the views and feelings of his relatives — contestants and beneficiaries — toward him.[56]

(7.) Knowledge of Financial Condition of Relatives. — It may also be shown that testator was aware that his relatives were poor.[57]

(8.) Knowledge of Character or Habits of Relative. — It may be shown that testator knew that a certain relative had habits or characteristics such as would render it unlikely that he would make a large provision for such person.[58]

(9.) Feelings, Affections and Preferences. — In a will contest it is proper to show the known affections and preferences of testator, and the correspondence or the contradiction of the will to these.[59]

44 Am. Dec. 448; Cowan *v.* Shaver, 197 Mo. 203, 95 S. W. 200.

51. Floyd *v.* Floyd, 2 Strobh. (S. C.) 44, 49 Am. Dec. 626; Estate of Nelson, 132 Cal. 182, 194, 64 Pac. 294; Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Campbell *v.* Campbell, 51 Iowa 713, 2 N. W. 541; McDaniel *v.* Crosby, 19 Ark. 533, 551; Reynolds *v.* Root, 62 Barb. (N. Y.) 250.

52. Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473.

As to spiritualism, see Connor *v.* Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84; Orchardson *v.* Cofield, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211; Baylies *v.* Spaulding (Mass.), 6 N. E. 62; O'Dell *v.* Goff, 149 Mich. 152, 112 N. W. 736; Steinkuehler *v.* Wempner, 169 Ind. 154, 81 N. E. 482.

In *In re* Will of Smith, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, it was shown that testator was a spiritualist. The court seems to have considered this proof in connection with the charge of unsoundness of mind rather than undue influence, although the latter ground was alleged against the will.

53. Lyon *v.* Home, L. R. 6 Eq. (Eng.) 655, 37 L. J. Ch. 674, 18 L. T. 451.

54. Belknap *v.* Robinson, 67 N. H. 194, 29 Atl. 450.

55. Belknap *v.* Robinson, 67 N. H. 194, 29 Atl. 450.

56. Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

57. Fairchild *v.* Bascomb, 35 Vt. 398, 417.

58. Fairchild *v.* Bascomb, 35 Vt. 398, 417, where it was held proper to show that testatrix knew that one of his brothers was intemperate.

59. *Delaware.* — Sutton *v.* Sutton, 5 Har. 459.

Maryland. — See Frush *v.* Green, 86 Md. 494, 39 Atl. 863.

New Hampshire. — Patten *v.* Cilley, 67 N. H. 520, 528, 42 Atl. 47.

(10.) Disposition. — Susceptibility. — (A.) GENERALLY. — Disposition of actor to submit to influence, or his susceptibility to influence may be shown.[60] It is competent to show that he was firm and decided, or irresolute and easily persuaded to conform to the wishes of others.

(B.) OPINION. — It has been held that, to show disposition and susceptibility of actor, a witness may state his opinion on those subjects, if he state the facts and circumstances upon which that opinion is based, and show his acquaintance with actor.[61]

Qualification of Witness Question for Court. — Whether or not witness is qualified to express an opinion is a question of fact for the trial court.[62]

(11.) Brutality Inadmissible. — But it has been held improper to admit testimony showing that testator was brutal.[63]

(12.) Motive. — Circumstances tending to show or explain actor's motive for doing the act in question may be proved.[64]

(13.) Reasons. — It is proper to show actor's reasons for certain actions, as showing his mental condition;[65] or as showing that the act in question was natural and proper.[66]

New York. — Allen *v.* Public Admr., 1 Bradf. Sur. 378; Wightman *v.* Stoddard, 3 Bradf. Sur. 393; Marvin *v.* Marvin, 4 Keyes 9, 22; *In re* Blair's Will, 16 N. Y. Supp. 874; *In re* Seagrist's Will, 1 App. Div. 615, 37 N. Y. Supp. 496, *affirming*, 11 Misc. 188, 32 N. Y. Supp. 1095.

Vermont. — Fairchild *v.* Bascomb, 35 Vt. 398, 417.

60. *Alabama.* — Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

Georgia. — Howell *v.* Howell, 59 Ga. 145.

Massachusetts. — Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275.

New Hampshire. — Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47; Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459.

North Carolina. — Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

Pennsylvania. — Robinson *v.* Robinson, 203 Pa. St. 400, 417, 53 Atl. 253.

Texas. — Hart *v.* Hart (Tex. Civ. App.), 110 S. W. 91.

Influence To Do a Certain Act. The fact that about the time of the execution of the will in question testator was influenced by his friends to convey his property to a trustee, for the purpose of enabling testator to more advantageously contest the validity of a certain contract, it appearing that the person charged attended the conference at which such conveyance was proposed, is a circumstance showing testator's susceptibility to undue influence, and therefore competent. Stubbs *v.* Houston, 33 Ala. 555, 563.

61. Howell *v.* Howell, 59 Ga. 145; *In re* Vivian's Appeal, 74 Conn. 257, 50 Atl. 797; Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459.

62. Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459.

63. Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

64. Testator's reason for giving his estate to a stranger to the exclusion of his children is explained by proof that his children treated him unkindly. White *v.* Bailey, 10 Mich. 155.

In Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233, it was held proper to show testator's testimony in a suit between himself and his omitted children as tending to show the causes of estrangement between him and such children.

65. *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252.

66. **Person Charged Omitted From Will of Third Person.** — It may be shown that a devise alleged to have been obtained by undue influence

(14.) Wishes as to Disposition of Estate. — The exhibition of the testator's wishes, orally expressed, as to the disposition of his estate, is material in determining the probability of the will having been his free act.[67]

Conflict Between Will and Intention. — The fact that a will conflicts with testator's known testamentary intentions may be shown.[68]

Expressed in Will Not Executed. — So it may be shown that testator caused wills to be prepared, although such wills were never executed.[69]

Former Will More Favorable Than That in Question. — The fact that a will made by testator prior to the execution of the will in question was more favorable to the person charged than the subsequent will, is a strong circumstance in favor of the latter.[70]

(15.) Prior Intention. — From remarks made in a leading English case, it would seem that the intention of donor formed prior to the exercise of the alleged undue influence is a circumstance to be considered in determining whether or not his act was voluntary.[71]

Grant Opposed to Grantor's Intention. — That the disposition made by a grant is opposed to grantor's prior expressed intention, and inconsistent with his previous conduct, are circumstances to be considered in ascertaining the voluntary character of such grant.[72]

(16.) Financial Condition. — (A.) Amount and Character of Estate. In general, the amount of testator's estate may be shown in ascertaining his mental capacity, and the influences actuating his mind in disposing of his property.[73]

was made by the father of the person charged because his wife had omitted such person from her own will. Varner *v.* Varner, 16 Ohio C. C. 386.

67. Wilson *v.* Moran, 3 Bradf. Sur. (N. Y.) 172, 183. To same effect, see Weir *v.* Fitzgerald, 2 Bradf. Sur. (N. Y.) 42; Maverick *v.* Reynolds, 2 Bradf. Sur. (N. Y.) 360; Thompson *v.* Quimby, 2 Bradf. Sur. (N. Y.) 449.

68. Ross *v.* Christman, 23 N. C. (1 Jones' L.) 209.

69. Thornton's Exrs. *v.* Thornton's Heirs, 39 Vt. 122, 158.

70. Seebrock *v.* Fedawa, 30 Neb. 424, 46 N. W. 650; Boggs *v.* Boggs, 62 Neb. 274, 87 N. W. 39; *In re* Read's Will, 17 Misc. 195, 40 N. Y. Supp. 974.

71. Allcard *v.* Skinner, L. R. 17 Ch. Div. (Eng.) 145, 191. See also Dingman *v.* Romine, 141 Mo. 466, 477, 42 S. W. 1087; Tyler *v.* Gardiner, 35 N. Y. 559, 582; *In re* Middleton's Will, 68 N. J. Eq. 584, 59 Atl. 454; Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939; Citizens' L. & T. Co. *v.* Holmes, 116 Wis. 220, 93 N. W. 39.

72. Frush *v.* Green, 86 Md. 494, 39 Atl. 863. See also O'Neil *v.* Murray, 4 Bradf. Sur. (N. Y.) 311, 319; Fagan *v.* Dugan, 2 Redf. (N. Y.) 341.

The fact that testator, after promising to provide for contestant by his will, left him only a small legacy does not show that his action in bequeathing a smaller sum than was expected was the result of undue influence. McKeone *v.* Barnes, 108 Mass. 344.

73. *In re* Jones' Estate, 130 Iowa 177, 106 N. W. 610; Davenport *v.* Johnson, 182 Mass. 269, 65 N. E. 392; *In re* Woodward's Will, 167 N. Y. 28, 60 N. E. 233; Frew *v.* Clarke, 80 Pa. St. 170, 180; Reichenbach *v.* Ruddach, 127 Pa. St. 564, 592, 18 Atl. 432; Thornton's Exrs. *v.* Thornton's Heirs, 39 Vt. 122, 158.

Amount and Character of Estate. In the case of a will contested on the ground of undue influence ex-

Will of Third Person Incompetent. — But the will of a third person devising property to testatrix is not admissible for this purpose.[74]

(B.) Straitened Circumstances. — It is proper to show that, at the time of the transaction in question, actor was in straitened circumstances.[75]

(17.) Conduct of Actor. — The acts of the actor which bear upon the question of influence may be shown.[76]

(A.) Acts of Affection. — Thus, acts or expressions of affection for members of his family.[77]

Conduct Showing Affection. — Conduct showing that actor entertained affection for a certain person is a proper circumstance to be considered.[78]

(B.) Regret at Omission of Heir. — Conduct which indicates that testatrix regretted the omission of a testamentary provision for contestant is a circumstance to be considered.[79]

(18.) Change of Attorney. — The fact that testator abandoned the attorneys who had previously attended to his business, and employed the attorney of the principal devisee to prepare his will, is a circumstance to be considered in determining the question of undue

ercised by the confidential adviser of testator, it is proper to permit proponent to show the amount and character of testator's estate, as such circumstances tend to show the relations between testator and such agent, and the extent to which the former was kept informed as to his affairs. Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85. See also *In re* Flint, 100 Cal. 391, 34 Pac. 863; *In re* Arnold's Estate, 147 Cal. 583, 591, 82 Pac. 252; Fountain *v.* Brown, 38 Ala. 72.

In case of a will contest, an inventory and account executed by testatrix as executrix of her husband's estate, prepared by proponent and signed by testatrix, from which valuable assets are omitted, is admissible as a circumstance showing that testatrix was not informed as to her property and that her property and affairs were managed by proponent. Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293. See remarks of court in Pooler *v.* Cristman, 145 Ill. 405, 34 N. E. 57, to the effect that such accounts would be competent to show amount of property received by testatrix from her husband's estate.

74. Pooler *v.* Cristman, 145 Ill. 405, 34 N. E. 57.

Contra. — But the contrary has been held. Floore *v.* Green, 26 Ky. L. Rep. 1073, 83 S. W. 133.

75. Tucker *v.* Roach, 139 Ind. 275, 38 N. E. 822.

76. Boyd *v.* Boyd, 66 Pa. St. 283, 296.

Actor's conduct subsequent to act in question may be considered. Boyd *v.* Boyd, 66 Pa. St. 283, 296. Evidence of testator's conduct is admissible when it tends to show his feelings toward the natural objects of his bounty. Randolph *v.* Lampkin, 90 Ky. 551, 14 S. W. 538; Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642.

77. Lewis *v.* Mason, 109 Mass. 169.

78. Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642.

79. Weeping. — The fact that testatrix wept when speaking of a grandchild whom she had omitted from her will has been held properly admitted as showing affection for such grandchild, and regret for the omission. Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642.

But in *In re* Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179, it was held error to admit declarations of testatrix to the effect that she regretted having omitted one of her children from her will.

influence.[80] Also the fact that the will in question was not drawn by testator's attorney, but by a layman and stranger.[81]

(19.) Permitting Will to Remain Unaltered and Unrevoked. — It would seem that the fact that testator, when removed from the influence of the person alleged to have procured the execution of his will, permitted it to remain unaltered and unrevoked, may be considered as a circumstance showing the voluntary character of his testamentary act.[82]

Influence Preventing Revocation. — Proof that undue influence prevented the revocation of a will tends strongly to the conclusion that the same influence caused its execution.[83]

(20.) Will Conforming With Instructions. — That a will conforms with testator's instructions is a proper circumstance to be considered.[84]

Conformity Not Conclusive. — The fact that testator instructed draughtsman to draw his will in the form in which it was actually drawn is not conclusive of its voluntary character.[85]

(21.) Expression of Satisfaction. — So also the fact that testator expressed himself as satisfied with his will.[86]

(22.) Change of Will. — The execution of a former will making dispositions differing from those of the will in question is a circumstance to be considered in ascertaining the validity of the second will.[87]

80. Jenkins *v.* Tobin, 31 Ark. 306.

81. Fagan *v.* Dugan, 2 Redf. (N. Y.) 341.

82. *England.* — Kelly *v.* Thewles, 2 Ir. Ch. 510, 530.

California. — Estate of Morey, 147 Cal. 495, 505, 82 Pac. 57.

District of Columbia. — Barbour *v.* Moore, 10 App. Cas. 30, 46.

Idaho. — Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295.

Illinois. — Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; *s. c.,* 194 Ill. 408, 62 N. E. 907.

Massachusetts. — Shailer *v.* Bumstead, 99 Mass. 112.

Nebraska. — Seebrock *v.* Fedawa, 30 Neb. 424, 443, 46 N. W. 650.

New York. — *In re* Harrold's Will, 50 Hun 606, 3 N. Y. Supp. 316, *reversing* Banta *v.* Willets, 6 Dem. 84; Wilson *v.* Moran, 3 Bradf. Sur. 172; Yeandle *v.* Yeandle, 5 N. Y. Supp. 535, *affirmed,* 61 Hun 625, 16 N. Y. Supp. 49; See Marx *v.* M'Glynn, 4 Redf. 455, 480; *In re* Brunor's Will, 19 Misc. 203, 43 N. Y. Supp. 1141.

Pennsylvania. — *In re* Coleman's Estate, 185 Pa. St. 437, 40 Atl. 69.

Wisconsin. — Deck *v.* Deck, 106 Wis. 470, 82 N. W. 293; Gavitt *v.* Moulton, 119 Wis. 35, 96 N. W. 395.

83. *In re* Sickle's Will, 63 N. J. Eq. 233, 50 Atl. 577; *s. c.,* 64 N. J. Eq. 791, 53 Atl. 1125.

84. *In re* Blair's Will, 16 N. Y. Supp. 874.

85. "Because the instructions themselves may have been procured by influence." Carroll *v.* Norton, 3 Bradf. Sur. (N. Y.) 291; Mowry *v.* Silber, 2 Bradf. Sur. (N. Y.) 133.

But the fact of conformity is not conclusive of the voluntary character of the act. Carroll *v.* Norton, 3 Bradf. Sur. (N. Y.) 291, 321; Mowry *v.* Silber, 2 Bradf. Sur. (N. Y.) 133, 149.

86. *In re* Blair's Will, 16 N. Y. Supp. 874; Peery *v.* Peery, 94 Tenn. 328, 343, 29 S. W. 1.

87. *Alabama.* — Hughes *v.* Hughes' Exr., 31 Ala. 519, *overruling* on this point, Roberts *v.* Trawick, 13 Ala. 68; Bulger *v.* Ross, 98 Ala. 267, 12 So. 803.

Illinois. — Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227.

(23.) Former Will Similar to That in Question. — That some time prior to the execution of the will in question, and prior to the doing of acts alleged to have constituted undue influence, testator made a will containing the same provisions as those of the will in question, is a circumstance in favor of the later will.[88]

(24.) Change of Intent. — Will. — That testator expressed a testamentary intent different from that evidenced by the will in question, is a proper circumstance to be considered on the question of undue influence.[89]

Existence of Fact Upon Which Expressed Intention Depended. — When will in question does not accord with testator's formerly expressed intention, and it appears that such intention was based upon the promise of a third person to do a certain act, the performance of that act by such third person may be proved.[90]

Change Alone Insufficient. — But change of intent is not, by itself, sufficient to establish the fact of undue influence. It is simply a circumstance to be considered in connection with other proof.[91]

Maryland. — Clark *v.* Stansbury, 49 Md. 346.

Michigan. — Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

New York. — Tyler *v.* Gardiner, 35 N. Y. 559; Marvin *v.* Marvin, 4 Keyes 9, 23; Horn *v.* Pullman, 10 Hun 471, *affirmed*, 72 N. Y. 269.

Ohio. — Varner *v.* Varner, 16 Ohio C. C. 386.

Pennsylvania. — Irish *v.* Smith, 8 Serg. & R. 573.

88. Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. 837; Johnson *v.* Johnson, 134 Iowa 33, 111 N. W. 430; Barlow *v.* Waters, 16 Ky. L. Rep. 426, 28 S. W. 785; Farr *v.* Thompson, Cheves L. (S. C.) 37, 48; Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

89. Bulger *v.* Ross, 98 Ala. 267, 12 So. 803; Moore's Exrs. *v.* Blauvelt, 15 N. J. Eq. 367; Horn *v.* Pullman, 72 N. Y. 269, *affirming s. c.*, 10 Hun 471; Neiheisel *v.* Toerge, 4 Redf. 328, 337; *In re* Nolte's Will, 10 Misc. 608, 32 N. Y. Supp. 226; Varner *v.* Varner, 16 Ohio C. C. 386.

In Neiheisel *v.* Toerge, 4 Redf. (N. Y.) 328, it is said that the force of this circumstance depends mainly upon its connection with associated facts.

Change of Intent. — Deed. — That grantor at one time stated in regard to disposition of her property an intention different from that expressed in the deed in question, does not indicate vacillation or weakness of purpose, when events occurring between such statement and the act in question render such act reasonable, proper and consistent with her duty and affection. Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939; Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779.

90. Where, in a will contest, it appears that testatrix requested contestant's father to omit contestant from his will because testatrix intended to provide for contestant, it is competent to show by contestant's oral testimony that she was omitted from her father's will, such testimony being competent as showing that the will in question expressed not the intention of testatrix, but of another. Bulger *v.* Ross, 98 Ala. 267, 12 So. 803.

91. In Horn *v.* Pullman, 72 N. Y. 269, the court says: "A change of testamentary intention, as bearing upon the allegation of undue influence in procuring a will, is sometimes an important circumstance. But its force depends mainly upon its connection with associated facts. If made upon a reason satisfactory to the testator, although it may seem inadequate to a court investigating the question of undue influence, it furnishes of itself no ground for setting aside the will. A testator has a right to dispose of his estate in any way he may deem best. He is not required to make an equitable

(25.) Change of Feeling. — That the will in question indicates a change in testator's feelings toward certain persons is a proper circumstance.[92]

(26.) Recognition of Will. — The fact that testator, after the time of the alleged exertion of influence, recognized his will and its provisions, is a circumstance in favor of its voluntary character.[93]

(27.) Confirmation. — When a person benefits by a transaction with one toward whom he occupies a relation of trust and confidence, the fact that actor subsequently, and during the lifetime of such relation, or while surrounded by the same conditions, confirms the transaction is a circumstance tending to prove the existence of influence.[94]

(28.) Deed Omitting Revocation. — The fact that a deed made by an unprotected woman, conveying all her estate to her confidential adviser, omits a clause of revocation is a circumstance showing that its execution was obtained by undue influence.[95] But this circumstance is only to be considered in connection with other proof, and is not conclusive.[96]

(29.) Deed Omitting Provision for Grantor. — That a deed by an aged and infirm person conveying valuable property to a person occupying a confidential relation toward grantor, reserving a life estate, makes

will, and he may if he choose exclude his children, or divide his estate among them unequally. The question in all such cases is, was the will the free act of a competent testator."

92. Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456; White *v.* Bailey, 10 Mich. 155.

93. Allen *v.* Public Administrator, 1 Bradf. Sur. (N. Y.) 378; Wightman *v.* Stoddard, 3 Bradf. Sur. (N. Y.) 393.

Recognition of Deed by Subsequent Will. — But recognition, in the sense of confirmation, of a deed procured by undue influence is not shown by matter in a subsequent will referring to such deed as having been executed for the sake of peace. Parker *v.* Hill, 85 Ark. 363, 108 S. W. 208.

94. Barron *v.* Wills, L. R. (1900), 2 Ch. (Eng.) 121, 135; *reversing s. c.*, L. R. (1899), 2 Ch. 578.

Sufficiency of Evidence Offered To Show Confirmation. — See *In re* Sickles' Will, 63 N. J. Eq. 233, 241, 50 Atl. 577, *affirmed*, 64 N. J. Eq. 791, 53 Atl. 1125. In this case, the person charged relied upon testator's expressions of gratitude toward persons charged, and of satisfaction with his will to show the absence of undue influence in its execution. The court says: "Had the testator, when these declarations were made, been in a normal condition of mind, freed from the circumstances which surrounded him, the testimony would be quite persuasive that the act he had executed received his voluntary approval. But it is to be considered that he was still surrounded by the same influences as when the will was made. Fred was present when testator made the remark to Mr. Woodward, and Fred brought Mr. Ivins to his father's house to receive his instructions. The same influence which induced the execution of the will would as easily induce the statement made after its execution."

95. Huguenin *v.* Baseley, 14 Ves. Jr. 273, 33 Eng. Reprint 526. To same effect, see Whitridge *v.* Whitridge, 76 Md. 54, 83, 24 Atl. 645; Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907; Toker *v.* Toker, 3 DeG., J. & S. 487, 46 Eng. Reprint 724; Hall *v.* Hall, L. R. 8 Ch. App. 430, 438.

96. Brown *v.* Mercantile Tr. Co., 87 Md. 377, 40 Atl. 256.

no provision for grantor's support, is a circumstance to be considered.[97]

(30.) Failure To Complain of Importunity. — That testator did not complain of any importunity of his heirs, or of any acts constituting an exercise of undue influence, is a proper circumstance to be considered.[98]

(31.) Whether Actor Joined in Conversation. — It is proper to show whether or not actor took part in certain conversations, in order to show whether his mental faculties were so impaired as to render him susceptible to undue influence.[99]

(32.) Deed Subsequent to Will. — That, after execution of the will in question, grantor conveyed to the person charged and benefited valuable property believed not to have been included in the will, is a circumstance tending to overcome a presumption of undue influence in procuring the will.[1]

(33.) Will Subsequent to Deed. — In an action to set aside a deed, the fact that subsequent to execution of such deed grantor made a will devising to grantee the property described in the deed, is a proper circumstance to be considered, as showing grantor's mental condition and intent.[2]

Will Admissible..— The will is admissible for the same purpose.[3]

(34.) Devising Property Not Owned. — It may be shown that testatrix attempted to devise property which she owned jointly with her husband, that circumstance tending to show that she did not understand the true relation she sustained toward him concerning property rights, or that her mind was weak.[4]

(35.) Manner. — When an act is claimed to have been procured by undue influence exercised upon a person whose mental powers are alleged to have been impaired, it is proper to admit testimony showing his manner on certain occasions.[5]

b. *Facts Relating to Person Charged.* — **(1.) Motive.** — It is proper to introduce testimony concerning circumstances which show

97. Sweet *v.* Bean, 67 Barb. (N. Y.) 91.

98. Leaycraft *v.* Simmons, 3 Bradf. Sur. (N. Y.) 35; Wightman *v.* Stoddard, 3 Bradf. Sur. (N. Y.) 393.

"The same remark will apply to the negative evidence that no complaint was made by Beaubien of any importunity from his natural heirs. Although of no great force alone, it had a tendency, if true, to show that her charges made to him about their rapacity, did not meet with any response in his feelings; and also that he had not been driven to disinherit them by any such importunities of theirs. It was not irrelevant, and was admissible as throwing some light, however faint, upon these domestic affairs." Beaubien *v.* Cicotte, 12 Mich. 459.

99. Yeandle *v.* Yeandle, 5 N. Y. Supp. 535, *affirmed*, 61 Hun 625, 16 N. Y. Supp. 49.

1. *In re* Williams' Will, 15 N. Y. Supp. 828, *affirmed*, 19 N. Y. Supp. 778.

2. Michon *v.* Ayalla, 84 Tex. 685, 19 S. W. 878.

3. Michon *v.* Ayalla, 84 Tex. 685, 19 S. W. 878.

4. *In re* Buckman, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930.

5. Yeandle *v.* Yeandle, 5 N. Y. Supp. 535, *affirmed*, 61 Hun 625, 16 N. Y. Supp. 49.

the motive actuating the person charged with having unduly influenced actor.[6]

Relations Between Person Charged and Contestant. — In a will contest it is proper to show the state of feeling existing between contestant and person charged as showing motive of the latter.[7]

Inadmissible in Absence of Direct Proof. — But such testimony is not admissible in the absence of direct proof.[8]

Disagreements Between Devisees and Contestants Must Be Connected With Will. — While it may be proper to show disagreements and altercations between devisees and contestants, such proof must be connected, in point of time, with the execution of the will.[9]

(2.) Disposition. — Intention. — It is also proper to prove circumstances which show his disposition[10] or intention[11] to procure the

6. Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Cook *v.* Carr, 20 Md. 403; Swenarton *v.* Hancock, 9 Abb. N. C. (N. Y.) 326, *affirming* 22 Hun 38, 84 N. Y. 653; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313; *In re* Tibbett's Estate, 137 Cal. 123, 69 Pac. 978; *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252.

In Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268, the court says: "The fact that the will makes an unnatural disposition of the property, the physical and mental condition of the testator at the time the influence is exerted, the relative position of the testator and the person exerting it to each other, and the motive of the latter, as deducible from interest to himself, or from affection or animosity to others, may all be circumstances proper to be taken into consideration, in the determination of this issue."

In Batton *v.* Watson, 13 Ga. 63, 58 Am. Dec. 504, this language is used: "The principal transaction here is the destruction of Coalson's Will by the undue influence and interference of Dr. Patillo. The will was executed on the twenty-fifth of June, and on the next day, after the will had been sent for, but before it is brought to Coalson, the witness hears loud and boisterous talking in the sick-room; recognizes the voice to be that of Patillo, but cannot understand what is said. Shortly afterwards witness went into the sick-room, and Dr. Patillo invited him into the parlor, when he stated 'he just had learned that Coalson had made a will, cutting off Sarah; that it was not such a will as he had expected; that he, Patillo, would not submit to it; that he would resist it at the threshold; that he would make Sarah sign away what was given to her, and would take her home, and support her as he had done; that she should not have a dime of the property, and that he had said that much to Jack. Dr. Patillo seemed excited.' This conversation was intermediate the time the will had been sent for to Tooke and its return to Coalson the same evening. When Tooke brought the will to Coalson it was destroyed by him. This evidence tends to illustrate what took place in the sick-room when the witness heard the loud and boisterous talking, and was made during the time the will was sent for and its return; therefore, a part of the transaction which finally resulted in the destruction of the will. These declarations also went to show the motive by which the party charged with having exerted the undue means to procure the destruction of the will was influenced."

7. *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252; Betts *v.* Betts, 113 Iowa 111, 84 N. W. 975; Beaubien *v.* Cicotte, 12 Mich. 459; *In re* Budlong's Will, 126 N. Y. 423, 27 N. E. 945.

8. Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

9. Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32; Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

10. *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313.

11. *In re* Wheeler's Will, 5 Misc.

execution of the act in question. But it has been held that testimony as to the general disposition of the person charged with regard to being active and exerting influence is not admissible.[12]

(3.) Opportunity. — It is also proper to show that a certain person had opportunities to influence actor.[13]

(A.) KNOWLEDGE OF ACTOR'S MENTAL WEAKNESS. — For this purpose it may be shown that such person knew that actor was of weak mind.[14]

(B.) KNOWLEDGE OF FACTS CONCERNING WILL. — (a.) *Existence.* — It may also be shown whether or not the person charged knew of the existence of the will in question.[15]

(b.) *Place of Keeping Will.* — Also that he knew where the will was kept.[16] For this purpose it may be shown that an indorsement on the envelope containing the will was in his handwriting.[17]

(C.) KNOWLEDGE OF ACTOR'S CIRCUMSTANCES. — It may be shown that such person was informed of the circumstances surrounding actor, including his estate, his business affairs and his relations with his family and associates.[18]

(4.) Conduct. — The conduct of person charged with undue influence may be shown.[19]

279, 25 N. Y. Supp. 313; Greenwood *v.* Cline, 7 Or. 17.

Intention To Secure Control of Devised Estate. — It may be shown that such person formed a plan to obtain control of the devised estate. Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 47.

12. Meyer *v.* Arends, 126 Wis. 603, 106 N. W. 675.

13. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Porter *v.* Throop, 47 Mich. 313, 11 N. W. 174; Walts *v.* Walts, 127 Mich. 607, 86 N. W. 1030; Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313.

It is proper to show that prior to execution of will in question, the person charged frequently visited testator. Garrus *v.* Davis, 234 Ill. 326, 84 N. E. 924.

14. Dennis *v.* Weekes, 46 Ga. 514; Robinson *v.* Hutchinson, 31 Vt. 443.

15. Townsend *v.* Townsend, 122 Iowa 246, 97 N. W. 1108.

16. Barbour *v.* Moore, 10 App. Cas. (D. C.) 30, 53.

17. Barbour *v.* Moore, 10 App. Cas. (D. C.) 30, 53.

18. *In re* Arnold's Estate, 147 Cal. 483, 592, 82 Pac. 252, where it was held that the trial court erred in excluding testimony as to what was said by testatrix' agent to the person charged; as, to show that such person was informed concerning her estate and her circumstances generally, would have enabled the jury to judge concerning his motives.

19. England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526; *In re* Hollingsworth's Will, 58 Iowa 526, 12 N. W. 590; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313; Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 250, 24 Atl. 253; *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252; Morris *v.* Stokes, 21 Ga. 552, 570; Higginbotham *v.* Higginbotham, 106 Ala. 314, 17 So. 516.

In Wilbur *v.* Wilbur, 138 Ill. 446, 27 N. E. 701, the facts that a person displayed anxiety to have his father make a will, that such person desired the execution of a will favorable to himself, that he took the testator from his—testator's—home to a remote place to have the will executed, that he was present and to some extent assisted in the execution of the will, are competent upon the issue of undue influence.

In Davis *v.* Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282, it was charged that the will there in question was procured by the undue influence of a woman with whom testator had lived in unlawful relations. Contestant offered to prove that cer-

(A.) Actor Controlled by Person Charged. — It may be shown that the person charged controlled actor in his general conduct.[20]

(B.) Threats. — That he influenced actor's general conduct by threats of personal violence[21] and that he abused and ill-treated him.[22]

(C.) Importunity. — That he importuned testator to make the will in question.[23]

(D.) Deception. — It may be shown that such person deceived testator.[24]

(E.) Creating Suspicion Against Heir. — Also that he created in testator's mind suspicions against members of his family.[25]

(F.) Causing Devise to Testator. — It may be shown that such person was instrumental in causing a third person to devise property to the wife of the person charged, whose will is in question.[26]

(G.) Activity in Regard to Execution of Will. — That person charged was active in securing execution of the will in question is a proper circumstance to be shown.[27]

tain children of the person charged, made devisees in the will, and stated by her to be testator's children, were not his, but were the children of other men with whom the person charged had been intimate, that testator was by reason of age and infirmity incapable of begetting children. This testimony was excluded by the trial court, and its ruling held erroneous. The appellate court says: "In questions of this kind, the condition and character and conduct of the persons drawn around the testator, are all important to be inquired into, in reference to his family and relations, his own situation, the extent and nature of his estate, the character of the dispositions of the will, and the persons to whom the property is given." See also Todd *v.* Grove, 33 Md. 188; Beaubien *v.* Cicotte, 12 Mich. 459, 488; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

Requesting Attesting Witness To Keep Secret. — That person charged requested the only subscribing witness who knew the nature of the paper in question, to keep its execution a secret until after testator's death, is a proper circumstance to be considered. Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491.

20. Hartman *v.* Strickler, 82 Va. 225; Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38.

21. Hartman *v.* Strickler, 82 Va. 225.

22. Steadman *v.* Steadman (Pa.), 14 Atl. 406.

23. Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90.

24. Porter *v.* Throop, 47 Mich. 313, 11 N. W. 174.

False Statements to Testator. When the person charged was testator's agent, it may be shown that he made false statements to his principal concerning the subject of the agency. *In re* Arnold's Estate, 147 Cal. 583, 596, 82 Pac. 252.

25. Porter *v.* Throop, 47 Mich. 313, 11 N. W. 174; Smith *v.* Henline, 174 Ill. 184, 198, 51 N. E. 227; Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394; Tyler *v.* Gardiner, 35 N. Y. 559, 582; Marvin *v.* Marvin, 4 Keyes (N. Y.), 9, 23; Greenwood *v.* Cline, 7 Or. 17.

Disparaging Statements May Be Proven False. — When such person has made to testator statements reflecting upon a member of testator's family, such statements may be proven to have been false. Dietrich *v.* Dietrich, 5 Serg. R. (Pa.) 207.

26. Such circumstance tends to show a plan on his part to procure such disposition as would bring the devised property under his control, so that he might influence its ultimate disposition. Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38.

27. Smith *v.* Henline, 174 Ill. 184,

(H.) Excluding Testator's Family. — It may be shown that such person excluded testator's family or friends from his presence;[28] also that he failed to inform testator's family of his approaching death.[29]

(I.) Conduct Subsequent to Execution. — Conduct of person charged subsequent to the execution of the act in question may be shown.[30]

(a.) *Actor's Agent. — Conduct Relating to Property.* — Where person charged is testator's agent, it may be shown what use he made of funds in his hands, subsequent to execution of will.[31]

(b.) *Conduct Toward Testator's Family.* — Conduct of such person toward testator's family, subsequent to execution of will, may be shown.[32]

198, 51 N. E. 227; Cheney *v.* Goldy, 225 Ill. 394, 80 N. E. 289; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322; Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500; *In re* Blair's Will, 16 N. Y. Supp. 874; Tyler *v.* Gardiner, 35 N. Y. 559, 582; *In re* Slinger's Will, 72 Wis. 22, 37 N. W. 236.

It may be shown that such person employed an attorney to draw the will in question, and instructed him concerning its provisions (Morris *v.* Stokes, 21 Ga. 552, 570); also that he procured the attendance of a draughtsman (*In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313); also that he induced testator to go to an attorney's office for the purpose of having his will drawn, that testator was reluctant, but finally consented to go. Higginbotham *v.* Higginbotham, 106 Ala. 314, 17 So. 516. As to participation consisting in the performance of merely mechanical acts, see Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; *s. c.*, 194 Ill. 408, 62 N. E. 907; Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869; Tyler *v.* Gardiner, 35 N. Y. 559.

28. *Alabama.* — Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

Massachusetts. — Lewis *v.* Mason, 109 Mass. 169; Davenport *v.* Johnson, 182 Mass. 269, 65 N. E. 392.

Michigan. — Walts *v.* Walts, 127 Mich. 607, 86 N. W. 1030.

New York. — Tyler *v.* Gardiner, 35 N. Y. 559, 593; Marvin *v.* Marvin, 4 Keyes 9, 23.

Oregon. — Greenwood *v.* Cline, 7 Or. 17.

Virginia. — Hartman *v.* Strickler, 82 Va. 225.

Excluding Friends. — Porter *v.* Throop, 47 Mich. 313, 11 N. W. 174. But such exclusion subsequent to execution of will is not sufficient. Haight *v.* Haight, 112 N. Y. Supp. 144.

29. Tyler *v.* Gardiner, 35 N. Y. 559, 593.

30. *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338; Walts *v.* Walts, 127 Mich. 607, 86 N. W. 1030; Porter *v.* Throop, 47 Mich. 313, 11 N. W. 174; Haines *v.* Hayden, 95 Mich. 332, 349, 54 N. W. 911, 35 Am. St. Rep. 566.

Such testimony is proper to rebut the presumption of validity created by the fact that testator permitted his will to remain unrevoked, and as showing continuing dominion. Haines *v.* Hayden, 95 Mich. 332, 349, 54 N. W. 911, 35 Am. St. Rep. 566.

31. *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252, where the court says that if the agent used testator's funds with testator's knowledge, it showed influence; and that if testator was not informed, the agent's motive was shown.

32. Where husband charges that his wife's will was obtained by undue influence of her mother and family, he may show that they prevented his having anything to do with the funeral of his wife, or seeing her body. *In re* Tibbett's Estate, 137 Cal. 123, 69 Pac. 978. In this case the court said that such circumstances were admissible as showing animosity toward contestant, and a motive to secure execution of will.

(c.) *False Statements Concerning Will.* — It may be shown that the person charged made false statements concerning the execution or contents of the will in question.[33]

(d.) *Beneficiary's Doubt of Validity of Act.* — Circumstances showing that beneficiary doubted the validity of an act alleged to have been procured by his undue influence may be considered.[34]

(e.) *Willingness To Compromise, Immaterial.* — It is immaterial that proponent requested a certain person to inform an heir omitted from testator's will that proponent would give such omitted person a portion of the devised estate.[35]

(f.) *Failure To Testify.* — The fact that the person charged with having procured the execution of a will by undue influence does not testify upon the trial of a contest involving that issue is a circumstance to be considered by the jury in determining such issue.[36]

But evidence that person charged excluded a member of testator's family from his presence after execution of the will in question, is not, alone, sufficient to show undue influence. Haight *v.* Haight, 112 N. Y. Supp. 144.

33. Fairchild *v.* Bascomb, 35 Vt. 398, 418, where it is said that such conduct impresses the mind that such person professed ignorance in order to shield himself from suspicion.

34. Failure To Record Instrument. — That beneficiary did not until twenty years after its execution, record an instrument alleged to have been procured by his undue influence, indicates his doubts as to its validity. Sears *v.* Shafer, 6 N. Y. 268.

Agreements of Indemnity Among Several Persons Charged. — The fact that several persons charged with having procured a grant by undue influence agree to indemnify each other against claims of actors' heirs indicates their doubts of its validity. Sears *v.* Shafer, 6 N. Y. 268.

35. Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233. In this case D's Will was contested on ground of undue influence exercised by W. A witness was permitted to testify that W. requested witness to state to contestant that if contestant would withdraw from the contest, W. would divide the estate with her. *Held*, that the trial court erred in admitting this testimony. The supreme court said: "We do not see what legitimate bearing such evidence could have on either of the issues to be tried. It would tend to show either that W. C. Brinson (person charged) thought it would be abstractly just for his sister to have a part of her father's estate, or a disposition to compromise the rights of himself and the other beneficiary to avoid litigation with brother, sister or children; but we do not see that such evidence would tend to prove that the testator was of unsound mind when he made the will, nor that it was executed through undue influence exercised by W. C. Brinson over the testator."

36. Hiss *v.* Weik, 78 Md. 439, 28 Atl. 400; Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820; Rider *v.* Miller, 86 N. Y. 507; Mullen *v.* McKeon, 25 R. I. 305, 55 Atl. 747.

In Blackman *v.* Andrews, 150 Mich. 322, 114 N. W. 218, it is said that this circumstance is "utterly unimportant" unless direct proof showing undue influence is offered.

Failure To Explain Changes. The fact that the person benefited by a change in testator's will, and charged with procuring such change, and who had motive, disposition and opportunity to effect it, does not explain such change is also a significant circumstance. Chambers *v.* Chambers, 61 App. Div. 299, 70 N. Y. Supp. 483; Mullen *v.* McKeon, 25 R. I. 305, 55 Atl. 747.

Refusal To Produce Evidence. That one of the persons charged obtained possession of letters exchanged between himself and another, and refused to produce them at the trial, is a suspicious circum-

(J.) Conduct Negativing Influence. — Evidence having been introduced tending to show undue influence, it is proper, in rebuttal, to show acts of the person charged which negative such influence.[37]

Circumstance Negativing Undue Influence. — It is a circumstance showing the absence of undue influence that the proof fails to connect the beneficiary of the will in any way with its execution, either by agency, procurement, suggestion, solicitation or knowledge of its execution.[38]

(K.) Character. — Evidence to the effect that the person charged is of easy, quiet temper, and facile disposition, and, therefore, unlikely to threaten violence, is not admissible.[39] Testimony to the effect that the person charged was a very determined and persistent man is inadmissible in the absence of proof showing that he had exercised influence on testatrix.[40] Testimony to the effect that the person charged was penurious is incompetent.[41]

Relevancy of Specific Acts. — Testimony showing that the person charged was guilty of certain immoral or unwise acts is not admissible.[42] But when the issue is, did actor entertain certain feelings toward person charged, and admitted evidence shows that he had made statements that he entertained such feelings, and that they were caused by the conduct and disposition of the person charged, it is proper to show specific acts of such person of the nature of those complained of by actor, and which indicate such person's dis-

stance. Cole *v.* Getzinger, 96 Wis. 559, 575, 71 N. W. 75.

37. *In re* Peterson's Will, 136 N. C. 13, 48 S. E. 561. In this case it was held that evidence showing the state of mind and feeling of the person charged in regard to testator's will was relevant.

In Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 24 Atl. 253, testatrix had been confined in an asylum. It was held proper to show that the person charged had requested a certain person to assist in removing testatrix from this asylum. The court says: "All the acts of Mrs. Hayes in behalf of the testatrix so far as known to her were admissible to enable the jury to determine whether the disposition she made of her property in respect to Mrs. Hayes was natural and probable, and to rebut any inference of undue influence on the part of Mrs. Hayes. Her having interested Dr. Foote in Mrs. Foster's behalf while the latter was confined in the asylum, bore directly upon this issue."

Absent When Will Executed. That the person charged with having procured the execution of a will was absent when such will was executed, is a proper circumstance to be proved. Wilson *v.* Moran, 3 Bradf. Sur. (N. Y.) 172.

38. Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113; *In re* Douglass' Estate, 162 Pa. St. 567, 29 Atl. 715.

39. Bottoms *v.* Kent, 48 N. C. (3 Jones' L.) 154. In this case it was alleged that proponent procured the execution of the will in question by making threats against testator. Propounder offered to prove that he was of an easy, quiet temper and facile disposition, and not likely to make threats. *Held*, that such testimony was properly excluded.

40. Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599.

41. Estate of Calkins, 112 Cal. 296, 44 Pac. 577.

42. Garland *v.* Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836, where the action of the trial court was held correct in excluding testimony showing that the person charged had speculated on change, or in "bucket shops." See also Chaddick *v.* Haley, 81 Tex. 617, 17

position, in order to show actor's reasons for making his statements.[43]

c. *Conspiracy.* — When in a will contest it is charged that the will in question was the result of a conspiracy between the principal devisee and members of her family, it is proper to show that the husband of testatrix was of weak mind and unable to protect her against the fraudulent designs of others; that the same persons caused the husband to transfer valuable property to testatrix shortly prior to the execution of the will, and caused the sister of testatrix, who was an inmate of her home, to be absent from their residence when the will was executed.[44]

Property Received From Omitted Wife. — When will omits testator's wife, or leaves her only a trifling amount, it may be shown that testator's estate came to him by his wife, as bearing upon a conspiracy between testator's parents to obtain this property from her.[45]

Will of Third Person Admissible. — When it is charged that the will in question was the result of a conspiracy formed to procure such will, and the will of a third person, the will of such third person is admissible.[46]

d. *Assisters of Person Charged.* — The conduct of those who were active in assisting the person charged may be shown.[47]

e. *Facts Concerning Other Persons.* — **(1.) Acts of Third Persons.** It is proper to show officious and intermeddling acts of third persons, harassing and annoying to a dying man, or evincing a purpose to hurry him on to make a will, without giving him time to deliberate.[48]

(2.) Relatives of Actor. — Character. — Conduct. — The character, conduct and habits of relatives of actor may be shown, when evi-

S. W. 233; Lancaster *v.* Lancaster's Exr., 27 Ky. L. Rep. 1127, 87 S. W. 1137.

43. Curtice *v.* Dixon, 74 N. H. 386, 68 Atl. 587. In this case it was alleged that plaintiff's intestate had given certain property to his niece by reason of her undue influence. Defendant alleged that she was decedent's favorite niece, and that their relations were affectionate. Plaintiff alleged that decedent disliked defendant because she had a quarrelsome disposition, and proved that decedent had so stated. *Held*, proper to show specific acts of defendant, showing that she had such disposition. Such acts occurring after the execution of the act in question were held admissible. For the same purpose, letters written by defendant which showed a quarrelsome disposition were admissible.

Cruelty Toward Former Wife. So where influence complained of consisted in cruel treatment of wife by her husband, evidence that the latter had been divorced from three former wives on the ground of cruelty is not prejudicial to him. Livering *v.* Russell, 30 Ky. L. Rep. 1185, 100 S. W. 840.

44. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

45. Patterson *v.* Patterson, 6 Serg. & R. (Pa.) 56.

46. Cowan *v.* Shaver, 197 Mo. 203, 95 S. W. 200.

47. Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

Acquiescence. — Where several persons are charged, the fact that some of them acquiesced in acts of the person principally active is a proper circumstance for the jury. Cowan *v.* Shaver, 197 Mo. 203, 95 S. W. 200.

48. Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

dence thereof tends to show actor's feelings toward, or relations with them.[49]

(3.) Character of Protectors. — It may be shown that the natural protectors of actors were unable to afford him protection against persons disposed to influence him.[50]

(4.) Family Disagreements. — While it is proper, under certain circumstances, to show conduct of members of testator's family, it is not proper to admit proof of quarrels or fights between members of his family occurring long prior to execution of the will in question.[51]

(5.) Desire of Third Person That Devisee Receive Property. — In a will contest on the ground of undue influence exercised by devisee, it is proper to show that the property in question was derived by testator by inheritance from a person who was strongly attached to devisee, and who desired and intended that he should have the property.[52]

(6.) That Third Persons Were Ignorant of Will, Immaterial. — It is not proper to admit testimony to the effect that certain persons who lived in and were acquainted with the neighborhood in which testator lived had not heard of the will until a short time before its offer for probate.[53]

(7.) Opinion or Statement of Third Person. — It is error to admit evidence showing public sentiment in and about testator's residence as to the unjustness of his will.[54]

(8.) Will of Third Person. — The will of a third person is admissible, when it tends to show a conspiracy to procure the execution of the will in question.[55]

To Show Intent. — When will in favor of testator's wife is contested on ground of her undue influence, it appearing that testator and wife had agreed with a certain person that such person should

49. Thus, it may be shown that certain relatives of testator were dissipated, as that fact would explain why testator ignored them, or left them only small legacies, such provision being in accordance with testator's intention. Whitman *v.* Morey, 63 N. H. 448, 2 Atl. 899.

Relative Intemperate. — It may be shown that a relative of testator was intemperate, as a circumstance showing why a more liberal provision was not made for him. Fairchild *v.* Bascomb, 35 Vt. 398, 417; Barbour *v.* Moore, 10 App. Cas. (D. C.) 30.

50. Thus, in a will contest, it is proper to show that the husband of testatrix was of weak mind, and unable to protect her from the person charged. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459, 469.

51. Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32, 56.

52. Glover *v.* Hayden, 4 Cush. (Mass.) 580.

53. Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

54. McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506; *s. c.*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771.

55. In Cowan *v.* Shaver, 197 Mo. 203, 95 S. W. 200, it was charged that the will in question was executed by undue influence of testator's wife, her brother, and her daughter, who had married a son of the wife's brother, and that these persons had conspired to procure the will. Contestants offered the will of the wife, who pre-deceased her husband, leaving her estate to the daughter—defendant. *Held*, that this will was admissible as tending to show a scheme to divert the family estates to the family of the wife's brother.

receive their property, the wife's will devising her estate to such person is admissible to show testator's assent to his own will.[56]

f. *Relations Between Actor and Others.* — **(1.) Actor and Person Charged** with having unduly influenced him.[57]

56. McMirch *v.* Charles, 2 Rich. L. (S. C.) 229, 239.

57. *Alabama.* — Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Pool's Heirs *v.* Pool's Exrs., 33 Ala. 145; Dunlap *v.* Robinson, 28 Ala. 100; Chandler *v.* Jost, 96 Ala. 596, 11 So. 636.

California. — Estate of Brooks, 54 Cal. 471; Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555; *In re* Ruffino, 116 Cal. 304, 48 Pac. 127; *In re* Arnold's Estate, 147 Cal. 583, 591, 82 Pac. 252.

Georgia. — Gaither *v.* Gaither, 20 Ga. 709.

Illinois. — Wilbur *v.* Wilbur, 138 Ill. 446, 27 N. E. 701.

Iowa. — Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69.

Kentucky. — Stoke's Exr. *v.* Shippen, 13 Bush 180; Porschet *v.* Porschet, 82 Ky. 93, 56 Am. Rep. 885.

Michigan. — Beaubien *v.* Cicotte, 12 Mich. 459; Potter's Appeal, 53 Mich. 106, 18 N. W. 575; Page *v.* Beach, 134 Mich. 51, 95 N. W. 981.

Missouri. — Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; McKissock *v.* Groom, 148 Mo. 459, 50 S. W. 115; Bradford *v.* Blossom, 190 Mo. 110, 88 S. W. 721; King *v.* Gilson, 191 Mo. 307, 327, 90 S. W. 367.

New York. — Reynolds *v.* Root, 62 Barb. 250; Forman *v.* Smith, 7 Lans. 443.

North Carolina. — Wright *v.* Howe, 52 N. C. (7 Jones' L.) 412; Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526; Vester *v.* Collins, 101 N. C. 114, 7 S. E. 687.

Pennsylvania. — Frew *v.* Clarke, 80 Pa. St. 170, 180; Steadman *v.* Steadman, 14 Atl. 406.

In Lewis *v.* Mason, 109 Mass. 169, it was held proper to admit a written instrument showing upon what terms testator lived with the persons charged with having influenced him.

Agency. — It is proper to show that the person charged acted as the confidential business agent of actor. Porter *v.* Throop, 47 Mich. 313, 11 N. W. 174.

Assistance to Relatives in Lifetime. — In Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628, it was held proper to show whether or not, and to what extent, decedent had, in his lifetime, assisted his nephews and nieces, who were his heirs.

But it has been held that evidence is not admissible to show that sons of testator who were omitted from his will lived on his farm and worked for him. Maddox *v.* Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734.

In Estate of Brooks, 54 Cal. 471, it is held that the fact that testator's sole beneficiary was his business partner, might, in connection with other proof, be a circumstance to be considered in determining whether or not undue influence had been brought to bear on testator.

In Blakey's Heirs *v.* Blakey's Exr., 33 Ala. 611, it was held proper to permit proponent in a will contest to ask a witness whether or not he had ever known of any difficulty between testator and proponent, on the ground that, as contestant had offered evidence showing the feeling between these persons, proponent had the right to rebut it. Witness' answer was that he knew of no serious difficulty. It appeared that witness had been an inmate of testator's home.

Kindness of Beneficiary's Family Toward Actor. — That the wife of the person charged with obtaining the will by undue influence treated testator kindly or unkindly is a proper circumstance to be considered. Garvin *v.* Williams, 50 Mo. 206.

In Forney *v.* Ferrell, 4 W. Va. 729, 739, it was held that the trial court did not err in admitting testimony showing that testatrix had taken the part of the person charged in a fight in which he engaged.

In *In re* Arnold's Estate, 147 Cal. 583, 591, 82 Pac. 252, it was held

(A.) At What Time. — Testimony must show relations existing at or near the time of execution of the act in question.[58]

(B.) Transactions. — Evidence of transactions between actor and person charged is admissible to show the existence between them of a relation of trust and confidence, although such transactions may not be directly connected with the transaction in question.[59]

(C.) Conversations. — In a will contest evidence that a certain beneficiary, the person charged, had conversations with testator and directed testator how such person wished the will made, that the will was made in accordance with such instructions, and that such conversations were had prior to the execution of the will, and on the same day, is material.[60]

that the trial court should have admitted evidence showing that testatrix had made a gift of money to person charged.

In Somes *v.* Skinner, 16 Mass. 348, 358, it was held proper to show that the person charged, guardian of actor, had encouraged his ward to contract habits of extravagance and dissipation.

If a woman leaves her estate to her parents to the exclusion of her husband, his charge of undue influence is met by proof that his wife had left him on account of his cruelty toward her, and made her home with her parents, to whom she wished her infant child to be given. Andrews' Case, 33 N. J. Eq. 514.

But it has been held that testimony to the effect that husband (person charged) and wife (testatrix) had frequent quarrels, is inadmissible, when there is also evidence showing that such quarrels were followed by long intervals during which the spouses lived together amicably. Kultz *v.* Jaeger, 29 App. Cas. (D. C.) 300.

58. Batchelder *v.* Batchelder, 139 Mass. 1, 29 N. E. 61.

59. Lee *v.* Dill, 16 Abb. Pr. (N. Y.) 92; Somes *v.* Skinner, 16 Mass. 348.

In Jones *v.* Jones, 120 N. Y. 589, 24 N. E. 1016, it was claimed that a certain conveyance was procured by plaintiff's brother, agent of grantee, who had managed plaintiff's affairs and had her confidence ever since the death of their father, from whom the conveyed estate was derived. *Held,* competent to show conversations and transactions between plaintiff and her brother extending over a considerable period prior to execution of the will in question, although such conversations and transactions were not connected with that in question.

Services Rendered to Actor by Person Charged. — When it is claimed that a deed was procured by undue influence, grantee may show that he rendered valuable services to grantor. Canfield *v.* Fairbanks, 63 Barb. (N. Y.) 461.

60. Matter of Potter, 161 N. Y. 84, 55 N. E. 387, *reversing* 17 App. Div. 267, 45 N. Y. Supp. 563; Lee *v.* Dill, 16 Abb. Pr. (N. Y.) 92.

Contestant Entitled to Entire Conversation. — Contestant is entitled to have the entire conversation, statements of deceased, as well as those of beneficiary. Matter of Potter, 161 N. Y. 84, 55 N. E. 387, *reversing* 17 App. Div. 267, 45 N. Y. Supp. 563. In this case the trial court permitted contestant to show statements made by beneficiary to testator, but excluded the latter's statements. *Held,* that this ruling was erroneous, and that contestant was entitled to the entire conversation. (See next preceding note). It was contended that the person charged could not testify concerning statements of testator, being made incompetent by § 829 C. C. P., which provided that no person could testify in his own behalf as to communications with a deceased person. The Court of Appeals said that, as the person charged was called by contestant, he could not be said to be testifying in his own interest, and that, therefore, § 829, C. C. P., did not apply.

(D.) Actor Dependent Upon, or Controlled By. — It is proper to show the extent to which actor was dependent upon the person charged with having influenced him,[61] and to what extent he was subject to the control of such person.[62]

(a.) *Actor Unduly Influenced in Other Matters.* — It may be shown that about the time of the execution of the act in question actor was, in other important matters, so subject to the influence of the person charged that as to such matters he was not a free agent.[63]

Inadmissible Unless Connected With Direct Proof. — It has been held that such testimony is not admissible unless offered in connection with direct proof.[64]

(b.) *Acquiescence in Cruelty or Immorality.* — It may be shown that actor took no action when person charged committed in his presence acts of cruelty or immorality which a person acting freely would have resented or prevented.[65]

(2.) Actor and Family or Heirs. — The relations between the actor and his family, or heirs, may be shown.[66] In contest of a will on

61. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326.

62. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479.

In Lewis *v.* Mason, 109 Mass. 169, it was held proper to show that the person charged with the exercise of undue influence commanded testator, in an angry voice, to "shut up," and that testator obeyed him. The supreme court said that such testimony had a tendency to show that the person charged had both power and inclination to exert a controlling influence over testator.

63. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Tyler *v.* Gardiner, 35 N. Y. 559, 582, where it is said that the fact that the person charged with causing, by undue influence, the execution of the will in question, had prior to such execution, caused testator to expel contestant from testator's home, justifies the conclusion that the will was the product of the same influence.

Boyse *v.* Rossborough, 6 H. L. Cas. (Eng.) 2, where the court says: "The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But this principle must not be carried too far. Where a jury sees that at and near the time when the will sought to be impeached was executed, the alleged testator was, in other immediate transactions, so under the influence of the person benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised." See also Walts *v.* Walts, 127 Mich. 607, 86 N. W. 1030; Greenwood *v.* Cline, 7 Or. 174.

64. Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441. But the language of the court in Boyse *v.* Rossborough, quoted in next preceding note, indicates that such circumstance might be considered in the absence of direct proof.

65. Mullen *v.* Helderman, 87 N. C. 471. In this case, a will was contested on the ground of undue influence exercised over testator by his wife. It was held proper to show that testator submitted to acts of cruelty practiced by his wife toward his children by a former marriage; also that he made no objection when a third person took liberties with his wife in his presence.

66. *Arkansas.* — Campbell *v.* Carnahan, 13 S. W. 1098.

the ground of undue influence, it is competent to show the relations between testator and his heirs.[67] Thus it is proper to show that he was displeased with certain of his heirs omitted from his will, and the extent and special grounds of his displeasure.[68]

(3.) Actor and Beneficiary. — The relations between actor and per-

Colorado. — Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790.

Georgia. — Cox *v.* Rutledge, 18 Ga. 294, 312.

Illinois. — Cheney *v.* Goldy, 225 Ill. 394, 80 N. E. 289.

Indiana. — Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

Iowa. — Townsend *v.* Townsend, 122 Iowa 246, 97 N. W. 1108.

Maryland. — Clark *v.* Stansbury, 49 Md. 346.

Michigan. — White *v.* Bailey, 10 Mich. 155; Pierce *v.* Pierce, 38 Mich. 412; McHugh *v.* Fitzgerald, 103 Mich. 21, 61 N. W. 354.

New York. — Marvin *v.* Marvin, 4 Keyes 9, 22.

Pennsylvania. — Miller *v.* Miller, 187 Pa. St. 572, 590, 41 Atl. 277.

Tennessee. — Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

Texas. — Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233.

Vermont. — Fairchild *v.* Bascomb, 35 Vt. 398, 417; Thornton's Exrs. *v.* Thornton's Heirs, 39 Vt. 122, 158; Crocker *v.* Chase, 57 Vt. 413; Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

Competent To Rebut Evidence of Alienation. — When, in a will contest, devisee, not a member of testator's family, offers evidence showing that testator had become alienated from his wife and children, contestants, the latter may disprove such facts. Clark *v.* Stansbury, 49 Md. 346.

67. Roberts *v.* Trawick, 13 Ala. 68; Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456; Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47.

Thus, it may be shown that testator had cause to reject the claims of his children and make a will which would otherwise seem unnatural. Roberts *v.* Trawick, 13 Ala. 68; White *v.* Bailey, 10 Mich. 155.

Ill-Treatment by Family. — In White *v.* Bailey, 10 Mich. 155, it was held proper to show that testator's children treated him unkindly, thus showing a motive for leaving his property to a stranger.

In Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277, a daughter claimed that her father's will, from which she had been omitted, had been obtained by undue influence exercised by her brother. *Held,* proper to show that the relations between testator and contestant's husband were unpleasant.

In Estes *v.* Bridgforth, 114 Ala. 221, 21 So. 512, *held,* proper to show that parents of contestant, a minor, had sued testator.

Quarrel With Child, Inadmissible. In *In re* Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179, it was held that it was error to permit contestant to show that testatrix and contestant had a quarrel about three weeks prior to execution of will. The Court says: "The greater part of the record is taken up with the circumstances of this quarrel between Lizzie and her mother, apparently either for the purpose of showing to the jury that the mother had no sufficient reason therein for disinheriting her daughter, or in order to allow the jury to conjecture that the mother's dislike of Lizzie may have been fostered by her other sisters. Whatever may have been the reason for its introduction, it was immaterial and irrelevant to either of the issues submitted to the jury."

68. Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47.

Suit Against Testator. — In a will contest it is proper to show that the parents of a contesting grandchild brought suit against testator, as that circumstance tended to show testator's feeling toward such grandchild. Estes *v.* Bridgforth, 114 Ala. 221, 21 So. 512.

son benefited by the will, grant, gift or contract in question may be shown.[69]

(4.) Actor and Contestant. — Relations between testator and contestant, or those acting in his behalf, may be shown.[70]

(5.) Actor Without Near Relatives. — That there were no persons having strong natural claims upon actor is a circumstance to be considered in determining whether a benefit conferred upon one not related to him was the result of undue influence.[71]

(6.) Kinship of Parties. — The fact that parties to a given transaction were blood relations is a circumstance to be considered in determining whether or not a fiduciary relation existed between them.[72] The claims which certain persons had upon testator, by reason of blood relationship or otherwise, are circumstances proper to be considered.[73]

(7.) Relation of Trust and Confidence. — The existence of a relation of trust and confidence between the parties to a transaction is a circumstance to be considered.[74]

(8.) Unlawful Relation. — That actor lived in an unlawful relation with the person charged, is a circumstance to be considered in determining whether or not his act was the result of undue influence.[75]

69. Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Slingloff *v.* Bruner, 174 Ill. 561, 51 N. E. 772; Piper *v.* Andricks, 209 Ill. 564, 71 N. E. 18; Grove *v.* Spiker, 72 Md. 300, 20 Atl. 144; Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219.

Floore *v.* Green, 26 Ky. L. Rep. 1073, 83 S. W. 133, where it was held proper to show that certain children — devisees — had lived with testatrix, who had no children of her own and no near relatives.

70. Estes *v.* Bridgforth, 114 Ala. 221, 21 So. 512, where it was held proper to admit proof that the parents of contestant had brought suit against testator.

71. Frew *v.* Clarke, 80 Pa. St. 170, 180; *In re* Wingert's Estate, 199 Pa. St. 427, 49 Atl. 281; Floore *v.* Green, 26 Ky. L. Rep. 1073, 83 S. W. 133.

72. In Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555, the parties to a certain conveyance were brother and sister. The supreme court held that while this relationship was not of itself fiduciary, it was a material circumstance in determining whether, as matter of fact, a fiduciary relation existed between them, such relation being more easily superinduced by blood relationship.

73. Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790; Cox *v.* Rutledge, 18 Ga. 294, 312.

Equal Claims of Relatives Other Than One Preferred. — In a will contest, the fact that testator had relatives whose claims upon his bounty were equal to those of the person who received the greater portion of his estate is a circumstance to be considered in determining the question of undue influence. Fagan *v.* Dugan, 2 Redf. (N. Y.) 341.

74. Yardley *v.* Cuthbertson, 108 Pa. St. 395, 56 Am. Rep. 218; *In re* Blair's Will, 16 N. Y. Supp. 874.

Principal and Agent. — The fact that grantee in a deed from an aged person had for many years acted as grantor's confidential agent, that the deed in question was prepared by grantee's solicitor, and that the members of grantor's family were not informed of the transaction are circumstances showing undue influence. Hunter *v.* Atkins, 3 Myl. & K. 113, 40 Eng. Reprint 43.

75. *California.* — *In re* Ruffino's Estate, 116 Cal. 304, 48 Pac. 127.

District of Columbia. — Stant *v.* American S. & T. Co., 23 App. Cas. 25.

(9.) Relations as to Property. — It is competent to show the relations between actor and others concerning the property involved in a given transaction, or concerning other property.

(A.) Property Given by Testator in Lifetime. — Thus, it is competent to prove the character, amount and value of property given by testator to his children in his lifetime.[76]

(B.) Source of Testator's Title. — Testimony as to the manner in which testator acquired his property is admissible only when it explains his disposition thereof.[77]

Illinois. — Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227.

Kentucky. — Porschet *v.* Porschet, 82 Ky. 93, 56 Am. Rep. 880.

Maryland. — Saxton *v.* Krumm, 68 Atl. 1056.

Michigan. — Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394.

Nebraska. — Staley *v.* Housel, 35 Neb. 160, 52 N. W. 888.

New Jersey. — In re Willford's Will, 51 Atl. 501.

Pennsylvania. — Main *v.* Ryder, 84 Pa. St. 217, 225; *In re* Wainwright's Appeal, 89 Pa. St. 220.

Continuance of Influence Arising From Such Relation. — Although proof shows that an unlawful relation at one time existing between actor and person charged had ceased at time of execution of the act in question, the jury may consider whether such influence continued and was exercised in procuring such act. Reichenbach *v.* Ruddach, 127 Pa. St. 564, 593, 18 Atl. 432.

Unlawful Relation — What Is Not. The fact that testator, an intemperate man, was constantly supplied with intoxicating liquor by the person charged, does not show an unlawful relation between them, and that circumstance should not be submitted to the jury. *In re* Levis' Estate, 140 Pa. St. 179, 21 Atl. 242. See discussion of this subject in *In re* Will of Slinger, 72 Wis. 22, 35, 37 N. W. 236.

76. Allen *v.* Prater, 35 Ala. 169; Stoke's Exr. *v.* Shippen, 13 Bush (Ky.) 180; Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883. *In re* Sickle's Will, 63 N. J. Eq. 233, 50 Atl. 577, *affirmed*, 64 N. J. Eq. 791, 53 Atl. 1125, where it was said that the execution of a deed of gift from testator to one of his children, and the circumstances surrounding such execution, show testator's state of mind, and his relations with grantee.

77. Source of Title Generally Immaterial. — Ormsby *v.* Webb, 134 U. S. 47, 65.

Source of Testator's Title. Agreement To Devise. — It has been held to be proper to admit evidence showing manner in which testator acquired the devised estate, when such testimony explains an apparently unnatural disposition in the will, by showing that it was made in pursuance of an agreement or understanding between him and the person or persons from whom his estate was derived. Gunn's Appeal, 63 Conn. 254, 27 Atl. 1113. See Norton *v.* Paxton, 110 Mo. 456, 19 S. W. 807, where the property in question was received by testator from his wife, and devised to her sisters, although no agreement to so devise it was shown.

In Floore *v.* Green, 26 Ky. L. Rep. 1073, 83 S. W. 133, testatrix devised to her husband property she had inherited from her father, and to relatives of her first husband property she had inherited from him. *Held*, proper to show how she had acquired the devised property, as explaining the motives by which she was actuated. The court held that in this connection it was proper to read the first husband's will to the jury.

In *In re* Lyddy's Will, 4 N. Y. Supp. 468, *affirmed*, 53 Hun 629, 5 N. Y. Supp. 636, it was held that a will ignoring all decedent's relatives in favor of his wife was explained by the fact that the greater part of the devised estate was acquired by testator from his wife.

In Glover *v.* Hayden, 4 Cush.

(C.) Property of Contestant Held by Testator. — It has been held proper to admit evidence to the effect that part of the property in the possession of testator morally belonged to contestant, on the ground that, while this fact would not prove undue influence, it would make the will seem more unjust, and would, therefore, be a proper circumstance to be considered in connection with other facts tending to prove undue influence.[78]

(D.) Property of Devisee Held by Testator. — So also it is proper to show that land willed to a person was his own property which had been bought in by testator at forced sale.[79]

(E.) Deed From Testator to Person Charged. — When it is sought to be shown that a will in contest was executed in pursuance of a continuing course of undue influence exercised by devisee, it is proper to introduce a deed whereby testator conveyed property to devisee.[80]

g. *Character of the Act.* — **(1.) Provisions of Will** may be considered, in connection with other circumstances, in determining whether or not undue influence was the cause of its execution.[81]

(Mass.) 580, it was held proper to show that testator's title to the devised property had been derived from a certain person who desired and intended that it should belong to the person to whom testator devised it.

73. *In re* Ruffino, 116 Cal. 304, 48 Pac. 127.

In Belknap *v.* Robinson, 67 N. H. 194, 29 Atl. 450, the case is stated as follows: "There was a verdict for the defendant on the issue whether the testatrix was induced to make the will by the undue influence of a nephew, to whom she devised the 'Sargent lot' at the expiration of a life estate given to the defendant. The testatrix held the legal title to the lot, but the defendant claimed he was its equitable owner. It was obtained in exchange for a hotel. The defendant introduced evidence showing that when the exchange was made he claimed that the deed of the Sargent lot ought to be made to him because he paid for the hotel, and that the testatrix replied that the hotel stood in her name, and that she would not sign a deed of it unless the deed of the Sargent lot was made to her. He also put in evidence a deed signed by the testatrix, of the same date as the deed of the hotel to her, in which she covenanted with him to stand seized of the hotel to her use for life and to his use after her decease. The plaintiff excepted to the ruling admitting this evidence." The court says: "Evidence that the testatrix obtained the lot devised by an exchange of property, which was paid for by the defendant and in which he had an interest, was relevant to the issue. The fact that the lot was obtained in that way was a reason why the testatrix should not divert it from him. It tended to show that she understood the property equitably belonged to him at her decease. Her sense of justice, if she was free from restraint, would naturally influence her not to give it to another. Rollwagen *v.* Rollwagen, 63 N. Y. 504, 519; Bellows *v.* Sowles, 59 Vt. 63; *In re* Buckman's Will, 64 Vt. 313; Foster's Executors *v.* Dickerson, 64 Vt. 233; Glover *v.* Hayden, 4 Cush. 580; Whitman *v.* Morey, 63 N. H. 448; Carpenter *v.* Hatch, 64 N. H. 573."

79. Marvin *v.* Marvin, 4 Keyes (N. Y.) 9, 25.

80. **Deed Antedating Will.** Clark *v.* Stansbury, 49 Md. 346.

Deed Subsequent To Will. — *In re* Sickles' Will, 63 N. J. Eq. 233, 50 Atl. 577, *affirmed*, 64 N. J. Eq. 791, 53 Atl. 1125.

81. *Colorado.* — Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790.

(A.) Unjust or Unnatural Disposition. — Thus the fact that a will makes an unjust or unnatural disposition of testator's estate, may be considered.[82]

(a.) *Inequality Alone, Insufficient.* — But the fact that a will or deed makes an unnatural or unjust disposition of testator's or grantor's estate, is not alone sufficient to establish the fact of undue influence; it is only a circumstance to be considered in connection with other

Connecticut. — Crandall's Appeal, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375.

Illinois. — Salisbury *v.* Aldrich, 118 Ill. 199, 8 N. E. 777; McCommon *v.* McCommon, 151 Ill. 428, 38 N. E. 145.

Iowa. — *In re* Convey's Will, 52 Iowa 197, 2 N. W. 1084; Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

Missouri. — Myers *v.* Hanger, 98 Mo. 433, 11 S. W. 974 (where it is said that the will may be read to the jury); Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858.

New York. — *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107.

North Carolina. — Ross *v.* Christman, 23 N. C. (1 Ired. L.) 209; Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

Pennsylvania. — Patterson *v.* Patterson, 6 Serg. & R. 55; Baker *v.* Lewis, 4 Rawle 356; Perret *v.* Perret, 184 Pa. St. 131, 39 Atl. 33.

South Carolina. — Means *v.* Means, 5 Strobh. L. 167, 191.

But in *In re* Peterson's Will, 136 N. C. 13, 48 S. E. 561, it is held that the fact that a man devises all his property to his wife, to the exclusion of other relatives, is not a circumstance to be considered by the jury.

82. *Alabama.* — Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Roberts *v.* Trawick, 13 Ala. 68, *s. c.*, 17 Ala. 55, 52 Am. Dec. 164; Coleman *v.* Robertson's Exrs., 17 Ala. 84; Hughes *v.* Hughes, 31 Ala. 519; Fountain *v.* Brown, 38 Ala. 72; Allen *v.* Prater, 35 Ala. 169; Eastis *v.* Montgomery, 93 Ala. 293, 9 So. 311; Evans *v.* Arnold, 52 Ala. 169; Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687.

Georgia. — Thompson *v.* Davitte, 59 Ga. 472.

Illinois. — Willemin *v.* Dunn, 93 Ill. 511; Salisbury *v.* Aldrich, 118 Ill. 199, 8 N. E. 777; Pooler *v.* Cristman, 145 Ill. 405, 34 N. E. 57; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Nicewander *v.* Nicewander, 151 Ill. 156, 37 N. E. 698; Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. 837; McCommon *v.* McCommon, 151 Ill. 428, 38 N. E. 145.

Iowa. — Johnson *v.* Johnson, 134 Iowa 33, 111 N. W. 430.

Kentucky. — Bottom *v.* Bottom, 32 Ky. L. Rep. 494, 106 S. W. 216; Kevil *v.* Kevil, 2 Bush 614.

Maryland. — Hiss *v.* Weik, 78 Md. 439, 28 Atl. 400.

Minnesota. — Tyner *v.* Varien, 97 Minn. 181, 106 N. W. 898.

Mississippi. — Hitt *v.* Terry, 46 So. 829.

Missouri. — Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883.

New York. — *In re* Blair's Will, 16 N. Y. Supp. 874; *In re* Bernsee's Will, 141 N. Y. 389, 36 N. E. 314.

North Carolina. — Ross *v.* Christman, 23 N. C. (1 Ired. L.) 209.

Pennsylvania. — Baker *v.* Lewis, 4 Rawle 356; Perret *v.* Perret, 184 Pa. St. 131, 39 Atl. 33.

Tennessee. — Wisener *v.* Maupin, 2 Baxt. 342, 365.

Texas. — Renn *v.* Samos, 33 Tex. 760.

Vermont. — Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

The fact that a will passes over testator's relatives and gives his estate to strangers is a proper circumstance to be considered. Elliott *v.* Welby, 13 Mo. App. 19.

proof,[83] and an apparently unnatural disposition of property may be explained and justified.[84]

(b.) *Apparent Inequality Is Explained* by the circumstance that the favored heir treated testator with kindness, which he did not receive

83. *Alabama.* — Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33.

California. — *In re* Langford, 108 Cal. 608, 41 Pac. 701.

Illinois. — Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Nicewander *v.* Nicewander, 151 Ill. 156, 37 N. E. 698; Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. 837; Kaenders *v.* Montague, 180 Ill. 300, 54 N. E. 321; Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907; England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526; Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; *s. c.,* 194 Ill. 408, 62 N. E. 907.

Iowa. — Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; Trotter *v.* Trotter, 117 Iowa 417, 90 N. W. 750; Johnson *v.* Johnson, 134 Iowa 33, 111 N. W. 430; Muir *v.* Miller, 72 Iowa 585, 34 N. W. 429.

Kentucky. — Zimlich *v.* Zimlich, 90 Ky. 657, 14 S. W. 837; Bottom *v.* Bottom, 32 Ky. L. Rep. 494, 106 S. W. 216; Kevil *v.* Kevil, 2 Bush 614.

Minnesota. — *In re* Storer's Will, 28 Minn. 9, 8 N. W. 827; *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

Missouri. — Ravens *v.* Nau, 110 Mo. 416, 19 S. W. 823; Moore *v.* Moore, 67 Mo. 192; Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32; Thomas *v.* Stump, 62 Mo. 275.

New Jersey. — Lynch *v.* Clements, 24 N. J. Eq. 431; Dumont *v.* Dumont, 46 N. J. Eq. 223, 19 Atl. 467.

New York. — Brick *v.* Brick, 66 N. Y. 144; Gamble *v.* Gamble, 39 Barb. 373; Reynolds *v.* Root, 62 Barb. 250; Wade *v.* Holbrook, 2 Redf. 378; Mairs *v.* Freeman, 3 Redf. 181; *In re* Hall's Will, 50 Hun 606, 3 N. Y. Supp. 288, *affirmed,* without opinion, 117 N. Y. 643, 24 N. E. 455; *In re* Bernsee's Will, 141 N. Y. 389; 36 N. E. 314.

84. *Colorado.* — *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. Rep. 181.

Michigan. — White *v.* Bailey, 10 Mich. 155.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

Missouri. — Seibert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962; Carter *v.* Dilley, 167 Mo. 564, 67 S. W. 232 (involves deed).

Nebraska. — Isaac *v.* Halderman, 76 Neb. 823, 107 N. W. 1016.

New Jersey. — *In re* Humphrey's Will, 26 N. J. Eq. 513, *affirmed,* 27 N. J. Eq. 567; *In re* Gleespin's Will, 26 N. J. Eq. 523; White *v.* Starr, 47 N. J. Eq. 244, 20 Atl. 875.

New York. — Brick *v.* Brick, 66 N. Y. 144; Deas *v.* Wandell, 3 Thomp. & C. 128; *s. c.,* 1 Hun 120, *affirmed,* 59 N. Y. 636.

Wisconsin. — Anderson *v.* Laugen, 122 Wis. 57, 99 N. W. 437.

Roberts *v.* Trawick, 13 Ala. 68, where it appeared that testator had good cause for rejecting the claims of his children, and was justified in making a will which would otherwise seem unnatural.

In Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95, a will was attacked on the ground of undue influence exercised over testator by one of his sons, the principal devisee. It appeared that this son had been a dutiful child, had remained at home with his father, had rendered him valuable services, and was by his father considered more deserving than his other children. The supreme court said that these facts were a sufficient explanation of the apparently unequal provisions of the will. See also Chambers *v.* Brady, 100 Iowa 622, 69 N. W. 1015.

Conduct or Habits of Omitted Child. — Failure to provide for a child may be explained by proof that the conduct or habits of such child were such as to justify the omission. Conover *v.* Conover (N. J.), 8 Atl. 500; Haight *v.* Haight, 112 N. Y. Supp. 144.

Husband Omitted. — So where it

from others,[85] or by the fact that the relations between testator and the person discriminated against were hostile;[86] thus the omission of the testator to provide for his children is explained by proof that the relations between them were unfriendly, that testator had agreed to make the devise in question in consideration of services rendered by devisee, which his children had refused to render,[87] or by proof that the testator had entertained and expressed warm affection for a devisee favored at expense of relatives.[88]

Mutual Wills Between Testator and Person Charged. — An apparently unnatural will is explained by proof that testator and the person charged with influencing him made mutual wills.[89]

Contestant Already Provided for. — An apparently unequal will is explained by the circumstance that the person complaining, or other relative omitted from the will, had already been amply provided for by testator or by others.[90]

appears that a husband, omitted from his wife's will, had left her on the day of their marriage; that she had thereafter refused to see him, and that her will was in accordance with her expressed desires and her affection for her children by a former marriage. *In re* Dwyer's Will, 29 Misc. 382, 61 N. Y. Supp. 903.

85. *Arkansas.* — Boggianna *v.* Anderson, 78 Ark. 420, 94 S. W. 51.

Iowa. — Malcomsen *v.* Graham, 75 Iowa 54, 39 N. W. 179.

Maine. — Appeal of O'Brien, 100 Me. 156, 60 Atl. 880.

Nebraska. — Isaac *v.* Halderman, 76 Neb. 823, 107 N. W. 1016.

New Jersey. — White *v.* Starr, 47 N. J. Eq. 244, 20 Atl. 875.

New York. — *In re* Hollohan's Will, 52 Hun 614, 5 N. Y. Supp. 342; *In re* Williams' Will, 15 N. Y. Supp. 828, *affirmed*, 19 N. Y. Supp. 778; M'Coy *v.* M'Coy, 4 Redf. 54; *In re* Groot's Will, 72 Hun 548, 25 N. Y. Supp. 633; *In re* Brough's Will, 41 Misc. 263, 84 N. Y. Supp. 41.

Pennsylvania. — Roberts *v.* Clemens, 202 Pa. St. 198, 51 Atl. 758.

West Virginia. — Hale *v.* Cole, 31 W. Va. 576, 584, 8 S. E. 516; Stewart *v.* Lyons, 54 W. Va. 665, 47 S. E. 442.

So, where a child receiving a large portion of testator's estate had cared for testator in illness, while others had acted in a manner to cause her care and suffering. De Haven's Appeal, 75 Pa. St. 337.

86. Coit *v.* Patchen, 77 N. Y. 533, 541; *In re* Will of Mondorf, 110 N. Y. 450, 18 N. E. 256; Deas *v.* Wandell, 3 Thomp. & C. (N. Y.) 128; *s. c.*, 1 Hun 120, *affirmed*, 59 N. Y. 636; Haight *v.* Haight, 112 N. Y. Supp. 144; *In re* Glockner's Will, 2 N. Y. Supp. 97; *In re* Hamilton's Will, 29 Misc. 724, 62 N. Y. Supp. 820; Pensyl's Estate, 157 Pa. St. 465, 27 Atl. 669.

87. *In re* Springsted's Will, 55 Hun 603, 8 N. Y. Supp. 596.

As to deed to one child in preference to another, see Schneitter *v.* Carman, 98 Iowa 276, 67 N. W. 249.

88. *In re* Darling's Will, 53 Hun 636, 6 N. Y. Supp. 191; *In re* Groot's Will, 25 N. Y. Supp. 633; *In re* Murphy's Will, 41 App. Div. 153, 58 N. Y. Supp. 450; *In re* DeHaven's Appeal, 75 Pa. St. 337.

89. *In re* DeBaun's Estate, 9 N. Y. Supp. 807; *In re* Bedell's Will, 12 N. Y. Supp. 96; Morrison *v.* Thoman (Tex. Civ. App.), 86 S. W. 1069; *s. c.*, 99 Tex. 248, 89 S. W. 409.

90. *Iowa.* — Sim *v.* Russell, 90 Iowa 656, 57 N. W. 601.

New York. — Matter of Mondorf, 110 N. Y. 450, 18 N. E. 256; *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107; *In re* Gihon's Will, 44 App. Div. 630, 60 N. Y. Supp. 1139, *affirmed*, 163 N. Y. 595, 57 N. E. 1110; Heath *v.* Koch, 74 App. Div. 338, 77 N. Y. Supp. 513, *affirmed*, 173 N. Y. 629, 66 N. E. 1110; *In re* O'Gorman's Will, (App. Div.), 111 N. Y. Supp. 274.

Person Charged Not Provided for by Will of Third Person. — To explain a disproportionate share of testator's estate given to person charged, it may be shown that testator's wife, mother of person charged, had made no provision for him by her will.[91]

Agreement by Devisee To Provide for Contestant. — To explain omission of contestant from will, it is proper to show that testatrix did not wish contestant's share of her estate to be subjected to payment of a certain judgment, and for that reason devised a double share to another child, upon the understanding that he was to convey one-half of it to contestant.[92]

(c.) *Reasons for Disposition Subject of Inquiry.* — If actor assigns a reason for his act, and the act, standing alone, is such that it, of itself, suggests a suspicion that it was not voluntary, the existence or truth of the reason is a proper subject of inquiry.[93] But it has been held that when an unequal division of testator's estate is explained by the fact that testator was indignant against those discriminated against on account of certain acts which he believed they had

Pennsylvania. — *In re* DeHaven's Appeal, 75 Pa. St. 337.

Rhode Island. — Jenckes *v.* Probate Court, 2 R. I. 255, 263.

Vermont. — *In re* Rogers' Will, 80 Vt. 259, 67 Atl. 726.

91. Varner *v.* Varner, 16 Ohio C. C. 386.

92. Trezevant *v.* Rains (Tex. Civ. App.), 25 S. W. 1092.

Agreement To Devise to Contestant. — So if testator and person charged agree to make mutual wills, each to devise estate to the other for life, with remainder to contestant. Morrison *v.* Thoman, 99 Tex. 248, 89 S. W. 409.

93. Frush *v.* Green, 86 Md. 494, 39 Atl. 863; Mullen *v.* Helderman, 87 N. C. 471.

Lancaster *v.* Lancaster, 27 Ky. L. Rep. 1127, 87 S. W. 1137. In this case testator's omission of contestant—his brother—from his will was, in part, attempted to be explained by proof that contestant had, in a certain court proceeding, testified on the subject of testator's mental capacity. It was held proper to show that testator had given the same testimony.

False Reason for Unequal Division. — If reason assigned for a grossly unequal division of his estate be shown to be untrue, the jury may legitimately infer that testator's motive did not originate in his own mind. In Hiss *v.* Weik, 78 Md. 439, 28 Atl. 400, testator made a division of his estate which the court of appeals characterized as grossly unequal, stating, in explanation, that he had already given to the son, who was practically disinherited, all that he desired to give him. After the will was made testator sent valuable bonds to this son. The court says: "This delivery of bonds after the date of the will fully contradicted the declaration of the will, and afforded a reasonable ground for questioning the truth of the motive assigned for cutting off the son, and it was, therefore, competent to the jury to infer that the son was not disinherited for that reason, and if not for that reason, no other being suggested, that he was disinherited by his father without reason at all; and if so disinherited that the will which did that was not the act of an unbiased or uninfluenced mind." The court further says: "Especially is this a legitimate inference when the jury had before them evidence, which, as we have said, must, in considering the appellant's prayers be assumed to be true, and which moreover was not contradicted, to the effect that Bishop was devotedly attached to his little granddaughter and was deeply moved by the affliction of his only son, and that Mrs. Hiss, the caveatee, who secured all the estate, cruelly denounced her insane brother to their aged father,

done, it is immaterial whether or not his indignation was justified.[94]

(B.) Large Part of Estate Devised to One Person. — The fact that a large portion of the estate of a testator having a number of relatives is bequeathed to a person standing in a fiduciary relation toward testator, is a proper circumstance to be considered.[95]

(2.) Character of Gift. — Value. — The nature, character and value of the gift in question are circumstances to be considered,[96] also the value of several testamentary gifts made by one will.[97]

(3.) Character of Transaction. — In action to set aside deed, the character of the transaction in question is a circumstance to be considered.[98]

Absence of Consideration. — That no consideration passed from grantee to grantor is a circumstance to be considered on the question whether the deed in question was obtained by undue influence.[99]

h. *Terms of Instrument.* — **(1.) Showing Feelings.** — The terms of a will may be considered as showing feelings of testator toward persons included or omitted.[1]

(2.) Exciting Suspicion. — Use of Word "Voluntarily" in Gift. — A recital in a written declaration of gift to donor's daughter that it was made "voluntarily, without suggestion from any one," and the failure to disclose the gift to other relatives of donor, will not create a suspicion of undue influence when donor had learned that certain persons had accused her of securing a certain legacy by the use of undue influence.[2]

i. *Circumstances Attending Execution* of the act in question are competent.

(1.) Will. — Thus, in a will contest, all the circumstances of the

shortly before the will was made, as crazy and indolent and unworthy of sympathy."

In Mullen *v.* Helderman, 87 N. C. 471, the court says: "We think it was not inadmissible in answer to the reason given for the exclusion of one class of the testator's children from any participation in his estate, except in the paltry sums to each which add indignity to wrong and which indicate a hostile feeling towards them, to show that no foundation for such exclusion existed, and the natural parental sentiment had been perverted, if he used the language imputed to him, or the misrepresentation of his meaning by the executor."

94. Schuchhardt *v.* Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485; Wightman *v.* Stoddard, 3 Bradf. Sur. (N. Y.) 393; *In re* Glockner's Will, 2 N. Y. Supp. 97; *In re* Bedlow's Will, 67 Hun 488, 22 N. Y. Supp. 290; Robinson *v.* Duvall, 27 App. Cas. (D. C.) 535, 544.

95. Forman *v.* Smith, 7 Lans. (N. Y.) 443.

96. Golding *v.* Golding, 82 Ky. 51; Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; Lins *v.* Lenhardt, 127 Mo. 271, 29 S. W. 1025.

97. *In re* Woodward's Will, 167 N. Y. 28, 60 N. E. 233, *reversing* 52 App. Div. 494, 65 N. Y. Supp. 405.

98. Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; McKissock *v.* Groom, 148 Mo. 459, 50 S. W. 115.

99. Nobles *v.* Hutton (Cal. App.), 93 Pac. 289.

1. *In re* Carland's Will, 15 Misc. 355, 37 N. Y. Supp. 922.

2. Towson *v.* Moore, 173 U. S. 17.

As to terms of instrument in question exciting suspicion, see remarks of court in Taylor *v.* Taylor, 8 How. (U. S.) 183, where it was said that the very vehemence with which donor protested that her gift was

execution may be shown, including time, place, persons present, and their situation, capabilities and credibility.[3]

Revocation. — So as to circumstances attending an act of revocation of will.[4]

(A.) Absence of Family. — Contestant may show the absence of those whose claims upon testator were as great as the claims of those present and benefited.[5]

(B.) Secrecy. — Contestant may show that the will in question was executed in secret.[6]

(C.) Absence of Person Charged. — That the person charged with procuring the act in question was not present at its execution is a circumstance to be considered.[7]

(D.) Writing of Will. — (a.) *Olograph.* — That the will in question was written by testator himself, without the assistance of counsel, is a circumstance showing its voluntary character.[8]

(b.) *Written by Executor.* — It may be proved that the will in question was written by the person therein named as executor, who is also made residuary legatee.[9]

(c.) *Written by Attorney for Person Charged.* — So, if will be drawn

freely and voluntarily made was sufficient to excite suspicion.

3. Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790; Sutton *v.* Sutton, 5 Har. (Del.) 459; Taylor *v.* Pegram, 151 Ill. 106, 114, 37 N. E. 837; *In re* Hollingsworth's will, 58 Iowa 526, 2 N. W. 590.

That at the time his will was executed testator was surrounded by inmates and servants of a charitable corporation to which his estate was bequeathed, and that the subscribing witnesses were also employees or patients of the devisees, are circumstances to be considered. Elliot *v.* Welby, 13 Mo. App. 19.

Where a will is contested on the ground of fraud or undue influence, a very broad inquiry is permitted into the whole chain of circumstances attending its preparation; and the transaction must be deemed to embrace all the immediate preliminaries. Where the instructions for executing a will contemplated that the attending physician should be sent for to attest it, the *res gestae* necessarily embraced this as one of the steps actually taken; and what message was sent, or received and acted upon, is therefore admissible, as a circumstance which may have weight or not, as made significant or not by other proofs. Beaubien *v.* Cicotte, 12 Mich. 459.

Livering *v.* Russell, 30 Ky. L. Rep. 1185, 100 S. W. 840, where it is said that "The place in which the will was executed, the witnesses who were called to attest her signature, the disposition she made of it after it was executed, are circumstances which it was proper for the jury to consider in determining whether or not it was procured by the undue influence of her husband."

4. May *v.* Bradlee, 127 Mass. 414.

5. Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227. See also Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; *In re* Blair's Will, 16 N. Y. Supp. 874.

6. Greenwood *v.* Cline, 7 Or. 17.

7. In Wilson *v.* Moran, 3 Bradf. Sur. (N. Y.) 172, the court says that this circumstance—absence of person charged—is not conclusive against improper influence, but says: "But still here is a certain degree of liberty, which would have been wanting in case the legatee had been present."

8. Carroll *v.* Norton, 3 Bradf. Sur. (N. Y.) 291.

9. Lord *v.* Lord, 58 N. H. 7; Waddington *v.* Buzby, 43 N. J. Eq. 154, 10 Atl. 862; Marvin *v.* Marvin, 4 Keyes (N. Y.) 9, 23; Renn *v.* Samos, 33 Tex. 760; McMechen *v.* McMechen, 17 W. Va. 683, 703.

by the attorney of the person charged with exercising the influence.[10]

(d.) *Will in Handwriting of Legatee.* — That will is in the handwriting of legatee is a suspicious circumstance.[11]

(E.) Will and Deed Executed Simultaneously. — In a will contest, the fact that at the time the will in question was executed, testator made devisee a deed conveying the devised property, is a circumstance bearing upon the question of undue influence in procuring the will.[12]

(2.) Deed. — (A.) Between Parties Occupying Fiduciary Relation. When a deed is made without a valuable consideration, between parties occupying toward each other a relation of trust and confidence, all circumstances attending the execution of the deed may be considered in determining whether or not it was grantor's voluntary act.[13]

(B.) Drawn by Grantee's Attorney. — That a deed of gift was drawn by the attorney for the grantee is a proper circumstance to be shown.[14]

(C.) Independent Advice. — Whether or not actor had independent advice concerning the transaction in question, is a material circumstance in determining its voluntary character.[15]

Circumstance Not Conclusive. — But the fact that, in transactions between persons occupying relations of trust and confidence, the actor had independent advice is not conclusive, and the court will require proof as to whether or not the influence of the person benefited was operative in procuring the act in question.[16]

j. *Effect of Act.* — **(1.) Upon Actor.** — The effect of the act in question upon the actor may be considered.[17] In determining the question of undue influence, a broad distinction is to be taken between a disposition by the donor which takes from him his whole

10. *In re* Blair's will, 16 N. Y. Supp. 874; *In re* Lansing's will, 59 Hun 610, 2 N. Y. Supp. 117.

11. Renn *v.* Samos, 33 Tex. 760.

12. Vreeland *v.* M'Clelland, 1 Bradf. Sur. (N. Y.) 393.

13. Golding *v.* Golding, 82 Ky. 51; Cadwallader *v.* West, 48 Mo. 483.

14. Decker *v.* Waterman, 67 Barb. (N. Y.) 460.

15. Baker *v.* Bradley, 7 De G., M. & G. 597, 44 Eng. Reprint 233, 2 Sm. & G. 531, 25 L. J. Ch. 7, 2 Jur. (N. S.) 98; Malone *v.* Kelley, 54 Ala. 532; Holt *v.* Agnew, 67 Ala. 360; Cadwallader *v.* West, 48 Mo. 483; Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Connelly *v.* Fisher, 3 Tenn. Ch. 382; Watkins *v.* Brant, 46 Wis. 419, 1 N. W. 82.

Independent Advice as Showing Continuance of Influence. — That actor had independent advice is a circumstance to be considered in showing whether or not an influence shown to have existed continued at time of transaction. Wright *v.* Carter, L. R. (1903), 1 Ch. (Eng.) 27; Malone *v.* Kelley, 54 Ala. 532.

"I am inclined to think that the only competent independent advice that should be given to a man who says he has arranged to make a gift to his solicitor is to tell him not to do so." Cozens-Hardy, L. J., in Wright *v.* Carter, L. R. (1903), 1 Ch. (Eng.) 27.

16. Wright *v.* Carter, L. R. (1903), 1 Ch. (Eng.) 27.

17. Actor Impoverished by Deed. The fact that the effect of the art in question is to impoverish actor is a proper circumstance in deter-

estate and leaves him helpless, and one which provides for him during his life and disposes of his property in a rational mode after his death.[18]

Proportionate Value of Property Affected. — The value of the property affected by the transaction in question in proportion to actor's entire estate may be considered.[19]

Inadequacy of Consideration. — In cases involving the execution of a contract, adequacy or inadequacy of consideration may be considered.[20]

(2.) Upon Others. — The effect of the conventional or testamentary act in question upon the natural objects of actor's bounty may be considered.[21]

(A.) Person Charged. — Benefit Decreased by Will. — That person charged received a smaller sum under a will which he is charged to have procured by undue influence than he would have received had decedent died intestate, is a proper circumstance to be considered in determining whether or not such influence was exercised.[22]

(a.) *Financial Condition and Needs of Relations* may be shown. When a will is contested upon the ground of undue influence, and contestant shows that the relations between testator and his relatives, who were practically excluded from the will, were pleasant and affectionate, proponent may show that such relations possessed ample property of their own, and did not need a portion of the devised estate.[23]

mining the presence or effect of undue influence. Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528 (deed); Cadwallader *v.* West, 48 Mo. 483.

That Deed Makes Grantor Dependent Upon Grantee for subsistence is a proper circumstance to be proved. Purcell *v.* McNamara, 14 Ves. Jr. 91, 33 Eng. Reprint 455.

Improvidence of Gift is a circumstance to be considered in determining its voluntary character. Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645. See Thorn *v.* Thorn, 51 Mich. 167, 16 N. W. 324.

18. Clark *v.* Stansbury, 49 Md. 346; Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334; McClure *v.* Lewis, 4 Mo. App. 554. Judgment in this case was reversed on appeal to supreme court (72 Mo. 314), but this question was not discussed.

19. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Fountain *v.* Brown, 38 Ala. 72; McCommon *v.* McCommon, 151 Ill. 428, 38 N. E. 145; Piper *v.* Andricks, 209 Ill. 564, 71 N. E. 18. See Wright *v.* Carter, L. R. (1903), 1 Ch. (Eng.) 27; Rhodes *v.* Bate, 35 L. J. Ch. (Eng.) 267, L. R. 1 Ch. App. 252, 12 Jur. (N. S.) 178, 13 L. T. 778; Curtice *v.* Dixon, 74 N. H. 386, 68 Atl. 587.

20. Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326.

21. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479.

22. *In re* Sheldon's Will, 16 N. Y. Supp. 454, *affirmed,* without opinion, 65 Hun 623, 21 N. Y. Supp. 477.

Change of Will — Person Charged Not Affected. — See *In re* Read's Will, 17 Misc. 195, 40 N. Y. Supp. 974.

23. *Alabama.* — Roberts *v.* Trawick, 13 Ala. 68; Stubbs *v.* Houston, 33 Ala. 555; Fountain *v.* Brown, 38 Ala. 72.

District Columbia. — Barbour *v.* Moore, 10 App. Cas. 30, 51.

Iowa. — Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Sim *v.* Russell, 90 Iowa 656, 57 N. W. 601.

Missouri. — Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552.

(b.) *Financial Condition and Needs of Legatees and Devisees.* — The condition and situation of the persons named in the will as legatees and devisees may also be shown.[24]

Tennessee. — Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

Vermont. — Fairchild *v.* Bascomb, 35 Vt. 398, 417; Crocker *v.* Chase, 57 Vt. 413, 421.

Virginia. — Wallen *v.* Wallen, 107 Virginia 131, 57 S. E. 596.

In Eastis *v.* Montgomery, 95 Ala. 486, 11 So. 204, 36 Am. St. Rep. 227, the court says: "Evidence was adduced going to show affectionate relations between the testatrix and these grandchildren. This was, of course, intended to afford an inference that had the testatrix taken counsel of her affections, and been allowed to make such dispositions of her property as they naturally dictated, the grandchildren would not have been cut off with a penny; and therefore, the argument proceeds, undue influence must have been exerted upon her to induce this unnatural result. It is manifest that the strength of this inference depends greatly upon the circumstances and necessities of the grandchildren. If they, for instance, were already provided for—if their conditions in life were not such as to appeal to the bounty of the testatrix—it was much more reasonable that she should have failed of her own free will to make additional provision for them in her will, than had they been in necessitous circumstances. And for the purpose of showing that this exclusion from any substantial benefits under the will, notwithstanding the affection entertained for them by testatrix, was not unnatural, and did not afford a basis for any inference of undue influence, it was entirely proper for the proponents to adduce evidence to the effect that the contestants had property of their own; Schouler on Wills, sec. 242; Beaubien *v.* Cicotte, 12 Mich. 459; Crocker *v.* Chase, 57 Vt. 413; Stubbs *v.* Houston, 33 Ala. 555; Fountain *v.* Brown, 38 Ala. 72."

But see *In re* Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179, where the court says: "The court permitted the contestant, against the objections of the proponent, to give evidence of the amount of property owned respectively by the husbands of the beneficiaries under the will, and also that the contestant and her husband were comparatively without any property. The evident object of this evidence was to give to the jury the impression that the contestant had been unjustly treated in the division of her mother's estate, and it should have been excluded by the court. Aside from the fact that Mrs. Kaufman had the right to exclude the contestant from the will if she so desired, the testimony was neither relevant nor competent for the purpose of sustaining either of the issues before the jury, and its introduction could have only a prejudicial effect upon their minds. When the validity of a will is contested upon the ground of undue influence in its execution, a court cannot be too careful in excluding from the consideration of the jury evidence that is incompetent or irrelevant to establish the charge. The very nature of the issue, as well as the lack of experience and of mental training on the part of the jurors in reference thereto, render them less able than the court to weigh the sufficiency of any evidence that may be offered upon this issue. The fact that the evidence has been permitted by the court to come before them justly authorizes them to consider that it is both relevant and competent for that purpose, and the evidence so received will, unconsciously it may be, produce an impression upon their minds which will not be effaced by subsequent instructions."

24. Blackman *v.* Edsall, 17 Colo. App. 429, 68 Pac. 790; Sim *v.* Russell, 90 Iowa 656, 57 N. W. 601.

When the will of a widow is contested on the ground of undue influence exercised by her son, it is proper to show the amount received by such son under his father's will. Davenport *v.* Johnson, 182 Mass. 269, 65 N. E. 392, where the court says: "The fact that the will

(AA.) Must Relate to Time of Execution. — But such proof must be reasonably connected in point of time, with the execution of the will.[25]

(BB.) Will Necessary to Determine Materiality. — When on the issue of undue influence in the execution of a will, evidence is offered showing the pecuniary condition and needs of relatives who claimed to have been less favorably provided for than others, an appellate court cannot determine the materiality of such testimony, unless the will is before the court.[26]

and codicil were or might be found to be unreasonable in the opinion of the jury would not of themselves justify them in finding that it was the product of an insane mind or of undue influence. But as bearing upon the question whether the will was a reasonable will and such as a person of sound mind and free from undue influence would have made, evidence not only of the amount of her own estate was competent, but, also, evidence of the amount of her husband's estate and of the amount to which William W. Davenport was or would be entitled under the husband's will. If he was entitled to receive under the husband's will a large amount, we cannot say that the jury were not justified in finding, if they did so find, that the more reasonable explanation of the large bequest to him in the will and codicil of the testatrix was that it was procured by undue influence on his part over her. There was testimony from which the jury could have found that both he and the testatrix knew the contents of the husband's will before his death, and at the time of the execution of the will and codicil, and the approximate amount of the estate. Further, as tending to show his relations with and influence over the testatrix, it was competent, we think, for the appellants to show if they could, that he had induced her not to waive the provisions of her husband's will, and that the amount of her husband's estate and the share to which he would be entitled were admissible for that purpose." See cases cited in note 83 under IV, 1, C., g., (1.) (A.) (a.) *ante*, "Contestant Provided for."

25. Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319; Smith *v.* Ryan, 136 Iowa 335, 112 N. W. 8; Simon *v.* Middleton (Tex. Civ. App.) 112 S. W. 441.

Thus, where it was held that it was proper to admit the will of the mother of person charged which made no provision for him, to explain an apparently disproportionate provision of his father's will, it was held improper to show a division of property made by the mother subsequent to the execution of the father's will, as that circumstance could not have influenced his mind at the time of making his own will. Varner *v.* Varner, 16 Ohio C. C. 386.

26. In Latham *v.* Schaal, 25 Neb. 535, 41 N. W. 354, the court says: "It is no doubt the law that, if by a will the testator seems to have bestowed his property more bountifully upon those who are alleged to have exerted the undue influence, and to the exclusion of others who by the common ties of kinship should be provided for, that fact may be considered in arriving at the condition of the mind of the testator at the time of the execution of the will. But no copy of the will is found in the record in this case, and we are left wholly in the dark as to what the bequests were, and to whom given. . . . Mrs. Harrison, a daughter of the testator, was called as a witness. It was shown that she was a widow, and had four children. When asked as to her financial condition, upon objection being made, the proposed evidence was excluded. We are inclined to think the ruling of the district court in excluding this evidence was correct, in any view of the case. It would evidently have been entirely proper, had there been any evidence to show that undue influence had been exerted to procure the execution of the will. But be that as it may, as we have said, there is

(B.) Gift Leaves Nothing for Heirs. — The fact that the gift in question consumes donor's estate, leaving nothing for his heirs, is also a circumstance to be considered.[27]

D. Circumstantial Evidence Must Do More Than Raise Suspicion. — It must amount to proof, and such evidence has the effect of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator.[28]

E. Admissibility in Discretion of Trial Judge. — It has been said that, as to the admission of proof of circumstances, much must be left to the discretion of the trial judge.[29]

Sufficiency of Circumstantial Proof. — It appearing that at time of execution of act in question, actor was of sound mind and not ac-

nothing before us showing whether Mrs. Harrison was a beneficiary or not, and therefore it would be wholly immaterial as to what her financial condition was. This must dispose of the exception to the ruling of the court in excluding the county court record showing the appraised value of the estate of the testator, and in excluding certain copies of deeds to real estate in Greeley county and elsewhere, by which the land described was conveyed by the testator to defendants in error."

27. Lins *v.* Lenhardt, 127 Mo. 271, 29 S. W. 1025.

28. *California.* — *In re* McDevitt, 95 Cal. 17, 34, 30 Pac. 101; *In re* Langford, 108 Cal. 608, 620, 41 Pac. 701.

District Columbia. — Kultz *v.* Jaeger, 29 App. Cas. 300.

Illinios. — Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881.

Maryland. — Somers *v.* McCready, 96 Md. 437, 53 Atl. 1117.

New York. — *In re* Johnson's Will, 5 N. Y. Supp. 922; *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392.

Texas. — Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 606.

Wisconsin. — Citizens' L. & T. Co. *v.* Holmes, 116 Wis. 220, 93 N. W. 39. A mere suspicion of the existence and exercise of undue influence will not be sufficient to sustain a verdict against the validity of a will. Parfitt *v.* Lawless, L. R. 2 P. (Eng.) 462, 41 L. J. P. 68, 27 L. T. 215; Browning *v.* Budd, 6 Moore P. C. 430, 13 Eng. Reprint 749; Casborne *v.* Barsham, 2 Beav. 76, 48 Eng. Reprint 1108; Kelly *v.* Thewles, 2 Ir. Ch. 510, 530; Beyer *v.* LeFevre, 186 U. S. 114; Estate of Keegan, 139 Cal. 123, 72 Pac. 828; Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590.

"To make a case of undue influence, the will must express the mind and intent of some one else, and not of the testator. From the nature of the case, the evidence of undue influence will generally be mainly circumstantial. It is not usually exercised openly, in the presence of others, so that it may be directly proved. But the circumstances relied on to show it must be such as, taken altogether, point unmistakably to the fact that the mind of the testator was subject to that of some other person, so that the will is that of the latter, and not of the former; mere ground of conjecture or guess is not enough." *In re* Nelson's Will, 39 Minn. 204, 39 N. W. 143.

In an action to set aside a transfer of personal property it was held that the facts that, shortly after the transfer, donee paid large sums of money to the physician who attended donor, and to the attorney who prepared the instrument of transfer, both of whom were witnesses in her behalf, were not sufficient to show undue influence. Nor was the fact that donee transferred a large portion of the donated property to donor's heirs. Citizens' L. & T. Co. *v.* Holmes, 116 Wis. 220, 93 N. W. 39.

29. Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 50.

tually under undue influence, if all circumstances relied upon to show undue influence are equally consistent with some other theory, the charge cannot be sustained.[30]

F. Indicia of Undue Influence. — Certain facts set out in the notes have been held to be *indicia* of undue influence.[31]

G. Circumstances Held Sufficient. — Certain combinations of circumstances which have been held insufficient to show undue influence are given in the notes.[32]

30. Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881.

31. Secrecy in the preparation or execution of the will, or failure to inform the testator's heirs of his approaching death, or that prior to execution of act in question, actor was brought to a state of causeless suspicion against one heir, and unfounded fears as to the financial condition of another. Tyler *v.* Gardiner, 35 N. Y. 559.

Care To Preserve Evidence of Fairness. — It has been said that the exercise of great care to preserve evidence showing that the transaction in question was voluntary and free from undue influence, is a suspicious circumstance. Martin *v.* Baker, 135 Mo. 495, 36 S. W. 369; Greenwood *v.* Cline, 7 Or. 17, 29.

Failure To Produce Evidence. When certain letters exchanged between persons charged show their conduct in securing the act in question, the fact that one of such persons obtains possession of all these letters, keeps them at a distance from the place of trial and refuses to produce them in court is a suspicious circumstance. Cole *v.* Getzinger, 96 Wis. 559, 71 N. W. 75.

Secrecy in Execution of Deed is said to be a "badge of undue influence." Watkins *v.* Brant, 46 Wis. 419, 1 N. W. 82. In this case a woman whose physical condition was such as to affect her mental powers, who was easily influenced, and who was subject to the influence of her sister, made a deed conveying valuable real property to this sister. The transaction was kept secret from grantor's husband. This case is cited as authority in Cole *v.* Getzinger, 96 Wis. 559, 572, 71 N. W. 75.

32. Testator very old; physically and mentally weak; fearful of disposition of person charged (his son); previous statements of intention to make a different testamentary disposition; fact of execution concealed from testator's other children. Edwards *v.* Edwards, 63 N. J. Eq. 224, 49 Atl. 819.

Deed by aged woman very weak both mentally and physically, to her son, who was her agent. Lindly *v.* Lindly (Tex. Civ. App.), 109 S. W. 467. To same effect, see Oldham *v.* Oldham, 58 N. C. (5 Jones Eq.) 89. Deed by aged and infirm woman executed in secret and under suspicious circumstances, conveying a disproportionate part of her estate to a nephew. Amis *v.* Satterfield, 40 N. C. (5 Ired. Eq.) 173.

Testator physically weak; prevented by threats of his wife, (person charged) from executing will differing from that in question. Matter of Clark, 40 Hun (N. Y.) 233.

Testator physically weak; bulk of estate devised to son who had exceptional opportunities to exercise influence; influence actually exerted in business affairs; importunity. Fischer *v.* Sperl, 94 Minn. 421, 103 N. W. 502. In this case verdict was rendered for contestants; the judge rendered judgment notwithstanding verdict, which judgment was reversed on appeal.

Testator physically and mentally weak; in exclusive charge of beneficiaries, who suggested terms of will, and guided his hand in signing, testator stating he was too weak to make a will. *In re* Wiltsey's Will, 135 Iowa 430, 109 N. W. 776.

Testator mentally and physically infirm, under control of his wife, a woman of great mental and physical vigor, made a will which excluded testator's children by a former marriage, a few hours before death and two hours after testator

H. Circumstances Insufficient. — Certain combinations of cir-

had expressed his love for his children, and his desire that they share equally in his estate; draughtsman and witnesses procured by wife. *In re* Nolte's Will, 10 Misc. 608, 32 N. Y. Supp. 226.

Testator under control of his wife, the person charged, and their only child omitted from will in favor of wife's heirs; wife present at all interviews between contestant and testator. Judgment of nonsuit against contestant reversed. *In re* Welch's Estate, 6 Cal. App. 44, 91 Pac. 336.

Testator physically and mentally weak; will in question different from previous will in favor of wife, who, in later will was omitted in favor of a person who lived with testator, actually influenced him, and who had expressed an intention to obtain his property. Darley *v.* Darley, 3 Bradf. Sur. (N. Y.) 481.

Testatrix addicted to use of intoxicating liquors, ill at time of execution, and under charge of person charged, a total stranger, who suggested provisions for her own benefit and attempted to obtain possession of testatrix's money. *In re* Anderson's Will, 50 Hun 600, 2 N. Y. Supp. 423.

Motive, opportunity, person charged and testatrix living together, attempts to exclude contestant, a son, from testatrix, contestant omitted from will. Marvin *v.* Marvin, 4 Keyes (N. Y.) 9, 23.

That testator was old, feeble, and unable to write, that one beneficiary—his son—dictated the will, and it was executed in presence of this son and the other beneficiary—testator's wife—both of whom kept close watch over testator; that the will without any apparent reason disinherited another son and a granddaughter of testator. *In re* Elster's Will, 39 Misc. 63, 78 N. Y. Supp. 871.

Tyner *v.* Varien, 97 Minn. 181, 106 N. W. 898. Circumstances: Ill-treatment of testator's children by person charged (his second wife), actual influence, testator subject to wife, family excluded, and not informed of testator's illness or death; active efforts of person charged to have children excluded from testator's will.

Circumstances Held Sufficient To Sustain Verdict That Will Was Procured by Undue Influence. — Testatrix addicted to intoxicants, cruelly treated by person charged, her husband, statements of testatrix that she intended to give her husband everything, and commit suicide; will executed under suspicious circumstances, and delivered to a stranger, person charged telling witness to note testatrix' expression of intention. Livering's Exr. *v.* Russell, 30 Ky. L. Rep. 1185, 100 S. W. 840.

Affectionate relations between testator and children changed by influence of person charged, testator's second wife; testator mentally and physically weak; will grossly unreasonable and unjust, and contrary to testator's previously expressed intentions. Hoffman *v.* Hoffman, 192 Mass. 416, 78 N. E. 492.

Threats by person charged to kill testator and contestant, son of testator. Capper *v.* Capper, 172 Mass. 262, 52 N. E. 98.

Circumstances: Expressions of hatred and contempt by testatrix toward contestant, her husband; efforts on part of children to estrange contestant and testatrix by disparaging statements concerning the former; all of contestant's property transferred to testatrix. Johnson's Admr. *v.* Johnson, 20 Ky. L. Rep. 138, 45 S. W. 456.

Testator physically and mentally weak; persons charged anxious in regard to will, solicitous for its execution, and active in preparation and execution. *In re* Wiltsey's Will, 135 Iowa 430, 109 N. W. 776.

In a will contest where it appears that contestant had been regarded as testator's favorite child until he was, in old age, stricken with paralysis and left in the exclusive care of another daughter and her husband; that out of their presence testator was kind and affectionate toward contestant, but in their presence constrained and silent; that on seeking to visit testator contestant was by her sister and brother-in-law excluded from testa-

cumstances which have been held insufficient to show undue influ-

tor's presence; that the sister and brother-in-law talked to testator in a harsh and prejudicial manner concerning contestant; that the sister caused the will to be written, and permitted testator to remain under a delusion that he had already provided for contestant, a verdict against the will will not be disturbed on appeal. Fry *v.* Jones, 95 Ky. 148, 24 S. W. 5, 44 Am. St. Rep. 206. See Will of Farnsworth, 62 Wis. 474, 22 N. W. 523.

Finding that deed was obtained by undue influence supported by proof showing: Grantor ill, under influence of opiates and anodynes; no negotiations prior to execution of deed; grossly inadequate consideration; grantee mother of grantor. Nielson *v.* Lafflin, 66 Hun 636, 21 N. Y. Supp. 731. Such finding was held supported by proof showing that grantor was mentally weak, and was induced to believe that grantee—his son—intended to prosecute a claim against him. Norton *v.* Norton, 74 Iowa 161, 37 N. W. 129. Such was held to be the effect of proof showing that grantor was weak minded and unable to take care of himself, and that grantee assumed guardianship over him. Gibson *v.* Fifer, 21 Tex. 260. See also Chase *v.* Hubbard, 153 Mass. 91, 26 N. E. 433; Peek *v.* Peek, 101 Mich. 304, 59 N. W. 604.

Testatrix very weak, physically and mentally; beneficiary and friends active in procuring will; will prepared by friend of beneficiary, and signed without alteration; contestant, husband of testatrix, not informed of execution, which was secret; persons charged acting as witnesses. *In re* Abel's Estate (Nev.) 93 Pac. 227. See also *In re* Spratt's Will, 17 App. Div. 636, 45 N. Y. Supp. 273; Ledwith *v.* Claffey, 18 App. Div. 115, 45 N. Y. Supp. 612; Anderson *v.* Carter, 24 App. Div. 462, 49 N. Y. Supp. 255, *affirmed*, without opinion, 165 N. Y. 624, 59 N. E. 1118; Riley *v.* Hall, 119 N. C. 406, 26 S. E. 47; Allen's Admr. *v.* Allen's Admrs., 79 Vt. 173, 64 Atl. 1110; Hartman v. Strickler, 82 Va. 225, 238; Deem *v.* Phillips, 5 W. Va. 168; *In re* Will of Slinger, 72 Wis. 22, 37 N. W. 236; Kelly *v.* Smith, 73 Wis. 191, 41 N. W. 69; Bryant *v.* Pierce, 95 Wis. 331, 341, 70 N. W. 297; *In re* Derse's Will, 103 Wis. 108, 79 N. W. 46.

For cases involving circumstances held sufficient to support a verdict or finding of undue influence, see the following cases:

Illinois. — Keyes *v.* Kimmel, 186 Ill. 109, 117, 57 N. E. 851; Elmstedt *v.* Nicholson, 186 Ill. 580, 58 N. E. 381.

Kentucky. — Smith *v.* Kelly, 2 Bush 557.

Minnesota. — Graham *v.* Burch, 44 Minn. 33, 46 N. W. 148; Prescott *v.* Johnson, 91 Minn. 273, 97 N. W. 891.

Missouri. — Dausman *v.* Rankin, 189 Mo. 677, 88 S. W. 696; Martin *v.* Baker, 135 Mo. 495, 36 S. W. 369.

Montana. — Muller *v.* Buyck, 12 Mont. 354, 30 Pac. 386 (duress).

Nebraska. — Seebrock *v.* Fedawa, 30 Neb. 424, 46 N. W. 650.

New Jersey. — Yard *v.* Yard, 27 N. J. Eq. 114; Haydock *v.* Haydock, 33 N. J. Eq. 494; Barkman *v.* Richards, 63 N. J. Eq. 211, 49 Atl. 831.

New York. — Rollwagen *v.* Rollwagen, 63 N. Y. 504, *affirming* 3 Hun 121.

Circumstances Insufficient To Justify Direction of Verdict That Will Was Not Procured by Undue Influence. — Testator old, mentally weak, dependent upon proponent, who was her confidential adviser, who urged her to make will in his favor, procured draughtsman, and was the only person present at execution. Edgerly *v.* Edgerly, 73 N. H. 407, 62 Atl. 716.

Judgment directing verdict in favor of will reversed on proof showing that testator, who was physically weak, made a will in favor of a son who was his confidential agent, had great influence over him, and excluded wife from him at time of execution. Mowry *v.* Norman, 204 Mo. 173, 103 S. W. 15.

Circumstances Sufficient To Sustain Finding of Undue Influence. Yordi *v.* Yordi, 6 Cal. App. 20, 91 Pac. 348; Ferguson *v.* Heffner, 31 Ky. L. Rep. 711, 103 S. W. 270; Martin *v.* Baker, 135 Mo. 495, 36

ence, or which have been held to necessitate reversal or affirmance

S. W. 369; Aldrich *v.* Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311 (rehearing); Champeau *v.* Champeau, 132 Wis. 136, 112 N. W. 36; Goodloe *v.* Goodloe (Tex. Civ. App.), 105 S. W. 533.

Judgments Reversed on Evidence Showing Undue Influence. — For circumstances held to so tend to show undue influence as to require reversal of decree admitting will to probate, see *In re* Bernsee's Will, 63 Hun 628, 17 N. Y. Supp. 669; *In re* Gallup's Will, 43 App. Div. 437, 60 N. Y. Supp. 137; Chambers *v.* Chambers, 61 App. Div. 299, 70 N. Y. Supp. 483; Greenwood *v.* Cline, 7 Or. 17; Kabelmacher *v.* Kabelmacher, 21 Tex. Civ. App. 317, 50 S. W. 1118, 51 S. W. 353; Rathjens *v.* Rathjens, 38 Wash. 442, 80 Pac. 754; *In re* Pike's Will, 83 Hun 327, 31 N. Y. Supp. 689.

In Miller's Estate, 179 Pa. St. 645, 36 Atl. 139, the circumstances held sufficient were, testator's mind impaired by use of liquor, testator constantly under charge of person charged—his son—gross inequality in provisions of will.

Trezevant *v.* Rains, 85 Tex. 329, 23 S. W. 890. In this case the circumstances were: Testatrix was in her last illness, her physician having announced four days prior to execution of will that she could not live; children with whom she had been on friendly terms were excluded from her presence; her other children, who were beneficiaries of the will in question, were unfriendly, one being hostile; these children were with her when will was executed.

Smith *v.* Smith, 67 Vt. 443, 32 Atl. 255, where judgment was reversed on record showing testator addicted to use of intoxicants, secrecy in execution of will, legacies to strangers to detriment of family, misstatements by legatees concerning fact of execution. See also Mullen *v.* McKeon, 25 R. I. 305, 55 Atl. 747.

For circumstances necessitating reversal of judgment finding that deed was not executed under undue influence, see Dooley *v.* Holden, 53 App. Div. 625, 65 N. Y. Supp. 713; Watkins *v.* Brant, 46 Wis. 419, 1 N. W. 82. See statement in "Indicia" under IV, F, *ante*. Konrad *v.* Zimmermann, 79 Wis. 306, 48 N. W. 368; Grove *v.* Spiker, 72 Md. 300, 20 Atl. 144.

Jones *v.* McGruder, 87 Va. 360, 12 S. E. 792, where proof showed that grantor was mentally weak from excessive indulgence in intoxicating liquors; that grantees, who were grantor's relatives and agents, had great influence over him, and that the execution of the deed was kept secret from grantor's family. See also Goodrich *v.* Shaw, 72 Mich. 109, 40 N. W. 187.

Circumstances Sufficient To Go to Jury. — The following circumstances have been held sufficient to go to the jury on the question of undue influence: That, after making a will which made a fairly equitable division among testator's children, he commenced making codicils which finally practically disinherited all but two children; that some of the disinherited children were in greater need than those provided for; that one child who was made a devisee lived with testator, and another was a frequent visitor and frequently consulted with him; that, after such consultations, testator spoke against the disinherited children, and spoke of making different provisions. Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

"Evidence that the chief beneficiary in a will had made arrangements in advance for having it drawn, sent for a justice of the peace as draughtsman; and the witnesses; talked with the testator in his sick room about the will, wrote it himself and read it to the testator, corrected the testator as to the amount of a certain legacy and held the testator up in bed while he signed the will." England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526.

Testatrix aged and weak-minded; accustomed to rely upon persons charged in business affairs; persons charged active in procuring execution of will. Dunaway *v.* Smoot, 23 Ky. L. Rep. 2289, 67 S. W. 62.

of judgments in cases involving issue of undue influence are given in the notes.[33]

33. Relation of parent and child, opportunity, unequal will, previous expressions of differing testamentary intent, it not appearing that the person charged, son of testatrix, attempted to influence his mother, and that the will was prepared by an attorney who received all his instructions from testatrix, no one else making suggestions. *In re* Turner's Will (Or.), 93 Pac. 461.

Relation of husband and wife — husband grantee — fact that parties occupied separate houses, scrivener summoned by grantee, contrary intention expressed by grantor prior to execution of deed. Hoover *v.* Neff, 107 Va. 441, 59 S. E. 428.

That person charged, a nephew of testator, and a physician, administered morphine to testator in proper quantities to allay pain, and that testator often visited such person and entrusted business affairs to him. *In re* Lowman's Estate, 1 Misc. 43, 22 N. Y. Supp. 1055.

Devise in trust for church to priest who was not testatrix' spiritual adviser, and who employed draughtsman. Kerrigan *v.* Leonard (N. J.) 8 Atl. 503.

In Boyle *v.* Robinson, 129 Wis. 567, 109 N. W. 623, it was claimed that undue influence was shown by the fact that donee lived with donor, and kept secret the fact of the execution of the deed in question. The proof showed that donor and donee were mother and daughter; that donor was self-willed; that she made the deed after consultation with friends and with her attorney; that she had expressed her intention of making the deed, giving reasons therefor. *Held*, that a *prima facie* case against undue influence was made out.

Nor is such influence shown by the facts that grantor and grantee were mother-in-law and son-in-law, lived in the same house, and that grantee and wife had great influence over grantor. Rockey's Estate, 155 Pa. St. 453, 26 Atl. 656.

Undue influence is not shown by the fact that grantee in a certain deed, who sometimes practiced law, offered to draw the papers between plaintiff and himself without compensation, and that defendant was engaged in a business from which it might be inferred that he was better qualified to make bargains and to obtain advantages by reason of capacity, shrewdness and superior ability. Stout *v.* Smith, 98 N. Y. 25, 50 Am. Rep. 632.

Unequal Distribution by Aged Testator. — The facts that testator was very old, and made an unequal distribution of his estate are not sufficient to show undue influence. Manogue *v.* Herrell, 13 App. Cas. (D. C.) 455.

Opportunity and Disposition together are insufficient. Fothergill *v.* Fothergill, 129 Iowa 93, 105 N. W. 377.

Unequal will, beneficiary in attendance upon testatrix. *In re* O'Gorman's Will (App. Div.), 111 N. Y. Supp. 274.

Nor is such influence shown by the fact that testatrix, who was in the habit of conversing with friends concerning the disposition of her property, would cease conversing when her daughter, whose influence was claimed to have procured her will, entered the room. Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1. Nor by proof that children of grantor in deed attacked on the ground of undue influence disputed among themselves, and that the child charged with exercising influence, stated to the father that other children were attempting to obtain his property, and made other charges against his brothers and sisters. Campbell *v.* Campbell, 75 Mich. 53, 42 N. W. 670.

The following circumstances have been held insufficient to show that a deed or will was executed by reason of undue influence. The fact that the deed was made by an aged person acting without independent advice. Allcard *v.* Skinner, L. R. 36 Ch. Div. (Eng.) 145, 185; Soberanes *v.* Soberanes, 97 Cal. 140, 31 Pac. 910; Hunter *v.* Atkins, 3 Myl. & K. 113, 40 Eng. Reprint 43. See also Sehr *v.* Lindemann, 153 Mo. 276, 54 S. W. 537; Holmes *v.* Hill, 22 Neb. 425, 35 N. W. 206; Brick *v.* Brick, 43 N. J. Eq. 167, 10 Atl.

Single Circumstances Held Insufficient. — A list of circumstances

869, *affirmed*, 44 N. J. Eq. 282, 18 Atl. 58; Stoutenburgh *v.* Hopkins, 43 N. J. Eq. 577, 12 Atl. 689; McCoon *v.* Allen, 45 N. J. Eq. 708, 17 Atl. 820; Middleditch *v.* Williams, 45 N. J. Eq. 726, 17 Atl. 826; Clifton *v.* Clifton, 47 N. J. Eq. 227, 21 Atl. 333; *In re* Brunor's Will, 19 Misc. 203, 43 N. Y. Supp. 1141; *In re* Portingall's Will, 60 Hun 585, 15 N. Y. Supp. 486; *In re* Carter's Will (N. J.), 51 Atl. 65; Rathjens *v.* Merrill, 45 Wash. 55, 87 Pac. 1070.

Confidential relation; prejudice created against heirs by person charged; solicitation by devisees; unequal will; secrecy in execution. Fox *v.* Martin, 104 Wis. 581, 80 N. W. 921. See also *In re* Butler's Will, 110 Wis. 70, 85 N. W. 678; *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110; Fothergill *v.* Fothergill, 129 Iowa 93, 105 N. W. 377; *In re* Muellenschlader's Will, 128 Wis. 364, 107 N. W. 652; Rathjens *v.* Merrill, 38 Wash. 442, 80 Pac. 754.

In Erwin *v.* Hedrick, 52 W. Va. 537, 44 S. E. 165, proof showed that the deed in question was made upon valuable consideration; grantee, the person charged, agreeing to support grantor, and to pay certain of her debts, the inadequacy of consideration not being sufficient to create suspicion. See also *In re* Palmateer's Will, 78 Hun 43, 28 N. Y. Supp. 1062; *In re* Patterson's Will, 59 Hun 624, 13 N. Y. Supp. 463; Englert *v.* Englert, 198 Pa. St. 326, 47 Atl. 940; Masterson *v.* Berndt, 207 Pa. St. 284, 56 Atl. 866.

McEnroe *v.* McEnroe, 201 Pa. St. 477, 51 Atl. 327, involving devise to Roman Catholic priest, who was testator's cousin, other cousins being omitted; testator a Roman Catholic, but not a member of devisee's parish. Drinkwine *v.* Gruelle, 120 Wis. 628, 98 N. W. 534.

Circumstances Held Sufficient To Support Verdict or Finding That Certain Acts Were Not Procured by Undue Influence. — *California.* Hemenway *v.* Abbott, 97 Pac. 190.

Iowa. — Semper *v.* Englehart, 118 N. W. 318.

Kentucky. — Sullivan *v.* Hodgkin, 11 Ky. L. Rep. 642, 12 S. W. 773.

Maine. — O'Brien's Appeal, 100 Me. 156, 60 Atl. 880.

Michigan. — Hoag *v.* Allen, 152 Mich. 528, 116 N. W. 453.

Minnesota. — Mitchell *v.* Mitchell, 43 Minn. 73, 44 N. W. 885.

Missouri. — West *v.* West, 144 Mo. 119, 46 S. W. 139.

Nebraska. — Kemp *v.* Kemp, 118 N. W. 1069.

New Jersey. — Barker *v.* Streuli, 69 N. J. Eq. 771, 61 Atl. 408; Armstrong *v.* Armstrong, 69 N. J. Eq. 817, 66 Atl. 399.

Pennsylvania. — *In re* Pensyl's Estate, 157 Pa. St. 465, 27 Atl. 669; Caughey *v.* Bridenbaugh, 208 Pa. St. 414, 57 Atl. 821; *In re* Rockey's Estate, 155 Pa. St. 453, 26 Atl. 656; South Side Tr. Co. *v.* McGrew, 219 Pa. St. 606, 69 Atl. 79.

Rhode Island. — Kaul *v.* Brown, 17 R. I. 14, 20 Atl. 10.

Virginia. — Parramore *v.* Taylor, 11 Gratt. 220.

West Virginia. — Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779.

Wisconsin. — *In re* Morgan's Will, 110 Wis. 7, 85 N. W. 644; Meyer *v.* Arends, 126 Wis. 603, 106 N. W. 675; Mueller *v.* Pew, 127 Wis. 288, 106 N. W. 840; Boyle *v.* Robinson, 129 Wis. 567, 109 N. W. 623.

Wright's Exr. *v.* Wright, 32 Ky. L. Rep. 659, 106 S. W. 856, where circumstances relied upon to show undue influence were: Contract in question prepared by attorney other than one preferred by actor; contract in question witnessed, while matter between same parties at the same time was not witnessed, and a recital in actor's previously executed will that he had made advancements to person charged.

For circumstances held sufficient to require reversal of judgment denying probate of will, see *In re* Small's Will, 105 App. Div. 140, 93 N. Y. Supp. 1065; *In re* Holman's Will, 42 Or. 345, 70 Pac. 908; *In re* Keisler's Estate, 213 Pa. St. 9, 62 Atl. 108; *In re* Will of Smith, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665.

Circumstances Sufficient To Reverse Judgment Invalidating Deed. Revels *v.* Revels, 64 S. C. 256, 42

S. E. 111, where the facts were: Grantor of sound mind, fearing that son-in-law would foreclose a mortgage upon her home, conveyed it to her son, in consideration of his paying the mortgage and supporting her. No actual exercise of influence was shown. The supreme court reversed judgment setting aside the deed.

In Bowen *v.* Hughes, 5 Wash. 442, 32 Pac. 98, judgment setting aside a deed was reversed upon proof showing that grantor — daughter of grantee — was two years past majority, that she lived away from home, that her mother had no control over her, and there was no affection between them.

Circumstances Insufficient To Go to Jury. — The trial court is correct in taking from the jury the question of undue influence when the proof merely shows that the person charged had control of actor's person and had opportunities to influence him. Severance *v.* Severance, 90 Mich. 417, 52 N. W. 292.

Ruling of trial court refusing an issue to a jury was held correct where the facts relied upon were, that testator used intoxicating liquor to excess, that the favored legatee supplied him with liquor and was his friend. *In re* Levis' Estate, 140 Pa. St. 179, 21 Atl. 242.

Mental Weakness.—Will in Favor of Person at One Time Unfriendly. The trial court is also justified in refusing to send an issue to a jury when the only evidence on the question of undue influence shows that testatrix was somewhat weak and vacillating in mind, and made a will in favor of a person with whom she was once on unfriendly terms. *In re* McDonald's Estate, 130 Pa. St. 480, 18 Atl. 617.

Testatrix very old, relatives ignored, estate devised to charitable and religious uses. Wingert's Estate, 199 Pa. St. 427, 49 Atl. 281.

Wife Charged With Undue Influence. — Children by former marriage excluded in favor of second wife and children. Testator dissatisfied with will after execution. Wife had possession of will and refused to produce it. Wife unkind to testator. Lee *v.* Williams, 111 N. C. 200, 16 S. E. 175.

For other cases of circumstances held insufficient to go to the jury, see the following cases:

California. — *In re* Morey's Estate, 147 Cal. 495, 82 Pac. 57 (will drawn by legatee, confirmed by testator).

District of Columbia. — *In re* McLane's Estate, 21 D. C. 554; Kultz *v.* Jaeger, 29 App. Cas. 300.

Illinois. — Wickes *v.* Walden, 228 Ill. 56, 81 N. E. 798.

Iowa. — Hanrahan *v.* O'Toole, 117 N. W. 675.

Michigan. — Blackman *v.* Andrews, 150 Mich. 322, 114 N. W. 218; *In re* More's Estate, 153 Mich. 695, 117 N. W. 329; Peninsular Tr. Co. *v.* Barker, 116 Mich. 333, 74 N. W. 508; Kneisel *v.* Kneisel, 143 Mich. 384, 106 N. W. 1114.

Missouri. — Likins *v.* Likins, 122 Mo. 279, 27 S. W. 531; Couch *v.* Gentry, 113 Mo. 248, 20 S. W. 890; Doherty *v.* Gilmore, 136 Mo. 414, 37 S. W. 1127; Tibbe *v.* Kamp, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; Hamburger *v.* Rinkel, 164 Mo. 398, 64 S. W. 104.

New York. — Cornwell *v.* Riker, 2 Dem. 354.

North Carolina. — Lee *v.* Williams, 111 N. C. 200, 16 S. E. 175.

Pennsylvania. — *In re* Foster's Estate, 142 Pa. St. 62, 21 Atl. 798; *In re* Tallman's Estate, 148 Pa. St. 286, 23 Atl. 986; Miller *v.* Oestrich, 157 Pa. St. 264, 27 Atl. 742 (involving relations of friendship and nursing of testatrix by person charged); *In re* Johnson's Estate, 159 Pa. St. 630, 28 Atl. 448 (unlawful relation); *In re* Schneeweiss' Estate, 219 Pa. St. 627, 69 Atl. 45; *In re* Allison's Estate, 210 Pa. St. 22, 59 Atl. 318; *In re* Logan's Estate, 195 Pa. St. 282, 45 Atl. 729 (beneficiary acting as testator's agent; procuring draughtsman of will; concealing fact of execution from child of testator; testator "drowsy;" unequal will); *In re* Wingert's Estate, 199 Pa. St. 427, 49 Atl. 281 (circumstances: religious uses preferred to relatives; testatrix intimate with clergyman, who knew of her intentions and advised making devises for religious purposes); *In re* Adams' Estate, 201 Pa. St. 502, 51 Atl. 368; *s. c.*, 10 Pa. Dist. 237 (circumstances: person charged son of beneficiary; rendered trifling services; advice once asked and rejected;

which have been held, when standing alone, insufficient to establish undue influence is given in the notes.[34]

wrote will, but without persuasion from himself or his mother; prior will written by stranger made same provisions as will in question; latter will retained by testatrix some days before execution; will conformed with declarations of testatrix.

34. As to Actor. — Belief in Spiritualism. — That testator was a spiritualist is not sufficient to show undue influence in the absence of proof showing that his will was the result of the action of spirit mediums, or of belief in the effective action of spirits. *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392.

The fact that testator was very fond of an omitted child is not sufficient. *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110.

Fact of Execution of Prior Will. The fact that prior to execution of the will in question, testator made a will giving more to his children and less to his wife than given by the will in contest, is not admissible, in absence of proof to the effect that, during the interval between the two wills testator did not make advancements to his children. Rankin *v.* Rankin, 61 Mo. 295.

Expression of Dissatisfaction With Will, coupled with fact that testator lived several weeks after execution, and died without making alterations. *In re* McKenna's Will, 4 N. Y. Supp. 458.

Change of Intention. — The fact that a will in question is radically different from testator's prior expressed testamentary intention is not, alone, sufficient. *In re* Nelson's Will, 39 Minn. 204, 39 N. W. 143; Horn *v.* Pullman, 72 N. Y. 269; Wood *v.* Bishop, 1 Dem. (N. Y.) 512.

That the will in question differed from a former will made by testator is not evidence of undue influence in obtaining the second will. Johnson *v.* Johnson, 134 Iowa 33, 111 N. W. 430. See also the following cases:

District of Columbia. — Estate of McLane, 21 D. C. 554, 583.

New Jersey. — *In re* Barber's Will, 49 Atl. 826; Byrnes *v.* Gibson 68 Atl. 756.

New York. — *In re* Bennett's Will, 6 N. Y. Supp. 199; *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791; *In re* Mabie's Will, 5 Misc. 179, 24 N. Y. Supp. 855; *In re* Clark's Will, 5 Misc. 68, 25 N. Y. Supp. 712; *In re* Skaats' Will, 74 Hun 462, 26 N. Y. Supp. 494; *In re* Johnson's Will, 7 Misc. 220, 27 N. Y. Supp. 649.

Pennsylvania. — Slater *v.* Slater, 209 Pa. St. 194, 58 Atl. 267.

Texas. — Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Barry *v.* Graciette (Tex. Civ. App.), 71 S. W. 309.

So if testator had said he was satisfied with the distribution made in cases of intestacy, and afterwards makes a will. Kaul *v.* Brown, 17 R. I. 14, 20 Atl. 10.

As to Person Charged. — Motive or Interest. — The existence of a motive to exercise such influence is not, alone, sufficient.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 35 Am. St. Rep. 734.

Missouri. — Riley *v.* Sherwood, 144 Mo. 354, 366, 45 S. W. 1077; Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32.

New Jersey. — Turnure *v.* Turnure, 35 N. J. Eq. 437; Stoutenburgh *v.* Hopkins, 43 N. J. Eq. 577, 12 Atl. 689.

New York. — Cudney *v.* Cudney, 68 N. Y. 148; *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107; LaBau *v.* Vanderbilt, 3 Redf. 384; Bicknell *v.* Bicknell, 2 Thomp. & C. 96; *In re* Dunham's Will, 48 Hun 618, 1 N. Y. Supp. 120, *affirmed*, 121 N. Y. 575, 24 N. E. 932; Callery *v.* Miller, 1 N. Y. Supp. 88, 16 N. Y. St. 437; *In re* DeBaun's Estate, 9 N. Y. Supp. 807, 32 N. Y. St. 279.

Oregon. — Hubbard *v.* Hubbard, 7 Or. 42.

Opportunity To Exercise Influence.

Iowa. — Gates *v.* Cole, 137 Iowa 613, 115 N. W. 236; Slaughter *v.* McManigal, 116 N. W. 726.

Massachusetts. — Maynard *v.* Tyler, 108 Mass. 105, 115, 46 N. E. 413.

2. Declarations and Admissions. — A. Declarations of Actor. a. *When Admissible.* — **(1.) Generally.** — Declarations of testator,

Michigan. — Porter *v.* Throop, 47 Mich. 313, 324, 11 N. W. 174; Severance *v.* Severance, 90 Mich. 417, 52 N. W. 292; Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394.

Minnesota — *In re* Nelson's Will, 39 Minn. 204, 39 N. W. 143; *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; Little *v.* Little, 83 Minn. 324, 86 N. W. 408.

Missouri. — Riley *v.* Sherwood, 144 Mo. 354, 366, 45 S. W. 1077; Schierbaum *v.* Schemme, 157 Mo. 1, 15, 57 S. W. 526, 80 Am. St. Rep. 604; Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32.

Nebraska. — Isaac *v.* Halderman, 76 Neb. 823, 107 N. W. 1016.

New Jersey. — *In re* Barber's Will, 49 Atl. 826; *In re* Gilham's Will, 64 N. J. Eq. 715, 52 Atl. 690; Grant *v.* Stamler, 68 N. J. Eq. 555, 59 Atl. 890; Turnure *v.* Turnure, 35 N. J. Eq. 437, *affirmed*, 37 N. J. Eq. 629; Dumont *v.* Dumont, 46 N. J. Eq. 223, 19 Atl. 467; Schuchhardt *v.* Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485.

New York. — *In re* Atchley's Will, 108 N. Y. Supp. 877; Cudney *v.* Cudney, 68 N. Y. 148; *In re* Martin, 98 N. Y. 193; *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107; Wood *v.* Bishop, 1 Dem. 512; Hagan *v.* Yates, 1 Dem. 584, 595; Mairs *v.* Freeman, 3 Redf. 181; Ewen *v.* Perrine, 5 Redf. 640; Bicknell *v.* Bicknell, 2 Thomp. & C. 96; *In re* Dunham's Will, 48 Hun 618, 1 N. Y. Supp. 120; *In re* DeBaun's Estate, 9 N. Y. Supp. 807, 32 N. Y. St. 279; *In re* Phalen's Will, 64 Hun 639, 19 N. Y. Supp. 358; *In re* Mabie's Will, 5 Misc. 179, 24 N. Y. Supp. 855; *In re* Spratt's Will, 4 App. Div. 1, 38 N. Y. Supp. 329, *reversing* 11 Misc. 218, 32 N. Y. Supp. 1092; *In re* Murphy's Will, 41 App. Div. 153, 58 N. Y. Supp. 450; *In re* Dixon's Will, 42 App. Div. 481, 59 N. Y. Supp. 421; *In re* Bolles' Will, 37 Misc. 562, 75 N. Y. Supp. 1062; *In re* Hawley's Will, 44 Misc. 186, 89 N. Y. Supp. 803, *affirmed*, without opinion, 100 App. Div. 513, 91 N. Y. Supp. 1097.

Oregon. — Hubbard *v.* Hubbard, 7 Or. 42.

Texas. — Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 606; Trezevant *v.* Rains, 85 Tex. 329, 23 S. W. 890; Barry *v.* Graciette (Tex. Civ. App.), 71 S. W. 309.

West Virginia. — Woodville *v.* Woodville, 60 S. E. 140.

Testator Prejudiced Against Contestant by Devisees. — Mitchell *v.* Mitchell, 43 Minn. 73, 44 N. W. 885; *In re* Corblis' Will (N. J.), 52 Atl. 996, *affirmed*, 65 N. J. Eq. 768, 55 Atl. 1132.

Charges by Favored Legatee Against Contestant. — Dumont *v.* Dumont, 46 N. J. Eq. 223, 235, 19 Atl. 467, *cited* with approval in Salter *v.* Fly, 56 N. J. Eq. 357, 39 Atl. 365, *affirmed*, 58 N. J. Eq. 581, 43 Atl. 1098; Stewart *v.* Jordan, 50 N. J. Eq. 733, 26 Atl. 706. In this case testator had for years entertained strong feelings against the Roman Catholic religion. Devisee wrote letters to testator referring to the fact that contestant was a Roman Catholic, a fact already known to testator, who had stated that no part of his estate should ever be used to assist that church. *Held*, not sufficient to show undue influence.

Attempts To Estrange Testator and Family. — Nor is undue influence shown to have been exercised by a certain person by proof showing that such person attempted to estrange testator from his children. Stant *v.* Am. S. & T. Co., 23 App. Cas. (D. C.) 25.

Deception. — That testator was induced to make a will by false statements of devisee does not show undue influence. Howell *v.* Troutman, 53 N. C. (8 Jones' L.) 304. In this case a woman falsely stated to testator that he was the father of her child. Testator made both mother and child beneficiaries of his will. There was no evidence that the woman solicited testator to make the will, or was in any manner connected with its execution. *Held*, not sufficient to show undue influence.

Acquiescence in Actor's View of Another's Conduct. — Where will is attacked on the ground of undue influence exercised by a certain person,

when made a reasonable time before or after the execution of a will, are admissible to establish everything concerning testator him-

such influence is not shown by proof that the person charged acquiesced in testator's views concerning the conduct of contestant which caused testator to omit the latter from the will. Zelozoskei *v.* Mason, 64 N. J. Eq. 327, 54 Atl. 97.

Request. — That wife requested her husband to appoint her executrix of his will. Black *v.* Foljambe, 39 N. J. Eq. 234.

Request To Make Will. — Undue influence is not shown by the fact that beneficiaries under a will caused a third person to request testator to make a will, nothing being said to such person, or by him to testator, concerning the terms of such will. *In re* Seagrist's Will, 1 App. Div. 615, 37 N. Y. Supp. 496, *affirming* 11 Misc. 188, 32 N. Y. Supp. 1095; *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392; *In re* Dwyer's Will, 29 Misc. 382, 61 N. Y. Supp. 903; *In re* Cruger's Will, 36 Misc. 272, 73 N. Y. Supp. 412; McIntire *v.* McConn, 28 Iowa 480.

Deed. — So as to the fact that grantees advised and encouraged the execution of deeds. Seat *v.* McWhirter, 93 Tenn. 542, 569, 29 S. W. 220; Pritchard *v.* Pritchard, 2 Tenn. Ch. App. 294.

Beneficiary's Knowledge of Testator's Intention is insufficient. *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107.

Participation, Alone, Insufficient. McCoon *v.* Allen, 45 N. J. Eq. 708, 719, 17 Atl. 820.

Memorandum for Will Prepared by Beneficiary is not, alone, sufficient evidence of such influence. *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791.

That part of the will in question was drawn by the wife of the person alleged to have exercised undue influence. Blanchard *v.* Nestle, 3 Denio (N. Y.) 37.

That Beneficiary Communicated Provisions of Will to Scrivener who prepared it, is insufficient. *In re* Smith, 98 N. Y. 193; *In re* Westerman's Will, 29 Misc. 409, 61 N. Y. Supp. 1065; Gilman *v.* Ayer (N. J.), 47 Atl. 1049, *affirmed*, 63 N. J. Eq. 806, 52 Atl. 1131.

Terms of Will Stated to Draughtsman by Devisee. — *In re* McKenna's Will, 4 N. Y. Supp. 458. In this case upon draughtsman's inquiry to testator as to proposed disposition, testator's wife, who was favored devisee and person charged, said everything was to go to her. Testator being asked if that was so, answered "Yes." To same effect, see Armstrong *v.* Armstrong, 63 Wis. 162, 23 N. W. 407.

Beneficiary Present at Execution of Will is not, alone, sufficient. Fritz *v.* Turner, 46 N. J. Eq. 515, 22 Atl. 125; *In re* Westerman's Will, 29 Misc. 409, 61 N. Y. Supp. 1065; Delgado *v.* Gonzales (Tex. Civ. App.), 28 S. W. 459.

Subsequent Conduct of Proponent. Conduct of proponent, subsequent to testator's death, showing animosity toward contestants, insufficient. *In re* Nelson's Will, 39 Minn. 204, 39 N. W. 143.

Refusal To Produce Will. — Nor is such influence shown by the circumstance that the person charged had possession of testator's will, and refused to produce it. Lee *v.* Williams, 111 N. C. 200, 16 S. E. 175.

That Person Charged Lived With Actor, and had a general influence over him. Latham *v.* Schaal, 25 Neb. 535, 41 N. W. 354.

Confidential Relation Alone Insufficient. — Latham *v.* Schaal, 25 Neb. 535, 41 N. W. 354.

Parent and Child. — Proof that person charged was child of actor is insufficient. *In re* Martin's Will, 98 N. Y. 193.

Relationship, Actual Trust and Confidence. — Business Advice. — *In re* McLaughlin's Will, 69 N. J. Eq. 479, 59 Atl. 892.

Agent Appointed Executor. — *In re* Dwyer's Will, 29 Misc. 382, 61 N. Y. Supp. 903.

Person With Whom Testator Had Contract Named as Executor. — *In re* Sutherland's Will, 28 Misc. 424, 59 N. Y. Supp. 989.

Friendship. — Services. — Tawney

self — his memory, intentions, idiosyncrasies, prejudices, affections, relations with and feelings toward beneficiaries and those who, if he

v. Long, 76 Pa. St. 106, 114; Caughey *v.* Bridenbaugh, 208 Pa. St. 414, 432, 57 Atl. 821.

That Testator Lived Near Beneficiaries — *In re* Palmateer's Will, 78 Hun 43, 28 N. Y. Supp. 1062.

Servant. — Nor is the fact that beneficiary was a servant of testator, where will was made from the promptings of affection and gratitude. *In re* Halbert's Will, 15 Misc. 308, 37 N. Y. Supp. 757.

Physician and Patient. — The fact that person charged was actor's physician is not, alone, sufficient to show undue influence. Penn Mut. L. Ins. Co. *v.* Union Trust Co., 83 Fed. 891.

Devise to Spiritual Adviser. — *In re* Hoilohan's Will, 52 Hun 614, 5 N. Y. Supp 342, *affirming* 6 Dem. 166; Caughey *v.* Bridenbaugh, 208 Pa. St. 414, 57 Atl. 821.

Unpleasant Relations. — That grantor did not treat grantee with due respect is not sufficient. Ravens *v.* Nau, 110 Mo. 416, 19 S. W. 823.

Family Disagreements Alone Are Insufficient. — *California.* — Estate of Motz, 136 Cal. 558, 69 Pac. 294.

District of Columbia. — Stant *v.* Am. S. & T. Co., 23 App. Cas. 25.

Missouri. — Hamilton *v.* Armstrong, 120 Mo. 597, 625, 25 S. W. 545.

New Jersey. — Stewart *v.* Stewart, 56 N. J. Eq. 761, 40 Atl. 438; Dumont *v.* Dumont, 46 N. J. Eq. 223, 19 Atl. 467.

New York. — *In re* McKenna's Will, 4 N. Y. Supp. 458; *In re* Brunor's Will, 19 Misc. 203, 43 N. Y. Supp. 1141.

Pennsylvania. — *In re* Hook's Estate, 207 Pa. St. 203, 56 Atl. 428.

Wisconsin. — *In re* Butler's Will, 110 Wis. 70, 85 N. W. 678.

Disparity of Age Between Actor and Beneficiary. — The fact that grantor was sixty-five and her husband, grantee, twenty-six, is not, alone, sufficient to show undue influence. Ravens *v.* Nau, 110 Mo. 416, 19 S. W. 823. To same effect, see Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

Unlawful Relation Between Actor and Person Charged. — *District of Columbia.* — Stant *v.* Am. S. & T. Co., 23 App Cas. 25.

Maryland. — Saxton *v.* Krumm, 107 Md. 393, 68 Atl. 1056.

Michigan. — Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394.

Missouri. — Weston *v.* Hanson, 212 Mo. 248, 111 S. W. 44.

New York. — *In re* Rand's Will, 28 Misc. 465, 59 N. Y. Supp. 1082; *In re* Mondorf's Will, 110 N. Y. 450, 18 N. E. 256; *In re* Westerman's Will, 29 Misc. 409, 61 N. Y. Supp. 1065; *In re* Hamilton's Will, 29 Misc. 724, 62 N. Y. Supp. 820; *In re* Eddy's Estate, 41 Misc. 283, 84 N. Y. Supp. 218; *In re* Jones' Will, 85 N. Y. Supp. 294; Scott *v.* Barker, (App. Div.), 113 N. Y. Supp. 695.

Pennsylvania. — *In re* Johnson's Estate, 159 Pa. St. 630, 28 Atl. 448; *In re* Lewis' Estate, 210 Pa. St. 599, 60 Atl. 260; Allshouse *v.* Kelly, 69 Atl. 88.

Request for Purpose of Having Masses Said for the soul of testator or the souls of deceased relatives of testator is not sufficient to show undue influence. Martin *v.* Bowdern, 158 Mo. 379, 59 S. W. 227; Newton *v.* Carbery, 5 Cranch C. C. (U. S.) 626.

Bequest for Religious Purposes. Testator Not Religious. — *In re* Johnson's Will, 28 Misc. 363, 59 N. Y. Supp. 906.

That Will Makes no Provision for a Child is not sufficient. Heath *v.* Koch, 74 App. Div. 338, 77 N. Y. Supp. 513, *affirmed*, 173 N. Y. 629, 66 N. E. 1110; *In re* Eddy's Estate, 41 Misc. 283, 84 N. Y. Supp. 218; Woodward *v.* James, 3 Strobh. L. (S. C.) 552, 51 Am. Dec. 649.

Grant to Several Children to Exclusion of Others. — Carter *v.* Dilley, 167 Mo. 564, 67 S. W. 232.

Favored Children. — The fact that proponents of will were favored children to testatrix and more attentive to her than her other children does not show undue influence. *In re* Hook's Estate, 207 Pa. St. 203, 56 Atl. 428; Nicholas *v.* Kershner, 20 W. Va. 251.

Deed Favoring One Child. — Vance

had died intestate, would have been entitled to share in the distribu-

v. Davis, 118 Wis. 548, 95 N. W. 939.

Preference for One Child — Intimate Associations — Actor in Ill Health. — Nailor *v.* Nailor, 5 Mackey (D. C.) 93, 101. Appeal dismissed for want of jurisdiction, see 127 U. S. 787.

Son-in-Law Preferred to Children. *In re* Journeay's Will, 15 App. Div. 567, 44 N. Y. Supp. 548, *affirmed*, without opinion, 162 N. Y. 611, 57 N. E. 1113.

Collateral Relatives Preferred to Family. — Coffin *v.* Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Campbell *v.* Carlisle, 162 Mo. 634, 647, 63 S. W. 701; *In re* Hoffmann's Estate, 151 Mich. 595, 115 N. W. 690.

Strangers Preferred to Relatives. *Michigan.* — *In re* Hoffmann's Estate, 151 Mich. 595, 115 N. W. 690.

Missouri. — Campbell *v.* Carlisle, 162 Mo. 634, 647, 63 S. W. 701.

Nebraska. — *In re* Isaac's Estate, 76 Neb. 823, 107 N. W. 1016.

New York. — *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791; *In re* Clark's Will, 5 Misc. 68, 25 N. Y. Supp. 712; Clarke *v.* Schell, 84 Hun 28, 31 N. Y. Supp. 1053; *In re* Cleveland's Will, 28 Misc. 369, 59 N. Y. Supp. 985; *In re* Bolles' Will, 37 Misc. 562, 75 N. Y. Supp. 1062.

Pennsylvania. — Trost *v.* Dingler, 118 Pa. St. 259, 268, 12 Atl. 296; *In re* Wingert's Estate, 199 Pa. St. 427, 49 Atl. 281; Caughey *v.* Bridenbaugh, 208 Pa. St. 414, 57 Atl. 821.

Unequal or Unjust Will. — In the absence of other proof of undue influence, the fact that the will is unequal and unjust in its provisions are not sufficient to go to the jury. Doherty *v.* Gilmore, 136 Mo. 414, 37 S. W. 1127; Hughes *v.* Rader, 183 Mo. 630, 709, 82 S. W. 32. See also the following cases:

California. — *In re* Donovan's Estate, 140 Cal. 390, 73 Pac. 1081.

District of Columbia. — Estate of McLane, 21 D. C. 554, 581.

Illinois. — Donnan *v.* Donnan 236 Ill. 341, 86 N. E. 279.

Iowa. — Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110; Johnson *v.* Johnson, 134 Iowa 33, 111 N. W. 430.

Maryland. — Saxton *v.* Krumm, 107 Md. 393, 68 Atl. 1056.

Minnesota. — Storer's Will, 28 Minn. 9, 8 N. W. 827.

New Jersey. — *In re* Barber's Will, 49 Atl. 826.

New York. — *In re* Hall's Will, 50 Hun 606, 3 N. Y. Supp. 288, *affirmed*, without opinion, 117 N. Y. 643, 24 N. E. 455; *In re* Lasak, 57 Hun 417, 10 N. Y. Supp. 844, *affirmed*, 131 N. Y. 624, 30 N. E. 112; *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791; *In re* Mabie's Will, 5 Misc. 179, 24 N. Y. Supp. 855; *In re* Skaats' Will, 74 Hun 462, 26 N. Y. Supp. 494; *In re* Hamilton's Will, 29 Misc. 724, 62 N. Y. Supp. 820; *In re* Woodward's Will, 52 App. Div. 494, 65 N. Y. Supp. 405, *reversed* on ground that court erred in excluding testimony as to value of testator's estate, and in excluding certain declarations of testator, 167 N. Y. 28, 60 N. E. 233.

North Carolina. — Lee *v.* Williams, 111 N. C. 200, 16 S. E. 175.

Oregon. — Hubbard *v.* Hubbard, 7 Or. 42; *In re* Holman's Will, 42 Or. 345, 358, 70 Pac. 908.

South Carolina. — Woodward *v.* James, 3 Strobh. L. 552, 51 Am. Dec. 649; Means *v.* Means, 5 Strobh. L. 167, 191.

Wisconsin. — Cutler *v.* Cutler, 103 Wis. 258, 79 N. W. 240.

Secrecy in Execution. — Coffin *v.* Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Fox *v.* Martin, 104 Wis. 581, 80 N. W. 921; Tibbe *v.* Kamp, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939.

Deed at Same Time as Will. — Nor is it sufficient that at the time of the execution of the will testatrix executed a deed to be delivered after her death, conveying to the favored devisee certain land, on condition that he pay her estate a certain sum, it appearing that such sum was less than the value of the land. Hook's Estate, 207 Pa. St. 203, 56 Atl. 428.

Subscribing Witness Alone In-

tion of his estate, and towards those charged with undue influence.[35] They are admissible to show mental condition of testator, annoyances to which he may have been subjected by importunities, his susceptibility to the influence of those in whose care he was, his want of mental vigor to resist influence, his relations to his family, the terms upon which he stood with them, the claims of particular individuals.[36]

(2.) To Show State of Mind. — (A.) GENERALLY. — Declarations of testator, made about the time his will was executed, are admissible to show his mental condition; also to show whether or not his mind was in condition to resist importunity or influence.[37]

formed of Will. — Gavitt *v.* Moulton, 119 Wis. 35, 96 N. W. 395.

Improvidence of Gift. — Rottenburgh *v.* Fowl (N. J. Eq.), 26 Atl. 338.

35. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687; Cockeram *v.* Cockeram, 17 Ill. App. 604; Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456; Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

36. Cockeram *v.* Cockeram, 17 Ill. App. 604.

37. *California.* — *In re* Arnold's Estate, 147 Cal. 583, 593, 82 Pac. 252; *In re* Calkins, 112 Cal. 296, 44 Pac. 577.

District of Columbia. — Barbour *v.* Moore, 4 App. Cas. 535, 553; 10 App. Cas. 30.

Georgia. — Dennis *v.* Weekes, 51 Ga. 24, *approved* in Mallery *v.* Young, 94 Ga. 804, 22 S. E. 142 (where issue was fraud); Credille *v.* Credille, 123 Ga. 673, 51 S. E. 628, 107 Am. St. Rep. 133.

Illinois. — Hill *v.* Bahrns, 158 Ill. 314, 41 N. E. 912; England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526; Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56 (grantor); Cockeram *v.* Cockeram, 17 Ill. App. 604.

Iowa. — Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Smith *v.* Ryan, 136 Iowa 335, 112 N. W. 8; Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072 (mental capacity); Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236; *In re* Goldthorp's Estate, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400.

Kansas. — Mooney *v.* Olsen, 22 Kan. 69.

Kentucky. — Lucas *v.* Cannon, 13 Bush 650.

Maryland. — Griffith *v.* Diffenderffer, 50 Md. 466.

Massachusetts. — Woodbury *v.* Obear, 7 Gray 467; Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430.

Michigan. — Harring *v.* Allen, 25 Mich. 505; Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628; Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566.

Mississippi. — Sheehan *v.* Kearney, 21 So. 41.

Missouri. — Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Gibson *v.* Gibson, 24 Mo. 227.

New Jersey. — Rusling *v.* Rusling, 36 N. J. Eq. 603, *affirming* 35 N. J. Eq. 120; *In re* Sickles' Will, 63 N. J. Eq. 233, 50 Atl. 577, *affirmed,* 64 N. J. Eq. 791, 53 Atl. 1125.

New York. — Waterman *v.* Whitney, 11 N. Y. 157, 62 Am. Dec. 71; *In re* Green's Will, 20 N. Y. Supp. 538, 48 N. Y. St. 450, *affirmed,* without opinion, 22 N. Y. Supp. 1112, 51 N. Y. St. 938; *In re* Woodward, 167 N. Y. 28, 60 N. E. 233, *reversing* 52 App. Div. 494, 65 N. Y. Supp. 405; Chambers *v.* Chambers, 61 App. Div. 299, 70 N. Y. Supp. 483.

Pennsylvania. — Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95; Robinson *v.* Robinson, 203 Pa. St. 400, 425, 53 Atl. 253.

Tennessee. — Peery *v.* Peery, 94 Tenn. 328, 29 S. W. 1; Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152.

Texas. — Hart *v.* Hart (Tex. Civ. App.), 110 S. W. 91.

Utah. — *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

West Virginia. — Thompson *v.* Updegraff, 3 W. Va. 629, 637; Dinges

(B.) Prior. — Declarations of testator made prior to execution of will are competent as showing his mental capacity, and bearing upon the question of undue influence.[38]

(C.) Subsequent. — Declarations of testator made shortly after the execution of his will are admissible to show his state of mind, as the condition of one's mind a few days after a given act presents evidence of what it was at the time of the act.[39]

(D.) Not Necessarily Part of Res Gestae. — Testator's declarations have been held admissible, though not part of the *res gestae*, if the fair inference from all the circumstances is, that such declarations show the testator's mind at the time of executing the will.[40]

v. Branson, 14 W. Va. 100, 118 (action to set aside deed).

Wisconsin. — Bryant *v.* Pierce, 95 Wis. 331, 339, 70 N. W. 297.

In Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98, it is held that declarations of testator concerning his testamentary intent are admissible to show his state of mind. See also Robinson *v.* Hutchinson, 26 Vt. 38, 60 Am. Dec. 298; Reynolds *v.* Adams, 90 Ill. 134, 32 Am. Rep. 15; Jones *v.* McLellan, 76 Me. 49; Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95; *In re* Calkins, 112 Cal. 296, 44 Pac. 577.

Of such declarations the court of appeals of West Virginia says, in Thompson *v.* Updegraff, 3 W. Va. 629: "This class of evidence is dangerous in its character, and is to be received with great caution. The only legitimate purpose of this sort of evidence is to show a condition of mind in which its free agency may be easily overcome by the improper influences of those surrounding the testator, and to lay the foundation for the introduction of other and more direct testimony showing that such improper influences were in fact exerted. The declarations themselves are no evidence that improper influences were exerted."

38. *Alabama.* — Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

Iowa. — Estate of Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400.

Kansas. — Mooney *v.* Olsen, 22 Kan. 69.

Massachusetts. — Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073 (relates to transfer of bank book).

Michigan. — Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628; Walts *v.* Walts, 127 Mich. 607, 86 N. W. 1030.

Missouri. — Rule *v.* Maupin, 84 Mo. 587; McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506; Crowson *v.* Crowson, 172 Mo. 691, 72 S. W. 1065.

New York. — *In re* Clark, 40 Hun 233.

Pennsylvania. — Hindman *v.* Van Dyke, 153 Pa. St. 243, 25 Atl. 772.

Tennessee. — Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152.

39. *Alabama.* — Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459, 470.

Illinois. — Moore *v.* Gubbins, 54 Ill. App. 163; Cockeram *v.* Cockeram, 17 Ill. App. 604.

Iowa. — Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

Massachusetts. — May *v.* Bradlee, 127 Mass. 414; Shailer *v.* Bumstead, 99 Mass. 112.

New Jersey. — Rusling *v.* Rusling, 36 N. J. Eq. 603, *affirming* 35 N. J. Eq. 120.

New York. — *In re* Green's Will, 20 N. Y. Supp. 538, 48 N. Y. St. 450, *affirmed*, 67 Hun 527, 22 N. Y. Supp. 1112, 51 N. Y. St. 938.

Pennsylvania. — McTaggart *v.* Thompson, 14 Pa. St. 149.

Texas. — Campbell *v.* Barrera (Tex Civ. App.), 32 S. W. 724.

Utah. — *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

Vermont. — Crocker *v.* Chase, 57 Vt. 413.

West Virginia. — Dinges *v.* Branson, 14 W. Va. 100.

40. Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Robinson *v.* Hutchinson, 26 Vt. 38, 60 Am. Dec. 298; Dinges *v.* Bran-

(E.) But Must Be Connected. — But the matters testified of should be sufficiently near in point of time that the testimony may be of value in determining the question directly in issue.[41] The declarations must have a natural bearing upon the mental condition or intention of actor at the time of the execution of the act.[42]

(F.) Question of Remoteness for Court. — Whether or not the time referred to in a given question is too remote from the act in question, or whether the circumstances have so changed that declarations made at the time indicated in the interrogatory would not be deemed satisfactory evidence tending to show actor's condition at the earlier period, are questions for the trial judge. If his determination is in favor of admitting the testimony, it goes to the jury for them to determine its weight.[43] But it has been held that the jury should be permitted to consider the question of lapse of time between the making of the declarations and the execution of the act in question, in connection with the declaration itself.[44] Testator's subsequent declarations are not made incompetent by proof that at the time they were made actor's mind was suffering from senile decay.[45]

(G.) Dependent Upon Character of Condition Alleged. — The limitations which govern the admissibility of testator's declarations to

son, 14 W. Va. 100. But see Davis *v.* Davis, 123 Mass. 590.

41. Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; Sanford *v.* Ellithorp, 95 N. Y. 48.

If declarations are offered to show mental condition at time of execution of will, they should not be held incompetent unless they were separated from execution by such length of time, or unless there were such intermediate changes of condition as to convince the court that such declarations would not show testator's condition at time of execution. *In re* Clark, 40 Hun (N. Y.) 233.

42. *California.* — *In re* Kaufman, 117 Cal. 288, 49 Pac. 192.

Idaho. — Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295.

Massachusetts. — Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430.

Nebraska. — Davidson *v.* Davidson, 96 N. W. 409.

New York. — *In re* Clark, 40 Hun 233.

Texas. — Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599.

Vermont. — Crocker *v.* Chase, 57 Vt. 413; Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 263, 24 Atl. 253.

43. Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; Shailer *v.* Bumstead, 99 Mass. 112, 130; Com. *v.* Coe, 115 Mass. 481, 505; Com. *v.* Abbott, 130 Mass. 472; Com. *v.* Robinson, 146 Mass. 571, 580, 16 N. E. 452.

44. Dinges *v.* Branson, 14 W. Va. 100, 119; *In re* Denison's Appeal, 29 Conn. 399, where the court says: "And, in our opinion, the correct course would have been to admit the declaration made by the testator, and let the jury weigh it in connection with the length of time that had elapsed since it was made, and any other circumstances, if any existed, calculated to strengthen or weaken it. . . . The court cannot enter into an inquiry as to the attending circumstances with a view of determining upon the admissibility of the evidence."

45. Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566. But the fact that when testator stated that he was dissatisfied with his will he was suffering from senile decay, was held to show that his declarations then made were not reliable indicia of his mental state at the time of the execution of such will. Rusling *v.* Rusling, 36 N. J. Eq. 603, *affirming* 35 N. J. Eq. 120.

show his mental condition depend largely upon the character of the mental weakness attempted to be shown.[46]

(3.) To Show Susceptibility. — Testator's declarations are admissible to show his susceptibility to influence.[47]

(4.) To Show Actor's Feelings. — (A.) Toward Contestant. — Testator's prior and subsequent declarations as to his feelings toward contestant, and his reason for not recognizing him in his will are admissible.[48] Declarations are also admissible to show testator's feelings toward, or relations with, his family.[49] But statements of testatrix in her last illness that she felt she had all with her when she had certain persons, including the person charged, are irrelevant.[50] Testator's declarations are also admissible to show his feelings toward person charged.[51]

(B.) Toward Others. — But it has been held that such declarations are not admissible to show testator's feelings toward other persons, although such persons were heirs of testator and parents of the person charged.[52]

46. Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95; Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119. See Crocker *v.* Chase, 57 Vt. 413.

47. Wall *v.* Dimmitt, 114 Ky. 923, 72 S. W. 300; Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152.

48. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Estate of Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Canada's Appeal, 47 Conn. 450; Dye *v.* Young, 55 Iowa 433, 7 N. W. 678; Whitman *v.* Morey, 63 N. H. 448, 2 Atl. 899; Seibert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962.

Admissible To Show Feelings Toward Proponent. — Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Mooney *v.* Olsen, 22 Kan. 69.

49. *District of Columbia.* — Barbour *v.* Moore, 4 App. Cas. 535, 554, 10 App. Cas. 30.

Iowa. — *In re* Hollingsworth's Will, 58 Iowa 526, 12 N. W. 590; Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456.

Kentucky. — Lucas *v.* Cannon, 13 Bush 650; Randolph *v.* Lampkin, 90 Ky. 551, 14 S. W. 538.

Maryland. — Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117.

Massachusetts. — Potter *v.* Baldwin, 133 Mass. 427.

Missouri. — McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506, cited as authority in Garland *v.* Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836; Rule *v.* Maupin, 84 Mo. 587; Crowson *v.* Crowson, 172 Mo. 691, 72 S. W. 1065.

New York. — Marx *v.* McGlynn, 88 N. Y. 357.

Tennessee. — Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

Utah. — *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

Vermont. — Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

50. Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599.

51. Potter *v.* Baldwin, 133 Mass. 427; Beaubien *v.* Cicotte, 12 Mich. 459; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Hindman *v.* Van Dyke, 153 Penn. St. 243, 25 Atl. 772.

52. Robinson *v.* Stuart, 73 Tex. 267, 11 S. W. 275. In this case it was charged that the will in question was procured by the undue influence of the daughter and son-in-law of testatrix exercised in favor of their daughter Lulu Roberts. Letters written by testatrix to another granddaughter, complaining of treatment received from Mrs. Roberts and her parents, and speaking unkindly of a brother of Mrs. Roberts were offered to show testatrix' feelings toward the latter, and to corroborate contestant's witnesses. So much of the letters as showed the animus of testatrix toward others

(C.) Change of Feelings. — Declarations of testator made some time prior to execution of his will, to the effect that certain legatees named in his will had no affection for him, are admissible, in connection with other evidence, as bearing upon the question of undue influence.[53]

(D.) Must Constitute Part of Res Gestae. — But unless declarations offered to show the state of testator's feelings were made so near the time of the execution of the will as to constitute a part of the *res gestae,* they do not tend to show that his will was procured by undue influence merely because it did not conform with such expressions.[54]

(E.) May Be Proven False. — In a will contest when testator's declarations have been admitted to show his feelings toward proponent, the latter may prove that the statements so made were false.[55]

(5.) To Show Relations. — Testator's declarations are also admissible to show his relations with those around him and the persons named as beneficiaries under his will.[56]

than Mrs. Roberts was objected to, and the objection was sustained. The supreme court says: "We think there was no error in the ruling. So much of the letters as showed the testatrix's feelings toward Lulu Roberts was admissible. (Johnson *v.* Brown, 51 Tex. 80; Kennedy *v.* Upshaw, 66 Texas 450.) The latter was the principal beneficiary under the will. But neither her father, mother nor brother was a beneficiary and so much of the letters as related to them was not admissible over the objection of the proponent."

53. Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456.

In Seibert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962, it is held that declarations of testator are admissible to show that change of feelings toward contestant was caused by indifference on the part of the latter, and not by any conduct of the person charged.

54. *In re* Langford, 108 Cal. 608, 41 Pac. 701; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459. See also Bunyard *v.* McElroy, 21 Ala. 311; Rule *v.* Maupin, 84 Mo. 587; McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506; Kelly *v.* Perrault, 5 Idaho 221, 48 Pac. 45; *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

In *In re* McDevitt, 95 Cal. 17, 30 Pac. 101, the court says: "Although, therefore, such statements, when made under such circumstances as to show friendliness, are admissible for that purpose, the effect should be carefully limited by the court to the one for which they are admissible. Only so far as the friendly relations of the parties may have such effect can they throw any light upon the testamentary intentions of the decedent at the time of the execution of the will. In fact, in a case like this, where the testator was, beyond question, of sound mind, they were entitled to no weight at all, in the absence of proof of influence as to the very testamentary act."

Where wife was charged with obtaining her husband's will by undue influence, it was held that his statements, made prior to marriage, showing his feelings toward her and her relatives, were too remote. The court also said such statements were properly excluded because the circumstances were so changed by marriage as to render the evidence valueless or actually misleading. Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459.

55. Canada's Appeal, 47 Conn. 450.

56. Marx *v.* McGlynn, 88 N. Y. 357, 388; Chambers *v.* Chambers, 61 App. Div. 299, 70 N. Y. Supp. 483; Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819; *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

"When they are not a part of the *res gestae,* declarations of this nature are excluded because they are un-

Must Constitute Parts of Res Gestae. — But it has been held that such declarations must have been so made, in point of time, as to constitute parts of the *res gestae*.[57]

(6.) Knowledge of Character or Conduct of Another. — Such declarations are also admissible to show that testator had such knowledge of the character or conduct of a person who would naturally be a beneficiary under his will, as would explain the omission of such person.[58]

(7.) To Show Intention. — (A.) TESTAMENTARY. — (a.) *Prior.* — Prior declarations of testator showing his testamentary intent are admissible as showing that the will conformed with such expressions, as a will conforming with such expressions is less likely to have been procured by undue influence than one which does not so conform.[59]

sworn, being hearsay only; and where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, where the mental or testamentary capacity of the deceased is not in issue." Throckmorton *v.* Holt, 180 U. S. 552 (quoted in Kultz *v.* Jaeger, 29 App. Cas. (D. C.) 300). In this case the issues were forgery and revocation.

57. Kultz *v.* Jaeger, 29 App. Cas. (D. C.) 300.

58. Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 264, 24 Atl. 253, where the court held it proper to admit declarations of testatrix which showed that she knew of her husband's reputation and of his conduct with other women.

59. *Alabama.* — Seale *v.* Chambliss, 35 Ala. 19; Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687; Roberts *v.* Trawick, 17 Ala. 55, 52 Am. Dec. 164.

Georgia. — Williamson *v.* Nabers, 14 Ga. 285.

Illinois. — Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113.

Indiana. — Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296.

Iowa. — Estate of Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Dye *v.* Young, 55 Iowa 433, 7 N. W. 678.

Maryland. — Griffith *v.* Diffenderffer, 50 Md. 466; Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117.

Michigan. — Renaud *v.* Pageot, 102 Mich. 568, 61 N. W. 3; McHugh *v.* Fitzgerald, 103 Mich. 21, 61 N. W. 354.

Mississippi. — Sheehan *v.* Kearney, 21 So. 41.

Missouri. — Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552.

New York. — O'Neil *v.* Murray, 4 Bradf. Sur. 311, 323.

Pennsylvania. — Neel *v.* Potter, 40 Pa. St. 483; Hindman *v.* Van Dyke, 153 Pa. St. 243, 25 Atl. 772.

Rhode Island. — Gardner *v.* Frieze, 16 R. I. 640, 19 Atl. 113.

South Carolina. — Farr *v.* Thompson, 1 Spears L. 93; Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

Texas. — Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98.

Vermont. — Thornton's Exrs. *v.* Thornton's Heirs, 39 Vt. 122, 158; Perry *v.* Moore, 66 Vt. 519, 29 Atl. 806.

As to the sufficiency of such declarations, see Patton *v.* Allison, 7 Humph. (Tenn.) 320, 335.

In Forney *v.* Ferrell, 4 W. Va. 729, 739, it was held proper to admit statements of testatrix showing what she proposed to do with the devised property at the time of her death. The opinion does not show whether such statements preceded or followed the will, or whether or not they conformed with it.

(b.) *Subsequent.* — Testator's declarations, made after execution of will, showing his intent, are also admissible.[60]

(c.) *Concerning Former Will.* — Testator's statements concerning provisions of former will are also admissible when such will makes provisions similar to those of the will in question.[61]

(d.) *Must Relate to Testamentary Act in Question.* — Declarations as to testamentary intent must relate to the testamentary act in question.[62] Hence declarations as to a disposition of property otherwise than by the will in question are not competent.[63]

(e.) *Must Not Be Remote.* — Such declarations must not be remote, in point of time, from the execution of the will.[64]

Declarations of testator, made years prior to execution of the will in question, to the effect that he did not intend to make a will, and that certain persons were urging him to make one, are not competent to show undue influence on the part of such persons, being too remote from the time of execution.[65]

(AA.) Admissible, Though Remote, if Connected. — Testator's declarations, as to testamentary intentions, though remote in point of time, are admissible in connection with other evidence of a similar character, proximately connected with the transaction in question.[66]

From the opinion in Sheehan *v.* Kearney (Miss.), 21 So. 41, it seems that the court held that declarations of testamentary intent made at time of execution or prior or subsequent thereto are competent, whether conforming with will or not.

60. Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Sheehan *v.* Kearney (Miss.), 21 So. 41.

61. Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. 837. The question of secondary evidence was not raised in this case.

62. Browne *v.* Molliston, 3 Whart. (Pa.) 129.

Testator's Statement To Provide for All Children. — Statements of testatrix to the effect that, if she ever made a will, not one of her children should be omitted, and that all should share alike, are inadmissible. Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599.

63. Roberts *v.* Trawick, 22 Ala. 490.

In Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233, it was held that evidence showing that testator had requested his principal devisee to "give something" to a certain person was improperly admitted.

64. Browne *v.* Molliston, 3 Whart. (Pa.) 129; Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599; Kultz *v.* Jaeger, 29 App. Cas. (D. C.) 300; Bunyard *v.* McElroy, 21 Ala. 311.

Declarations of testator concerning his testamentary intent, remote from the time of the execution of his will, in regard to the disposition of his property among his children, at a time when he had already made a will which he never changed as to them, in which he had given them only a part of his property, and which he afterwards republished in a codicil, have no value to overcome direct proof that the will was freely executed. *In re* Langford, 108 Cal. 608, 41 Pac. 701.

65. Bunyard *v.* McElroy, 21 Ala. 311.

66. Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687.

Thus, in regard to a series of letters held admissible as showing state of testator's mind, it is said: "The position that some of the letters are too remote in time from the making of the will to be competent would doubtless be tenable if the earlier ones stood alone, but being repeated in substance—that is, the subject-matter of the earlier letters being repeated in those of later dates—makes them all competent as a chain of evidence. No fixed rule

(BB.) Remoteness Affects Weight, Not Admissibility. — Whether or not declarations as to intent are too remote from time of execution, bears rather on the weight of such testimony rather than its admissibility.[67]

(f.) *Admissibility as Affected by Conformity With Present Will.* — It has been held in Illinois that declarations of testamentary intent are not admissible unless in conformity with will subsequently made.[68] But it has been held that testator's declarations of testamentary intention are relevant if they tend to show that the will offered for probate is in conflict with the fixed purposes of testator as previously expressed by him.[69]

(B.) Intention of Grantor. — Declarations of grantor made years prior to execution of deed in question, showing his intention in regard to his then intended disposition of his property are inadmissible when offered to show that deed making a different disposition was procured by undue influence.[70]

(8.) Expressions of Satisfaction or Dissatisfaction.— Declarations of testator, not made in presence of persons alleged to have unduly influenced him, or while he was acting under restraint or coercion, tending to show that the paper propounded had been prepared in accordance with his wishes, and that he was satisfied with it, are admissible.[71] So statements of testator to the effect that he was not satisfied with his will are admissible,[72] though it has been held to

can be laid down as to when such evidence is too remote to be competent. Baker *v.* Baker, 202 Ill. 595, 67 N. E. 410.

67. Renaud *v.* Pageot, 102 Mich. 568, 61 N. W. 3.

68. Cheney *v.* Goldy, 225 Ill. 394, 80 N. E. 289; Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712.

"Declarations at different periods of life as to the views and intentions of the testator in the disposition of his property may be introduced if consistent with the provisions of the will, but are not competent to be considered to invalidate a will as having been made under undue influence." Cheney *v.* Goldy, 225 Ill. 398, 80 N. E. 289; *citing* Compher *v.* Browning, 219 Ill. 429. 76 N. E. 678. See to same effect, Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1; England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526.

69. Seale *v.* Chambliss, 35 Ala. 19; Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117.

"Where the sanity of the testator is in question, and where undue influence is sought to be established, it is competent to give in evidence the declarations of the decedent to show that the disposition of his property by the writing which is propounded for probate is in opposition to his intention, as manifested by his repeated declarations upon the subject." Turner *v.* Cheesman, 15 N. J. Eq. 243.

70. Kelly *v.* Perrault, 5 Idaho 221, 48 Pac. 45.

Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158, which was an action to set aside a deed, and where the court says: "Prior declarations of an intention contrary to the subsequent disposition cannot be shown to establish undue influence in respect to the disposition finally made."

71. Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590.

72. Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564; Shailer *v.* Bumstead, 99 Mass. 112, where it is held that the trial court should have admitted declarations of testatrix to the effect that the will in question was contrary to her real intentions. In Campbell *v.* Barrera

the contrary.[73] And it has been held that declarations of the grantor, subsequent to execution of deed, to the effect that he was dissatisfied with it, and desired a different disposition of the conveyed land, are inadmissible.[74]

(9.) To Show Character of Act. — Testator's declarations made after execution of his will are admissible as bearing upon the unreasonableness or injustice of the act in question, and whether or not it was consistent with the natural impulses of the human heart.[75]

(10.) Testamentary Instructions. — Testator's instructions to attorney drawing his will, to the effect that testator objected to the insertion of the names of certain of his children, are admissible as part of the *res gestae*.[76] But the fact that a will conforms with testator's instructions is not conclusive of its voluntary character.[77]

b. *Admissible in Rebuttal.* — **(1.) Testator's Declarations.** — Testator's declarations made prior to execution of the will, to the effect that he intended to disinherit certain persons, are admissible to rebut testimony tending to show undue influence.[78] So as to his declarations, made prior to the date of his will, showing that he intended leaving his property to a certain person, when the will in question conforms with such declarations.[79] Subsequent declarations of tes-

(Tex. Civ. App.), 32 S. W. 724, expressions of dissatisfaction were held admissible as showing the effect of certain acts upon testator's mind. In Dennis *v.* Weekes, 51 Ga. 24, 32, it was held that expressions of dissatisfaction were admissible to show testator's state of mind, and that he was in a condition to be easily influenced.

73. Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590; *In re* Kaufman, 117 Cal. 288, 49 Pac. 192.

74. Bain *v.* Bain (Ala.), 43 So. 562.

75. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

76. Nelson *v.* McClanahan, 55 Cal. 308.

77. Demmert *v.* Schnell, 4 Redf. (N. Y.) 409.

As said in Bridgman *v.* Green, an English case cited in Tyler *v.* Gardiner, 35 N. Y. 559, "the same power which produces one produces the other."

78. Roberts *v.* Trawick, 17 Ala. 55, 52 Am. Dec. 164. In this case the court says: "The will before us conforms substantially to the declarations attempted to be proved. It gives to the daughters only a small, we might say a nominal, sum. This proof conduced to establish that the testator, many years previous to the execution of the will in controversy, had a fixed and settled purpose to make a will similar to the one he is alleged to have executed. It was then proper, as rebutting the evidence on the part of the contestants, that the will was not the deliberate act of the deceased, but was obtained fraudulently or by the over-persuasion of his wife or others. It tends to show that the provisions in the will which exclude the daughters were not the result of any suggestion made at or near the time when the will was drafted, but that some ten years anterior thereto the testator declared his intention then to disinherit his daughters, which intention was repeated five years afterwards." See also Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

79. *Illinois.* — Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. 837; Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113; Kaenders *v.* Montague, 180 Ill. 300, 54 N. E. 321; Baker *v.* Baker, 202 Ill. 595, 67 N. E. 410; Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678.

Indiana. — Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296.

tator are admissible in rebuttal for the purpose of weakening the presumption of the validity of a will to be drawn from its non-destruction during a period of years.[80] Such declarations are also admissible to rebut the presumption arising from the fact that testator permitted his will to continue unrevoked.[81]

(2.) Donor's Declarations of intention to make the gift in question are admissible to rebut the presumption of undue influence arising from the existence between the parties of relations of trust and confidence.[82]

c. *Competent Only in Connection With Other Evidence.* — To render testators' declarations competent, it is necessary that there be proof of other facts or circumstances tending to show undue influence.[83] Without other evidence such declarations have no pro-

Iowa. — Dye *v.* Young, 55 Iowa 433, 7 N. W. 678.

Pennsylvania. — Hindman *v.* Van Dyke, 153 Pa. St. 243, 25 Atl. 772.

South Carolina. — Kaufman *v.* Caughman, 49 S. C. 159, 169, 27 S. E. 16, 61 Am. St. Rep. 808.

80. In Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566, the supreme court of Michigan says: "The testimony relating to the subsequent conditions and declarations of the testator, and the continuous dominion over him, was admissible for the purpose of weakening the presumption of the validity of the will to be drawn from its non destruction during the period of ten years. The proponent relied upon this presumption, and also offered testimony tending to show the declarations by the testator that this will had been made by him and could not be broken, and evidence of directions to Margaret to resist any attempt to break the will to the utmost. It was clearly competent to meet this inference as well by this affirmative showing as by testimony to show that such nondestruction, as well as such affirmative directions, were made while under the same delusion or dominion as existed or was exerted when the will was made."

81. Shailer *v.* Bumstead, 99 Mass. 112; *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

82. Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087.

83. *California.* — See *In re* McDevitt, 95 Cal. 17, 30 Pac. 101; *In re* Langford, 108 Cal. 608, 41 Pac. 701.

District of Columbia. — Manogue *v.* Herrell, 13 App. Cas. 455.

Iowa. — *In re* Goldthorp's Estate, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Bates *v.* Bates, 27 Iowa 110, 1 Am. Rep. 260.

Massachusetts. — McKeone *v.* Barnes, 108 Mass. 344.

Missouri. — McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506.

Nebraska. — Davidson *v.* Davidson, 96 N. W. 409.

New York. — La Bau *v.* Vanderbilt, 3 Redf. 384, 413; Cudney *v.* Cudney, 68 N. Y. 148.

Pennsylvania. — Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95.

South Carolina. — Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

Tennessee. — Peery *v.* Peery, 94 Tenn. 328, 342, 29 S. W. 1; Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

Texas. — Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599.

In Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295, it is said that declarations showing testator's feelings and his dissatisfaction with his will are entitled to no weight in the absence of proof of undue influence as to the very testamentary act complained of.

The case of Throckmorton *v.* Holt, 12 App. Cas. (D. C.) 552, is cited in Manogue *v.* Herrell, 13 App. Cas. (D. C.) 455, and in several other cases, as authority on the subject of

bative force upon the question of the existence of the alleged influence.[84]

d. *Inadmissible To Show.* — **(1.) Fact of Undue Influence.** — Declarations of the actor are not admissible to show the fact that undue influence was, or was not, exercised to procure the execution of the act in question.[85] But it has been held that testator's declarations

testator's declarations. In Throckmorton *v.* Holt, the issues were forgery and revocation. Testator's declarations were held admissible. In that case and in the cases citing it, it is said that the reasons there given apply with equal force to cases of fraud or undue influence.

In *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665, the supreme court says that the trial court correctly charged the jury that if the evidence, independent and exclusive of the testator's declarations, did not satisfy them that undue influence was used in procuring the making of the will, they must find against contestant on the question of undue influence. The supreme court adds: "And this must of course be so; otherwise the fact would be permitted to be proved by such declarations, though not part of the *res gestae.* The evidence of undue influence must be other than that which proceeds from the testator's own mouth after a will is made."

In Cawthorn *v.* Haynes, 24 Mo. 236, testator's declarations made prior to execution of his will, to the effect that the persons afterwards made legatees should never have any of his property, and declarations after making the will, that he had no will, when alone and supported by no other evidence on the subject, furnished no legal evidence of undue influence. The rule stated in the text is disputed, and the case of Cawthorn *v.* Haynes criticised in Dinges *v.* Branson, 14 W. Va. 100, 117.

In *In re* Kah's Estate, 136 Iowa 116, 113 N. W. 563, it is said that unless positive proof of undue influence be introduced, testator's declarations become immaterial.

84. *Iowa.* — *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110. *Minnesota.* — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; Storer's Will, 28 Minn. 9, 8 N. W. 827.

Nebraska. — *In re* Clapham's Estate, 73 Neb. 492, 103 N. W. 61.

North Carolina. — Linebarger *v.* Linebarger, 143 N. C. 229, 55 S. E. 709.

Tennessee. — Peery *v.* Peery, 94 Tenn. 328, 342, 29 S. W. 1; Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819.

Wisconsin. — *In re* Loennecker's Will, 112 Wis. 461, 88 N. W. 215; Mueller *v.* Pew, 127 Wis. 288, 106 N. W. 840.

85. Declarations of Testator. *Alabama.* — Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459, Adair *v.* Craig, 135 Ala. 332, 33 So. 902.

California. — *In re* Calkins, 112 Cal. 296, 44 Pac. 577; Estate of Gregory, 133 Cal. 131, 65 Pac. 315; *In re* Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *In re* Donovan's Estate, 140 Cal. 390, 73 Pac. 1081.

Connecticut. — *In re* Vivian's Appeal, 74 Conn. 257, 50 Atl. 797.

District of Columbia. — Towson *v.* Moore, 11 App. Cas. 377, 385, *affirmed,* but the point not discussed, 173 U. S. 17.

Georgia. — Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590; Underwood *v.* Thurman, 111 Ga. 325, 36 S. E. 788; Credille *v.* Credille, 123 Ga. 673, 51 S. E. 628, 107 Am. St. Rep. 133.

Idaho. — Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295.

Illinois. — Dickie *v.* Carter, 42 Ill. 376; Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712; Massey *v.* Huntington, 118 Ill. 80, 7 N. E. 269; Bevelot *v.* Lestrade, 153 Ill. 625, 38 N. E. 1056; England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526; Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068, *s. c.* 194 Ill. 408, 62 N. E. 907; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678; Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1.

Indiana. — Hayes *v.* West, 37 Ind. 21; Todd *v.* Fenton, 66 Ind. 25; Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433; Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089.

Iowa. — Wiltsey *v.* Wiltsey, 122 Iowa 423, 98 N. W. 294; *In re* Goldthorp's Estate, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Johnson *v.* Johnson, 134 Iowa 33, 111 N. W. 430; *In re* Kah's Estate, 136 Iowa 116, 113 N. W. 563.

Kentucky. — Wall *v.* Dimmitt, 114 Ky. 923, 72 S. W. 300.

Maine. — Jones *v.* McLellan, 76 Me. 49.

Massachusetts. — Shailer *v.* Bumstead, 99 Mass. 112.

Michigan. — Harring *v.* Allen, 25 Mich. 505; Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628; Zibble *v.* Zibble, 131 Mich. 655, 92 N. W. 348.

Missouri. — Gibson *v.* Gibson, 24 Mo. 227, *approved* in Spoonemore *v.* Cables, 66 Mo. 579, but question not discussed; Garvin *v.* Williams, 44 Mo. 465, 100 Am. Dec. 314; Bush *v.* Bush, 87 Mo. 480; McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506; Doherty *v.* Gilmore, 136 Mo. 414, 37 S. W. 1127; Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642; Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; Crowson *v.* Crowson, 172 Mo. 691, 72 S. W. 1065; Jones *v.* Roberts, 37 Mo. App. 163; Teckenbrock *v.* McLaughlin, 209 Mo. 533, 108 S. W. 46.

Nebraska. — Davidson *v.* Davidson, 96 N. W. 409.

New York. — Lynch *v.* Clements, 24 N. J. Eq. 431; Rusling *v.* Rusling, 35 N. J. Eq. 120; *s. c.* 36 N. J. Eq. 603; Kitchell *v.* Beach, 35 N. J. Eq. 446; Pemberton's Case, 40 N. J. Eq. 520, 4 Atl. 770, *affirmed*, 41 N. J. Eq. 349, 7 Atl. 642; Hammell *v.* Hyatt, 59 N. J. Eq. 174, 44 Atl. 953; Byrnes *v.* Gibson, 68 Atl. 756.

New York. — Jackson *v.* Kniffen, 2 Johns. 31, 3 Am. Dec. 390; Cudney *v.* Cudney, 68 N. Y. 148; Horn *v.* Pullman, 72 N. Y. 269; Marx *v.* McGlynn, 88 N. Y. 357; *s. c.*, 4 Redf. 455; *In re* Clark, 40 Hun 233; LaBau *v.* Vanderbilt, 3 Redf. 384, 411; Neiheisel *v.* Toerge, 4 Redf. 328; Mason *v.* Williams, 53 Hun 398, 6 N. Y. Supp. 479; *In re* Bedell's Will, 12 N. Y. Supp. 96; *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791; *In re* Green's Will, 20 N. Y. Supp. 538, 48 N. Y. St. 450, *affirmed*, without opinion, 22 N. Y. Supp. 1112, 51 N. Y. St. 938; *In re* Palmateer's Will, 78 Hun 43, 28 N. Y. Supp. 1062; *In re* Metcalf's Will, 16 Misc. 180, 38 N. Y. Supp. 1131; Anderson *v.* Carter, 24 App. Div. 462, 49 N. Y. Supp. 255, 266, *affirmed*, without opinion, 165 N. Y. 624, 59 N. E. 1118.

Oregon. — *In re* Turner's Will, 93 Pac. 461.

Pennsylvania. — Moritz *v.* Brough, 16 Serg. & R. 403; Hoshauer *v.* Hoshauer, 26 Pa. St. 404.

South Carolina. — Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

Tennessee. — Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 33 S. W. 819; Earp *v.* Edgington, 107 Tenn. 23, 31, 64 S. W. 40; Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152.

Texas. — Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441; McKay *v.* Peterson (Tex. Civ. App.), 113 S. W. 981 (involving charge that defendant by undue influence caused plaintiff to assign certain promissory notes); Wetz *v.* Schneider (Tex. Civ. App.), 96 S. W. 59.

Vermont. — Richardson *v.* Richardson, 35 Vt. 238.

Virginia. — Wallen *v.* Wallen, 107 Va. 131, 57 S. E. 596 (non-contemporaneous).

Wisconsin. — *In re* Loennecker's Will, 112 Wis. 461, 88 N. W. 215; Mueller *v.* Pew, 127 Wis. 288, 106 N. W. 840.

Inadmissible To Show Threats. Such declarations have been held inadmissible to show that the person charged made threats, the tendency of which would be to induce the performance of the act in question. McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506, where declarations of testatrix to the effect that the person charged had made threats against her were held incompetent.

Inadmissible To Show Fraud. Such declaration are not admissible to show that the person charged obtained influence over actor by fraud and deceit. Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526,

may be admitted to show the exercise of undue influence in the execution of his will.[86]

80 Am. St. Rep. 604. In this case contestant claimed that the will in question was obtained by undue influence of testator's son. It was claimed that the son obtained influence over testator by stating to him that contestant had stolen certain papers from testator. On the trial a witness was permitted to testify that testator had stated to witness that proponent had made testator believe that contestant had taken the papers. *Held,* that the admission of this testimony was erroneous.

Influence of Spirits or Mediums. Testator's declarations are not admissible to show the existence or extent of influence exercised over him by spirits or spirit mediums. Middleditch *v.* Williams, 45 N. J. Eq. 726, 17 Atl. 826.

In Comstock *v.* Hadlyme E. Soc., 8 Conn. 254, 20 Am. Dec. 100, it is held that on the issue of execution of will under undue influence, declarations of testator made after execution of will are not admissible to show such influence. The same doctrine is announced, and Comstock *v.* Hadlyme Soc. cited as authority in Robinson *v.* Hutchinson, 26 Vt. 38, 60 Am. Dec. 298. See also Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296; *In re* Langford, 108 Cal. 608, 41 Pac. 701; Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1; Jones *v.* McLellan, 76 Me. 49; Mooney *v.* Olsen, 22 Kan. 69; Shailer *v.* Bumstead, 99 Mass. 112.

86. Roberts *v.* Trawick, 13 Ala. 68; *s. c.,* 17 Ala. 55; Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456.

In Reel *v.* Reel, 8 N. C. (1 Hawks) 248, 9 Am. Dec. 632, it is held that in contest of a will upon grounds of fraud and undue influence, it is competent to show declarations of testator subsequent to execution of will, to the effect that he understood it to be different from what it really was, particularly in regard to a clause giving the greater part of his estate to the person charged to have exercised undue influence. In its opinion the court states that it disregards the cases of Jackson *v.* Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390, and Smith *v.* Fenner, 1 Gall. (U. S.) 170. Reel *v.* Reel, is followed in Howell *v.* Barden, 14 N. C. (3 Dev. L.) 442 and Linebarger *v.* Linebarger, 143 N. C. 229, 55 S. E. 709.

Reel *v.* Reel, 8 N. C. (1 Hawks) 248, 9 Am. Dec. 632, is followed in Linch *v.* Linch, 1 Lea (Tenn.) 526. From the report of Linch *v.* Linch, it cannot be determined whether the declarations showed fact or effect of influence, or merely showed testator's mental condition or feelings; nor does the report show whether such declarations were prior or subsequent to execution of will.

From language used in Powers *v.* Powers, 25 Ky. L. Rep. 1468, 78 S. W. 152, it would seem that the courts of Kentucky hold testator's declarations admissible to show fact of undue influence. But an examination of the whole opinion indicates that the court intended to hold that such declarations were admissible to show testator's state of mind or feelings.

In Bates *v.* Bates, 27 Iowa 110, declarations of testator to the effect that he was bound to make the will in order to have peace, were admitted. The exact ground of the ruling is not apparent. The court cites Waterman *v.* Whitney, *supra,* to the effect that such declarations are not admissible to show the fact of undue influence, and continues: "But such declarations of the testator, whether made before or after the making of the will, are competent evidence *to show the mental incapacity of the testator, or that the will was procured by undue influence.* We are content to follow this case so far as it is applicable to the point now under consideration. Nor do we deem it necessary to here review the authorities. Under the rule as laid down in that case and here followed, there was no error in admitting the testimony complained of. It was claimed, and

Whole Conversation Admissible. — It has been held that when it is sought to show by contestant of will that the person charged had conversations with testator in which such person dictated the terms of the will in question, the whole conversation may be given in evidence.[87]

Deed. — Declarations of grantor are not admissible to show that a deed executed by him was procured by undue influence.[88]

evidence was given tending to show, that the testator's mind and faculties were impaired by reason of his advanced age, and a material issue was as to the undue influence of the plaintiff over the testator in the making of the will; and upon this question there was other important and substantive testimony besides the declarations proved. These declarations were competent to be received and considered in connection with the substantive facts tending to establish the same issue, also shown in evidence in the case." In Johnson *v.* Johnson, 134 Iowa 33, 111 N. W. 430, the court quotes from Bates *v.* Bates, and says: "The distinction was also noted in Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456, and Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293." What "distinction" is referred to is not apparent. In Stephenson *v.* Stephenson, declarations were held admissible to show effect of influence; and in Manatt *v.* Scott, the court said: "That declarations made by the testatrix are admissible as bearing on capacity and undue influence is well settled" (*citing* Waterman *v.* Whitney, and Bates *v.* Bates). It is probable that the court meant to distinguish between declarations admitted to show the fact of influence, and those admitted to show actor's mental condition or feelings. This would appear to be the case from the fact that in Johnson *v.* Johnson, the court says positively that "Declarations of the testator are never received for the purpose of showing that such influence was exercised."

In Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444, the court says: "The declaration of the testator, that his wife and father-in-law plagued him to go to Lebanon, that they wanted him to give her all, or he would have no rest, that he did not want to go to Lebanon; this would be evidence of weakness of mind, operated upon by excessive and undue importunity."

"It is expressly ruled in Rambler *v.* Tryon, 7 Ser. & R. 94, and in Chess *v.* Chess, 1 Pa. Rep. 16, that the declarations of a testator, although after the execution of the will, are evidence of imbecility of mind. Thus in Rambler *v.* Tryon, the party was permitted to prove declarations of the testator, that his wife and father plagued him to go to Lebanon; that they wanted him to give her all, or he would have no rest; that he did not want to go to Lebanon. This evidence was admitted, because, as the court say, it is evidence of weakness of mind, operated upon by excessive and undue influence. The court appear to have excluded the testimony, because they chose, contrary to the offer, to suppose it was designed to prove duress, for which purpose it would be clearly inadmissible." McTaggart *v.* Thompson, 14 Pa. St. 149.

In Robinson *v.* Robinson, 203 Pa. St. 400, 53 Atl. 253, it is said that in Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444, these declarations were admitted to show testator's state of mind. See Smith *v.* Fenner, 1 Gall. (U. S.) 170.

87. *In re* Potter, 161 N. Y. 84, 55 N. E. 387, *reversing* 17 App. Div. 267, 45 N. Y. Supp. 563.

88. *Alabama.* — Bain *v.* Bain, 43 So. 562.

Idaho. — Kelly *v.* Perrault, 5 Idaho 221, 48 Pac. 45.

Illinois. — Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Burt *v.* Quisenberry, 132 Ill. 385, 24 N. E. 622; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665.

(2.) Effect of Undue Influence. — It has been held that testator's declarations are not admissible to show that undue influence was effective.[89] It has been held, however, that declarations of testator made after execution of the will in question are admissible to show the fact that undue influence accomplished its purpose, and subjected his will to that of the person influencing him.[90] So as to declarations of grantor prior to execution of the deed in question.[91]

(3.) Testator's Conduct Toward Contestant. — It has been held that testator's declarations to the effect that he had caused contestant to form certain vicious habits are not admissible.[92]

(4.) Declarations of Devisees. — Testator's declarations cannot be introduced for the purpose of proving declarations of devisees.[93]

(5.) Statements of Third Persons. — Testator's declarations cannot be received to show that certain persons had made to testator state-

Maryland. — Kerby *v.* Kerby, 57 Md. 345.

West Virginia. — Ritz *v.* Ritz, 60 S. E. 1095 (non-contemporaneous).

89. Estate of Calkins, 112 Cal. 296, 44 Pac. 577.

90. Stephenson *v.* Stephenson, 62 Iowa 163, 17 N. W. 456; O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59; Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; Peery *v.* Peery, 94 Tenn. 328, 29 S. W. 1; Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Campbell *v.* Barrera (Tex. Civ. App.), 32 S. W. 724.

In Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808, the same view is indicated, although the discussion was not necessary. See Haines *v.* Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566, where the language of the opinion indicates confusion between undue influence and fraud. A similar view is indicated in Storer's Will, 28 Minn. 9, 8 N. W. 827, and in Rusling *v.* Rusling, 35 N. J. Eq. 120.

"Such declarations, alone, are not competent evidence to prove acts of others amounting to undue influence, although when the acts are proven, the declarations of the testator may be given in evidence to show the operation they had upon his mind." Cudney *v.* Cudney, 68 N. Y. 148.

91. Howe *v.* Howe, 99 Mass. 88.

In *In re* Sickles' Will, 63 N. J. Eq. 233, 50 Atl. 577, *affirmed*, 64 N. J. Eq. 791, 53 Atl. 1125, undue influence was attempted to be shown by proof that testator had stated that his son, with whom testator lived, had threatened to leave testator alone. The court says: "While proof of the declarations of the testator that Fred. or Euphemia had told him that they were going to leave him are not evidential of this fact, they are evidential that such remarks, if otherwise proved, produced a serious effect upon the mind of the testator."

92. In Randolph *v.* Lampkin, 90 Ky. 551, 14 S. W. 538, which was a will contest, the trial court admitted statements of testator to the effect that he had encouraged L., contestant's father, to drink liquor. The court of appeals holding this ruling erroneous, said: "But the evidence introduced on trial of this case for the purpose of showing that the testator admitted he had encouraged Lewis W. Lampkin to drink liquor, and was, therefore, responsible for his subsequent dissipated and drunken habits, was improperly admitted; for while his purpose was not to injure, but as he said to prevent him dying of consumption, as his brother and sister had done, still the inference was attempted to be drawn, and to operate improperly on the minds of the jury, that he owed a recompense to the children of Lewis W. Lampkin, to be discharged only by devising his estate to them."

93. Thompson *v.* Updegraff, 3 W. Va. 629, 637.

ments, the effect of which would have been to give such persons an influence over him.[94]

(6.) Acts of Third Persons. — Nor can such declarations be received to show the conduct of third persons toward testator.[95]

(7.) Feelings or Disposition of Person Charged. — Declarations of testator are not admissible to show the feelings of the person charged in regard to certain conduct of testator.[96]

(8.) Testator's Reasons. — Testator's declarations of his reasons for making testamentary provision in question are not admissible.[97] But such declarations have been held admissible, in connection with other testimony.[98]

(9.) That No Will Was Made. — Testator's declaration that he had not made a will is not admissible.[99]

B. Declarations or Admissions of Person Charged. — a. *Generally Admissible.* — It is proper to prove declarations of person charged, made shortly before and at the time of the execution of the act alleged to have been procured by his undue influence.[1]

(1.) To Show Intention To Exclude Contestant. — It may be shown

94. Defoe *v.* Defoe, 144 Mo. 458, 46 S. W. 433.

Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293. In this case it was held that testimony was properly admitted showing that testatrix had stated that she had been informed by certain persons that a daughter and son-in-law of testatrix had poisoned testatrix's husband. The court says that these declarations could not be received to show that the persons referred to had made the statements attributed to them, but that her declarations as to such statements did have a tendency to show that her mind was controlled by undue influence.

Testator's Declarations as to Statements of Third Person in regard to a member of the former's family are inadmissible. Defoe *v.* Defoe, 144 Mo. 458, 46 S. W. 433.

95. *In re* Calkins, 112 Cal. 296, 44 Pac. 577; Estate of Gregory, 133 Cal. 131, 65 Pac. 315; Pemberton's Case, 40 N. J. Eq. 520, 4 Atl. 770, *affirmed,* 41 N. J. Eq. 349, 7 Atl. 642.

96. Garland *v.* Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836. In this case testatrix had, in her lifetime, made large gifts to charities. It was sought to show by her declarations what the person charged with influencing her thought on this subject. *Held,* inadmissible.

97. Lynch *v.* Clements, 24 N. J. Eq. 431.

In Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441, testator's declarations stating his reason for withdrawing an allowance from a disinherited child were held inadmissible.

98. Goodloe *v.* Goodloe (Tex. Civ. App.), 105 S. W. 533.

99. Barker *v.* Barker, 36 N. J. Eq. 259; Pemberton's Case, 40 N. J. Eq. 520, 4 Atl. 770, *affirmed,* 41 N. J. Eq. 349, 7 Atl. 642; *In re* Kaufman, 117 Cal. 288, 49 Pac. 192.

1. Morris *v.* Stokes, 21 Ga. 552, 570; Jackson *v.* Jackson, 32 Ga. 325, 337; *In re* Last Will of Hollingsworth, 58 Iowa 526, 12 N. W. 590.

Statements to Draughtsman. Morris *v.* Stokes, 21 Ga. 552, 570; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313.

In Lancaster *v.* Lancaster's Exr., 27 Ky. L. Rep. 1127, 87 S. W. 1137, it was held proper to show that devisee, who drew the will, had made statements indicating that he had not acted as a mere amanuensis, but had participated in framing the will.

that such person stated that he would see that contestant received nothing from testator's estate.[2]

(2.) To Show Disposition, Motive, Intent, Power, Opportunity. — His statements showing that he was actuated by a motive to secure the execution of the act in question, or that he had an interest in securing such act, are admissible.[3] Also his statements showing that he had the disposition, intent or power, or opportunity to secure the act in question.[4]

(3.) Knowledge Concerning Actor. — (A.) CONDITION. — AFFAIRS. — Also his declarations showing his knowledge of actor's mental condition or disposition as to susceptibility; or knowledge of his business affairs.[5]

(B.) WILL. — It is not error to exclude evidence of statements of legatee charged with procuring the will by undue influence, which simply tend to show that he had knowledge of the provisions of the will in question.[6]

(4.) Anxiety for Act. — It is competent to prove his statements showing his anxiety for execution of the act in question.[7]

(5.) Activity. — Participation. — And his activity in securing such act and his participation therein.[8]

2. Higginbotham *v.* Higginbotham, 106 Ala. 314, 17 So. 516; Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642.

3. Motive. — Interest. — Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Wall *v.* Dimmitt, 114 Ky. 923, 72 S. W. 300; Batton *v.* Watson, 13 Ga. 63, 58 Am. Dec. 504; Julke *v.* Adam, 1 Redf. 454; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313; Perret *v.* Perret, 184 Pa. St. 131, 145, 39 Atl. 33; Crocker *v.* Chase, 57 Vt. 413, 421.

4. Disposition. — Intention. Lewis *v.* Mason, 109 Mass. 169; Gordon *v.* Burris, 141 Mo. 602, 612, 43 S. W. 642; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313; Brush *v.* Holland, 3 Bradf. Sur. (N. Y.) 240; Perret *v.* Perret, 184 Pa. St. 131, 148, 39 Atl. 33.

Declarations of proponents of will which demonstrate their attitude toward contestant in regard to the subject-matter at issue and the intent with which each performed the acts attributed to him are admissible, although no conspiracy has been established. *In re* Budlong, 54 Hun 131, 7 N. Y. Supp. 289, *affirmed*, 126 N. Y. 423, 27 N. E. 945. See also Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

Opportunity. — *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313.

Power. — Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Robinson *v.* Robinson, 203 Pa. St. 400, 437, 53 Atl. 253.

Control Over Testator. — Lewis *v.* Mason, 109 Mass. 169, where it was held that a statement made by a person charged to a member of testator's family, that "we have got father where we want him," was properly admitted. See also Brush *v.* Holland, 3 Bradf. Sur. (N. Y.) 240.

5. Robinson *v.* Hutchinson, 31 Vt. 443.

Susceptibility. — Declarations of person charged, to the effect that testator was easily influenced, are competent. Lundy *v.* Lundy, 118 Iowa 445, 92 N. W. 39; Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

6. Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; *s. c.*, 194 Ill. 408, 62 N. E. 907.

7. Wilbur *v.* Wilbur, 129 Ill. 392, 21 N. E. 1076; *s. c.*, 138 Ill. 446, 27 N. E. 701.

8. Wilbur *v.* Wilbur, 129 Ill. 392 21 N. E. 1076; *s. c.*, 138 Ill. 446, 27 N. E. 701.

(6.) Statements to Testator. — (A.) Concerning Family. — Also his statements to testator concerning the character or conduct of his heirs.[9] But his disparaging remarks concerning contestant are not admissible, unless shown to have been made in testator's presence.[10]

(B.) Showing Relation or Control. — His statements showing his relations with testator, and control over his property, are admissible.[11]

(C.) Ability To Break Will. — It may also be shown that such person stated that he was able to break testator's will.[12]

(7.) Subsequent Declarations. — Declarations of the person charged, made after execution of the will in question, are admissible to show continuing dominion over actor.[13]

Remote Declarations of Person Charged. — Statements of person charged, made long prior to execution of the will in question, are incompetent.[14]

(8.) Statements Negativing Undue Influence. — Evidence tending to show undue influence having been introduced, it is proper to show, in rebuttal, statements of the person charged, made at time of execution of act in question which negative undue influence.[15]

C. Declarations of Other Persons. — a. *Legatee.* — **(1.) Inadmissible Against Other Legatees.** — The declarations of a legatee are, as against other legatees, incompetent to show that the will under which he claims was procured by undue influence.[16] Statements of

9. Wall *v.* Dimmitt, 114 Ky. 923, 72 S. W. 300; Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394.

10. Jenkins *v.* Hall, 52 N. C. (7 Jones' L.) 295; Waters *v.* Reed, 129 Mich. 131, 88 N. W. 394.

11. Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236.

Confidential Relation. — His declarations are admissible to show that a confidential relation existed between himself and testator. Robinson *v.* Robinson, 203 Pa. St. 400, 437, 53 Atl. 253.

Control of Testator's Property. *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252.

12. *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252.

13. Mullen *v.* Helderman, 87 N. C. 471. See also *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

14. Garland *v.* Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836; Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599.

15. *In re* Peterson's Will, 136 N. C. 13, 48 S. E. 561. In this case evidence tending to show undue influence having been introduced, it was sought to be shown that the person charged—testator's wife—had stated that she would not speak to her husband concerning his will, and stated that she would not permit witness to do so. *Held*, that this testimony was improperly excluded, as it tended to show the wife's state of mind, and tended to to rebut contestant's testimony.

16. *Connecticut.* — Dale's Appeal, 57 Conn. 127, 17 Atl. 757; Livingston's Appeal, 63 Conn. 68, 76, 26 Atl. 470.

Illinois. — Campbell *v.* Campbell, 138 Ill. 612, 28 N. E. 1080.

Iowa. — Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236; *In re* Ames' Will, 51 Iowa 596, 2 N. W. 408; Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689; Dye *v.* Young, 55 Iowa 433, 7 N. W. 678; Fothergill *v.* Fothergill, 129 Iowa 93, 105 N. W. 377.

Massachusetts. — McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 1114.

Missouri. — Schierbaum *v.* Schemme, 157 Mo. 1, 17, 57 S. W. 526, 80 Am. St. Rep. 604, where decision in case of Armstrong *v.*

Farrar, 8 Mo. 627, on this point is disapproved; Wood *v.* Carpenter, 166 Mo. 465, 485, 66 S. W. 172; King *v.* Gilson, 191 Mo. 307, 329, 90 S. W. 367; Teckenbrock *v.* McLaughlin, 209 Mo. 533, 108 S. W. 46; Seibert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962.

New Hampshire. — Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219.

New York. — Brush *v.* Holland, 3 Bradf. Sur. 240; Matter of Baird, 47 Hun 77; I a Bau *v.* Vanderbilt, 3 Redf. 384; *In re* Seagrist's Will, 11 Misc. 188, 32 N. Y. Supp. 1095, *affirmed*, 1 App. Div. 615, 37 N. Y. Supp. 496.

North Carolina. — Linebarger *v.* Linebarger, 143 N. C. 229, 55 S. E. 709.

Pennsylvania. — Gallagher *v.* Rogers, 1 Yeates 390; Dietrich *v.* Dietrich, 4 Watts 167; Hauberger *v.* Root, 6 Watts & S. 431.

South Carolina. — Dillard *v.* Dillard, 2 Strobh. L. 89.

Texas. — Helsley *v.* Moss (Tex. Civ. App.), 113 S. W. 599.

West Virginia. — Forney *v.* Ferrell, 4 W. Va. 729, 739.

In Eastis *v.* Montgomery, 93 Ala. 293, 9 So. 311, the court says: "Declarations made by Jonathan Montgomery, if material, might be admissible, in a proper case, to impeach or lessen the weight of his testimony, but declarations made by him, there being others interested in the probate of the will, in the absence of the testatrix, whether before or after the making of the will, are not competent either to support or invalidate the will."

Language used by the court in *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, indicates that when the person charged with exercising influence is not the sole legatee, his admissions are not evidence upon any issue. This case was affirmed (19 N. Y. Supp. 778, 46 N. Y. St. 791), but the affirming opinion makes no mention of this subject.

The rule in Kentucky is apparently to the contrary, it being held by the courts of that state that admissions of a legatee are admissible against "co-legatees." See Wall *v.* Dimmitt, 114 Ky. 923, 72 S. W. 300; *s. c.*, 29 Ky. L. Rep. 670, 94 S. W. 639; Gibson *v.* Sutton, 24 Ky. L. Rep. 868, 70 S. W. 188. The case last referred to cites as authorities the cases of Beall *v.* Cunningham, 1 B. Mon. 399; Rogers *v.* Rogers, 2 B. Mon. 324; Milton *v.* Hunter, 13 Bush 163, quoting from the opinion of Chief Justice Robertson in Beall *v.* Cunningham, as follows: "'The admissions of one legatee or devisee, obviously against his interest, should be evidence against himself, and it would seem to be unreasonable that he should escape the effect of them altogether merely because they might not be equally conclusive as to the interest of his co-legatees or devisees. And the rule of evidence that entitles him to such an escape would equally apply to the admissions of nineteen out of twenty co-legatees, and even when the interest of the twentieth legatee, who had made no admission, may not be equal to one thousandth part of the aggregate interest of the nineteen who had made admissions against the validity of the common document. This would, in our judgment, be unreasonable and unjust. It would, in our opinion, be more consistent with principle and analogy to allow the admission of a fact by one of several legatees or devisees, evidently against his interest, to be evidence, entitled to the effect not of an admission by all of his associates in interest but of the simple circumstance that a party interested admitted what he probably would not have done had he not believed it to be true. And this fact, though not entitled to the effect of an admission by all concerned in a common interest under the will, may nevertheless tend legitimately to a presumption against all of them (in a degree corresponding with all the circumstances) that the thing admitted may be true. Such parties, like co-obligors, have a common interest in the same question, and must stand or fall together. They are thus consolidated by their testator and by their own act in claiming under his will.'" The declarations in this case related not to undue influence, but to mental incapacity. The same is true of the declarations in Milton *v.* Hunter. Wall *v.* Dimmitt is cited as authority in Powers *v.* Powers, 25 Ky. L. Rep. 1468, 78 S. W. 152. See also

legatee to the effect that he proposed to procure the execution of a will are not competent as against other legatees.[17]

(2.) Admissible. — (A.) Against Person Admitting. — It has been held that declarations of person charged are admissible against himself, although he is not sole legatee.[18]

Admissions of Legatee to the effect that he and another legatee had procured a will to be executed in accordance with their wishes, are competent as against the person making the admission, but not against another legatee.[19]

(B.) Admissible To Impeach. — Such admissions are also admissible to impeach the testimony of the person making them.[20]

(C.) Admissible, When Conspiracy or Collusion Charged. — When it is charged that a certain will was procured by a conspiracy between proponent and others, declarations of proponent, made after death of testator, and showing an endeavor to carry out the common object of the conspirators, are competent on behalf of contestant.[21] Statements of person charged showing collusion between himself and third persons to procure execution of the will in question are admissible.[22] Declarations of devisee to the effect that the principal devisee had procured the execution of the will in question by fraud and undue influence are admissible.[23]

discussion in Brown *v.* Moore, 6 Yerg. (Tenn.) 272.

In the case of Dennis *v.* Weekes, 46 Ga. 514, such declarations were held admissible, although the exact nature and grounds of the ruling are not clear.

17. *In re* Will of Ames, 51 Iowa 596, 2 N. W. 408.

18. Morris *v.* Stokes, 21 Ga. 552, 564. In this case it is said that declarations of person charged are admissible against him, although he be not the sole legatee, and that the jury, upon sufficient proof, may strike out his legacy, and establish the rest of the will.

19. Saunders' Appeal, 54 Conn. 108, 6 Atl. 193. But see Livingston's Appeal, 63 Conn. 68, 26 Atl. 470, to the effect that, where there are other legatees, not in privity with the one making such admission, the admission is not competent, citing as authority, Dale's Appeal, 57 Conn. 127, 17 Atl. 757. To same effect, see Morris *v.* Stokes, 21 Ga. 552; Dennis *v.* Weekes, 46 Ga. 514; Ryman *v.* Crawford, 86 Ind. 262; O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105.

Conspiracy Among Legatees. — As to admissions of legatees as showing a conspiracy among them to obtain the execution of a will by undue influence, see Primmer *v.* Primmer, 75 Iowa 415, 69 N. W. 676; Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883; Robinson *v.* Robinson, 203 Pa. St. 400, 437, 53 Atl. 253.

20. Saunders' Appeal, 54 Conn. 108, 6 Atl. 193.

21. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459. See also Primmer *v.* Primmer, 75 Iowa 415, 69 N. W. 676; Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883; Robinson *v.* Robinson, 203 Pa. St. 400, 437, 53 Atl. 253.

22. Robinson *v.* Robinson, 203 Pa. St. 400, 437, 53 Atl. 253.

23. Brown *v.* Moore, 6 Yerg. (Tenn.) 272; Renn *v.* Samos, 33 Tex. 760.

In Mullins *v.* Lyles, 1 Swan (Tenn.) 337, it is held that such admissions by a *legatee* are not admissible. The court says: "We think the evidence was properly rejected. This is not like the case of Brown *v.* Moore, 6 Yerg. R. 277, where the admissions of a devisee were admitted against the will. For, there, in case of intestacy, the person making the admissions would not take any interest."

(3.) The Admissions of a Sole Legatee are admissible against him.[24]

(4.) Admissible Against Joint Legatee. — A legatee's admissions are admissible against one who is a joint legatee with the person making such admission.[25]

(5.) Admissible Against Person in Whose Behalf Influence Exercised. Such admissions are also admissible against persons for whose benefit the influence in question is alleged to have been exercised;[26] and their admissibility is not affected by the fact that the person charged renounces all benefits arising from the act in question.[27] But in an action of ejectment in which a will relied upon as vesting title is claimed to have been procured by undue influence exercised on behalf of devisee by a person deceased at time of trial, it was held that declarations of the person charged showing undue influence exercised by such person are not admissible against the defendant in ejectment, sole devisee under such will.[28]

Distinction Between Will Contest and Action. — It has been held that the rule in regard to admissibility of declarations of person charged in action in which will is relied upon as the source of title is different from the rule applicable to probate contests involving validity of will,

24. Lundy *v.* Lundy, 118 Iowa 445, 92 N. W. 39; *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

Sole Legatee, Also, Sole Executor. Declarations of one who is sole legatee and sole executor of a will are competent evidence for contestant. Seale *v.* Chambliss, 35 Ala. 19; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Dennis *v.* Weekes, 46 Ga. 514; *s. c.*, 51 Ga. 24; Horn *v.* Pullman, 10 Hun (N. Y.) 471.

25. Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227; Wall *v.* Dimmitt, 114 Ky. 923, 72 S. W. 300; Horn *v.* Pullman, 10 Hun (N. Y.) 471.

26. Mullen *v.* Helderman, 87 N. C. 471. See statement and quotation in next succeeding note.

27. In Mullen *v.* Helderman, 87 N. C. 471, where it was claimed that the will in question had been procured by testator's wife for the benefit of herself and children to the exclusion of the testator's children by a former marriage, it was held proper to show declarations of the wife to the effect that she had caused the will to be executed. The court says: "The said Sarah F. by her dissent surrenders all rights devised under the will and, thus claiming only as in case of an intestacy, becomes no party to the present contest, and personally has no pecuniary interest in the determination of the issue. But she had such, and a predominating interest at the time when the declarations were made. It is through her persevering efforts and by means of her self-assumed agency for all that, as the contestants insist, the will was put in its present form expressing her own instead of the volition of the deceased, and for their common benefit. The same vitiating influence infects and pervades all the dispositions which it contains, and, if it exists as to one, is fatal to all the others. But for the dissent, it would be the common source of title to each beneficiary still." After further discussion of this subject the court says: "But we prefer to sustain the ruling upon the ground of identity of interest among the beneficiaries and its common origin in an act by which that of each is secured, and when the mother bears to her children a relation not unlike that of agent to principal, and admitting the rule that when the latter claims the benefit of what the former has done without previous authority, he must submit to the conditions and attending incidents of the act itself."

28. Myers *v.* Myers (N. J.), 68 Atl. 82. See statement in next succeeding note.

and that in such actions declarations of the person charged are not admissible against a legatee.[29]

b. *Contestant.* — Declarations of one contestant in relation to will in question are inadmissible as against other contestants.[30]

c. *Conversations Between Proponents and Legatees.* — Conversations between proponents, who are legatees, concerning testator's property, had prior to execution of will, are not admissible, there being no charge of conspiracy.[31]

d. *Other Persons.* — **(1.) Executor.** — Declarations of executor are generally incompetent to impeach validity of will.[32] The declarations of an executor, who is also legatee, as to facts occurring at the execution of the will, are admissible.[33] Also his declarations showing the exercise by himself of undue influence.[34]

(2.) Third Persons. — Statements of third persons made in testator's presence and having a tendency to negative undue influence by supplying a proper, legal motive for a given bequest are competent.[35]

29. Myers *v.* Myers (N. J.), 68 Atl. 82. This was an action of ejectment. Defendant pleaded a will, in which he was named as sole devisee, as the source of his title. Plaintiff claimed that this will had been procured by the undue influence of defendant's mother. *Held,* that declarations of the mother, made long prior to execution of the will, were not competent. The court says: "It is to be kept in mind that the question of the admissibility of the declarations of Sallie R. G. Myers in this case radically differs from a question concerning the admissibility of the declarations of a legatee or devisee when offered in a probate contest. The judgment in the present action binds only the parties to the suit, and affects only the property in dispute. As to all other parties, and respecting all other property, the provisions of the will would stand unimpaired by the judgment. But in a contest respecting the probate of a will all persons interested are in some shape parties. These parties may, all but one, be ranged on one side, or they may be divided into groups which represent opposite interests. Now, where there is but one party whose position is such that his interest alone will be affected by his admissions, his admissions are admissible. . . . In the present case S. R. G. M. was not a party to the suit, and in no view were her declarations admissible against the defendant."

30. Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564, where the court says: "The plaintiffs — proponents — sought to prove the declarations of one of the contestants in relation to the will. This evidence was objected to and the objection sustained. It has been held that a contestant cannot be permitted to introduce in evidence the declarations of one of the legatees (*In re* Will of Mary Ames, 51 Iowa 596; Dye *v.* Young, 55 Id. 433). For the same reasons we do not think the declarations of one of the contestants can be introduced in evidence by or in behalf of the legatees." The cases cited by the court hold that declarations of one legatee are inadmissible against other legatees.

31. *In re* Estate of Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400.

32. Roberts *v.* Trawick, 13 Ala. 68; Bunyard *v.* McElroy, 21 Ala. 311; *In re* Will of Ames, 51 Iowa 596, 2 N. W. 408.

33. Atkins *v.* Sanger, 1 Pick. (Mass.) 192.

34. Dennis *v.* Weekes, 46 Ga. 514; *s. c.*, 51 Ga. 24.

35. In Gunn's Appeal, 63 Conn. 254, 27 Atl. 1113, it appeared that all the estate passing by the will was derived by testator by devise from his wife and by conveyance from his

Explanatory of Actor's Conduct. — Statements of third person to actor which explain the latter's reason for doing the act in question are competent.[36]

Statements of Third Persons Derogatory to Contestant. — In will contest when statements of contestant derogatory to testator have been proven, it was held proper to permit contestant to explain such statement by showing that in making the statements in question he was referring to remarks made to testator by third persons; and in this connection it was held proper to permit him to repeat such remarks.[37]

Statements of Third Person Showing Character of Person Charged. That a third person made a derogatory statement in regard to person charged is an admissible circumstance, in connection with circumstances showing that the acts of person charged in regard to the person making such statement were part of a plan to secure the execution of the will in question.[38] To weaken the force of such testimony it is proper to show by a physician that the person making such statement was suffering from a disease which affected his mental powers.[39]

wife's sister. The trial court admitted evidence of statements of the wife and sister, made in testator's presence, at the time of their executing their respective instruments, to the effect that the property then devised and conveyed to testator was to go back to his wife's relations on her mother's side. This ruling was held correct. As to this evidence the appellate court says: "Its reception was expressly upon the ground that it tended to show the mental condition of the testator, as to whether he was or was not dominated by undue influence exercised upon him by the beneficiaries under the will. It is conceded by the appellant that for this purpose, and to rebut the charge made against the beneficiaries, proof by competent evidence of the source from which the testator derived his property, and of his declarations in regard to the same, would be admissible. And the appellant cites the following language used in Schouler on Wills (2d edition, sec. 242, note 2): 'Evidence showing through what line of relatives, or from what sources the fortune bequeathed was derived or favors received, may have a bearing upon the natural or unnatural character of the disposition.' Now since the 'natural or unnatural character of the disposition' is a relevant inquiry, and evidence of the source from which the property was derived is admissible because it tends to throw light upon that inquiry, any other evidence having the same clear tendency would seem to be equally admissible upon like ground and for like purpose."

36. Campbell *v.* Carnahan (Ark.), 13 S. W. 1098, where it was held proper to show that the husband of testatrix had expressed to her his dislike of contestant, and his unwillingness that the latter should receive any part of his property, it appearing that all of testatrix's estate was acquired from her husband.

37. Betts *v.* Betts, 113 Iowa 111, 84 N. W. 975.

38. Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 52. In this case it was charged that a woman's will was procured by her husband's undue influence. The court had admitted proof that the husband had caused his wife's father to make a devise to her, in order that certain property should come under the husband's control. It was held proper, in connection with such proof, to show that the wife's father had stated that her husband was a rascal. See note 19, under IV, 1, C, b, (4.).

39. Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 53

3. Documentary Proof. — A. Former Will. — A will executed by testator prior to the execution of that in question may on issue of undue influence be introduced to show testator's intention.[40]

Former Will Different From That in Question. — A former will making provisions different from those of the will in question furnishes no evidence to rebut the charge of undue influence.[41] But the fact that such former will was made, and that the will in question makes different dispositions of the estate, are circumstances to be considered in ascertaining testator's intention and the validity of the second will.[42]

40. Seale *v.* Chambliss, 35 Ala. 19.
Contra. — *Alabama.* — Roberts *v.* Trawick, 13 Ala. 68.
Illinois. — Hill *v.* Bahrns, 158 Ill. 314, 41 N. E. 912; Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. 837; Kaenders *v.* Montague, 180 Ill. 300, 54 N. E. 321; Freund *v.* Becker, 235 Ill. 513, 85 N. E. 610.
Iowa. — *In re* Selleck's Will, 125 Iowa 678, 101 N. W. 453.
Maryland. — Clark *v.* Stansbury, 49 Md. 346.
Michigan. — Beaubien *v.* Cicotte, 12 Mich. 459.
Missouri. — Muller *v.* St. Louis Hospital Assn., 5 Mo. App. 390, *affirmed*, 73 Mo. 242.
Utah. — *In re* Young's Estate, 33 Utah 382, 94 Pac. 731.
In Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552, the court says: "It tends to show that, for a year before making the will in question, she had formed the purpose of giving the bulk of her property to the defendant. The fact that she had formed that purpose at that date tends to show that the present will was not the result of undue influence exercised by defendant in her last sickness, and when she had become weaker in body and probably in mind. Says Redfield: 'Evidence of former wills and of other pecuniary arrangements for the wife is also admissible, as having a bearing upon the question whether the testator has understandingly and of his own free will changed his settled views'. 1 Redfield on Wills, 4th ed., 538. The law allows a wide range of testimony on the issues of undue influence and weakness of mind, and it seems former wills may be introduced to show undue influence and weakness of mind, and on the other hand, they may be introduced to show the previous purpose of the testator in regard to the disposition of his property, and thus shed some light on the question whether the contested will was the testator's own free act: 1 Redfield on Wills, 4th ed., 537; Love *v.* Johnston, 12 Ired. 358; Hughes *v.* Hughes, 31 Ala. 520."

41. Roe *v.* Taylor, 45 Ill. 485; Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712.

42. Hughes *v.* Hughes' Exr., 31 Ala. 519, *overruling* on this point, Roberts *v.* Trawick, 13 Ala. 68; Seale *v.* Chambliss, 35 Ala. 19; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.
In re Arnold's Estate, 147 Cal. 583, 82 Pac. 252, where the testatrix had made two wills prior to execution of that in question. The court says: "It was proper to show that the will of 1900 was substantially the same as that of 1902, and to explain the changes made by the latter. This would tend to show a more permanent and fixed state of mind of the testatrix with regard to her general plan for the disposition and administration of her estate as declared by those wills prior to the execution of the disputed will, and bring out in a stronger light the significance of any changes therefrom in the will of 1903 in controversy, and to raise a greater probability that the latter was the product of fraud and undue influence. For the same purpose the contestants should have been permitted to show that shortly before the time of making the last will the testatrix was still as much interested and as favorably disposed as form-

Admissible To Show Change of Intention. — A former will differing from that in question is admissible to show a change in testator's testamentary intent.[43]

Former Will Basis of That in Question and Alleged To Have Been Procured by Same Influence. — A former will executed by testator is competent when it appears to have been the basis of the will in question, and is alleged to have been obtained by the same undue influence.[44]

To Show Intent or Reason. — When a deed from parent to child is attacked on ground of undue influence exercised by the latter, a will made by grantor years prior to execution of deed in question making a disposition in favor of grantee similar to that made by the deed is admissible to show grantor's intentions and reasons for making such conveyance.[45]

Unfinished Will. — An unfinished will is admissible as showing testator's intentions.[46]

B. Will of Third Person. — The will of a third person providing for or omitting the person charged is competent to show that a devise made to person charged was made to provide against the consequences of such omission,[47] or that provision was omitted because person charged was already provided for.

Conspiracy. — When the will in question is alleged to have been procured by conspiracy, the will of a third person made in pursuance of such conspiracy is admissible.[48]

C. Letters. — Admissible To Show Relations, Generally. Letters written by testator are admissible to show relations between him and his family, or those surrounding him, or the persons made beneficiaries of his will.[49]

Testator to Devisee. — Letters exchanged between testator and devisee are admissible to show the existence of affectionate relations

erly toward the children's home carried on by Mrs. Westgate, and toward the Young Men's Christian Association. Both of these institutions were given legacies by the will of 1902, and neither was mentioned in the will in dispute."

43. *In re* Arnold's Estate, 147 Cal. 583, 592, 82 Pac. 252; Varner *v.* Varner, 16 Ohio C. C. 386; Irish *v.* Smith, 8 Serg. & R. (Pa.) 573, 11 Am. Dec. 648.

44. Chambers *v.* Chambers, 61 App. Div. 299, 70 N. Y. Supp. 483.

45. Bishop *v.* Hilliard, 227 Ill. 382, 81 N. E. 403.

46. Love *v.* Johnston, 34 N. C. (12 Ired. L.) 355; Thornton's Exrs. *v.* Thornton's Heirs, 39 Vt. 122, 158.

47. Varner *v.* Varner, 16 Ohio C. C. 386, where the will of the mother of the person charged was admitted to show that she had omitted him, thus tending to explain an apparently disproportionate devise in his father's will.

48. Cowan *v.* Shaver, 197 Mo. 203, 95 S. W. 200. In this case testator's will was charged to have been obtained by undue influence of his wife and certain relatives conspiring therefor. It was held that the wife's will devising her property, which was derived from testator, to the principal devisee in the latter's will was admissible as showing the result of such conspiracy.

49. *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676; Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

between them;[50] also to show that relations between testator and devisee were unfriendly.[51]

From Testator to Family are admissible to show the condition of testator's mind with reference to the objects of his bounty.[52]

Complaining of Treatment. — Letters written by testator to a member of his family, complaining of treatment received from person charged, are admissible.[53]

Complaints Against Other Persons. — But not complaints against other persons, although heirs of testator and parents of person charged.[54]

To Show Conformity With Intent. — Letters written by testator which show that the will in question conforms with his testamentary intent are admissible.[55]

But Not the Opposite. — Such letters are not admissible to show an intent different from that expressed by the will.[56]

Mental Condition. — Letters written by testator are admissible to show his mental condition.[57]

Letters Between Legatees showing their attitude toward contestant, and the motive with which they acted in regard to him, are admissible.[58]

Letters From Proponent to Contestant. — So as to letters written by devisee to contestant showing a disposition on the part of the former to influence testator.[59]

Feelings Toward Testator. — Letters exchanged between contestants and devisees, showing their respective views and feelings toward testator, their contents being known to the latter, are admissible.[60]

Showing Relations. — Also letters showing relations between contestant and person charged.[61]

Showing Disposition. — Letters showing disposition of person charged are admissible, when such disposition is a fact in issue.[62]

50. Slingloff *v.* Bruner, 174 Ill. 561, 51 N. E. 772; Fuller *v.* Fuller, 83 Ky. 345; Johnson *v.* Stivers, 95 Ky. 128, 23 S. W. 957; Potter's Appeal, 53 Mich. 106, 18 N. W. 575; *In re* Ross' Will, 20 N. Y. Supp. 520.

51. Mooney *v.* Olsen, 22 Kan. 69.

52. Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687; *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676; Marx *v.* McGlynn, 88 N. Y. 357; Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

53. Robinson *v.* Stuart, 73 Tex. 267, 11 S. W. 275.

54. Robinson *v.* Stuart, 73 Tex. 267, 11 S. W. 275.

55. McNinch *v.* Charles, 2 Rich. L. (S. C.) 229; Kaufman *v.* Caughman, 49 S. C. 159, 170, 27 S. E. 16, 61 Am. St. Rep. 808; Bulger *v.* Ross, 98 Ala. 267, 12 So. 803.

56. Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712.

57. Baker *v.* Baker, 202 Ill. 595, 67 N. E. 410; *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676; Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

58. *In re* Budlong, 54 Hun 131, 7 N. Y. Supp. 289, *affirmed*, 126 N. Y. 423, 27 N. E. 945.

59. *In re* Budlong, 54 Hun 131, 7 N. Y. Supp. 289, *affirmed*, 126 N. Y. 423, 27 N. E. 945.

60. Foster's Exrs. *v.* Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

61. *In re* Arnold's Estate, 147 Cal. 583, 593, 82 Pac. 252.

62. Curtice *v.* Dixon, 74 N. H. 386, 68 Atl. 587.

Testator's Wife to Devisee — Referring to Proponent. — Letters from testator's wife, who predeceased him, to devisee, reflecting upon character of proponent, are not admissible.[63]

D. Diary kept by testator is admissible to show the condition of his mind with reference to a certain person.[64]

E. Bank Book. — A bank book showing testatrix' account, and containing directions to the bank to pay the amount on deposit to her husband, is admissible as showing her intention to give her property to her husband in pursuance of an agreement between them.[65]

4. Opinion. — A witness cannot state his opinion whether or not actor was on a certain occasion acting under the control of another.[66] But the contrary has been held.[67] Nor can witness be asked if, in his opinion, the person charged had an improper or undue influence over actor.[68]

Opinion as to Relation. — A witness cannot be asked his opinion as to what caused ill feeling between testator and a member of his family.[69]

Opinion as to Condition. — Nor can a witness state his opinion

63. Miller *v.* Miller, 187 Pa. St. 572, 590, 41 Atl. 277.

64. Marx *v.* McGlynn, 88 N. Y. 357; *s. c.*, 4 Redf. 453.

65. Perry *v.* Moore, 66 Vt. 519, 29 Atl. 806.

66. *District of Columbia.* — Kultz *v.* Jaeger, 29 App. Cas. 300.

Georgia. — Dennis *v.* Weekes, 51 Ga. 24; Thompson *v.* Davitte, 59 Ga. 472; Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590.

Illinois. — Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273; Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678.

Iowa. — Estate of Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400.

Michigan. — O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105.

Missouri. — McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506.

West Virginia. — Forney *v.* Ferrell, 4 W. Va. 729, 739; Kerr *v.* Lunsford, 31 W. Va. 659, 669, 8 S. E. 493.

See Howell *v.* Howell, 59 Ga. 145, where the court says: "We think that the testimony of Spence should have gone to the jury. It was his opinion of the character of the donor in regard to his pliability and prejudices, and the ease with which he could be influenced, drawn from long acquaintance with him, and circumstances arising from that acquaintance. In other words, it was his opinion of the sort of mind the donor had, when the stubbornness or pliability of mind was an important point in the case, in respect to those qualities of mind; an opinion based upon long acquaintance with, and intimate knowledge of, the man. The Code, § 3867, certainly covers such an opinion as this. The question being, was the donor unduly influenced, the character of his will, whether stubborn or yielding, seemed to enter into it materially, and the opinion should have gone to the jury with the reasons therefor."

Where circumstances are such as to impose upon proponent the burden of proving that the will in question was not the product of undue influence, the force of such circumstances is not negatived by proof that the subscribing witnesses stated that, in their opinion, testator was not unduly influenced. Claffey *v.* Ledwith, 56 N. J. Eq. 333, 38 Atl. 433.

67. Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459. So held on motion for rehearing.

68. Dean *v.* Fuller, 40 Pa. St. 474; Hart *v.* Hart (Tex. Civ. App.), 110 S. W. 91.

69. Miller *v.* Miller, 187 Pa. St. 572, 590, 41 Atl. 277.

whether or not actor was in such condition as to be easily influenced.[70]

Opinion as to Disposition. — But it has been held that a witness may state his opinion of the character of actor in regard to his disposition and prejudices, and the ease with which he could be influenced, if witness state the facts upon which his opinion is based.[71]

Opinion as to Unjustness of Will. — Witness cannot be asked if he does not consider testator's will unjust.[72]

Conjecture. — A witness may not state his conjecture as to what testamentary disposition testator might have made under certain conditions.[73]

5. Presumptions. — A. As to Possession, Exercise and Effect. a. *General Rule.* — As a general rule, it will not be presumed that the execution of a given act was procured by the exercise of undue influence. That such influence existed, was exercised, and was the effectual means of procuring such act, must be proved.[74]

b. *Distinction Between Wills and Transactions Inter Vivos.* — A state of facts which would create a presumption of undue influence concerning a transaction *inter vivos,* would not necessarily create such presumption concerning a testamentary disposition. It has been said that the presumption of undue influence is stronger in regard to the former.[75]

70. Dennis *v.* Weekes, 51 Ga. 24; Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

71. Hart *v.* Hart (Tex. Civ. App.), 110 S. W. 91; Howell *v.* Howell, 59 Ga. 145.

In Appeal of Vivian, 74 Conn. 257, 50 Atl. 797, the court says: "One whose mind is in such a condition that he can be easily influenced is especially liable to be constrained by others to act against his own real wishes. Such a state of mind may be habitual. It may be apparent to those who know him well, and, if so, it is properly the subject of opinion evidence." The opinion states that no objection was made as to means of observation possessed by witness.

72. Aylward *v.* Briggs, 145 Mo. 604, 47 S. W. 510.

73. McHugh *v.* Fitzgerald, 103 Mich. 21, 61 N. W. 354.

74. *Louisiana.* — Succession of Stewart, 51 La. Ann. 1553, 26 So. 460.

Massachusetts. — Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697.

New Jersey. — *In re* Humphrey's Will, 26 N. J. Eq. 513; Sutton *v.* Morgan, 30 N. J. Eq. 629; Kise *v.* Heath, 33 N. J. Eq. 239; Dale *v.* Dale, 36 N. J. Eq. 269.

New York. — Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. 874; Wood *v.* Bishop, 1 Dem. 512.

75. *England.* — Parfitt *v.* Lawless, L. R. 2 P. 462, 41 L. J. P. 68, 27 L. T. 215.

Canada. — Collins *v.* Kilroy, 1 Ont. L. 503.

Alabama. — Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; McQueen *v.* Wilson, 131 Ala. 606, 31 So. 94; Hutcheson *v.* Bibb, 142 Ala. 586, 38 So. 754.

Illinois. — Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

New York. — *In re* Sheldon's Will, 16 N. Y. Supp. 454, 40 N. Y. St. 369, *affirmed,* without opinion, 65 Hun 623, 21 N. Y. Supp. 477; *In re* Bedlow's Will, 67 Hun 408, 22 N. Y. Supp. 290; *In re* Hurlbut's Will, 48 App. Div. 91, 62 N. Y. Supp. 698, *affirming* 26 Misc. 461, 57 N. Y. Supp. 648; *In re* Hawley's Will, 44 Misc. 186, 89 N. Y. Supp. 803, *affirmed,* without opinion, 100 App. Div. 513, 91 N. Y. Supp. 1097.

North Carolina. — Lee *v.* Lee, 71 N. C. 139.

Oregon. — *In re* Holman's Will, 42 Or. 345, 359, 70 Pac. 908.

(1.) Wills. — Influence Not Presumed From Confidential Relations Alone. In regard to wills, it has been held that the mere fact that relations

South Carolina. — Pressley *v.* Kemp, 16 S. C. 334, 42 Am. Rep. 635.
Wisconsin. — *In re* Loennecker's Will, 112 Wis. 461, 88 N. W. 215.

On this subject the supreme court of Minnesota in *In re* Sperl's Estate, 94 Minn. 421, 103 N. W. 502, says: "Inasmuch as, however, the force of the reasoning involved is not naturally confined to any particular class of cases, and inasmuch as proof of undue influence on a testator must concern things hidden from ordinary knowledge, and provable in large measure by circumstances only (*In re* Hess' Will, 48 Minn. 510, 51 N. W. 614, 31 Am. St. Rep. 665; Shepardson *v.* Potter (Mich.), 18 N. W. 577; Thompson *v.* Thompson (Neb.), 68 N. W. 372, 1 Prob. Rep. Ann. 111, note, page 119), and inasmuch as both common-law and statutory rules of evidence exclude conversations between the deceased testator and persons interested, necessarily a large part of testimony ordinarily available, the rules have been gradually extended until the subject is commonly treated as if they applied indifferently to wills and to deeds and contracts *inter vivos*. See Tyrrell *v.* Painton, L. R. Pro. Div. 1893, 157, and cases hereinafter cited. These rules govern bequests and gifts between persons in confidential relations generally."

"The presumption of undue influence, however, does not also arise from the same state of facts, in the case of a gift, because the rule in regard to what constitutes undue influence differs when applied to wills and when applied to gifts. Boyse *v.* Rossborough, 6 H. L. Cas. 149; Parfitt *v.* Lawless, L. R. 2 P. & D. 462. The influence which is undue in cases of gifts *inter vivos* is very different from that which is required to set aside a will. In testamentary cases undue influence is always defined as coercion or fraud, but *inter vivos*, no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other. Huguenin *v.* Baseley, 14 Ves. 273, 33 Eng. Reprint 526. In the present case, these gifts, while gifts *inter vivos*, were undoubtedly intended by the donee to operate as a testamentary disposition of the donor's property. . . . Now it seems to me, that where it is apparent that a gift is made to accomplish the purpose of a will, to operate as such an instrument, without being surrounded by the formal guards which the statute has provided for the execution of a will, it raises an additional reason why a gift like this should be scanned with circumspection, and why the donee should clearly and convincingly show the validity of its execution." Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385. See also Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Pressley *v.* Kemp, 16 S. C. 334, 42 Am. Rep. 635; Parfitt *v.* Lawless, 41 L. J. P. 68, L. R. 2 P. (Eng.) 462, 27 L. T. 215; Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

In Bancroft *v.* Otis, 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904, it is stated, although not necessary to the decision, that in case of transactions *inter vivos*, the exercise of undue influence by the person benefited will be presumed from the existence of confidential relations between the parties. The question decided was, that in case of wills, the mere fact of the existence of a relation of trust creates a presumption of undue influence. This case is cited on this point in Chandler *v.* Jost, 96 Ala. 596, 11 So. 636. Further as to distinction between transactions *inter vivos* and wills, see Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296; Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

In Tyson *v.* Tyson, 37 Md. 567, the court says: "The doctrine of confidential relations adopted in Courts of Equity in regard to gifts and contracts *inter vivos*, cannot be applied here. It has been extended, it is true, in some states to wills, where parties stood in the relation of guardian and ward, client and at-

of trust and confidence existed between testator and a person benefited by his will does not create a presumption that the devise or bequest in question was obtained by undue influence.[76]

torney, and in such, the burden of proof has been cast upon the legatee or devisee to show that the testamentary act was free from undue influence or restraint. On the other hand, however, in the late case of Parfitt *v.* Lawless (21 Weekly Reporter, 200) in the Probate Court of England before Lord Penzance, Piggott, B., and Brett, J., this doctrine was held not to apply to wills, for two reasons: 1st. Because in cases of gifts or contracts *inter vivos,* the party benefited takes part in the transaction and whether he unduly urges his influence or not, in calling upon him to explain the part he took, and the circumstances under which the *gift* or *contract* was made, the court is requiring him to make an explanation within his knowledge, but in the case of a *will,* the legatee or devisee may have no knowledge of the act, and to cast upon him the *burden* of showing how or under what circumstances the *will was made,* would be in most cases to cast upon him a duty he could not possibly discharge. *Secondly.* Because the influence which is *undue* in cases of *gifts 'inter vivos,'* is very different from that which is required to set aside a will. In the former the *natural influence* which such relations as those in question involve, is considered *undue,* provided it is exerted to obtain a benefit for themselves, whereas in the case of a will the *influence* which the law condemns as *unlawful,* must be such as amounts to force and coercion, destroying the free agency of the testator." See also Griffith *v.* Diffenderffer, 50 Md. 466.

In Sparks' Will, 63 N. J. Eq. 242, 51 Atl. 118, the court says: "Lord Penzance, in Parfitt *v.* Lawless, L. R. 2 P. 462, 41 L. J. P. 68, 27 L. T. N. S. 215, entered into an elaborate discussion, explanatory of his notion of the reason why courts of equity had laid down a rule concerning gifts more rigid than the probate court had concerning wills. The controlling reason is, I think, because by a gift a man strips himself of that which he can still enjoy and of which he may have need during his life; while by his will he disposes of that which can be of no further use to him. As he is, under ordinary conditions, so much the less likely to do the first than the second, courts subject gifts to the sharper scrutiny." See also *In re* Smith's Will, 95 N. Y. 516; Decker *v.* Waterman, 67 Barb. (N. Y.) 460.

76. *Alabama.* — Bulyer *v.* Russ, 98 Ala. 267, 12 So. 803; McQueen *v.* Wilson, 131 Ala. 606, 31 So. 94; Hutcheson *v.* Bibb, 142 Ala. 586, 38 So. 754.

Iowa. — Hanrahan *v.* O'Toole, 117 N. W. 675.

Maryland. — Griffith *v.* Diffenderffer, 50 Md. 466.

New Jersey. — *In re* Willford's Will, 51 Atl. 501.

New York. — *In re* Bernsee's Will, 71 Hun 27, 24 N. Y. Supp. 504, *affirmed,* but this subject not discussed, 141 N. Y. 389, 36 N. E. 314; *In re* Spratt's Will, 4 App. Div. 1, 38 N. Y. Supp. 329, *reversing* 11 Misc. 218, 32 N. Y. Supp. 1092; *In re* Read's Will, 17 Misc. 195, 40 N. Y. Supp. 974; *In re* Hurlbut's Will, 48 App. Div. 91, 62 N. Y. Supp. 698, *affirming* 26 Misc. 461, 57 N. Y. Supp. 648; *In re* Small's Will, 105 App. Div. 140, 93 N. Y. Supp. 1065; Doheny *v.* Lacy, 168 N. Y. 213, 222, 61 N. E. 255, *affirming* 42 App. Div. 218, 59 N. Y. Supp. 724.

North Carolina. — Lee *v.* Lee, 71 N. C. 139.

Oregon. — *In re* Holman's Will, 42 Or. 345, 359, 70 Pac. 908.

Pennsylvania. — *In re* Yorke's Estate, 185 Pa. St. 61, 73, 39 Atl. 1119.

In Bancroft *v.* Otis, 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904, the supreme court of Alabama overrules Moore *v.* Spier, 80 Ala. 129, where it was held that the existence of confidential relation alone created a presumption of undue influence. The court says: "Our consideration of the authorities, and also of the reasons which underlie the true doc-

(A.) Participation Must Appear. — To raise such presumption the person benefited must have taken some active part in the preparation of the will, or in procuring the devise or bequest in question.[77]

(a.) *Relation and Participation.* — But such presumption does arise when one sustaining toward testator a relation of trust and confidence is active in procuring the devise or bequest in question.[78]

(b.) *Relation and Unnatural Will.* — It has been said that, in case of wills, such presumption does not arise from the existence of confidential relations, unless it appear that the will in question excludes the natural objects of testator's bounty.[79]

trine in the premises, drive us to the conclusion that the case of Moore *v.* Spier, 80 Ala. 129, is unsupported by either, and must be overruled. And we return to the rule as it was really held in Lyons *v.* Campbell, 88 Ala. 462, and other adjudications of this court, that the existence of confidential relations between the testator and principal or large beneficiary under the will, coupled with activity on the part of the latter in and about the preparation or execution of the will, such as the initiation of proceedings for the preparation of the instrument, or participation in such preparation, employing the draughtsman, selecting the witnesses, excluding persons from the presence of the testator at or about the time of the execution, concealing the making of the will after it was made, and the like, will raise up a presumption of undue influence, and cast upon him the burden of showing that it was not induced by coercion or fraud on his part, directly or indirectly; but that no such presumption can be predicated alone on confidential relations: Hill *v.* Barge, 12 Ala. 687; Daniel *v.* Hill, 52 Ala. 430, 437; dissenting opinion of Handy, J., in Meek *v.* Perry, 36 Miss. 190, approved in Daniel *v.* Hill, 52 Ala. 430; Wheeler *v.* Whipple, 44 N. J. Eq. 142; Bailey on Onus Probandi, 385-407; Leeper *v.* Taylor, 47 Ala. 221."

In Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296, we find this language: "In addition the rule which obtains as to transactions between the living must be greatly modified when it comes to testamentary devises. If the will is not made with the active participation of the devisee, then the rule sought to be applied in the instruction cannot obtain in any degree. Surely, one ought not to be incapable of taking a devise simply for the reason that he had been a friend of the testator, or had served him faithfully when living. On such a theory a wife or child might be suspected of having exerted undue influence over a loving and grateful husband or father, merely because he should be found to have remembered them generously in his will, and that even if the will were made with his lawyer alone, in the privacy of his chamber, as was done in this case." See also Wheeler *v.* Whipple, 44 N. J. Eq. 141, 14 Atl. 275; Hunter *v.* Atkins, 3 Myl. & K. 113, 40 Eng. Reprint 43.

77. Bancroft *v.* Otis, 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904; Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296.

78. McQueen *v.* Wilson, 131 Ala. 606, 31 So. 94.

79. *In re* Sheldon's Will, 16 N. Y. Supp. 454, 40 N. Y. St. 369, *affirmed*, without opinion, 65 Hun 623, 21 N. Y. Supp. 477; Marx *v.* McGlynn, 88 N. Y. 357, 371.

On this subject the supreme court of Oregon in *In re* Holman's Will, 42 Or. 345, 70 Pac. 908, says: "Some authorities deduce a presumption of undue influence, however, where the two conditions exist together, namely, where the will is one that the testator could not have made, consistent with the claims of duty and affection, and a close confidential relationship between him and the object of his bounty: Marx *v.* McGlynn, 88 N. Y. 357. And, see, 2 White & T. Lead. Cas. Eq. 1275.

(c.) *Relation and Fact That Testator Leaves Heirs.* — A devise of testator's entire estate, or the greater part thereof, to one occupying confidential relation to testator, who leaves legal heirs, will be deemed to have been procured by undue influence.[80]

(d.) *Confidential Relation. — Testator Mentally Weak.* — Where testator is old or his mental powers are weak or impaired, a benefit conferred by him upon one occupying a relation of trust and confidence will be presumed to have been obtained by undue influence.[81]

(2.) Distinction Not Observed. — (A.) Transaction Between Guardian and Ward. — It would seem that the distinction between wills and transactions *inter vivos* is not observed in regard to devise made by a minor to his guardian, but that in such case the same presumption applies as to a gift from such minor to his guardian.[82]

(B.) When Active Agency Shown. — When the proof shows that the person benefited was active in procuring the execution of the act in question, the distinction between wills and transactions *inter vivos* is not observed.[83]

c. *Presumption From Relation.* — The rule to the effect that the exercise of undue influence will not be presumed does not apply to cases where persons occupying certain relations of trust and confidence obtain benefits from a conveyance or will executed by the persons to whom they are under obligations of good faith and fairness.[84]

This court, however, in Greenwood *v.* Cline, 7 Or. 17, refused to adopt this view, but declared that, where such conditions exist together, slight evidence that the legatee or devisee has abused the confidence reposed in him will suffice to invalidate the will; and we are not now disposed to overturn the doctrine thus established. It simply means that the two conditions combined and existing together will not suffice within themselves to overcome the *prima facie* case made, or presumption arising from proof of the due and regular execution of the instrument, in favor of testamentary capacity and the exercise of an unconstrained volition. Something more will be required to be shown, and slight evidence that advantage has been taken of the confidential relations will suffice to establish the undue influence as against the *prima facie* case or initial presumption. After all, the difference in practical operation between the two theories is very slight."

80. Marx *v.* McGlynn, 88 N. Y. 357, 371; *In re* Monroe's Will, 20 N. Y. Supp. 82; Boyd *v.* Boyd, 66 Pa. St. 283.

81. *Alabama.* — Lyons *v.* Campbell, 88 Ala. 462, 7 So. 250.

New York. — Tyler *v.* Gardiner, 35 N. Y. 559.

Pennsylvania. — Boyd *v.* Boyd, 66 Pa. St. 283; *In re* Cuthbertson's Appeal, 97 Pa. St. 163, 171; *In re* Wilson's Appeal, 99 Pa. St. 545; Wilson *v.* Mitchell, 101 Pa. St. 495, 505; *In re* Armor's Estate, 154 Pa. St. 517, 26 Atl. 619; *In re* Miller's Estate, 179 Pa. St. 645, 36 Atl. 139; *s. c.*, Miller *v.* Miller, 187 Pa. St. 572, 591, 41 Atl. 277.

82. Morris *v.* Stokes, 21 Ga. 552; *s. c.*, 27 Ga. 239; Meek v. Perry, 36 Miss. 190; Similar view indicated in Limburger *v.* Rauch, 2 Abb. Pr. N. S. (N. Y.) 279. But see Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

83. Decker *v.* Waterman, 67 Barb. (N. Y.) 460.

84. See Hoghton *v.* Hoghton, 15 Beav. 278, 51 Eng. Reprint 545; Couch *v.* Couch, 148 Ala. 332, 42 So. 624; Dowie *v.* Driscoll, 203 Ill. 480, 68 Atl. 56; Corporation *v.* Watson, 25 Utah 45, 69 Pac. 531.

In case of testamentary disposition or conveyance to person occupying fiduciary relation, it will be presumed that any advantage to

It has been said that the mere fact of the existence between parties to a conveyance or gift of a defined relation of trust and confidence raises a presumption of undue influence.[85]

(1.) Not Limited to Specific Relations. — The rule as to the presumption of undue influence is not limited to specific relations, but applies wherever fiduciary relations exist in fact and there has been a confidence reposed, which invests the person benefited with an advantage in treating with the person trusting him. Another statement of the rule is that when one person is shown to have exercised a dominating influence over another, a devise or gift from the weaker to the stronger will be presumed to have been procured by undue influence.[86] But it has also been held that unless the parties to a given transaction stand in a fixed legal relation, such as guardian and ward, attorney and client, or a similar relation, no pre-

legatee, devisee or grantee was obtained through the exercise of undue influence. Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491. See also Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep 85.

85. Powell *v.* Powell, L. R. (1900) 1 Ch. 243, 69 L. J. Ch. 164, 82 L.T.N.S. (Eng.) 84; Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480; Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334. See next preceding note.

Remarks of the Lord Chancellor of Ireland in Cooke *v.* Burtchaell, 2 Dr. & War. (Eng.) 165, 178, indicate the opposite view, as do statements in Collins *v.* Kilroy, 1 Ont. L. (Can.) 503.

86. *England.* — Dent *v.* Bennett, 4 Myl. & C. 269, 7 Sim. 539, 41 Eng. Reprint 105.

Alabama. — Couch *v.* Couch, 148 Ala. 332, 42 So. 624.

California. — Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555.

Colorado. — Meldrum *v.* Meldrum, 15 Colo. 478, 24 Pac. 1083.

Illinois. — Gilmore *v.* Lee, 86 N. E. 568, 137 Ill. App. 498.

Missouri. — Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337; Cadwallader *v.* West, 48 Mo. 483; Yosti *v.* Langran, 49 Mo. 594; Caspari *v.* First German Church, 12 Mo. App. 293, *affirmed*, 82 Mo. 649; Jones *v.* Roberts, 37 Mo. App. 163; Carl *v.* Gabel, 120 Mo. 283, 25 S. W. 214; Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; Mowry *v.* Norman, 203 Mo. 173, 103 S. W. 15; Campbell *v.* Carlisle, 162 Mo. 634, 63 S. W. 701; Dausman *v.* Rankin, 189 Mo. 677, 88 S. W. 696, 107 Am. St. Rep. 338; Reed *v.* Carroll, 82 Mo. App. 102.

New Jersey. — Haydock *v.* Haydock, 34 N. J. Eq. 570; 38 Am. Rep. 385.

New York. — Sears *v.* Shafer, 6 N. Y. 268; Marx *v.* McGlynn, 88 N. Y. 357.

North Carolina. — Deaton *v.* Munroe, 57 N. C. (4 Jones Eq.) 39.

Utah. — Corporation *v.* Watson, 25 Utah 45, 69 Pac. 531.

In Gilmore *v.* Lee (Ill.), 86 N. E. 568, the court says: "Every confidential relation implies a condition of superiority by one of the parties over the other, and if the superior obtains a benefit, such as a gift, equity raises a presumption against its validity, and casts upon the donee the burden of proving affirmatively good faith, full knowledge, and independent action on the part of the donor."

Quasi Confidential Relations. The exercise of undue influence may be inferred in all cases of confidential or quasi confidential relationship, where the power of the person receiving a gift or other like benefit has been so exerted upon the mind of the donor, as by improper acts or circumvention to have induced him to confer the benefaction contrary to his deliberate judgment, reason and discretion. Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Nichols *v.* McCarthy, 53 Conn.

sumption arises from the mere fact of their relations.[87] It has been said that a presumption of undue influence does not arise when the relation between the parties to the transaction in question is merely confidential, and not fiducial.[88] But the existence between given parties of a relation of trust and confidence creates a presumption that the person occupying the fiduciary relation possessed influence over the actor.[89]

When a Question of Fact. — Except in cases of specific, defined relations the question whether or not a relation of trust and confidence existed to such an extent as to create a presumption of undue influence, depends upon the circumstances of each case.[90]

(2.) What Relations Create Presumption. — (A.) HUSBAND AND WIFE. Transactions from which a husband obtains a benefit from his wife are presumed to have been procured by the exercise of undue influence.[91] But the contrary has been held in jurisdictions where the law permits husband and wife to contract with each other.[92]

299, 55 Am. Rep. 105; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Gillespie *v.* Holland, 40 Ark. 88, 48 Am. Rep. 1.

87. Pressley *v.* Kemp, 16 S. C. 334, 42 Am. Rep. 635; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

In Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428, an aged man executed his promissory note to his grandson. The testimony showed that the payee had for years lived with payor and managed his affairs; that payee had left payor's home to devote himself to his own business, but had returned at maker's solicitation and resumed his former employment; also that maker had given payee considerable property; also that he had intended to change his will by increasing a bequest to payee, but, upon suggestion of his attorney, had left the will unaltered, executing the note in question in place of increasing payee's legacy. It was contended that the relations of the parties gave rise to a presumption of undue influence. The court of appeals held that no such presumption arose, and, in the absence of a finding that undue influence was actually exercised, the transaction was valid.

88. *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392; Mauney *v.* Redwine, 119 N. C. 534, 26 S. E. 52. See Earle *v.* Chace, 12 R. I. 374.

89. Bayliss *v.* Williams, 6 Coldw. (Tenn.) 440; Fishburne *v.* Ferguson's Heirs, 84 Va. 87, 112; Rosevear *v.* Sullivan, 47 App. Div. 421, 62 N. Y. Supp. 447.

90. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Brown *v.* Merchants T. A. D. Co., 87 Md. 377, 40 Atl. 256; Hayes *v.* Moulton, 194 Mass. 157, 80 N. E. 215; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

91. Ireland *v.* Ireland, 43 N. J. Eq. 311, 12 Atl. 184. See Meldrum *v.* Meldrum, 15 Colo. 478, 24 Pac. 1083; Witbeck *v.* Witbeck, 25 Mich. 439; Boyd *v.* De La Montagnie, 4 Thomp. & C. (N. Y.) 148; *s. c.*, 1 Hun 696, *affirmed*, 73 N. Y. 498.

Where statute forbids the conveyance of real property from wife to husband, the circumstance that the wife joins her husband in conveying her real property to a trustee, who at once conveys to the husband, creates a presumption of undue influence. Watson *v.* Mercer, 6 Serg. & R. (Pa.) 49.

92. McDougall *v.* McDougall, 135 Cal. 316, 67 Pac. 778; Dimond *v.* Sanderson, 103 Cal. 97, 37 Pac. 189; Sheehan *v.* Sullivan, 126 Cal. 189, 58 Pac. 543; Stiles *v.* Cain, 134 Cal. 170, 66 Pac. 231; Yordi *v.* Yordi, 6 Cal. App. 20, 91 Pac. 348; Bulger *v.* Ross, 98 Ala. 267, 12 So. 803; Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806.

White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723, cites as authority Tillaux *v.* Tillaux, 115 Cal. 663, 47 Pac. 691, which was decided on judgment rendered for defendant after demurrer to complaint sus-

And it has been held that the relation of husband and wife does not create a presumption that a gift or devise from wife to husband was procured by the latter's undue influence.[93]

Provision for Wife. — There is no presumption against the validity of a provision made by a man for his wife.[94]

(B.) PARENT AND CHILD. — (a.) *Child to Parent.* — Transaction between parent and child whereby a benefit is conferred upon the former by the latter will be presumed[95] to have been obtained by

tained. The statute in question in each case, § 158 Civ. Code of California, provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying fiduciary relations with each other, as defined by the title on trusts."

In White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723, it was held that the burden of proof was imposed upon the husband by the fact that the transaction there in question was a gift from wife to husband, the court basing its ruling upon § 2235, Civ. Code which provides that all transactions between trustee and beneficiary by which the former obtains an advantage are presumed to have been entered into without consideration.

93. Mullen *v.* Johnson (Ala.), 47 So. 584; Kultz *v.* Jaeger, 29 App. Cas. (D. C.) 300; Mahan *v.* Schroeder, 236 Ill. 392, 86 N. E. 97; Hardy *v.* Van Harlingen, 7 Ohio St. 209; Hoover *v.* Neff, 107 Va. 441, 59 S. E. 428.

94. Gwin *v.* Gwin, 5 Idaho 271, 49 Pac. 295; McConnell *v.* Brown, 232 Ill. 336, 83 N. E. 854; Lathan *v.* Udell, 38 Mich. 238; *In re* Watkins' Will (Vt.), 69 Atl. 144.

But it has been said that the fact of the relation of husband and wife is an important circumstance to be considered in determining whether or not a wife obtained her husband's will by means of undue influence. *In re* Welch's Will, 6 Cal. App. 44, 91 Pac. 336. To same effect, see Boggs *v.* Boggs, 62 Neb. 274, 87 N. W. 39, where the court says: "Undoubtedly, as a general rule, confidential relations may raise strong suspicion of undue influence. But this is not true to the same extent of the relation of husband and wife where, as here, the relation has subsisted for a long time under circumstances which give rise to a very strong legitimate influence, and the disposition in question is not unjust or unnatural. Mrs. Boggs had shared his poverty, and her thrift and saving had contributed to his rise. She had faithfully and jealously attended him in his long illness, and there can be no doubt that he held her in great and well deserved affection. No presumption of undue influence can be drawn from such facts."

95. White *v.* Ross, 160 Ill. 56, 43 N. E. 336; Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480; Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918; Miller *v.* Simonds, 5 Mo. App. 33, *affirmed*, 72 Mo. 669.

In transactions between parent and child just after the latter attains majority, when the former takes a benefit without any consideration or benefit to the child, the act is presumed to have been procured by undue influence. Noble's Admr. *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175.

While conveyance from child to parent, during or shortly after maturity, is not necessarily *prima facie* void, such transactions will be viewed with great suspicion. Taylor *v.* Taylor, 8 How. (U. S.) 183. See remarks of court in Soberanes *v.* Soberanes, 97 Cal. 140, 31 Pac. 910.

In Hoghton *v.* Hoghton, 15 Beav. 278, 51 Eng. Reprint 545, 21 L. J. Ch. 482, a leading English case on the subject, the court says: "In many cases, the court, from the relations existing between the parties to the transaction, infers the prob-

ability of such undue influence having been exerted. These are the cases of guardian and ward, of solicitor and client, spiritual instructor and pupil, medical adviser and patient, and the like; and, in such cases, the court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit; not that the influence itself, flowing from such relations, is either blamed or discountenanced by the court; on the contrary, the due exercise of it is considered useful and advantageous to society; but this court holds, as an inseparable condition, that this influence should be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it. The case of parent and child is undoubtedly one of this class of cases, and it is prominently put forward as such in all cases illustrating this principle. 'Everybody,' says Lord Langdale, in Archer *v.* Hudson (7 Beav. 560), 'will affirm in this court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete "emancipation," without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party who endeavors to maintain such a transaction, to show that that presumption is adequately rebutted;' and he adds, 'that it may be adequately rebutted is perfectly clear.'" See also Wright *v.* Vanderplank, 8 De G., M. & G. 133, 44 Eng. Reprint 340, 2 K. & J. 1, 25 L. J. Ch. 753.

Even if it be conceded that the mere fact of the relation of parent and child does not create such presumption, if it appears that a parent obtained benefit from a transaction with his child, and the parties did not deal on terms of equality, such presumption arises. Toms *v.* Greenwood, 9 N. Y. Supp. 666, 30 N. Y. St. 478, *affirmed*, without opinion, 130 N. Y. 687, 30 N. E. 67.

In Ferns *v.* Chapman, 211 Ill. 597, 71 N. E. 1106, where White *v.* Ross, 160 Ill. 56, 43 N. E. 336, and Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480, are cited and the rule therein stated adhered to, the court says: "It is, however, clear from all the authorities that a child, after attaining his majority, is not prohibited by law from transferring his property to his parent, if the transaction is fully understood by the child, voluntarily made and is not tainted with fraud or brought about by parental influence and is for the best interest of the child, and it is equally clear that the presumption growing out of the fiduciary relation existing between child and parent is stronger and more difficult to rebut in some cases than in others. It is not the relation of parent and child which avoids the transfer, but the presumption of undue influence growing out of that relation when unrebutted, and while the court should view a transfer from a child to a parent with a critical eye, still if the court can see, from the evidence, the conveyance was voluntarily made and was fully understood by the child and was for the best interest of the child, it will be sustained. In this case the son, after his mother's death, had been much of the time from beneath the parental roof and was under the influence and control of persons other than the father. At the time the deed was executed he was twenty-three years of age. The conveyance was drawn with his own hand. Twice—once in 1895 and again in 1896—he testified he had conveyed the property to his father, and he made no question but what the deed was valid until after his father's death, which did not occur until eight years after the deed was made and delivered. These facts rebutted the presumption that the deed was not voluntarily and understandingly made by the grantor. If voluntarily and understandingly made, was it to the interest of Alexander M. Cheney to execute the same? He had acquired habits which made him the easy victim of

undue influence, although it has been held to the contrary.[96]

Minor and Person In Loco Parentis. — Also as to transactions between a minor and a person who stands toward him *in loco parentis*.[97]

Not Overcome by Presumption of Fairness. — The presumption of undue influence arising from the fact that a parent has received a benefit from a transaction between himself and his minor child is not overcome by the general presumption of fair dealing.[98]

Circumstance Negativing Presumption. — That land conveyed by child to parent was originally the property of grantee, that he conveyed it to his child without consideration, and for the purpose of defeating the claims of his creditors, is a circumstance to be considered as rebutting the presumption of undue influence.[99]

Presumption as to Duration of Influence. — In case of parent and child the latter is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts.[1]

(b.) *Parent to Child.* — In case of will or conveyance from parent to child, undue influence is not to be inferred, unless proof shows that the former was, at the time of the transaction, under dominion of the latter.[2] A relation of dependence or of special trust and con-

the vile and unscrupulous, who, while he was under the influence of drink or narcotic drugs, were likely to take advantage of his then condition and impoverish him. When in his normal condition, this, naturally, he would fully realize. The father was a prudent man and his best friend, and he was his father's only child. By transferring the estate to the father the patrimony given him by his grandfather was safe, at least so long as the father lived, and he might well trust his father, in case of his death, to so dispose of the property by will as to secure to him its use and preserve the same for the benefit of his children after his death; and the will left by his father shows the confidence reposed in the father by the son was not misplaced, as not one acre of the land left by Dr. D'Arcy in Christian county was disposed of by the father but remained in his name at the time of his death, the income of which Alexander M. Cheney may enjoy, under the terms of his father's will, if he will abandon his vicious habits and associations, and the fee will go to his children after his death, if he leave children him surviving."

96. Pusey *v.* Gardner, 21 W. Va. 469, 480.

97. Archer *v.* Hudson, 7 Beav. 551, 49 Eng. Reprint 1180, 13 L. J. Ch. 380, 8 Jur. 701; Bradshaw *v.* Yates, 67 Mo. 221.

98. Hoblyn *v.* Hoblyn, L. R. 41 Ch. Div. (Eng.) 200.

99. Knox *v.* Singmaster, 75 Iowa 64, 39 N. W. 183.

1. Wright *v.* Vanderplank, 8 DeG., M. & G. 133, 44 Eng. Reprint 340, 2 K. & J. 1, 25 L. J. Ch. 753.

2. *United States.* — Sawyer *v.* White, 122 Fed. 223.

Alabama. — McLeod *v.* McLeod, 145 Ala. 269, 40 So. 414; Bain *v.* Bain, 43 So. 562; Dolberry *v.* Dolberry, 44 So. 1018; Sanders *v.* Gurley, 44 So. 1022.

California. — Becker *v.* Schwerdtle, 6 Cal. App. 462, 92 Pac. 398.

Connecticut. — Mooney *v.* Mooney, 80 Conn. 446, 68 Atl. 985. *In re* Lockwood, 80 Conn. 513, 69 Atl. 8.

Illinois. — Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Bishop *v.* Hilliard, 227 Ill. 382, 81 N. E. 403; Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881.

Indiana. — Slayback *v.* Witt, 151 Ind. 376, 50 N. E. 389; Tenbrook *v.* Brown, 17 Ind. 410; Wray *v.* Wray, 32 Ind. 126.

Iowa. — Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158, *cited* with approval in Chidester *v.* Turnbull, 117 Iowa 168,

fidence must be shown.[3] In case of a deed from parent to child, it is presumed that the conveyance was made from affection, and for the child's interest.[4]

Child Agent of Parent. — But a presumption of undue influence

90 N. W. 583; Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233.

Minnesota. — Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597.

Nebraska. — Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

New Jersey. — LeGendre *v.* Goodridge, 46 N. J. Eq. 419, 19 Atl. 543, *affirmed*, 48 N. J. Eq. 308, 23 Atl. 581.

New York. — Cooper *v.* Moore, 104 N. Y. Supp. 1049; *In re* Bernsee's Will, 71 Hun 27, 24 N. Y. Supp. 504, *affirmed*, 141 N. Y. 389; 36 N. E. 314.

North Carolina. — Wessell *v.* Rathjohn, 87 N. C. 377.

Pennsylvania. — Simon *v.* Simon, 163 Pa. St. 292, 301, 29 Atl. 657; Knowlson *v.* Fleming, 165 Pa. St. 10, 30 Atl. 519; Clark *v.* Clark, 174 Pa. St. 309, 336, 34 Atl. 610, 619; Campbell *v.* Brown, 183 Pa. St. 112, 120, 38 Atl. 516; Carney *v.* Carney, 196 Pa. St. 34, 46 Atl. 264; Vaughn *v.* Vaughn, 217 Pa. St. 496, 66 Atl. 745.

Texas. — Sanfley *v.* Jackson, 16 Tex. 579, 587; Millican *v.* Millican, 24 Tex. 426, 446; Beville *v.* Jones, 74 Tex. 148, 11 S. W. 1128.

Vermont. — Pember *v.* Burton, 71 Atl. 812.

Virginia. — Jenkins *v.* Rhodes, 106 Va. 564, 56 S. E. 332.

Wisconsin. — Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939.

Wills. — Distinction. — Devise to Child or Stranger. — There is a broad distinction between the effect of a confidential relation of a legatee to testator as suggestive of undue influence when that legatee is a stranger, and when he is a child. In the latter case both the relation of confidence and some participation in the estate are natural. *In re* Lockwood, 80 Conn. 513, 69 Atl. 8.

Wessell *v.* Rathjohn, 89 N. C. 377, 45 Am. Rep. 696. In this case it is held that in case of a deed from father to daughter undue influence will not be presumed. The court says: "The relation of parent and child, as to presumption of fraud and the onus of proof to rebut the same, in business transactions between them, does not stand upon the same footing as the relation of trustee and *cestui que trust*, guardian and ward, attorney and client, principal and agent, and the like relations; it belongs to a different class of fiduciary relations, in which the presumption is not so strong, nor does it arise under the same circumstances. Besides, the presumption is always against the party having the superior dominant position or control, and this in the case of parent and child is that of the parent."

3. McKinney *v.* Hensley, 74 Mo. 326; Doherty *v.* Noble, 138 Mo. 25, 39 S. W. 458; Collins *v.* Collins, 45 N. J. Eq. 813, 18 Atl. 860; Carpenter *v.* Soule, 88 N. Y. 251, 42 Am. Rep. 248.

In Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500, the court says: "Where the parent is old and feeble and dependent upon the child, or where the child has been given the control and management of the parent's affairs, or has been largely consulted therein, or where they have long lived together, the fiduciary relation may be clear enough. But where, as in this case, parent and child have long lived apart, neither is dependent on the other, neither has habitually consulted or advised with the other, and but a few weeks have elapsed from their reunion to the transaction in question, while we do not deny that a relation of trust and confidence might arise, as Mrs. Gibson testifies there did in this case, such relation is not a necessary presumption from the mere fact that the parties are parent and child, but must be established by the party attacking the transfer, as a part of his case. At least until such trust and confidence are shown, the burden is upon the plaintiff."

4. Wessell *v.* Rathjohn, 87 N. C. 377; Slayback *v.* Witt, 151 Ind. 376,

does arise when the child is, and for years prior to act in question was, the trusted agent of his parent,[5] especially if the parent is mentally weak.[6]

(C.) GUARDIAN AND WARD. — The same presumption of undue influence arises in transactions between guardian and ward.[7] This

50 N. E. 389; Prescott *v.* Johnson, 91 Minn. 273, 97 N. W. 891.

5. Neal *v.* Neal (Ala.), 47 So. 66; Mowry *v.* Norman, 203 Mo. 173, 103 S. W. 15.

6. Martin *v.* Martin, 1 Heisk. (Tenn.) 644, 653; Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488; Mowry *v.* Norman, 203 Mo. 173, 103 S. W. 15.

7. *Alabama.* — Voltz *v.* Voltz, 75 Ala. 555.

Georgia. — Morris *v.* Stokes, 21 Ga. 552, *s. c.*, 27 Ga. 239.

Minnesota. — Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918.

Mississippi. — Meek *v.* Perry, 36 Miss. 190.

Missouri. — Bradshaw *v.* Yates, 67 Mo. 221; Miller *v.* Simonds, 5 Mo. App. 33; *s. c.*, 72 Mo. 669; Bridwell *v.* Swank, 84 Mo. 455.

New York. — Limburger *v.* Rauch, 2 Abb. Pr. (N. S.) 279; Gale *v.* Wells, 12 Barb. 84.

Vermont. — Wade v. Pulsifer, 54 Vt. 45, 63 *In re* Cowdry's Will, 77 Vt. 359, 60 Atl. 141.

Conveyance from ward to guardian is presumed to have been executed by reason of undue influence. Waller *v.* Armistead, 2 Leigh (Va.) 11, 21 Am. Dec. 594.

To effect that a guardian dealing with his ward, just after the latter arrived at full age, and obtaining any beneficial contract from him or a release of the ward's rights, must show that such contract was fairly obtained, see Johnson *v.* Johnson, 2 Hill Ch. (S. C.) 277, 29 Am. Dec. 72; Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609.

Will executed to guardian by ward immediately upon his attaining majority, and immediately after he had settled his guardian's accounts, it appearing that the ward had always given his guardian unreserved confidence, will be presumed to have been executed by reason of undue influence. Garvin's Admr. *v.* Williams, 44 Mo. 465, 100 Am. Dec. 314; *s. c.*, 50 Mo. 206.

In Bridwell *v.* Swank, 84 Mo. 455, the court says: "This presumption rests upon three facts for its foundation: first, the fiduciary relation; second, the gift or devise to, or in the interest of the guardian; third, the opportunity for and exercise of undue influence. Perhaps it would be accurate to say that the fiduciary relation *prima facie* implies an opportunity, and that proof of a want of opportunity is evidence properly in rebuttal of the presumption, which arises in the first instance from the first two facts, the first of which implies the third, but not by a conclusive implication. This distinction is immaterial in the present case, as the answer admits that the ward resided with her guardian, thus furnishing ample opportunity for the exercise of undue influence upon her."

Effect and Extent of Presumption. As to the effect and extent of the presumption arising from the existence of the relation of guardian and ward, see *In re* Cowdry's Will, 77 Vt. 359, 60 Atl. 141, where the court says: "The contestants requested a charge that the law presumes undue influence when a ward makes a will in favor of her guardian and views the act with suspicion. The court refused, but charged instead that the burden was on the guardian to show no undue influence on his part. This was not enough. The presumption of undue influence, which the law undoubtedly raised, did more than to take the burden of proof from the contestants and place it upon the guardian. It established *prima facie* the existence of such influence, and was sufficient to defeat the will unless and until it was overcome by counterproof, and should have been used as a piece of evidence, and thrown into the scale

is especially true when the gift or conveyance in question was made while the ward continued to reside with the guardian, or the guardian continues in actual control of the ward's property.[8] When the effect of a conveyance from ward to guardian is to make the former dependent upon the latter for subsistence, it will be inferred that grantor's acquiescence in the transaction was the result of undue influence.[9]

When Member of Guardian's Family Is Beneficiary. — The rule applies when the gift or devise in question is made by ward to a member of guardian's family.[10]

Duration of Influence. — In case of guardian and ward the influence of the former is presumed to last while his functions are to any extent still unperformed.[11] And the presumption applies even after the termination of the formal relation, where the guardian retains his dominion in fact, and his position of influence as respects the ward or his property.[12]

No Distinction Between Will and Conveyance. — In case of guardian and ward the distinction between testamentary disposition and transactions *inter vivos* is not observed.[13]

Committee of Insane Person. — The committee of an insane person has been held to occupy a relation of confidence within this rule.[14]

(D.) Attorney and Client. — Any benefit which an attorney receives from a transaction with his client will be presumed to have been obtained by undue influence.[15] Thus, a confession of judg-

and weighed as such in favor of the contestants."

As to rule when the transaction takes the form of a family settlement in which other members of the ward's family participate, and not a mere release from ward to guardian, see Coward's Appeal, 74 Pa. St. 329, 337. See also Womack *v.* Austin, 1 S. C. 421; Baum *v.* Hartmann, 225 Ill. 160, 80 N. E. 711.

Inference of Undue Influence. An inference of undue influence arises from the facts that persons unfamiliar with business, of limited mental capacity and under the influence of a lawyer who was a member of their guardian's family, and upon whom they relied implicitly for advice and assistance, conveyed all their estate to such lawyer upon his agreement to pay certain debts of grantor's and their brother. The fact that the result of such conveyance was to make grantor dependent upon grantee for subsistence, justifies the inference that grantor's acquiescence in the situation was also the result of undue influence. Purcell *v.* McNamara, 14 Ves. P. 91, 33 Eng. Reprint 455.

8. In Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918, the guardian was the ward's mother, and, after ward's attaining majority, continued to exercise parental control.

9. Purcell *v.* McNamara, 14 Ves. Jr. 91, 33 Eng. Reprint 455.

10. Bridwell *v.* Swank, 84 Mo. 455, where devise was made to wife of testatrix's guardian.

11. Willey *v.* Tindal, 5 Del. Ch. 194; Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287; McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609.

12. Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918; Miller *v.* Simonds, 5 Mo. App. 33, *affirmed*, 72 Mo. 669; Baum *v.* Hartmann, 225 Ill. 160, 80 N. E. 711.

13. See note 82, *ante*, under IV, 5, A, b, (2.) (A.).

14. *In re* Murdy's Appeal, 123 Pa. St. 464, 482, 16 Atl. 483.

15. *England.* — Wright *v.* Carter, L. R. (1903), 1 Ch. 27; Liles *v.* Terry, L. R. (1895), 2 Q. B. 679, 43 L. T. 428, 65 L. J. Q. B. 34.

ment by a client in favor of his attorney will be presumed to have been obtained by undue influence.[16]

Does Not Apply to Wills. — The rule that a benefit obtained by an attorney from his client is presumed to have been obtained by undue influence has been held to be limited to transactions *inter vivos*, and not to apply in case of testamentary gifts.[17] But such devise is viewed with great suspicion by courts, and, where the circumstances are suspicious, will not be sustained unless full explanation is made.[18] A presumption of undue influence is not created by proof that testatrix names as executor her attorney who had acted for her in a fiduciary capacity, and who drew the will in question.[19]

(E.) Spiritual Adviser. — A presumption of undue influence also arises from transactions in which a spiritual adviser obtains a benefit from a person accustomed to seek his professional assistance, and also accustomed to depend upon him for advice.[20] But it has been held that in case of a devise to a spiritual adviser, or to a religious

Alabama. — Yonge *v.* Hooper, 73 Ala. 119.

Connecticut. — St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735.

Illinois. — Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777.

Michigan. — *In re* Bromley's Estate, 113 Mich. 53, 71 N. W. 523.

New Hampshire. — Whipple *v.* Barton, 63 N. H. 613, 3 Atl. 922.

New York. — Mason *v.* Ring, 3 Abb. App. Dec. 219; *s. c.* 2 Abb. Pr. 322; Whitehead *v.* Kennedy, 7 Hun 230; Burling *v.* King, 2 Thomp. & C. 545.

16. Yonge *v.* Hooper, 73 Ala. 119.

17. *In re* Smith's Will, 95 N. Y. 516; Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. 874; *In re* Suydam's Will, 84 Hun 514, 32 N. Y. Supp. 449; *affirmed*, without opinion, 152 N. Y. 639, 46 N. E. 1152; *In re* Sheldon's Will, 16 N. Y. Supp. 454, 40 N. Y. St. 369, *affirmed*, without opinion, 65 Hun 623, 21 N. Y. Supp. 477; *In re* Bedlow's Will, 67 Hun 408, 22 N. Y. Supp. 290; *In re* Carver's Estate, 3 Misc. 567, 23 N. Y. Supp. 753; *In re* Edson's Will, 70 Hun 122, 24 N. Y. Supp. 71; Clarke *v.* Schell, 83 Hun 28, 31 N. Y. Supp. 1053; *In re* Read's Will, 17 Misc. 195, 40 N. Y. Supp. 974; *In re* Murphy's Will, 28 Misc. 650, 59 N. Y. Supp. 1078, *affirmed*, 48 App. Div. 211, 62 N. Y. Supp. 785; Haughian *v.* Conlan, 86 App. Div. 290, 83 N. Y. Supp. 830; *In re* Marlor's Estate, 121 App. Div. 398, 106 N. Y. Supp. 131, *reversing*, 52 Misc. 263, 103 N. Y. Supp. 161; *In re* Wilcox' Estate, 55 Misc. 170, 106 N. Y. Supp. 468; *In re* Wells, 96 Me. 161, 51 Atl. 868.

18. *In re* Gallup's Will, 43 App. Div. 437, 60 N. Y. Supp. 137; *In re* Egan's Will, 46 Misc. 375, 94 N. Y. Supp. 1064.

Thus where the proof shows that testator was of weak mind and very easily influenced, that the influence of his attorney was very great and extended beyond professional matters, and that testator passed over his wife and near relatives to devise the bulk of his estate to his attorney, the will will be set aside on the ground of undue influence. Newhouse *v.* Godwin, 17 Barb. (N. Y.) 236.

19. *In re* Marlor's Estate, 121 App. Div. 398, 106 N. Y. Supp. 131, *reversing* 52 Misc. 263, 103 N. Y. Supp. 161.

20. Huguenin *v.* Baseley, 14 Ves. 273, 33 Eng. Reprint. 526; McClellan *v.* Grant, 83 App. Div. 599, 82 N. Y. Supp. 208, *affirmed*, 181 N. Y. 581, 74 N. E. 1119.

Religious Influence. — Thus it was held in an Irish case that a conveyance, made by a young woman living in a convent as a nun to members of such convent, will be presumed to have been made under undue influence. Whyte *v.* Meade, 2 Ir. Eq. 420. See also Allcard *v.* Skinner, L. R. 36 Ch. Div. (Eng.)

institution represented by him,[21] at least where there is not a total or nearly total exclusion of the heirs,[22] no presumption arises, though it has also been held to the contrary.[23]

(F.) Executor and Heir. — It has been held that an agreement by which an heir agrees to pay an executor increased compensation for services rendered in the administration of his ancestor's estate will be presumed to have been procured by the exercise of undue influence.[24] So as to release of a widow's share of her husband's estate obtained by executors, who were her stepsons, and who had been upon friendly relations with her during her husband's lifetime, it appearing that the attorney who prepared the release had been decedent's attorney and had the widow's confidence.[25]

Devise to Executor. — So as to a devise made to the executor by a devisee of the person whose estate such executor is administering.[26]

(3.) Participation as a Factor. — In several cases where undue influence has been attempted to be shown by presumptions arising from confidential relation, the presence or absence of the person charged at the exact time of execution of the act in question has been considered in determining whether or not such presumption arose.[27]

Participation Alone Does Not Create Presumption. — The fact that a certain person took an active part in the preparation of a will does not, alone, create a presumption of undue influence exercised by him.[28] Such conduct or participation to create a presumption of undue influence must be coupled with a benefit under the will and confidential relations, or dependency, or some fact which tends to show that the person in question was able to exercise undue influence.[29] While the fact that the will in question was executed at the direction of the sole devisee may not create a presumption of undue influence, such circumstance raises a suspicion of undue influence, and courts will be vigilant in scrutinizing all the evidence offered in favor of the will.[30]

145; Spark's Case, 63 N. J. Eq. 242, 51 Atl. 118; Corporation *v.* Watson, 25 Utah 45, 69 Pac. 531.

21. *In re* Spark's Will, 63 N. J. Eq. 242, 51 Atl. 118; Figueira *v.* Taafe, 6 Dem. (N. Y.) 166, *affirmed* in *In re* Hollohan's Will, 52 Hun 614, 5 N. Y. Supp. 342. See Longenecker *v.* Zion Church, 200 Pa. St. 567, 50 Atl. 244.

22. Marx *v.* McGlynn, 4 Redf. (N. Y.) 455, 483.

23. *In re* Welsh, 1 Redf. (N. Y.) 238.

24. Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560.

25. Mayrand *v.* Mayrand, 194 Ill. 45, 61 N. E. 1040.

26. Vreeland *v.* M'Clelland, 1 Bradf. Sur. (N. Y.) 393. But see *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392.

27. Marx *v.* McGlynn, 4 Redf. (N. Y.) 455, 481; McCoy *v.* McCoy, 4 Redf. (N. Y.) 54.

28. Henry *v.* Hall, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22; McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Wilcoxon *v.* Wilcoxon, 165 Ill. 454, 46 N. E. 369; Howe *v.* Howe, 99 Mass. 88; Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869; Clifton *v.* Clifton, 47 N. J. Eq. 227, 21 Atl. 333.

29. Henry *v.* Hall, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22.

30. *In re* Miller's Estate, 31 Utah

Participation Purely Mechanical. — But even when influence and benefits are shown, if it appears that the participation of the person in question consisted in the performance of mechanical acts only, such as acting as amanuensis or messenger of testator, no presumption of undue influence arises.[31]

(4.) Relations Which Do Not Create Presumption. — (A.) KINSHIP. (a.) *Generally.* — The mere fact of kinship does not raise a presumption of undue influence.[32]

(b.) *Uncle and Niece.* — The relation of uncle and niece or nephew has been held not to create a presumption that a deed from uncle to niece or nephew was obtained by undue influence.[33]

(c.) *Grandparent and Grandchild.* — So as to the relation of grandparent and grandchild.[34]

(d.) *Brother and Sister.* — Thus it has been held that proof that the parties to a given transaction were brother and sister does not create a presumption that such transaction was the result of undue influence.[35]

(e.) *Mother-in-Law and Son-in-Law.* — Proof that person charged with exercise of undue influence was the son-in-law of testatrix and her confidential agent creates no presumption of undue influence.[36]

(B.) OTHER PERSONAL RELATIONS. — (a.) *Affianced Persons.* — Such presumption is not created by the fact that parties to the transaction in question were affianced.[37]

(b.) *Friendship and Affection.* — Undue influence will not be presumed from the fact that relations of friendship and affection existed between the parties to a given transaction.[38] Nor will such

415, 88 Pac. 338; Hill *v.* Barge, 12 Ala. 687.

31. Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068; *s. c.*, 194 Ill. 408, 62 N. E. 907; Doherty *v.* Gilmore, 136 Mo. 414, 37 S. W. 1127 (where the only participation by person charged in the preparation of the will in question consisted in his acting, at testator's request, as a messenger to procure the attendance of the attorney who prepared the will); Campbell *v.* Carlisle, 162 Mo. 634, 63 S. W. 701 (where participation consisted in securing the attendance of an attorney to draw the will in question); Fritz *v.* Turner, 46 N. J. Eq. 515, 22 Atl. 125; Seguine *v.* Seguine, 4 Abb. Dec. (N. Y.) 191, 3 Keyes 663; Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869, where participation consisted in taking draft which testator had prepared to an attorney with instructions to him to prepare a will from such draft.

32. Kinship between parties to transaction. Collins *v.* Collins, 45 N. J. Eq. 813, 18 Atl. 860; Bade *v.* Feay (W. Va.), 61 S. E. 348.

33. Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545; Doheny *v.* Lacy, 168 N. Y. 213, 222, 61 N. E. 255; Bade *v.* Feay (W. Va.), 61 S. E. 348.

34. Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

35. Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555; Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885.

36. Griffith *v.* Diffenderffer, 50 Md. 466; Hanrahan *v.* O'Toole (Iowa), 117 N. W. 675.

37. Atkins *v.* Withers, 94 N. C. 581; *In re* Willford's Will (N. J.), 51 Atl. 501. See V, 1, B, g, note 69. *post. Contra.* — Rockafellow *v.* Newcombe, 57 Ill. 186.

38. Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296; Stamets *v.* Mitchenor, 165 Ind. 672, 75 N. E. 579; Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887; West *v.* West, 144 Mo. 119, 46 S. W. 139;

presumption be raised by proof that testator and person charged with undue influence lived together many years.[39]

(C.) Business Relations. — (a.) *Physician and Patient.* — A presumption that a will was procured by undue influence does not arise from the fact that the principal beneficiary was testator's physician.[40] But the contrary has been held.[41]

(b.) *Partnership.* — In a will contest, the fact that devisee was a partner of testator will not create a presumption that the will was obtained by undue influence.[42]

Otherwise in Transaction Inter Vivos. — But in a transaction between two partners, where other circumstances showing a relation of confidence appeared, undue influence was presumed.[43]

(c.) *Principal and Agent.* — The existence of the relation of principal and agent between the parties to a given transaction does not create a presumption that such transaction was procured by undue influence.[44] The rule applies, although such person was not only the agent, but a near relative of actor.[45]

(d.) *Bank Cashier and Depositor.* — So as to relation of bank cashier and depositor.[46]

Booth *v.* Kitchen, 3 Redf. (N. Y.) 52, 64; Mauney *v.* Redwine, 119 N. C. 534, 26 S. E. 52.

39. *Indiana.* — Slayback *v.* Witt, 151 Ind. 376, 50 N. E. 389.

Michigan. — Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322; Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887.

Minnesota. — Little *v.* Little, 83 Minn. 324, 86 N. W. 408.

Missouri. — West *v.* West, 144 Mo. 119, 46 S. W. 139.

New York. — Bleecker *v.* Lynch, 1 Bradf. Sur. 458.

Pennsylvania. — *In re* Foster's Estate, 142 Pa. St. 62, 73, 21 Atl. 798.

Wisconsin. — *In re* Loennecker's Will, 112 Wis. 461, 88 N. W. 215; Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939; Meyer *v.* Arends, 126 Wis. 603, 106 N. W. 675.

40. *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53; *s. c.*, 163 N. Y. 608, 57 N. E. 1107.

41. Peck *v.* Belden, 6 Dem. (N. Y.) 299; Calhoun *v.* Jones, 2 Redf. (N. Y.) 34; Hitt *v.* Terry (Miss.), 46 So. 829.

42. Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101.

In Estate of Brooks, 54 Cal. 471, the court says that the fact of partnership is a circumstance which may be considered in determining the question of undue influence, but creates no presumption.

43. Platt *v.* Platt, 2 Thomp. & C. (N. Y.) 25.

44. Howe *v.* Howe, 99 Mass. 88; Campbell *v.* Carlisle, 162 Mo. 634, 63 S. W. 701; Doheny *v.* Lacy, 168 N. Y. 213, 61 N. E. 255; *In re* Sheldon's Will, 16 N. Y. Supp. 454, 40 N. Y. St. 369, *affirmed*, without opinion, 65 Hun 623, 21 N. Y. Supp. 477; Peery *v.* Peery, 94 Tenn. 328, 339, 29 S. W. 1; Millican *v.* Millican, 24 Tex. 426, 452; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428. But see Comstock *v.* Comstock, 57 Barb. (N. Y.) 453, where the opposite view is indicated. See also Kinne *v.* Johnson, 60 Barb. (N. Y.) 69, where, in regard to a devise from a principal to his agent the court says that this circumstance is suspicious, if it does not furnish ground for the presumption that undue influence was exerted, or fraud practiced upon testator in procuring the execution of the will.

45. *In re* Flagg's Estate, 27 Misc. 401, 59 N. Y. Supp. 167.

46. Doheny *v.* Lacy, 168 N. Y. 213, 222, 61 N. E. 255, *affirming* 42 App. Div. 218, 59 N. Y. Supp. 724.

(e.) *Boarder and Landlord.* — So as to the relation of boarder and landlord.[47]

(f.) *Master and Servant.* — So as to master and servant.[48]

(D.) Member of Church Benefited. — Nor does such presumption arise from the fact that a person charged is a member of a church to which property has been conveyed.[49]

(E.) Certain Combinations of Relations. — It has been held that a fiduciary relation is not shown by certain combinations of relations between actor and person charged. Thus, such relation is not shown by proof that person charged was the friend, housekeeper and nurse of testator,[50] or was his cousin, friend, nurse and business partner.[51]

(F.) Unlawful Relation. — The existence of an illicit relation between grantor or testator and a woman to whom property is conveyed or devised will not create a presumption that the instrument in question was procured by undue influence.[52] But the contrary has been held.[53] In such cases, however, undue influence is more

47. Doran *v.* McConlogue, 150 Pa. St. 98, 110, 24 Atl. 357.

48. Doran *v.* McConlogue, 150 Pa. St. 98, 110, 24 Atl. 357.

In re Harrold's Will, 50 Hun 606, 3 N. Y. Supp. 316. This case was tried in surrogate's court under the title Banta *v.* Willetts (see 6 Dem. 84). Upon the trial it was held that the relation of master and servant created a presumption that a devise from the latter to the former was procured by undue influence, and probate of will was denied. In reversing this judgment, the court in *In re* Harrold's Will, says: "Neither do we find that an implication of undue influence would be justified or legitimately inferred from the relation which existed between the testatrix and the chief objects of her bounty; but even if such inference could be drawn, the facts disclosed upon the trial before the surrogate were sufficient to destroy and overcome the same." See also *In re* Murphy's Will, 15 Misc. 208, 37 N. Y. Supp. 223.

49. Longenecker *v.* Zion Church, 200 Pa. St. 567, 575, 50 Atl. 244.

50. Richardson *v.* Bly, 181 Mass. 97, 63 N. E. 3.

51. Snodgrass *v.* Smith (Colo.), 94 Pac. 312; Bade *v.* Feay (W. Va.), 61 S. E. 348.

52. *England.* — Hargreave *v.* Everard, 6 Ir. Ch. 278.

Alabama. — Dunlap *v.* Robinson, 28 Ala. 100; Pool's Heirs *v.* Pool's Exr., 35 Ala. 12.

Illinois. — Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227.

Kentucky. — Porschet *v.* Porschet, 82 Ky. 93, 56 Am. Rep. 880; Best *v.* House, 113 S. W. 849.

Maryland. — *In re* Hewitt's Appeal, 55 Md. 509.

Missouri. — Sunderland *v.* Hood, 13 Mo. App. 232, *affirmed,* 84 Mo. 293; Weston *v.* Hanson, 212 Mo. 248, 111 S. W. 44.

New Jersey. — Arnault *v.* Arnault, 52 N. J. Eq. 801, 31 Atl. 606; Schuchhardt *v.* Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485; *In re* Willford's Will, 51 Atl. 501; *In re* Middleton's Will, 68 N. J. Eq. 584, 798, 59 Atl. 454, *affirmed,* 64 Atl. 1134.

New York. — *In re* Jones' Will, 85 N. Y. Supp. 294. See Platt *v.* Elias, 186 N. Y. 374, 79 N. E. 1, *affirming* 108 App. Div. 365, 95 N. Y. Supp. 710, as to presumption concerning gift to woman with whom donor lived in unlawful relation.

Pennsylvania. — Main *v.* Ryder, 84 Pa. St. 217, 225; *In re* Wainwright's Appeal, 89 Pa. St. 220.

Tennessee. — See McClure *v.* McClure, 86 Tenn 173, 6 S. W. 44.

53. Hanna *v.* Wilcox, 53 Iowa 547, 5 N. W. 717; Leighton *v.* Orr, 44 Iowa 679; Bivins *v.* Needham, 3 Baxt. (Tenn.) 282. But see McClure *v.* McClure, 86 Tenn. 173, 6 S. W. 44.

readily inferred than in a case where the relation between the parties is legal.[54]

d. *Presumption From Circumstances.* — Certain circumstances have been held to create or not to create a presumption of undue influence.

(1.) Legacy to Draughtsman. — It has been held that when a will bequeaths a legacy to the person who draws the will it will be presumed that such bequest was not the free and voluntary act of testator.[55] Such is the presumption when testator is old and feeble,[56] and when devise is made to a stranger in blood, to the exclusion of testator's relatives.[57] The rule is applied in any case where devise or legacy is made to any person represented by the draughtsman.[58] The presumption of undue influence in such cases is stronger when the natural objects of testator's bounty are excluded from his will.[59]

Contra. — No Presumption. — But it has been held that no such presumption arises from proof that the will in question was prepared

54. Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227.

In Schuchhardt *v.* Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485, it is said that while proof of the existence of unlawful relations will not raise a presumption of undue influence, it will call for close scrutiny of the circumstances, citing as authority Arnault *v.* Arnault, 52 N. J. Eq. 801, 31 Atl. 606, where the court says: "Particularly is the necessity for such scrutiny emphasized when the will prefers the influence of a mistress, usually predicated upon sensual charms and meretricious arts, to the just and honorable influence of a lawful wife, attributable to purity, virtue and affection." The court continues: "It is a modifying circumstance in the relation existing between Arnault and Elsie Strassheim, which is to be regarded in a suspicious scrutiny of this case, that their life together, at least when the will was made, partook more of the connubial than the meretricious character."

55. Butlin *v.* Barry, 1 Curt. (Eng.) 617; Garrett *v.* Heflin, 98 Ala. 615, 13 So. 326, 39 Am. St. Rep. 89; Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491.

56. Marvin *v.* Marvin, 3 Abb. App. Dec. 192 (not officially reported, but opinion given in full in Rollwagen *v.* Rollwagen, 3 Hun 121); Boyd *v.* Boyd, 66 Pa. St. 283, 294; Wilson *v.* Mitchell, 101 Pa. St. 495, 505; Woods *v.* Devers, 14 Ky. L. Rep. 81, 19 S. W. 1.

57. *In re* Eckler's Will, 47 Misc. 320, 95 N. Y. Supp. 986; *In re* Barney's Will, 70 Vt. 352, 370, 40 Atl. 1027.

58. *In re* Welch, 1 Redf. (N. Y.) 238, where it was held that a presumption of undue influence was created by the fact that the will there in question was drawn by a vestryman of the church which was named as residuary legatee.

Legacy to Draughtsman's Wife. So if the will is prepared by the husband of a legatee. Hill *v.* Barge, 12 Ala. 687; Lake *v.* Ranney, 33 Barb. (N. Y.) 49.

Legacy to Wife of Person Employing Draughtsman. — The fact that the draughtsman of the will was employed by the husband of the principal legatee, creates a presumption that the execution of the will was procured by undue influence. Henry *v.* Hall, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22.

Will Drawn by Devisee's Attorney. A presumption of undue influence arises from the fact that a will is drawn by the attorney of the person to whom the bulk of testator's estate is devised. Vreeland *v.* McClelland, 1 Bradf. Sur. (N. Y.) 393; *In re* Lansing's Will, 49 Hun 610, 2 N. Y. Supp. 117.

59. Butlin *v.* Barry, 1 Curt. (Eng.) 617.

by a legatee,[60] at least not unless testator was unable, by reason of physical or mental weakness to protect himself.[61]

Will Drawn by Executor. — Presumption of undue influence does not arise from the fact that a will was drawn by the person therein named as executor.[62]

(2.) Activity of Devisee's Family. — The fact that a member of the family of a person who occupies a relation of trust and confidence toward testator, and who takes a substantial benefit under his will,

60. *Colorado.* — Snodgrass *v.* Smith (Colo.), 94 Pac. 312.

Georgia. — Carter *v.* Dixon, 69 Ga. 82.

New Jersey. — Waddington *v.* Buzby, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706.

New York. — Coffin *v.* Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Post *v.* Mason, 91 N. Y. 539; *In re* Thompson's Will, 121 App. Div. 470, 106 N. Y. Supp. 111, *reversing* 50 Misc. 222, 100 N. Y. Supp. 492; *In re* Wilcox's Estate, 55 Misc. 170, 106 N. Y. Supp. 468; *In re* Von Keller's Estate, 28 Misc. 600, 59 N. Y. Supp. 1079.

Pennsylvania. — *In re* Harrison's Appeal, 100 Pa. St. 458; Caldwell *v.* Anderson, 104 Pa. St. 199; *In re* Yorke's Estate, 185 Pa. St. 61, 72, 39 Atl. 1119; *In re* Spellier's Estate, 2 Pa. Dist. 513; Stevenson *v.* Kingsley, 8 Pa. Dist. 245; *In re* Coleman's Estate, 185 Pa. St. 437, 40 Atl. 69.

This is especially so when the draughtsman is a near relative of testator, and would have inherited a large portion of his estate in case of intestacy. Coldwell *v.* Anderson, 104 Pa. St. 199; Blume *v.* Hartman, 115 Pa. St. 32, 8 Atl. 219, 2 Am. St. Rep. 525. To same general effect, see *In re* Barney's Will, 70 Vt. 352, 370, 40 Atl. 1027; Riddell *v.* Johnson, 26 Gratt. (Va.) 152, 173.

In Snodgrass *v.* Smith (Colo.), 94 Pac. 312, the court says: "Perhaps the rule has never been more clearly expressed than by the learned Baron Parke in the leading case of Barry *v.* Butlin, 1 Curteis 637. In referring to a case like the one before us, and with respect to a contention similar to that made here, the learned judge said: 'If it is intended to be stated as a rule of law that in every case in which the party preparing the will derives a benefit under it the onus probandi is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we concede the doctrine to be incorrect. . . . And it can not be that the simple fact of the party who prepared the will, being himself a legatee, is in every case and under all circumstances to create a contrary presumption, and to call upon the court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. . . . All that can be truly said is that if a person, whether attorney or not, prepared a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case.' In 1 Underhill on Wills, § 137, this language of Baron Parke is quoted with approval, and the learned author says: 'The safer and more correct statement of the rule is that such a condition of affairs creates no presumption, but merely raises a suspicion which ought to appeal to the vigilance of the court.' See, also, 1 Jarman on Wills (6th Ed.) 49; 1 Woerner on Administration (2d Ed.) 51; 1 Williams on Executors (Perkins Notes) bottom p. 112; Schouler on Wills (3d Ed.) § 245; 29 Am. & Eng. Enc. Law (2d Ed.) 114."

61. *In re* Sheldon's Will, 16 N. Y. Supp. 454, 40 N. Y. St. 369, *affirmed*, without opinion, 65 Hun 623, 21 N. Y. Supp. 477.

62. *In re* Linton's Appeal, 104 Pa. St. 228, 237; Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219.

is active in procuring the execution of such will, creates a presumption of undue influence.[63]

(3.) Extravagant Contract. — It was held in an English case that where a contract is shown to have been obtained by a physician from a patient of very advanced age, its existence concealed from obligor's professional advisers, the contract being extravagant in its provisions, which were inconsistent with obligor's proved habits, views and intentions, the court will conclude that it was obtained by the exercise of undue influence.[64]

(4.) Change of Intention or Will. — (A.) Will Contrary to Expressed Intent. — The fact that a will made on deathbed and after solicitation of devisee, is contrary to testator's intention as formerly expressed by him, creates a presumption of undue influence.[65]

(B.) Change of Will. — But it has been held that a presumption of undue influence does not arise from the fact that the will or codicil in question makes testamentary dispositions different from those of a former will or codicil.[66] The fact that a husband changes his will to gratify the wishes of his wife, does not create a presumption

63. Van Kleeck *v.* Phipps, 4 Redf. (N. Y.) 99, 135; *affirmed* 22 Hun 541; Wilson's Appeal, 99 Pa. St. 545.

In Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459, the court says. "In the case of Henry *v.* Hall, 106 Ala. 95, we decided that where there was a devise to the wife of one between whom and the testator there existed such relations, and who was active in and about the preparation and execution of the will, these facts brought the devise to the wife under the influence of this principle, and cast upon her the burden of showing that it was not induced by coercion or fraud. And we regard it as a legitimate application of the doctrine, resulting from the reason upon which it is founded, that if the members of the family have a common scheme or purpose to induce a person to execute a will in favor of any members of the family, one of whom occupies these confidential relations, and another, in the execution of the common purpose, actively participates in the execution of the will, by which legacies are given to various members of the family, the legal presumption arising from these facts will cast upon each of these beneficiaries the burden of showing the absence of undue influence. We do not decide, however, that the existence of such relations between one member of the family and the testator, together with the necessary activity on his part, without any evidence of conspiracy or common purpose, will necessarily raise a presumption against the validity of benefits given by the will to all the other members of the family."

64. Dent *v.* Bennett, 4 Myl. & C. 269, 41 Eng. Reprint 105.

65. Harrel *v.* Harrel, 1 Duv. (Ky.) 203; Lee *v.* Dill, 11 Abb. Pr. (N. Y.) 214; Forman *v.* Smith, 7 Lans. (N. Y.) 443; Hartman *v.* Strickler, 82 Va. 225, 238.

In McLaughlin *v.* McDevitt, 63 N. Y. 213 (*followed* and *quoted* in Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387), the court says: "The testator has, of course, a right to change radically and arbitrarily, the manner of disposing of his property, and, in the absence of fraud, courts will sustain his action in this respect; but when, according to the ordinary motives which operate upon men, we find an unnatural change made in a sick man's will, and one apparently contrary to his previous fixed and determined purpose, it is the duty of courts to scrutinize closely the circumstances, with a view of ascertaining whether the act was free, voluntary and intelligent."

66. *In re* Dunham, 48 Hun 618, 1 N. Y. Supp. 120, *affirmed*, 121 N. Y. 575, 24 N. E. 932.

of undue influence on her part.[67] Nor will such presumption arise from the fact that the will in question was executed shortly after testator had, at the suggestion of a certain person, executed a radically different will;[68] nor from the fact that shortly prior to executing the will in question, testator had drawn a radically different will from a draft prepared by another person.[69]

Change in Favor of Heir. — When the change is in favor of testator's nearest heir, when the former intention was formed during an estrangement between testator and such heir, and the change was made after reconciliation, any presumption of undue influence created by change of intention is overcome.[70]

Deed Affecting Will. — Nor does such presumption arise from the fact that a deed is contrary to grantor's intent as expressed in a will made prior thereto.[71]

(5.) Will Contrary to Known Affection. — It has been said that the fact that a will is contrary to testator's known affection to a certain descendant raises an inference that such will was the result of undue influence.[72]

(6.) Inequality in Will. — The fact that the provisions of a will are unequal or unreasonable does not create a presumption that such will was procured by undue influence.[73] But it has been held that a presumption of undue influence arises from the fact that a will is unreasonable and grossly unequal.[74]

(7.) Circumstances Held To Create Presumption. — Combinations of circumstances which have been held to create presumptions of undue influence are given in the notes.[75]

67. *In re* Langford, 108 Cal. 608, 41 Pac. 701.

68. *In re* Langford, 108 Cal. 608, 41 Pac. 701.

69. Mason *v.* Williams, 53 Hun 398, 6 N. Y. Supp. 479, *cited* in *In re* Langford, 108 Cal. 608, 41 Pac. 701.

70. *In re* Green's Will, 20 N. Y. Supp. 538, 48 N. Y. St. 450, *affirmed*, without opinion, 67 Hun 527, 22 N. Y. Supp. 1112.

71. Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779.

72. Lyon *v.* Dada, 111 Mich. 340, 69 N. W. 654.

73. *Alabama.* — Knox *v.* Knox, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235.

Illinois. — Donnan *v.* Donnan, 236 Ill. 341, 86 N. E. 279.

Iowa. — Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236.

Missouri. — McFadin *v.* Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *s. c.*, 120 Mo. 252, 25 S. W. 506; Maddox *v.* Maddox, 114 Mo. 35, 21 S. W. 499; Berberet *v.* Berberet, 131 Mo. 399, 33 S. W. 61.

New Jersey. — *In re* Barber's Will, 49 Atl. 826.

New York. — LaBau *v.* Vanderbilt, 3 Redf. 384, 424; Stein *v.* Wilzinski, 4 Redf. 44; *In re* Lyddy's Will, 4 N. Y. Supp. 468, *affirmed*, 53 Hun 629, 5 N. Y. Supp. 636, 24 N. Y. St. 607.

Texas. — Simon *v.* Middleton (Tex. Civ. App.), 112 S. W. 441.

Wisconsin. — *In re* Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665; Meyer *v.* Arends, 126 Wis. 603, 106 N. W. 675.

74. Sherley *v.* Sherley, 81 Ky. 240.

75. Voluntary Deed by Aged and Infirm Person to One Not Related. Where grantor, an aged and infirm man, suffering from grief and distress, makes a deed to a person for whom he had entertained no feel-

(8.) Circumstances Which Do Not Create Presumption. — (A.) CIRCUMSTANCES RELATING TO ACTOR. — (a.) *Age.* — Presumption of undue influence arises from the facts that the will in question was drawn by the attorney of the person charged, that such person occupied a relation of trust and confidence toward testator that the will was executed in secret, and discriminated unjustly in favor of proponent. Leonard *v.* Burtle, 226 Ill. 422, 80 N. E. 992.

Confidential Relation. — Actor Insane. — Actual Custody. — Where devisee, who occupies a confidential relation toward testatrix, who is insane, procures the execution of the will in question while she is in his custody, a presumption of undue influence arises. Murdy's Will, 123 Pa. St. 464, 472, 16 Atl. 483.

Actor Helpless, Dependent and Subject to Influence. — If an aged and infirm man who is helpless and dependent upon his wife, and entirely subject to her influence, makes under her direction a will in her favor, excluding his children by a former marriage, such will is presumed to have been executed under undue influence. Rollwagen *v.* Rollwagen, 3 Hun (N. Y.) 121, 139, *affirmed,* 63 N. Y. 504; Van Kleeck *v.* Phipps, 4 Redf. (N. Y.) 99, 135, *affirmed,* 22 Hun 541; Robinson *v.* Robinson, 203 Pa. St. 400, 53 Atl. 253; Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488.

Testator Enfeebled by Age. — Will Changed in Favor of Devisee Upon Whom He Is Dependent. — Where a person enfeebled by old age or illness makes a will in favor of another person upon whom he is dependent, and such will is at variance with another will made, or intentions formed when testator's faculties were unimpaired, and is opposed to the dictates of nature and justice, such will is presumed to have been obtained by undue influence. Demmert *v.* Schnell, 4 Redf. (N. Y.) 409; Boyd *v.* Boyd, 66 Pa. St. 283; Whitelaw's Exr. *v.* Sims, 90 Va. 588, 19 S. E. 113.

A presumption of undue influence arises from the facts that the deed in question preferred grantee to grantor's other children; that grant-

ings of affection, it will be inferred that such deed was procured by undue influence. Musick *v.* Fisher, 96 Ky. 15, 27 S. W. 812.

Gift or Conveyance from aged and infirm person to one upon whom he is dependent for care, and who is active in procuring execution of will, will be presumed to have been obtained by undue influence. Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; McCormick *v.* St. Joseph's Home, 26 Misc. 36, 55 N. Y. Supp. 224; Schinotti *v.* Cuddy, 25 Misc. 556, 55 N. Y. Supp. 219; Giles *v.* Hodge, 74 Wis. 360, 43 N. W. 163; Cole *v.* Getzinger, 96 Wis. 559, 573, 71 N. W. 75.

Grantor Infirm and Unable To Attend to His Affairs. — So as to deed by person who is old and infirm and unable to attend to his own affairs. Rider *v.* Miller, 76 N. Y. 507; Green *v.* Roworth, 113 N. Y. 462, 21 N. E. 165.

Confidential Relation. — Actor's Mind Impaired. — The fact that testator's mind was impaired, and that the principal beneficiary of his will was his confidential adviser, creates a presumption against the voluntary character of such will. *In re* Miller's Estate, 179 Pa. St. 645, 36 Atl. 139; *s. c.,* 187 Pa. St. 572, 591, 41 Atl. 277; Robinson *v.* Robinson, 203 Pa. St. 400, 433, 53 Atl. 253; Disch *v.* Timm, 101 Wis. 179, 189, 77 N. W. 196.

Confidential Relation. — Actual Influence. — Participation. — Will Contrary to Previous Intention. — Testator Weak-Minded. — A presumption of undue influence is established by proof that testator was weak-minded; that the will was contrary to his previous expressions of testamentary intentions; that proponent was the religious and business adviser of testator, possessed actual influence over him; and that proponent and his family were active in securing the execution of such will. *In re* Rogers' Will, 80 Vt. 259, 67 Atl. 726.

Confidential Relation. — Will Drawn by Proponent's Attorney. Secrecy. — Unjust Will. — A presumption of undue influence arises from the facts that the will in question was drawn by the attorney of the person charged, that such person occupied a relation of trust and confidence toward testator that the will was executed in secret, and discriminated unjustly in favor of proponent. Leonard *v.* Burtle, 226 Ill. 422, 80 N. E. 992.

fluence does not arise from the fact that testator or grantor was a very old person.[76]

(b.) *Physical Weakness.* — Nor does it arise from the fact that actor was physically weak at time of execution.[77]

(c.) *Adjudication of Insanity.* — The fact that prior to the execution of the will in question testator was adjudged to be of unsound mind does not create a presumption of the existence of undue influence in regard to such will.[78]

(d.) *Improper Motive.* — A presumption of the exercise of undue influence does not arise from the fact that testator devised property in a certain manner for the purpose of preventing the collection of a certain judgment against one of his children.[79] It has been said that the law will not consider the morality of testator's motives.[80]

(B.) Relating to Person Charged. — (a.) *General Influence.* — The exercise of undue influence will not be presumed from the fact that persons, not related to testator or grantor, influenced his conduct and controlled him in many of his actions.[81]

or was aged, susceptible to influence, actually subject to grantee—who managed all grantor's affairs; that grantee participated in the execution of the deed in question, giving instructions to the attorney who drew it; the conveyance in question being opposed to grantor's expressed intention concerning his family and property. Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488.

Relation of Master and Servant. Will Unnatural and Contrary to Previous Intention. — So, where it appeared that a will made by a simple minded servant girl to members of her master's family with whom she had lived for years and whose command she was accustomed to obey, omitted a relative between whom and testatrix affectionate relation had existed, and was contrary to the expressed intentions of testatrix, such will was held to have been executed under undue influence. Banta *v.* Willetts, 6 Dem. (N. Y.) 84.

Relatives Ignored. — Testamentary Intent Reversed. — So as to the circumstance that a will ignores all of testator's relatives, and reverses his testamentary intent as expressed in a former will. Van Kleeck *v.* Phipps, 4 Redf. (N. Y.) 99, 134, *affirmed*, 22 Hun 541; Forman *v.* Smith, 7 Lans. (N. Y.) 443.

Family Excluded — Unfavorable Comments on Their Conduct. — A presumption of undue influence in the execution of a will arises from proof that the favored legatee excluded other members of testator's family from his presence, and represented their conduct toward testator in an unfavorable light. Forman *v.* Smith, 7 Lans. (N. Y.) 443, 451.

76. *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791; *In re* Hedges' Will, 57 App. Div. 48, 67 N. Y. Supp. 1028; Mauney *v.* Redwine, 119 N. C. 534, 26 S. E. 52; Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; McIntosh *v.* Moore, 22 Tex. Civ. App. 22, 30, 53 S. W. 611 (where it was claimed that will was revoked through undue influence); Millican *v.* Millican, 24 Tex. 426, 449; Beville *v.* Jones, 74 Tex. 148, 11 S. W. 1128.

77. *In re* Barber's Will (N. J.), 49 Atl. 826.

Mental Weakness. — As to mental weakness creating presumptions, see remark of Justice Story in Harding *v.* Wheaton, 2 Mason (U. S.) 378, 386.

78. King *v.* Gilson, 191 Mo. 307, 90 S. W. 367.

79. Allmon *v.* Pigg, 82 Ill. 149, 25 Am. Rep. 303.

80. Sunderland *v.* Hood, 13 Mo. App. 232, *affirmed*, 84 Mo. 293.

81. Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329; Campbell *v.* Carlisle, 162 Mo. 634, 63 S. W. 701.

(b.) *Motive, Interest or Opportunity.* — The exercise of undue influence will not be presumed from proof of the fact that a certain person had a motive to procure the execution of the act in question,[82] or was interested in procuring it,[83] or had opportunities to influence the actor.[84]

82. *Alabama.* — Pool's Heirs *v.* Pool's Exr.. 33 Ala. 145.

Colorado. — *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. Rep. 181.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

Missouri. — McFadin *v.* Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *s. c.*, 120 Mo. 252, 25 S. W. 506.

New Jersey. — Kitchell *v.* Beach, 35 N. J. Eq. 446.

New York. — *In re* Gihon's Will, 44 App. Div. 621, 60 N. Y. Supp. 65, *affirmed*, 163 N. Y. 595, 57 N. E. 1110; McCoy *v.* McCoy, 4 Redf. 54; Mason *v.* Williams, 53 Hun 398, 6 N. Y. Supp. 479.

83. *In re* Langford, 108 Cal. 608. 41 Pac. 701; Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Kitchell *v.* Beach, 35 N. J. Eq. 446; Seguine *v.* Seguine, 4 Abb. Dec. 191, 3 Keyes 663, 35 How. Pr. 336; Carroll *v.* Norton, 3 Bradf. Sur. (N. Y.) 291.

84. *Alabama.* — Knox *v.* Knox, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235; Pool's Heirs *v.* Pool's Exr., 33 Ala. 145.

Colorado. — Snodgrass *v.* Smith, 94 Pac. 312; *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. Rep. 181.

Illinois. — Roe *v.* Taylor, 45 Ill. 485; Rutherford *v.* Morris, 77 Ill. 397; Kimball *v.* Cuddy, 117 Ill. 213, 7 N. E. 589.

Indiana. — Bundy *v.* McKnight, 48 Ind. 502.

Iowa. — Campbell *v.* Campbell, 51 Iowa 713, 2 N. W. 541.

Massachusetts. — McKeone *v.* Barnes, 108 Mass. 344.

Michigan. — Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

Missouri. — Doherty *v.* Gilmore, 136 Mo. 414, 37 S. W. 1127; McFadin *v.* Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771.

New Jersey. — Kitchell *v.* Beach, 35 N. J. Eq. 446; *In re* Barber's Will, 49 Atl. 826.

New York. — *In re* Gihon's Will, 44 App. Div. 621, 60 N. Y. Supp. 65, *affirmed*, 163 N. Y. 595, 57 N. E. 1110; Carroll *v.* Norton, 3 Bradf. Sur. 291; McCoy *v.* McCoy, 4 Redf. 54; Seguine *v.* Seguine, 35 How. Pr. 336; *s. c.*, 3 Keyes 663, 4 Abb. App. Dec. 191; *In re* Bartholick's Will, 5 N. Y. Supp. 842; Mason *v.* Williams, 53 Hun 398, 6 N. Y. Supp. 479; *In re* Spratt's Will, 4 App. Div. 1, 38 N, Y. Supp. 329, *reversing* 11 Misc. 218, 32 N. Y. Supp. 1092.

Tennessee. — Peery *v.* Peery, 94 Tenn. 328, 338.

Wisconsin. — McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

As to opportunity, the supreme court of Wisconsin in Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939, says: "Any of the circumstances mentioned, and probably many others, may be present to so slight extent as to hardly arouse suspicion, or so extremely as to strongly suggest influence. Thus the word 'opportunity' has almost uniformly been given prominence where a private interview is shown to have taken place between grantor and grantee upon the subject of the conveyance, the result of which was a direction transmitted by the beneficiary for the preparation of the instrument. That word has not been used to express a mere possibility of private interviews, as between people in the same house, where there was no proof that any such took place."

Upon the issue whether or not a release of debt held by a husband against his wife was obtained by her undue influence, the exercise of such influence will not be presumed from the fact that the husband, who,

(c.) *Nor From Anxiety for Execution of Will.* — Nor from evidence that a certain person was anxious that testator make his will.[85]

(d.) *Relationship and Solicitation.* — Presumption is not created by the combined circumstances that grantees in deeds in question were members of grantor's family, that they solicited the execution of such deeds, and that other members of grantor's family received nothing.[86]

(e.) *Confidential Relation and Unjust Will.* — Nor is such presumption created by the combined circumstances of a confidential relation between testator and person charged, and an unjust or unequal will. It must appear that an advantage has been taken of the trust relation.[87]

(f.) *Actual Influence, Opportunity and Inequality.* — Nor is such presumption created by the combined circumstances that the person charged possessed and exercised over actor an influence gained through affectionate family relations, that such person had opportunities to unduly influence actor, and the act in question made an unequal distribution of actor's estate to the prejudice of one of her children, and showed a change of intent in regard to such estate.[88]

(C.) Terms of Instrument. — Preference of Collateral Relatives. No presumption of undue influence is created by the fact that testator makes a will more favorable to his collateral relatives than to his wife;[89] nor from the fact that he gives his property to strangers instead of to those of his own blood.[90]

(D.) Execution of Act. — (a.) *No Independent Advice.* — Nor is such presumption created by the fact that actor executed the instrument in question without independent advice.[91]

by reason of drunkenness was unable to manage his business, entrusted to her the management of his affairs. Gardner *v.* Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340.

85. Woodman *v.* Illinois Tr. & Sav. Bank, 211 Ill. 578, 71 N. E. 1099.

86. Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779.

87. *In re* Holman's Estate, 42 Or. 345, 70 Pac. 908; *In re* Metcalf's Will, 16 Misc. 180, 38 N. Y. Supp. 1131.

88. Meyer *v.* Jacobs, 123 Fed. 900, 919.

Nursing and Attendance of Actor by Beneficiary. — Undue influence will not be presumed from the fact that grantor was in his last illness nursed and attended by grantees, his nieces, who lived with him. Hamilton *v.* Armstrong, 120 Mo. 697, 25 S. W. 545; Bade *v.* Feay (W. Va.), 61 S. E. 348.

In Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087, the fact that for many years grantee nursed and cared for grantor was a circumstance which, with others, imposed burden of proof upon grantee.

89. Coffin *v.* Coffin, 23 N. Y. 9, 80 Am. Dec. 235; *In re* Merriman's Appeal, 108 Mich. 454, 66 N. W. 372.

90. Chandler *v.* Jost, 96 Ala. 596, 11 So. 636; Henry *v.* Hall, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

Grant Leaving Nothing for Grantor's Children. — The fact that testamentary provision for testator's wife leaves nothing for his children does not create a presumption of undue influence on the part of the wife. *In re* Smith's Will, 52 Wis. 543, 552, 8 N. W. 616, 9 N. W. 665.

91. *In re* Spark's Will, 63 N. J. Eq. 242, 51 Atl. 118.

(b.) *Secrecy.* — No presumption of undue influence is created by the fact that a will is executed in secret, and without the knowledge of testator's wife.[92]

(c.) *Will Made on Deathbed in Presence of Legatees.* — No presumption of undue influence arises from the fact that the will was made by testator while on his deathbed and surrounded by relatives who were made legatees.[93]

(d.) *Deed Drawn by Grantee's Husband.* — The fact that a deed in question was drawn by grantee's husband will not create a presumption of undue influence, it appearing that grantor directed such person to draw the deed.[94]

(e.) *Will Drawn by Testator's Partner.* — The facts that the will was drawn by testator's partner, who was named therein as executor, and that the testator's son was required by its terms to enter into partnership with the draughtsman and obtain his consent before selling property, together with the fact that testator had been for years addicted to the excessive use of liquor, do not raise a presumption of undue influence.[95]

(9.) When Presumption Arises From Circumstances. — A presumption against the person charged does not arise until proof is made of circumstances which suggest the act complained of.[96]

e. *Presumptions in Favor of Act. — When Relations Between Devisee and Testator Affectionate.* — When it appears that the person benefited by a will or deed is one with whom testator or grantor maintained intimate and affectionate relations, the presumption is in favor of the validity of the will.[97] So where it is shown that in making his will testator was influenced by the advice of his wife, it

92. Coffin *v.* Coffin, 23 N. Y. 9, 80 Am. Dec. 235; *In re* Stickney's Will, 104 Wis. 581, 80 N. W. 921.

Fact of Execution Concealed at Testator's Request. — That execution of will was kept secret at testator's request tends to rebut any presumption of undue influence which might arise from the mere fact of secrecy. Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869.

93. Bundy *v.* McKnight, 48 Ind. 502.

94. Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545.

95. Koegel *v.* Egner, 54 N. J. Eq. 623, 35 Atl. 394. The court says such circumstances are usually reckoned among the indicia of undue influence and fraud, and excite suspicions, and demand their critical consideration by the court, but do not raise a presumption against the deed.

96. Small *v.* Champeny, 102 Wis. 61, 69, 78 N. W. 407.

97. Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113; Slingloff *v.* Bruner, 174 Ill. 561, 51 N. E. 772; Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1; Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296; Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446. To same effect, see Eakle *v.* Reynolds, 54 Md. 305; Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887; Coleman's Estate, 185 Pa. St. 437, 40 Atl. 69.

Presumption of Affection. — That certain family relations existed between parties to a transaction, creates a presumption that affection was the consideration for such transaction. Beith *v.* Beith, 76 Iowa 601, 41 N. W. 371.

will be presumed that she, as well as himself, was controlled by motives of propriety and natural affection.[98]

Will Coinciding With Known Feelings of Testator. — That the will in question coincides with the known feelings and affections of testator at the time of execution creates a presumption against undue influence.[99]

Will Remaining Unrevoked. — That testator permitted his will to remain unrevoked and unaltered during a number of years creates a presumption that its execution was voluntary.[1]

B. As to Duration of Influence. — Parent and Child. — In the case of parent and child, the child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts.[2]

Guardian and Ward. — In case of guardian and ward the presumption continues as long as any of guardian's functions remain undischarged.[3]

Attorney and Client. — Influence created by relation of attorney and client is presumed to continue even after dissolution of relation.[4]

No Presumption of Continuance of Influence. — It has been held, in regard to wills, that the law does not presume that influence, proven to have once existed, continued until the execution of the will in question; but proof that such influence once existed makes it necessary for the court to use much caution, and to be suspicious in weighing evidence offered to show such influence in regard to matters arising subsequently to the time when influence was shown to have been exercised.[5]

Continuance of Relation. — A relation of trust and confidence between the parties once proved is presumed to continue, unless there is direct evidence of its termination.[6]

Acquiescence Presumed Result of Influence. — When acquiescence is relied upon as a defense in an action to set aside a transaction resulting in benefit to one occupying a confidential relation toward actor, and the proof shows that actor continued to trust the person

98. Deck *v.* Deck, 106 Wis. 472, 82 N. W. 293.

99. *In re* Dwyer's Will, 29 Misc. 382, 61 N. Y. Supp. 903.

1. Barbour *v.* Moore, 10 App. Cas. (D. C.) 30, 46.

Such Presumption Overcome. Any presumption created by the fact that will remained unrevoked is overcome by proof showing that testator was of weak mind; that the will was not always in his possession; that his attention was not called to it, and he did not remember having ever made a will. Barbour *v.* Moore, 10 App. Cas. (D. C.) 30, 46.

2. Wright *v.* Vanderplank, 8 De G., M. & G. 133, 44 Eng. Reprint 340, 2 K. & J. 1, 25 L. J. Ch. 753.

3. See Baum *v.* Hartmann, 225 Ill. 160, 80 N. E. 711. See note 13, under V, 1, H.

In Wade *v.* Pulsifer, 54 Vt. 45, 63, it is said that "Time never puts an end to this presumption."

4. Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

5. Kelly *v.* Thewles, 2 Ir. Ch. 510.

6. Rhodes *v.* Bate, L. R. 1 Ch. App. (Eng.) 252, 35 L. J. Ch. 267, 12 Jur. (N. S.) 178, 13 L. T. 778.

benefited, it will be presumed that acquiescence and inaction were caused by the influence which was operative in procuring the original transaction.[7]

Novation Deemed Part of Original Transaction. — It being shown that a certain instrument was executed by reason of undue influence, a second instrument, executed in renewal or continuation of the first, will be deemed to have been connected with the first, and subject to be set aside, it not appearing that actor was aware of the invalidity of the first.[8]

Whether Confirming Documents Procured by Original Influence, Question of Fact. — Where letters from the testator to the beneficiary showing an intent similar to that expressed in the will are relied upon to show the voluntary character of the will, it is a question for the jury whether or not the letters were procured by the same influence.[9]

C. CHARACTER OF PRESUMPTION. — a. *Not Conclusive.* — In cases in which, because of the existence of trust relations, a presumption of undue influence arises, such presumption is one of fact and not of law, and is disputable.[10]

7. Wade *v.* Pulsifer, 54 Vt. 45, 68. This case involved conveyances from wards to guardian. Defense was that wards acquiesced in the transaction and took no action toward impeaching it. The court said: "The silence of Sarah and Mary since their marriage — the absence of all evidence that they or Charles ever made any allusion to the gifts, and the continued confidence that the girls reposed in Charles, that gave him, to some extent the continued management of their property, and at all times turned them to him, as their adviser; are facts that raise the presumption, in the absence of evidence to the contrary, that whatever acquiescence existed in the case is traceable to the same influence that vitiated the gifts when originally made." To same effect, see Sharp *v.* Leach, 31 Beav. 491, 503, 7 L. T. N. S. 146; Brown *v.* Kennedy, 33 Beav. 133, 148, 55 Eng. Reprint 317.

8. Kempson *v.* Ashbee, L. R. 10 Ch. App. (Eng.) 15. See also Savery *v.* King, 5 H. L. Cas. (Eng.) 627, 664.

9. Livering *v.* Russell, 30 Ky. L. Rep. 1185, 100 S. W. 840.

10. St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Ferns *v.* Chapman, 211 Ill. 597, 71 N. E. 1106; Breed *v.* Pratt, 18 Pick. (Mass.) 115; Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47; *In re* Soule's Will, 3 N. Y. Supp. 259, 267, 19 N. Y. St. 532, *affirmed*, 9 N. Y. Supp. 949; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313.

Attorney and Client. — Thus it has been held that in case of a legacy from client to attorney drawing the will in question, the presumption that such legacy was procured by undue influence is disputable. *In re* Holmes' Estate, 3 Giff. 337, 66 Eng. Reprint 439, 8 Jur. N. S. 252, 5 L. T. 378; St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Wright *v.* Howe, 52 N. C. (7 Jones' L.) 412.

In *In re* Bromley's Estate, 113 Mich. 53, 71 N. W. 523, the presumption was rebutted by showing that the will in question was prepared by an attorney other than devisee.

In Liles *v.* Terry, L. R. (1895), 2 Q. B. (Eng.) 679, it is said that the presumption of undue influence in case of transactions between attorney and client is conclusive. In later cases the courts incline to the opinion that such presumption is disputable.

Will Procured by One Occupying Relation of Trust in favor of himself or a member of his family.

Presumption Against Undue Influence Not Conclusive, When. — Such presumption against the exercise of undue influence as is created by recitals in a deed from a woman to her husband is not conclusive against grantor.[11]

b. *Presumption Strengthened or Weakened.* — When actor is a person of feeble intellect, irresolute character and vacillating will, the presumption of undue influence is strengthened, and stronger and more conclusive evidence will be required to rebut it than in case of person of stronger character.[12] On the other hand, the presumption is weakened by proof that actor was a person of strong mind and determined will.[13]

Presumption Stronger When Confirmation Relied Upon. — The presumption of undue influence is stronger when, in a case involving a transaction between persons occupying a relation of trust and confidence, the person benefited relies upon a confirmation of a voidable contract, than when he relies upon the original contract.[14]

Made Stronger by Circumstances. — In cases where the fact that draughtsman of a will takes a legacy under it is held to create a presumption of undue influence, such presumption may be strengthened by certain circumstances, such as unbounded confidence in the drawer of the will, extreme debility of testator or clandestinity.[15]

Presumption Arising From Formal Execution Weakened. — The presumption arising from execution of will in due form of law may be weakened by proof of suspicious circumstances.[16]

D. Presumption Rebutted. — a. *Sufficient Reason for Act.* The presumption of undue influence arising from the existence of confidence or confidential relations between parties to the act in

Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387.

Religious Influence. — So as to influence exercised by a spiritual adviser. Marx *v.* McGlynn, 88 N. Y. 357.

Person Possessing Actual Influence. — So as to a person who sustains toward a testator relations held to be fiduciary, and who possesses as a matter of fact, a powerful influence over him. Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491.

Presumption Arising From Unnatural or Unequal Will. — Sherley *v.* Sherley, 81 Ky. 240.

Presumption Arising From Legacy to Draughtsman of will is not conclusive. Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491; Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387; Crispell *v.* Dubois, 4 Barb. (N. Y.) 393.

Such presumption is rebutted by proof showing that testator made the will in question in his own handwriting, after having independent advice. *In re* Bromley's Estate, 113 Mich. 53, 71 N. W. 523.

11. Hardin *v.* Darwin, 77 Ala. 472, 482.

12. Waddell *v.* Lanier, 62 Ala. 347.

13. Waddell *v.* Lanier, 62 Ala. 347.

14. Voltz *v.* Voltz, 75 Ala. 555.

15. Hill *v.* Barge, 12 Ala. 687.

16. Thus, where it appears that testatrix was old, ill and illiterate, was accustomed to rely upon the person charged — who was the favored devisee — for advice, that such person caused the will to be prepared by his own attorney, and refused to read it to testatrix, it was held that the presumption of voluntary execution was weakened. *In re* Lansing's Will, 49 Hun 610, 2 N. Y. Supp. 117.

question, or from other circumstances, is rebutted by any proof showing a sufficient reason for doing such act.[17]

17. *In re* Soule's Will, 3 N. Y. Supp. 259, 269, 19 N. Y. St. 532, *affirmed*, 11 N. Y. Supp. 949; *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313; *In re* Friend's Estate, 198 Pa. St. 363, 47 Atl. 1106; Dailey *v.* Kastell, 56 Wis. 444, 14 N. W. 635; Marking *v.* Marking, 106 Wis. 292, 82 N. W. 293; Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939.

Kindly Feeling. — Deed made for consideration less than value of the property involved is explained by fact that grantee was a favorite relative of grantor. Coombe's Exr. *v.* Carthew, 59 N. J. Eq. 638, 43 Atl. 1057.

Valuable Consideration. — Thus it may be shown that actor received a valuable consideration for the execution of the act in question. Biglow *v.* Leabo, 8 Or. 147; Barbee *v.* Stokes, 33 Ky. L. Rep. 439, 110 S. W. 341.

Presumption is negatived by proof showing that grantee agreed to support grantor and pay certain of her debts. Marking *v.* Marking, 106 Wis. 292, 82 N. W. 293; Erwin *v.* Hedrick, 52 W. Va. 537, 44 S. E. 165.

Advancements. — Any presumption of undue influence arising from the fact that an aged grantor conveyed property to one child to the exclusion of others, is rebutted by proof that grantee rendered valuable services to grantor, and that the latter had given property to his other children. Moore *v.* Moore, 67 Mo. 192; Canfield *v.* Fairbanks, 63 Barb. (N. Y.) 461.

Services — Gratitude. — *In re* Reed's Will, 20 N. Y. Supp. 91; Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939.

Legacy to Attorney — Draughtsman. — In case where, by reason of relationship of attorney and client, a codicil is presumed to have been procured by undue influence, the presumption so arising is rebutted by proof showing that the legacy in question constituted but a small portion of testator's estate; that testator had, without his attorney's action, made a codicil other than the one in question, altering a previous disposition; that testator had a strong affection for his attorney and wished to reward him for services, as he rewarded other lawyers; that testator was assisted in preparing the codicil in question by a trusted relative whose legacy was decreased by the change thereby made, and who was not acquainted with the draughtsman. *In re* Soule's Will, 3 N. Y. Supp. 259, 269, 19 N. Y. St. 532, *affirmed*, 11 N. Y. Supp. 949, 32 N. Y. St. 1136.

Draughtsman Heir at Law. — Also by proof that attorney (draughtsman) was an heir at law to testator, and would have received almost as much, had testator died intestate, as he took under the will. *In re* Skaats' Will, 74 Hun 462, 26 N. Y. Supp. 494.

Such presumption is rebutted by proof showing that draughtsman, not an attorney, merely copied a former will of testator's at his request, and according to his instructions; that the will so prepared was read over to testator prior to execution; that draughtsman was not present at execution, which was superintended by an attorney who had been decedent's legal adviser and had superintended the execution of his former wills. *In re* Bartholick's Will, 5 N. Y. Supp. 842, *reversed*, on another ground, 59 Hun 616, 12 N. Y. Supp. 640.

Grantee's Property Standing in Grantor's Name. — Such presumption of undue influence as may arise from the fact that a married woman conveyed valuable property to a person selected by her husband and who at once conveyed it to the husband, is rebutted by proof showing that the land in question was really the property of the husband and paid for from his funds; that the wife executed the conveyance at his request, and acknowledged before a notary that she executed it freely. Allen *v.* Drake, 109 Mo. 626, 19 S. W. 41.

Unlawful Relation. — Platt *v.* Elias, 186 N. Y. 374, 79 N. E. 1, *af-*

b. *Prior Intention.* — A presumption that a certain act was the result of undue influence is negatived by proof that actor had during a long time, and in many modes, indicated an intention to do the act in question.[18] But it must appear that actor's previously formed

firming 108 App. Div. 365, 95 N. Y. Supp. 710.

In Best *v.* House (Ky.), 113 S. W. 849, it was held that the existence of an unlawful relation between testator and the mother of his illegitimate children did not create a presumption that his will in favor of such children was procured by her undue influence; but that such devise was explained by his moral obligation to provide for such children.

No Benefit to Person Charged. Presumption created by existence of confidence is repelled by proof that person charged had no personal or selfish end in view. Longenecker *v.* Zion E. L. Church, 200 Pa. St. 567, 50 Atl. 244.

Discrimination Explained by Hostile Feeling. — Coit *v.* Patchen, 77 N. Y. 533; Crispell *v.* Dubois, 4 Barb. (N. Y.) 393.

Testator Kindly Treated by Devisee. — Limburger *v.* Rauch, 2 Abb. Pr. N. S. (N. Y.) 279 (where testator was devisee's ward).

Apparently Unnatural Will Explained. — An apparently unnatural will is explained, and a presumption of undue influence in its execution rebutted, by proof that the only near relative of testatrix was already amply provided for, was aged, unmarried, and would probably devise all her estate for charitable uses. Marx *v.* McGlynn, 88 N. Y. 357.

18. Kennedy *v.* Ten Broeck, 11 Bush (Ky.) 241. To same effect, see Eakle *v.* Reynolds, 54 Md. 305; Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643; Carter *v.* Dilley, 167 Mo. 564, 67 S. W. 232; Crispell *v.* Dubois, 4 Barb. (N. Y.) 393; Wright's Exr. *v.* Wright, 32 Ky. L. Rep. 659, 106 S. W. 856, *citing* Garner *v.* Garner, 4 Ky. L. Rep. 823.

In Kennedy *v.* Ten Broeck, 11 Bush (Ky.) 241, it was claimed that a certain deed was the result of undue influence exercised over a woman by her husband. The wife had often stated that she proposed to give her estate to her husband, he being poor, and her relatives wealthy. *Held*, that such proof of intention negatived any presumption of undue influence.

In Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387, the court says: "While the law regards with disfavor and suspicion the conduct of a party who occupies confidential relations to another, and takes advantage of his position to obtain an unjust will in his favor, or in behalf of his kindred, and thus employs his influence to control free action and judgment in the disposition of an estate, the legal presumption which arises from such an act may be rebutted by testimony and circumstances showing that what was done was in entire conformity to the express desire and intention of the decedent. And, in considering such an act, it must not be overlooked that in this case no near relatives, who have been injured or excluded from their natural rights, make any complaint, but the parties to be affected are mostly strangers, who have only been selected by reason of friendly offices, or under a sense of obligation for kindnesses extended, or are institutions of charity and benevolence which appeal to the liberality and generosity of the human heart. In view of the circumstances and the evidence presented, I am not prepared to hold that the act of Loveridge was such an abuse of confidence reposed in him as to authorize the conclusion that the will was invalid, for that reason. I am the less inclined to such a result because the will was in accordance with the intention of the testatrix as expressed by her to her physician and other persons who had no part in its execution, and who were entirely disinterested, to say nothing of the positive testimony of the other parties who were present at the time."

intention was to do the very act in question, and to do it in the manner in which it was done.[19]

c. *Acquiescence.* — In case of will alleged to have been procured by one occupying a confidential relation toward testator, the presumption arising from such relation is negatived by proof that testator permitted the will in question to remain unrevoked for many years,[20] except where it appears that his mind was too feeble to determine the propriety of revocation.[21]

E. Presumption Not Overcome. — When the circumstances surrounding a given act are such as to create a presumption of undue influence, this presumption is not overcome by proof that actor was aware of the contents of the instrument in question, and assented to all its provisions.[22]

By Failure To Provide for Child. — The presumption in favor of the validity of a will is not overcome by proof that testator omits to provide for one of his children.[23]

19. In Caspari *v.* First German Church, 12 Mo. App. 293, *affirmed*, 82 Mo. 649, the court says: "First, it is urged that the gift was the result of an intention long harbored by Mrs. Caspari, and in nowise created by the pastor. This cannot be said of the gift *as made*. Mrs. Caspari had long intended to make a gift to the church, but not this gift. She had intended to give the church something after her death, not during her lifetime. She had not intended to part with the income of any of her estate, which she needed for her support and that of her eldest stepson. And, finally, she did not intend to give $4,000 but only $3,000. It is perfectly clear upon the testimony that, but for the active influence and solicitations of the pastor, the most that the church would ever have received from her would have been a bequest in her will of $3,000."

20. *In re* Harrold's Will, 50 Hun 606, 3 N. Y. Supp. 316, *reversing s. c.*, 6 Dem. 84. The question of acquiescence was not discussed by the lower court.

In Mitchell *v.* Homfray, 45 L. T. N. S. (Eng.) 694, it was held that the presumption that a certain act was the result of undue influence exercised by a physician over his patient was overcome by proof that actor intentionally abided by her act.

21. Irish *v.* Smith, 8 Serg. & R. (Pa.) 573.

22. In Tyler *v.* Gardiner, 35 N. Y. 559, after holding that the circumstances of that case were such as to create a presumption of undue influence, the court says: "It is not sufficient answer to the presumption of undue influence, which results from the undisputed facts, that the testatrix was aware of the contents of the instrument, and assented to all its provisions. This was the precise purpose, which the undue influence was employed to accomplish. That consideration was urged in the case of Bridgman *v.* Green; but Lord Chief Justice Wilmot very properly replied, that it only tended to show, more clearly, the deep rooted influence obtained over the testator. He added: 'In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect that the deed or the will, are very material; but in cases of undue influence and imposition, they prove nothing, for the same power which produces one produces the other.' (Wilmot, 70). In the case of Huguenin *v.* Baseley, Lord Eldon said: 'The question is, not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced.'"

23. *In re* Munger, 38 Misc. 268, 77 N. Y. Supp. 648.

F. Presumption in Favor of Will Admitted to Probate. — In jurisdictions which permit the institution of an action or proceeding to test the validity of a will after the same has been admitted to probate, the decree admitting such will is *prima facie* evidence of its validity.[24]

V. BURDEN OF PROOF.

1. In General on Person Alleging. — As a general rule, the burden of proving undue influence is upon the party alleging that a certain act was thereby procured.[25]

24. Decree. — Heath *v.* Koch, 74 App. Div. 338, 77 N. Y. Supp. 513, *affirmed*, 173 N. Y. 629, 66 N. E. 1110; Cook *v.* White, 43 App. Div. 388, 60 N. Y. Supp. 153, *affirmed*, 167 N. Y. 588, 60 N. E. 1109. To same general effect, see Post *v.* Mason, 91 N. Y. 539.

25. *England.* — Rhodes *v.* Cook, 2 Sim. & S. 488, 57 Eng. Reprint 432; Field *v.* Sowle, 4 Russ. 112, 38 Eng. Reprint 747; Parfitt *v.* Lawless, 41 L. J. P. 68, 27 L. T. 215, L. R. 2 P. 462; Boyse *v.* Rossborough, 6 H. L. Cas. 2, 49.

United States. — Towson *v.* Moore, 173 U. S. 17.

Alabama. — Dunlap *v.* Robinson, 28 Ala. 100; Malone *v.* Kelley, 54 Ala. 532.

Connecticut. — Rockwell's Appeal, 54 Conn. 119, 6 Atl. 198; Livingston's Appeal, 63 Conn. 68, 26 Atl. 470.

Illinois. — English *v.* Porter, 109 Ill. 285; Burt *v.* Quisenberry, 132 Ill. 385, 24 N. E. 622; Swearingen *v.* Inman, 198 Ill. 255, 65 N. E. 80.

Iowa. — Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Marshall *v.* Henly, 115 Iowa 318, 88 N. W. 801; Parker *v.* Lambertz, 128 Iowa 496, 104 N. W. 452; *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110; Mallow *v.* Walker, 113 Iowa 238, 88 N. W. 452.

Kentucky. — Johnson *v.* Stivers, 95 Ky. 128, 23 S. W. 957; Barlow *v.* Waters, 16 Ky. L. Rep. 426, 28 S. W. 785.

Maine. — Barnes *v.* Barnes, 66 Me. 286; *In re* Wells, 96 Me. 161, 51 Atl. 868.

Maryland. — Tyson *v.* Tyson, 37 Md. 567; Layman *v.* Conrey, 60 Md. 286.

Massachusetts. — McKeone *v.* Barnes, 108 Mass. 344; Davis *v.* Davis, 123 Mass. 590; Bacon *v.* Bacon, 181 Mass. 18, 62 N. E. 990, 92 Am. St. Rep. 397.

Michigan. — Potter's Appeal, 53 Mich. 106, 18 N. W. 575; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

Minnesota. — *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; Mitchell *v.* Mitchell, 43 Minn. 73, 44 N. W. 885.

Missouri. — Taylor *v.* Wilburn, 20 Mo. 306, 64 Am. Dec. 186; Maddox *v.* Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Norton *v.* Paxton, 110 Mo. 456, 19 S. W. 807; Carl *v.* Gabel, 120 Mo. 283, 25 S. W. 214; Norton *v.* Heidorn, 135 Mo. 608, 37 S. W. 504; Doherty *v.* Noble, 138 Mo. 25, 39 S. W. 458; McFadin *v.* Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *s. c.*, 120 Mo. 252, 25 S. W. 506; Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642; Riley *v.* Sherwood, 144 Mo. 354, 45 S. W. 1077; Aylward *v.* Briggs, 145 Mo. 604, 47 S. W. 510; Tibbe *v.* Kamp, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; Dausman *v.* Rankin, 189 Mo. 677, 88 S. W. 696, 107 Am. St. Rep. 338; King *v.* Gilson, 191 Mo. 307, 90 S. W. 367.

Nebraska. — Seebrock *v.* Fedawa, 30 Neb. 424, 46 N. W. 650.

New Jersey. — Kise *v.* Heath, 33 N. J. Eq. 239; Dumont *v.* Dumont, 46 N. J. Eq. 223, 19 Atl. 467; Turnure *v.* Turnure, 35 N. J. Eq. 437; Kitchell *v.* Beach, 35 N. J. Eq. 446; *In re* Barber's Will, 49 Atl. 826; Stewart *v.* Jordan, 50 N. J. Eq. 733, 26 Atl. 706; Salter *v.* Ely, 56 N. J. Eq. 357, 39 Atl. 365, *affirmed*, 58 N. J. Eq. 581, 43 Atl. 1098; Stewart *v.* Stewart, 56 N. J. Eq. 761, 40 Atl.

A. Exception. — Trust Relations. — But when the person charged occupies a fiduciary relation toward actor, and obtains any advantage from transactions between them, the burden of proof is

438, *affirmed*, 57 N. J. Eq. 664, 40 Atl. 438; Schuchhardt *v.* Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485.

New York. — Gardner *v.* Gardner, 22 Wend. 526, 34 Am. Dec. 340; Ewen *v.* Perrine, 5 Redf. 640; *In re* Nelson's Will, 97 App. Div. 212, 89 N. Y. Supp. 865; Van Orman *v.* Van Orman, 58 Hun 606, 11 N. Y. Supp. 931; *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791; *In re* Martin, 98 N. Y. 193; *In re* Cornell's Will, 43 App. Div. 241, 60 N. Y. Supp. 53, *affirmed*, 163 N. Y. 608, 57 N. E. 1107; Marvin *v.* Marvin, 3 Abb. App. Dec. 192; Bleecker *v.* Lynch, 1 Bradf. Sur. 458.

North Carolina. — Wessell *v.* Rathjohn, 89 N. C. 377, 45 Am. Rep. 696; Horah *v.* Knox, 87 N. C. 483; Atkins *v.* Withers, 94 N. C. 581.

South Carolina. — Woodward *v.* James, 3 Strobh. L. 552, 51 Am. Dec. 649; Southerlin *v.* M'Kinney, Rice L. 35.

Texas. — Patterson *v.* Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98.

Vermont. — Robinson *v.* Hutchinson, 26 Vt. 38, 60 Am. Dec. 298.

West Virginia. — McMechen *v.* McMechen, 17 W. Va. 683, 701; Coffman *v.* Hedrick, 32 W. Va. 119, 132, 9 S. E. 65.

Wisconsin. — McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Cutler *v.* Cutler, 103 Wis. 258, 79 N. W. 240; Armstrong *v.* Armstrong, 63 Wis. 162, 23 N. W. 407.

In Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697, the court says: "But where the issue of undue influence is a separate and distinct issue, involving proof that the testator, though of sound mind, and intending that the instrument, which he executes with all the legal formalities, shall take effect as his will, was induced to execute it by the controlling power of another, we think the weight of authority and the best reason are in favor of imposing upon the party who alleges the undue influence the burden of proving it. And we are inclined to think that this has been the general practice in this commonwealth. Glover *v.* Hayden, 4 Cush. 580."

In a will contest the burden of proof is "upon the contestants to establish the fraud or undue influence charged, and not only that, but their burden was to overcome that presumption which exists in favor of the will when its formal execution was shown, and mental capacity of the testator established." Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604. *Contra.* — Thus, it has been held that in a will contest proponent does not make out a *prima facie* case by introducing testimony of subscribing witnesses to the effect that testator was not acting under undue influence, but the burden is upon him to show that the will was not the product of undue influence. Evans *v.* Arnold, 52 Ga. 169.

See Thompson *v.* Davitte, 59 Ga. 472, where the court says: "Another part of the charge complained of is: 'Where fraud or undue influence is alleged, in the procurement of the will, the burden of proof is upon the *caveators* to prove such fraud or undue influence.' The full charge is not set out in the record. For aught that appears, the court may have previously defined what it took to constitute a *prima facie* case on the part of the propounders. If that was done, the clause above quoted would then have been appropriate. The Code declares, in section 3759, that: 'What amount of evidence will change the onus or burden of proof, is a question to be decided in each case by the sound discretion of the court.' Adverting to the brief of evidence contained in the record, we have no doubt that the propounders did prove enough to change the *onus*, and that, as the case stood when the charge was delivered, the burden was upon the propounders to make good their al-

upon such person to show that no undue influence was exercised.[26]

a. *Not Limited to Specific Relations.* — The rule as to the burden of proof in case of transactions between persons occupying toward each other relations of trust and confidence is not limited to any class of defined legal relations. It is applied whenever one in whom

legations. According to what is said by the court in Evans *v.* Arnold, 52 Ga. 169, the charge in that case was to the effect that after the *factum* of the will was duly proven, the burden of showing the other requisites ceased as to the propounders. That feature is not presented here. How much besides the *factum* of the will was held requisite, is nowhere made known to us, nor is it said or intimated that nothing further was exacted of the propounders. The truth is, that what the propounders have to carry, on the score of sanity and freedom, is more in the nature of ballast than of cargo. It is just burden enough to sail with — no more."

In Freeman *v.* Hamilton, 74 Ga. 317, it is said that Evans *v.* Arnold, and Thompson *v.* Davitte, *supra*, are not in conflict. See also Credille *v.* Credille, 123 Ga. 673, 51 S. E. 628; Sheehan *v.* Kearney (Miss.), 21 So. 41.

26. *England.* — Sharp *v.* Leach, 31 Beav. 491, 54 Eng. Reprint 1229, 7 L. T. 146; Chambers *v.* Crabbe, 34 Beav. 457, 55 Eng. Reprint 712; Allcard *v.* Skinner, L. R. 36 Ch. Div. 145; Griffiths *v.* Robins, 3 Madd. 191, 56 Eng. Reprint 480; Billage *v.* Southee, 9 Hare 534, 68 Eng. Reprint 623, 21 L. J. Ch. 472, 16 Jur. 188; Hunter *v.* Atkins, 3 Myl. & K. 113, 40 Eng. Reprint 43; Morse *v.* Royal, 12 Ves. 355, 33 Eng. Reprint 134.

Alabama. — Malone *v.* Kelley, 54 Ala. 532.

California. — Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555.

Illinois. — Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808.

Missouri. — Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491; Maddox *v.* Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Tibbe *v.* Kamp, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; Jones *v.* Roberts, 37 Mo. App. 163; Mowry *v.* Norman, 203 Mo. 173, 103 S. W. 15.

New Jersey. — Farmer's Exr. *v.* Farmer, 39 N. J. Eq. 211; Barkman *v.* Richards, 63 N. J. Eq. 211, 49 Atl. 831; Dale *v.* Dale, 38 N. J. Eq. 274; Spark's Case, 63 N. J. Eq. 242, 51 Atl. 118; Byrnes *v.* Gibson, 68 Atl. 756.

New York. — *In re* Smith's Will, 95 N. Y. 516; Calhoun *v.* Jones, 2 Redf. 34.

Ohio. — Keck *v.* Sayre, 4 Ohio Dec. 194, 202.

Pennsylvania. — Miskey's Appeal, 107 Pa. St. 611, 621.

"It is necessary, to say broadly, that those who meddle with such transactions, take upon themselves the whole proof that the thing is righteous." Lord Eldon, in Gibson *v.* Jeyes, 6 Ves. 266, 31 Eng. Reprint 1044. To same general effect, see Huguenin *v.* Baseley, 14 Ves. 273, 33 Eng. Reprint 526; Gillespie *v.* Holland, 40 Ark. 28, 48 Am. Rep. 1; Ten Eyck *v.* Whitbeck, 156 N. Y. 341, 50 N. E. 963.

As to distinction between trust arising from specified legal relations and that created by the existence of relations of actual trust and confidence between persons, see Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808. See also Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908, where this language is used: "Where a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will and where the testator is the dependent and the devisee the dominant party and the testator therefore reposes trust and confidence in the devisee as in the ordinary relation of attorney and client, and where the will is written, or its preparation procured, by that beneficiary, proof of these facts establishes *prima facie* the charge that the execution of the will was the result of undue influence exercised by that beneficiary, and this proof standing alone and undisputed by other proof entitles con-

trust and confidence are, in fact, reposed, obtains an advantage from a person subject to his influence; and whenever the proof shows that one person possessed an influence over another.[27]

testants to a verdict. (1 Woerner on American Law of Administration, — 2d ed. — sec. 32; Richmond's Appeal, 59 Conn. 226; Marx *v.* McGlynn, 88 N. Y. 357; Garvin *v.* Williams, 44 Mo. 465; Coghill *v.* Kennedy, 119 Ala. 641; Thomas *v.* Whitney, 186 Ill. 225.) This results from the distinction, pointed out in the authorities cited, between undue influence arising from coercion or active fraud and undue influence resulting from the abuse of a fiduciary relation existing between the parties. Proof of the relationship and of the fact that the beneficiary, in whom trust and confidence were reposed by the testator, prepared or procured the preparation of the will by which he profits, may or may not be a preponderance of all the evidence on that subject. When that proof is made, the presumption arises therefrom that undue influence induced the execution of the document. That proof casts upon proponent, if he is to sustain the will, the necessity of showing that the execution of the will was the result of free deliberation on the part of the testator and of the deliberate exercise of his judgment, and not of imposition or wrong practiced by the trusted beneficiary. This, however, does not change the general rule which is, that upon the whole case the burden of proof is upon the contestants to establish the undue influence."

27. *England.* — Powell *v.* Powell, L. R. (1900) 1 Ch. 243, 69 L. J. Ch. Div. 164, 82 L. T. N. S. 84; Cooke *v.* Lamotte, 15 Beav. 234, 51 Eng. Reprint 527, 21 L. J. Ch. 371; Gibson *v.* Jeyes, 6 Ves. 266, 5 R. R. 295; Griffiths *v.* Robins, 3 Madd. 191, 56 Eng. Reprint 480; Sharp *v.* Leach, 7 L. T. N. S. 146; Lyon *v.* Home, L. R. 6 Eq. 655, 37 L. J. Ch. 674, 18 L. T. 451; Coutts *v.* Acworth, L. R. 8 Eq. 558, 38 L. J. Ch. 694, 21 L. T. 224; Topham *v.* Duke of Portland, L. R. 5 Ch. App. 40, 39 L. J. Ch. 259, 22 L. T. 847; Smith *v.* Kay, L. R. 7 H. L. Cas. 750, 30 L. J. Ch. 45, 11 Eng. Reprint 299; Morley *v.* Loughnan, L. R. (1893) 1 Ch. 736; Boyse *v.* Rossborough, 6 H. L. Cas. 2, 26 L. J. Ch. 256, 3 Jur. (N. S.) 373.

Alabama. — Cleveland *v.* Pollard, 37 Ala. 556; Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Waddell *v.* Lanier, 62 Ala. 347; Baines *v.* Barnes, 64 Ala. 375; Holt *v.* Agnew, 67 Ala. 360; Voltz *v.* Voltz, 75 Ala. 555; Bancroft *v.* Otis, 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904, *overruling* Moore *v.* Spier, 80 Ala. 129; Ryan *v.* Price, 106 Ala. 584, 17 So. 734; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Whitten *v.* McFall, 122 Ala. 619, 26 So. 131.

California. — Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785.

Connecticut. — Nichols *v.* McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; Turner's Appeal, 72 Conn. 305, 44 Atl. 310.

Illinois. — Mayrand *v.* Mayrand, 194 Ill. 45, 61 N. E. 1040; Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908.

Kansas. — Hill *v.* Miller, 50 Kan. 659, 32 Pac. 354.

Kentucky. — Harper *v.* Harper, 85 Ky. 160, 3 S. W. 5, 7 Am. St. Rep. 583.

Maryland. — Todd *v.* Grove, 33 Md. 188; Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820.

Missouri. — Street *v.* Goss, 62 Mo. 226, *cited* in Jones *v.* Roberts, 37 Mo. App. 163; Ranken *v.* Patton, 65 Mo. 378; McClure *v.* Lewis, 72 Mo. 314, *reversing* 4 Mo. App. 554; Caspari *v.* First German Church, 12 Mo. App. 293, *affirmed*, 82 Mo. 649; Reed *v.* Carroll, 82 Mo. App. 102; Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337.

New Jersey. — Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469; Parker *v.* Parker, 45 N. J. Eq. 224, 16 Atl. 537; Pironi *v.* Corrigan, 47 N. J. Eq. 135, 20 Atl. 218; *s. c., reversed* on another point, but not as to question of onus, 48

b. *Benefit to Person Charged, or Family, Essential.* — It has been held that the rule imposing the burden of proof upon a person occu-

N. J. Eq. 607, 23 Atl. 355; Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997; Spark's Case, 63 N. J. Eq. 242, 51 Atl. 118; Burkman *v.* Richards, 63 N. J. Eq. 211, 49 Atl. 831.

New York. — Licmon *v.* Wilson, 3 Edw. Ch. 36; Fisher *v.* Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; Barnard *v.* Gantz, 140 N. Y. 249, 35 N. E. 430; Baker's Will, 2 Redf. 179, 195; Case *v.* Case, 1 N. Y. Supp. 714; Mason *v.* Ring, 2 Abb. Pr. N. S. 322; *s. c.*, 3 Abb. Dec. 219.

Pennsylvania. — *In re* Darlington's Estate, 147 Pa. St. 624, 23 Atl. 1046; Unruh *v.* Lukens, 166 Pa. St. 324, 31 Atl. 110.

Rhode Island. — Earle *v.* Chace, 12 R. I. 374.

Virginia. — Strathorn *v.* Ferguson's Admr., 25 Gratt. 28.

Apparently to the contrary, see Uhlich *v.* Muhlke, 61 Ill. 499.

The case of Boney *v.* Hollingsworth, 23 Ala. 690, is cited in later Alabama decisions in support of the rule as stated in the text, although the transaction there involved was attacked upon the ground of fraud.

"It matters not what the relation is, if confidence is reposed and influence obtained." Leighton *v.* Orr, 44 Iowa 679.

"It seems now settled that the rule is not confined to relations strictly fiduciary, but applies to 'all the variety of relations in which dominion may be exercised by one person over another.'" Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528. In Bancroft *v.* Otis, 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904, it is said that the rule stated in Shipman *v.* Furniss, is limited to transactions *inter vivos*, and does not apply to wills. To same effect, see Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

Limited to transactions *inter vivos* in case of spiritual adviser. Parfitt *v.* Lawless, L. R. 2 P. 462, 41 L. J. P. 68, 27 L. T. 215.

Applies Whenever Actor Subject to Another. — Whenever it is shown that the mind of one person has been subjected to that of another, and that other was instrumental in procuring the act in question, and a testamentary disposition, conveyance or gift has been made by the weaker in favor of the stronger, the burden of proof shifts, and the person benefited will be required to show that the benefit was not conferred through the exercise of undue influence. Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469.

On this subject, see also remarks of court in Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785; Hays *v.* Union Trust Co., 27 Misc. 240, 57 N. Y. Supp. 801; Mowry *v.* Norman, 203 Mo. 173, 103 S. W. 15.

Attorney and Client. — *In re* Suydam's Will, 84 Hun 514, 32 N. Y. Supp. 449.

"I take the rule to be settled that where a person, enfeebled in mind by disease or old age is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee. Huguenin *v.* Baseley, 2 L. C. in Eq. (4th Am. ed.) notes, pp. 1183-1185, American notes, pp. 1192-1194. The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian and ward, or husband and wife exists, but in every instance where the relation between donor and donee is one in which the latter has acquired a dominant position. The parent, by age, may come under the sway of his children. Highberger *v.* Stiffler, 21 Md. 338. And so, as in the present case, the husband may become the dependent of the wife, and their natural position become reversed. The ecclesiastical courts have declared a rule of evidence in regard to wills executed by persons of weak mental condition.

pying a relation of trust and confidence toward actor does not apply

The presumption is that a person who executes a will knows the nature of its contents. Proof of its execution therefore is all that is required of the proponent. But if it appears that the testator was of a weak mind, and a bequest is made to a person who stood in a position which would have enabled the beneficiary to influence the act, the burden is shifted and a more rigid rule is enforced, and probate will not be granted unless the court be satisfied, by additional evidence, that the paper presented does really express the true will of the testator. Taylor on Ev., § 160." Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385. To same effect, see Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; McCulloch *v.* Campbell, 49 Ark. 367, 5 S. W. 590. See also Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337; Gillespie *v.* Holland, 40 Ark. 28, 48 Am. Rep. 1; Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808; Jones *v.* Lloyd, 117 Ill. 597, 7 N. E. 119 (trustee). But see Wheeler *v.* Whipple, 44 N. J. Eq. 141, 14 Atl. 275, to the effect that in will cases the existence of a relation of actual trust and confidence is not alone sufficient to impose the burden of proof upon beneficiary. The court says: "Among the cases in which the burden of proof has been thrown upon the beneficiary under a will, I do not find one in which confidential relationship with the testator was the sole element which influenced the decision. In such cases, added to proof that the testator's mind was enfeebled so that it was difficult to resist improper influence, and the establishment of intimate confidential relationship, there has usually been some other element, such as the initiation of proceedings for the preparation of the instrument, or participation in such preparation by the employment of a draughtsman, the selection of the witnesses present at the different stages of the proceedings, and the like, or an effort to exclude the natural objects of the testator's bounty from his society, or to conceal the making of the will or the instrument itself after it has been made." Wheeler *v.* Whipple is followed and quoted in Sparks' Case, 63 N. J. Eq. 242, 51 Atl. 118. The same rule is announced in Matter of Will of Smith, 95 N. Y. 516 and in Parfitt *v.* Lawless, L. R. 2 P. 462, 41 L. J. P. 68, 27 L. T. 215.

"The influence which will set aside a will, says Mr. Justice Williams, 'must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear:' Williams' Executors, pt. 1, bk. 2, ch. 1, § 2." Parfitt *v.* Lawless, L. R. 2 P. 462, 41 L. J. P. 68.

"The rule on this point is of universal recognition and finds application commensurate with the existence of confidential relations. It however is chiefly invoked between parent and child, client and attorney, principal and agent, and patient and medical adviser; though as before stated it is by no means confined within such narrow limits. There exists therefore no necessity to show fraud or imposition practiced on him who bestows the confidence; but simply to show that, during the pendency of such intimate relations, the conveyance in question was made. This being done, all the above mentioned consequences as to the onus of proof attend the given transaction as inevitable incidents." Street *v.* Goss, 62 Mo. 226. See also 1 Beach on Contracts, § 825, *quoted* in Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808.

In Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820, the court says: "A good deal has been said as to what constitutes a confidential relation

in cases where such person does not derive some benefit either to himself or to a member of his family.[28]

Contra. — But the contrary has been held.[29]

c. *Distinction Between Wills and Transactions Inter Vivos.* — In regard to burden of proof being imposed by the existence of fiduciary relations, the courts have made a distinction between cases involving the validity of wills, and cases involving transactions *inter vivos,* holding that, in regard to the former, the existence of a relation of trust and confidence does not, alone, impose the burden of proof upon person charged, but that in regard to the latter, proof of the existence of such relation is, alone, sufficient.[30]

Relation Alone Insufficient in Will Cases. — In an action or proceeding involving the validity of a will, the existence of a relation of trust and confidence between testator and the person charged is not alone sufficient to impose the burden of proof upon the latter.[31]

within the operation of the principle, but courts have always been careful not to fetter the operation of the principle by undertaking to define its precise limits. The cases of parent and child, guardian and ward, trustee and *cestui que trust,* principal and agent, are familiar instances in which the principle applies in its strictest sense. But its operation is not confined to the dealings and transactions between parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence, may be exercised by one person over another. No part of the jurisdiction of the court is more useful, it has been said, than that which it exercises in watching and controlling transactions between parties standing in a relation of confidence to each other; and, being founded on the principle of correcting abuses of confidence, it ought to be applied to every case in which a confidential relation exists as a fact, — where confidence is reposed on the one side, and the resulting superiority and influence on the other. Billage *v.* Southee, 9 Hare 534; Tate *v.* Williamson, L. R. 1 Eq. 528; Id., L. R. 2 Ch. App. 55. The broad principle, says Vice Chancellor Wood, on which the court acts in cases of this description, is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. Tate *v.* Williamson, L. R. 1 Eq. 528."

28. Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678; Riddle *v.* Cutter, 49 Iowa 547.

Appointing a person executor of a will, or trustee of trusts thereby created, does not confer a benefit upon him so as to impose the burden of proof upon him. Livingston's Appeal, 63 Conn. 68, 26 Atl. 470; Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678.

It has been held that the obligation to show that actor had independent advice does not exist unless the trustee or some person for whom he acted, took a benefit from the transaction in question. President of Bowdoin College *v.* Merritt, 75 Fed. 480, 506.

29. Huguenin *v.* Basely, 14 Ves. 273, 33 Eng. Reprint 526. To same general effect, see Williams *v.* Williams, 63 Md. 371, where Huguenin *v.* Basely, *supra* is cited and quoted.

30. See cases cited in next succeeding note.

31. *England.* — Parfitt *v.* Lawless, L. R. 2 P. 462, 41 L. J. P. 68, 27 L. T. 215; Boyse *v.* Rossborough, 6 H. L. Cas. 2, 49.

Conveyance in Lieu of Will. — The same rule applies to a conveyance in lieu of will.[32]

Slight Additional Circumstances Sufficient. — But when such relation is shown, slight additional circumstances are sufficient to impose burden upon beneficiary.[33]

B. Relations Held Confidential. — a. *Guardian and Ward.* In case of conveyance or devise made by a ward to his guardian, the burden is upon the latter to show that he exercised no undue influence over the former to procure the execution of the act in question.[34]

Release. — So as to release executed by ward to guardian during, or shortly after, minority.[35]

(1.) What Guardians Must Show. — To sustain a transaction between himself and his ward, a guardian must show that the act in question was the deliberate act of the ward, taken after full knowl-

Canada. — Collins *v.* Kilroy, 1 Ont. L. 503.

Alabama. — Bancroft *v.* Otis, 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904; Bulger *v.* Ross, 98 Ala. 267, 12 So. 803; Mullen *v.* Johnson, 47 So. 584.

Illinois. — Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

Missouri. — Mowry *v.* Norman, 203 Mo. 173, 103 S. W. 15.

New Jersey. — Wheeler *v.* Whipple, 44 N. J. Eq. 141, 14 Atl. 275; *In re* Spark's Case, 63 N. J. L. 242, 51 Atl. 118; *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676.

New York. — *In re* Springstead's Will, 55 Hun 603, 8 N. Y. Supp. 596; *In re* Hurlbut's Will, 48 App. Div. 91, 62 N. Y. Supp. 1042; *In re* Suydam's Will, 84 Hun 514, 32 N. Y. Supp. 449, *approving* 152 N. Y. 639, 46 N. E. 1152; *In re* Smith's Will, 95 N. Y. 516.

Pennsylvania. — *In re* Douglass' Estate, 162 Pa. St. 567, 29 Atl. 715; *In re* Hook's Estate, 207 Pa. St. 203, 56 Atl. 428. See also Friend's Estate, 198 Pa. St. 363, 47 Atl. 1106, where it is said that the burden is not imposed upon one occupying relation of trust and confidence toward actor, unless it appears that actor was of weak mind. The court explains a misleading syllabus to the opinion in Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277, which states that such relationship and benefit to the person charged are sufficient to impose the burden. But see Dudley *v.* Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959.

32. Nutting *v.* Pell, 42 N. Y. Supp. 987.

33. Sparks' Case, 63 N. J. Eq. 242, 51 Atl. 118. *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676.

34. *England.* — O'Connor *v.* Foley, 1 Ir. Rep. (1905) 1.

Alabama. — Daniel *v.* Hill, 52 Ala. 430; Jackson *v.* Harris, 66 Ala. 565; Voltz *v.* Voltz, 75 Ala. 555.

Illinois. — Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587.

Massachusetts. — Breed *v.* Pratt, 18 Pick. 115.

Minnesota. — Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918.

Mississippi. — Meek *v.* Perry, 36 Miss. 190.

Missouri. — Garvin's Admr. *v.* Williams, 44 Mo. 465, 100 Am. Dec. 314; *s. c.* 50 Mo. 206; Miller *v.* Simonds, 5 Mo. App. 33, *affirmed*, 72 Mo. 669; Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

North Carolina. — Williams *v.* Powell, 36 N. C. (1 Ired. Eq.) 460.

South Carolina. — Johnson's Admr. *v.* Johnson, 2 Hill Eq. 277, 286.

Vermont. — Wade *v.* Pulsifer, 54 Vt. 45, 62; *In re* Cowdry's Will, 77 Vt. 359, 60 Atl. 141.

35. Carter *v.* Tice, 120 Ill. 277, 11 N. E. 529; Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; Baum *v.* Hartmann, 225 Ill. 160, 80 N. E. 711; Ashton *v.*

edge of his rights.[36] The onus of proof is upon the guardian to show everything requisite to make the settlement valid and binding.[37]

(2.) When Burden Shifted to Ward. — It has been held that the burden of proof is shifted to the ward by the circumstance that he was virtually emancipated from his guardian's control prior to coming of age and making settlement.[38]

b. *Parent and Child.* — **(1.) Gift From Child to Parent.** — In case of gift or conveyance from a child to his parent, the burden is upon the latter to show that the former acted voluntarily.[39]

Thompson, 32 Minn. 25, 18 N. W. 918; Gregory *v.* Orr, 61 Miss. 307.

36. Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918; Williams *v.* Powell, 36 N. C. (1 Ired. Eq.) 460.

Guardian must show not only that the ward had an opportunity to ascertain his rights, but that he understood the settlement was a final one. Gregory *v.* Orr, 61 Miss. 307.

The onus is upon the guardian to show that "the transaction is righteous." Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918.

Independent Advice. — As to obligation to show that ward had independent advice, and the rules applicable to that subject, see V, 1, D, b (2.), *post*.

"It is not enough that the ward could have obtained the requisite information by the exertion even of ordinary care. It must be shown that it was laid before him, and that he knew what he was doing." Gregory *v.* Orr, 61 Miss. 307.

37. McConkey *v.* Cockey, 69 Md. 286, 14 Atl. 465; Miller *v.* Simonds, 5 Mo. App. 33, *affirmed*, 72 Mo. 669.

38. Smith *v.* Davis, 49 Md. 470, 490.

39. *England.* — Chambers *v.* Crabbe, 34 Beav. 457, 55 Eng. Reprint 712; Wright *v.* Vanderplank, 8 De G., M. & G. 133, 25 L. J. Ch. 753, 44 Eng. Reprint 340; Davies *v.* Davies, 4 Giff. 417, 9 L. T. N. S. 162, 66 Eng. Reprint 769; Bainbridgge *v.* Browne, L. R. 18 Ch. Div. 188; Hoblyn *v.* Hoblyn, L. R. 41 Ch. Div. 200; Turner *v.* Collins, L. R. 41 L. J. Ch. 558, 7 Ch. App. 329, 25 L. R. 1, 779; Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. (N. S.) 503, 25 L. J. Ch. 482; M'Mackin *v.* Hibernian Bank, 1 Ir. Rep. (1905) 296; Powell *v.* Powell, L. R. (1900) 1 Ch. Div. 243, 82 L. T. N. S. 84, 69 L. J. Ch. Div. 164. See also Baker *v.* Bradley, 7 De G., M. & G. 597, 44 Eng. Reprint 233, *reversing* 2 Sm. & G. 531, 65 Eng. Reprint 513.

Alabama. — Noble's Admr. *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175.

Illinois. — White *v.* Ross, 160 Ill. 56, 43 N. E. 336; Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480.

Kansas. — Stevens *v.* Stevens, 10 Kan. App. 259, 62 Pac. 714.

Maryland. — Williams *v.* Williams, 63 Md. 371; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645.

Minnesota. — Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918.

Missouri. — Miller *v.* Simonds, 5 Mo. App. 33, *affirmed*, 72 Mo. 669.

New York. — Bergen *v.* Udall, 31 Barb. 9.

Ohio. — Berkmeyer *v.* Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577.

Pennsylvania. — Miskey's Appeal, 107 Pa. St. 611, 629; Worrall's Appeal, 110 Pa. St. 349, 363, 1 Atl. 380, 765.

Virginia. — Davis *v.* Strange's Exr., 86 Va. 793, 807, 11 S. E. 406.

As to distinction between cases in which a child conveys property to his father for the sole benefit of the latter, and cases in which conveyance is made for the benefit of the family, or for the purpose of resettling family estates, see Potts *v.* Surr, 34 Beav. 543, 55 Eng. Reprint 745; Berdoe *v.* Dawson, 34 Beav. 603, 55 Eng. Reprint 768, 12 L. T. 103, 11 Jur. (N. S.) 254; Baker *v.* Bradley, 7 De G., M. & G. 597, 44 Eng. Reprint 233, 2 Sm. & G. 531, 25 L. J. Ch. 7, 2 Jur. (N. S.) 98; Wycherley *v.* Wycherley, 2

In Loco Parentis. — The rule is the same in regard to a person standing in the place of a parent toward one whose act is in question.[40]

(2.) From Parent to Child. — In case of conveyance by parent to child, unless the proof shows the existence of dependence, or of actual trust and confidence, the burden is not upon grantee, the relation alone not being sufficient for that purpose.[41] But where the natural relation of parent and child is so changed, that the former becomes subject to the dominion of the latter, and where their situation is such that the child has a controlling influence over the will and conduct and interests of the parent, gifts from parent to child will be set aside unless most satisfactory evidence is produced that they were not obtained by undue influence.[42]

Eden 175, 28 Eng. Reprint 864. See discussion of this subject in Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918.

In Hoblyn *v.* Hoblyn, L. R. 41 Ch. Div. (Eng.) 200, it is said that whenever it appears that a father receives a benefit from a transaction between himself and his son, the burden is upon the father to prove that the bargain was fair and fairly made.

40. Archer *v.* Hudson, 7 Beav. 551, 49 Eng. Reprint 1180, 13 L. J. Ch. 380, 8 Jur. 701; Gillespie *v.* Holland, 40 Ark. 28, 48 Am. Rep. 1; McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Worrall's Appeal, 110 Pa. St. 349, 363, 1 Atl. 380, 765.

41. *Alabama.* — McLeod *v.* McLeod, 145 Ala. 269, 40 So. 414; Bain *v.* Bain, 43 So. 562.

Illinois. — Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881.

Indiana. — Slayback *v.* Witt, 151 Ind. 376, 50 N. E. 389.

Iowa. — Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236; McCord *v.* McCord, 136 Iowa 53, 113 N. W. 552; Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233; Chidester *v.* Turnbull, 117 Iowa 168, 90 N. W. 583.

Missouri. — Doherty *v.* Noble, 138 Mo. 25, 39 S. W. 458; Teckenbrock *v.* McLaughlin, 209 Mo. 533, 108 S. W. 46; Hatcher *v.* Hatcher, 139 Mo. 614, 39 S. W. 479 (the court cites McKinney *v.* Hensley, 74 Mo. 326.

New Jersey. — LeGendre *v.* Goodridge, 46 N. J. Eq. 419, 19 Atl. 543, *affirmed*, 48 N. J. Eq. 308, 23 Atl. 581.

New York. — Cooper *v.* Moore, 55 Misc. 102, 104 N. Y. Supp. 1049; *In re* Hurlbut's Will, 62 N. Y. Supp. 1162.

Pennsylvania. — Yeakel *v.* McAtee, 156 Pa. St. 600, 611, 27 Atl. 277; Carney *v.* Carney, 196 Pa. St. 34, 46 Atl. 264.

Virginia. — Jenkins *v.* Rhodes, 106 Va. 564, 56 S. E. 332.

Child and Parent. — In case of a conveyance from parent to child, although made very shortly before grantor's death, the burden of proof is not upon grantee to show the absence of undue influence. Beanland *v.* Bradley, 2 Sm. & G. 339, 65 Eng. Reprint 427; Chidester *v.* Turnbull, 117 Iowa 168, 90 N. W. 583.

42. *Alabama.* — Couch *v.* Couch, 148 Ala. 332, 42 So. 624.

Illinois. — Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150.

Iowa. — Fitch *v.* Reiser, 79 Iowa 34, 44 N. W. 214.

Kentucky. — Harper *v.* Harper, 85 Ky. 160, 3 S. W. 5, 7 Am. St. Rep. 583.

Maryland. — Highberger *v.* Stiffler, 21 Md. 338, 83 Am. Dec. 593; Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643.

New Jersey. — White *v.* Daly, 58 Atl. 929; Slack *v.* Rees, 66 N. J. Eq. 447, 59 Atl. 466.

New York. — Disbrow *v.* Disbrow, 31 App. Div. 624, 52 N. Y. Supp. 471, *affirmed*, 164 N. Y. 564, 58 N. E. 1086; Brice *v.* Brice, 5 Barb. 533; Liemon *v.* Wilson, 3 Edw. Ch. 36; Ross *v.* Ross, 6 Hun 84.

North Dakota. — Brummond *v.* Krause, 8 N. D. 573, 80 N. W. 686.

c. *Husband and Wife.* — In actions involving transactions between husband and wife whereby one obtains a benefit from the other, the burden is upon the spouse receiving the benefit to show that undue influence was not exercised.[43]

Son Agent of Father Who Is Physically and Mentally Weak must prove that transaction by which he receives a benefit was his father's voluntary act. Martin *v.* Martin, 1 Heisk. (Tenn.) 644, 653. To same effect, see Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488; Mowry *v.* Norman, 203 Mo. 173, 103 S. W. 15.

In Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997, the court says: "With reference to transactions between parent and child, the law presumes that the influence of the parent over his child, during the tender years of infancy, is so controlling that it regards transfers from the child to the parent, on arriving at majority, or immediately thereafter, as having been made under the influence of overweening confidence. As the child matures and acquires experience and independence the presumption weakens and at last ceases. As the parent, however, advances in years, the condition of dependence may be reversed by the hand of time. If life draws to a close with a failing intelligence and enfeebled frame, the parent naturally looks with confidence to a son or daughter for advice and protection. The parent becomes the child, 'with the same dependence, over-weening confidence and implicit acquiescence' which had made the other, in infancy, the willing instrument of the parent's desires. Highberger *v.* Stiffler, 21 Md. 338; Martin *v.* Martin, 1 Heisk. 644, 653; Brice *v.* Brice, 5 Barb. 533; Comstock *v.* Comstock, 57 Barb. 473; Whelan *v.* Whelan, 3 Cow. 557; 2 White & T. Lead. Cas. (4th ed.) 1206. If, under such circumstances, a son obtains a conveyance from a parent, this court will not permit it to stand unless such son establish by abundant proof that the contract was not only free, but fair, and made with the utmost good faith."

When a son possessing influence over his father, whose mental powers are impaired, procures the execution to himself by his father of a deed conveying real property, the burden of proof is upon grantee to show that no advantage was taken, and that the bargain was fair and conscientious. Sands *v.* Sands, 112 Ill. 225; Smith *v.* Snowden, 96 Ky. 32, 27 S. W. 855; Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997; Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488; Reese *v.* Shutte, 133 Iowa 681, 108 N. W. 525; Hunter *v.* McCammon, 119 App. Div. 326, 104 N. Y. Supp. 402.

If deed of gift from parent who is aged and in feeble health, conveys to a child more than a due and reasonable proportion of grantor's estate, the burden of proof will be upon donee to sustain the transaction. Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

Especially Applicable When Act Divests Actor of Entire Estate. This is especially true when the effect of the conveyance in question is to divest grantor of all, or practically all, of his estate. Slack *v.* Rees, 66 N. J. Eq. 447, 59 Atl. 466; Post *v.* Hagan (N. J. Eq.), 65 Atl. 1026; Gick *v.* Stumpf, 110 N. Y. Supp. 712.

In Jacox *v.* Jacox, 40 Mich. 473, 29 Am. Rep. 547, a son believing that his father, who had the "blues," was incompetent to manage his own affairs, took charge of them with the father's consent, and procured from his father a deed conveying all the real property of the latter to the son. *Held*, that the father was entitled to a decree setting aside this deed, the court holding as stated in the text. See Whelan *v.* Whelan, 3 Cow. (N. Y.) 537.

43. *England.* — Page *v.* Horne, 11 Beav. 227, 50 Eng. Reprint 804, 17 L. J. Ch. 200, 12 Jur. 340; Carnegie *v.* Carnegie, 30 L. T. N. S. 460.

Alabama. — Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Holt *v.* Agnew, 67 Ala. 360; Walker *v.* Nicrosi, 135 Ala. 353, 33 So. 161.

Relation Believed to Exist. — This rule applies to conveyance made by a woman to a man with whom she was living under the belief that a valid marriage existed between them, although, in fact, their supposed marriage was invalid.[44]

Otherwise as to Conveyance for Wife's Support. — In case where a husband conveys property to his wife for her support and maintenance, the burden of proof is upon his heirs seeking to set aside such deed on the ground of undue influence.[45]

d. *Attorney and Client.* — In transactions between attorney and client whereby an advantage accrues to the former, the burden is upon him to show that he has not unduly used his influence over his client, and that the consideration passing to the latter was adequate.[46]

Arkansas. — Mathy *v.* Mathy, 113 S. W. 1012.

California. — Hayne *v.* Hermann, 97 Cal. 259, 32 Pac. 171; Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723.

Indiana. — Leimgruber *v.* Leimgruber, 86 N. E. 73.

Mississippi. — Pennington *v.* Acker, 30 Miss. 161.

Missouri. — Miller *v.* Lullman, 11 Mo. App. 419.

Nebraska. — Greene *v.* Greene, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724.

New Jersey. — Farmer's Exr. *v.* Farmer, 39 N. J. Eq. 211; Ireland *v.* Ireland, 43 N. J. Eq. 311, 12 Atl. 184; Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907; Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385.

New York. — Boyd *v.* De La Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Cruger *v.* Cruger, 5 Barb. 225; *s. c.*, 4 Edw. Ch. 433, 525.

In a case where a wife of weak mind and defective faculties, soon after marriage conveys all her estate to her husband for a nominal consideration, the burden is on him to show that he has taken no advantage of his situation and influence, and that the arrangement was fair and conscientious. Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726.

The husband "must show by satisfactory proof, that although the wife was under his influence, yet such influence was employed only to induce her to make such a disposition of her property as she ought in equity and good conscience to have made." Pennington *v.* Acker, 30 Miss. 161. But see Earle *v.* Chace, 12 R. I. 374; Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412.

44. Coulson *v.* Allison, 2 De G., F. & J. 521, 45 Eng. Reprint 723, *affirming* 2 Giff. 279.

45. Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412.

46. *England.* — Morgan *v.* Higgins, 1 Giff. 270, 65 Eng. Reprint 915, 5 Jur. (N. S.) 236; Gibson *v.* Jeyes, 6 Ves. Jr. 267, 31 Eng. Reprint 1044, 5 R. R. 295; Savery *v.* King, 5 H. of L. Cas. 627, 25 L. J. Ch. 482; Pisani *v.* Attorney General, L. R. 5 P. C. 516, 30 L. T. 729; Wright *v.* Carter, L. R. (1903) 1 Ch. 27, 87 L. T. N. S. 624; Walker *v.* Smith, 29 Beav. 394, 54 Eng. Reprint 680; Tomson *v.* Judge, 3 Drew 305, 61 Eng. Reprint 920; Readdy *v.* Pendergast, 55 L. T. N. S. 767; Brown *v.* Kennedy, 33 Beav. 133, 55 Eng. Reprint 317, 33 L. J. Ch. 71, 9 L. T. 302.

Illinois. — Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777; Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241.

Kentucky. — Carter *v.* West, 93 Ky. 211, 19 S. W. 592.

New Hampshire. — Whipple *v.* Barton, 63 N. H. 613, 3 Atl. 922.

New Jersey. — Brown *v.* Bulkley, 14 N. J. Eq. 451; Condit *v.* Blackwell, 22 N. J. Eq. 481; Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

New York. — Fisher *v.* Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; Mason *v.* Ring, 3

(1.) Attorney Draughtsman of Will. — As to whether or not the fact that an attorney drew the will by which his client makes him a devisee imposes upon the attorney the burden of proof, the authorities are conflicting.[47] Although the mere fact that an attorney is made a legatee under his client's will does not impose upon the former the burden of proving the absence of undue influence, yet, when a person of advanced years, mentally and physically infirm, makes his attorney his principal beneficiary, and it appears that this was contrary to testator's previously expressed testamentary intention, that the attorney drew the will, was active in procuring its execution, and testator acted without independent advice, the burden is upon the attorney.[48]

Abb. Ct. App. Dec. 210; Evans *v.* Ellis, 5 Denio 640; Lewis *v.* J. A., 4 Edw. Ch. 599; Whitehead *v.* Kennedy, 7 Hun 230; Haight *v.* Moore, 5 Jones & S. (N. Y. Super.) 161.

South Carolina. — Miles *v.* Ervin, 1 McCord's Eq. 524, 16 Am. Dec. 623.

Tennessee. — McMahan *v.* Smith, 6 Heisk. 167.

As to general nature of attorney's burden, see Rogers *v.* Marshall, 3 McCrary (U. S.) 76; *s. c.*, 9 Fed. 721. To same effect, see Jennings *v.* McConnel, 17 Ill. 148, where transaction was attacked on ground of fraud. See also Dickinson *v.* Bradford, 59 Ala. 581, 31 Am. Rep. 23; Merryman *v.* Euler, 59 Ind. 588, 43 Am. Rep. 564.

Devise to Attorney. — So in case of a devise or bequest from client to attorney, the latter must show affirmatively that the testamentary disposition was not obtained by his undue influence. Wilson *v.* Moran, 3 Bradf. Sur. (N. Y.) 172. But see Post *v.* Mason, 91 N. Y. 539, 43 Am. Rep. 689, *affirming* 26 Hun (N. Y.) 187, where it is held that in an action to set aside a will already admitted to probate, the burden of proof is upon plaintiff to show that undue influence was used by the attorney who drew the will and received a legacy.

In Fisher *v.* Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357, action was brought by a mortgagor to cancel a mortgage alleged to have been executed under undue influence. Mortgagor's son had failed in business and absconded. To secure his father, who had become involved as his indorser, he executed to him a transfer of his property. W., who had previously acted as legal adviser to the father, stated to him that this transfer was void, and would be attacked by the son's creditors. Influenced by confidence in W. on account of their previous relations, the father executed a bond and mortgage to secure the son's debts. In an action to set aside this mortgage judgment was rendered for plaintiff and affirmed on appeal. See also Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85.

Confession of Judgment. — The burden is upon attorney to show that confession of judgment in his favor made by his client was not obtained by undue influence. Yonge *v.* Hooper, 73 Ala. 119.

47. In a number of cases it has been held that the burden of proof was upon the attorney, but an examination will show that in each case other circumstances were considered, in addition to the fact of relation, as producing that result. See St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676; *In re* Hoopes' Estate, 174 Pa. St. 373, 34 Atl. 603; Wilson *v.* Moran, 3 Bradf. Sur. (N. Y.) 172; Post *v.* Mason, 91 N. Y. 539, 43 Am. Rep. 689. See IV, 5, A, c (2.) (D.), *ante*.

48. *In re* Smith's Will, 95 N. Y. 516; *In re* Soule's Will, 3 N. Y. Supp. 259, 269, 19 N. Y. St. 532, *affirmed*, 11 N. Y. Supp. 949; *In re* Carver's Estate, 3 Misc. 567, 23 N. Y. Supp. 753.

(2.) What Attorney Must Prove. — When a transaction between attorney and client is attacked upon the ground of undue influence, the onus is upon the attorney to prove, first, that his client was fully informed; second, that he had competent independent advice;[49] third, that the price given was a fair one.[50] It has been held that the attorney must prove that his diligence to do the best for his client was as great as if he were only an attorney dealing for the client with a stranger.[51]

(3.) When Actor Competent Business Man. — The attorney is not relieved of his burden by the fact that his client was a competent business man.[52]

(4.) Effect of Advice From Other Counsel. — An attorney does not relieve himself of the onus of proving that his client acted, in transactions between themselves, without undue influence by showing that client consulted another solicitor in regard to the transaction which resulted in benefit to the attorney, it appearing that the benefited attorney continued to act as such for his client.[53]

(5.) When Confirmation Is Claimed. — If the attorney claims that his client confirmed the transaction in question, he must show by clear and satisfactory proof that at the time of the alleged confirmation the relation of attorney and client had ceased, and that the other party acted with full knowledge of his right to set aside the transaction.[54]

So where a person whose mind was enfeebled from use of liquor, and toward whom his attorney had occupied a relation of especial confidence, signed a will prepared without instructions by his attorney, and without independent advice, the burden of proof was held to be upon the attorney. *In re* Rintelen's Will, 77 App. Div. 142, 78 N. Y. Supp. 1092, *affirming* 37 Misc. 462, 75 N. Y. Supp. 935; *In re* Egan's Will, 46 Misc. 375, 94 N. Y. Supp. 1064; *In re* Eckler's Will, 47 Misc. 320, 95 N. Y. Supp. 986.

49. **As to Independent Advice,** See V, 1, D, b (2.), *post.*

50. Wright *v.* Carter, L. R. (1903) 1 Ch. (Eng.) 27; *In re* Haslam, L. R. (1902) 1 Ch. (Eng.) 765; Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777; Whipple *v.* Barton, 63 N. H. 613, 3 Atl. 922; Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842. See also *In re* Holmes' Estate, 5 L. T. N. S. (Eng.) 378.

51. Holman *v.* Loynes, 23 L. J. Ch. 529, 4 De G., M. & G. 270, 43 Eng. Reprint 510; Haight *v.* Moore, 5 Jones & S. (N. Y. Super.) 161. See generally, Rogers *v.* Marshall, 3 McCrary (U. S.) 76; *s. c.*, 9 Fed. 721; Barnard *v.* Hunter, 39 Eng. L. & Eq. 569; Morgan *v.* Minett, L. R. 6 Ch. Div. (Eng.) 638; Savery *v.* King, 5 H. L. Cas. (Eng.) 627, 665, where the court says the attorney must show "not only that he gave the utmost value for the estate, but further, that no one of the circumstances likely to influence Richards in his determination to concur or not to concur in the sale was kept from him, that he was aware of the invalidity of the mortgage, so far as he was concerned, and so knew the real nature and extent of his interest." Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241; Condit *v.* Blackwell, 22 N. J. Eq. 481.

52. Barnard *v.* Hunter, 39 Eng. L. & Eq. 569.

53. Wright *v.* Carter, L. R. (1903) 1 Ch. (Eng.) 27. To same effect, see Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

54. Tyars *v.* Alsop, 61 L. T. N. S. (Eng.) 8. See also Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777;

(6.) Independent Evidence Required. — The attorney must establish his position by separate, independent testimony.[55] But the contrary has been held.[56]

(7.) Prerequisites to Imposition of Burden. — Before burden can be imposed upon the attorney, the relation of attorney and client must be clearly and unequivocally proved, also that the attorney derived some pecuniary benefit from the transaction, either to himself, or to some one for whom he was interested.[57]

(8.) May Prove Agreement Made Prior to Relation. — The attorney may discharge his burden by showing that the act in question was agreed upon and arranged for prior to the formation of the relation of attorney and client.[58]

(9.) Rule Applies Although Relation Terminated. — The rule applies although the relation of attorney and client may have terminated prior to the act in question, if the influence growing out of the relation continued to exist.[59]

(10.) When Rule Not Applicable. — (A.) Attorney Creditor. — This rule does not apply to transactions in which the attorney is not advising his client, but demanding settlement of debt due from client to himself.[60]

(B.) Attorney Not Acting as Such. — As to whether the rule applies in cases where the attorney did not act as attorney for actor in the transaction in question, the authorities are conflicting. It

Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

55. In Walker *v.* Smith, 29 Beav. 394, 54 Eng. Reprint 680, Sir John Romilly says that, in such cases, the testimony of the attorney should not be taken into account. See also Haight *v.* Moore, 5 Jones & S. (N. Y. Super.) 161.

This testimony may be given by the person complaining of the transaction, or documentary evidence may be introduced. Readdy *v.* Pendergast, 55 L. T. N. S. (Eng.) 767.

56. Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241.

57. Richards *v.* French, 22 L. T. N. S. (Eng.) 327.

Must Be Attorney for Actor, or Receive Benefit. — Burden is not upon attorney unless he was the attorney for actor (Barkley *v.* Cemetery Assn., 153 Mo. 300, 54 S. W. 482), and derived some pecuniary benefit from the transaction, either to himself (Barkley *v.* Cemetery Assn., 153 Mo. 300, 54 S. W. 482, *distinguished* in Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858) or to some one for whom he was interested. Barkley *v.* Cemetery Assn., 153 Mo. 300, 54 S. W. 482, *distinguished* in Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858.

Attorney Acting as Manager for Corporation Controlled by Testator. Where proof shows that testator formed the corporation to which he devised all his estate, retained all its stock except four shares, made a certain attorney a nominal stockholder, by giving him one share of stock, and consulted him in regard to its business and management, a presumption will not arise that such attorney procured the will in question by undue influence. Barkley *v.* Cemetery Assn., 153 Mo. 300, 54 S. W. 482.

58. Bingham *v.* Salene, 15 Or. 208, 218, 14 Pac. 523.

59. Mason *v.* Ring, 2 Abb. Pr. N. S. (N. Y.) 322; *s. c.*, 3 Abb. Dec. 219.

60. Johnson *v.* Fesemeyer, 3 De G. & J. 13, 44 Eng. Reprint 1174. The contrary view is indicated in Brown *v.* Bulkley, 14 N. J. Eq. 451.

has been held that the rule does apply in such cases; also that it does not.[61]

e. *Spiritual Adviser.* — A spiritual adviser occupies toward the person seeking his professional assistance a relation of trust and confidence imposing upon the former the burden of disproving undue influence.[62]

61. Rule Applied. — Carter *v.* West, 93 Ky. 211, 19 S. W. 592. *Contra,* Edwards *v.* Meyrick, 2 Hare 60, 67 Eng. Reprint 25, 12 L. J. Ch. 49, 6 Jur. 924.

See discussion of this subject in Wright *v.* Carter, L. R. (1903) 1 Ch. 27, 51. In this case, C., fearing that his property might be swept away by payment of certain claims, desired to make a settlement for the benefit of his children. To accomplish this purpose, he instructed his solicitor to prepare a deed of settlement, the deed to contain a provision for payment of the solicitor's bill for past services. His solicitor stated that he, solicitor, could not act in the preparation of a deed conferring a benefit upon himself, and advised the employment of independent counsel, suggesting several names. C. consulted one of the persons named by his solicitor, and executed a deed carrying out his intention. C.'s action to set aside the deed was sustained. In discussing this branch of the case the court says: "I will now make a few observations upon the decision of Wigram V.-C. in the case which has been cited to us of Edwards *v.* Meyrick. (1) Being a decision of that learned judge, it deserves great attention. It is suggested that he laid it down that this rule of Lord Eldon's had no application except in a case where the solicitor was employed *in hac re.* Now, that decision of Wigram V.-C. was dealt with afterwards by Turner L. J., and also by Lord Cranworth L. C., in the case of Holman *v.* Loynes (2), from which the true meaning of the decision of Wigram V.-C. may be arrived at. Turner L. J., speaking of that decision, after quoting the words of the Vice Chancellor, says (3): 'Gifts from clients to their attorneys can be maintained only, when not only the relation has ceased but the influence may rationally be supposed to have ceased also.' Now, in my view here Mr. Carter never did from first to last cease to be the solicitor of Colonel Wright. He was the solicitor advising him in all his affairs, and advising him in particular both in dealing with his property, including the rejected assets, in dealing with his most pressing creditor, if not his only creditor, the Capital and Counties Bank, in dealing with the settlements that he should make on his children, and in dealing with these very deeds by which gifts were to be made. Under those circumstances, to my mind, it would be absolutely untrue to say that Mr. Carter did not continue solicitor *in hac re;* and certainly, if it could be held that the employment of the independent solicitor took that particular matter out of the hands of the regular solicitor, it could not possibly be said that the proper inference was that the influence of the regular solicitor might rationally be supposed to have ceased under those circumstances." See remarks of Lord Chancellor in Holman *v.* Loynes, 23 L. J. Ch. 529, 18 Jur. 839, 4 De G. M. & G. 270, 43 Eng. Reprint 510. See statement to the contrary in Jennings *v.* McConnel, 17 Ill. 148, where ground of action was fraud.

62. Huguenin *v.* Baseley, 14 Ves. 273, 33 Eng. Reprint 526; Thompson *v.* Heffernan, 4 Drury & W. (Ir. Ch.) 285; Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56; Gilmore *v.* Lee (Ill.), 86 N. E. 568, *s. c.,* 137 Ill. App. 498; Kemp *v.* Kemp (Neb.), 118 N. W. 1069; *In re* Welsh, 1 Redf. (N. Y.) 238.

Where the proof shows that between the maker of a bond for the payment of money and the payee,

f. *Trustee.* — The same rule applies to transactions between a trustee and his *cestui que trust,* or beneficiary.[63]

Rule More Exacting When Confirmation Relied Upon. — The rule imposing the burden of proof upon a trustee to show that a benefit conferred upon him by his beneficiary was not obtained by undue influence and requiring strict proof of good faith, is more exacting when it is sought to show a ratification of a voidable contract than where the trustee seeks an enforcement of the original contract.[64]

Executor. — The rule applies to transactions between an executor and the persons named as devisees of the will under which he acts.[65]

Principal and Agent. — The relation of principal and agent has been held to be a relation of trust and confidence so as to impose upon the latter the burden of showing that a transaction between himself and the former was not made under undue influence.[66] But

there existed a relation of peculiar trust and confidence similar to that between a religious devotee and his spiritual adviser, the burden of proof is upon the payee to show that the execution of the bond was not obtained by undue influence. Finegan *v.* Theisen, 92 Mich. 173, 52 N. W. 619; Hegney *v.* Head, 126 Mo. 619, 29 S. W. 587.

Connor *v.* Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84, was decided under California Civ. Code, § 2219, which provides that everyone who voluntarily assumes a relation of personal confidence with another is a trustee, and § 2235 which raises a presumption that all transactions by which the person trusted obtains an advantage are entered into under undue influence. The court holds that as the person benefited had obtained great influence over the other, by reason of acting as a medium for spiritualistic communications, she was a trustee within the meaning of § 2219. See also Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469, and Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785; Ford *v.* Hennessy, 70 Mo. 580.

63. Pairo *v.* Vickery, 37 Md. 467 (which involved mortgage executed to a trustee by *cestui que trust*); Williams *v.* Williams, 63 Md. 371 (deed by *cestui que trust* to trustee); Gick *v.* Stumpf, 110 N. Y. Supp. 712.

64. Voltz *v.* Voltz, 75 Ala. 555. To same effect, see Morse *v.* Royal, 12 Ves. Jr. 355, 373, 33 Eng. Reprint, 134 (although the acts there complained of constituted fraud).

65. Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560; Mayrand *v.* Mayrand, 194 Ill. 45, 61 N. E. 1040; Woods *v.* Roberts, 185 Ill. 489, 57 N. E. 426; Cunningham's Appeal, 122 Pa. St. 464, 15 Atl. 868.

66. *Alabama.* — Waddell *v.* Lanier, 62 Ala. 347.

Maryland. — Kerby *v.* Kerby, 57 Md. 345 (where the agent in question was the son of grantor).

Missouri. — Street *v.* Goss, 62 Mo. 226 (where agent was son-in-law of grantor); Reed *v.* Carroll, 82 Mo. App. 102. See also Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858.

New Jersey. — Farmer's Exr. *v.* Farmer, 39 N. J. Eq. 211 (where agent was husband of donor).

New York. — Decker *v.* Waterman, 67 Barb. 460; Brice *v.* Brice, 5 Barb. 533; Barnard *v.* Gantz, 140 N. Y. 249, 35 N. E. 430 (grantee in deed in question was the son-in-law and confidential agent of grantor); Disbrow *v.* Disbrow, 31 App. Div. 624, 52 N. Y. Supp. 471, *affirmed,* 164 N. Y. 564, 58 N. E. 1086 (in this case grantee was grantor's son); Comstock *v.* Comstock, 57 Barb. 453 (where person charged was son of actor). Bowen *v.* De Selding, 92 N. Y. Supp. 292.

Pennsylvania. — Darlington's Estate, 147 Pa. St. 624, 23 Atl. 1046.

Vermont. — Taylor *v.* Vail, 80 Vt. 152, 66 Atl. 820.

the contrary has been held.[67] In jurisdictions holding the relation of principal and agent to be confidential, the rule does not apply in cases where the power of the agent is limited to one or two special purposes, and the act complained of relates to other matters.[68]

g. *Other Relations.* — Certain other relations which have been held confidential within the meaning of this rule are stated in the notes.[69]

Relations Held Not Confidential. — Reference is made in the notes to cases in which certain relations have been held not to be confidential within the meaning of the rule under consideration.[70]

67. Trusts & Guarantee Co. *v.* Hart, 2 Ont. L. (Can.) 251; Uhlrick *v.* Mulke, 61 Ill. 499; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Vannest *v.* Murphy, 135 Iowa 123, 112 N. W. 236; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428. *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392; Kelly *v.* Ashforth, 47 Misc. 498, 95 N. Y. Supp. 1004, *affirmed*, 111 App. Div. 922, 96 N. Y. Supp. 1131.

68. Brown *v.* Mercantile Trust Co., 87 Md. 377, 40 Atl. 256.

69. Affianced Persons. — In actions between affianced persons, the burden of proof is upon the person receiving the benefit of the transaction in question to show that it was not procured by undue influence. *In re* Shea's Appeal, 121 Pa. St. 302, 319, 15 Atl. 629; *In re* Kline's Estate, 64 Pa. St. 122. To same effect, see Gilmore *v.* Burch, 7 Or. 374, 33 Am. Rep. 710. See remarks of court in Rockafellow *v.* Newcomb, 57 Ill. 186.

Partners. — It has been held that the relationship of partners between the parties to a transaction imposes upon the one benefited the burden of proving that the transaction was fair and honest. Platt *v.* Platt, 2 Thomp. & C. (N. Y.) 25.

70. Relations Held Not Confidential. — Physician and Patient Not. — A physician does not sustain toward his patient such relation of confidence as will impose upon him the burden of establishing the fairness and freedom from undue influence of a conveyance by which the patient transfers property to the physician. Audenreid's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731; Pratt *v.* Barker, 1 Sim. 1, 57 Eng. Reprint 479. But see Billage *v.* Southee, 9 Hare 534, 68 Eng. Reprint 623, 21 L. J. Ch. 472; Dent *v.* Bennett, 4 Myl. & C. 269, 41 Eng. Reprint 105.

In Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479, a gift from patient to physician was set aside in an action by donor's administrator. But the facts showed that the donee was not only the physician of donor, but was her trusted, confidential agent, that donor was weak in mind and memory and was subject to donee's influence in all her affairs. The supreme judicial court held that the testimony justified the jury in finding the existence of undue influence as a fact. *Contra.* — Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14.

In Ashwell *v.* Lomi, L. R. 2 P. & D. (Eng.) 477, it is held that when a person laboring under a severe disease makes a large devise to his medical attendant, the will being executed in secrecy, and the whole transaction assuming the character of a clandestine proceeding, the burden of proof is upon devisee to maintain the validity of the will. See also Dent *v.* Bennett, 4 Myl. & C. 269, 41 Eng. Reprint 105; Greville *v.* Tylee, 29 Eng. L. & Eq. 53.

Friendship — Guest. — A confidential relation within the meaning of the rule does not exist between an aged, infirm and feeble woman who resides in the family of a young man to whom she is strongly attached, there being no proof that he exercised any influence over her in procuring the execution of the act complained of. Pressley *v.* Kemp, 16 S. C. 334, 42 Am. Rep. 635. See also Looby *v.* Redmond, 66 Conn. 444, 34 Atl. 102.

C. Burden Imposed by Circumstances. — a. *Generally.* — In numerous cases the burden of proof has been held to have been imposed upon the person charged, by certain combinations of circum-

Grandparent and Grandchild. The existence of the relation of grandparent and grandchild is not sufficient to impose upon the latter the burden of showing that benefits conferred by the former were not the result of undue influence. Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

Brother and Sister. — The relation of brother and sister is not of itself fiduciary, although it is a material fact to be considered in determining whether, as a matter of fact, an actual fiduciary relation existed between certain persons, as such relation is more easily superinduced by blood relationship. Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555; Albrecht *v.* Hunecke, 196 Ill. 127, 63 N. E. 616. For case apparently to the contrary, see Davis *v.* Dunne, 46 Iowa 684.

Brother-in-Law — Sister-in-Law. So as to the relation of brother-in-law and sister-in-law. Richards *v.* French, 22 L. T. N. S. (Eng.) 327; *In re* Springstead's Will, 55 Hun 603, 8 N. Y. Supp. 596.

Uncle and Nephew or Niece. — So as to the relation existing between an uncle or aunt and his or her nephew or niece. Kischman *v.* Scott, 166 Mo. 214, 65 S. W. 1031; Bade *v.* Feay (W. Va.), 61 S. E. 348; Michael *v.* Michael, 40 N. C. (5 Ired. Eq.) 349; Goodwin *v.* White, 59 Md. 503.

Step-Parent and Stepchild. — The relation. Earle *v.* Chace, 12 R. I. her stepchild is not a confidential relation. Earle *v.* Chase, 12 R. I. 374. But see Kempson *v.* Ashlee, L. R. 10 Ch. App. (Eng.) 15.

Mortgagor and Mortgagee. Where, in arranging for a mortgage, the mortgagee obtains a stipulation for some collateral advantage as a condition of the loan, it will not be presumed that such stipulation was procured by the exercise of undue influence. Santley *v.* Wilde, 81 L. T. N. S. (Eng.) 393. See Reeves *v.* Lampley, 125 Ala. 449, 27 So. 840.

Tenant in Common. — So as to the relations existing between tenants in common. Albrecht *v.* Hunecke, 196 Ill. 127, 63 N. E. 616.

Friendship. — Burden is not imposed upon person charged by the fact that he sustained intimately friendly relations with actor, such as living with him, nursing him and managing his business. *In re* Douglass' Estate, 162 Pa. St. 567, 29 Atl. 715; Messner *v.* Elliott, 184 Pa. St. 41, 39 Atl. 46.

Unlawful Relation. — It has been held that in case of devise, bequest or conveyance to a person with whom testator or grantor lives in illicit sexual relations, where the natural objects of testator's or grantor's bounty are excluded, the burden of proof is upon devisee, legatee or grantee to show that the transaction was not procured by the exercise of undue influence. Leighton *v.* Orr, 44 Iowa 679; Hanna *v.* Wilcox, 53 Iowa 547, 5 N. W. 717.

In Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528, the court says: "The following principle, we think, is sound both in law and morals, and though a departure from the former rule, is sustained by the more modern authorities. When one, living in illicit sexual relations with another, makes a large gift of his property to the latter, especially in cases where the donor excludes natural objects of his bounty, the transaction will be viewed with such suspicion by a court of equity, as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence. How much further the principle may be extended, if any, it is neither our province nor purpose now to consider. This doctrine is fully sustained by Judge Cooley in his work on Torts, and receives the approval of other eminent jurists and text writers. Cooley on Torts, 515; Bigelow on Fraud, 271; 1 Redf. on Wills, 532-4; 3 Lead. Cases Eq. 146." In this case a young man who had impaired his physical and

stances; a number of these will be found in the notes.[71] The main factors in such cases are, certain combinations of relations; certain relations in connection with the characteristics of the actor or the conduct of the person charged; or the existence of conditions which

mental powers by dissipation conveyed all his property to a common prostitute, with whom he lived after the performance of a void marriage ceremony, and who had great influence over him. In obtaining this conveyance, grantee was assisted by her paramour, who also had great influence over grantor. A decree setting aside the deed was affirmed on appeal. See also Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227. But the weight of authority appears to be to the contrary. See IV, 5, A, c, (4.), (F.).

71. Burden Imposed by Circumstances. — In General. — In Fritz *v.* Turner, 46 N. J. Eq. 515, 22 Atl. 125, the court says: "Such influence need not be proved directly. It may be established by inference from circumstances attending the preparation and execution of the will. The circumstances of this character which are most familiar to the courts are, that the testator was in an enfeebled condition of mind; that he was under the dominating influence of the favored legatees; that such legatees prepared the will and superintended its execution, and, about the time of that execution, excluded the natural objects of the testator's bounty from his society and kept secret the fact of the existence of the instrument from those who would naturally be interested in it, and the like. Combinations of such indicia of undue influence may throw upon those who offer the will for probate the burden of showing that it was the spontaneous act of the testator. But, at the same time, they may exist under circumstances which so explain them that it at once appears that their occurrence was both natural and harmless. Each case must depend upon, and be judged by, its own surroundings."

Physician and Patient — Secrecy. Relatives Excluded. — When testator, an aged man, makes a will during his last illness, leaving the bulk of his estate to the wife of his physician, a stranger in blood, to the exclusion of near relatives, and it appears that the transaction was attended with secrecy, and that testator had made a different and more reasonable will shortly before the execution of that in question, the burden of proof is upon proponent. *In re* Keefe's Will, 27 Misc. 618, 59 N. Y. Supp. 490.

Trustee and Beneficiary. — Testator Physically and Mentally Weak. The concurrence of the circumstances of relation of trustee and beneficiary, testator feeble both mentally and physically, next of kin omitted, or not receiving a reasonable share of testator's estate have been held to impose upon a trustee the burden of proving that a devise to him was not obtained by undue influence. *In re* De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. Supp. 364; Edgerly *v.* Edgerly, 73 N. H. 407, 62 Atl. 716.

Actual Confidence. — Business Adviser. — Thus where proof showed that relations between donor and donee were confidential; that donee, who had studied law, had acted as donor's business adviser, and that donor was old and feeble, it was held that the burden of proof was upon donor to show that the gift was not obtained by undue influence. Snook *v.* Sullivan, 53 App. Div. 602, 66 N. Y. Supp. 24, *reversing* 25 Misc. 578, 55 N. Y. Supp. 1073, *affirmed*, without opinion, 167 N. Y. 536, 60 N. E. 1120. To same effect, see Boyd *v.* Boyd, 66 Pa. St. 283.

Stepmother Executrix. — The fact that person charged was the stepmother of actor, was executrix of his father's will, and possessed actual influence over him, is sufficient to impose burden of proof upon the former. Woods *v.* Roberts, 185 Ill. 489, 495, 57 N. E. 426.

Executor Stepson. — Hayes *v.* Kerr, 19 App. Div. 91, 45 N. Y. Supp. 1050.

rendered the actor peculiarly susceptible to influence. Physical and mental weakness of actor have exercised a controlling influence in the determination of this question.

Physician Agent. — So, where person charged is the physician and general agent of actor. Unruh *v.* Lukens, 166 Pa. St. 324, 31 Atl. 110.

Combined Relations of Uncle and Nephew and Principal and Agent. It has been held that the facts that the parties to a transaction were uncle and nephew, and that the latter, under power of attorney managed the estate of the former, imposed upon him the burden of showing that the transaction in question was the result of undue influence. *In re* Darlington's Estate, 147 Pa. St. 624, 23 Atl. 1046. To same effect, see Nobles *v.* Hutton (Cal. App.), 93 Pac. 289, where it was held that the burden of proof was imposed upon grantee by the combined circumstances that he was the son of grantor and her agent.

In Crothers *v.* Crothers, 149 Pa. St. 201, 24 Atl. 190, it was held that the relation of parent and child, and the fact that the grantor—father—had, shortly prior to executing the conveyance in question, given grantee — son — a general power of attorney which specially authorized a lease of the land in question, did not impose the burden of proof upon grantee.

Kinship, Physician and Patient, Constant Attendance, Actor Infirm and Helpless. — Hill *v.* Miller, 50 Kan. 659, 32 Pac. 354. Grantee, who was a physician, lived with grantor, who was his elder brother and infirm and helpless, cared for him and managed his business. *Held*, that these circumstances imposed onus on grantee.

Confidential Relation. — Attorney Draughtsman and Legatee. — Activity in Securing Execution. — Testator Mentally and Physically Weak. — *In re* Smith's Will, 95 N. Y. 516.

Trusteeship and Other Circumstances. — Where the proof shows that the person charged was testator's trustee, that testator was feeble in mind and body, that the will in question was prepared by devisee's attorney, and that devisee was preferred to relatives of testator, the burden of proof is upon a trustee to show that a devise to him from his beneficiary was not obtained by undue influence. *In re* De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. Supp. 364.

Confidential Relation and Unjust Will. — Such is the effect of the circumstances of confidential relation and a will which is inconsistent with the claims of duty and affection. *In re* Spark's Case, 63 N. J. Eq. 242, 51 Atl. 118; *In re* Carland's Will, 15 Misc. 355, 37 N. Y. Supp. 922; *In re* Keefe's Will, 27 Misc. 618, 59 N. Y. Supp. 490; Greenwood *v.* Cline, 7 Or. 17, 26; Chappell *v.* Trent, 90 Va. 849, 927, 19 S. E. 314; Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737; Fischer *v.* Sperl, 94 Minn. 421, 103 N. W. 502.

Confidential Relation and Active Participation. — *Alabama.* — McQueen *v.* Wilson, 131 Ala. 606, 31 So. 94; Chandler *v.* Jost, 96 Ala. 596, 11 So. 636; Bancroft *v.* Otis, 91 Ala. 279, 8 So. 286, 24 Am. St. Rep. 904; Higginbotham *v.* Higginbotham, 106 Ala. 314, 17 So. 516; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

Missouri. — Dausman *v.* Rankin, 189 Mo. 677, 88 S. W. 696, 107 Am. St. Rep. 338; Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858.

New Hampshire. — Edgerly *v.* Edgerly, 73 N. H. 407, 62 Atl. 716.

New Jersey. — Sparks' Case, 63 N. J. Eq. 242, 51 Atl. 118.

New York. — Lee *v.* Dill, 11 Abb. Pr. 214; Lake *v.* Ranney, 33 Barb. 49; *In re* Carland's Will, 15 Misc. 355, 37 N. Y. Supp. 922; *In re* Ellwanger's Will, 114 N. Y. Supp. 727; *In re* Keefe's Will, 27 Misc. 618, 59 N. Y. Supp. 490 (decision of surrogate revoking probate. The surrogate's decision was reversed, 47 App. Div. 214, 62 N. Y. Supp. 124, by the appellate division. The judgment of appellate division was reversed on a question of practice, and the surrogate's judgment affirmed by the

b. *Circumstances Held Insufficient.* — Reference is made in the court of appeals in *In re* Keefe, 164 N. Y. 352, 58 N. E. 117.)

Pennsylvania. — Messner *v.* Elliott, 184 Pa. St. 41, 49, 39 Atl. 46; Scattergood *v.* Kirk, 192 Pa. St. 263, 43 Atl. 1030.

Vermont. — *In re* Rogers' Will, 80 Vt. 259, 67 Atl. 726.

Virginia. — Chappell *v.* Trent, 90 Va. 849, 927, 19 S. E. 314.

Deed. — The same rule applies to a deed made without a valuable consideration. Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500; Sears *v.* Shafer, 1 Barb. (N. Y.) 408, *affirmed*, 6 N. Y. 268; Dausman *v.* Rankin, 189 Mo. 677, 88 S. W. 696, 107 Am. St. Rep. 338; *In re* De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. Supp. 364. See also Miller *v.* Rivers, 138 Pa. St. 270, 22 Atl. 243; Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737; Hays *v.* Union Tr. Co., 27 Misc. 240, 57 N. Y. Supp. 801; Doyle *v.* Welch, 100 Wis. 24, 75 N. W. 400; Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488.

Direct Participation Not Essential. — Forman *v.* Smith, 7 Lans. (N. Y.) 443, 451; *In re* Miller's Estate, 179 Pa. St. 645, 653, 36 Atl. 139; *s. c.*, Miller *v.* Miller, 187 Pa. St. 572, 591, 41 Atl. 277; Chappell *v.* Trent, 90 Va. 849, 19 S. E. 314.

Participation at Testator's Request. — But if proponent's action in regard to the will was taken at testator's request, and for the purpose of carrying his wishes into effect, the fact of participation does not impose the onus upon the proponent. Eastis *v.* Montgomery, 95 Ala. 486, 11 So. 204, 36 Am. St. Rep. 227; Henry *v.* Hall, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22; Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869. To same effect, see Goodbar *v.* Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296; Wightman *v.* Stoddard, 3 Bradf. Sur. (N. Y.) 393; Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545; Blanchard *v.* Nestle, 3 Denio (N. Y.) 37.

Confidential Relation — Actor Mentally Weak. — The burden is upon grantee, wife of grantor, to show that deed made to her when grantor's mind was greatly enfeebled by disease was fairly obtained. Hester *v.* Hester, 13 Lea (Tenn.) 189; Connelly *v.* Fisher, 3 Tenn. Ch. 382. See Morton's Admr. *v.* Morton (N. J.), 8 Atl. 807. To same effect, see Moran *v.* Sullivan, 12 App. Cas. (D. C.) 137, 146, where grantee was business adviser of grantor, lived with her, and occupied the position of a son toward her. See also German Sav. & L. Soc. *v.* DeLashmutt, 83 Fed. 33.

Spiritual Adviser — Donor in Extremis. — McPherson *v.* Byrne (Mich.), 118 N. W. 985.

Confidential Relation — Deed Omitting Clause of Revocation. Burden has been held to be imposed upon grantee named in a deed by the circumstances that the latter was the father of grantor, and the deed omitted a clause of revocation. *In re* Miskey's Appeal, 107 Pa. St. 611, 628.

Confidential Relation. — Donor mentally weak; gift disproportionate to means of donor; donee active in procuring execution of gift. Sears *v.* Shafer, 1 Barb. (N. Y.) 408, *affirmed*, 6 N. Y. 268.

Grantor Physically and Mentally Weak. — Entire estate conveyed to son with whom grantor lived. Collins *v.* Collins (N. J. Eq.), 15 Atl. 849.

Nurse and Patient. — Actor Mentally Weak. — The relation between nurse and patient has been held to be a confidential relation within the meaning of the rule. Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087. But see *In re* King's Will, 29 Misc. 268, 61 N. Y. Supp. 238; Richardson *v.* Bly, 181 Mass. 97, 63 N. E. 3; Snodgrass *v.* Smith (Colo.), 94 Pac. 312.

Fiduciary Relation and Suspicious Circumstances. — McCartney's Exrs. *v.* Bone, 33 Ala. 601; Waddington *v.* Buzby, 43 N. J. Eq. 154, 10 Atl. 862; Greenwood *v.* Cline, 7 Or. 17, 29. See also Worrall's Appeal, 110 Pa. St. 349, 364, 1 Atl. 380, 765; Davis *v.* Dean, 66 Wis. 100, 108, 26 N. W. 737; Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488.

notes to cases in which certain combinations of circumstances have

Actor Weak-Minded and Actually Under Influence of Person Benefited. *Illinois.* — Dowie *v.* Driscoll, 203 Ill. 480, 68 Atl. 56.

Missouri. — Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858.

New Hampshire. — Edgerly *v.* Edgerly, 73 N. H. 407, 62 Atl. 716.

New Jersey. — Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469; Boisaubin *v.* Boisaubin, 51 N. J. Eq. 252, 27 Atl. 624; *In re* Spark's Case, 63 N. J. Eq. 242, 51 Atl. 118; Thorp *v.* Smith, 63 N. J. Eq. 70, 51 Atl. 437, *affirmed*, 65 N. J. Eq. 400, 54 Atl. 412.

New York. — Canfield *v.* Fairbanks, 63 Barb. 461; Sweet *v.* Bean, 67 Barb. 91; Phipps *v.* VanKleeck, 22 Hun 541; Turhune *v.* Brookfield, 1 Redf. 220, 229; Demmert *v.* Schnell, 4 Redf. 409.

To same effect, see Miller's Estate, 179 Pa. St. 645, 653, 36 Atl. 139; *s. c.*, 187 Pa. St. 572, 591, 41 Atl. 277.

Actor Mentally Weak. — Thus, in case of a will in favor of one who was the business adviser of testator, and who, although not an attorney, drew his will, the burden of proof is imposed upon proponent by the fact that testator's mind was weak. Boyd *v.* Boyd, 66 Pa. St. 283; Cuthbertson *v.* Yardley, 97 Pa. St. 163; *s. c.*, 108 Pa. St. 395.

Testator Mentally Weak. — Dependent; under influence of person charged, who had intent to procure will and active in securing and present at execution; will unjust; conforming with intention of person charged, who failed to testify. Claffey *v.* Ledwith, 56 N. J. Eq. 333, 355, 38 Atl. 433.

Gift. — Donor Mentally and Physically Infirm. — So, where an old man, mentally and physically infirm, makes gifts of great value to a woman who had lived in his family as an adopted child, who acted as his nurse and with whom his relations were confidential, it appearing that donor acted without independent advice. Keck *v.* Sayre, 4 Ohio Dec. 195, 203.

It has been held that burden is imposed upon proponent by the circumstances that testator, who was mentally very weak, made his home with proponent, who was an active, intelligent business man; that the latter caused the will in question to be prepared by his own attorney. Barkman *v.* Richards, 63 N. J. Eq. 211, 49 Atl. 831. See also *In re* Ellwanger's Will, 114 N. Y. Supp. 727; Anderson *v.* Carter, 24 App. Div. 462, 49 N. Y. Supp. 255, *affirmed*, without opinion, 165 N. Y. 624, 26 N. E. 737.

Actor Susceptible by Reason of Mental Weakness. — Esterbrook *v.* Gardner, 2 Dem. (N. Y.) 543; *In re* Carland's Will, 15 Misc. 355, 37 N. Y. Supp. 922; Greenwood *v.* Cline, 7 Or. 17, 26; *In re* Miller's Estate, 179 Pa. St. 645, 653, 36 Atl. 139; *s. c.*, 187 Pa. St. 572, 591, 41 Atl. 277; Davis *v.* Dean, 66 Wis. 100, 108, 26 N. W. 737; Mullen *v.* McKeon, 25 R. I. 305, 55 Atl. 747.

Grantor Susceptible to Influence by Reason of Disease or Age. *Delaware.* — Jones *v.* Thompson, 5 Del. Ch. 374.

Illinois. — Lewis *v.* McGrath, 191 Ill. 401, 61 N. E. 135; Dowie *v.* Driscoll, 203 Ill. 480, 68 Atl. 56; Dorsey *v.* Wolcott, 173 Ill. 539, 50 N. E. 1015; Sands *v.* Sands, 112 Ill. 225; Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808.

Kentucky. — Smith *v.* Snowden, 96 Ky. 32, 27 S. W. 855.

Missouri. — McClure *v.* Lewis, 72 Mo. 314; Dingman *v.* Romine, 141 Mo. 466, 42 S. W. 1087; Reed *v.* Carroll, 82 Mo. App. 102.

New Jersey. — Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385; Dale *v.* Dale, 38 N. J. Eq. 274; Wilkinson *v.* Sherman, 45 N. J. Eq. 413, 18 Atl. 228, *affirmed*, 47 N. J. Eq. 324, 21 Atl. 955; Parker *v.* Parker, 45 N. J. Eq. 224, 16 Atl. 537; Morton's Admr. *v.* Morton, 8 Atl. 807; White *v.* Daly (N. J. Eq.), 58 Atl. 929; Post *v.* Hagan (N. J. Eq.), 65 Atl. 1026; Monoghan *v.* Collins (N. J. Eq.), 71 Atl. 617.

New York. — Sears *v.* Shafer, 6 N. Y. 268; Tyler *v.* Gardiner, 35 N. Y. 559; *In re* Liney's Will, 13 N. Y.

Supp. 551, 34 N. Y. St. 700, *affirmed*, without opinion, 131 N. Y. 613, 30 N. E. 865; Schinotti *v.* Cuddy, 25 Misc. 556, 55 N. Y. Supp. 219.

Pennsylvania. — Scattergood *v.* Kirk, 192 Pa. St. 263, 43 Atl. 1030.

Dependent by Reason of Physical Disability. — Carroll *v.* Hause, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469; Jones *v.* Roberts, 37 Mo. App. 163; Turbune *v.* Brookfield, 1 Redf. (N. Y.) 220, 229.

Testator Deaf and Dumb — Unable To Read or Write. — Rollwagen *v.* Rollwagen, 63 N. Y. 504.

Testator Extremely Ignorant; unable to read or write; susceptible to influence; victim of passion or prejudice; will not in accord with previous expressions of testamentary intent. Van Pelt *v.* Van Pelt, 30 Barb. (N. Y.) 134.

Actor Deficient in Business Capacity, Trusting all Affairs to Person Charged. — Smith *v.* Cuddy, 96 Mich. 562, 56 N. W. 89; Disbrow *v.* Disbrow, 31 App. Div. 624, 52 N. Y. Supp. 471, *affirmed*, 164 N. Y. 564, 58 N. E. 1086; Moran *v.* Sullivan, 12 App. Cas. (D. C.) 137, 146; Griesel *v.* Jones, 123 Mo. App. 45, 99 S. W. 769.

Distress and Necessity of Actor. Dependence Upon Other Party. Especially if the act in question amounts to a disinheritance of actor's relatives (Schinotti *v.* Cuddy, 25 Misc. 556, 55 N. Y. Supp. 219), or divests him of all, or practically all, of his property. Slack *v.* Rees, 66 N. J. Eq. 447, 59 Atl. 466; Post *v.* Hagan (N. J. Eq.), 65 Atl. 1026; Walsh *v.* Harkey (N. J. Eq.), 69 Atl. 726; Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326; Story Eq. Jur., § 239; 1 Redf. Wills, p. 515; Tracey *v.* Sacket, 1 Ohio St. 54.

Testator Aged and Ill. — Actual Influence. — Relatives Excluded. Activity. — Change of Intent. Where testator who was aged and ill, was required against his will to make his home with proponents, who excluded other relatives from testator, and made statements calculated to create hostile feelings against them, and were active in causing him to make codicils, which effected material changes in testamentary disposition in favor of proponents, and prejudicial to other relatives, it was held that the codicils were procured by undue influence. Swenarton *v.* Hancock, 22 Hun (N. Y.) 38; Phipps *v.* Van-Kleeck, 22 Hun (N. Y.) 541.

Motive, Interest, Disposition, Opportunity. — Actor Infirm and Dependent. — *In re* Wheeler's Will, 5 Misc. 279, 25 N. Y. Supp. 313; *In re* Ellwanger's Will, 114 N. Y. Supp. 727; Dirch *v.* Timm, 101 Wis. 179, 191, 77 N. W. 196; Baker *v.* Baker, 102 Wis. 226, 78 N. W. 453; *In re* Derse's Will, 103 Wis. 108, 79 N. W. 46; Fischer *v.* Sperl, 94 Minn. 421, 103 N. W. 502; Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488.

Suspicious Circumstances. — Whenever a will or deed is executed under circumstances which excite the suspicion of the court, the burden of proof is imposed upon him who propounds or claims under the instrument in question to show that benefit conferred upon him was not obtained by the exercise of undue influence. Tyrrell *v.* Painton (1894) P. 151, 70 L. T. 453, 6 R. 540; Tyler *v.* Gardiner, 35 N. Y. 559, 592; McLaughlin *v.* McDevitt, 63 N. Y. 213; Forman *v.* Smith, 7 Lans. (N. Y.) 443; Baker *v.* Baker, 102 Wis. 226, 78 N. W. 453, where, among other acts, person charged concealed fact of execution from testator's children.

In *In re* Gallup's Will, 43 App. Div. 437, 60 N. Y. Supp. 137, it is said that a will executed under suspicious circumstances will not be upheld until such circumstances are explained. See Blume *v.* Hartman, 115 Pa. St. 32, 8 Atl. 219, 2 Am. St. Rep. 525, where will was not read to testatrix. See also Waddington *v.* Buzby, 43 N. J. Eq. 154, 10 Atl. 862.

Deed. — Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

Contract Made on Deathbed. Family Absent. — Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387; *In re* Ehminne's Will, 30 Misc. 21, 62 N. Y. Supp. 1006.

Magnitude of Gift as Imposing Burden. — Allcard *v.* Skinner, L. R. 36 Ch. Div. (Eng.) 145; Lyon *v.* Home, L. R. 6 Eq. 655, 37 L. J. Ch. 674, 18 L. T. 451; Thorn *v.* Thorn, 51 Mich. 167, 16 N. W. 324; *In re*

been held not to impose the burden of proof upon the person charged.[72]

Worrall's Appeal, 110 Pa. St. 349, 365, 1 Atl. 380, 765.

Gift of Small Value. — But where gift of trifling value is made to one standing in confidential relation to donor, the burden is not upon donee, and the court will require proof as to whether or not influence was unfairly exercised. Todd *v.* Grove, 33 Md. 188. See also Layman *v.* Conrey, 60 Md. 286; Trubey *v.* Richardson, 224 Ill. 136, 79 N. E. 592; Rhodes *v.* Bate, L. R. 1 Ch. 252, 35 L. J. Ch. 267, 13 L. T. 778.

Gross Inequality in the Dispositions of the Instrument Where No Reason Is Suggested for It. — Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712. To same effect, see Harrel *v.* Harrel, 1 Duv. (Ky.) 203; Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491; Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883; Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32; Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858; Davis *v.* Dean, 66 Wis. 100, 108, 26 N. W. 737. See discussion and explanation of this case in Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220, and Quinn *v.* Quinn, 130 Wis. 548, 110 N. W. 488. See also Lins *v.* Lenhardt, 127 Mo. 271, 29 S. W. 1025; Sickles' Case, 63 N. J. Eq. 233, 50 Atl. 577; *In re* Budlong's Will, 126 N. Y. 423, 27 N. E. 945, *affirming* 54 Hun 131, 7 N. Y. Supp. 289; Mullen *v.* McKeon, 25 R. I. 305, 55 Atl. 747.

Unequal Will. — Execution Kept Secret. — Not in Accord With Previous Expressions of Intention. Mowry *v.* Silber, 2 Bradf. Sur. (N. Y.) 133.

Slight Circumstances Sufficient To Impose Burden. — Yount *v.* Yount, 144 Ind. 133, 43 N. E. 136; Ashmead *v.* Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 239; *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676.

72. Single Circumstance Insufficient. — Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697.

Legacy to Draughtsman of Will. If the draughtsman of a will takes a benefit under it, the burden of proof is upon him to show that it was not obtained by the exercise of undue influence.

England. — Fulton *v.* Andrew, L. R. 7 H. L. 448; Parker *v.* Duncan, 62 L. T. N. S. 642.

Canada. — Collins *v.* Kilroy, 1 Ont. L. 503.

Alabama. — Garrett *v.* Heflin, 98 Ala. 615, 13 So. 326, 39 Am. St. Rep. 89; Hill *v.* Barge, 12 Ala. 687.

Connecticut. — St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Drake's Appeal, 45 Conn. 9.

Michigan. — Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628.

Missouri. — Harvey *v.* Sullens, 46 Mo. 147, 2 Am. Rep. 491.

New Jersey. — *In re* Cooper's Will (N. J. Eq.), 71 Atl. 676.

New York. — Newhouse *v.* Godwin, 17 Barb. 236 (attorney draughtsman).

Pennsylvania. — Hoopes' Estate, 174 Pa. St. 373, 34 Atl. 603. To same effect, see Duffield *v.* Morris, 2 Har. (Del.) 375.

In Drake's Appeal, 45 Conn. 9, the legacy was to church of which draughtsman was vestryman and active member. In Yardley *v.* Cuthbertson, 108 Pa. St. 395, 56 Am. Rep. 218 and in Montague *v.* Allan's Exrs., 78 Va. 592, 49 Am. Rep. 384, the fact that the draughtsman of a will takes a legacy under it, is said to be a suspicious circumstance. See Lee *v.* Dill, 11 Abb. Pr. (N. Y.) 214; Crispell *v.* Dubois, 4 Barb. (N. Y.) 393; *In re* Bartholick's 5 N. Y. Supp. 842; *In re* Eckler's Will, 47 Misc. 320, 95 N. Y. Supp. 986; *In re* Barney's Will, 70 Vt. 352, 40 Atl. 1027; Baker *v.* Batt, 2 Moore P. C. 317, 12 Eng. Reprint 1026; Patton v. Allison, 7 Humph. (Tenn.) 320. *Contra,* Post *v.* Mason, 91 N. Y. 539, 43 Am. Rep. 689.

Will Drawn by Attorney of Legatee. — The fact that a will is drawn by the attorney of the person to whom the bulk of testator's estate is devised requires very satisfactory evidence of its entire fairness. Vreeland *v.* McClelland, 1 Bradf. Sur. (N. Y.) 393: Scatter-

D. NATURE OF BURDEN. — a. *On Person Alleging.* — In case of contest of a will on the ground of undue influence, the burden is upon contestant to show the existence of a relation of trust or confidence, if alleged, between actor and the person alleged to have exercised such influence.[73] Or the person alleging undue influence

good *v.* Kirk, 192 Pa. St. 263, 43 Atl. 1030.

When Burden on Draughtsman. *In re* Barney's Will, 70 Vt. 352, 40 Atl. 1027. See also Woods *v.* Devers, 14 Ky. L. Rep. 81, 19 S. W. 1.

Single Circumstance. — Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697. Nor if the circumstances are such as simply to beget suspicion. McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

Actual Influence and Discrimination Against Heirs. — Berberet *v.* Berberet, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; Chidester *v.* Turnbull, 117 Iowa 168, 90 N. W. 583; McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506; Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526; Brick *v.* Brick, 44 N. J. Eq. 282, 18 Atl. 58, *affirming* 43 N. J. Eq. 167, 10 Atl. 869; Loennecker's Will, 112 Wis. 461, 88 N. W. 215.

Opportunity To Exercise Influence. — McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828. *Contra.* — But it has been held that the circumstances that the will in question discriminates in favor of one child of testator, that testator's mind was weakened by disease, and that such person had opportunities to exercise undue influence, imposes upon such person the burden of showing the absence of undue influence. Dale *v.* Dale, 38 N. J. Eq. 274, *reversing* 36 N. J. Eq. 269.

Affectionate Relations. — Towson *v.* Moore, 173 U. S. 17; LeGendre *v.* Goodridge, 46 N. J. Eq. 419, 19 Atl. 543; Lodge *v.* Hulings, 63 N. J. Eq. 159, 51 Atl. 1015.

Devisee's Knowledge of Will. Wheeler *v.* Whipple, 44 N. J. Eq. 141, 14 Atl. 275.

Not Imposed by Unjust Discrimination. — *In re* Warnock's Will, 103 App. Div. 61, 92 N. Y. Supp. 643; Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604.

Strangers Preferred to Relatives. Chandler *v.* Jost, 96 Ala. 596, 11 So. 636; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; *In re* King's Will, 29 Misc. 268, 61 N. Y. Supp. 238. *Contra.* — Mullen *v.* McKeon, 25 R. I. 305, 55 Atl. 747, *followed* in Lancaster *v.* Alden, 26 R. I. 170, 58 Atl. 638.

Not Imposed by Mere Fact That Devisee Stranger in Blood. — Miles *v.* Treanor, 194 Pa. St. 430, 45 Atl. 368.

Executor Devisee. — *In re* Rohe's Will, 22 Misc. 415, 50 N. Y. Supp. 392.

Beneficiary Acting as Agent and Procuring Draughtsman. — *In re* Logan's Estate, 195 Pa. St. 282, 45 Atl. 729.

Testator Physically Infirm. — Living With Favored Legatee. — Marshall *v.* Hanly, 115 Iowa 318, 88 N. W. 801.

Family Excluded. — Sufficient Reason. — When a will bequeaths one half of testatrix's estate to person who had rendered valuable services, and with whom she had lived on terms of intimacy for years, it appearing that testatrix had not lived with her husband for many years, and that her sons were provided for, the will will not be held so unnatural as to impose burden upon proponent. *In re* King's Will, 29 Misc. 268, 61 N. Y. Supp. 238.

73. Holman *v.* Loynes, 23 L. J. Ch. 529, 4 De G. M. & G. 270, 43 Eng. Reprint 510, 18 Jur. 839; Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; Turner's Appeal, 72 Conn. 305, 44 Atl. 310; Jones *v.* Roberts, 37 Mo. App. 163.

Relation Must Precede Transaction in Question. — It has been held that, in order to make out a case of undue influence because of a relation of trust and confidence between the parties to a certain transaction, it must appear that such a relation existed prior to such transaction; proof that it was contemporaneous

must show that the mental condition or circumstances of actor were such as to render him susceptible to such influence, or easily subjected to it.[74]

Existence of Trust Relation, Question of Fact. — Whether or not the relation between parties to a given transaction was confidential for the purpose of imposing upon the person benefited the burden of showing its voluntary character, is a question of fact, dependent upon the circumstances of each case.[75]

b. *On Person Charged.* — **(1.) Must Show Cessation of Influence.** In order to sustain a gift from child to parent, the existence of parental influence being shown, it must appear that such influence had been removed at the time of the gift in question.[76] When the proof establishes the existence of a relation of trust and confidence, some positive act or a complete case of abandonment must be proved in order to show that a given act was not the result of the influence arising from such relation.[77]

(2.) Independent Advice. — (A.) GENERALLY. — The onus is on a person occupying a relation of confidence toward actor to show that he was emancipated from the influence of the person charged, or was placed by the possession of independent advice in a position equivalent to emancipation.[78]

with and grew out of the transaction itself not being sufficient. Henson *v.* Hill, 3 Mackey (D. C.) 315.

74. Mental Condition. — When undue influence is alleged to have been exercised over a person of weak mind, the person alleging such influence must prove that actor's mind was weak. Biglow *v.* Leabo, 8 Or. 147.

75. Brown *v.* Mercantile Tr. Co., 87 Md. 377, 40 Atl. 256; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459, 468.

76. Davies *v.* Davies, 4 Giff. 417, 9 L. T. N. S. 162, 66 Eng. Reprint 769; Powell *v.* Powell, L. R. (1900) 1 Ch. Div. 243, 82 L. T. N. S. 84, 69 L. J. Ch. Div. 164. To same effect, see Garvin's Admr. *v.* Williams, 50 Mo. 206.

77. Rhodes *v.* Bate, L. R. 1 Ch. (Eng.) 252, 35 L. J. Ch. 267, 12 Jur. (N. S.) 178, 13 L. T. 778; Couch *v.* Couch, 148 Ala. 332, 42 So. 624.

Attorney and Client. — When person charged was attorney for actor, he must show that, prior to transaction in question, his employment had ceased, and that the relation was completely at an end. Lewis *v.* J. A., 4 Edw. Ch. (N. Y.) 599.

78. *England.* — Huguenin *v.* Baseley, 14 Ves. 273, 33 Eng. Reprint 526; Allcard *v.* Skinner, L. R. 36 Ch. Div. 145, 183; McMackin *v.* Hibernian Bank, 1 Ir. Rep. (1905) 296, 305; Powell *v.* Powell, L. R. (1900), 1 Ch. Div. 243, 82 L. T. N. S. 84, 69 L. J. Ch. Div. 164; Sercombe *v.* Sanders, 34 Beav. 382, 55 Eng. Reprint 682; Savery *v.* King, 5 H. L. Cas. 626, 654. To same effect, see Rhodes *v.* Bate, L. R. 1 Ch. App. 252, 35 L. J. Ch. 267, 12 Jur. (N. S.) 178, 13 L. T. 778. See also Sharp *v.* Leach, 7 L. T. N. S. 146; Revelt *v.* Harvey, 1 Sim. & L. 502.

California. — Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785.

Missouri. — Caspari *v.* First German Church, 12 Mo. App. 293, *affirmed*, 82 Mo. 649.

New Jersey. — Monoghan *v.* Collins (N. J. Eq.), 71 Atl. 617; Pironi *v.* Corrigan, 47 N. J. Eq. 135, 156, 20 Atl. 218, *reversed* on another question, but not on the proposition stated in the text, 48 N. J. Eq. 607, 23 Atl. 355; Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907.

Vermont. — Wade *v.* Pulsifer, 54 Vt. 45, 62.

(B.) WHAT IS. — To show that actor had independent advice it must be shown that he had an opportunity to confer fully and privately upon the subject of his proposed act with a person who was not only competent to inform him correctly as to its legal effect, but who was so entirely disassociated from the person benefited, as to be enabled to advise actor impartially and confidently as to the consequences to himself of his intended act.[79]

(C.) LEGAL ADVICE UNNECESSARY. — It is not necessary that the "independent advice" referred to in the decisions should be legal advice. The advice of any person, competent by reason of learning or experience, is sufficient.[80]

(D.) ADVICE FROM AGENT OF PERSON CHARGED. — Advice given to ac-

As to the nature of the burden imposed upon a person occupying a relation of confidence with another who is mentally infirm, the supreme court of Tennessee in Hester *v.* Hester, 13 Lea (Tenn.) 189, says: "The rules of equity in such cases throw upon a person claiming by gift the burden of proof to some extent, not readily determined by definite lines, to show that the act was free and not procured by improper influence, and a degree of weakness far below that which would justify a commission of lunacy, coupled with other circumstances, to show that the weakness had been taken advantage of, would be sufficient to set aside the deed. The question is one of fact, and all that can ordinarily be asked of a beneficiary is to show that he had no voice in the transaction, or if he had, that his action was free from fault, or that the donor had the benefit of a full consultation with some disinterested third person: 2 Lead. Cas. Eq., 1275."

In Barnard *v.* Hunter, 39 Eng. L. & Eq. 569, the court says: "What is meant in cases of this sort, when it is said that parties are to have protection, is, that they are to have some person to look into the facts, and explain the matter to the client, in order that the client, with that assistance, may exercise his judgment. Evidently Shaw was not called in for that purpose, and did not think it his duty to exercise any such watchfulness over the interests of Lyde. I am ready to absolve these parties of intentional imposition on Lyde. They probably thought that he was a man of business habits, trying every means of getting money, and was able to protect himself. Still, we cannot look into these cases minutely as to the particular competency of the particular man. The rule is a general rule, that where there is the relation of solicitor and client, the solicitor, if he deals with the client, must, whether that client was more or less a man of business, show that he had due professional and other assistance to put him on his guard."

It has been said that, when the burden of proof is upon a person to show the validity of a transaction of which he takes the benefit, the best evidence of the righteousness of the transaction is the fact that the person giving up something had independent advice. Berdoe *v.* Dawson, 34 Beav. 603, 55 Eng. Reprint 768, 12 L. T. 103, 11 Jur. 254.

"In transactions connected with the transfer of property, where a fiduciary relation exists, especially where there is a gift, the non-intervention of any disinterested third party, or independent professional advice, where the donor, from the circumstances, seems to be one likely to be imposed upon, is a probable test of undue influence. Cadwallader *v.* West, 48 Mo. 483." Miller *v.* Lullman, 11 Mo. App. 419.

79. Post *v.* Hagan (N. J. Eq.), 65 Atl. 1026; Walsh *v.* Harkey (N. J. Eq.), 69 Atl. 726; Nobles *v.* Hutton (Cal. App.) 93 Pac. 289.

80. Allcard *v.* Skinner, L. R. 36 Ch. Div. 145, 158.

tor by one acting in the interest of the other party to the transaction in question does not constitute independent advice within the meaning of the rule.[81]

Attorney Acting for Both Parties. — But it has been held that the fact that an attorney acted as such for both parties to the transaction in question does not necessarily deprive his advice of the character of independent advice.[82]

(E.) Advice Must Have Been Acted Upon. — Donee must prove not only that donor had independent advice, but that he acted upon such advice.[83]

(3.) That Actor Was Fully Informed. — Trustee does not entirely relieve himself of his burden by showing that the actor had independent advice; he must show that he, trustee, had furnished full information, so that the independent advice could be intelligently given.[84]

81. Archer *v.* Hudson, 7 Beav. 551, 49 Eng. Reprint 1180, 13 L. J. Ch. 380, 8 Jur. 701; McMackin *v.* Hibernian Bank, 1 Ir. Rep. (1905) 296, 305; Powell *v.* Powell, L. R. 1900, 1 Ch. Div. 243, 82 L. T. N. S. 84, 69 L. J. Ch. Div. 164; Sayles *v.* Christie, 187 Ill. 420, 448, 58 N. E. 480. See also Berdoe *v.* Dawson, 34 Beav. 603, 55 Eng. Reprint 768, 12 L. T. 103, 11 Jur. (N. S.) 254; Miskey's Appeal, 107 Pa. St. 611, 632.

Not Discharged by Showing Action of Same Solicitor for Both Parties. — In transactions between parent and child by which the former receives a benefit, he does not discharge his burden of proof by showing that his own solicitor acted for the child. Powell *v.* Powell, L. R. (1900) 1 Ch. Div. (Eng.) 243, 82 L. T. N. S. 84, 69 L. J. Ch. Div. 164. See also Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480.

In McMackin *v.* Hibernian Bank, 1 Ir. Rep. (1905) 296, the pretended "independent advice" was given to a young woman just of age by her mother's solicitor, the mother having caused her daughter to make her own estate liable for the mother's debts. Further as to advice from parent's solicitor, see Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480.

Attorney Selected by Person Influencing. — Participation. — For case in which a person occupying a relation of trust and confidence in securing the execution of a deed, suggested to grantor an attorney to draw such deed, gave directions to the attorney, and was present at execution of deed, see Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785.

82. Hobart's Admr. *v.* Vail, 80 Vt. 152, 66 Atl. 820.

83. Powell *v.* Powell, L. R. (1900) 1 Ch. 243, 82 L. T. N. S. 84, 69 L. J. Ch. Div. 164. See Malone *v.* Kelley, 54 Ala. 532.

Must Show That Advice Was Effective. — Donee must also show that donor acted upon such independent advice, and not by reason of parent's influence. Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918.

84. Malone *v.* Kelley, 54 Ala. 532.

Trustee. — Beneficiary. — Release. If release from beneficiary to trustee be exercised soon after the expiration of the time appointed for the termination of the trust, and immediately on the emancipation of the former from the disability of infancy, such release will not be sustained unless the trustee shows affirmatively that it was executed with full knowledge of all the circumstances, after sufficient deliberation and ample opportunity of investigating all the accounts and transactions connected with the trust. Malone *v.* Kelley, 54 Ala. 532; Waddell *v.* Lanier, 62 Ala. 347; Jones *v.* Thompson, 5 Del. Ch. 374; Sands *v.* Sands, 112 Ill. 225; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645.

Actor Must Know All Facts Known to Beneficiary. — Beneficiary must show that there has been the fullest and fairest explanation and communication to actor of every particular resting in his own knowledge.[85]

Mere Reading of Instrument Insufficient. — It is not sufficient to show that the instrument in question, when it is of a complicated nature, was read over to or by actor, but it must be shown that actor comprehended it.[86]

(4.) Transaction Understood. — He must show that the transaction was well understood by actor.[87]

(5.) Actor Informed of Effect of Act. — In conveyance *inter vivos*, grantee must show that grantor knew that the conveyance itself operated to divest him of title to the property and vest it in the donee.[88]

(6.) Actor Informed of Legal Rights. — Person charged must also show that actor was informed that he was at liberty to do the act in question, or not to do it, according to his own desire.[89]

(7.) Deliberation Insufficient, if Controlled by Others. — It is not sufficient for the person attempting to sustain a transaction to show merely that actor had and used opportunities for deliberation. He

85. Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820; Hayes *v.* Kerr, 19 App. Div. 91, 45 N. Y. Supp. 1050.

86. Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907; Connelly *v.* Fisher, 3 Tenn. Ch. 382; McQueen *v.* Wilson, 131 Ala. 606, 31 So. 94.

87. *Missouri.* — Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14.

New Jersey. — Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907.

New York. — Disbrow *v.* Disbrow, 31 App. Div. 624, 52 N. Y. Supp. 471, *affirmed*, 164 N. Y. 564, 58 N. E. 1086; Sweet *v.* Bean, 67 Barb. 91; Nesbit *v.* Lockman, 34 N. Y. 167; Bowron *v.* De Selding, 105 App. Div. 500, 94 N. Y. Supp. 292; Kissam *v.* Squires, 102 App. Div. 536, 92 N. Y. Supp. 873.

Ohio. — Kech *v.* Sayre, 4 Ohio Dec. 195, 203.

Pennsylvania. — Boyd *v.* Boyd, 66 Pa. St. 283, 296.

Tennessee. — Connelly *v.* Fisher, 3 Tenn. Ch. 382.

Vermont. — Wade *v.* Pulsifer, 54 Vt. 45, 62.

Agreement To Provide by Will. The grantee sustains burden of proof that the grantor fully understood the transaction; that he stated he had made a gift to grantee and understood that grantee had made a will in favor of grantor. Couchman *v.* Couchman, 98 Ky. 109, 32 S. W. 283; Bergen *v.* Udall, 31 Barb. (N. Y.) 9.

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

89. Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645.

In Finegan *v.* Theisen, 92 Mich. 173, 52 N. W. 619, grantor's brother died leaving a paper stating that he wished defendant, who was the confessor of decedent and grantor, to have certain property. Believing such paper to operate as a will or conveyance, grantor made a deed conveying the property in question to defendant, who knew that the paper first referred to was worthless, but did not so inform grantor. *Held*, that it was defendant's duty to have communicated the fact to grantor.

"The *cestui que trust* must not only have been acquainted with the facts, but apprised of the law, how those facts would be dealt with, if brought before a court of equity." Cumberland Coal & I. Co. *v.* Sherman, 20 Md. 117; Pairo *v.* Vickery, 37 Md. 467.

must show that actor's deliberations were not controlled by the influence complained of.[90]

(8.) Intention Originated With Actor. — One occupying a relation of trust and confidence, seeking to uphold a gift by the person having such confidence in him, must show that the intention to make the gift originated in donor's mind, without any influence from donee.[91]

(9.) Advice as to Act. — Person charged must show that the transaction was such as he would have advised his beneficiary to enter into with a third person, and that he had given all the advice against himself that he would against another.[92] When conveyance to trustee is made by beneficiary under the influence of fear, and for the purpose of escaping a danger the imminence of which is suggested by trustee, the latter, to uphold the transaction, must show that he attempted to convince grantor that his fears were unfounded, and that the conveyance was not a rational mode of escape from the apprehended trouble.[93]

(10.) When Act Is Procured by Agent of Fiduciary. — When an act is procured by the act of a person who is agent of one occupying a relation of trust towards actor, and who attempts to avoid liability by contending that such relation did not exist as to the act in question because his agent, and not he himself, acted, the strongest evidence showing that the agent was intended to act, and did act, independently of his principal, will be required.[94]

(11.) Burden When Confirmation Relied Upon. — When confirmation by actor is relied on, the person benefited must show that the confirming act was not done under undue influence.[95]

E. How Discharged. — a. *Good Faith — Knowledge by Actor.* The burden is discharged by showing that the actor, when of full age, and after opportunities for investigation, performed the act in question, that trustee advised against it, and only consented after full discussion and consideration by actor.[96] He may show that

90. Caspari *v.* First German Church, 12 Mo. App. 293, *affirmed,* 82 Mo. 649.

91. Gilmore *v.* Lee (Ill.), 86 N. E. 568; *s. c.,* 137 Ill. App. 498.

92. Voltz *v.* Voltz, 75 Ala. 555; Williams *v.* Williams, 63 Md. 371.

93. Williams *v.* Williams, 63 Md. 371.

Warning Insufficient. — It is not sufficient to show that grantor was warned that he was taking an irretrievable step, and stated that he knew what he was doing. Williams *v.* Williams, 63 Md. 371.

94. Rhodes *v.* Bates, L. R. 1 Ch. App. 252.

95. Dunbar *v.* Fredennick, 2 Ball & B. (Eng.) 304; Voltz *v.* Voltz, 75 Ala. 555; Thompson *v.* Lee, 31 Ala. 292; Hoffman Steam Coal Co. *v.* Cumberland Coal & I. Co., 16 Md. 456, 77 Am. Dec. 311; Caspari *v.* First German Church, 12 Mo. App. 293, *affirmed,* 82 Mo. 649.

"To give validity to such confirmation, it must be shown that the party was fully acquainted with his rights; that he knew the transaction to be impeachable which he was about to confirm; and that with this knowledge, and under no influence, he freely and spontaneously executed the deed." Dunbar *v.* Fredennick, 2 Ball & B. (Eng.) 304.

As to confirmation between parent and child, see Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480.

96. In Kirschner *v.* Kirschner, 113 Mo. 290, 20 S. W. 791, certain

actor was of sound mind, that he was informed of all the circumstances, that he had in mind the natural objects of his bounty, and that the act in question was done in pursuance of actor's previously expressed intention.[97]

b. *Proper Motive of Actor.* — Donee discharges his burden by showing a proper motive for the transaction in question, such as affection or gratitude.[98]

c. *Sufficient Reason For Act.* — Beneficiary sustains his burden by showing that grantor had a legal, sufficient and reasonable motive for doing the act in question.[99]

persons sought to set aside deeds made by them to a person who had stood toward them *in loco parentis*. The deed was made after all of grantors attained legal age. Grantee advised against the sale, stated the value of the land to be greater than the sum for which grantors offered it. Grantors, after further investigation, offered the land to grantee, who accepted. *Held*, that burden of proof was upon grantee and that he had sustained it.

Devise, Principal to Agent. — In Decker *v.* Waterman, 67 Barb. (N. Y.) 460, the court says: "When the relation is simply one of principal and agent — and I am considering this case in that view, only, in connection with these remarks — the proofs are usually held to be sufficient and satisfactory when they show that the donor knew what he was about; the value of the thing donated; the exact situation of the property; the effect it would have on his own estate; the condition in which he would be left; if the gift was effected by a deed, or an instrument in writing, that the same was read over and explained before execution, its contents being fully understood and comprehended."

97. Hobart's Admr. *v.* Vail, 80 Vt. 152, 66 Atl. 820.

98. Ball *v.* Ball, 214 Ill. 255, 73 N. E. 314; Keck *v.* Sayre, 4 Ohio Dec. 195, 203.

Thus, it may be shown that a gift to one occupying confidential relation toward donor was made from affection, in recognition of services, and by reason of a relation similar to that of parent and child. Keck *v.* Sayre, 4 Ohio Dec. 195, 203.

99. Keck *v.* Sayre, 4 Ohio Dec. 195, 203. In Chambers *v.* Brady, 100 Iowa 622, 69 N. W. 1015, a child of grantor sought to set aside a deed conveying real property to other children. After stating that burden of proof was upon grantees, the court said they had sustained the burden by showing that grantor had made the deed to provide a home for grantees; that grantees had cared for him, and rendered services to him; that grantor had objected to plaintiff's marriage, and disliked her husband. Burden of showing that a gift was not obtained by undue influence is sustained by showing that donor had no children, that donee and his wife attended to donor, treated him with kindness and affection, and that their relations were intimate and affectionate. Reed *v.* Carroll, 82 Mo. App. 102, 110. In the same case it was said that suspicion of undue influence was met by proof that donor had received property from his wife, and had expressed an intention to return it to his wife's family, of which donee's wife was a member.

It is sufficient to show that the property in question was given to donee to make up for inequality in the provisions of the will of a third person. Leddell *v.* Starr, 20 N. J. Eq. 274, 287.

Bad Treatment. — Immoral Conduct of Heirs. — It may be shown that an apparently unjust will was made because testator had been badly treated by his children, or because some of them had been guilty of immoral conduct. Spark's Case, 63 N. J. Eq. 242, 51 Atl. 118.

Neglect by Relatives Indebtedness. — When burden is imposed upon proponent by the circumstance

Valuable Consideration. — Thus, he may show that the deed in question was made in consideration for services which were, in value, adequate to the property conveyed.[1] He may show that he paid a fair and reasonable price for property purchased.[2]

d. *Act for Actor's Interest.* — A parent discharges his burden by proving that the transfer in question was made without actual fraud, and that it was for the best interests of the child.[3]

e. *Family Arrangement.* — The burden is discharged by proof showing that the will in question was executed in pursuance of an understanding between testatrix, her husband and the person charged to the effect that after the husband's death the person charged should become a member of testatrix' family, and have the devised estate after her death.[4]

f. *Will Less Favorable Than Former Will.* — The burden imposed by the existence of a relation of trust and confidence between testator and beneficiary who was active in procuring the execution of the will in question is discharged by proof that testator had made a former will, in the preparation and execution of which such person had no part, making more favorable provision for him.[5]

g. *Good Faith in Particular Instance.* — When, in attempting to show that a given act was procured by undue influence of a person occupying a relation of trust and confidence toward actor, it is sought to be shown that such person exercised a general influence over actor, it is competent for such person to show that in a given transaction, cited as an instance of his influence, he acted in good faith.[6]

h. *Burden Not Discharged.* — **(1.) Presumption of Fairness.** — When the burden is upon the father to show fairness of a transaction be-

that he, a stranger, is preferred to testator's relatives, he sustains his burden by showing that testator was neglected by his relatives; that testator was fond of proponent, and was under moral and financial obligations to him. Lancaster *v.* Alden, 26 R. I. 170, 58 Atl. 638.

1. Kerby *v.* Kerby, 57 Md. 345; Hampton *v.* Westcott, 49 N. J. Eq. 522, 25 Atl. 254; Fjone *v.* Fjone, 16 N. D. 100, 112 N. W. 70.

2. Kirschner *v.* Kirschner, 113 Mo. 290, 20 S. W. 791.

3. He may show that the conveyance was necessary for the preservation of the child's estate which was being wasted through extravagance and dissipation, and that grantor had testified in another action that he had voluntarily conveyed the property in question and received the consideration therefor, not questioning the validity of the transaction. Ferns *v.* Chapman, 211 Ill. 597, 71 N. E. 1106; *s. c.* and similar ruling, 118 Ill. App. 116.

In Ferns *v.* Chapman, 118 Ill. App. 116, the court says: "The question of unreasonableness and unfairness in the transaction is a controlling one, and when it appears that a conveyance from a child to a parent is reasonable, fair, for the best interests of the grantor, and was voluntarily and understandingly entered into and long acquiesced in by him, no ground of public policy demands that it be set aside as constructively fraudulent."

4. Stein *v.* Wilzinski, 4 Redf. (N. Y.) 441.

5. *In re* Walton's Estate, 194 Pa. St. 528, 45 Atl. 426.

6. Hines' Appeal, 68 Conn. 551, 37 Atl. 384.

tween himself and son, no presumption of fairness, propriety or honesty relieves him of that obligation.[7]

(2.) Actor's Statement of Reasons. — The burden is not discharged by proof that, prior to execution of the act in question, actor stated his reasons for executing it.[8]

(3.) Expressions of Gratitude or Satisfaction. — Nor is the burden discharged by proof that testator, when surrounded by the same influences which procured his will, expressed gratitude toward the person charged, and expressed himself as satisfied with his will.[9]

F. TIME WHEN BURDEN IMPOSED. — a. *Will contest.* — In a will contest the burden of proof does not pass to proponent until evidence is introduced from which undue influence may be inferred.[10]

7. Hoblyn *v.* Hoblyn, L. R. 41 Ch. Div. (Eng.) 200.

8. In Dale *v.* Dale, 38 N. J. Eq. 274, *reversing* 36 N. J. Eq. 269, the court says: "Nor do I think the force of the testimony, in this direction, is overcome by the two principal features of the cause relied upon by the beneficiary under the will, to support its validity. These are, first, that the testatrix had, previous to her death, stated why she intended to make a testamentary disposition of her property as she afterwards did, and second, that she had been, for some weeks, removed from the personal influence of Nelson at the time she executed her will. It is, indeed, proven that the testatrix, before the execution of the will, confided to two or three persons the reasons which led her to make this instrument, only exhibits what notions induced the course she took. If these notions were the result of influences which were improper, they became no less so by the fact that she stated them before the actual execution of the instrument."

That Testator Repeated Proponent's Arguments Against Contestant. — When burden of proof is upon proponents to show the voluntary character of the will in question, it is not borne by showing that during the period covered by the making of the will, testator repeated the arguments which had been used against contestant by proponent. Claffey *v.* Ledwith, 56 N. J. Eq. 333, 356, 38 Atl. 433.

9. Sickles' Case, 63 N. J. Eq. 233, 241, 50 Atl. 577, *affirmed*, 64 N. J. Eq. 791, 53 Atl. 1125.

10. Maddox *v.* Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 56 Am. St. Rep. 33; McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Wheeler *v.* Whipple, 44 N. J. Eq. 141, 14 Atl. 275. See cases in next succeeding note.

In Jones *v.* Roberts, 37 Mo. App. 163, the court says: "It must follow that in every case where a will is contested on the ground of undue influence, and it is not admitted by the pleadings that the legatee occupied toward the alleged testator the superior position in a confidential relation, the *initial burden of proof* rests upon the contestant, at least so far as to show that the proponent of the will did occupy such a relation to the alleged testator. When this fact is admitted or shown, then a presumption arises against the validity of the will, and the burden is cast upon the proponent of the will of overcoming this presumption. . . . In this case, it was not alleged in the petition that Mr. and Mrs. Roberts, or Sophia Fritz, occupied any confidential relation towards Mrs. Bennett. The naked charge was that the execution of the will was procured by undue influence exerted upon Mrs. Bennett by these persons. The burden of proving this fact, at least so far as showing a confidential relation and bringing the cases within the rule which would change the burden of proof, rested upon the plain-

b. *Transactions Inter Vivos.* — In case of a transaction between husband and wife, the burden of proof does not shift to the person attempting to enforce the obligation in question, unless it appears

tiffs. The declaration of the court *at the outset*, that the entire burden of proof rested upon the plaintiffs, seems not to have been harmful, because it had no other influence than to control the order of proof, and this, as we have seen, proceeded in the natural way. So the refusal of the court to instruct the jury that on the issue of undue influence the burden was upon the plaintiff, and the action of the court in giving without qualification the instruction that the burden was upon the defendants, seems equally harmless, because the existence of the confidential relation between the alleged testatrix and Mrs. Roberts and her husband was indisputably established, so that the effect of these rulings was merely an assumption of the existence of an established fact, which in itself had the effect of shifting the burden of proof."

"The conclusion which is practically reached in Fox *v.* Martin, *supra,* with reference to wills is, in brief, that in order to raise the presumption of undue influence, which throws the burden of proof on the beneficiary, there must be shown a subject unquestionably susceptible to undue influence, either as the result of old age, mental weakness, or both; also some clear evidence of opportunity, and a disposition on the part of the beneficiary, to exercise such influence. When these facts are shown to exist, and especially when they exist with other facts out of the usual course of business transactions of such a nature, the presumption will arise which will put the beneficiary to his proof of good faith and freedom from undue influence. Whether the testimony shows these preliminary facts with sufficient clearness and certainty is a matter to be decided by the trial court." *In re* Loenneckker's Will, 112 Wis. 461, 88 N. W. 215.

In Small *v.* Champeny, 102 Wis. 61, 69, 78 N. W. 407, the court says: "The field for the operation of undue influence or fraud being shown, together with satisfactory indications that the operation has taken place, then from that situation springs the presumption of fact which the person charged with the wrongdoing must meet and overcome by showing affirmatively that there was no wrong. A presumption against the person charged does not exist from the mere fact that there is such a charge, but because of circumstances appearing which satisfactorily suggest the wrong, and it is not till such circumstances appear that it can properly be said the burden of proof to disprove wrong is on the person charged." See also Vance *v.* Davis, 118 Wis. 548, 95 N. W. 939.

"Generally the burden of showing that a will was procured by undue influence rests upon those who assert the fact; but when the contestants have made a *prima facie* case, by the production of evidence from which the presumption of undue influence arises, the burden is then upon the proponents to show that the instrument is the will of the testator. It is not very material whether we say that in such a case the burden shifts, or that the evidence produced, aided by the presumption which arises therefrom, is evidence sufficient to make a *prima facie* case." Tyner *v.* Varien, 97 Minn. 181, 106 N. W. 898.

Burden Not Imposed Till Relation Shown. — The burden of establishing the voluntary character of a given transaction is not imposed upon the person charged, until the proof shows the existence of a relation of trust and confidence; that the person alleged to have been influenced was suffering from mental impairment, or was subservient to the will of the person charged. Doheny *v.* Lacy, 42 App. Div. 218, 59 N. Y. Supp. 724, 732, *affirmed,* 168 N. Y. 213, 61 N. E. 255.

Burden Does Not Shift Until Participation Shown. — In case of a will, although relation of actual trust and confidence is shown, the

that there was no consideration for such obligation, or that the consideration stated was so inadequate as to create suspicion that it was not the true reason for the execution of the act in question.[11]

burden of proof remains with contestants in the absence of any proof or circumstances showing that the person benefited took any part in procuring the execution of the will. *In re* Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; Berberet *v.* Berberet, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; Pressley *v.* Kemp, 16 S. C. 334, 42 Am. Rep. 635; Beyer *v.* LeFevre, 186 U. S. 114; *In re* Carpenter, 94 Cal. 406, 29 Pac. 1101; Tyrrell *v.* Painton, (1894) P. 151, 70 L. T. 453, 6 R. 540.

In Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95, testator, had, in his will, favored one of his sons, to whom he had entrusted the conduct of his business, and toward whom he occupied a confidential relation. There was no proof that this son took any part in the preparation of the will, or that he was present when it was made and signed. *Held,* that the burden of proof to show undue influence remained with contestants.

In Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69, it was contended that the burden of proof shifted to proponents upon proof that testator made a certain devise to a person who had acted as his confidential agent, and in whose family he had lived upon terms of intimacy and affection, instead of to his relatives. The court says: "Before the burden of proof can be said to be shifted to the proponents, in such a case, it must be shown that there is evidence sufficient, and of such a character as, to warrant the presumption that the will was not the free act of the testator; as, in a case like that at bar, that the confidential agent and legatee was actually instrumental in the dictation and procurement of the execution of the will."

11. In Dimond *v.* Sanderson, 103 Cal. 97, 37 Pac. 189, plaintiff sued upon a promissory note executed to her by her husband. Defendant alleged that the note was procured by undue influence, and contended that the burden of proof was upon plaintiff to show that such influence was not exercised. Defendant relied upon Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, and Jackson *v.* Jackson, 94 Cal. 446, 29 Pac. 957. The trial court rendered judgment for plaintiff. Affirming this judgment, the supreme court says: "In each of the cases above cited the husband had conveyed real estate to the wife, and sought to compel a reconveyance, and of necessity assumed the burden of proving the circumstances under which the conveyance was made, and which entitled them to a reconveyance. Laying aside the distinction between the subject of those actions and of this, if the action here had been brought by the husband to have the note canceled upon the ground that it was without consideration, or had been obtained fraudulently or by undue influence, these cases would have been in point. Appellant's contention would destroy the effect of another presumption declared by the code, as well as an express provision as to the burden of proof. Section 1614 of the Civil Code declares that 'A written instrument is presumptive evidence of a consideration'; and section 1615 provides that 'The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.' These, it is said, are general provisions, while sections 158 and 2235 of the Civil Code are special, and therefore control. But all these provisions should be harmonized and given effect, if possible, and this, we think, may be accomplished. . . . We think that before the presumption contended for can apply it must appear that plaintiff, on obtaining the note sued upon, obtained some advantage over the defendant, and that the possession of the note is not of itself evidence that any advantage has been obtained. Upon appellant's theory, a sufficient answer in this case would

G. Rule in Will Contests Not Changed. — Although proof of the existence of a relation of trust and confidence between testator and a person who procures the execution of a will conferring a benefit upon himself may impose upon such person the burden of proving a voluntary execution, such proof does not change the general rule, which is, that upon the whole case the burden of proof is upon contestant to show undue influence.[12]

H. Rule Not Changed by Actor's Insanity. — The fact that at a time prior to the execution of the act in question the actor was adjudged to be of unsound mind does not impose upon proponent the burden of showing the voluntary character of a will executed after such adjudication.[13]

I. Burden in Case Two Wills Offered. — When two wills are offered for probate, and the proof shows that the first was made with due deliberation while testator was in good health, and the second when he was in ill health and under charge of its principal

have consisted merely of the allegation that at the time said note was made and delivered the plaintiff and defendant were husband and wife. Such answer would have been clearly insufficient."

12. Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908.

"Where it is said that, when such proof of a fiduciary relation is introduced, the burden of proof is shifted, 'all that is meant by this is that there is a necessity of evidence to answer the *prima facie* case or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact, which constitutes the issue; and this burden remains throughout the trial.'" Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678. See Loennecker's Will, 112 Wis. 461, 88 N. W. 215, where on the subject of shifting of burden of proof, the court says: "It is not the law that, whenever a deed or a will is made by a party in favor of one child to the prejudice of others, a presumption of fraud arises from that fact alone, even if the parent be living with such favored child. In order to set aside such a deed or will on the ground of fraud, proof is necessary on the part of the plaintiff or contestant in the first instance in all cases. He may discharge that burden by going on and proving affirmatively the facts showing undue influence, or he may discharge it by showing a state of facts from which *prima facie*, without direct proof of the undue influence itself, a presumption thereof will arise, in which latter case the burden of proof then shifts and the beneficiary of the conveyance or will must show that there was no fraud in fact. The facts which may be shown, and which will arouse this presumption of fraud, manifestly cannot be the same in all cases. Facts which might seem very suspicious with reference to a deed or conveyance, such as secrecy in its execution and custody, may have very little weight as to a will, which we all know is usually made with secrecy and is rarely published to the world."

13. In King *v.* Gilson, 191 Mo. 307, 90 S. W. 367, plaintiff propounded a will executed in 1893. The probate court rejected this will, admitting one executed in 1887. Upon the trial of the ensuing contest it appeared that in 1892 testator had been adjudged to be of unsound mind. In the trial of the contest the court instructed the jury that the burden was upon plaintiff to show that the will of 1893 was executed after testatrix had been restored to sanity, or during a lucid interval; also that the burden was upon plaintiff to show that such will was not procured by undue influence. *Held*, that the latter part of the instruction was erroneously given.

beneficiary, who had an interest in and opportunity for procuring its execution, the burden is upon proponent of second to show the absence of undue influence.[14]

J. Burden on Successors in Interest. — a. *Third Party Claiming Benefit.* — **(1.) Generally.** — The rule as to transactions between parent and child, and guardian and ward, applies, although the transaction in question be made for the benefit of a third person, the burden being upon such third person to show that the parent did not unduly influence the child.[15] He must also show that the person acting understood the transaction.[16] Generally, a person taking from grantee or mortgagee any instrument based upon deed or mortgage obtained by undue influence, and with knowledge of such influence, or knowledge of facts which would put him on inquiry leading to such knowledge, must prove the voluntary character of the transaction.[17]

(2.) Notice Necessary. — But in order to invalidate an act as against third persons claiming under a parent whose undue influence procured the execution of an act by his child, it must appear that such third person had either actual notice of the exercise of such influence, or of circumstances sufficient to charge him with notice.[18]

14. *In re* Green's Will, 20 N. Y. Supp. 538, 48 N. Y. St. 450, *affirmed*, without opinion, 67 Hun 527, 22 N. Y. Supp. 1112; *In re* Way's Will, 6 Misc. 484, 27 N. Y. Supp. 235, 245, *affirmed*, without opinion, 86 Hun 620, 33 N. Y. Supp. 1135.

15. McMackin *v.* Hibernian Bank, 1 Ir. Rep. (1905) 296; Berdoe *v.* Dawson, 34 Beav. 603, 12 L. T. 103, 55 Eng. Reprint 768, 11 Jur. (N. S.) 254; DeWitte *v.* Addison, 80 L. T. N. S. (Eng.) 207; Walker *v.* Nicrosi, 135 Ala. 353, 33 So. 161; Gale *v.* Wells, 12 Barb. (N. Y.) 84.

In Noble's Admr. *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175, *overruling* 74 Ala. 604, a daughter, just after coming of age, became surety for her father, receiving no benefit to herself from the transaction. *Held*, that in an action involving her obligation, the burden of proof was upon her father's creditor to whom she had become bound, to show that her act in becoming surety was not obtained by undue influence.

16. Berdoe *v.* Dawson, 34 Beav. 603, 12 L. T. 103, 55 Eng. Reprint 768, 11 Jur. (N. S.) 254.

17. Beeson *v.* Smith (N. C.), 61 S. E. 888.

18. Cobbett *v.* Brock, 20 Beav. 524, 52 Eng. Reprint 706; Wooden *v.* Haviland, 18 Conn. 101; Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Shell *v.* Holston Nat. B. & L. Ass'n. (Tenn. Ch. App.), 52 S. W. 909.

In Bainbrigge *v.* Browne, L. R. 18 Ch. Div. 188, 44 L. T. N. S. (Eng.) 705, it was held that the conveyance there in question had been procured by undue influence exercised by a father over his children. By this conveyance the children had charged certain property with a mortgage debt due from their father to Brown, Rogers and Rock. Grantors sued to set aside their conveyance, on the ground that its execution was procured by undue influence exercised by their father. The holders of their father's mortgage debt were made defendants. After holding that the deed was the result of undue influence, the court says: "Then the next point which arises is this, against whom does this inference of undue influence operate? Clearly it operates against the person who is able to exercise the influence (in this case it was the father) and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of

(A.) Knowledge of Relation Sufficient. — A knowledge on the part of such third person that the relation of guardian and ward existed between the parties to the transaction is sufficient to put him upon inquiry, as to the voluntary character of the transaction, and if he omits such inquiry, he is as much affected with notice as if he knew that undue influence had been actually exercised.[19]

the equity thereby created, or with notice of the circumstances from which the court infers the equity."

Same ruling in regard to transaction between husband and wife, it being held that a third person claiming the benefit of such transaction does not sustain the burden of proof, unless it appear that he had notice of undue influence exercised by the husband. Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806.

In an English case it was held that the mere fact that a daughter voluntarily paid a debt of her father, who was in difficulties, was not, of itself, ground for imputing undue influence to the father, or, even if such influence had been exercised, for imputing knowledge of it to the creditor who received payment in that way. Thornber *v.* Sheard, 12 Beav. 589, 50 Eng. Reprint 1186. See also Espey *v.* Lake, 10 Hare 260, 68 Eng. Reprint 923, 22 L. J. Ch. 336, 16 Jur. 1106; Maitland *v.* Irving, 15 Sim. 437, 60 Eng. Reprint 688; Maitland *v.* Backhouse, 16 Sim. 58, 60 Eng. Reprint 794.

In a case where a son had by the exercise of undue influence caused his mother to execute a deed conveying certain land to third persons, the proof failing to show notice on the part of such persons, and showing that the price paid was reasonable, and the same for which grantor had offered the land, it was held that the presumption arising from execution and acknowledgment of the deed was not overcome. Wood *v.* Craft, 85 Ala. 260, 4 So. 649.

Where actor sold a mortgage to her attorney under circumstances which would have entitled her to invalidate the transaction, but made the assignment to a third party, who executed and delivered an assignment in blank to the attorney, who sold the mortgage to D, inserting her name in the blank assignment, it not appearing that D. knew of the purchase of the mortgage by the attorney, it was held that D. was not a purchaser with notice. Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842.

19. In Gale *v.* Wells, 12 Barb. (N. Y.) 84, a person who had been guardian of a young man who had just come of age, the guardian's accounts being still unsettled, procured his former ward to indorse a note to a creditor of the guardian. *Held,* that the holder of the note was in no better condition than the guardian. The court says: "So the first part of the charge, that the plaintiffs to be barred, must have understood, at the time, that the defendant was under the influence of the guardian, is too broad. If they knew facts from which the law would infer that influence, they were as much affected as if they knew the influence."

From the opinion of the court in Ladew *v.* Paine, 82 Ill. 221, it would seem that knowledge of relation is not sufficient to impose burden of proof upon person claiming benefit, when actor made no objection to the act at the time of execution. In this case the court seems to assume that the mortgage in question was executed by mortgagor's wife under undue influence of her husband. The majority of the court stated that the proofs showed that mortgagee had no knowledge of the exercise of such influence. The court says: "The certificate of the officer taking the acknowledgment, shows that she professed to execute the mortgage of her own free will. The testimony of Paine and of Mr. Thorn (the notary public) is, that she signed and acknowledged the mortgage in the presence of Paine and the officer, and that she professed to act freely and without restraint, and did not, at that time, in any manner, indicate that she had

(B.) Must Show Transaction Understood. — But even if such third person had no notice of an intended fraud, the burden of proof is upon him to show that the person under influence was advised as to the nature or the act in question.[20]

b. *Administrator of Deceased Fiduciary.* — The burden of proof is upon the fiduciary's administrator to show that no undue influence was exercised by his intestate in transaction between the latter and actor.[21]

c. *Representative of Deceased Husband.* — The burden to show voluntary character of transaction between husband and wife is upon the representative of the deceased husband.[22]

d. *Successor of Deceased Trustee.* — When the proof shows that the deed of trust in question was executed under such circumstances as to impose upon the original grantee in trust the burden of showing the voluntary nature of the transaction, the burden is also imposed upon his successor in trust.[23]

K. Question of Burden — Where Settled. — The question of the burden of proof must be settled in the trial court. It is too late to wait until the case is in an appellate court, and then, for the first time, that the case should be considered with reference to the rule in regard to the onus of proof.[24]

VI. GENERAL RULES.

1. Degree And Nature of Proof. — A. Great Latitude Allowed. In determining whether or not a will was executed under undue in-

objections of any kind to the giving of the mortgage. She knew that Paine, in accepting this mortgage upon the hotel, was surrendering a valid chattel mortgage, which was a good and adequate security. It was her duty, then, to have notified Paine, in some way, of her unwillingness to execute the mortgage in question. Having failed to do so, and having permitted (as a majority of the court think, from the evidence,) Paine to act upon the faith that she did execute the mortgage of her own free will, she cannot now be allowed to insist upon this defense as against him."

20. Dettmar *v.* Metropolitan Bank, 10 L. T. N. S. (Eng.) 63. See also Noble's Admr. *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175.

21. Baines *v.* Barnes, 64 Ala. 375.

22. Miller *v.* Lullman, 11 Mo. App. 419.

23. In Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645, an estate had been devised to W. in trust for his daughter during her minority. A few months after attaining majority, the daughter conveyed the subject of this trust to her father and another trustee, to be held upon certain trusts, the father himself being a large beneficiary. After execution of this deed the father died and a new trustee was appointed in his place. After holding that the burden would have been upon the father to uphold the trust deed, the court holds that it was also upon the new trustee.

24. Fitzpatrick *v.* Weber, 168 Mo. 562, 68 S. W. 913, where it was contended in the supreme court, in an action to set aside a deed, that because of confidential relations between grantor and grantee, the burden was upon the latter to show the fairness of the transaction. No reference had been made to that subject on the trial. *Held,* that the

fluence, great latitude must be allowed in the introduction of evidence.[25]

When Latitude To Be Allowed to Person Alleging Influence. — When a will offered for probate is wholly in favor of certain children of testator with whom he resided, and disinherits other children, the greatest latitude should be allowed contestants when examining beneficiaries as witnesses.[26]

B. Discretion of Court. — To a great extent it must be left to the trial judge to determine how far evidence of conditions prior or subsequent to the occurrence of the act in question have a tendency to illustrate the condition existing at the time of such occurrence.[27]

C. Degree of Proof When Influence Shown. — In case of a gift, when it is shown that donee had great power or influence over donor, the gift will be set aside, unless it be shown in the clearest and most unequivocal manner that the influence did not subsist at the time of the gift.[28]

D. When Actor Feeble Minded. — It being shown that the person who executed a given will, conveyance or agreement was of feeble mind, less evidence will be required to show that such action was the result of undue influence than would be required in case of a person of vigorous mind.[29]

2. Strict Proof, When Required. — A. Will Procured by Interested Person. — That the execution of a will is procured by persons largely benefited by it is a circumstance to excite a closer scrutiny and require stricter proof of voluntary action.[30]

Legacy to Draughtsman — Suspicious Circumstances. — Strict proof will be required when proof shows that the will in question was drawn by a legatee, in whom testator, who was mentally weak, had unlimited confidence, the will being executed in secret.[31]

B. Unnatural and Unreasonable Will. — Slight Evidence

question could not be made, for the first time, on appeal.

25. Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Pool's Heirs *v.* Pool's Exrs., 33 Ala. 145; Reynolds *v.* Adams, 90 Ill. 134, 32 Am. Rep. 15; Beaubien *v.* Cicotte, 12 Mich. 459.

"However, such indulgence must not be regarded as an absolute abolishment of the rules of evidence. The testimony offered must at least have some tendency to establish the facts at issue by the pleadings." Hughes *v.* Rader, 183 Mo. 630, 82 S. W. 32.

26. Matter of Potter, 161 N. Y. 84, 55 N. E. 387, *reversing* 17 App. Div. 267, 45 N. Y. Supp. 563.

27. Shailer *v.* Bumstead, 99 Mass. 112, *holding* it to be to a great extent a matter of discretion as to what period subsequent to execution of will might be covered by testimony as to testator's mental condition.

28. Davies *v.* Davies, 4 Giff. 417, 66 Eng. Reprint 769.

29. Reynolds *v.* Adams, 90 Ill. 134, 32 Am. Rep. 15. To same effect, see Kelly's Heirs *v.* McGuire, 15 Ark. 555.

30. Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227; Purdy *v.* Hall, 134 Ill. 298, 25 N. E. 645; Keyes *v.* Kimmel, 186 Ill. 109, 57 N. E. 851; England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526; Cheney *v.* Goldy, 225 Ill. 394, 80 N. E. 289; *In re* Miller's Estate, 31 Utah 415, 88 Pac. 338.

31. Hill *v.* Barge, 12 Ala. 687.

SUFFICIENT. — It has been said that a will entirely unreasonable and unnatural points directly to the conclusion of insanity or abuse of influence, and very slight evidence will then be sufficient to warrant the conclusion that it was the product of one or the other.[32]

C. UNNATURAL AND RADICAL CHANGE IN WILL. — When a sick man makes an unnatural change in his will, and one apparently contrary to his previous fixed and determined purpose, it is the duty of the courts to scrutinize closely the circumstances to ascertain whether or not such change was the result of undue influence.[33]

D. GIFT OF GRANTOR'S WHOLE ESTATE. — The fact that by a certain deed grantor conveys his entire estate, requires strict and satisfactory proof of all the essentials of a valid gift.[34]

E. GIFT INTENDED TO OPERATE AS WILL. — It has been said that in case of a gift intended to operate as a will, the courts require stricter proof than in case of such a transaction intended to operate *inter vivos*.[35]

3. Direct Proof, When Required. — Where the charge is that undue influence was exerted upon a mind healthy, strong and free, nothing short of direct proof will avail, and it must be clear and convincing.[36] It has been said that when the person charged derives no benefit or an inconsiderable benefit, from the act in question, there must be direct proof of influence; but when such person is a

32. Muller *v.* St. Louis Hospital Assn., 5 Mo. App. 390, *affirmed*, 73 Mo. 242.

"That there was sufficient evidence to go to the jury must be admitted. Incapacity opens the door to undue influence, and when opportunities for such influence are shown, and the favored devisees are the beneficiaries of a will unnatural in its provisions, to the exclusion of others having equal claims at least upon his bounty, very slight circumstances are sufficient to make the question of undue influence one for the jury." Walls *v.* Walls, 30 Ky. L. Rep. 948, 99 S. W. 969.

Mental Weakness Shown. — Less Proof of Undue Influence Required. The feebler the mind of testator, no matter from what cause, whether from sickness or otherwise, the less evidence will be required to show undue influence. England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526; Purdy *v.* Hall, 134 Ill. 298, 25 N. E. 645. See also *In re* Glass' Estate, 127 Iowa 646, 103 N. W. 1013, where the court says: "It is seldom that such influence is capable of direct proof, and in cases where incapacity and undue influence are both relied upon to defeat the will, and there is substantial evidence of the testator's unsoundness of mind, any evidence, however slight, tending to prove the issue of an undue influence is freely admitted."

33. Swenarton *v.* Hancock, 22 Hun 38, *affirmed*, 9 Abb. N. C. 326, 84 N. Y. 653.

34. Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545.

Gift Disproportionate. — Donor Weak-Minded. — So when a gift is disproportionate to the means of the giver, who is of weak mind, easy temper and yielding disposition, the court will regard the transaction with suspicion, and strictly examine the conduct and behavior of donee. Sears *v.* Shafer, 1 Barb. (N. Y.) 408, *affirmed*, 6 N. Y. 268.

35. Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385.

36. Cuthbertson's Appeal, 97 Pa. St. 163; Robinson *v.* Robinson, 203 Pa. St. 400, 417, 53 Atl. 253; *In re* Hook's Estate, 207 Pa. St. 203, 56 Atl. 428; *In re* Townsend's Estate, 128 Iowa 621, 105 N. W. 110; South

stranger having no claims upon actor, by reason of relationship or for other reasons, such direct proof is not required.[37]

4. Preponderance Sufficient, or Not. — It has been held that when probate of a will is contested on the ground of undue influence, contestant is required to show the exercise and effect of such influence by a preponderance of testimony; but he is not required to establish such facts beyond a reasonable doubt; nor is the proof required to be such as will render the circumstances of execution inconsistent with any other hypothesis than that of undue influence.[38]

Side Tr. Co. *v.* McGrew, 219 Pa. St. 606, 69 Atl. 79.

37. Boyd *v.* Boyd, 66 Pa. St. 283, 293.

38. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

In Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712, the supreme court referring to a certain instruction which had been given at the trial, says: "This instruction is manifestly erroneous, in that portion of it which declares that, 'in order to set aside the will on the ground of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, which cannot be presumed, but must be shown in connection with the will; and it devolves upon those contesting the will to show such undue influence by a preponderance of the testimony.' In civil cases 'it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth.' In such cases 'it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party': 1 Greenl. Ev., 14th ed., sec. 13*a*; 3 Id., sec. 29. It will be observed that the portion of the instruction now being criticised lays down a rule as stringent in its operation in civil cases as the one which prevails in criminal cases. Indeed, it may be said that the rule laid down in this instance is more stringent than the one obtaining in criminal cases; for in the latter class of cases it is usual to use the qualifying word 'reasonable' in connection with the word 'hypothesis': Wills on Circumstantial Evidence, 149; Commonwealth *v.* Costley, 118 Mass. 1. Here it will be noted that, in order to defeat the will of Nathan Gillilan on the ground of undue influence, the instruction in question requires the contestants to show that the circumstances of the execution of the will are inconsistent with any other hypothesis than such undue influence, whether such hypothesis was a fanciful or a reasonable one. Even if the qualifying word 'reasonable' had been used in the instruction, it would have been unwarranted under the authorities cited."

In Schuchhardt *v.* Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485, the court says: "If from all the facts and circumstances existing when the will was made an inference can be drawn that its provisions are such as he intended them to be, and such as he would have made if no influence had been exerted upon him, the latter inference is at least as probable as the former, and the burden of proof in the attack upon the will is not sustained. The inference that undue influence prevailed over testator's intent and induced him to do what he would not otherwise have done, must stand upon preponderating proof, excluding other reasonable inference. If the character of testator and the circumstances existing at the execution of the will naturally and reasonably explain its provisions so that it may be fairly inferred that it was such a will as he would have made, the inference that it was the product of influence will not be justified."

Must Exclude Hypothesis of Free Action. — It has been held that proof must show that the circumstances attending the execution of a will are inconsistent with the hypothesis that such will was the result of testator's voluntary act.[39]

Must Prove Absence of Influence Beyond a Doubt, When. — It has been said that when the proof shows the existence of a relation of trust and confidence between the parties to a transaction, and the existence of influence as a fact, the person benefited must prove beyond a doubt that the act of the other party was voluntary.[40]

5. Examination of Married Woman by Court. — In actions growing out of transactions between husband and wife, courts of equity,

It is sufficient that the jury believe from the evidence that undue influence was possessed by a certain person, and used to procure the execution of the act in question. Milton *v.* Hunter, 13 Bush (Ky.) 163.

39. *England.* — Boyse *v.* Rossborough, 6 H. L. Cas. 2, 51.

Canada. — Adams *v.* McBeath, 27 Can. Sup. Ct. 13.

Idaho. — Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295.

Illinois. — Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678.

Michigan. — Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276; Severance *v.* Severance, 90 Mich. 417, 52 N. W. 292; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322.

Nebraska. — Boggs *v.* Boggs, 62 Neb. 274, 87 N. W. 39.

New Jersey. — Dale *v.* Dale, 36 N. J. Eq. 269.

New York. — Whelpley *v.* Loder, 1 Dem. 368; *In re* Williams' Will, 15 N. Y. Supp. 828, 40 N. Y. St. 356, *affirmed*, 19 N. Y. Supp. 778, 46 N. Y. St. 791.

Pennsylvania. — Caughey *v.* Bridenbaugh, 208 Pa. St. 414, 423, 57 Atl. 821.

Wisconsin. — Armstrong *v.* Armstrong, 63 Wis. 162, 172, 23 N. W. 407.

This is stated to be the rule in regard to transactions between husband and wife in Potter's Appeal, 53 Mich. 106, 18 N. W. 575. *Contra.* Maynard *v.* Vinton, *supra*, and Severance *v.* Severance, *supra*, are disapproved by the supreme court of Michigan in Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628, where it is held that the proof, where the burden is upon contestant, need not be of any greater force than to amount to a preponderance of the evidence. The court, in Bush *v.* Delano, cites Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712. In Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712, the supreme court of Missouri announces the doctrine stated in Bush *v.* Delano, but in McFadin *v.* Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771, the same court (at p. 219) quotes, apparently with approval, from Boyse *v.* Rossborough, *supra*, the rule last stated in the text.

"It (undue influence) must be established by such evidence that the inference of wrongdoing follows as a natural and unavoidable result, and it is only so established when such facts are proven that no other legitimate conclusion can be drawn." *In re* Sheldon's Will, 16 N. Y. Supp. 454, 40 N. Y. St. 369, *affirmed*, without opinion, 65 Hun 623, 21 N. Y. Supp. 477.

40. *In re* Holmes' Estate, 5 L. T. N. S. (Eng.) 378, involved a transaction between attorney and client. The court says: "If the relation which creates the incapacity to receive the gift on account of its influence subsists, I am not aware of any case in which the court, where there was the slightest speck of doubt upon the transaction, has allowed the gift to prevail. Looking at the principle of public policy and public utility upon which the court acts in regard to gifts of this kind, if there be the slightest speck of doubt or inconsistency in the transaction, it seems to me that the duty of the court is to say that the gift

through fear of undue influence, will examine the wife in court to ascertain her unbiased will and wishes.[41]

is not one which can prevail under such circumstances."

"Where there is a question of a deed of gift from client to attorney, penitent to spiritual adviser, child to parent, ward to guardian, or wife to husband, the perfect fairness and honesty of the transaction must be established beyond reasonable doubt." Miller *v.* Lullman, 11 Mo. App. 419.

41. Golding *v.* Golding, 82 Ky. 51; Farmer's Exr. *v.* Farmer, 39 N. J. Eq. 211; Ireland *v.* Ireland, 43 N. J. Eq. 311, 12 Atl. 184.

UNITED STATES—CLAIMS AGAINST.

By Roscoe G. Clark.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. In General. — A. Pardon for Treason. — After the president's proclamation of December 25, 1868, granting unconditionally and without reservation to all persons who participated in the Civil War, full pardon and amnesty for the offense of treason against the United States, it was unnecessary for persons seeking to recover from the United States the proceeds of captured and abandoned property, under the Abandoned and Captured Property Act, to prove personal pardon for having taken part in the Rebellion.[1]

B. Want of Prior Payment. — Act of Congress, March 3, 1877, appropriated a sum for the payment of claims for services rendered in the postal department in the Confederate states before the war, "provided, that any such claims which had been paid by the Confederate states government shall not again be paid." Where action was brought on such claim, the burden was on claimant to show that payment had not been made by the Confederate states.[2]

C. Official Acts. — As a rule government officials are presumed to have done their duty,[3] and where in an action on a claim against the United States the government alleges as a defense that such officials failed in their duty, the burden of proof is on the government.[4]

Presumption Rebutted. — Where, in an action to recover a claim against the United States for goods sold or services rendered, it appeared that the goods fell below the government standard, or that the price therefor was grossly exorbitant, or that the bill for services was likewise exorbitant, a presumption arises[5] that the govern-

1. Armstrong *v.* United States, 80 U. S. 154.

2. Selma, R. & D. R. Co. *v.* United States, 139 U. S. 560; Hukill *v.* United States, 16 Ct. Cl. 562.

In Selma, R. & D. R. Co. *v.* United States, 139 U. S. 560, it was held that even though the burden were on the United States to show that a prior payment had been made, since the facts relating to such a payment are peculiarly within the knowledge of the claimant, a failure on his part to produce any evidence in regard to payment warrants the inference that he has been paid.

3. Leavitt *v.* United States, 34 Fed. 623.

In Merchants' Exch. Co. *v.* United States, 1 Ct. Cl. 332, it was held that where the title to real estate is submitted to the attorney-general for his approval before its acceptance by the government, and upon his rejecting it, nothing to the contrary being stated, it will be presumed, upon his subsequently approving the title to the same premises, that the objection to the title as at first presented has been obviated.

4. In Leavitt *v.* United States, 34 Fed. 623, it was held that though no authority rests in an executive department to bind the government in excess of appropriations, yet, where an appropriation has been made by Congress for a general purpose, there being a contemplation of many acts to be done by the department, the department's agency is general within these limits; and where persons act in good faith under orders of the department, no excess of authority in giving orders above the prescribed limits will be presumed, and the burden of proving this defense is on the government, where the facts are peculiarly within its power, and a creditor was not in a position to ascertain them.

5. In Allen *v.* United States, 3 Ct. Cl. 91, where it appeared that a

ment officials and the seller conspired to defraud the government, and the burden is on the claimant to show the entire good faith of the transaction.[6]

2. Loyalty to Federal Government. — To recover claims against the United States for damages incurred to property by federal military forces during the Civil War it was necessary to determine whether or not the claimant was a loyal citizen of the federal government at the time the damage occurred. A presumption of loyalty arose in favor of a claimant residing before and during the Rebellion in a loyal state.[7] And by statute a presumption arose against one's loyalty by reason of a voluntary residence in Rebel territory.[8]

Fact That Claimant Was a Negro raised a strong presumption in favor of his loyalty.[9]

3. Disposal of Proceeds of Captured Property. — Where it was shown that the loyal owner of captured property lost possession and control of the same through seizure by federal officers charged by law with its custody, the presumption was that such property was

government inspector had passed mules which manifestly fell below the government standard, it was held that the presumption was that a conspiracy existed between the inspector and the seller to defraud the government.

In Beard *v.* United States, 3 Ct. Cl. 122, it was held that where individuals are acting for themselves, it is presumed that their own self-interest will excite their vigilance and guard them against mistake or imposition. In the case of a public officer, every presumption is to be made in favor of the fairness of his conduct, and of his fidelity to his public trust. Yet, a court whenever there are circumstances to excite suspicion, will look narrowly into the case and hold the party who seeks to enforce such a contract to fuller explanations and stricter proof of fairness than would be required between two individuals, *sui juris,* and each acting on his own behalf.

6. Beard *v.* United States, 3 Ct. Cl. 122.

7. Turner *v.* United States, 3 Ct. Cl. 400 (presumption exists in favor of a resident of one of the northern states even though he owned and worked a plantation in Louisiana during the war).

8. Grossmeyer *v.* United States, 4 Ct. Cl. 1; Wayne *v.* United States, 4 Ct. Cl. 426.

The Act of June 25, 1868, § 3, (15 Stat. at L., c. 71) provided as follows: "Whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late Rebellion, the claimant or party asserting the loyalty of any such person to the United States during such Rebellion must prove affirmatively that such person did, during such Rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in such Rebellion, and the voluntary residence of any such person in any place where at any time during such residence the Rebel force or organization held sway shall be *prima facie* evidence that such person did give aid," etc.

Presumption as to Loyalty During Involuntary Residence. — Where a claimant shows that his residence within the insurrectionary states during a part of the Rebellion was involuntary, and establishes his loyalty for the remainder, a presumption exists in favor of his loyalty during his involuntary residence. Ealer *v.* United States, 4 Ct. Cl. 372.

9. Fordham *v.* United States, 4

regularly sold and the proceeds turned into the treasury.[10] The burden of showing the contrary rested upon the government.[11] But where captured property was merely traced to an employé of a treasury agent, but not to the agent nor to any officer of the government, no presumption arose, in an action for the proceeds, that it was transmitted to the government, nor that the proceeds thereof were in the treasury.[12]

4. Burden of Proving Claim. — The burden is upon the claimant to prove every material fact upon which his claim is based.[13]

Ct. Cl. 469; Thomas *v.* United States, 3 Ct. Cl. 52; Oliver *v.* United States, 3 Ct. Cl. 62.

10. After the loyal owner of captured property has lost possession and control thereof through seizure by federal officers charged by law with its custody, he cannot be compelled to trace it specifically to the treasury. Henry *v.* United States, 6 Ct. Cl. 389.

In Silvey *v.* United States, 4 Ct. Cl. 490, it was held that where, in an action under the abandoned or captured property act (12 Stat. at L. 820), property is shown to have been captured by the United States military forces, once fairly in their possession, it is presumed that government agents charged by law with a duty in respect thereto, faithfully performed that duty; and where property is clearly shown to have gone into the hands of the lawful military authorities and under the direction of the quartermaster charged with the collection of abandoned or captured property, the law presumes that it was regularly sold and the proceeds paid into the treasury.

11. Silvey *v.* United States, 4 Ct. Cl. 490.

In Queyrouze *v.* United States, 7 Ct. Cl. 402, it appeared that a certain consignment of cotton was shipped from the interior of the state of Louisiana and was traced into the hands of the United States. It was held that the burden was upon the government to show that the portion not accounted for was lost in transit. It seemed that there were two routes of transportation between such section and New Orleans where the seized cotton was shipped. A loss could not be presumed from the fact that only a portion of it was shown to have been brought over one route.

In Daniels *v.* United States, 7 Ct. Cl. 447, it was held that the burden of proof rests on the government to explain, establish, and justify erasures and alterations in its original shipping books of captured property, if it would avail itself of the altered entries. And when the original entries receive strong confirmation from certain circumstances, and the alterations are not explained by the government, the former will be taken in favor of the claimant.

12. Johnson *v.* United States, 8 Ct. Cl. 454.

13. Where the question of ratification of an agreement, executory in its nature, depends wholly on whether or not the government has received certain property and paid the stipulated price, the burden of proof is on the claimant. For him to simply show that the government did receive the property is not sufficient; he must also show the price paid. Danolds *v.* United States, 5 Ct. Cl. 65.

Where captured property appears to have remained in the possession of a claimant's vendors, and he shows the accidental destruction of the bills of sale, it is necessary for him also to prove the contents of the bills and the signatures of the vendors. Rhine *v.* United States, 14 Ct. Cl. 268.

Where in computing the compensation to be awarded a land grant railroad for government services, the claimant maintained that the nominal cost of the road as it appeared on the books included a discount for the sale of stock and securities, it is held that it is for the claimants to show the amount of the discount, and if they do not, the nominal cost will

Where Preferred Cases Are Reopened under the Indian Depredation Act, the party electing to reopen assumes the burden of proof.[14]

And Where a Prior Award of the Senate Is Attacked by the United States in the court of claims under a statutory provision giving the court of claims jurisdiction to determine amounts due the Choctaw nation, and to reconsider awards made by the senate, the burden of proof is on the government.[15]

be treated as the actual cost of the road. Atchison, T. & S. F. R. Co. *v.* United States, 15 Ct. Cl. 126.

Where an act refers to the court of claims the claims of such a class of claimants as show that they relied on an arrangement whereby it was understood and agreed that their claims should abide the result of certain test cases, they must show this as a matter of fact. Van Schaick *v.* United States, 21 Ct. Cl. 7.

Where a party sues the United States to recover the value of a package alleged to contain a specified sum in mutilated national bank notes, forwarded and delivered to the treasurer of the United States and never accounted for, he has the burden of proving, not only the receipt by the treasurer of the package alleged to contain the notes, but also the contents of the package so received at the treasury department. Uncas Nat. Bank *v.* United States, 18 Ct. Cl. 349.

Extent of Loss Must Be Shown. Headman *v.* United States, 5 Ct. Cl. 640.

Where a vessel taken by the French was recaptured, and salvage allowed therefor, and an appeal was taken from the decree allowing it, the result of the appeal not being shown, the burden of proof rests on claimants to establish the extent of their loss. The Schooner Dolphin, 27 Ct. Cl. 276.

14. In Cox *v.* United States, 29 Ct. Cl. 349, the court said: "This claim having been examined, approved, and allowed by the Secretary of the Interior, in pursuance of the Act of Congress of March 3, 1885, is entitled to priority of consideration and to judgment for the amount therein found due, unless either the claimant or the United States elects to reopen the case and try the same before the court according to the terms of the last two provisos of the Jurisdictional Act March 3, 1891, chapter 913, section 4 (1 Supp. Rev. Stat., 2d ed., p. 915). . . . Proof of citizenship, the depredation, the value of the property destroyed, amity of the tribe, band, or nation, and other facts necessary to be proved are alike as necessary in one class of cases as in the other, the only difference being that the party reopening assumes the burden of proof. In no other particular is there any difference in the proof required."

In Mares *v.* United States, 29 Ct. Cl. 197, it was held that where a case is not properly an examined and allowed case, within the meaning of the Act of March 3, 1891, c. 538, 26 Stat. at L. 851 (U. S. Comp. Stat. 1901, p. 758), relating to Indian depredations, defendants cannot be compelled to assume the burden of proof by electing to reopen it.

15. In Choctaw Nation *v.* United States, 119 U. S. 1, it was held that under the provision of the Act of Congress, March 3, 1881, giving the court of claims jurisdiction to determine the amounts due the Choctaw nation by the United States under various treaties, that the court of claims "shall not be estopped by any action had or award given by the senate of the United States in pursuance of the treaty of 1855," which treaty provided that "the adjudication and decision of the senate shall be final," the award of the senate though not binding on the court, should not be entirely disregarded, but should be regarded as *prima facie* establishing the validity of the claim thereby adjudged in favor of the Choctaws, leaving the award open to the attack by the government, both on such grounds as would

II. ADMISSIBILITY OF EVIDENCE.

1. To Show Claim or Amount Thereof. — Where one seeking to collect a claim against the United States, appeals to Congress and that body transmits the claimant's affidavits, letters, etc., to the court of claims, such action on the part of Congress does not render the documents referred to relevant or admissible evidence on the trial in the court of claims.[16]

A. VOUCHERS. — A voucher given by an officer of the government, in the regular course of his business, for services performed or articles furnished by his order for the public service within the scope of his authority and the line of his duty, unimpeached, is admissible as *prima facie* evidence of indebtedness on the part of the United States as therein stated.[17] And a voucher supporting a claim against the United States cannot be impeached by *ex parte* affidavits, or by a record in criminal proceedings to which the claimant was not a party.[18] But vouchers given by unauthorized officials are not competent evidence by which to establish a claim.[19]

B. SENATE AWARDS. — An award of the senate made as to a claim of an Indian tribe under treaty authority is not final but may be received in evidence in the court of claims where the case is referred to that court by Congress.[20]

originally invalidate awards, and on the ground of being unsupported by proof, or unjust and unfair, in view of all the circumstances, on which questions the burden would be on the government.

16. Clark *v.* United States, 1 Ct. Cl. 246.

In Brannen *v.* United States, 20 Ct. Cl. 219, it was held that the requirement of the Bowman Act that "vouchers, papers, proofs, and documents" be transmitted with the claim was not made to change the rules of evidence as to their admissibility, but to relieve committees from the duty of passing upon the competency of the matter transmitted.

17. McCann *v.* United States, 18 Ct. Cl. 445; Hart's Admr. *v.* United States, 15 Ct. Cl. 414; Countryman *v.* United States, 21 Ct. Cl. 474.

Where it is shown that a person notoriously acted as an agent or officer of the government about the duties connected with his station, under the observation of his superiors, and recognized by them, the government, receiving the benefit of his services without objection, should not dispute his vouchers, but these, when given within the scope of his ordinary duties, should be *prima facie* evidence that their statements are true. Parrish *v.* United States, 2 Ct. Cl. 341.

A voucher issued and transmitted to a contractor, after he had joined the insurgents in 1861 and while he was within the enemy's lines, though for goods purchased prior to the breaking out of hostilities, is absolutely void and cannot be received in evidence to support an action for the goods. Hart's Admr. *v.* United States, 15 Ct. Cl. 414.

18. Countryman *v.* United States, 21 Ct. Cl. 474.

19. In Travers *v.* United States, 5 Ct. Cl. 329, it was held that since the Act July 4th, 1864, (13th Stat. at L., pp. 394, 395,) the quartermaster's department is alone charged with the duty and responsibility of erecting military barracks. Vouchers given by an engineer officer for materials used in erecting military barracks are not competent evidence, even though the vouchers may have been approved by the commanding general of the department.

20. In Choctaw Nation of Indians *v.* United States, 19 Ct. Cl. 243, it appeared that the United

C. Bills of Sale. — Bills of sale given by the owners of cotton to the purchasing agents of the Confederate government, found in the Rebel archives in Washington, are admissible in evidence to show that the title to the property passed to the Confederate government and vested in the United States by right of conquest.[21]

D. Admissions and Declarations of Government Officials. The United States are not subject to the same rule of responsibility that attaches to individuals in relation to admissions and declarations.[22]

2. To Show Value of Government's Right To Use of Land Grant Railroad. — Rates fixed by the government for transportation of troops and property of the United States over a land grant road and acquiesced in by the road, are the best evidence of what was a fair allowance for the use of the road.[23]

3. To Show Loyalty. — A. Claimant's Oath. — Under the provisions of Act of July 12, 1870 (16 Stat. at L. 235), which declares that a claimant's oath of amnesty shall not be admissible to support any claim against the United States, or to establish the standing of any claimant, etc., his oath of amnesty is not admissible to prove his loyalty or his adherence to the government.[24]

States senate had been empowered by treaty to make an award as to a claim of the Choctaw Indians against the government. An award was made. The case was then referred by Congress to the court of claims "to review the entire question *de novo*." The act declared that the court should not be estopped by the senate's award. It was held that the award was not final, but that it might be put in evidence in the court of claims.

21. Gilmer *v.* United States, 14 Ct. Cl. 184.

22. The United States are represented by agents, and the power of an agent to bind his principal by admissions and declarations is much more limited than the power of an individual to bind himself. The United States are not bound by the acts of an agent of a quartermaster in taking testimony for the department in the investigation of cases under the Fourth of July Act. Therefore, affidavits taken by an agent of the quartermaster's department are not admissible on behalf of a claimant. Allen *v.* United States, 28 Ct. Cl. 141.

23. During the Civil War the war department employed to carry freight and passengers, numerous railroads, for the construction of which grants of the public lands had been made upon the statutory condition that such roads should be and remain public highways for the use of the government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States. By a general order, the department settled what was a fair deduction from the ordinary tariff rates for the use of these roads, including compensation for use and for services as carrier. Where a land grant road acquiesced in that rate of reduction, and voluntarily rendered service, in an action against the government to recover for services as carrier, the rate fixed as indicated above was the best evidence of what was a fair reduction for the use of such road. Atchison, T. & S. F. R. *v.* United States, 12 Ct. Cl. 295.

The Value of the Government's Right to the use of a land grant railroad cannot be gathered from leases of branch roads rented and operated by claimant. Atchison, T. & S. F. R. *v.* United States, 15 Ct. Cl. 126.

24. Mills *v.* United States, 6 Ct. Cl. 253.

B. Official Reports. — Reports of military officers to the effect that a claimant had aided United States soldiers escaping from Rebel prisons were admissible for the purpose of showing claimant's loyalty.[25]

4. Miscellaneous Matters. — Assistant Quartermaster's Unofficial Record. — A communication purporting to be a report from an assistant quartermaster to his chief, but dated after the writer had left the military service, is not an official report, and cannot be admitted in evidence.[26]

The Report of a Military Board of Survey concerning the merchantable quality of supplies furnished the quartermaster's department is not binding on the contractor, nor are its proceedings evidence against him. If this record of the board of survey can be admitted for any purpose, it is simply to show that a board was ordered as an incident of the dispute.[27]

Agreement Between Claimant and House Committee. — Where a private act awards a contractor a large amount and expressly sets forth in terms that it shall be "in full for the balance due him," in an action to collect such balance, an agreement between the claimant and a committee of the House of Representatives cannot be introduced to affect the construction of the act, nor to remove conditions which it imposed upon him.[28]

In Proceedings Under the French Spoliation Claims Act the rules relating to the admission of evidence are more elastic than in ordinary common-law actions.[29]

25. In Gordon *v.* United States, 6 Ct. Cl. 292, it was held that the official contemporaneous reports and communications of public officers made in the line of their duty, before the controversy began, are admissible in evidence. The communications of a first sergeant of a troop of cavalry to the commanding officer at Savannah, made immediately after the capture of that city, showing that a resident had concealed and aided United States soldiers escaping from Rebel prisons, and the communication of the commanding officer to the chief quartermaster of the army on the same subject, are in effect official reports, which may be put in evidence for what they may be worth as proof tending to establish a party's loyalty.

26. Brandeis *v.* United States, 3 Ct. Cl. 99.

27. Heathfield *v.* United States, 8 Ct. Cl. 213.

28. Cruger *v.* United States, 11 Ct. Cl. 766.

29. The Ship Ganges, 25 Ct. Cl. 110. In this action the court said: "It must always be remembered that there is a most material difference between the spoliation cases and actions at law. As far as possible we try to assimilate the proceedings in these cases to the doctrines of the common law; but if the common-law rules of evidence were applied with technical strictness it would not be possible to investigate these claims in the spirit contemplated by the jurisdictional statute or to accomplish the result intended by the Congress. So many years have passed since the occurrences now complained of took place, that, through no fault of claimant's, court and counsel have been much embarrassed as to the competency and value of many documents presented here in support of the claims and which from the nature of the cases constitute the best evidence now to be obtained. These documents, which common-law rules of evidence might exclude from our consideration, we

III. WEIGHT AND SUFFICIENCY OF EVIDENCE.

1. Proof of Claim. — A. In General. — Where one seeks to recover a claim against the United States for services rendered, for goods delivered, or for the use of real estate, he must introduce satisfactory evidence showing that services were rendered;[30] or that goods were delivered;[31] or that real estate was actually used by federal authorities;[32] and he must further show the value of the same.[33]

B. Under Abandoned or Captured Property Act. — When a claimant under the Abandoned or Captured Property Act (12 Stat. at L. 820) sought to recover property, he was required to produce satisfactory evidence showing ownership of the property in question and the amount thereof.[34] It was held that it was necessary that such proof should be made by evidence sufficient to at least equal

admit under the clause of the statute, which provides that: 'In the course of their proceedings they (the court) shall receive all suitable testimony on oath or affirmation, and all other proper evidence historic and documentary concerning the same.'"

30. In Donahue *v.* United States, 2 Ct. Cl. 340, it was held that a blacksmith employed to shoe government horses by an assistant quartermaster who died before the giving of the usual voucher for the work, was entitled to recover on proof of the work and its value.

31. In Hart's Admr. *v.* United States, 15 Ct. Cl. 414, it was held that where an unsupported voucher of an army officer was for 30,000 pounds of flour, and the officer's abstract of purchases and accompanying vouchers for the same quarter showed only one purchase of flour, viz., of 32,000 pounds, for the same contractor on the same day, which was paid, the evidence warranted the finding of a resulting fact that the contractor delivered no flour except that for which he was paid.

32. In Mills *v.* United States, 19 Ct. Cl. 79, the United States military forces occupied certain land of the claimant. The owner never objected to the occupancy, and the officers in possession never asserted title. The owner demanded rent and the officers promised to pay the same. The Secretary of War ordered that vouchers therefor be sent to the treasury for settlement. *Held*, that the evidence was sufficient to establish *prima facie* the relationship of landlord and tenant.

33. Donahue *v.* United States, 2 Ct. Cl. 340.

In M'Cann *v.* United States, 18 Ct. Cl. 445, the court held that a voucher given by a public officer in the regular and ordinary course of his business for services performed by his order within the scope of his authority and the line of his duty, unimpeached, is *prima facie* evidence of value received on the part of the United States as therein stated.

In Wilson *v.* United States, 22 Ct. Cl. 67, the claimant established his right to a certain bounty. The government set up a counter-claim for $114, alleging that a horse furnished and used by him as a soldier, for which he was paid $114, had been stolen. No evidence was produced except a quartermaster's roll, on the margin of which was noted, "Void — horse proven away as stolen." It was held that a memorandum upon the official purchase roll of a quartermaster stating that a certain horse was "proven away as stolen" may justify delay and inquiry on the part of the accounting officers, but it is not sufficient evidence to justify a judgment on a counter-claim to recover money paid for the use of the horse.

34. Stout *v.* United States, 24 Ct. Cl. 348; Whitehead *v.* United States, 1 Ct. Cl. 319.

Where it is shown that a cotton picker accumulated a considerable quantity of cotton, the precise

that necessary to sustain an action of trespass or trover.[35] Further, it was necessary to show the seizure or capture of such property by federal military authorities,[36] and also that the property or proceeds thereof eventually went into the hands of United States officials.[37]

C. Under Indian Depredation Act. — In an action on a claim under the Indian Depredation Act, satisfactory evidence was required showing ownership of the property in question, possession of it by claimant, the quantity and value thereof, the fact of the

amount being unknown, and purchased seventy-two bales, and that 153 bales were captured on his premises by the federal authorities, it is sufficient evidence to raise the presumption that he owned the quantity captured, entitling him to recover the net proceeds of such quantity under the Abandoned or Captured Property Act. Kilduff *v.* United States, 6 Ct. Cl. 250.

Where forty-six bales of cotton, shown to be the property of the claimant suing under the Abandoned or Captured Property Act, were placed on board a schooner and removed by him, and afterwards the same number, in the same vessel were returned, and remained in the claimant's possession until seized, and were claimed by no one else, it is *prima facie* evidence of ownership, and in the absence of countervailing evidence is sufficient to establish that fact. Tait *v.* United States, 4 Ct. Cl. 579. See also Aiken *v.* United States, 3 Ct. Cl. 307; Backer *v.* United States, 7 Ct. Cl. 551; Boyd *v.* United States, 9 Ct. Cl. 419.

The Reports and Accounts of Treasury Agents who seized or transmitted captured property are not conclusive as to the title or ownership, nor as to the sources whence it was derived. And a release of property by the treasury does not necessarily establish the title of the person to whom it was released. Sharp *v.* United States, 12 Ct. Cl. 638.

35. Bond *v.* United States, 2 Ct. Cl. 529.

36. When an employe of a quartermaster charged with the care of captured property testifies of the seizure of a party's property, and designates the transport on which it was shipped, it is sufficient evidence of capture, though the property may not appear on the quartermaster's books. The defendants should produce the bill of lading of the transport, or otherwise refute the testimony of the witness. Willis *v.* United States, 6 Ct. Cl. 385.

Evidence Held Insufficient. Lowry *v.* United States, 4 Ct. Cl. 377.

In Habersham *v.* United States, 4 Ct. Cl. 433, the registration book of captured cotton showed certain bales to have been reported to the authorities, but was blank as to its seizure, and there was no evidence that it came into the hands of the authorities. *Held*, that this was insufficient proof of capture to support a claim under the Abandoned or Captured Property Act. 12 Stat. at L. 820. See also Moore *v.* United States, 25 Ct. Cl. 82.

37. Where a claimant traces his property after capture to a certain town, and it appeared from the returns of the treasury agent there, that property of like description was received and sold, this is sufficient proof to the satisfaction of the court that the net proceeds of the claimant's property reached the treasury. Holland *v.* United States, 4 Ct. Cl. 465.

Where the evidence does not show that the identical property of the claimant under the Abandoned or Captured Property Act was sold by the agents of the treasury, but does not show that it was captured and shipped from Charleston to New York and that a larger quantity of the same kind of property was sold in New York, it is sufficient proof to establish the claim. Hayes *v.* United States, 4 Ct. Cl. 489. See also Ross *v.* United States, 10 Ct. Cl. 424.

Evidence Held Insufficient. Cones *v.* United States, 8 Ct. Cl. 329. The fact that a military officer, with-

depredation,[38] which includes proof of malicious intent on the part of the Indians charged, or such a condition of negligence as would establish at common law a liability for the destruction of property.[39]

D. Under French Spoliation Act. — In an action on a claim under the French Spoliation Act satisfactory evidence must be produced on claimant's part showing present ownership of the claim and the right to payment or indemnity for a loss sustained.[40]

2. Proof of Loyalty. — Under the Abandoned or Captured Property Act (12 Stat. at L. 820) an owner of property was required to produce satisfactory evidence showing that he had not given aid or comfort to the Rebellion.[41]

out authority of law, sold certain personal property and received the purchase money, for which it does not appear that he ever accounted, is insufficient evidence with which to charge the government with the receipt of the money. Pharis *v.* United States, 16 Ct. Cl. 501.

38. In Stone *v.* United States, 29 Ct. Cl. 111, it was held that on the testimony of the claimant and one witness, the court should proceed with great caution, and not allow such evidence to control a decision, though the witnesses be neither contradicted nor impeached.

39. Jaeger *v.* United States, 29 Ct. Cl. 172.

40. French Spoliation Act Jan. 20, 1885, c. 25, § 3, 23 Stat. at L. 283 (U. S. Comp. Stat. 1901, p. 750), requires that the court of claims shall determine the "present ownership of such claims." It was held in this case that present ownership will not be proved by the mere production of letters of administration upon the estate of a person alleged to be entitled to recover for a spoliation; the administrator must show that his intestate was the person who suffered the loss at the time alleged. The ship Betsey, 23 Ct. Cl. 277. In the same case it was further held that where an insured concedes that the insurers are entitled to the insurance recovered under the French Spoliation Act, such concession dispenses with further proof of their right to payment or indemnity for the loss.

41. Grossmeyer *v.* United States, 4 Ct. Cl. 1; Bond *v.* United States, 2 Ct. Cl. 529.

Expressed sentiments of loyalty to the government and avoidance to take the Confederate oath of allegiance, and freeing slaves so that they should not work on Confederate fortifications, together with contributions and kindness shown to Union prisoners, are satisfactory evidence of loyalty. Foley *v.* United States, 3 Ct. Cl. 53.

Proof of repeated generous acts of kindness to Union prisoners, together with evidence showing assistance to such prisoners to escape, accompanied with negative evidence, is sufficient proof of loyalty within the meaning of the Captured and Abandoned Property Act. Reils *v.* United States, 3 Ct. Cl. 61.

Evidence showing that claimant concealed on his premises, and fed and clothed, an escaped Union prisoner for several months, is satisfactory evidence that he never gave aid or comfort to the Rebellion. Graver *v.* United States, 3 Ct. Cl. 83.

An official entry on a quartermaster's regular book, of captured cotton, which specially certifies the claimant's loyalty, corroborated by testimony of a credible witness, is satisfactory evidence that he did not give aid or comfort to the Rebellion. Koester *v.* United States, 3 Ct. Cl. 95. Proof that a widow residing in Charleston, during the Rebellion, contributed from scanty means to aid suffering Union prisoners, and that she harbored and sheltered some who escaped, was satisfactory evidence of loyalty. Hilborn *v.* United States, 3 Ct. Cl. 270.

Where a claimant never lived in a place where "the Rebel force or organization held sway" (Rev. Stat. § 1074 (U. S. Comp. Stat. 1901, p. 742), and was found loyal by the quartermaster general, and Congress, by statute, gave effect to an award

Especially Where Claimant Resided Within Rebel Lines during the war was it necessary that he should in an action under the Abandoned or Captured Property Act, present direct and positive proof of his loyalty, under Act June 25th, 1868, which provides that residence within the Rebel lines during the Rebellion shall be *prima facie* evidence that such person gave aid and comfort to the Rebellion.[42]

in his favor, a *prima facie* case of loyalty was established. Hall *v.* United States, 27 Ct. Cl. 438. And for similar cases, see Potter *v.* United States, 3 Ct. Cl. 390; Hudnal *v.* United States, 3 Ct. Cl. 291; Clark *v.* United States, 3 Ct. Cl. 228; Edmonds *v.* United States, 3 Ct. Cl. 179; Hancock *v.* United States, 3 Ct. Cl. 177.

Evidence Held Insufficient. Under the Abandoned or Captured Property Act (12 Stat. at L. 820), the testimony of two persons, each as to his own and to the other's loyalty, it appearing that they lived in different places during part of the Rebellion, was insufficient. Donnelly *v.* United States, 3 Ct. Cl. 276.

A Colored Person could recover a claim under the Abandoned or Captured Property Act on very slight evidence of loyalty. Thomas *v.* United States, 3 Ct. Cl. 52.

42. Dothage *v.* United States, 4 Ct. Cl. 208. See also Nugent *v.* United States, 6 Ct. Cl. 305.

Evidence Held Insufficient. One whose neighbors speak in doubtful terms of his loyalty, and whose household servants are silent in regard to it when produced as witnesses, is but neutral at best, and does not establish his loyalty by such evidence, since the statute requires that he should prove his loyalty affirmatively. Zellner *v.* United States, 4 Ct. Cl. 480.

Where a party whose loyalty is in issue shows that his family resided during the Rebellion in the north, and leaves it doubtful as to whether he entered the insurrectionary states before or after the war began, and does not call a single witness to show his political status at the place where he resided during a part of the Rebellion, his case will be deemed suspicious, and his loyalty will be adjudged not proven to the satisfaction of the court. Witkowski *v.* United States, 6 Ct. Cl. 406.

Where the evidence of one's loyalty, who voluntarily resided within the insurrectionary district during the Rebellion, stopped with the year 1863, it was insufficient, and he will be deemed disloyal. Fisher *v.* United States, 6 Ct. Cl. 235. See also Austin *v.* United States, 25 Ct. Cl. 437.

Testimony of a Single Witness, negative in its character, in an action by a contractor to recover on a contract for the sale to the government of certain property, is not satisfactory proof of loyalty to the government on the part of the contractor, where it appeared that the contractor had voluntarily resided during the Rebellion within the insurrectionary district and had friends and neighbors who might understandingly testify as to his conduct during the war. Patterson *v.* United States, 6 Ct. Cl. 40.

UNLAWFUL ASSEMBLY.—See Affray; Riot.

UNLAWFUL DETAINER.—See Forcible Entry and Detainer.

USAGE.—See Customs and Usages.

USE AND OCCUPATION.—See Adverse Possession; Ejectment; Landlord and Tenant; Trespass To Try Title.

USER.—See Abandonment; Corporations; Dedication; Highways.

USES.—See Trusts and Trustees

USURPATION.—See Officers; Quo Warranto.

USURY.

By Roscoe G. Clark.

I. DEFINITION.

Usury is the voluntary taking or reservation of a greater interest, or compensation of some sort in lieu of interest, for the loan of money than is allowed by law.[1]

II. AVOIDANCE OF TRANSACTION AS USURIOUS.

1. Actions Between Original Parties. — A. PRESUMPTIONS. — a. *In General.* — If an instrument does not upon its face import usury, there exists a presumption in favor of its validity which can only be overcome by clear and positive evidence.[2] This presumption against the violation of the law and in favor of the validity of an instrument or the regularity of a transaction is usually controlling in the absence of evidence de hors the agreement to show a scheme or device to cover up usury.[3] And this alleged device whether it be made to refer to services performed, a contemporaneous sale, or other means, must be actually shown by the party attacking the

1. Parham *v.* Pulliam, 5 Coldw. (Tenn.) 497; Brundage *v.* Burke, 11 Wash. 679, 40 Pac. 343; New England Mtg. Co. *v.* Gay, 33 Fed. 636; United States Mtg. Co. *v.* Sperry, 26 Fed. 727; Newton *v.* Wilson, 31 Ark. 484; Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557.

2. *Arkansas.* — Leonhard *v.* Flood, 68 Ark. 162, 56 S. W. 781; Citizens' Bank *v.* Murphy, 83 Ark. 31, 102 S. W. 697.

Illinois. — Wilson *v.* Kirby, 88 Ill. 566.

Iowa. — Barthell *v.* Jensen, 86 Iowa 736, 53 N. W. 124.

Maryland. — Wetter *v.* Hardesty, 16 Md. 11.

New York. — White *v.* Benjamin, 138 N. Y. 623, 33 N. E. 1037.

Tennessee. — Hughes *v.* Marquet, 85 Tenn. 127, 2 S. W. 20.

Texas. — Norris *v.* Belcher Mtg. Co., 98 Tex. 176, 82 S. W. 500.

The existence of a usurious contract is never presumed. Where an agreement to pay interest is subject to two constructions, one of which would make it usurious and the other not, the court will adopt the latter. Lusk *v.* Smith, 71 Kan. 550, 81 Pac. 173.

Courts will not presume that parties have entered into a usurious contract. Such a contract must be alleged and proven. Wagoner *v.* Landon (Neb.), 95 N. W. 496.

In Cameron *v.* Fraser, 48 Misc. 8, 94 N. Y. Supp. 1058, it is held that usury cannot be presumed. Every presumption must be against the violation of the law, and, if a transaction can be construed in such a way as to render it valid, such construction should be given to it, rather than one which would render it illegal and criminal.

3. Phillips *v.* Mason, 66 Hun 580, 21 N. Y. Supp. 842; Norris *v.* Belcher Mtg. Co., 98 Tex. 176, 82 S. W. 500, 83 S. W. 799; Ayars *v.* O'Connor, 45 Wash. 132, 88 Pac. 119.

In Farmer *v.* Sewall, 16 Me. 456, it was held that the sale of a nego-

transaction to be a cover for evading the usury laws.[4] Where, however, property or services are given in lieu of interest for money loaned, and there is a great disproportion between the value of the property or labor and the maximum legal rate of interest, some courts have presumed such transactions to be usurious.[5]

A Paper Which Is Usurious Upon Its Face, on the other hand, will be presumed usurious until shown to be innocent.[6]

b. *Place of Performance of Contract.* — If no place of performance is stated, there is a *prima facie* presumption that the law of the place where an agreement is made governs.[7]

c. *Foreign Laws.* — There being no usury at common law, there is no presumption that the usury laws of one state obtain in another state or territory.[8] But in those jurisdictions where in the absence of evidence foreign statutory law is presumed to be the same as that

tiable note, free from usury when made, at a greater discount than legal interest, is not conclusive evidence of usury, although the party making the sale is unconditionally liable by his endorsement.

4. Grosvenor *v.* Flax etc. Mfg. Co., 2 N. J. Eq. 453; Mosier *v.* Norton, 83 Ill. 519; Beadle *v.* Munson, 30 Conn. 175; Seymour *v.* Marvin, 11 Barb. (N. Y.) 80; Liskey *v.* Snyder, 56 W. Va. 610, 49 S. E. 515; Moody *v.* Hawkins, 25 Ark. 191.

5. Osborn *v.* Payne, 111 Mo. App. 29, 85 S. W. 667.

In Succession of Hickman, 13 La. Ann. 364, where the use of slaves was given in lieu of interest for money loaned, and there was a great disproportion between the value of the services of the slaves and the rate of conventional interest, it was held that the presumption was that the contract was intended to secure usurious interest.

6. Van Beil *v.* Fordney, 79 Ala. 76; Bank of U. S. *v.* Waggener, 9 Pet. (U. S.) 378; Henry *v.* McAllister, 93 Ga. 667, 20 S. E. 66; Trainor *v.* German-Am. Assn., 102 Ill. App. 604; Lockwood *v.* Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78.

Where a contract is on its face usurious, unlawful intent is presumed; it is only when the contract is not usurious on its face that intention becomes a material inquiry. Darden *v.* Schuessler (Ala.), 45 So. 130.

A party is presumed to have intended the necessary consequences of his acts. Where there is no claim of mistake in computation and where acts are done by parties deliberately and intentionally, if the result is a loan of money at a usurious rate, the conclusion is that the parties intended it. Hagan *v.* Barnes, 92 Minn. 128, 99 N. W. 415. See also Kommer *v.* Harrington, 83 Minn. 114, 85 N. W. 939.

In Dawson *v.* Taylor, 28 N. C. 225, it was held that where usurious interest is reserved in a bond, it is *prima facie* evidence that the obligee took it, knowing of the usury; but if he relies on a mistake in entering the amount of the bond, he must show it affirmatively.

Where a statute regulating usurious contracts is made inapplicable "to contracts or agreements entered into or discounts or arrangements made" prior to a given date, one suing on a note dated subsequent to such date has the burden of showing that the transaction was entered into before that time. Union Mtg. Bkg. & Tr. Co. *v.* Hagood, 97 Fed. 360.

7. Curtis *v.* Leavitt, 15 N. Y. 1, 88; Cutler *v.* Wright, 22 N. Y. 472; Davis *v.* Tandy, 107 Mo. App. 437, 81 S. W. 457; Coghlan *v.* South Carolina R. Co., 142 U. S. 101.

8. *Alabama.* — Bazemore *v.* Wilder, 10 Ala. 773; Camp *v.* Randle, 81 Ala. 240, 2 So. 287.

Georgia. — Mayor *v.* Inman, 57 Ga. 370; Flournoy *v.* First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Craven *v.* Bates, 96 Ga. 78, 23 S. E. 202.

Illinois. — Dearlove *v.* Edwards, 166 Ill. 619, 46 N. E. 1081.

of the forum, it would seem that the usury laws of a foreign state should be presumed to be the same as those of the forum.[9]

d. *Payment and Acceptance of Unlawful Rate.* — Proof of payment and acceptance of an unlawful rate of interest creates a presumption that such payment was made and accepted in conformity with a prior usurious agreement.[10] But a note expressed to carry interest prior to its date will not be presumed usurious, but that it was given for an antecedent consideration.[11] This presumption may be rebutted by evidence tending to show it to have been done as a device to cover up usury,— when it becomes a question of fact for the determination of the tribunal.[12] Neither does a prior usurious agreement invalidate a note or draft unless it is shown to have been made in conformity therewith.[13] Honest intentions alone will not rebut the presumption of usury where the taking of unlawful interest is shown.[14]

e. *Gratuities.* — A voluntary payment of a gratuity on the return of a sum of money legally loaned does not necessarily raise a presumption that the transaction is usurious; otherwise where there

Indiana. — Smith *v.* Muncie Nat. Bank, 29 Ind. 158.

Kentucky. — Greenwade *v.* Greenwade, 3 Dana 495.

Mississippi. — Robb *v.* Halsey, 11 Smed. & M. 140.

Missouri. — Davis *v.* Bowling, 19 Mo. 651.

New Jersey. — Uhler *v.* Semple, 20 N. J. Eq. 288; Dolman *v.* Cook, 14 N. J. Eq. 56.

New York. — Davis *v.* Garr, 6 N. Y. 124; Cutler *v.* Wright, 22 N. Y. 472; Pomeroy *v.* Ainsworth, 22 Barb. 118; City Sav. Bank *v.* Bidwell, 29 Barb. 325.

Tennessee. — Hubble *v.* Morristown Imp. Co., 95 Tenn. 585, 32 S. W. 965.

Existence of Foreign Statute of Usury Must Be Proved. — In Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77, it was held that in a suit on a contract made and intended to be performed in another state, in which the defendant pleads the statute of the other state defining usury and prescribing as a penalty the forfeiture of all interest, and bases an appropriate plea of usury on that statute, in order to maintain the plea it is essential that he prove that the statute was in force at the time of the execution of the contract. See Everton *v.* Day, 66 Ark. 73, 48 S. W. 900, *holding* that the presumption is that a verbal contract of another state to pay eight per cent interest is legal.

9. See Beadle *v.* Munson, 30 Conn. 175, and articles "Foreign Laws," note 44; "Statutes," note 52.

10. Smith *v.* Hathorn, 88 N. Y. 211; Reed *v.* Coale, 4 Ind. 283; Hammond's Admr. *v.* Smith, 17 Vt. 231; Cummins *v.* Wire, 6 N. J. Eq. 73.

11. Marvin *v.* Feeter, 8 Wend. (N. Y.) 532; Ewing *v.* Howard, 7 Wall. (U. S.) 499.

12. Patterson *v.* Storm, 14 Wis. 706.

13. Stout *v.* Wright, Litt. Sel. Cas. (Ky.) 482; Catlin *v.* Gunter, 11 N. Y. 368.

In Warren *v.* Coombs, 20 Me. 139, it was held that though it appear in evidence that a bargain was made between plaintiff and defendant that the former should furnish the latter with money at the rate of five per cent a month, such proof was not sufficient to authorize a presumption that a draft in suit was taken in pursuance of and under such agreement.

14. Caroline Sav. Bank *v.* Parrott, 30 S. C. 61, 8 S. E. 199.

In Reed *v.* Coale, 4 Ind. 283, it was held that if it be ascertained that a party intended, by a pretense used, to take more than the legal rate of interest, such intent is declared corrupt. It is a presumption of law which cannot be rebutted by any proof of honest intentions.

has been a series of payments.[15] If a gratuity is provided for in the agreement, the presumption of usury can only be overcome by clear opposing proof.[16]

f. *Principal and Agent.* — There is a conflict of authorities on the proposition as to whether a principal, whose agent accepts usury, shall be presumed to have known and authorized it. The greater number of decisions appear to hold in the affirmative.[17] Some courts have attempted to distinguish in this respect between general and special agencies, presuming the authorization of the principal only in the former class.[18] Other decisions, however, hold that where a loan of money is negotiated by an agent, it must be shown that the lender knew, or facts must be proven from which he may be presumed to have known, that usury was exacted.[19] This upon the theory that an agency comprehends the doing of only lawful acts, and the law should assume an illegal act to have been done without the principal's knowledge or consent.[20]

15. Storer *v.* Coe, 2 Bosw. (N. Y.) 661.

16. Lockwood *v.* Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78.

17. McBroom *v.* Scottish etc. Inv. Co., 153 U. S. 318; Haynes *v.* Gay, 37 Wash. 230, 79 Pac. 794.

One to whom money is intrusted to be loaned for the benefit of the principal, without limitation, except that he is to get ten per cent, is a general agent, and if he takes usury the presumption is that the principal knew and authorized it. Stevens *v.* Meers, 11 Ill. App. 138, *affirmed,* 106 Ill. 549.

In Ridgway *v.* Davenport, 37 Wash. 134, 79 Pac. 606, the court said: "The contention that the lender is not bound by the wrongful act of his agent not within the scope of his authority is right in the face of the statute, which provides that, in all cases where there is illegal interest contracted for by the transaction of any agent, the principal shall be held thereby to the same extent as though he had acted in person. The statute provides in so many words that no person shall directly or indirectly take or receive any money, goods, or things in action, or in any other way, any greater interest, sum or value for the loan or the forbearance of any money, goods or thing in action than 12 per cent per annum. In this case it is evident that there was taken and received in money a greater interest than 12 per cent, the sum received amounting to about 6 per cent per month on the money advanced to the respondent. The indirect taking, then, in this case cannot be disputed, and under the further provision of the statute that the principal shall be held to the same extent as though he had acted in person there is no escape from the conclusion that the contract was usurious as to the appellant J. R. Davenport."

18. Sherwood *v.* Roundtree, 32 Fed. 113.

In Rogers *v.* Buckingham, 33 Conn. 81, it was held that authority to make a usurious loan will not be presumed where the agency is special and limited to a single transaction. It may be presumed where the agency is general, and embraces the business of making, managing and collecting the loans of a moneyed man; but it is a presumption of fact and may be rebutted.

19. Lee *v.* Chadsey, 3 Abb. App. Dec. (N. Y.) 43.

20. Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379; Condit *v.* Baldwin, 21 N. Y. 219; *In re* Kellogg, 113 Fed. 120.

In Barger *v.* Taylor, 30 Or. 228, 42 Pac. 615, 47 Pac. 618, it was held that the presumption is that an agency comprehends the doing of only lawful things, and that the law will always presume that an illegal act, as for example, accepting usury, was done without the principal's knowledge or consent.

g. *Trustees.* — No such presumption as that applied to principal and agent is to be indulged in between trustees.[21]

B. Burden of Proof. — a. *In General.* — The burden of proving the usurious character of a transaction is upon the party attacking it.[22] If the transaction is not *per se* usurious, he must establish a

In Little *v.* Hooker Steam Pump. Co., 122 Mo. App. 620, 100 S. W. 561, the court said: "The mere showing of authority in the agent to lend one's money carries with it only, in the absence of a showing to the contrary, authority to exercise such agency or power in a lawful manner, and authority to lend money at a legal rate of interest does not imply authority to violate the law by lending at a usurious rate. Call *v.* Palmer, 116 U. S. 98-102, 6 Sup. Ct. 301, 29 L. Ed. 559. From this it necessarily follows that the plaintiff, Mrs. Little, not having expressly authorized her agent to collect usurious commissions, she cannot be held on the principle of agency to have authorized the agent by implication of law so to do, so as to bring the transaction to which she in no manner had given her consent, and of which she had no knowledge, within the influence of the penal statute quoted, whereby her rights, those of an innocent party, are forfeited. In such cases the law is well settled that the agents are constructively in collusion with the borrowers and the lenders are not particeps criminis. Webb on Usury (1899) § 93. In a case before the Supreme Court of the United States, very similar to the case now in judgment, involving the Iowa statutes on interest and usury, very similar to our own, that august tribunal said, in holding to the doctrine, the justness of which I commend: 'These decisions seem to be founded on plain principles of justice and right, for when two persons, the agent and borrower, conspire together for their own profit, to violate the law, how can punishment for their acts be justly imposed on an innocent third party, the lender?' Call *v.* Palmer, 116 U. S. 98-102, 6 Sup. Ct. 301, 29 L. Ed. 559."

21. Stout *v.* Rider, 12 Hun (N. Y.) 574.

In VanWyck *v.* Walters, 16 Hun (N. Y.) 209, it was held that where one of several trustees is shown to have exacted a bonus, the burden is upon the defendant to show sanction by the others.

22. *United States.* — Ewing *v.* Howard, 7 Wall. 499; Scott *v.* Lloyd, 9 Pet. 418; Buckingham *v.* McLean, 13 How. 151, 171; McAleese *v.* Goodwin, 32 U. S. App. 650, 69 Fed. 759, 16 C. C. A. 387; Dygert *v.* Vermont Loan & T. Co., 94 Fed. 913; *In re* Wilde's Sons, 133 Fed. 562, *affirmed*, 144 Fed. 972, 75 C. C. A. 601; Wood *v.* Babbitt, 149 Fed. 818.

Alabama. — Woolsey *v.* Jones, 84 Ala. 88, 4 So. 190; Smith *v.* Lehman, 85 Ala. 394, 5 So. 204.

Arkansas. — Baird *v.* Millwood, 51 Ark. 548, 11 S. W. 881; Taylor *v.* Van Buren Bldg. Assn., 56 Ark. 340, 19 S. W. 918; Holt *v.* Kirby, 57 Ark. 251, 21 S. W. 432; Richardson *v.* Shattuck, 57 Ark. 347, 21 S. W. 478; Garvin *v.* Linton, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; Jarvis *v.* So. Grocery Co., 63 Ark. 225, 38 S. W. 148; Citizens' Bank *v.* Murphy, 83 Ark. 31, 102 S. W. 697.

Georgia. — Holland *v.* Chambers, 22 Ga. 193; Hudson *v.* Equit. Mtg. Co., 100 Ga. 83, 26 S. E. 75; Finney *v.* Equitable Mtg. Co., 111 Ga. 108, 36 S. E. 461; Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

Illinois. — Puterbaugh *v.* Farrell, 73 Ill. 213; Wilson *v.* Kirby, 88 Ill. 566; Boylston *v.* Bain, 90 Ill. 283; Kihlholz *v.* Wolf, 103 Ill. 362; Abbott *v.* Stone, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60; Gantzer *v.* Schmeltz, 206 Ill. 560, 69 N. E. 584.

Indian Territory. — Smith *v.* Neeley, 2 Ind. Ter. 651, 53 S. W. 450; Carder *v.* Wallace, 3 Ind. Ter. 508, 61 S. W. 988.

Iowa. — Hough *v.* Hamlin, 57 Iowa 359, 10 N. W. 680; Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190; Stoddard *v.* Lloyd, 79 Iowa 11, 44 N. W. 207; Amerman *v.* Ross, 84 Iowa 359, 51 N. W. 6; Richards *v.* Purdy,

usurious intent or prove facts from which the intent will be presumed.[23]

b. *Particular Instances.* — Where there are several parties plaintiff or defendant in a case, they will not be presumed, in the absence of proof creating a *prima facie* case against them, to be in *pari delicto* with one who has been shown to have violated the usury laws, but the burden rests upon the party attacking the transaction to show participation in or sanction by the other defendants.[24] Should the defendant succeed in proving that a prior security was usurious and the one sued upon given in substitution therefor, it is incumbent upon the plaintiff to purge the transaction of the presumption of

90 Iowa 502, 58 N. W. 886, 48 Am. St. Rep. 458.

Kansas. — Lusk *v.* Smith, 71 Kan. 550, 81 Pac. 173; Lathrop *v.* Davenport, 20 Kan. 285.

Kentucky. — Newman *v.* Blades, 21 Ky. L. Rep. 1353, 54 S. W. 849; Ludlow *v.* Ludlow Coal Co., 23 Ky. L. Rep. 1815, 66 S. W. 615.

Maine. — Warren *v.* Coombs, 20 Me. 139.

Maryland. — Rappanier *v.* Bannon, 8 Atl. 555; Williams *v.* Banks, 19 Md. 22.

Minnesota. — Lukens *v.* Hazlett, 37 Minn. 441, 35 N. W. 265; Bishop *v.* Corbitt, 40 Minn. 200, 41 N. W. 1030; Phelps *v.* Montgomery, 60 Minn. 303, 62 N. W. 260.

Nebraska. — Allen *v.* Dunn, 71 Neb. 831, 99 N. W. 680; Olmstead *v.* New England Mtg. Security Co., 11 Neb. 487, 9 N. W. 650; New England Mtg. Sec. Co. *v.* Sandford, 16 Neb. 689, 21 N. W. 394.

New Jersey. — Grosvenor *v.* Flax etc. Mfg. Co., 2 N. J. Eq. 453; Brolasky v. Miller, 8 N. J. Eq. 789; Barcalow *v.* Sanderson, 17 N. J. Eq. 460; Conover *v.* Van Mater, 18 N. J. Eq. 481; Taylor *v.* Morris, 22 N. J. Eq. 606; Chew *v.* Ferrari, 29 N. J. Eq. 380; Berdan *v.* School Dist. No. 38, 47 N. J. Eq. 8, 21 Atl. 40.

New York. — Jennings *v.* Kosmak, 19 Misc. 433, 43 N. Y. Supp. 1134; Newman *v.* Simpson, 31 App. Div. 628, 54 N. Y. Supp. 1040; Friedman *v.* Bruner, 25 Misc. 474, 54 N. Y. Supp. 997; Reich *v.* Cochran, 102 N. Y. Supp. 827; Ferguson *v.* Bien, 47 Misc. 618, 94 N. Y. Supp. 459; Baldwin *v.* Doying, 114 N. Y. 452, 21 N. E. 1007; Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379; Algur *v.* Gardner, 54 N. Y. 360; Haughwout *v.* Garrison, 69 N. Y. 339; Guardian Mut. L. Ins. Co. *v.* Kashaw, 66 N. Y. 544; Valentine *v.* Conner, 40 N. Y. 248, 100 Am. Dec. 476; Thurston *v.* Cornell, 38 N. Y. 281; Thomas *v.* Murray, 32 N. Y. 605; Cutler *v.* Wright, 22 N. Y. 472; Seymour *v.* Marvin, 11 Barb. 80.

Oregon. — Nunn *v.* Bird, 36 Or. 515, 59 Pac. 808; Poppleton *v.* Nelson, 12 Or. 349, 7 Pac. 492.

South Carolina. — New England Mtg. Sec. Co. *v.* Baxley, 44 S. C. 81, 21 S. E. 444, 885.

Tennessee. — Hughes *v.* Marquet, 85 Tenn. 127, 2 S. W. 20.

Texas. — Rutherford *v.* Smith, 28 Tex. 322; Peightal *v.* Cotton States etc., 25 Tex. Civ. App. 390, 61 S. W. 428; Hillsboro Oil Co. *v.* Citizens' Nat. Bank, 32 Tex. Civ. App. 610, 75 S. W. 336.

Vermont. — McDaniels *v.* Barnum, 5 Vt. 279.

Virginia. — Harnsbarger *v.* Kinney, 6 Gratt. 287.

Wisconsin. — Hale *v.* Haselton, 21 Wis. 320.

23. Moody *v.* Hawkins, 25 Ark. 191; Haughwout *v.* Garrison, 69 N. Y. 339; Valentine *v.* Conner, 40 N. Y. 248, 100 Am. Dec. 476; Thomas *v.* Murray, 32 N. Y. 605.

When the defendant in an action on a promissory note admits enough to make out a *prima facie* case for the plaintiffs, and sets up the defense of usury, it is incumbent on him to establish the same by evidence, and, if he fails to do so, the court may direct a verdict for the plaintiff. Finney *v.* Equitable Mtg. Co., 111 Ga. 108, 36 S. E. 461.

24. Stout *v.* Rider, 12 Hun (N. Y.) 574.

In Van Wyck *v.* Walters, 16 Hun

usury.[25] Likewise, an endorsee of a note shown to be usurious in its inception has the onus of proving that he is an innocent holder for a valuable consideration.[26] One seeking to show that a note bearing interest prior to its date is usurious, must establish that fact by a preponderance of the evidence.[27] When it is alleged that a usurious transaction was carried on through an agent, the burden is on the party alleging the same.[28] Any device alleged to have been employed to evade the usury law must be proven by him who seeks to evade the transaction.[29]

(N. Y.) 209, it was held that where in an action to foreclose a mortgage owned by a trust estate, it appeared that one of the trustees received a usurious bonus, the mortgage is not avoided thereby, unless it be shown that the same was received by the authority or with the knowledge of the other trustees.

25. Stanley *v.* Whitney, 47 Barb. (N. Y.) 586.

26. Simpson *v.* Hefter, 42 Misc. 482, 87 N. Y. Supp. 243; Seymour *v.* Strong, 1 Hill (N. Y.) 563; State Sav. Bank *v.* Scott, 10 Neb. 83, 4 N. W. 314.

In McDonald *v.* Aufdengarten, 41 Neb. 40, 59 N. W. 762, the court said: "The uncontradicted proofs show that the notes sued on were renewals of numerous other notes which had been given by the defendant to the bank, but which had been returned to the defendant canceled. These canceled notes, the testimony of the witnesses above mentioned, and the bank-books were permitted to go before the jury for the purpose of establishing that the notes declared upon were renewals of others executed by defendant for the loan of money in excess of the legal or statutory rate. The criticism made upon this class of testimony in the brief of counsel is that the same was incompetent, until some evidence was first introduced tending to show that the plaintiff had notice or knowledge of the usurious transaction. Defendant was not required, under the authorities cited above, to establish in the first instance that plaintiff was aware of the consideration for which the notes were given; but it was legitimate and proper for the defendant to prove that the notes were usurious, and having done this, the burden of showing good faith was on plaintiff below."

27. Cole *v.* Horton (Tex. Civ. App.), 61 S. W. 503; Marvin *v.* Feeter, 8 Wend. (N. Y.) 532.

28. Where in an action upon a promissory note it affirmatively appears that the plaintiff, to whom the defendant had applied for a loan of the money for which the note in suit was given, remitted to a person named a check for the full amount of the note, less a sum which the defendant had agreed to pay to a corporation for negotiating the loan, the check being payable to the order of the person named therein as agent of the defendant, evidence which showed merely that this person was not the defendant's agent to borrow the money, and that he paid over to the defendant a sum less than that named in the check, was not sufficient to show that the transaction was usurious. It was incumbent upon the defendant to show further that the payee of the check was in fact the plaintiff's agent, and that as such he kept a portion of the money with a view to exacting usury on the loan. Finney *v.* Equitable Mtg. Co., 111 Ga. 108, 36 S. E. 461.

In Matthews *v.* Coe, 70 N. Y. 239, it was held that a contract between a commission merchant and a dealer in produce, by which the former agrees to advance money at the legal rate of interest to enable the dealer to purchase or carry his produce, and is also to receive a percentage upon the money advanced as a commission for the care, management and sale of the property, is not per se usurious; the burden is upon the party seeking to impeach the transaction to show a guilty intent and that the contract was a cover for usury.

29. Moody *v.* Hawkins, 25 Ark. 191.

C. Admissibility. — a. *In General.* — The common-law disability of interested parties to testify was largely removed as to usury at an early day.[30] In those states, however, in which usury is made a crime, testimony which might be incriminating is of course privileged.[31]

b. *Circumstantial Evidence.* — Circumstantial evidence is freely received upon the question of guilty knowledge. The situation and object of the parties at the time of the loan, as well as the time, manner and place of payment, are all proper subjects for the consideration of the court or jury.[32] In actions on promissory notes, in which usury is pleaded as a defense, evidence tending to show the transaction from which they originated, the amount of defendant's indebtedness, the rate of interest agreed to be charged, and that such interest was the consideration for the notes, is admissible; likewise, all notes, deeds, mortgages, receipts and papers pertaining

Where a party sets up that commissions on moneys advanced him by commission merchants, in their course of dealing, are so high as to amount to a disguised act of usury, the burden of proof is on him. Seymour *v.* Marvin, 11 Barb. (N. Y.) 80.

30. Paul *v.* Meek, 6 Ala. 753; Banner *v.* Gregg, 1 Har. (Del.) 523; Goodwin *v.* Appleton, 22 Me. 453; Vermilyea *v.* Rogers, 4 Hill (N. Y.) 567; Henry *v.* Salina Bank, 5 Hill (N. Y.) 523.

In Bolling *v.* Logan, 4 Ala. 169, the court said: "The act to suppress usury (Aik. Dig. 437, § 5), provides that the borrower, or party to the usurious contract from whom usury is taken, shall be a good and sufficient witness to establish that fact unless the person against whom such evidence is offered to be given will deny upon oath, in open court, the truth of what such witness offers to swear against him. The permission thus given to the defendant is a personal privilege which he may exercise or not, at his election. It appears that Bolling did not desire to interpose the defense pleaded by his co-defendant, and declined to give testimony, and we feel very clear in the opinion that he could not be compelled to do so."

But see Myrick *v.* Hasey, 27 Me. 9, 46 Am. Dec. 583, *holding* that where a defendant was the maker of a negotiable note, he will not be permitted to prove usury by his own oath in defense, where suit is brought by an indorsee.

31. Henry *v.* Salina Bank, 3 Denio (N. Y.) 593; Savage *v.* Todd, 9 Paige Ch. (N. Y.) 578.

In Burns *v.* Kempshall, 24 Wend. (N. Y.) 360, where a note had been transferred by the payee, and an action was brought upon it by the holder against the maker, the payee, called as a witness by the maker, was held to be privileged from answering questions put to him for the purpose of showing any agreement respecting the note or the consideration thereof, or any payment thereupon to him, the defendant having avowed that his defense was usury, and that usurious interest had been received by the payee; as the tendency of answers might be to subject him either to a penalty or to an indictment for a misdemeanor.

32. Train *v.* Collins, 2 Pick. (Mass.) 145; Seekel *v.* Norman, 71 Iowa 264, 32 N. W. 334; Tarleton *v.* Emmons, 17 N. H. 43; Quackenbos *v.* Sayer, 62 N. Y. 344; Knickerbocker L. Ins. Co. *v.* Nelson, 7 Abb. N. C. (N. Y.) 170, *affirming* 13 Hun 321.

Direct evidence as to a usurious agreement is not absolutely necessary. It may be proved by facts and circumstances. Guenther *v.* Amsden, 16 App. Div. 607, 44 N. Y. Supp. 982.

In Furr *v.* Keesler, 3 Ga. App. 188, 59 S. E. 596, it was held that while it is essential to constitute usury that there should be at the

to the transaction.[33] Further than that, extrinsic evidence may, in any case, be admitted to show the corrupt character of the transaction.[34]

c. *Parol Evidence.* — With respect to parol evidence, proof of usury is an exception to the rule prohibiting the terms of a written instrument to be disputed by showing a contemporaneous parol agreement. Resort may at any time be had to parol evidence to disclose the true nature of the transaction and the method used to evade the usury law.[35] That an instrument is usurious may be

time the contract is executed an intent on the part of the lender to take or charge for the use of the money a higher rate of interest than that allowed by law, yet this intention and the device or contract whereby usury is to be taken or reserved may be shown by circumstantial, as well as by direct proof. There was sufficient evidence in this case to justify the verdict.

33. Holland *v.* Chambers, 22 Ga. 193.

In an action on a promissory note, where usury is pleaded, a paper executed by the payee at the time of the transfer and delivery of the note, and connected therewith, though not of itself sufficient to prove usury, is admissible in evidence as conducing to such result. Tucker *v.* Wilamouicz, 8 Ark. 157.

Jackson *v.* American Mtg. Co., 88 Ga. 756, 15 S. E. 812. Where usury is pleaded to an action on a promissory note, deeds of even date with the note and executed to vest title in the lender as security for the loan, are admissible in evidence for the plaintiff to show the intention of the parties as to the real situs of the contract, and what state or country they had reference to in fixing the rate of interest.

34. McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587; Bank of U. S. *v.* Waggener, 9 Pet. (U. S.) 378; Scott *v.* Lloyd, 9 Pet. (U. S.) 418; Siter *v.* Sheets, 7 Ind. 132; Wetter *v.* Hardesty, 16 Md. 11; Jones *v.* Cannady, 15 N. C. 86.

Where usury is alleged to be concealed under the form of exchange, evidence on both sides is admissible to show the rate of exchange. Andrews *v.* Pond, 13 Pet. (U. S.) 65.

35. *United States.* — Scott *v.* Lloyd, 9 Pet. 418; McAleese *v.* Goodwin, 69 Fed. 759, 16 C. C. A. 387.

Arkansas. — Levy *v.* Brown, 11 Ark. 16; Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534.

Georgia. — Wilkinson *v.* Wooten, 59 Ga. 584; Whilden *v.* Milledgeville Bkg. Co., 3 Ga. App. 69, 59 S. E. 336.

Iowa. — Seekel *v.* Norman, 71 Iowa 264, 32 N. W. 334.

Kentucky. — Lear *v.* Yarnel, 3 A. K. Marsh. 419.

Maryland. — Wetter *v.* Hardesty, 16 Md. 11.

Massachusetts. — Hollenbeck *v.* Shutts, 1 Gray 431; Rohan *v.* Hanson, 11 Cush. 44; Train *v.* Collins, 2 Pick. 145.

Minnesota. — Stein *v.* Swenson, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234.

Mississippi. — Luckett *v.* Henderson, 12 Smed. & M. 334; Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482.

Nebraska. — Koehler *v.* Dodge, 31 Neb. 328, 47 N. W. 913, 28 Am. St. Rep. 518.

New Jersey. — Denyse *v.* Crawford, 18 N. J. L. 325.

New York. — Mudgett *v.* Goler, 18 Hun 302; Davis *v.* Marvine, 160 N. Y. 269, 54 N. E. 704; Hammond *v.* Hopping, 13 Wend. 505; Austin *v.* Fuller, 12 Barb. 360; Merrills *v.* Law, 9 Cow. 65.

Texas. — Roberts *v.* Coffin, 22 Tex. Civ. App. 127, 53 S. W. 597.

Wisconsin. — St. Maries *v.* Polleys, 47 Wis. 67, 1 N. W. 389.

The law will not be defeated by any device to cover usury, and evidence, either documentary or parol, is always admissible to show that a transaction apparently innocent is

shown by the acts and declarations of the parties at the time of the execution.[36]

d. *Other Usurious Transactions.* — Evidence of other usurious transactions is not competent,[37] unless shown to be part of a general usurious arrangement connected with the matter in suit.[38]

e. *Proof of Custom.* — Proof of a custom to take a higher rate of interest than allowed by law is not admissible, for if a contract is usurious, no custom can legalize it.[39] Neither is it competent to show the general reputation of the defendant as a usurer.[40]

D. Weight and Sufficiency. — a. *In General.* — It has been held that the defense of usury must be clearly shown[41] or that it

usurious, or vice versa. Macomber *v.* Dunham, 8 Wend. (N. Y.) 550.

The circumstance that a contract is in writing does not exclude parol evidence that the written instrument is but a cloak for a usurious transaction. Campbell *v.* Connable, 98 N. Y. Supp. 231.

In an issue of usury, where a sum of money apparently in excess of the legal rate of interest was retained by the lender, it is competent for a witness to testify that part of the same was received in payment of an independent claim, and not reserved as interest on the loan. Patton *v.* Bank of La Fayette, 124 Ga. 965, 53 S. E. 664.

36. Ripley *v.* Mason, Hill & D. Supp. (N. Y.) 66; Fellows *v.* Wallace, 8 Abb. N. C. (N. Y.) 351.

37. Eagle Bank *v.* Rigney, 33 N. Y. 613; Willard *v.* Pinard, 65 Vt. 160, 26 Atl. 67; Ottillie *v.* Waechter, 33 Wis. 252; Brinckerhoff *v.* Foote, Hoffm. Ch. (N. Y.) 291; Ross *v.* Ackerman, 46 N. Y. 210; Jackson *v.* Smith, 7 Cow. (N. Y.) 717.

38. Keutgen *v.* Parks, 2 Sandf. (N. Y.) 60.

39. Dunham *v.* Gould, 16 Johns. (N. Y.) 367; Bank *v.* Wager, 2 Cow. (N. Y.) 712; Pratt *v.* Adams, 7 Paige Ch. (N. Y.) 615.

40. Cox *v.* Brookshire, 76 N. C. 314.

The general reputation of the defendant as a usurer, or that he has taken usury in other cases and habitually, is not a foundation for presuming usury in a particular loan. Jackson *v.* Smith, 7 Cow. (N. Y.) 717.

41. *United States.* — Wood *v.* Babbitt, 149 Fed. 818.

Maryland. — Wetter *v.* Hardesty, 16 Md. 11.

Michigan. — Orr *v.* Lacey, 2 Dougl. 230.

New Jersey. — Rowland *v.* Rowland, 40 N. J. Eq. 281; New Jersey Pat. T. Co. *v.* Turner, 14 N. J. Eq. 326; Gillette *v.* Ballard, 25 N. J. Eq. 491; Conover *v.* VanMater, 18 N. J. Eq. 481.

New York. — Bayliss *v.* Cockcroft, 81 N. Y. 363.

Oregon. — Poppleton *v.* Nelson, 12 Or. 349, 7 Pac. 492.

Virginia. — Evans *v.* Rice, 96 Va. 50, 30 S. E. 463.

To establish a defense of usury it must be clearly shown. Usury will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached. Leonhard *v.* Flood, 68 Ark. 162, 56 S. W. 781.

Where a transaction apparently lawful in all respects is attacked as usurious, it is incumbent upon the person making such attack to affirmatively show that the same is thus tainted; and the mere fact that the amount received by the debtor is less than the apparent principal of the debt, and that treating the amount thus received as the true principal would render the transaction usurious, will not alone constitute proof of usury. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374.

The mere fact that a promissory note bears date prior to that of the trust deed by which it is secured is not alone sufficient to show usury, since it may be that the agreement was made on the date of the note and the execution of the deed for some reason delayed. "The pre-

must be satisfactorily,[42] or strictly,[43] or distinctly proved[44] or established with reasonable certainty,[45] or that the proof must be clear

sumption when the transaction is capable of that solution is that it was lawful." Cole *v.* Horton (Tex. Civ. App.), 61 S. W. 503.

Evidence Held Sufficient. — Egbert *v.* Peters, 35 Minn. 312, 29 N. W. 134; Holmen *v.* Rugland, 46 Minn. 400, 49 N. W. 189; Dell *v.* Oppenheimer, 9 Neb. 454, 4 N. W. 51; Parsons *v.* Babcock, 40 Neb. 119, 58 N. W. 726; Lansing *v.* McKillup, 1 Cow. (N. Y.) 35; Pratt *v.* Elkins, 80 N. Y. 198; Bliven *v.* Lydecker, 130 N. Y. 102, 28 N. E. 625, *reversing* 55 Hun 171, 7 N. Y. Supp. 867; Appeal of Duquesne Bank, 74 Pa. St. 426.

Evidence Held Insufficient. *New Hampshire.* — Vesey *v.* Ockington, 16 N. H. 479.

New Jersey. — Morris *v.* Taylor, 22 N. J. Eq. 438.

New York. — Cohen *v.* Waldron, 17 Misc. 639, 40 N. Y. Supp. 31; Culver *v.* Pullman, 59 Hun 615, 12 N. Y. Supp. 663; Morrison *v.* Verdinal, 53 Hun 63, 5 N. Y. Supp. 606; Tallman *v.* Sprague, 60 N. Y. Super. 425, 18 N. Y. Supp. 207; Faulkner *v.* McNeil, 78 Hun 505, 29 N. Y. Supp. 551.

Oregon. — Sujette *v.* Wilson, 13 Or. 514, 11 Pac. 267.

South Carolina. — Moffat *v.* McDowall, 1 McCord Eq. 434.

Vermont. — Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144.

Virginia. — Gimmi *v.* Cullen, 20 Gratt. 439.

In Leonhard *v.* Flood, 68 Ark. 162, 56 S. W. 781, it appeared from the evidence that a commission was paid by a borrower to an agent of a money lender for his services in obtaining a loan from his principal. It further appeared that upon such loan, the agent became surety and procured another to become such, in order to obtain the loan which he was employed by the borrower to negotiate. *Held*, that such evidence was not sufficient to show that the transaction was usurious, in a jurisdiction where the effect of usury is the forfeiture of both principal and interest.

42. Evans *v.* Rice, 96 Va. 50, 30 S. E. 463; White *v.* Benjamin, 138 N. Y. 623, 33 N. E. 1037.

The evidence to establish usurious contracts should be clear and satisfactory, for, when shown, they forfeit the whole debt, principal as well as interest. Usury will not be inferred, where from the circumstances the opposite conclusion can be reasonably and fairly reached. Citizens' Bank *v.* Murphy, 83 Ark. 31, 102 S. W. 697.

43. *In re* Worth, 130 Fed. 927; Conover *v.* Van Mater, 18 N. J. Eq. 481; Smith *v.* Paton, 6 Bosw. (N. Y.) 145; Taylor *v.* Morris, 22 N. J. Eq. 606; Mosier *v.* Norton, 83 Ill. 519. See also Robbins *v.* Legg, 80 Minn. 419, 83 N. W. 379.

In Evans *v.* Rice, 96 Va. 50, 30 S. E. 463, the court said: "It is well to remember that usury when charged, must be strictly proved. It was said in Brockenbrough's Exrs. *v.* Spindle's Admrs., 17 Grat. 21, 'that it should be proved beyond a rational doubt to the contrary.' We should with reluctance accept the sentence quoted as accurately expressing the degree of proof required in such cases. It seems to us somewhat severe in its terms, but we are warranted, and indeed compelled, to hold that usury must be proved by a clear and satisfactory preponderance of evidence."

44. Jennings *v.* Kosmak, 19 Misc. 433, 43 N. Y. Supp. 1134.

Testimony of witnesses that according to their recollection, ten or twelve per cent. was charged on a loan, is insufficient to establish usury; the terms and nature of the usurious agreement, and the amounts of payments made which are claimed to be usurious must be distinctly proven. Nance *v.* Gray, 143 Ala. 234, 38 So. 916.

45. White *v.* Benjamin, 138 N. Y. 623, 33 N. E. 1037.

While to support a plea of usuary filed for the purpose of invalidating a deed given to secure a debt, the evidence need not establish the usury with the particularity required when

and cogent,[46] or clear and convincing,[47] or clear and indubitable.[48] And there are cases holding that usury must be proved beyond a reasonable doubt,[49] although it has been said that the latter does not mean that the proof should be equivalent to that required in criminal cases.[50] But by the weight of authority evidence in usury cases is governed by the ordinary rule in civil actions, and nothing more is required to make out a case than a clear preponderance of evidence.[51]

b. *Custom To Take Usury.* — Proof that a party was accustomed to take usury and did actually do so near the time when the alleged transaction took place, is not sufficient to sustain a finding that usury was committed. It must be brought home to the subject of the suit.[52]

c. *Usury Must Relate to Loan of Money.* — In any case, in order to support a finding of usury, the weight of the evidence must be directed to establish an arrangement for the loan or forbearance of money; and this should never be confused with a sale or exchange.[53]

it is sought to recover back or set off the usury, still the evidence must show with certainty that the transaction was tainted with usury. Equitable Mtg. Co. *v.* Watson, 116 Ga. 679, 43 S. E. 49.

46. In Poppleton *v.* Nelson, 12 Or. 349, 7 Pac. 492, the court said: "As the defense of usury involves a forfeiture, it is considered as an unconscionable defense and a strict one. To establish such a defense the court requires clear and cogent proof, and will not accept vague inferences, or mere probabilities, or resort to conjectures, to aid the defense. The burden of proof is on the defense, and he must sustain his defense by a clear preponderance of the evidence." But see Nunn *v.* Bird, 36 Or. 515, 59 Pac. 808.

47. The evidence to sustain a corrupt and usurious agreement must be clear, convincing, and consistent with the presence of usury. *In re* Kellogg, 113 Fed. 120.

48. Usury cannot be proved by suspicious circumstances, but must be established by clear and indubitable proof. Short *v.* Post, 58 N. J. Eq. 130, 42 Atl. 569.

49. Conover *v.* Van Mater, 18 N. J. Eq. 481; Berdan *v.* School Dist. No. 38, 47 N. J. Eq. 8, 21 Atl. 40.

The facts necessary to constitute usury must be clearly established beyond reasonable doubt by the decided preponderance of evidence. It is not enough that the circumstances proved, render it highly probable that there was a corrupt bargain; such a bargain must be proved and not left to conjecture. Wood *v.* Babbitt, 149 Fed. 818.

50. Wheatley *v.* Waldo, 36 Vt. 237.

51. *Minnesota.* — Phelps *v.* Montgomery, 60 Minn. 303, 62 N. W. 260. But see Yellow Medicine Co. Bank *v.* Cook, 61 Minn. 452, 63 N. W. 1093.

New Jersey. — Rowland *v.* Rowland, 40 N. J. Eq. 281; Chew *v.* Ferrari, 29 N. J. Eq. 380.

New York. — White *v.* Benjamin, 138 N. Y. 623, 33 N. E. 1037.

Oregon. — Poppleton *v.* Nelson, 12 Or. 349, 7 Pac. 492.

Vermont. — Wheatley *v.* Waldo, 36 Vt. 237; McDaniels *v.* Barnum, 5 Vt. 279.

A preponderance of evidence only is sufficient upon which to establish usury. An instruction to the effect that the defense of usury is an unconscionable one, and that the proof to establish it must be clear and cogent should be refused. Nunn *v.* Bird, 36 Or. 515, 59 Pac. 808.

52. Brinckerhoff *v.* Foote, 1 Hoff. Ch. (N. Y.) 291; Moffat *v.* McDowall, 1 McCord (S. C.) 434.

53. Suydam *v.* Westfall, 4 Hill (N. Y.) 211.

In West *v.* Belches, 5 Munf. (Va.) 187, it was held that it was not sufficient that a sale was a cover for usury that it was made on credit

d. *Usury in Former Dealings.* — Evidence of usury in former dealings of the parties is not so correlated to a note or draft sued upon that it will support a finding of usury,[54] but a general arrangement for usurious accommodation, under which the loan in question was made, is.[55] In this connection, the taint of usury might be sufficiently established by showing that the note in suit is a renewal note given for a former usurious one, though the later note bears interest at a legal rate.[56]

e. *Proof of Usury Not Apparent on Face of Instrument.* — If an instrument does not upon its face import usury, there must be proof of some corrupt device or shift to cover usury within the contemplation of the parties.[57]

f. *Proof of Amount of Usury.* — Where in an action on a note the defense of usury is presented, the person presenting it must furnish sufficient evidence to enable the court to determine from the record the amount of usury, if any, embraced in the transaction, so that the court may correctly or approximately adjudge the rights of the parties.[58]

g. *Proof of Usurious Contract.* — The fact that a larger amount has been paid for the use of money than the legal rate of interest does not establish usury, in the absence of proof of a usurious contract pursuant to which the interest was paid, though the excess was paid as interest.[59]

for a much greater sum than the seller offered the property for cash, with interest, and that the seller was accustomed to loan money for usurious interest; there being no evidence that a loan of money was intended by the parties.

54. Warren *v.* Coombs, 20 Me. 139.

55. Where usurious interest has been paid for two years on a note, in accordance with the common course of dealing between the parties, and it appears that there was no stipulation regarding interest, it was held that a jury was authorized in finding that there was a tacit understanding at the beginning that usurious interest should be paid. Storer *v.* Coe, 2 Bosw. (N. Y.) 661; Lockwood *v.* Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78.

56. Citizens Nat. Bank *v.* Donnell, 172 Mo. 384, 72 S. W. 925.

57. Omaha Hotel Co. *v.* Wade, 97 U. S. 13; Bank of U. S. *v.* Waggener, 9 Pet. (U. S.) 378; Moody *v.* Hawkins, 25 Ark. 191.

58. Oman *v.* American Nat. Bank, 32 Ky. L. Rep. 502, 106 S. W. 277. See also Equitable Mtg. Co. *v.* Watson, 116 Ga. 679, 43 S. E. 49.

In Carder *v.* Wallace, 3 Ind. Ter. 508, 61 S. W. 988, which was an action on a note, defendant pleaded usury, but was unable to state what amounts he had paid as interest or otherwise on the notes in question, or how he had repaid small sums of money loaned to him, for which the note was executed. It was held that the evidence was insufficient to sustain the defendant's burden of proof.

59. *In re* Wilde's Sons, 133 Fed. 562; White *v.* Benjamin, 138 N. Y. 623, 33 N. E. 1037; Bosworth *v.* Kinghorn, 94 App. Div. 187, 87 N. Y. Supp. 983.

In Rosenstein *v.* Fox, 150 N. Y. 354, 44 N. E. 1027, the court said: "Usury, as a defense to an action on a promissory note given for a loan of money, is not made out by testimony of the defendant to the effect that upon several occasions after the loan was made he paid the holder of the note more than was due at that time for legal interest, without proof of any usurious agreement between the parties by which

2. Actions by or Against Third Persons. — A. Presumptions and Burden of Proof. — The presumptions are against usury.[60] Where it appears in evidence that a note was usurious in its inception, in an action on the same by a purchaser from the payee the burden is upon him of showing that he took the note in good faith and without notice of any infirmity.[61] But where there is no evidence that a note was usurious in its inception, the burden is upon the maker to show that a purchaser thereof had notice of its usurious character.[62] Where a chattel mortgage is grossly usurious, one who alleges that he bought it for value before maturity, from the mortgagee's agent, must show his good faith in the purchase.[63]

B. Admissibility. — Any evidence legally competent and relevant to the issue is admissible.[64] It seems that declarations of the original parties to the transaction are not admissible.[65]

C. Weight and Sufficiency. — In actions brought by or against third persons to an original transaction, it is sometimes held that usury must be strictly proved,[66] although the general rule is that a preponderance of evidence only is sufficient as in ordinary civil actions.[67]

the defendant was to pay more than the legal interest for the money loaned."

60. Barthell *v.* Jensen, 86 Iowa 736, 53 N. W. 124.

In Murray *v.* Barney, 34 Barb. (N. Y.) 336, it appeared that a bank in Oswego had discounted paper payable in New York, and charged exchange. The court refused to presume, in the absence of evidence, and in opposition to a finding of a referee, that the bank made a profit by the charge of exchange.

61. Simpson *v.* Hefter, 42 Misc. 482, 87 N. Y. Supp. 243; Richardson *v.* Stone, 32 Neb. 617, 49 N. W. 763; Male *v.* Wink, 61 Neb. 748, 86 N. W. 472.

62. Haynes *v.* Gay, 37 Wash. 230, 79 Pac. 794.

63. Costigan *v.* Howard, 100 Mich. 335, 58 N. W. 1116.

64. Schnitzer *v.* Husted, 14 N. Y. Supp. 918.

In Tucker *v.* Wilamouicz, 8 Ark. 157, which was an action on a note by the endorsee thereof, usury was pleaded as a defense. It was held that a paper executed by the payee at the time of the transfer and delivery of the note, and connected therewith, though not of itself sufficient to prove usury, was admissible in evidence, if conducing to such result.

65. In Richardson *v.* Field, 6 Me. 303, a right in an equity of redemption was purchased by a party who afterwards took an assignment of the mortgage, and immediately mortgaged the same land to the original mortgagee in fee. This was a writ of entry brought by the assignee against the mortgagor. It was held that the declarations of the original mortgagee were not admissible to prove usury in the first mortgage.

To invalidate a bond in the hands of an innocent holder, on the ground of usury in the origin of the note, strict proof will be required. Stock *v.* Parker, 2 McCord Eq. (S. C.) 376.

66. In White *v.* Benjamin, 138 N. Y. 623, 33 N. E. 1037, it was held that where a party sets up a defense of usury to a note more than five years subsequent to the death of the payee, having in the meantime paid the annual interest on the note, and alleging the usury for the first time when called upon to pay the principal, he cannot complain if the rules of evidence established for the protection of the estates of decedents are rigidly applied.

67. Barthell *v.* Jensen, 86 Iowa 736, 53 N. W. 124. And see Klos-

III. PENAL ACTIONS.

1. Burden of Proof. — In an action for a penalty for charging or receiving usurious interest, the burden is on plaintiff to show that renewal notes given in lieu of old notes containing the usurious interest, were accepted by the defendant as actual payment.[68]

2. Admissibility. — In an action to recover a penalty for accepting usury, evidence is not admissible on behalf of defendant to the effect that plaintiff had brought similar actions on former occasions, or had a reputation for bringing such actions.[69]

Evidence Counteracting Evidence of Usury is admissible showing that the amount alleged as usurious was received by defendant as compensation for time and services.[70]

3. Weight and Sufficiency. — Where a *qui tam* action is brought to recover a penalty for taking or accepting usury, the illegal contract must be precisely set forth and proved.[71] The evidence to establish usury must be clear and satisfactory.[72]

terman *v.* Olcott, 25 Neb. 382, 41 N. W. 250; Bayliss *v.* Cockcroft, 81 N. Y. 363.

Where action was brought on a note alleged to have been procured by fraud, it appeared that the payee pretended to burn it in the presence of defendant, but afterwards transferred it for one-half its face value. It was held that the defense of usury was not sustained where the only evidence in respect thereto was a grave suspicion that the note had its inception at the time of the transfer. Vosburgh *v.* Diefendorf, 48 Hun 619, 1 N. Y. Supp. 58, judgment *affirmed*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836.

68. Kearney *v.* First Nat. Bank, 129 Pa. St. 577, 18 Atl. 598.

69. Russell *v.* Hearne, 113 N. C. 361, 18 S. E. 711.

70. In Hutchinson *v.* Hosmer, 2 Conn. 341, which was an action *qui tam* for usury, the defendant, having placed his defense on the ground that the sum received by him beyond the lawful interest was a compensation for time, trouble and expense in obtaining the money from certain banks and running his notes, offered in evidence sundry notes signed by him, payable at the banks specified, corresponding in date and amount with the statement, which, after being discounted at such banks, had been duly paid by the defendant, and were respectively endorsed "Paid at the bank." It was held that these notes were admissible as they conduced to prove the fact on which the defense rested.

71. Morrell *v.* Fuller, 7 Johns. (N. Y.) 402, 8 Johns. 218; Livermore *v.* Boswell, 4 Mass. 437.

72. Leonhard *v.* Flood, 68 Ark. 162, 56 S. W. 781.

In Barcalow *v.* Sanderson, 17 N. J. Eq. 460, it is held that while it is the court's duty to maintain the law against usury, and to carefully prevent its evasion, it will not enforce its severe penalties without evidence entirely satisfactory and free from doubt.

Full Proof. — Where action is brought for money had and received, to recover, by a third person, a penalty for accepting usurious interest, such action is a penal one and requires full proof. White *v.* Comstock, 6 Vt. 405.

Strict Proof Required. — Robbins *v.* Legg, 80 Minn. 419, 83 N. W. 379.

VALUE.

By John R. Berryman.

CROSS-REFERENCES:

Admissions;
Attorney and Client;
Bailments;
Carriers;
Eminent Domain;
Executors and Administrators;
Injuries to Person;
Insurance;
Larceny;
Master and Servant;
Physicians and Surgeons,
Replevin;
Sales;
Seduction;
Taxation;
Trover and Conversion.

Scope Note. — This article does not deal with the subject of value for the purpose of taxation in the form of special assessments or otherwise. With this exception, the aim has been to cover the topic except in so far as it has been elsewhere fully treated in this work in particular matters or forms of action.

I. JUDICIAL NOTICE.

1. Coin and Currency. — A. Domestic. — Judicial notice will be taken of the value of denominational coin of the United States,[1] and also of national currency notes.[2] When government currency is below par the fact is judicially noticed,[3] but it is otherwise as to the extent of the depreciation at any particular time.[4]

B. Foreign Coin, Currency and Bonds. — Judicial notice has been taken of the value of the English pound;[5] but the value of foreign currency will not be so noticed,[6] nor will the solvency of a foreign government which has issued bonds.[7]

2. Of Undervalue Assessments. — The fact that land is never assessed for purposes of taxation at its actual cash market value has been judicially noticed.[8]

3. Of Relative Prices in Nearby Towns. — Judicial notice has been taken of the geographical location of towns, the means of communication between them and of the fact that the market value of staple articles at places situated near each other could not vary greatly.[9]

4. Reliance on Certain Statements. — The fact that publications relating to the value of vessels are relied upon by insurers of and dealers therein for the purpose of ascertaining their condition, capacity, age and value will be judicially noticed.[10]

5. Not Taken of the Value of Insurance Policy. — The rule that courts notice ordinary mathematical propositions does not apply to the ascertainment of the net value of a life insurance policy depending partly on extraneous facts and partly on the accuracy of an intricate computation.[11]

1. Grant *v.* State, 55 Ala. 201; Ector *v.* State, 120 Ga. 543, 48 S. E. 315; Sims *v.* State, 1 Ga. App. 776, 57 S. E. 1029 (that a "quarter" means twenty-five cents); McDonald *v.* State, 2 Ga. App. 633, 58 S. E. 1067 (meaning of "greenbacks"); Daily *v.* State, 10 Ind. 536.

2. Gady *v.* State, 83 Ala. 51, 3 So. 429; Barddell *v.* State, 144 Ala. 54, 39 So. 975; Grant *v.* State, 55 Ala. 201; Joiner *v.* State, 124 Ga. 102, 52 S. E. 151; Keating *v.* People, 160 Ill. 480, 43 N. E. 724; State *v.* Moseley, 38 Mo. 380; Sanchez *v.* State, 39 Tex. Crim. 389, 46 S. W. 249.

3. Perrit *v.* Crouch, 5 Bush (Ky.) 199.

4. Letcher *v.* Kennedy, 3 J. J. Marsh. (Ky.) 701; Feemster *v.* Ringo, 5 T. B. Mon. (Ky.) 336. See article "Judicial Notice," Vol. VII, p. 905.

5. Johnston *v.* Hedden, 2 Johns. Cas. (N. Y.) 274.

6. Kermott *v.* Ayer, 11 Mich. 181.

7. Hebblethwaite *v.* Flint, 115 App. Div. 597, 101 N. Y. Supp. 43.

8. Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 82 S. W. 471.

9. Siegbert *v.* Stiles, 39 Wis. 533.

10. Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802.

11. Price *v.* Connecticut Mut. L. Ins. Co., 48 Mo. App. 281, 295.

II. PRESUMPTIONS.

1. As to Value of Gold Coin. — A gold coin is presumed to be of its face value.[12]

2. Of the Value of Securities. — In the absence of evidence showing the insolvency of the maker of a note or other legal defense to an action on it, the presumption is that it is worth the sum expressed on its face.[13]

The same presumption applies to corporate bonds,[14] and to judgments;[15] but it cannot be presumed that the stock of a corporation is worth par,[16] though such may be the rule as against trustees.[17]

12. State *v.* Faulk (S. D.), 116 N. W. 72.

13. *England.* — Mercer *v.* Jones, 3 Campb. 477; Evans *v.* Kymer, 1 Barn. & Ald. 528, 9 L. J. (O. S.) K. B. 92.

Alabama. — St. John *v.* O'Connel, 7 Port. 466.

Illinois. — American Exp. Co. *v.* Parsons, 44 Ill. 312.

Minnesota. — Hersey *v.* Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689; Johnson *v.* Dunn, 75 Minn. 533, 78 N. W. 98 (common law bond for payment of judgment).

Missouri. — Menkens *v.* Menkens, 23 Mo. 252.

New York. — Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Booth *v.* Powers, 56 N. Y. 22; Atkinson *v.* Rochester Prtg. Co., 43 Hun 167; Allen *v.* Suydam, 20 Wend. 321, 335.

North Carolina. — Moseley *v.* Johnson, 144 N. C. 257, 56 S. E. 922.

North Dakota. — Anderson *v.* First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

Notes Fraudulently Put in Circulation in such manner as to impose liability upon their maker to a *bona fide* holder are presumed to be worth their face. Metropolitan El. R. Co. *v.* Kneeland, 120 N. Y. 134, 24 N. E. 381, 17 Am. St. Rep. 619, 8 L. R. A. 253.

Such Presumption Is Not Rebutted by the protest of non-payment by the maker, if the note is guaranteed by others, in the absence of proof of their inability to pay. Menkens *v.* Menkens, 23 Mo. 252.

14. Henry *v.* North American R. Const. Co., 158 Fed. 79, 85 C. C. A. 409; Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179; Meixell *v.* Kirkpatrick, 29 Kan. 679.

How Presumption Rebutted. Under a statute expressing that "for the purpose of estimating damages, the value of a thing in action is presumed to be equal to that of the property to which it entitles its owner," the defendant in replevin for securities cannot rebut the presumption that they are worth their face and interest by evidence of their market value when the action was brought. The actual value of the securities could be shown by proof of payment in whole or in part, the total or partial inability of the makers to pay, their release, the invalidity of the securities or other matter affecting their value. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689, and cases cited.

15. Bryant *v.* Robinson, 97 Minn. 533, 105 N. W. 1134.

16. A Certificate of Stock is not an obligation to pay money, which is presumed to be worth its face because every one is presumed to be solvent. It is only evidence that the holder has an interest in the corporation and its franchises and property in the proportion that the stock held by him bears to the whole amount of stock; but it is no evidence of the financial standing of the corporation, nor of the value of its franchises and property. Stensgaard *v.* St. Paul R. E. T. Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

17. As Against Trustees, bonds, stocks, notes and accounts are *prima facie* evidence of their face value,

There is no presumption as to the value of obligations issued by a foreign state.[18]

3. Worth of Accounts. — Stated accounts[19] and unstated accounts are presumed to be worth their face value, though as to the latter the presumption is not strong.[20]

4. Of the Value of Property as Against a Wilful Wrongdoer. As against a wilful wrongdoer who has obtained possession of personal property and refused to produce it, the presumption is that it is of the finest quality.[21] As against a wrongdoer it will not be presumed that real estate will be of less value in a year or two than it is at the present time.[22]

5. As to Depreciation in Value. — It is not to be presumed that anything occurred to property to affect its value while it was in transit from vendor to vendee.[23]

6. As to the Value of Services. — The person who has rendered services is presumed to know their value.[24]

7. Compliance With Law and Use To Be Made of Condemned Land. It is to be presumed that the condemnor will comply with the law in the construction and operation of the improvement to be put on the land;[25] that the improvement will be properly operated,[26] though to the full extent of the necessities of the condemnor.[27]

8. Repeal of Franchise. — It will be presumed that a franchise will not be repealed.[28]

9. Against Party Failing To Produce Evidence. — In the absence of notice to produce receipts and books which tend to show the value of the services in dispute, the party may give parol proof of their contents if they are in possession of his adversary; if such proof is not clear every intendment and presumption is against him who might have removed all doubt.[29]

10. As to Competency of Witnesses. — Every person is presumed

notwithstanding an appraisement of them by persons appointed by a trustee. Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

18. Hebblethwaite *v.* Flint, 115 App. Div. 597, 101 N. Y. Supp. 43.

19. Casey *v.* Ballou Bkg. Co., 98 Iowa 107, 67 N. W. 98; O'Donoghue *v.* Corby, 22 Mo. 393.

20. Sadler *v.* Bean, 37 Iowa 439. See Doyle *v.* Eccles, 17 U. C. C. P. 644; Woodborne *v.* Scarborough, 20 Ohio St. 57.

21. Armory *v.* Delamirie, 1 Str. (Eng.) 504.

22. Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62.

23. Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342.

24. Stevens *v.* Walton, 17 Colo. App. 440, 68 Pac. 834.

25. See article "EMINENT DOMAIN," Vol. V, p. 214.

26. See article "EMINENT DOMAIN," Vol. V, p. 214.

27. See article "EMINENT DOMAIN," Vol. V, p. 213.

"**In the Absence of Any Proof on the Subject**, the presumption is that the bridge to be erected will be of such a character as to do the most injury to the remaining property of the land-owner." Hadley *v.* Freeholders, 73 N. J. L. 197, 62 Atl. 1132, *citing* local cases.

28. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223, 242.

29. Rossiter *v.* Baley, 13 S. D. 370, 83 N. W. 428. See article "PRESUMPTIONS," Vol. IX, p. 958 *et seq.*

to have some idea of the value of property which is in almost universal use;[30] but such presumption is not indulged concerning the market value of property.[31] The owner and possessor of real property for a series of years is presumed to be informed of its value and of the value of other nearby properties;[32] and the owner of chattels is presumed to know their approximate value though he does not deal in similar property.[33] A dealer in property is presumed to know the value of such articles as he handles,[34] and a farmer to know the value of a crop he raised.[35]

11. As to Witness' Meaning. — It is presumed that testimony concerning value means market value[36] with reference to the place in which the witness resides.[37]

III. BURDEN OF PROOF.

1. Value in Condemnation Proceedings. — The topic suggested is elsewhere discussed.[38]

2. Between Vendor and Vendee. — As between a vendor and a defaulting vendee who has made a private sale of the property, the latter must show that it brought its full market value.[39]

3. Value of Contingent Interest. — He who asserts that a contingent interest in land is without substantial value must establish the fact.[40]

4. Value of Property Charged. — The plaintiff in an action on an open account has the burden of proving the value of the property charged therein.[41]

5. Market Value. — If the price of a commodity at the time in question was affected by speculative manipulation, the party so alleging must show the price at which it would have been sold under

30. Reebie *v.* Brackett, 109 Ill. App. 631; Chicago City R. Co. *v.* T. W. Jones Furn. T. Co., 92 Ill. App. 507; Maxwell *v.* Habel, 92 Ill. App. 510; Sinamaker *v.* Rose, 62 Ill. App. 118; Tubbs *v.* Garrison, 68 Iowa 44, 25 N. W. 921; Thomason *v.* Capital Ins. Co., 92 Iowa 72, 61 N. W. 843.

In the Absence of Objection to the Competency of a Witness, he is presumed to have been qualified to testify to the value of the property in question. Durham & N. R. *v.* Trustees of Bullock Church, 104 N. C. 525, 10 S. E. 761.

31. Daly *v.* W. W. Kimball Co., 67 Iowa 132, 24 N. W. 756.

32. Spring Val. Water-Wks. Co. *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

33. Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114.

34. Reed *v.* New, 35 Kan. 727, 12 Pac. 139.

35. Union Pac. D. & G. R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731; Chicago, etc. R. Co. *v.* Larsen, 19 Colo. 71, 34 Pac. 477.

36. Barnes *v.* Morrison, 97 Va. 372, 34 S. E. 93.

37. Lachner *v.* Adams Exp. Co., 72 Mo. App. 13.

38. See article "EMINENT DOMAIN," Vol. V, pp. 190-192.

39. Mayberry *v.* Lilly Mill Co. (Tenn.), 85 S. W. 401.

40. Fryberger *v.* Berven, 88 Minn. 311, 92 N. W. 1125.

41. Hillenbrand *v.* Wittkemper, 79 Ind. 180.

normal conditions.[42] An allegation that property has no market value must be sustained by the party so claiming.[43]

6. Consideration in Deed. — The burden of establishing a consideration different from that expressed in a deed is upon the party who alleges that that expressed is not in consonance with the fact.[44]

7. Improvements on Public Lands. — A person who seeks to bring himself within the exception to the statute governing the entry of public lands must show that his improvements are of the required value;[45] and he who seeks to enforce the right to buy such lands as against a party who has put improvements thereon, on the ground that they are not of the statutory value, must show the fact.[46]

8. In Detinue. — A rival claimant of the property who has been substituted for the defendant must show the value of the property in issue.[47] The plaintiff in an action upon a replevin bond must show the value of the chattel covered thereby.[48]

9. Payment of Value by Preferred Creditor. — A creditor who is preferred by a known insolvent must show that he acquired the transferred property at approximately its fair market value.[49]

10. Value of Lost Property. — The value of property must be shown by the party seeking to recover for its loss, and as definitely as possible.[50]

11. Extent of Possessor's Right. — As against a tort-feasor a person in the quiet and peaceable possession of land is *prima facie* entitled to prove its fee value.[51]

12. Reasonable Expense. — The burden of proving that expenses incurred under a contract were reasonable is upon the party seeking a recovery thereof.[52]

IV. VALUE OF LAND.

1. Value of the Fee as Shown by Elements of Value. — A. What Is Market Value. — The market value of land is represented by the sum of money which a person desirous, but not compelled,

42. Kent *v.* Miltenberger, 15 Mo. App. 480.

43. Todd *v.* Gamble, 67 Hun 38, 21 N. Y. Supp. 739.

44. See article "Deeds," Vol. IV, p. 190.

In a Suit To Have a Deed Declared a Mortgage because of the inadequacy of the consideration, the evidence as to the value of the property conveyed must establish plaintiff's case beyond a reasonable doubt. Butsch *v.* Smith, 40 Colo. 64, 90 Pac. 61.

45. Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176.

46. White *v.* Pyron, 23 Tex. Civ. App. 105, 57 S. W. 56.

47. Hensley *v.* Orendorff (Ala.), 44 So. 869, and local cases cited.

48. Sopris *v.* Lilley, 2 Colo. 496.

49. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177.

50. Carman *v.* Montana Cent. R. Co., 32 Mont. 137, 79 Pac. 690; Chicago, So. R. Co. *v.* Todd, 74 Neb. 712, 105 N. W. 83. See article "Insurance," Vol. VII, pp. 496, 555.

51. Moore *v.* Chicago, etc. R. Co., 78 Wis. 120, 47 N. W. 273.

52. Brooklyn Hts. R. Co. *v.* Brooklyn City R. Co., 124 App. Div. 896, 109 N. Y. Supp. 31.

to buy, and an owner willing, but not compelled, to sell, would agree on as a price to be given and received therefor.[53]

a. *Value to the Parties.* — Where land is sought to be obtained by condemnation proceedings neither its value to its owner,[54] nor

53. Calor Oil & G. Co. *v.* Franzell, 33 Ky. L. Rep. 98, 109 S. W. 328; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506.

Other Definitions. — "The market value of land at any time is the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy." Sharpe *v.* United States, 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932; Ligare *v.* Chicago, etc. R. Co., 166 Ill. 249, 46 N. E. 803; Maxon *v.* Gates, (Wis.), 116 N. W. 758.

As applied to land, market value means the highest price which those having the ability and the occasion to buy are willing to pay after reasonable notice and ample time to find a buyer, such as would ordinarily be taken by an owner to make sale of like property. Little Rock J. R. Co. *v.* Woodruff, 49 Ark. 381, 390, 51 S. W. 792, 4 Am. St. Rep. 51; Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; San Diego Land & T. Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

A definition of marketable value, as applied to land, as the sum for which it would sell if put upon the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated, is not open to objection as meaning a forced sale, unless land was ordinarily so sold, nor does it preclude the consideration of the value of land if it was platted into lots. Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109.

Varied Expressions to Indicate Market Value. — The expressions "actual value," "market value" or "market price" mean the same thing. Lawrence *v.* Boston, 119 Mass. 126; Maxon *v.* Gates (Wis.), 116 N. W. 758. They mean the price or value of the article established or shown by sales, public or private, in the way of ordinary business. Sanford *v.* Peck, 63 Conn. 486, 27 Atl. 1057. The terms "fair value" and "market value" are practically synonymous. Fort Scott, etc. R. Co. *v.* Jones, 48 Kan. 51, 28 Pac. 978.

A question calling for a witness' opinion of the market value of land in the neighborhood in question is not objectionable as calling for information as to its cash market value. Sullivan *v.* Missouri, etc. R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

54. *California.* — Central Pac. R. Co. *v.* Feldman, 152 Cal. 303, 92 Pac. 849; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247 (but *compare* the last case with San Diego Land & T. Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83).

Georgia. — Selma, etc. R. Co. *v.* Keith, 53 Ga. 178.

Illinois. — West Chicago Park Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824.

Missouri. — St. Louis, etc. R. Co. *v.* St. Louis Union Stock Yds. Co., 120 Mo. 541, 550, 25 S. W. 399.

Pennsylvania. — Auman *v.* Philadelphia, etc. R. Co., 133 Pa. St. 93, 20 Atl. 1059.

Washington. — Port Townsend So. R. Co. *v.* Barbare, 46 Wash. 275, 89 Pac. 710 (desire of owner to sell immaterial).

A Railroad Company Cannot Show in a proceeding to assess compensation for the loss of a small tract of land outside its right of way, which was adapted for railroad use only as a gravel pit or track yard, the value of its whole road before and after the taking. Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56.

The Testimony of a Life Tenant as to What He Would Take for His Interest does not detract from the force of his testimony as to its value, or render it inadmissible.

its value to the party who seeks to acquire it may be proved.[55]

b. *Inability To Use.* — The fact that proceedings *in invitum* have prevented the owner of land from using it cannot affect its value when it has been actually taken,[56] but it is otherwise if the inability to use is the result of voluntary acts done by the owner.[57]

B. General Statement Concerning the Nature of Evidence. The value of land may be shown by proof of its characteristics or elements of value, the general course of values, by the opinions of witnesses competent to judge, or by experts having special knowledge on the subject and familiar with the causes which affect its rise or decline in the market.

C. Preliminary Statement of Evidentiary Facts. — The market value of land is not necessarily the price which it would command in a forced sale at auction; it is estimated upon a fair consideration of the location of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken in connection with the general selling price of lands in the neighborhood at or about the time in question. Such price is that fixed in the mind of the witness from a knowledge of what lands are generally held at for sale, and at which they are sometimes actually sold, *bona fide,* in the neighborhood.[58]

Coapland *v.* Lake, 9 Tex. Civ. App. 39, 28 S. W. 104.

55. *California.* — Gilmer *v.* Lime Point, 19 Cal. 47 (value to the government as a site for fortifications). (But see San Diego Land & T. Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.)

Kentucky. — Calor Oil & G. Co. *v.* Franzell, 33 Ky. L. Rep. 98, 109 S. W. 328.

Massachusetts. — Sargent *v.* Merrimac, 196 Mass. 171, 80 N. E. 970; Gardner *v.* Brookline, 127 Mass. 358; Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56 (based on non-existing considerations).

Minnesota. — Stinson *v.* Chicago, etc. R. Co., 27 Minn. 284, 6 N. W. 784.

New York. — *In re* Board of Water Supply (Misc.), 109 N. Y. Supp. 1036; *In re* East River Gas Co., 119 App. Div. 350, 104 N. Y. Supp. 239.

Texas. — Texas, etc. R. Co. *v.* Postal Tel. C. Co. (Tex. Civ. App.), 52 S. W. 108.

Testimony as to the Benefits of the party seeking to condemn land will derive from it is inadmissible. *In re* East River Gas Co., 119 App. Div. 350, 104 N. Y. Supp. 239; St. Louis, etc. R. Co. *v.* St. Louis Union Stock Yds. Co., 120 Mo. 541, 25 S. W. 399.

The Wealth of the Party Seeking Condemnation is irrelevant and should not be referred to in argument. Peoria, B. & C. Tract. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607.

The Necessities of the Moving Party in condemnation proceedings or what it could afford to give for the land rather than do without it, are not proper matters of evidence. Spring Val. Water-Wks. Co. *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

56. *In re* Twelfth St., 217 Pa. St. 362, 66 Atl. 568.

57. Gamble *v.* Philadelphia, 162 Pa. St. 413, 29 Atl. 739.

58. Pittsburgh, etc. R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Pittsburgh & W. R. Co. *v.* Patterson, 107 Pa. St. 461; Pittsburg, etc. R. Co. *v.* Rose, 74 Pa. St. 362; Reed *v.* Pittsburg, etc. R. Co., 210 Pa. St. 211, 59 Atl. 1067.

The Government Price for Land is not the basis on which to ascer-

A Liberal Rule Prevails. — In condemnation proceedings a liberal rule is applied in the reception of evidence as to value,[59] and so in other cases.[60] All the facts which the owner would press upon the attention of a prospective buyer and all other facts which would naturally influence a person desiring to purchase may be shown, including the adaptation and value of the property for any legitimate purpose or business, regardless of the use made of it or the intention to use it for a particular purpose.[61]

D. Relevant and Irrelevant Facts. — a. *Location.* — The location of land with reference to its convenience to market and transportation facilities is a material consideration,[62] especially where the

tain the damages sustained by a *bona fide* settler on its land, with the right to pre-empt, by reason of an injunction restraining the cutting of timber thereon. Jordan *v.* Updegraff, McCahon (Kan.) 103.

59. Seefeld *v.* Chicago, etc. R. Co., 67 Wis. 96, 29 N. W. 904.

Evidence of Everything which gives land intrinsic value or which depreciates its value is competent. Gulf, C. & S. F. R. Co. *v.* Albany, 3 Wil. Civ. Cas. § 413.

60. See Baum *v.* Bosworth, 68 Wis. 196, 31 N. W. 744.

61. *Arkansas.* — Little Rock J. R. Co. *v.* Woodruff, 49 Ark. 381, 390, 5 S. W. 792, 4 Am. St. Rep. 51.

California. — Muller *v.* Southern Pac. B. R. Co., 83 Cal. 240, 23 Pac. 265.

Illinois. — Illinois, etc. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880.

Iowa. — Ranck *v.* Cedar Rapids, 134 Iowa 563, 111 N. W. 1027.

New York. — Matter of Newton, 63 Hun 628, 19 N. Y. Supp. 573.

North Carolina. — Brown *v.* Power Co., 140 N. C. 333, 342, 52 S. E. 954.

Pennsylvania. — Cox *v.* Philadelphia, etc. R. Co., 215 Pa. St. 506, 64 Atl. 729.

Texas. — Watkins' Land Mtg. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424.

Range of Inquiry. — "As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land owner should be allowed to state, and have his witnesses state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make." Little Rock J. R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; Brown *v.* Power Co., 140 N. C. 333, 342, 52 S. E. 954.

The Value of Land Must Be Shown by evidence of its general value, based upon a single view of all its elements, not upon its particular qualities or capabilities, to the exclusion of other elements. Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

62. Pittsburg, etc. R. Co. *v.* Rose, 74 Pa. St. 362; Pennsylvania S. Val. R. Co. *v.* Keller (Pa.), 11 Atl. 381; Chandler *v.* Geraty, 10 S. C. 304; Watkins Land Mtg. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424; Baker *v.* Sherman, 71 Vt. 439, 453, 46 Atl. 57.

Transportation Facilities. — If the land taken has coal mines on it and the railroad is located between them and the river, testimony is competent to show the effect of its construction upon the facilities for transporting coal. Cleveland & P. R. Co. *v.* Ball, 5 Ohio St. 568.

Inaccessibility of Mill. — Evidence is proper to show that by reason of the construction and operation of a railroad it has become inconvenient and dangerous for the patrons of a mill to visit it, and that the value of the property has thereby become affected. Pittsburgh, etc. R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764.

improvements are of such a nature that they have no market value.[63]

b. *General Development.* — The general development of the region adjacent to the land in question is a pertinent matter.[64]

c. *Productive Capacity.* — It is competent to show all the facts relating to the productive capacity of property,[65] unless the income derived from it has been the result of a special use and dependent upon many and varying contingencies.[66]

Photographs of the Premises in question are admissible to show their location, topography and situation. Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 558, 28 S. W. 471.

63. The Value of a Manufacturing Plant fitted for a peculiar business, and which has no market value, may be shown by its cost, condition, location with reference to the purposes for which it was intended, its adaptability therefor and earning capacity, supplemented by the testimony of experts. Sloan *v.* Baird, 12 App. Div. 481, 42 N. Y. Supp. 38, *affirmed*, without opinion on this point, 162 N. Y. 327, 56 N. E. 752.

64. Illinois, etc. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880; Gallagher *v.* Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250, 164 N. Y. 602, 58 N. E. 1087 (no opinion) (the situation of a mill with respect to its custom and the productiveness of the region in grain is an element affecting the value of the mill); Watkins Land Mtg. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424.

It may be shown that the land is near a great railway system. Cleveland T. & V. R. Co. *v.* Gorsuch, 8 Ohio C. C. (N. S.) 297.

65. *Connecticut.* — Borough of Norwalk *v.* Blanchard, 56 Conn. 461, 16 Atl. 242.

Illinois. — Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359; Dupuis *v.* Chicago & N. W. R. Co., 115 Ill. 97, 3 N. E. 720; Illinois, etc. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880.

Indiana. — New Jersey I. & I. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420.

Kentucky. — Covington Trans. Co. *v.* Piel, 87 Ky. 267, 8 S. W. 449.

Maine. — Kennebec W. Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

Michigan. — Grand Rapids & I. R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294.

Minnesota. — King *v.* Minneapolis U. R. Co., 32 Minn. 224, 20 N. W. 135.

Mississippi. — Board of Levee Comrs. *v.* Dillard, 76 Miss. 641, 25 So. 292.

New York. — Matter of Newton, 63 Hun 628, 19 N. Y. Supp. 573; Sloan *v.* Bird, 12 App. Div. 481, 42 N. Y. Supp. 38 (*affirmed*, without discussion on this point, 162 N. Y. 327, 56 N. E. 752); Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78; *In re* City of New York, 56 Misc. 306, 107 N. Y. Supp. 567 (net income from land and rights appurtenant thereto).

Pennsylvania. — Pittsburg, etc. R. Co. *v.* Rose, 74 Pa. St. 362.

Wisconsin. — Weyer *v.* Chicago, etc. R. Co., 68 Wis. 180, 31 N. W. 710.

No Market Value. — In the absence of a market value for property used as an integral portion of a freight terminal, which is a part of extensive railway systems, its value and the depreciation in the value of the part not taken, are to be shown by the business done, the capacity of the property for business and the profits it has yielded or may yield. Sanitary Dist. *v.* Pittsburgh, etc. R. Co., 216 Ill. 575, 75 N. E. 248.

66. Stockton & C. R. Co. *v.* Galgiani, 49 Cal. 139 (use of land a particular one and profits dependent upon many and varying circumstances); Matter of Newton, 63 Hun 628, 19 N. Y. Supp. 573 (the value of mill property is not provable by the amount of business done and the profits derived from the mill); Hunter's Admr. *v.* Chesapeake & O. R. Co., 107 Va. 158, 59 S. E. 415 (though the land, all of which was condemned, was peculiarly adapted

(1.) **Cultivation.** — It is pertinent to the value of a farm to understand how much of it is in cultivation.[67]

(2.) **Value of Trees.** — The value of growing trees may be shown,[68] and the value of the land with and without shade and fruit trees upon it[69] for the purposes for which it had been used.[70]

(3.) **Water Power.** — The existence of undeveloped water power is material.[71]

(4.) **Mineral Resources.** — The presence and value of undeveloped mineral deposits may be shown.[72] But if mines have not been opened on the land and the existence of minerals therein is only a matter of opinion, it is not competent to show that they have been found at a considerable distance from it.[73]

to the business); *In re* Board of Water Supply (Misc.), 109 N. Y. Supp. 1036.

67. Thompson *v.* Keokuk & W. R. Co., 116 Iowa 215, 89 N. W. 975.

68. Adkins *v.* Smith, 94 Iowa 758, 64 N. W. 761; Richardson *v.* Sioux City (Iowa), 113 N. W. 928 (though the title to land dedicated for street purposes passes to the public, it may be shown that trees in a parking have been destroyed by widening a street); Walker *v.* Sedalia, 74 Mo. App. 70; Green *v.* Irvington (N. J. L.), 69 Atl. 485 (though the widening of a street may bring trees within it and they will thereby become a nuisance and be subject to removal under the police power); Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852; Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413.

The Difference in the Value of Land before and after a fire may be shown by evidence of the value of trees, turpentine boxes, vegetable matter and litter destroyed. Dent *v.* South-Bound R. Co., 61 S. C. 329, 39 S. E. 527.

69. Peoria, B. & C. Tract. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607.

70. Foote *v.* Lorain & C. R. Co., 21 Ohio C. C. 319.

71. Brown *v.* Power Co., 140 N. C. 333, 52 S. E. 954.

72. *Colorado.* — Wilson *v.* Harnette, 30 Colo. 172, 75 Pac. 395.

Illinois. — Haslam *v.* Galena & S. W. R. Co., 64 Ill. 353.

Iowa. — Doud *v.* Mason City R. Co., 76 Iowa 438, 41 N. W. 65.

Minnesota. — Cameron *v.* Chicago, etc. R. Co., 51 Minn. 153, 53 N. W. 199.

Montana. — Northern Pac. & M. R. Co. *v.* Forbis, 15 Mont. 452, 39 Pac. 571, 48 Am. St. Rep. 692.

Pennsylvania. — Reading & P. R. Co. *v.* Balthaser, 119 Pa. St. 472, 13 Atl. 294; Searle *v.* Lackawanna & B. R. Co., 33 Pa. St. 57.

Washington. — Seattle *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

Value of Land as an Entirety. Though the right acquired by condemnation extends only to an easement, evidence is admissible to show the character of the land and its value as an entirety, as that it contained beds of coal. Doud *v.* Mason City & Ft. D. R. Co., 76 Iowa 438, 41 N. W. 65.

Abandonment of Operations. Though mining operations on land have been abandoned the owner may show that the mine is not exhausted; the reason for its abandonment is immaterial; and the future intention of the owner concerning the use of the land has no bearing upon its value at the time of the appropriation of a stream of water upon it. Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279.

73. Eldorado, etc. R. Co. *v.* Sims, 228 Ill. 9, 81 N. E. 782.

The Value of Mining Prospects is to be ascertained under the same rules as is the value of other property. Witnesses who know the property and are familiar with the uses to which it may be put can give their opinions as to the market

(5.) Stone Quarry. — The existence of a stone quarry may be shown to establish the quality and intrinsic character of land,[74] as may the quality of the stone therein.[75]

(6.) Rental Value. — The *bona fide* rent paid for the use of property may generally be shown as an aid in establishing its value.[76] It

value. Montana R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641.

It is competent to show as bearing on the value of timbered lands, located as placer mining claims, that the timber thereon is valuable, that no work has been done on such claims except such as is necessary to hold them, that no paying mine was located in the region and the result of efforts to discover such a mine therein. Anderson *v.* United States, 152 Fed. 87, 81 C. C. A. 311.

74. Reading & P. R. Co. *v.* Balthaser, 119 Pa. St. 472, 13 Atl. 294; O'Dell *v.* Rogers, 44 Wis. 136, 183.

75. Keim *v.* Reading, 32 Pa. Super. 613.

The Separate Value of Coal or Stone which is a component part of the land in question cannot be proved. St. Louis Belt & T. R. Co. *v.* Cartan R. E. Co., 204 Mo. 565, 103 S. W. 519; Reading & P. R. Co. *v.* Balthaser, 119 Pa. St. 472, 13 Atl. 294; Searle *v.* Lackawanna & B. R. Co., 33 Pa. St. 57.

Where proof of the nature and quality of material in the land and its adaptability for any beneficial use has been made, and the market value of such material in the soil has been shown, the court may exclude evidence of the market value thereof delivered, the cost of transportation, the demand and supply. Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56.

76. *Connecticut.* — Borough of Norwalk *v.* Blanchard, 56 Conn. 461, 16 Atl. 242.

Georgia. — Stewart *v.* Berry, 84 Ga. 177, 10 S. E. 601 (material to show the price agreed to be paid for land).

Illinois. — Clapp *v.* Noble, 84 Ill. 62.

Maryland. — Brooke *v.* Berry, 2 Gill 83 (in equity).

Massachusetts. — Lincoln *v.* Com., 164 Mass. 368, 380, 41 N. E. 489.

Minnesota. — Minnesota Belt-Line R. & T. Co. *v.* Gluck, 45 Minn. 463, 48 N. W. 194 (it is immaterial that the value of the land was largely based upon its proximity to a city).

New York. — *In re* Blackwell's Isl. Bridge, 118 App. Div. 272, 103 N. Y. Supp. 441; Jamieson *v.* King's County R. Co., 147 N. Y. 322, 41 N. E. 693; Gallagher *v.* Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250, 164 N. Y. 602, 58 N. E. 1087 (no opinion); Cook *v.* New York El. R. Co., 144 N. Y. 115, 39 N. E. 2; Ettlinger *v.* Weil, 184 N. Y. 179, 77 N. E. 31; Greenwood *v.* Manhattan R. Co., 61 N. Y. Super. 253, 19 N. Y. Supp. 702.

North Carolina. — Brown *v.* Power Co., 140 N. C. 333, 343, 52 S. E. 954.

Pennsylvania. — Cumberland Val. Mut. P. Co. *v.* Schell, 29 Pa. St. 31.

Tennessee. — Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182.

West Virginia. — Fox *v.* Baltimore & O. R. Co., 34 W. Va. 466, 12 S. E. 757.

Contra, Moore *v.* Harvey, 50 Vt. 297.

It Is Presumed that the sum stipulated to be paid was *bona fide* agreed upon. Greenwood *v.* Manhattan R. Co., 61 N. Y. Super. 253, 19 N. Y. Supp. 702.

The Rent Formerly Paid for premises may be shown by the books of their deceased owner, the entries therein being made in the regular course of business by a third person. Greenwood *v.* Manhattan R. Co., 61 N. Y. Super. 253, 19 N. Y. Supp. 702.

Difficulty in Renting Other Property. — Testimony as to the difficulty owners of other property in the vicinity of plaintiff's had in renting it is admissible as bearing upon the value of the fee. Kuh *v.* Metropolitan El. R. Co., 9 N. Y. Supp. 710.

Weight of Evidence. — The fact that a lease of the property affected has been renewed on the same terms

is immaterial whether rent is payable in cash or in a share of the crops produced on the land.[77]

(A.) Illegal Use of Property. — It may be shown that the rent stipulated for is based on an illegitimate use of the property; to the extent that such is the fact the agreed rental is not evidence of its value.[78] But such evidence is incompetent if the party seeking to prove the rental value was not connected with or responsible for such use.[79] It is also competent to show that the lease is a speculative one.[80]

(B.) Lease Must Antedate Controversy. — A lease of property made after the controversy in question is not admissible to show the value of the property.[81]

(C.) Prospective Rental Value. — The best use to which unimproved land can be put, the cost of improvements and their rental value involve so many elements of uncertainty that evidence thereof is inadmissible.[82]

d. *Cost and Value of Improvements.* — The cost and value of the improvements made on land may be shown;[83] but in some states not

is not conclusive that there has been no decrease in its value. Chouteau *v.* St. Louis, 8 Mo. App. 48.

Rental Value is not provable by evidence of the cost of maintaining a mill and what would be a fair return upon its value. Munson *v.* James Smith Woolen Mach. Co., 118 App. Div. 398, 103 N. Y. Supp. 502.

A Witness May Testify as to the Rental Value of property affected by an elevated road, with the free use of all above the surface of the street for light, air and access. Ottinger *v.* New York El. R. Co., 63 Hun 631, 17 N. Y. Supp. 912.

Evidence of Rental Value Is Immaterial if the improvements on the land are not to be valued. Springer *v.* Borden, 112 Ill. App. 168, 210 Ill. 518, 71 N. E. 345.

77. Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

78. McKinney *v.* Nashville, 102 Tenn. 131, 52 S. W. 781, 73 Am. St. Rep. 859.

79. Ganson *v.* Tifft, 71 N. Y. 48.

80. Speculative Lease. — It may be shown that a lease of the land condemned, held by one of the parties to the proceeding, was obtained solely as a means of speculation in the expectation that the property would be taken, and hence that the stipulated rent is not a criterion of the value of the property. Union R. Co. *v.* Hunton, 114 Tenn. 609, 620, 88 S. W. 182.

81. Gerrish *v.* Pike, 36 N. H. 510.

82. Burt *v.* Wigglesworth, 117 Mass. 302; *In re* Blackwell's Isl. Bridge, 118 App. Div. 272, 103 N. Y. Supp. 441; Tallman *v.* Metropolitan El. R. Co., 121 N. Y. 119, 23 N. E. 1134, 8 L. R. A. 173; Harris *v.* Schuylkill, etc. R. Co., 141 Pa. St. 242, 253, 21 Atl. 590, 23 Am. St. Rep. 278.

83. *California.* — Colusa County *v.* Hudson, 85 Cal. 633, 24 Pac. 791.

Illinois. — Chicago, etc. R. Co. *v.* Hock, 118 Ill. 587, 9 N. E. 205; Dupuis *v.* Chicago & N. W. R. Co., 115 Ill. 97, 3 N. E. 720; West Chicago Park Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824 (cost of sidewalk).

Indiana. — Indianapolis, etc. R. Co. *v.* Pugh, 85 Ind. 279.

Iowa. — Van Husen *v.* Omaha Bridge & T. Co., 118 Iowa 366, 92 N. W. 47; Haggard *v.* Independent School Dist., 113 Iowa 486, 85 N. W. 777.

Kansas. — Briggs *v.* Chicago, etc. R. Co., 56 Kan. 526, 43 Pac. 1131.

Kentucky. — Nelson County *v.* Bardstown L. Tpk. Co., 30 Ky. L. Rep. 1254, 100 S. W. 1181.

Louisiana. — Orleans & J. R. Co. *v.* Jefferson, etc. R. Co., 51 La. Ann. 1605, 26 So. 278.

Massachusetts. — Beale *v.* Boston,

as an independent fact, though they may be proved on cross-examination.[84] In Massachusetts if there is nothing to show that the cost of an addition made to a building before the premises were taken would aid in fixing the value of the estate or that its value

166 Mass. 53, 43 N. E. 1029; Maynard *v.* Northampton, 157 Mass. 218, 31 N. E. 1062.

Michigan. — Grand Rapids & I. R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294.

Missouri. — Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 666, 44 S. W. 802; Conner *v.* Missouri Pac. R. Co., 181 Mo. 397, 419, 81 S. W. 145 (the cost of a new improvement may be shown as an aid in fixing the value of the one destroyed, the difference in the price of cost and depreciation in value of the former being shown).

Nebraska. — Burlington & M. R. Co. *v.* White, 28 Neb. 166, 44 N. W. 95.

New Hampshire. — Rochester *v.* Chester, 3 N. H. 349.

Ohio. — Foote *v.* Lorain & C. R. Co., 21 Ohio C. C. 319 (cost of a well, the water it supplied and its necessity to the property proper in the absence of a market value for the well).

Texas. — Galveston, etc. R. Co. *v.* Serafina (Tex. Civ. App.), 45 S. W. 614.

Evidence of the Distance a House Has Been Moved is not competent to show the strength and character of its construction. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

84. *Minnesota.* — Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149.

New York. — *In re* Manhattan Bridge No. 3 (Misc.), 108 N. Y. Supp. 366; *In re* Blackwell's Isl. Bridge, 118 App. Div. 272, 103 N. Y. Supp. 441; St. Johnsville *v.* Smith, 184 N. Y. 341, 77 N. E. 617.

Ohio. — Foote *v.* Lorain & C. R. Co., 21 Ohio C. C. 319 (if the improvement has a market value).

Pennsylvania. — Harris *v.* Schuylkill, etc. R. Co., 141 Pa. St. 242, 253, 21 Atl. 590, 23 Am. St. Rep. 278; Warden *v.* Philadelphia, 167 Pa. St. 523, 31 Atl. 928; Plank-Road Co. *v.* Thomas, 20 Pa. St. 91; Kossler *v.* Pittsburg R. Co., 208 Pa. St. 50, 57 Atl. 66.

South Carolina. — Chandler *v.* Geraty, 10 S. C. 304.

Texas. — Watkins Land Mtg. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424; Galveston, etc. R. Co. *v.* Serafina (Tex. Civ. App.), 45 S. W. 614.

Evidence Is Inadmissible to show that an Osage orange hedge is a detriment to a farm, the action being for damage to the latter. Swanson *v.* Keokuk & W. R. Co., 116 Iowa 304, 89 N. W. 1088.

As Between Principal and Agent in an action against the latter for loaning money on a second mortgage, the value of improvements on the mortgaged premises may be shown. Faust *v.* Horsford, 119 Iowa 97, 93 N. W. 58.

As Between Vendor and Purchaser. A sworn statement made by the former as the basis of an application for a loan on the property in question, which statement was shown the latter before the exchange of properties was made, is admissible on the question of the value of the improvements on the land. Mullen *v.* Kinsey, 50 Neb. 466, 70 N. W. 18.

In Kansas the condemning party may show the value of the land actually taken independent of its improvements or its connection with that not taken, as one means of ascertaining the damage, but not as proof of all the damage. Commissioners *v.* Hogan, 39 Kan. 606, 18 Pac. 611.

Testimony as to the Bills a Witness Paid and those he saw others pay is admissible as tending to show the value of the house on account of which such payments were made. Markowitz *v.* Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498.

The Expense of the Construction of buildings years before the claim for injury thereto arose is not material to the claim for compensation

would depend closely on the cost of the improvements upon it, their cost cannot be shown.[85]

(1.) Condition and Purpose of Improvements. — The condition of improvements may be shown,[86] as may the facts that they were made for a special purpose, adapted thereto,[87] had long been used therefor[88] and the facility with which business had been conducted therein.[89]

(2.) Motive of a Builder. — The motives or expectations which led to the erection of a building are immaterial in ascertaining the value of the land long afterward.[90]

(3.) Basis on Which Fixtures Valued. — Evidence concerning fixtures in a building on condemned land must be based on their enhancement of the market value of the estate for any purpose for which it is adapted, and not on the value of their use in the business there conducted.[91]

(4.) Inchoate Improvements. — Evidence that the authorities have taken preliminary steps to make public improvements is not admissible to show the value of land at the time a petition for its condemnation was filed;[92] and so as to improvements contemplated by the owner.[93]

(5.) Influence of Improvement for Which Land Taken. — If the value of property to be condemned is to be fixed without regard to its enhancement by reason of the proposed improvement, a printed report made ten years before the taking is not admissible to show that the project had then or subsequently influenced the value of land in the vicinity because of the general expectation that the improvement would be made.[94] It is not competent in condemnation proceedings to show the effect of railroads upon the value of lands in other places.[95]

for such injury. *In re* Thompson, 58 Hun 608, 12 N. Y. Supp. 182.

85. Patch *v.* Boston, 146 Mass. 52, 14 N. E. 770.

86. West Chicago Park Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824.

87. King *v.* Minneapolis Union R. Co., 32 Minn. 224, 20 N. W. 135.

88. Ranck *v.* Cedar Rapids, 134 Iowa 563, 111 N. W. 1027.

89. Rippe *v.* Chicago, etc. R. Co., 23 Minn. 18.

90. St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 500.

Reason. — "A man may purchase a piece of wild land, far off from any railroad connection, and thereon may build a magnificent structure. No development may take place in the neighborhood, and there may be no demand of any kind for the property." *In re* Blackwell's Isl. Bridge, 118 App. Div. 272, 103 N. Y. Supp. 441.

91. Allen *v.* Boston, 137 Mass. 319.

92. Burt *v.* Wigglesworth, 117 Mass. 302; Cobb *v.* Boston, 112 Mass. 181 (incompetent as independent evidence of value though the improvements were made.

93. Watkins Land Mtg. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424.

94. May *v.* Boston, 158 Mass. 21, 32 N. E. 902.

The Probability That Land Would Be Taken for a projected improvement may be shown by proof of its situation with reference to the project. Bowditch *v.* Boston, 164 Mass. 107, 41 N. E. 132.

95. Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495, 504.

Cause and Effect. — In the absence

e. *Uses to Which Land May Be Put.* — The capability of property is not measured by the use to which it has been put, but by its adaptability for development with reference to such use,[96] or any other use.[97] The plans of a structure contemplated for a city lot

of evidence to show the connection between the building of a railroad and the increase in the value of lands in counties through which it runs, testimony as to such increase within six months preceding the taking of the land in question is immaterial. Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

96. St. Louis, etc. R. Co. *v.* Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

97. *United States.* — Boom Co. *v.* Patterson, 98 U. S. 403; Laflin *v.* Chicago, etc. R. Co., 33 Fed. 415.

Iowa. — McClean *v.* Chicago, etc. R. Co., 67 Iowa 568, 25 N. W. 782; Nosler *v.* Chicago, etc. R. Co., 73 Iowa 268, 34 N. W. 850.

Kansas. — Kansas City, etc. R. Co. *v.* Weidenmann, 94 Pac. 146; Kansas City & T. R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202; Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248, 26 Pac. 698.

Kentucky. — West Virginia, etc. R. Co. *v.* Gibson, 15 Ky. L. Rep. 7, 21 S. W. 1055; Chicago, etc. R. Co. *v.* Rottgering, 26 Ky. L. Rep. 1167, 83 S. W. 584.

Maine. — Warren *v.* Wheeler, 21 Me. 484.

Massachusetts. — Cochrane *v.* Com., 175 Mass. 299, 56 N. E. 610; Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506; Conness *v.* Com., 184 Mass. 541, 69 N. E. 341; Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544; Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56.

Minnesota. — Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283; Sherman *v.* St. Paul & C. R. Co., 30 Minn. 227, 15 N. W. 239; Russell *v.* St. Paul, etc. R. Co., 33 Minn. 210, 22 N. W. 379 (any existing facts which enter into the value of the land in the public and general estimation and tend to influence the minds of dealers may be shown).

Montana. — Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912; Montana R. Co. *v.* Warren, 6 Mont. 275, 284, 12 Pac. 641.

New Jersey. — Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495, 503; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 565, 25 Atl. 506.

New York. — *In re* East River Gas Co., 119 App. Div. 350, 104 N. Y. Supp. 239.

Pennsylvania. — Harris *v.* Schuylkill, etc. R. Co., 141 Pa. St. 242, 253, 21 Atl. 590, 23 Am. St. Rep. 278 (possible and probable uses); Cox *v.* Philadelphia, etc. R. Co., 215 Pa. St. 506, 64 Atl. 729.

Rhode Island. — Brown *v.* Providence & S. R. Co., 12 R. I. 238.

Tennessee. — Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; McKinney *v.* Nashville, 102 Tenn. 131, 52 S. W. 781, 73 Am. St. Rep. 859; Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 82 S. W. 471.

Texas. — Watkins Land Mtg. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424; Boyer *v.* St. Louis, etc. R. Co., 97 Tex. 107, 76 S. W. 441.

Washington. — Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

If Land Can Be Used for Two Compatible Purposes, such purposes go to make up its market value, and evidence of its adaptability therefor is competent; if one use is incompatible with another, evidence as to its value for the most valuable use is competent. Montana R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641; Northern Pac. & M. R. Co. *v.* Forbis, 15 Mont. 452, 39 Pac. 571.

Evidence Is Admissible To Show the Situation and Surroundings of Land sought to be condemned with reference to its special availability as a railroad approach to an established center of commerce. Currie *v.* Waverly, etc. R. Co., 52 N. J. L. 381, 394, 397, 20 Atl. 56.

Special Value for Purpose for Which Desired. — The owner may

are admissible to show the uses of which the lot is capable.[98]

prove that the land sought to be condemned has a special value for the purposes for which it was desired beyond its general market value, and the prices offered for it within a few months of the time of the trial. Johnson *v.* Freeport & M. R. Co., 111 Ill. 413.

Proof of Adaptability for Special Use. — If evidence has been received to show the adaptability of the land in question to a special use, the nature and size of a building in its vicinity devoted to the use for which the land may be put can be shown. Whitney *v.* Boston, 98 Mass. 312.

The Uses to Which Land Is Adapted is a subject for proof, and sometimes for expert testimony, as where it contains valuable clay, marl, or veins of coal or ore; but otherwise the question is for the jury. The situation and uses of other lands in the vicinity of that in question may sometimes be shown; but the admission of testimony to those points rests largely in the discretion of the trial court. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 565, 25 Atl. 506.

Inability To Devote Land to Special Use Immaterial. — Though the owner of land on which a dam is built has no mill and has not acquired the right to flow the lands of other persons above him, which would be necessary to the creation of power of any practical value, the value of the land as a mill site may be shown. The value of the lands which such a dam as was necessary would cause to be overflowed was also a proper matter of proof. Fales *v.* Easthampton, 162 Mass. 422, 38 N. E. 1129.

Occasion of Special Value. Though the owner has given evidence that the land in question has a peculiar value because of its being leased as a place of entertainment, it is not competent to show that such value was partly the result of the sale of liquors. Brown *v.* Providence, etc. R. Co., 5 Gray (Mass.) 35.

Prospective Uses. — Evidence is admissible to show the commercial value of land because of its availability as an approach to a large city for railroads, and its adaptability to use for manufacturing purposes, these uses being at the time of its condemnation in reasonable anticipation. Webster *v.* Kansas City & S. R. Co., 116 Mo. 114, 22 S. W. 474.

Unused Property. — "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated." The limitation suggested in this case is that the compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. Boom Co. *v.* Patterson, 98 U. S. 403. This is a leading case on this topic, and has been generally cited and approved by both federal and state courts.

98. Calumet River R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764.

Such Evidence Is Not Favored because of the danger that the jury will misunderstand it. If admitted, the court should distinctly limit its effect as stated in the text. Chicago & E. R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488.

(1.) Prospective Use and Present Value. — The evidence as to the prospective uses of land must show that such use affects its present value.[99]

(2.) Adaptability for Building Purposes. — In some jurisdictions the intention of the owner of land concerning its use may be shown.[1] A map or plat made from a survey of the land is admissible to show its value when platted as an addition to an adjacent city, either presently or in the immediate future.[2] But in some states in the absence of evidence showing that adjoining or abutting land has been sold as lots and improved, testimony as to the prospective value of the land in question for such purpose is inadmissible.[3]

(3.) Probability of Demand. — Opinions as to value may be based on the existing business wants of the community, or such as may be reasonably expected in the immediate future for any particular use the land may be adapted to in consideration of its location, surroundings and advantages.[4]

99. Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283; Sherman *v.* St. Paul & C. R. Co., 30 Minn. 227, 15 N. W. 239; Russell *v.* St. Paul, etc. R. Co., 33 Minn. 210, 22 N. W. 379; Louisville, etc. R. Co. *v.* Ryan, 64 Miss. 399, 8 So. 173; Board of Levee Comrs. *v.* Lee, 85 Miss. 508, 37 So. 747.

Unpublished Opinion. — On the issue as to the adequacy of the consideration paid for land, the opinion of a geological expert, not published or known so as to enter into any estimate of its value, that there was brownstone under the surface, is inadmissible. Roussain *v.* Norton, 53 Minn. 560, 55 N. W. 747.

1. Welch *v.* Milwaukee & St. P. R. Co., 27 Wis. 108.

2. Ohio Val. R. & T. Co. *v.* Kerth, 130 Ind. 314, 30 N. E. 298.

Value as Building Lots. — If the owner of property had, in good faith and without knowledge that it was to be condemned, laid it off into lots and streets for the purpose of sale and had sold some of the lots, the plat thereof, though unrecorded, is admissible to show that the land had been subdivided, and that it was more valuable in that form than by the acre. Cincinnati & S. R. Co. *v.* Longworth, 30 Ohio St. 108.

In Pennsylvania if land is so situated that it is capable of being laid out and sold as lots, the fact may be proved. O'Brien *v.* Schenley Park & H. R. Co., 194 Pa. St. 336, 45 Atl. 89; Galbraith *v.* Philadelphia Co., 2 Pa. Super. 359.

3. Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109.

Acreage Valuation. — Where a strip of land is taken from the front of a tract of considerable depth for the purpose of widening an existing highway, the proof of value should be on the basis of an acreage valuation, and not on the basis of a city lot valuation. *In re* Westchester Ave. (App. Div.), 111 N. Y. Supp. 351.

Condition of Land When Condemned is the basis on which its value must be fixed. Kansas City & T. R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202; Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248, 26 Pac. 698.

Future Profits in Land, if they are dependent upon large expenditures for improvements, cannot be regarded. Allison *v.* Cocke's, Exrs., 112 Ky. 212, 225, 65 S. W. 342, 66 S. W. 392.

4. Boom Co. *v.* Patterson, 98 U. S. 403; Laflin *v.* Chicago, etc. R. Co., 33 Fed. 415; Little Rock J. R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 62, 25 Pac. 977, 11 L. R. A. 604.

Inadmissible Evidence. — In Sar-

Remoteness of Probability. — A value based upon the probability

gent *v.* Merrimac, 196 Mass. 171, 81 N. E. 970, the contention was that the land in question had a special value as a source of municipal water supply. This value was attempted to be shown by questions put to an expert as follows: As to its value for such purpose when taken; its value for all the uses to which in the witness' judgment it was adapted; the value of the water in the land situated as it was when taken; as to the municipalities or communities which could avail themselves of the water; the fair value of the land and water because of its special adaptation as a source of water supply; the value of the locus, having regard to its special value and adaptability to filter and store water, and, assuming that petitioner had no other sufficient sources of water supply, without filtering the water, the value of the land and water to it as a source of water supply; over and above the other source of supply by filtration. Answers to these questions were held incompetent because of the collateral issues they would raise and because the value to petitioner was not the test of market value.

Probability of Future Use must be within the bounds of reasonable expectation. Kansas City, etc. R. Co. *v.* Weidenmann (Kan.), 94 Pac. 146.

Uses to Which Land May Be Presently Put are to be regarded. Kansas City & T. R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202; Kansas City & T. R. Co. *v* Vickroy, 46 Kan. 248, 26 Pac. 698.

Any Present or Proximate Use to which land is likely to be put, though not by itself a criterion of value, is an element thereof and may be shown as such. McGroarty *v.* Lehigh Val. Coal Co., 212 Pa. St. 53, 61 Atl. 570; Reiber *v.* Butler & P. R. Co., 201 Pa. St. 49, 50 Atl. 311.

The testimony as to the value of land is not to be confined to the price it would bring at a forced sale, but what it is reasonably worth, taking in view its fitness for the purpose for which it was intended and the time when, according to the reasonable and natural progress of local improvement and growth, it would be required for these purposes. Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495, 503.

Value for Special Use. — The facts that land is incumbered and that the owner has not been licensed to build on it does not make testimony as to the best plan to develop it inadmissible if the jury will be aided thereby in estimating the value of the land. Blaney *v.* Salem, 160 Mass. 303, 35 N. E. 858; Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544.

Testimony as to the Value of Land for a Specific Purpose is not proper; but testimony as to its value for the varied practical purposes to which it is adapted is admissible so long as the inquiries do not extend to speculative uses under conditions which may or may not arise. Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Evidence of Value may be based upon consideration of any reasonable use to which land can be put in the immediate future by a provident and discreet man. Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 356, 15 N. W. 468; Esch *v.* Chicago, etc. R. Co., 72 Wis. 229, 39 N. W. 129; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 378, 18 N. W. 328.

Unavailability of Other Land. On the condemnation of a pond for the purposes of obtaining a municipal water supply, the owner may show that there is no other pond suitable for such purpose within a radius of miles. Trustees of College Point *v.* Dennett, 5 Thomp. & C. (N. Y.) 217.

A Liberal Rule Applied. — Testimony as to the adaptability of the land for a hotel or cottage sites, and the future possible building of a railroad and trolley road, concerning both of which there was a possibility which had been talked of, was received in a federal court, and of it the supreme court observed

of a grant by legislative authority for disposing of the water on land or for the improvement of navigation is too remote.[5]

(4.) Uses Dependent Upon Third Persons. — Testimony as to value may not be rested upon contingencies dependent upon the volition of third persons over whom the owner of the land has no control.[6]

f. *Value for Special Purpose May Be Shown in Rebuttal.* — If value for a special purpose has been shown by the landowner, the condemnor may show by expert testimony the value of the land for a special purpose after its severance by the construction of the railroad.[7]

g. *Use Made of Land.* — The value of land as such, independently of its special surroundings or the special uses to which it had been put, may be shown, though such evidence is not of controlling effect.[8] Hence it is competent to show not only the actual

that the trial court was not illiberal. Sharp *v.* United States, 191 U. S. 341, 356, 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932.

5. Sargent *v.* Merrimac, 196 Mass. 171, 81 N. E. 970.

Improvement of Navigation. Testimony as to the prospective value of land must have regard to what is practicable and available within a reasonable time. If it rests upon the improvement of a river which is navigable only for small watercraft, and the existence of a plan for dredging it is not shown, the contingency is too remote. Chicago, etc. R. Co. *v.* Alexander, 47 Wash. 131, 91 Pac. 626.

Growth of Adjacent Cities. — The possible increase in the growth of two cities and a correspondingly increased demand for gas are contingencies too remote to be considered in fixing the value of a gas plant. Spring City Gas Light Co. *v.* Pennsylvania, etc. R. Co., 167 Pa. St. 6, 31 Atl. 368.

In England, the prospective value of land for building purposes may be shown, and is not to be affected by evidence of what might be done by the public authorities under a statute to enhance its value as agricultural land, their authority being limited to accommodation works relating to the land in its present condition. Queen *v.* Brown, L. R. 2 Q. B. (Eng.) 630.

Fairness of Consideration. — The fairness of a contract for the sale of land, valueless except for the timber upon it, is determinable by evidence of the value of the stumpage, the net value of the timber at nearby markets and the difficulties in the way of transporting it. Ladd *v.* Ladd, 121 Ala. 583, 25 So. 627.

Amount of Stumpage may be shown in rebuttal, though plaintiff gave no evidence thereof in his opening, for the purpose of discrediting the opinions of witnesses. Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

The Failure To Sell Other Standing Timber at a certain price is too remote to be considered in fixing the value of that destroyed. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247.

6. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247 (if franchise for wharf was obtained); Calor Oil & G. Co. *v.* Franzell, 33 Ky. L. Rep. 98, 109 S. W. 328; Powers *v.* Hazelton & L. R. Co., 33 Ohio St. 429; Munkwitz *v.* Chicago, etc. R. Co., 64 Wis. 403, 25 N. W. 438; Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

Contingent Element of Value. If any element of value to land may be withdrawn at the pleasure of a third party, proof of the existence of such contingent right is admissible. Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279.

7. Chicago, etc. R. Co. *v.* Alexander, 47 Wash. 131, 91 Pac. 626.

8. Hercules Iron Wks. *v.* Elgin, etc. R. Co., 141 Ill. 491, 30 N. E.

use made of land,[9] but the intention of its owner and all the surrounding circumstances.[10] And, in addition, the amount of travel over the street in front of it may be proved to show what it is adapted for and its rental value.[11]

(1.) Profits of Business. — The profits of a business conducted on land may not be shown.[12]

(2.) Anticipated Profits. — An expectation of future profits from the business carried on upon the land as the result of extending the existing plant is not an element in the value of the land.[13]

h. *Returns From Investment.* — The probable returns from an investment in land because of the use which may be made of it is a consideration which enters into an intelligent estimate of its value, and is entirely distinct from an estimate based on the profits of a business which may be conducted on it.[14]

i. *Natural Advantages.* — The natural advantages affecting the value of land in respect to the surrounding country may be shown.[15]

1050; Whitman *v.* Boston & M. R., 3 Allen (Mass.) 133, 142.

9. St. Louis, etc. R. Co. *v.* Continental Brick Co., 198 Mo. 698, 96 S. W. 1011; Durham & N. R. *v.* Trustees of Bullock Church, 104 N. C. 525, 10 S. E. 761 (use of property for religious purposes); Pittsburgh & W. R. Co. *v.* Patterson, 107 Pa. St. 461; Boyer *v.* St. Louis, etc. R. Co., 97 Tex. 107, 76 S. W. 441; Richmond & M. R. Co. *v.* Humphreys, 90 Va. 425, 436, 18 S. E. 901; Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720; Welch *v.* Milwaukee & St. P. R. Co., 27 Wis. 108.

10. Welch *v.* Milwaukee & St. P. R. Co., 27 Wis. 108.

11. Johnston *v.* Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800.

12. Cox *v.* Philadelphia, etc. R. Co., 215 Pa. St. 506, 64 Atl. 729.

13. Hamilton *v.* Pittsburgh, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

14. Gearhart *v.* Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891.

15. Railroad *v.* Land Co., 173 N. C. 330, 49 S. E. 350.

Adaptation for Reservoir. — If land sought to be condemned is, by reason of its situation, and because it is part of a basin adapted for reservoir purposes, regarded by probable purchasers as more valuable than it would otherwise be, its value for such purposes may be shown as an element affecting its market value. Spring Val. Water Wks. Co. *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681; San Diego Land & T. Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83 (*disapproving* Gilmer *v.* Lime Point, 19 Cal. 47, and Central Pac. R. Co. *v.* Pearson, 35 Cal. 247); *s. c.* 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

It is immaterial to the application of this rule that there is no practicable site upon the property in question for reservoir purposes except in connection with land owned by the condemning party. The question of value is distinct from that of ownership. San Diego Land & T. Co. *v.* Neale, 78 Cal. 63, 71, 20 Pac. 372, 3 L. R. A. 83. It is also immaterial that the condemning party is the only one who has offered to buy the land for the purpose to which he seeks to apply it. San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

The conditions which tended to make the land suitable for such purpose may be shown—as the area of the watershed and amount of water, and the demand for the latter. San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

Conjectural Profits. — Though, because of the physical formation of

The Proximity of Land to a town or city is a relevant circumstance.[16]

The Character and Quality of land taken may be testified to.[17]

The Value of Timber on land may be proved.[18]

Illegal Benefit. — The value of a privilege exercised in violation of law or of public policy is not to be regarded.[19]

j. *Value To Be Shown as if Contract Had Been Performed.* — If it is the necessary result of the breach of a contract that the property affected by it will be largely reduced in value, it is proper to receive testimony of its value on the hypothesis that the party responsible for the breach had performed his contract and made the property useful and available for the purpose for which it was intended.[20]

k. *Corporate Land.* — The amount of the capital stock of a corporation and its net earnings are some evidence of the value of its manufacturing plant; but if no part of the plant has been taken or affected, but simply a part of the corporate land, such evidence is immaterial.[21] The market value of the stock of a corporation may be shown, in connection with other facts, to aid in fixing the value of its property.[22]

l. *Value Per Acre.* — The value per acre of land condemned may be shown in ascertaining the present value of a farm,[23] and the value of that taken.[24] Though land was sold as a body, if, in fixing the

land, there is no other in the vicinity suited for the purpose in question, it is not competent for witnesses to estimate its value on speculative and conjectural calculations of expenditure and profit for periods of five or ten years' use of it in connection with other property. San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 60, 25 Pac. 977, 11 L. R. A. 604.

Value Affected by Improvement. The absence of a market value for land does not justify evidence of its enhanced value resulting from the proposed improvement; and so as to the enhanced value of adjacent lands so resulting. San Diego Land & T. Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *s. c.*, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; Moore *v.* Chicago, etc. R. Co., 78 Wis. 120, 47 N. W. 273.

The Effect of a Nuisance upon the neighborhood in which the plaintiff's property is may be shown. Brennan *v.* Corsicana Cotton Oil Co. (Tex. Civ. App.), 44 S. W. 588.

16. Kansas City & T. R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202; Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248, 26 Pac. 698; Chicago, etc. R. Co. *v.* Rottgering, 26 Ky. L. Rep. 1167, 83 S. W. 584.

17. Rochester *v.* Chester, 3 N. H. 349; Creighton *v.* Water Comrs., 143 N. C. 171, 55 S. E. 511.

18. Page *v.* Wells, 37 Mich. 415; Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

19. Calor Oil & G. Co. *v.* Franzell, 33 Ky. L. Rep. 98, 109 S. W. 328.

20. Richmond *v.* D. & S. R. Co., 40 Iowa 264, 277.

21. Spring City Gas L. Co. *v.* Pennsylvania S. V. R. Co., 167 Pa. St. 6, 31 Atl. 368.

22. Vernon Shell Road Co. *v.* Savannah, 95 Ga. 387, 22 S. E. 625.

23. Hercules Iron Wks. *v.* Elgin, etc. R. Co., 141 Ill. 491, 30 N. E. 1050; Pingery *v.* Cherokee & D. R. Co., 78 Iowa 438, 43 N. W. 285.

24. Winona & St. P. R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100.

price, the quantity of it was one of the elements of calculation, proof of its value per acre is relevant.[25]

m. *Existence of Easement.* — The party seeking to condemn land may show the existence of an easement therein in its favor.[26]

n. *Condition of Title.* — It is competent to show the condition of the title as affecting the value of land on the issue of adequacy of price;[27] but the existence of a rumor concerning an adverse claim to property cannot be shown to affect its market value.[28]

o. *Effect of Incumbrance.* — It may be shown that during a series of years no intention has been manifested to enforce a lien on land. Such testimony would influence bidders at an auction sale of the defective title.[29]

p. *Building Restrictions.* — The existence of building restrictions placed on land by the owner's grantor may be shown. If he waived any right by not becoming a party to the condemnation proceedings the waiver inured to the benefit of the condemnor.[30] The fact that such restrictions are generally objected to by purchasers may be shown.[31]

q. *Parol Reservation of Rights.* — Where land is taken by filing a description of it in a designated office, the document filed is conclusive upon both parties, and if the condemnor reserves no rights in favor of the owner it is not competent to show a parol reservation thereof in order to lessen his recovery.[32]

E. Applicability of Such Evidence. — Evidence of the character indicated in the preceding section is not competent as a test of value, but is relevant to show what land is worth for any use for which it would command the highest price.[33]

F. Admissions. — As against the members of a partnership, its account books showing the value at which land was carried are evidence of its value.[34]

G. Price Paid for the Res. — a. *Effect of Agreement.* — **(1.) Vendor and Purchaser.** — As between vendor and purchaser the estimated value of land as recited in a contract pleaded and admitted is *prima facie* evidence thereof.[35] In an action on a covenant of warranty

25. Griswold *v.* Gebbie, 126 Pa. St. 353, 366, 17 Atl. 673, 12 Am. St. Rep. 878.

26. Tobey *v.* Taunton, 119 Mass. 404; Crowell *v.* Beverly, 134 Mass. 98; Creighton *v.* Water Comrs., 143 N. C. 171, 55 S. E. 511.

27. Norvell *v.* Phillips, 46 Tex. 161.

28. Prescott *v.* Hayes, 43 N. H. 593.

29. Foster *v.* Foster, 62 N. H. 532.

30. Allen *v.* Boston, 137 Mass. 319.

31. Streeper *v.* Abeln, 59 Mo. App. 485.

32. Ham *v.* Salem, 100 Mass. 350.

33. Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506; Conness *v.* Com., 184 Mass. 541, 69 N. E. 341.

34. Steam Stone-Cutter Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076.

35. Humphreys *v.* Shellenberger, 89 Minn. 327, 94 N. W. 1083; Rhodes *v.* Pray, 36 Minn. 392, 32 N. W. 86 (value of equitable interest).

Contract Not Merged in Deed. A written contract for the sale, purchase and conveyance of land is not inadmissible because of the execution of a deed in pursuance of it; the two instruments are not so merged as that the former is inad-

by the grantee's grantee the consideration named in the deed is conclusive upon the grantor as to the value of the land.[36]

(2.) Third Parties. — But such consideration is not conclusive against others.[37] It is immaterial that the deed was made to an individual for the corporation desiring the land and that the consideration expressed represented the value put on the land by the appraisers in condemnation proceedings.[38]

b. *Competency of Evidence of Price.* — In several jurisdictions the price actually paid at a *bona fide* sale of the property, the value of which is in issue, about the time the cause of action arose may be proved as an aid in determining its value.[39] As between vendor

missible to show the value of the land as between the parties to it. Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518.

Contract Must Be Binding. — Only a valid contract is admissible to show the value of the land to which it relates. Matter of Rochester, etc. R. Co., 50 Hun 29, 2 N. Y. Supp. 457.

36. Greenvault *v.* Davis, 4 Hill (N. Y.) 643; Suydam *v.* Jones, 10 Wend (N. Y.) 180.

37. *Illinois.* — O'Hare *v.* Chicago, etc. R. Co., 139 Ill. 151, 28 N. E. 923.

Iowa. — Hibbets *v.* Threlkeld, 114 N. W. 1045 (exchange of lands).

Louisiana. — New Orleans *v.* Manfre, 111 La. 927, 35 So. 981.

Massachusetts. — Rose *v.* Taunton, 119 Mass. 99.

Minnesota. — Witzel *v.* Zuel, 90 Minn. 340, 96 N. W. 1124.

Mississippi. — Board of Levee Comrs. *v.* Nelms, 82 Miss. 416, 34 So. 149.

New York. — Matter of Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52; Kingsland *v.* Mayor, etc., 60 Hun 489, 15 N. Y. Supp. 232.

Wisconsin. — Esch *v.* Chicago, etc. R. Co., 72 Wis. 229, 39 N. W. 129 (in absence of evidence of the actual consideration).

As Between Principal and Agent, the consideration expressed in a deed given by the latter, he being charged to sell the land conveyed for cash, is *prima facie* evidence of its value, the principal electing to take the cash value of the land rather than the land received in part consideration for the conveyance. Mains *v.* Haight, 14 Barb. (N. Y.) 76.

38. Seefeld *v.* Chicago, etc. R. Co., 67 Wis. 96, 29 N. W. 904.

39. *Arkansas.* — St. Louis, etc. R. Co. *v.* Smith, 42 Ark. 265.

Georgia. — Southern R. Co. *v.* Williams, 113 Ga. 335, 38 S. E. 744.

Illinois. — Terre Haute & I. R. Co. *v.* Smith, 65 Ill. App. 101; Sanitary Dist. *v.* Pearce, 110 Ill. App. 592 (a deed is *prima facie* evidence that the consideration named in it was the price paid).

Iowa. — Swanson *v.* Keokuk & W. R. Co., 116 Iowa 304, 89 N. W. 1088; Richmond *v.* D. & S. C. R. Co., 40 Iowa 264, 277 (building).

Maine. — Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

Maryland. — Mayor *v.* Smith & S. Brick Co., 80 Md. 458, 473, 31 Atl. 423.

New Hampshire. — March *v.* Portsmouth & C. R., 19 N. H. 372 (undivided interest).

New Jersey. — Wolff *v.* Meyer (N. J. L.), 66 Atl. 959.

Pennsylvania. — West Chester & W. P. R. Co. *v.* Chester County, 182 Pa. St. 40, 50, 37 Atl. 905.

Vermont. — Rawson *v.* Prior, 57 Vt. 612 (in the absence of a regular market the price paid subsequent to the transaction in question may be proved).

Cost of System of Waterworks. See National Waterworks Co. *v.* Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; Kennebec W. Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; Newburyport

and purchaser it is immaterial that the price paid was the result of a " flurry " in prices.[40]

(1.) Time of Purchase. — The purchase must, however, have been made within a reasonable time and there must not have been a very great change in the condition of the property.[41]

(2.) Sale After Change of Condition. — The price at which land was sold after a railroad was located across it is competent on the question of its prior value and as an admission by the owner.[42]

(3.) Such Evidence Not Received. — In some jurisdictions evidence of cost is receivable in the discretion of the court,[43] and in others the price paid may not be shown except on cross-examination for

Water Co. *v.* Newburyport, 168 Mass. 541, 47 N. E. 533.

40. Johnson *v.* McMullin, 3 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670.

Rule Applicable To Test Sufficiency of Price Paid at Auction. As against an administrator alleged to have improvidently sold at auction an undivided interest in a leasehold estate, the price paid by him for a like interest therein at a *bona fide* private sale near the time the auction took place may be shown. Matter of Johnston, 144 N. Y. 563, 39 N. E. 643.

Scope of Cross-Examination. — In a suit to have a deed absolute on its face declared a mortgage on the ground of the discrepancy between the consideration and the value of the property, a witness who has testified that, at about the time of the conveyance, he offered to lend the grantor, on the security of the property conveyed, a sum largely in excess of that received by the grantee, should be permitted to testify that, at about the same time, he was offered an interest in the same estate as the grantor was interested in for the same price the latter received, and also that when he offered to make the loan he held an unsatisfied judgment against the grantor which he expected to have paid in the transaction. Butsch *v.* Smith, 40 Colo. 64, 90 Pac. 61.

41. *Colorado.* — Denver, etc. R. Co. *v.* Schmitt, 11 Colo. 56, 16 Pac. 842 (unimproved land bought seven years before and improved to the extent of about $5,000).

Georgia. — First State Bank *v.* Carver, 111 Ga. 876, 36 S. E. 960 (price at public sale several years after the rights of the parties became fixed is immaterial).

Iowa. — Beans *v.* Denny, 117 N. W. 1091.

Massachusetts. — Palmer Co. *v.* Ferrill, 17 Pick. 58 (owner's deed nine years old too remote though condition of property unchanged).

Nebraska. — Dietrichs *v.* Lincoln & N. W. R. Co., 12 Neb. 225, 10 N. W. 718 (price paid three years before land condemned immaterial, purchase being made at an administrator's sale). In Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289, the same rule was applied to the price paid at a voluntary sale, regardless of the lapse of time.

Pennsylvania. — Davis *v.* Pennsylvania R. Co., 215 Pa. St. 581, 64 Atl. 774 (seventeen years too remote).

Texas. — Sullivan *v.* Missouri, etc. R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745 (ten years too remote though value unchanged).

Wisconsin. — O'Dell *v.* Rogers, 44 Wis. 136, 183 (three years too remote).

Lapse of Time. — In the absence of testimony concerning the efforts made to sell land, it is not competent to show how long it was on the market nor the price for which it sold long after the time to which the testimony to its value related. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

42. Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

43. Discretion as to Receiving Evidence of Cost. — It is doubtless true that the cost of property is or-

the purpose of testing the fairness or honesty of the opinions given on direct examination.[44]

(4.) Price Received by Wrongdoer. — Purchasers at executors' sales cannot limit their liability as trustees by proof of the prices at which they sold some of the lands two years after their purchase.[45]

(5.) Price Paid by Condemnor. — The price paid for an undivided one-half interest by the party seeking to condemn land may be shown, no compulsion having been used and the sale not having been made as a compromise.[46]

(6.) Proof of Price. — The price actually paid for land may be shown by parol,[47] though the witness may be required to produce his deed.[48]

dinarily some evidence of its value. It is not true, however, that cost is so indicative of value at times however far removed or under circumstances however changed, that it deserves to be received in proof of such value. The conditions of the sale, moreover, may make the consideration for which the title passed of no true significance. Not all logically probative matter is entitled to be admitted in evidence. Such matter may for one reason or another be of so slight significance or have so remote a connection with the fact sought to be established, as to make it unworthy to be permitted to encumber or complicate the trial. So it is that trial courts are permitted to exercise a considerable measure of discretion in determining whether a given piece of testimony which may be logically probative of a fact in issue, ought, in view of the considerations suggested and others recognized by the authorities, to be received. And so it is that the admission or rejection of evidence as to the cost of property is not to be determined by an arbitrary rule, but by considerations which ought to influence the exercise by the court of a sound, but not unlimited or unreviewable, discretion, in view of all the circumstances of each case. Rosenstein *v.* Fair Haven & W. R. Co., 78 Conn. 29, 60 Atl. 1061.

44. Eutaw *v.* Botnick (Ala.), 43 So. 739; Enterprise Lumb. Co. *v.* Porter (Ala.), 46 So. 773; Spring Val. Waterworks *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681; San Antonio & A. P. R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040.

45. O'Dell *v.* Rogers, 44 Wis. 136, 183.

46. Presbrey *v.* Old Colony & N. R. Co., 103 Mass. 1; Seaboard Air-Line R. Co. *v.* Chamblin (Va.), 60 S. E. 727. *Contra,* Port Townsend So. R. Co. *v.* Barbare, 46 Wash. 275, 89 Pac. 710.

47. Langan *v.* Iverson, 78 Minn. 299, 80 N. W. 1051; LeMay *v.* Brett, 81 Minn. 506, 84 N. W. 339; Jensen *v.* Crosby, 80 Minn. 158, 83 N. W. 43.

Understanding of Witness. — If value is only collaterally involved, testimony as to the price paid for land need not be very positive; it may be according to the witness' understanding. Morehead's Trustee *v.* Anderson, 30 Ky. L. Rep. 1137, 100 S. W. 340.

Purchaser's Motive. — The motive and purpose of the purchaser of an adjoining estate cannot be gone into. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668.

Willingness To Pay More. — The purchaser of property used as a basis for comparison of value cannot testify that he would have paid more for it than he did if it had been necessary. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668.

48. Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332.

A deed reciting the consideration paid for land is admissible as evidence of its value and of the payment of the price testified to by the purchaser. Hinton *v.* Pritchard, 98 N. C. 355, 4 S. E. 462.

(7.) Circumstances of Sale. — All the circumstances under which the land was bought, its condition and the improvements made subsequently, may be shown.[49] The course of the bidding at an auction sale may be shown, and the influence of a lien held by one of the bidders.[50]

(8.) Price at Auction. — The price paid for land at a private auction sale fairly conducted is evidence of its value at that time and for a longer or shorter time before and after, the period depending upon the materiality of changes in value.[51]

(9.) Forced Cash Sale. — The fairness of the price realized for a large tract of land is to be tested by evidence as to its character and situation and the usual methods by which sales of like tracts were made, and not by proof of what it would have brought at a forced cash sale.[52]

(10.) Price at Foreclosure Sale. — The price at which property sold under foreclosure is some evidence of its value in the absence of facts showing irregularities.[53]

(11.) Cost of Building. — The actual cash value of a building when burned is not conclusively shown by proof of the cost of the materials of which it was constructed; but such evidence is competent.[54] In some cases the cost of a building can only be shown in case of necessity.[55] In the absence of proof of its market value it may be shown to enable the jury to test the opinions of witnesses,[56] to corroborate their opinions and to meet the charge of fraudulent overvaluation.[57]

(12.) Weight of Evidence. — If the benefits resulting from the improvements for which the land has been taken are not to be regarded in fixing its value, the sale of the land for a price equal to its market value before condemnation does not show that there was no depreciation in its value by taking part of it.[58] The price at which land sold is more convincing of its value than the opinions

49. St. Louis, etc. R. Co. *v.* Smith, 42 Ark. 265.

50. Hazleton *v.* LeDuc, 10 App. Cas. (D. C.) 379.

51. Hazleton *v.* LeDuc, 10 App. Cas. (D. C.) 379 (sale six months after forfeiture of contract to buy, as between the parties); Croak *v.* Owens, 121 Mass. 28.

52. Montgomery *v.* Sayre, 100 Cal. 182, 34 Pac. 646, 30 Am. St. Rep. 271.

53. Brady *v.* Finn, 162 Mass. 260, 38 N. E. 506 (sale fifteen months after rights of parties accrued); Knickerbocker L. Ins. Co. *v.* Nelson, 78 N. Y. 137; Mains *v.* Haight, 14 Barb. (N. Y.) 76 (land in a wild, unsettled condition).

Intended Offers. — The offers witnesses intended to make at a judicial sale of property cannot be testified to on direct examination to determine whether or not a fair price was realized for it. Ladd *v.* Ladd, 121 Ala. 583, 25 So. 627 (it was suggested that such testimony may be proper on cross-examination).

54. Cummins *v.* German Am. Ins. Co., 192 Pa. St. 359, 43 Atl. 1016.

55. Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315.

56. Patterson *v.* Kingsland, 8 Blatchf. 278, 18 Fed. Cas. No. 10,827 (not as evidence of value).

57. Sheldon *v.* Wood, 2 Bosw. (N. Y. Super.) 267, 286.

58. Watkins *v.* Wabash R. Co. (Iowa), 113 N. W. 924.

of witnesses.[59] No fraud or irregularity appearing, the price at which property sold at foreclosure is conclusive as to its value as a security.[60]

(13.) Exchange Value. — The value of property given in exchange for land may be material as to the truth of the representations concerning its value.[61] It is not regarded as a safe or just criterion of its market value.[62]

c. *Cross-Examination.* — If the owner has testified on cross-examination as to the price paid for the tract of land inquired about, he cannot be asked as to what he paid for a part of it.[63]

H. Offers To Buy and Sell. — a. *Offers To Buy.* — **(1.) Not Evidence of Value.** — An offer for property depends on so many considerations that it is not usually regarded as a test of value.[64]

59. Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 357, 15 N. W. 468.

60. Loeb *v.* Stern, 198 Ill. 371, 64 N. E. 1043, 99 Ill. App. 637.

61. Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682.

62. Shidy *v.* Cutter, 54 Md. 674. Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518 (especially if a second contract shows a largely reduced valuation).

63. Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289.

64. *United States.* — Sharp *v.* United States, 191 U. S. 341, 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 392 (or to lease for a special purpose).

California. — Central Pac. R. Co. *v.* Pearson, 35 Cal. 247, 262; Spring Val. Water-Wks. *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681 (may be shown on cross-examination).

Kansas. — St. Joseph, etc. R. Co. *v.* Orr, 8 Kan. 419.

Maryland. — Western U. Tel. Co. *v.* Ring, 102 Md. 677, 62 Atl. 802; Horner *v.* Beasley, 105 Md. 193, 65 Atl. 820.

Massachusetts. — Fowler *v.* Middlesex, 6 Allen 92; Whitney *v.* Thacher, 117 Mass. 523; Winnisimmet Co. *v.* Grueby, 111 Mass. 543; Davis *v.* Charles River Branch R. Co., 11 Cush. 506 (offer of condemnor).

Minnesota. — Lehmicke *v.* St. Paul, etc. R. Co., 19 Minn. 464; Minnesota Belt-Line R. & T. Co. *v.* Gluek, 45 Minn. 463, 48 N. W. 194.

Mississippi. — Louisville, etc. R. Co. *v.* Ryan, 64 Miss. 399, 8 So. 173.

Pennsylvania. — Auman *v.* Philadelphia, etc. R. Co., 133 Pa. St. 93, 20 Atl. 1059; Baltimore & P. R. Co. *v.* Springer, 13 Atl. 76 (offer for a building lot to be carved out of a farm).

Tennessee. — Vaulx *v.* Tennessee Cent. R. Co., 108 S. W. 1142.

Texas. — Brennan *v.* Corsicana Cotton Oil Co. (Tex. Civ. App.), 44 S. W. 588.

Washington. — Parke *v.* Seattle, 8 Wash. 78, 35 Pac. 594; Chicago, etc. R. Co. *v.* Alexander, 47 Wash. 131, 91 Pac. 626.

Wisconsin. — Atkinson *v.* Chicago & N. R. Co., 93 Wis. 362, 67 N. W. 703; Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

Grounds Upon Which Offers May Not Be Shown. — "It has been intimated in some cases that offers are some evidence of value. But it is a class of evidence which it is much safer to reject than to receive. Its value depends upon too many circumstances. If evidence of offers is to be received, it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and whether made with reference to the market value of the article, or to supply a particular need or to gratify a fancy. Private offers can be multiplied to any extent for the purpose of a cause, and the bad faith in which they were

It is not a sufficient basis for the opinion of a witness.[65] A witness may not say what sum he is willing to pay for land.[66] In two states offers made for land may be proved.[67] In one of them the owner who does not want to sell may prove the price offered subject to the right of the other party to show the lack of good faith and financial ability of the person proposing to buy,[68] and in another the decision was that an offer cannot be shown if made to and by persons not parties or witnesses in the proceedings.[69]

(2.) Competent To Show Demand. — It is proper to show the existence of a demand for the property in question because a market value is thereby indicated.[70] It is immaterial that the demand exists because of a special reason.[71] And as affecting the extent of the demand, the quantity of similar local lands on the market may be shown.[72]

(3.) Pro Forma Offers. — Offers necessarily made as the basis of

made would be difficult to prove." Keller *v.* Paine, 34 Hun (N. Y.) 167, *approved* in Hine *v.* Manhattan R. Co., 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591; Chicago, etc. R. Co. *v.* Alexander, 47 Wash. 131, 91 Pac. 626.

Such Testimony Not Valuable. Testimony by the owner of land as to what has been offered for it is so much open to suspicion and so inviting to fraud, unless the offer was made at a judicial or other public sale, or under other circumstances furnishing like security of good faith in making it, that it generally must rank with hearsay. *Per* Cooley, J., in Perkins *v.* People, 27 Mich. 386.

65. Minnesota Belt-Line R. & T. Co. *v.* Gluek, 45 Minn. 463, 48 N. W. 194. Neither the owner nor the party who made an offer for the property can testify thereof (Hine *v.* Manhattan R. Co., 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591; Keller *v.* Paine, 34 Hun (N. Y.) 167; Leale *v.* Metropolitan El. R. Co., 61 Hun 613, 16 N. Y. Supp. 419; Chicago, etc. R. Co. *v.* Alexander, 47 Wash. 131, 91 Pac. 626); nor can the purchaser of property, the price paid for which is used as a basis for comparison with that in issue, testify that he had been offered for it more than he paid. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668.

66. Selma, etc. R. Co. *v.* Keith, 53 Ga. 178; Swan *v.* Middlesex, 101 Mass. 173.

67. Fox *v.* Baltimore & O. R. Co., 34 W. Va. 466, 12 S. E. 757.

68. Curran *v.* McGrath, 67 Ill. App. 566.

69. Yellowstone Park R. Co. *v.* Bridger Coal Co., 34 Mont. 545, 557, 87 Pac. 963.

70. St. Louis, etc. R. Co. *v.* St. Louis Union Stock Yds. Co., 120 Mo. 541, 25 S. W. 399.

71. Gearhart *v.* Clear Spr. Water Co., 202 Pa. St. 292, 51 Atl. 891.

Demand the Result of a "Boom." As between vendor and vendee in an action for breach of contract to buy land its value at the time of the breach may be shown, notwithstanding that at the time the contract was made there existed in a nearby city a "boom" in suburban lands, the property involved being situated to meet such demand. It was immaterial how unsubstantial the boom was if a real demand for the property in question grew out of it. The extent to which such demand existed at the time the contract was broken might be shown. Allison *v.* Cocke's Exrs., 112 Ky. 212, 225, 65 S. W. 342, 66 S. W. 392.

72. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227; Maxon *v.* Gates (Wis.), 116 N. W. 758.

the right to institute condemnation proceedings cannot be proved, nor can any previous negotiations between the parties.[73]

(4.) Price Bid at Auction. — The price bid at an auction cannot be proved unless the circumstances and conditions connected with it are disclosed so that the weight to be given the testimony may be estimated.[74]

(5.) Bid at Execution Sale. — The sum bid for land at a sheriff's sale is not conclusive of its value.[75] It may be shown that the price offered was that of an inexperienced employe of the creditor, and that if his attorney had been present the bid would have been for a less sum.[76]

(6.) Authority To Bid. — It cannot be shown what sum a witness was authorized by a responsible man to bid for land.[77]

(7.) May Be Shown for Collateral Purposes. — Offers to buy may be shown for collateral purposes, as upon the issue of the fraudulent overvaluation of corporate realty,[78] and by a principal against his agent on the issue of the sufficiency of a second mortgage as security.[79] The amount of rent offered for a building may be shown to meet the contention that it was over-insured and fraudulently destroyed.[80]

b. *Offers To Sell.* — **(1.) Admissibility.** — The price at which land was offered for sale by its owner may be proved. Such testimony does not afford such opportunities for collusion or bad faith as are open when the owner testifies to an unaccepted offer made for property.[81] It is immaterial that such an offer was made to the party seeking to condemn the land, that being done before the railroad was formally located, or that the offer was withdrawn thereafter.[82] An offer may also be shown as evidence of the owner's good faith in another transaction,[83] and as his estimate of the value of the premises though a lease thereof was in force.[84]

73. St. Louis & K. C. R. Co. *v.* Eby, 152 Mo. 606, 54 S. W. 472.

An Offer Made by the Party Who Damaged Land to buy it at a price put on it by a third person cannot be proved. Mayor, etc. *v.* Harris, 75 Ga. 761.

An Unauthorized Offer for land is not provable. Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912.

74. Chaney *v.* Coleman, 77 Tex. 100, 13 S. W. 850.

75. Clowes *v.* Dickinson, 9 Cow. (N. Y.) 403.

76. Rickards *v.* Bemis (Tex. Civ. App.), 78 S. W. 239.

77. First Nat. Bank *v.* Hackett (Neb.), 89 N. W. 412.

78. Thurber *v.* Thompson, 21 Hun (N. Y.) 472.

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

80. Hotchkiss *v.* Germania F. Ins. Co., 5 Hun (N. Y.) 90.

81. City of Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635; Daniels *v.* Conrad, 4 Leigh (Va.) 401; Maxon *v.* Gates (Wis.), 116 N. W. 758.

82. Faufman *v.* Pittsburg, etc. R. Co., 210 Pa. St. 440, 60 Atl. 2.

83. Rawson *v.* Prior, 57 Vt. 612.

84. East Brandywine W. R. Co. *v.* Ranck, 78 Pa. St. 454; Houston *v.* Western Washington R. Co., 204 Pa. St. 321, 54 Atl. 166 (an offer is equivalent to a declaration); Phelps *v.* Root, 78 Vt. 493, 504, 63 Atl. 941.

Value Must Be Fixed by Owner, and not by creditor to whom land has been conveyed for sale at his

(2.) Conditions. — An offer to sell may not be proved unless it was unconditional,[85] or if made by way of compromise.[86] It must have been made within a reasonable time.[87]

(3.) Circumstances. — The circumstances under which the offer was made may be proved, the consideration stated in the deed not being conclusive.[88]

(4.) Efforts To Sell. — The effort made to sell land may be proved.[89]

(5.) Offer by Former Owner. — The price at which a former owner of the property offered it for sale cannot be proved (except to contradict) by the testimony of a third party; the best evidence of such owner's estimate of the value of the land would be his own testimony.[90]

I. TAX ASSESSMENTS. — a. *Generally.* — Owing to the varying statutes governing the assessment of real property and specifying the form of verification to returns, or the effect of returns, verified or unverified, there is great discrepancy of views as to the competency of tax returns, assessment rolls and such like papers to show its market value.

b. *Where Competent.* — If the owner, in compliance with the statute, places a valuation upon his land, he makes a declaration which is independent evidence against him in favor of a third party.[91] In Vermont the official appraisal of land, though verified only by the officers who made it, is admissible to show its value.[92]

discretion in payment of debt. Haney *v.* Clark, 65 Tex. 93.

In Massachusetts a mere agreement to sell the land in question cannot be proved. Chapin *v.* Boston & P. R. Co., 6 Cush. (Mass.) 422.

85. Tufts *v.* Charlestown, 4 Gray (Mass.) 537 (the sum for which the owner of a right of way would have sold his interest if a highway had not been laid out is immaterial).

86. Orr *v.* Carnegie Nat. Gas Co., 2 Pa. Super. 401.

87. Crouse *v.* Holman, 19 Ind. 30 (eight months before sale too remote though change in value not shown).

88. Webster *v.* Kansas City & S. R. Co., 116 Mo. 114, 22 S. W. 474.

89. Maxon *v.* Gates (Wis.), 116 N. W. 758.

90. O'Brien *v.* Schenley Park H. R. Co., 194 Pa. St. 336, 45 Atl. 89.

91. Birmingham M. R. Co. *v.* Smith, 89 Ala. 305, 7 So. 634; White *v.* Beal & F. Groc. Co., 65 Ark. 278, 45 S. W. 1060; Winter *v.* Bandel, 30 Ark. 362; Western & A. R. Co. *v.* Tate, 129 Ga. 526, 59 S. E. 266; Patch *v.* Boston, 146 Mass. 52, 14 N. E. 770 (statement made more than one year before property was taken); Steam Stone-Cutter Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076. St. Louis, etc. R. Co. *v.* Rothan, 142 Mo. 670, 44 S. W. 771.

The Value Placed Upon the Property of a Corporation for Taxing Purposes is admissible in connection with proof of the market value of its stock, to show the value of its property. Vernon Shell Road Co. *v.* Savannah, 95 Ga. 387, 22 S. E. 625.

An Assessment List Made by a Co-Tenant is admissible as against him and his co-tenant in a condemnation proceeding to which both are parties, notwithstanding a stipulation to the effect that the damages to be awarded should be equally divided between them. St. Louis, etc. R. Co. *v.* Rothan, 142 Mo. 670, 44 S. W. 802.

92. Town of Ripton *v.* Brandon, 80 Vt. 234, 67 Atl. 541.

In West Virginia the assessed value of corporate property may be shown to aid in fixing the value of the franchise.[93]

c. *Incompetent.* — If the valuation is made by the assessor, without participation by the owner, or if the latter's verification is limited to the correctness of the list so far as his ownership of the property is concerned, such valuation is not evidence of the cash or market value of the property.[94]

93. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223; Fox *v.* Baltimore & O. R. Co., 34 W. Va. 466, 12 S. E. 757.

94. *Alabama.* — Savannah, etc. R. Co. *v.* Buford, 106 Ala. 303, 17 So. 395 (if owner did not participate in assessment, payment of taxes did not convert assessor's valuation into an admission by owner that it equalled or exceeded the value of the land).

Arkansas. — Texas, etc. R. Co. *v.* Eddy, 42 Ark. 527 (same point as in Savannah, etc. R. Co. *v.* Buford, *supra.*

California. — Central Pacific R. Co. *v.* Feldman, 152 Cal. 303, 92 Pac. 849.

Colorado. — Ft. Collins Develop. R. Co. *v.* France, 41 Colo. 512, 92 Pac. 953.

Connecticut. — Martin *v.* New York, etc. R. Co., 62 Conn. 331, 343, 25 Atl. 239 (a married woman is not concluded by the valuation put on her realty by her husband as her agent in listing the property for taxation; his agency extended only to the listing of it, not to its valuation, and he was not bound to make oath to the latter).

Illinois. — Lewis *v.* Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44.

Indiana. — German Mut. Ins. Co. *v.* Niewedde, 11 Ind. App. 624, 39 N. E. 534.

Kentucky. — Scott *v.* O'Neil's Admr. 23 Ky. L. Rep. 331, 62 S. W. 1042 (not provable on issue of adequacy for which land sold at judicial sale).

Louisiana. — New Orleans Pac. R. Co. *v.* Murrell, 36 La. Ann. 344 (owner of a large tract of land varying materially in value is not estopped by the value per acre put upon it for taxing purposes from proving a higher value for the part of it condemned).

Massachusetts. — Flint *v.* Flint, 6 Allen 34, 83 Am. Dec. 615; Kenerson *v.* Henry, 101 Mass. 152; Anthony *v.* New York, etc. R. Co., 162 Mass. 60, 37 N. E. 780; Brown *v.* Providence, etc. R. Co., 5 Gray 35 (printed transcript of assessor's valuation).

Nevada. — Virginia & T. R. Co. *v.* Henry, 8 Nev. 165 (sworn return inadmissible unless to contradict affiant's testimony in chief).

New Hampshire. — Concord Land & W. P. Co. *v.* Clough, 69 N. H. 609, 45 Atl. 565, *overruling* Seavey *v.* Seavey, 37 N. H. 125, *holding* that the inventory of the estate of a decedent was evidence against third persons of the amount of property he owned).

North Carolina. — Railroad *v.* Land Co., 137 N. C. 330, 49 S. E. 350; Ridley *v.* Railroad, 124 N. C. 37, 32 S. E. 379.

Pennsylvania. — Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279; Miller *v.* Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132; Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518 (if unverified, not shown to have been made by a competent person or based on the actual cash value of the property); Com. *v.* Tryon, 31 Pa. Super. 146.

Rhode Island. — Spink *v.* New York, etc. R. Co., 26 R. I. 115, 58 Atl. 499.

Tennessee. — Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 559, 82 S. W. 471 (extra-legal valuation by owner).

Texas. — San Antonio *v.* Diaz (Tex. Civ. App.), 62 S. W. 549; Gulf, C. & S. F. R. Co. *v.* Abney, 3 Wil. Civ. Cas. § 414; Boyer *v.* St. Louis, etc. R. Co., 97 Tex. 107, 76

d. *Weight of.* — Assessment returns made by a lessee, if admissible against the owner, are not conclusive.[95]

e. *Admissibility on Cross-Examination.* — The owner who has testified to the value of his property may be asked as to the price at which he returned it for assessment. That question is not objectionable as calling for secondary evidence of the assessment.[96] A witness who has testified of the value of his property may be asked to state from his sworn statement, made to the assessor, the value he had therein placed on it.[97] In Minnesota if the assessment is not a positive, definite and complete declaration by the owner of the value of the property, the record is not admissible to affect his credibility.[98] A witness' knowledge of the assessed value of property is immaterial either to show its value or his knowledge of the premises.[99]

f. *Admissibility for Collateral Purposes.* — The assessed value of land may be shown to meet the charge that the price paid for it greatly exceeded its value.[1] Verified statements made to an assessor are competent on the issue of the *bona fides* of a conveyance made by the affiant,[2] and in proceedings supplementary to execution.[3]

J. APPRAISEMENTS. — a. *Commissioners' Award.* — An award made by commissioners in condemnation proceedings is not admissible to show the value of the property if, upon appeal therefrom, the parties are entitled to a retrial.[4]

b. *Extra-Legal Appraisement.* — An appraisement of land made without authority of law is not evidence of its value.[5]

c. *Statutory Awards.* — An unconfirmed statutory award made by arbitrators is not admissible unless it is pleaded,[6] except to impeach[7] the evidence of such commissioners, and is not admissible

S. W. 441 (if oath goes only to the correctness of the property listed it may be shown that the assessor placed the valuation on it).

Reason. — An assessment is merely an *ex parte* statement, made by an officer not subject to cross-examination, and is not evidence of the value of the land assessed. Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279.

95. Sanitary Dist. *v.* Pittsburgh, etc. R. Co., 216 Ill. 575, 586, 75 N. E. 248.

96. Gayle *v.* Court of County Comrs. (Ala.), 46 So. 261.

97. Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547. If the verification does not extend to the value placed on the property the owner may show that it was valued by the assessor. Boyer *v.* St. Louis, etc. R. Co., 97 Tex. 107, 76 S. W. 441.

98. LeMay *v.* Brett, 81 Minn. 506, 84 N. W. 339.

99. Storrs *v.* Robinson, 74 Conn. 443, 51 Atl. 135. But *compare* Central Pac. R. Co. *v.* Feldman, 152 Cal. 303, 92 Pac. 849.

1. Cardwell *v.* Mebane, 68 N. C. 485.

2. Sherman *v.* Hogland, 73 Ind. 472; Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

3. Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494.

4. Sherman *v.* St. Paul, etc. R. Co., 30 Minn. 227, 15 N. W. 239; Northern Pac. R. Co. *v.* Duncan, 87 Minn. 91, 91 N. W. 271.

5. Williams *v.* Hersey, 17 Kan. 18.

6. Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

7. Yellowstone Park R. Co. *v.* Bridger Coal Co., 34 Mont. 545, 556, 87 Pac. 963.

for that purpose unless authenticated or its genuineness is admitted.[8] The opinions of appraisers must be shown by their testimony as witnesses.[9]

d. *Evidence in Collateral Actions.* — The valuation of property by sworn appraisers appointed to appraise it will be given weight on the question of the adequacy of the price it brought at a judicial sale.[10]

K. Insurance and Proofs of Loss. — a. *Sum for Which Property Insured.* — In the absence of a statute or contract to the contrary, the sum for which property is insured does not tend directly to show its value.[11]

b. *Proofs of Loss.* — The proofs of loss required to be supplied by a policy of insurance are not evidence in favor of insured to show the value of the property destroyed or damaged.[12]

c. *Form of Objection.* — A specific objection to proofs is not an admission that the loss equals the sum specified in them.[13]

L. Prices Paid for Other Lands. — a. *The Affirmative View.* There is a marked conflict of opinions as to the competency of evidence showing the prices paid for other lands. In many jurisdictions such evidence is admitted if there is a general similarity in

8. Omaha Loan & T. Co. *v.* Douglas County, 62 Neb. 1, 86 N. W. 936.

9. Seefeld *v.* Chicago, etc. R. Co., 67 Wis. 96, 29 N. W. 904.

Their award is immaterial as to the value of the land appraised. Seefeld *v.* Chicago, etc. R. Co., 67 Wis. 96, 29 N. W. 904; Whiting *v.* Mississippi Val. Mfs. Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672; Munkwitz *v.* Chicago, etc. R. Co., 64 Wis. 403, 25 N. W. 438. But it seems that the valuation of standing timber by officers acting under authority may be shown. Lynch *v.* United States, 138 Fed. 535, 71 C. C. A. 59.

10. Scott *v.* O'Neil's Admr., 23 Ky. L. Rep. 331, 62 S. W. 1042.

11. Union Pac. R. Co. *v.* Lucas, 136 Fed. 374, 69 C. C. A. 218.

Declaration of Assignor of Policy as to cost of property is inadmissible in favor of assignee. Westlake *v.* St. Lawrence County Mut. Ins. Co., 14 Barb. (N. Y.) 206.

12. *Illinois.* — German Ins. Co. *v.* Bear, 63 Ill. App. 118.

Iowa. — Lundvick *v.* Westchester F. Ins. Co., 128 Iowa 376, 104 N. W. 429.

Maryland — Fidelity Mut. L. Assn. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; Scottish Union & Nat. Ins. Co. *v.* Keene, 85 Md. 263, 37 Atl. 33.

Michigan. — Cook *v.* Standard L. & A. Ins. Co., 84 Mich. 12, 47 N. W. 568.

Missouri. — Summers *v.* Home Ins. Co., 53 Mo. App. 521.

New York. — Bini *v.* Smith, 36 App. Div. 463, 55 N. Y. Supp. 842.

Pennsylvania. — Cole *v.* Manchester F. Assur. Co., 188 Pa. St. 345, 41 Atl. 593; Cummins *v.* German Am. Ins. Co., 192 Pa. St. 359, 43 Atl. 1016; Kittanning Ins. Co. *v.* O'Neill, 110 Pa. St. 548, 1 Atl. 592.

Tennessee. — Insurance Co. *v.* National Bank, 88 Tenn. 369, 12 S. W. 915.

Washington. — Cascade F. & M. Ins. Co. *v.* Journal Pub. Co., 1 Wash. 452, 25 Pac. 331.

A Schedule of the Destroyed Property, verified by the insured and attached to the proofs, was properly received to show the facts stated in it as to the items of property and their value, in connection with insured's testimony. Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14.

13. Kuznik *v.* Orient Ins. Co., 73 Ill. App. 201.

location, character and adaptability to use of the lands sold with those the value of which is in question and the sales were made about the time the value of the latter must be established.[14]

(1.) Admissible To Determine Fairness of Price at Judicial Sale. — The adequacy of the price paid for land at a judicial sale may be tested by testimony concerning the price obtained for similar local lands sold at about the time in question and under similar circumstances.[15]

(2.) Price Paid by Condemnor. — In some states the price paid for other property by a party seeking condemnation cannot be proved because it is fixed by compromise when there is no competition and no option to hold the property.[16] In some other states the price

14. *United States.* — Laflin *v.* Chicago, etc. R. Co., 33 Fed. 415; Lynch *v.* United States, 138 Fed. 535, 71 C. C. A. 59 (standing timber).

Illinois. — Dady *v.* Condit, 104 Ill. App. 507; White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 543.

Kentucky. — City of Paducah *v.* Allen, 111 Ky. 361, 63 S. W. 981 (adjoining properties, sales made before and after creation of nuisance); Chicago, etc. R. Co. *v.* Rottgering, 26 Ky. L. Rep. 1167, 83 S. W. 584.

Maine. — Warren *v.* Wheeler, 21 Me. 484.

Maryland. — Mayor *v.* Smith & S. Brick Co., 80 Md. 458, 31 Atl. 423; Moale *v.* Mayor, 5 Md. 314, 61 Am. Dec. 276.

Massachusetts. — Gardner *v.* Brookline, 127 Mass. 358; Patch *v.* Boston, 146 Mass. 52, 14 N. E. 770; Shattuck *v.* Stoneham Branch R., 6 Allen 115; Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668.

Missouri. — Hewitt *v.* Price, 204 Mo. 31, 102 S. W. 647; *In re* Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188; St. Louis, etc. R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906; Markowitz *v.* Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498.

Montana. — Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912.

New Hampshire. — Thornton *v.* Campton, 18 N. H. 20 (price paid in 1809 competent on question of value from 1810 to 1814); Hoit *v.* Russell, 56 N. H. 559; Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332.

New Jersey. — Laing *v.* United New Jersey R. & C. Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682; Hadley *v.* Freeholders, 37 N. J. L. 197, 62 Atl. 1132.

New York. — Thurber *v.* Thompson, 21 Hun 472 (for a collateral purpose).

North Carolina. — Belding *v.* Archer, 131 N. C. 287, 315, 42 S. E. 800.

Tennessee. — Union R. Co. *v.* Hunton, 114 Tenn. 609, 628, 88 S. W. 182; Humphreys *v.* Holtsinger, 3 Sneed 228 (as between a vendor and a defaulting purchaser).

Texas. — Sullivan *v.* Missouri, etc. R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745; Newbold *v.* International & G. N. R. Co., 34 Tex. Civ. App. 525, 78 S. W. 1079.

Washington. — Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738; Port Townsend So. R. Co. *v.* Barbare, 46 Wash. 275, 89 Pac. 710.

Wisconsin. — Atkinson *v.* Chicago & N. R. Co., 93 Wis. 362, 67 N. W. 703; Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 377, 18 N. W. 328.

Commissioners' Report. — It is not competent to show, either on direct or cross-examination, by the report of commissioners the price agreed to be paid for other local lands. San Luis Obispo *v.* Brizzolara, 100 Cal. 434, 34 Pac. 1083.

15. Ladd *v.* Ladd, 121 Ala. 583, 25 So. 627.

16. *California* — Central Pac. R. Co. *v.* Pearson, 35 Cal. 247, 262.

Georgia. — Streyer *v.* Georgia, etc. R. Co., 90 Ga. 56, 15 S. E. 637.

paid by the party seeking to acquire land by compulsory purchase may be proved.[17]

(3.) Valid Contract. — The contract for the purchase of the land used as a comparison must be valid.[18]

(4.) No Market Value. — In the absence of market value for land the prices at which lots in the vicinity were selling near the time of the condemnation of the res may be proved, though there is no other evidence of its value.[19]

(5.) Weight of Evidence. — Such evidence is more persuasive than the opinions of witnesses.[20]

Illinois. — Peoria Gas, L. & C. Co. *v.* Peoria T. R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; Illinois, etc. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880; Lyon *v.* Hammond, etc. R. Co., 167 Ill. 527, 47 N. E. 775.

Maryland. — Mayor *v.* Smith & S. Brick Co., 80 Md. 458, 473, 31 Atl. 423; Lake Roland El. R. Co. *v.* Weir, 86 Md. 273, 37 Atl. 714.

Massachusetts. — Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56; Presbrey *v.* Old Colony, etc. R. Co., 103 Mass. 1; Cobb *v.* Boston, 112 Mass. 181. But *compare* Wyman *v.* Lexington, etc. R. Co., 13 Met. 316.

Missouri. — Springfield *v.* Schmook, 68 Mo. 394.

Rhode Island. — Howard *v.* Providence, 6 R. I. 514.

Washington. — Port Townsend So. R. Co. *v.* Barbare, 46 Wash. 275, 89 Pac. 710.

An Incomplete Agreement between a condemning party and the owner of adjoining land is not admissible to show the value of the land in question. Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56. The principle has been applied where another party obtained a right of way over the same land. Brunswick & A. R. Co. *v.* McLaren, 47 Ga. 546.

17. Wyman *v.* Lexington, etc. R. Co., 13 Met. (Mass.) 316, 326.

Exceptions. — It is otherwise if it is shown that it was made apparent to the owner that if he did not come to terms the land would be condemned (Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711); or that the sum paid was agreed upon as a settlement (Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527), or was paid pursuant to an award. White *v.* Fitchburg R. Co., 4 Cush. (Mass.) 440.

Fairness of Transaction. — In the absence of evidence as to the circumstances under which land was sold to a body which had power to purchase as well as condemn, it will not be assumed that the transaction was not fair, rather than a compulsory settlement, and evidence of the price is proper. O'Malley *v.* Com., 182 Mass. 196, 65 N. E. 30.

Payment Must Have Been for Land. — But if the value of the land in question is small and the sum paid by the condemnor for other land must have been principally for damages, which resulted chiefly from conditions peculiar to it, the sum paid is not ordinarily material on the question as to what should be paid for another piece. Laing *v.* United New Jersey R. & C. Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682; Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332.

May Be the Best Evidence. Where the property condemned consisted solely of incorporeal rights and easements, concerning the value of which experts could not testify with any degree of intelligence, evidence of the prices paid by the condemning party for like property was held competent because the best that could be produced. Langdon *v.* Mayor, etc., 133 N. Y. 628, 31 N. E. 98.

18. Providence & W. R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56.

19. Culbertson & B. Pack. Co. *v.* Chicago, 111 Ill. 651; Concordia Cem. Assn. *v.* Minnesota & N. R. Co., 121 Ill. 199, 212, 12 N. E. 536.

20. Chicago, etc. R. Co. *v.* Rott-

(6.) Substantial Similarity Required. — There must be substantial similarity between the lands sold and those in question, or evidence of the price paid is not admissible,[21] unless the extent of the variation is accounted for.[22] There must be some relation between the size of the tract of land sold and that in question,[23] though mere

gering, 26 Ky. L. Rep. 1167, 83 S. W. 584.

Circumstances Affecting Weight. The value of such testimony is dependent upon the similarity in the character and location of the respective lands and the proximity of the time of the sales. Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 377, 18 N. W. 328; Maxon *v.* Gates (Wis.), 116 N. W. 758. It may be lessened by proof that the vendor discounted the notes received for the land. Dady *v.* Condit, 104 Ill. App. 507.

21. *Illinois.* — Concordia Cem. Assn. *v.* Minnesota & N. R. Co., 121 Ill. 199, 213, 12 N. E. 536 (the value of unimproved cemetery land cannot be shown by the prices paid for lots in other cemeteries); O'Hare *v.* Chicago, etc. R. Co., 139 Ill. 151, 28 N. E. 923.

Iowa. — Ranck *v.* Cedar Rapids, 134 Iowa 563, 111 N. W. 1027.

Massachusetts. — Shattuck *v.* Stoneham Branch R., 6 Allen 115; Chandler *v.* Jamaica Pond Aqueduct Co., 122 Mass. 305 (the lands must be similar in respect of access by streets, of nearness to other houses and of likelihood of coming into the market).

New Jersey. — Laing *v.* United New Jersey R. & C. Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682.

New York. — Langdon *v.* Mayor, etc., 133 N. Y. 628, 31 N. E. 98, *distinguishing In re* Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52.

North Carolina. — Bruner *v.* Threadgill, 88 N. C. 361; Warren *v.* Makely, 85 N. C. 12.

Rhode Island. — Daigneault *v.* Woonsocket, 18 R. I. 378, 28 Atl. 346.

Texas. — Chaney *v.* Coleman, 77 Tex. 100, 13 S. W. 850; Newbold *v.* International & G. N. R. Co., 34 Tex. Civ. App. 525, 78 S. W. 1079; Kirby *v.* Panhandle & G. R. Co., 39 Tex. Civ. App. 252, 88 S. W. 281.

Wisconsin. — Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 377, 18 N. W. 328.

Vacant and Improved Land. — The price at which vacant land has been sold may be proved as an aid in arriving at the value of improved land. O'Malley *v.* Com., 182 Mass. 196, 65 N. E. 30. But land with buildings upon it makes an estate so different in character that evidence of the price it sold for is probably inadmissible upon the issue as to the value of unimproved land. Old Colony R. Co. *v.* F. P. Robinson Co., 176 Mass. 387, 57 N. E. 670.

22. White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 543 (*holding* that, as between the parties to a contract for the sale of land the value of local land of a different quality might be shown, the jury to ascertain the difference in the value of the tracts); Ranck *v.* Cedar Rapids, 134 Iowa 563, 111 N. W. 1027.

Where the Price at Which Land with Buildings on it Was Sold Had Been Proved Without Objection to show the value of land without buildings, the court said there was no good reason why the party who offered the evidence should not point out the difference between the two estates for the purpose of giving the evidence its true value, and that "sales of other estates should not be admitted in evidence unless the similarity of these estates to that in question is such as to make the evidence helpful without aid from the testimony of experts. Differences may be pointed out to a jury, but the effect of these differences should be left to their judgment." Old Colony R. Co. *v.* F. P. Robinson Co., 176 Mass. 387, 57 N. E. 670.

23. Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506; Newbold *v.* International & G. N. R. Co., 34 Tex. Civ. App. 525, 78 S. W. 1079 (must be substantially similar); Silliman *v.* Gano, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391 (sales of small tracts in-

difference in the size of city lots is not cause for rejecting evidence of the price paid.[24] If there are material considerations common to both estates it is not necessary that their improvements should be precisely similar,[25] nor that they should be of equal value if they are similar in character.[26] Proof of proximity does not establish similarity of condition.[27]

(7.) Discretion of Court. — The ruling of the trial court on the admissibility of testimony as to the price at which adjacent lands, dissimilar in size or in improvements, were sold will not usually be disturbed.[28] But its discretion on these matters, as well as in respect to proximity of time and distance, is subject to review.[29]

volve expense and do not give an accurate basis for fixing the value of a large tract).

Sales in Small Tracts. — The price at which small parcels of land were sold is not convincing evidence of the value of very large tracts, the character of which varies materially. This consideration seems to have special force as between vendor and purchaser, the situation being such that neither of them contemplated the sale of the large tract in small parcels within a brief time. Maxon *v.* Gates (Wis.), 116 N. W. 758.

24. Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711.

25. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

26. Hadley *v.* Freeholders, 73 N. J. L. 197, 62 Atl. 1132.

27. Bruner *v.* Threadgill, 88 N. C. 361; Warren *v.* Makely, 85 N. C. 12.

Value of Other Properties. — If evidence has been received to show a special value in land because of its availability as an ice privilege, it is incompetent for the other party to show the sums for which such privileges have been sold at places seven or eight miles from the pond in question. Ham *v.* Salem, 100 Mass. 350.

28. *Massachusetts.* — Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276; Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227; Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506; Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127; Boston & W. R. Co. *v.* Old Colony & F. R. Co., 3 Allen 142; Sargent *v.* Merrimac, 196 Mass. 171, 81 N. E. 970; Yore *v.* Newton, 194 Mass. 250, 80 N. E. 472.

New Jersey. — Laing *v.* United New Jersey R. & C. Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682.

Wisconsin. — Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328.

Discretion as to time within which sales must have been made in order that proof of the price paid may be received is broad. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668; Hunt *v.* Boston, 152 Mass. 168, 25 N. E. 82 (the lapse of five months in the case of one sale and twenty months in the case of another, not too remote); Patch *v.* Boston, 146 Mass. 52, 14 N. E. 770 (a few months not too remote though a slight change in value had occurred); Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506; Bowditch *v.* Boston, 164 Mass. 107, 41 N. E. 132 (two and one-half years, no great change in prices being shown), unless great change in value is shown to have occurred. First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444.

29. Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 500, 30 Pac. 738.

If No Later Sales of Land in the Vicinity Have Been Made and the rise in values is not shown to have been great, the price paid for land two years before is not too remote. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

Rule Not Invariably Applied. On the issue as to injury to a part of a lot the owner may be asked on cross-examination as to the price the remainder of it sold for seventeen years after the cause of action arose. The remoteness affected the

(8.) Circumstances of Sale. — The circumstances attending the sale of land may be shown.[30]

(9.) Location of Land. — The land sold must not have been remote from that the value of which is to be ascertained.[31]

(10.) Improvements. — The nature and character of the improvements on the land sold must be shown.[32]

(11.) Prior Sales Must Have Been Voluntary. — The prior sales must have been made voluntarily and in good faith.[33]

(12.) Sales Must Have Been Recent. — The price paid at remote times cannot be proved.[34]

b. *The Negative View.* — In some jurisdictions the price paid for particular properties is not evidence of the value of another piece of property, regardless of their points of similarity. The value of the property in issue must be established by other means.[35]

weight, rather than the competency, of the evidence. It was proper, also, because the witness was being cross-examined as to the value of the property. Whitman *v.* Boston & M. R. Co., 7 Allen. (Mass.) 313.

The rule as to the admissibility of evidence of the prices at which other lands sold must vary with the conditions surrounding them. It would be very different in the case of town lots than in the case of wild, unsettled lands, or lowlands and flats on an island and harbor, where sales are few. Where such last mentioned lands were to be valued, evidence of the price at which like lands sold from one year to eight years before, in the absence of proof of more recent sales, was properly received, though there were points of dissimilarity in the lands. Benham *v.* Dunbar, 103 Mass. 365.

30. Wyman *v.* Lexington, etc. R. Co., 13 Met. (Mass.) 316, 326; Ham *v.* Salem, 100 Mass. 350; Webster *v.* Kansas City & S. R. Co., 116 Mo. 114, 22 S. W. 474; Port Townsend So. R. Co. *v.* Barbare, 46 Wash. 275, 89 Pac. 710 (if purchases by the party seeking condemnation are proved on cross-examination the facts and circumstances under which they were made may be shown on rebuttal).

The Condition of the Property when conveyed and the improvements put upon it may be shown. Ham *v.* Salem, 100 Mass. 350.

31. Hunt *v.* Boston, 152 Mass. 168, 25 N. E. 82; Chandler *v.* Jamaica Pond Aqueduct Co., 122 Mass. 305; Daigneault *v.* Woonsocket, 18 R. I. 378, 28 Atl. 346.

Lots Need Not Join. — Paine *v.* Boston, 4 Allen (Mass.) 168 (a distance of one hundred and seventy-six feet is not an objection, both properties being on the same street).

Need Not Be in Same Political Subdivision. — "If the question was as to the value of building lots, the exact situation of the two parcels with respect to each other might be of more importance; but when it is as to the value of land of rare quality, which is adapted to the cultivation of cranberries, a different standard applies, and if the land sold is in the same general locality, and of the same peculiar quality, the price obtained may afford a just measure of the value of the land taken." Gardner *v.* Brookline, 127 Mass. 358.

Unless the Similarity of the property in question with that two miles distant is shown, the value of the latter cannot be proved. Dallas *v.* Boise, 44 Or. 302, 75 Pac. 208.

32. O'Hare *v.* Chicago, etc. R. Co., 139 Ill. 151, 28 N. E. 923.

33. O'Hare *v.* Chicago, etc. R. Co., 139 Ill. 151, 28 N. E. 923.

34. Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109 (ten years too remote); Hunt *v.* Boston, 152 Mass. 168, 25 N. E. 82 (three and a half years too remote); Chandler *v.* Jamaica Pond Aqueduct Co., 122 Mass. 305 (three years too remote).

35. *Idaho.* — Spokane & P. R. Co. *v.* Lieuallen, 3 Idaho 381, 29 Pac. 854.

(1.) Exception to the Rule. — An exception to the foregoing view is sometimes made where the difficulty of proving value by other testimony is very great and the properties in question are so similar as to make evidence of the price at which one of them was sold reasonably satisfactory.[36]

Iowa. — Watkins *v.* Wabash R. Co., 113 N. W. 924, *distinguishing* Town of Cherokee *v.* Town Lot Co., 52 Iowa 279, 3 N. W. 42.

Kansas. — Kansas City, etc. R. Co. *v.* Weidenmann, 94 Pac. 146.

Nebraska. — Union Pac. R. Co. *v.* Stanwood, 71 Neb. 150, 91 N. W. 191, 98 N. W. 656.

New York. — Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544; Charman *v.* Hibbler, 43 App. Div. 449, 60 N. Y. Supp. 186; Bradshaw *v.* Rome, W. & O. R. Co., 49 Hun 605, 1 N. Y. Supp. 691 (though there is market value for woodland, the price at which similar standing timber to that in question has been sold cannot be proved); Matter of Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52; Jamieson *v.* Kings County E. R. Co., 147 N. Y. 322, 41 N. E. 693; Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78; Eno *v.* New York El. R. Co., 158 N. Y. 730, 53 N. E. 1125; Manhattan R. Co. *v.* Stuyvesant (App. Div.), 111 N. Y. Supp. 222.

Oregon. — Willamet Falls Canal & L. Co. *v.* Kelly, 3 Or. 99 (a circuit court Case).

Pennsylvania. — Pittsburgh & W. R. Co. *v.* Patterson, 107 Pa. St. 461.

Virginia. — Richmond & M. R. Co. *v.* Humphreys, 90 Va. 425, 18 S. E. 901 (it is immaterial to the value of the *res* that the owner of another piece of land gave it away).

Wisconsin. — O'Dell *v.* Rogers, 44 Wis. 136, 183 (inadmissible in favor of purchasers at an executors' sale who are sought to be charged as trustees, the sales being made two years after they bought).

Similarity of Condition Immaterial. — The price at which other farms in the county, which were crossed by railroads, have been sold cannot be shown to establish the value of plaintiff's farm so crossed. Kiernan *v.* Chicago, etc. R. Co., 123 Ill. 188, 14 N. E. 18; Cummins *v.* Des Moines & St. L. R. Co., 63 Iowa 397, 19 N. W. 268; Hollingsworth *v.* Des Moines & St. L. R. Co., 63 Iowa 443, 19 N. W. 325; Kansas City & T. R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202.

Evidence of Particular Sales for a Particular Purpose is not evidence of its general selling price. Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339; Pittsburg, etc. R. Co. *v.* Rose, 74 Pa. St. 362; Pittsburgh & W. R. Co. *v.* Patterson, 107 Pa. St. 461; Hays *v.* Briggs, 74 Pa. St. 373; East Pennsylvania R. Co. *v.* Hiester, 40 Pa. St. 53; Hewitt *v.* Pittsburg, etc. R. Co., 19 Pa. Super. 304.

Reasons. — "A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly; if it be given in evidence it raises an issue collateral to the subject of inquiry, and these collateral issues are as numerous as the sales. The offer was to show particular sales, made about the time of the location of the railroad and since, of properties alleged to possess similar qualities and equal facilities as landings; the consideration of each of such sales, therefore, involved necessarily not only the collateral issues already stated, but also a comparison of these various properties with that in question, as well as with each other. Such a course of examination must inevitably lead rather to the confusion than to the enlightenment of the jury on the single matter for consideration." Pittsburgh & W. R. Co. *v.* Patterson, 107 Pa. St. 461; Kansas City, etc. R. Co. *v.* Weidenmann (Kan.), 94 Pac. 146.

36. Stinson *v.* Chicago, etc. R. Co., 27 Minn. 284, 6 N. W. 784, (but *compare* Lehmicke *v.* St. Paul, etc. R. Co., 19 Minn. 464); Langdon *v.* Mayor, 133 N. Y. 628, 31 N. E. 98; Manhattan R. Co. *v.* Stuyvesant (App. Div.), 111 N. Y. Supp. 222.

The Price Received for a Part of the Tract in Issue may be proved in

(2.) Admissible on Cross-Examination. — Such testimony is competent on the cross-examination of witnesses who have given opinions of the value of the land in question.[37] In Pennsylvania the price paid by the condemning party for the lands of others cannot be shown on cross-examination.[38] That rule is favored elsewhere if the witness' testimony concerning value is not based on the prices paid for other properties.[39] But a witness may be asked whether he knew of and considered particular sales in forming his opinion of value, and it may be shown that the opinion given is based on a misapprehension of the facts.[40]

Pennsylvania (East Brandywine & W. R. Co. *v.* Ranck, 78 Pa. St. 454; Houston *v.* Western Washington R. Co., 204 Pa. St. 321, 54 Atl. 166), but not in Texas. Haney *v.* Clark, 65 Tex. 93.

Extinguishment of Easements. The exception does not apply in case of payments made to extinguish easements unless it appears that there is similarity in such easements and the one in question, nor unless the estates affected by the loss of the easements were so much alike as to afford a basis for comparison. Manhattan R. Co. *v.* Stuyvesant (App. Div.), 111 N. Y. Supp. 222.

37. *Illinois.* — Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058 (evidence of sales competent to show value of witness' opinion).

Indiana. — Union R. T. & S. Y. Co. *v.* Moore, 80 Ind. 458.

Kansas. — Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248, 26 Pac. 698; Kansas City, etc. R. Co. *v.* Weidenmann, 94 Pac. 146.

Mississippi. — Board of Levee Comrs. *v.* Nelms, 82 Miss. 416, 34 So. 149; Board of Levee Comrs. *v.* Dillard, 76 Miss. 641, 25 So. 292.

Missouri. — St. Louis, etc. R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771.

Nebraska. — Union Pac. R. Co. *v.* Stanwood, 71 Neb. 150, 91 N. W. 191, 98 N. W. 656 (proof of independent sales may not be made in following up the cross-examination).

Wisconsin. — Uniacke *v.* Chicago, etc. R. Co., 67 Wis. 108, 29 N. W. 899.

Sales for Special Purpose. — A witness who testifies of the prospective value of land for a use to which it has not been put may be cross-examined concerning his knowledge of sales of land devoted to the use which gives the land in question its prospective value for a period of years, the scope of the inquiry as to time being largely in the discretion of the court. Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

Redirect Examination. — If the condemning party brings out, on cross-examination, evidence of the price at which other land has been sold error will not be presumed from testimony of the same nature brought out on re-examination if the scope of the cross-examination is not exceeded. Chicago, etc. R. Co. *v.* Griffith, 44 Neb. 690, 62 N. W. 868.

38. Pennsylvania S. V. R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187; Schonhardt *v.* Pennsylvania R. Co., 216 Pa. St. 224, 65 Atl. 543; Neely *v.* Western A. R. Co., 219 Pa. St. 349, 68 Atl. 829 (not competent to show that witness' opinion was based on an improper comparison of the properties).

39. Schradsky *v.* Stimson, 76 Fed. 730, 22 C. C. A. 515.

40. Henkel *v.* Wabash P. T. R. Co., 213 Pa. St. 485, 62 Atl. 1085; Neely *v.* Western A. R. Co., 219 Pa. St. 349, 68 Atl. 829.

Scope of Cross-Examination. The good faith of a witness who testifies as to the value of land and the extent of his knowledge may be tested by questioning him as to particular sales to ascertain whether his opinion is based upon them. And the other party may show that such opinion is valueless because founded on a misapprehension of the facts, as that a supposed sale had not been made, or that the consideration given was fictitious, or that the sale was

M. Estimated Value of Other Lands. — a. *Award in Condemnation Proceedings.* — The value put upon similar local property by a jury in condemnation proceedings cannot be proved.[41]

b. *Affidavits Used Before Commissioners.* — Affidavits concerning the relative values of different tracts of land appraised by commissioners in the same proceeding are incompetent on appeal from their award.[42]

c. *Offers by Owner.* — The price at which the owner of lands adjoining the land in question, but in no way connected with it, has offered them is not competent evidence of the value of the latter,[43] except in Michigan,[44] at least if the testimony is not restricted to a reasonable time,[45] or is not offered for a collateral purpose.[46] It is not material on the issue of fraudulent representations made in the sale of the land in question.[47]

d. *Offers for Other Lands.* — Unaccepted offers made for similar lands cannot be proved.[48]

N. Value as Affected by the Exercise of a Right or the Perpetration of a Wrong. — a. *What Lands Within Scope of Inquiry.* — The evidence concerning the value of property affected by the condemnation of a part of it, or by an unlawful act injuring it in some indivisible part, may be directed to so much of it as is used as an entirety, though it consists of a number of government

made without regard to the market value of the property. Henkel *v.* Wabash P. T. R. Co., 213 Pa. St. 485, 62 Atl. 1085; East Pennsylvania R. Co. *v.* Heister, 40 Pa. St. 53; Pittsburg, etc. R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Becker *v.* Philadelphia & R. T. R. Co., 177 Pa. St. 252, 35 Atl. 617.

41. Howe *v.* Howard, 158 Mass. 278, 33 N. E. 528; White *v.* Fitchburg R. Co., 4 Cush. (Mass.) 440.

Reason. — "A price so fixed represents only the opinion of those who make it, and, as the grounds and reasons of their opinion are not known, and they cannot be presumed to have been qualified experts, and cannot be subjected to cross-examination by the parties whose rights the evidence will affect, their opinion is not competent evidence to show the value of other land." Howe *v.* Howard, 158 Mass. 278, 33 N. E. 528.

42. *In re* Board of Water Supply (Misc.), 109 N. Y. Supp. 1036.

43. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Sherlock *v.* Chicago, etc. R. Co., 130 Ill. 403, 22 N. E. 844; Winnisimmet Co. *v.* Grueby, 111 Mass. 543; Montclair R. Co. *v.* Benson, 36 N. J. L. 557; Currie *v.* Waverly, etc. R. Co., 52 N. J. L. 381, 397, 20 Atl. 56; Sullivan *v.* Missouri, etc. R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745; Chicago, etc. R. Co. *v.* Alexander, 47 Wash. 131, 91 Pac. 626.

44. City of Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635.

45. Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224 (*limiting* or *disapproving* Muller *v.* Southern Pac. B. R. Co., 83 Cal. 240, 23 Pac. 265, in which it was said that bona fide offers for property are admissible).

46. On the Issue of Good Faith on the part of the vendor of land in selling it for more than its value as a cloak to cover usury, the price at which owners of land in the same vicinity asked for it is competent. Banning *v.* Hall, 70 Minn. 89, 72 N. W. 817.

47. Merrill *v.* Taylor, 72 Tex. 293, 10 S. W. 532.

48. Davis *v.* Charles River Branch R. Co., 11 Cush. (Mass.) 506; Louisville, etc. R. Co. *v.* Ryan, 64 Miss. 399, 8 So. 173; Sullivan *v.* Missouri, etc. R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

subdivisions. The use made of the property is more significant than section lines or divisions of it for convenience or utility.[49]

(1.) Failure To File Cross-Petition. — The right to show what lands are injured by the act in question is not affected by the landowner's failure to file a cross-petition, though the condemnor has described only a part of the lands in his petition.[50]

(2.) Subdivision by Former Owner. — The scope of the testimony is not limited by the subdivision of the land by a former owner if it is all used for the same general purpose.[51]

(3.) Defective Title. — If the condemnor has been the moving party, evidence of the value of the entire tract is admissible though the defendant's title might not entitle him to a recovery in ejectment.[52]

(4.) Rule as to Independent Tracts. — If tracts of land constitute separate and independent farms, operations on which are conducted independently of each other, the present value of the tracts not touched by the condemnor is not open to inquiry unless the land taken renders one or more of them too small to work profitably.[53] The separation of the land into tracts by the land of another renders evidence as to added expense and inconvenience concerning the tract not physically affected inadmissible.[54]

b. *General Statement of Evidentiary Facts.* — It is competent to show the size of the farm from which a part has been taken, the use made of it, the improvements upon it and their location, the direction of the condemned strip across the farm, the cuts and fills made and to be made, the width of the right of way, the height of

49. Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Scace *v.* Wayne County, 72 Neb. 162, 100 N. W. 149; Esch *v.* Chicago, etc. R. Co., 72 Wis. 229, 39 N. W. 129; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328.

The Effect of a Statute Making All Section Lines Public Roads does not bar the owner of land on each side of such line from the right to recover for the depreciation of all his land caused by opening a road on such line. Scace *v.* Wayne County, 72 Neb. 162, 100 N. W. 149.

In Pennsylvania if land is divided by a street into two portions, only one of which is affected by the construction of a railroad, evidence may be confined to proof of the value of that portion through which the road was laid. O'Brien *v.* Schenley Park & H. R. Co., 194 Pa. St. 336, 45 Atl. 89.

50. Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82; Kansas City S. B. R. Co. *v.* Norcross, 137 Mo. 415, 38 S. W. 299; Ragan *v.* Kansas City & S. E. R. Co., 111 Mo. 456, 20 S. W. 234; Yellowstone Park R. Co. *v.* Bridger Coal Co., 34 Mont. 545, 556, 87 Pac. 963.

51. Kansas City S. B. R. Co. *v.* Norcross, 137 Mo. 415, 425, 38 S. W. 299.

Cause of Subdivision Immaterial. In arriving at the value of the land after part of it has been condemned, the value of different subdivisions of it before and after the taking may be shown, regardless of what caused one portion to be separated from the remainder. Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283.

52. Kansas City S. B. R. Co. *v.* Norcross, 137 Mo. 415, 425, 38 S. W. 299.

53. Sharp *v.* United States, 191 U. S. 341, 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932.

54. Bergen Neck R. Co. *v.* Point

embankments, the depth of ditches, the inconveniences of crossing the track to get from one part of the farm to another, the danger to stock and the danger of fire from passing trains,[55] the diversion of surface water, invasion of privacy, deprivation of means of access, the burden of additional fencing, the change of roads, the obstruction of light, and like matters affecting the property as such, and not any special use the owner may make of it.[56]

(1.) Application of Such Evidence. — These and other separate items, mentioned hereafter, are not to be considered as distinct items of loss in value, but only as they affect the market value of the property.[57] Such evidence is not to be limited by any use heretofore made of the estate, if it is occupied by the owner, but extends to it for whatever purposes it is available.[58]

(2.) Party's Responsibility Must Appear. — Such facts can be shown

Breeze Ferry & Imp. Co., 57 N. J. L. 163, 30 Atl. 584.

55. Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Omaha So. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557; Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

56. *Massachusetts.* — Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029.

Pennsylvania. — Shano *v.* Fifth Ave. & H. St. Bridge Co., 189 Pa. St. 245, 42 Atl. 128; Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369; Reyenthaler *v.* Philadelphia, 160 Pa. St. 195, 28 Atl. 840; Dawson *v.* Pittsburg, 159 Pa. St. 317, 28 Atl. 171; Struthers *v.* Philadelphia & D. County R. Co., 174 Pa. St. 291, 34 Atl. 443; Hewitt *v.* Pittsburg, etc. R. Co., 19 Pa. Super. 304; Tannehill *v.* Philadelphia Co., 2 Pa. Super. 159.

Weight Is To Be Given the fact that the land is not separated by the railroad, and that the latter is at a considerable distance from the buildings and other combustible improvements. St. Louis & I. Belt R. Co. *v.* Barnsback, 234 Ill. 344, 84 N. E. 931.

57. Phillips *v.* Postal Tel. C. Co., 131 N. C. 225, 42 S. E. 587 (it is immaterial as to the sum an adjoining landowner would accept to have his land so used); Shano *v.* Fifth Ave. & H. St. Bridge Co., 189 Pa. St. 245, 42 Atl. 128; Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171; Reyenthaler *v.* Philadelphia, 160 Pa. St. 195, 28 Atl. 840; Comstock *v.* Clearfield, etc. R. Co., 169 Pa. St. 582, 32 Atl. 431; Struthers *v.* Philadelphia, etc. R. Co., 174 Pa. St. 291, 34 Atl. 443; Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

Witnesses May Specify Causes of Lessened Value. — Witnesses who have given opinions as to the value of land before and after damage thereto may specify the elements or items which have influenced their judgments. But such testimony does not go as evidence to the jury to assess damages upon, but only as a means by which it can estimate the worth of the evidence as to depreciated value. Such evidence must not extend to remote and conjectural sources of injury. Neilson *v.* Chicago, etc. R. Co., 58 Wis. 516, 17 N. W. 310; Snyder *v.* Western Union R. Co., 25 Wis. 60; Hutchinson *v.* Chicago & N. W. R. Co., 37 Wis. 582.

Ordinarily such evidence is admissible only upon cross-examination; but in at least one state it has been held competent for the party to thus test the value of the testimony of his new witness. The rule is recognized as exceptional and liable to lead to abuses, and will not be extended. Its application lies in the discretion of the trial court. Neilson *v.* Chicago, etc. R. Co., 58 Wis. 516, 17 N. W. 310; Hutchinson *v.* Chicago & N. W. R. Co., 37 Wis. 582.

58. Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495.

against the party who has exercised the right of eminent domain only to the extent of its responsibility for them.[59]

c. *Relevant and Irrelevant Facts.* — **(1.) Access to Highways.** The effect of the improvement upon access to highways may be shown, and that there is no reserved right to use a crossing put in by the condemnor.[60]

(2.) Noise. — Evidence as to the effect of the noise caused by the use of the land condemned has been held inadmissible.[61] But it has been received where property used for religious purposes has been taken,[62] and where a street has been occupied by a railroad under municipal authority, but without compensation to the owner of the fee whose inconvenience was substantial and unlike that of the general community.[63] Unusual noises are frequently mentioned as proper matters to be shown, in connection with smoke, soot, cinders and like annoyances.[64]

(3.) Inconvenience. — Inconvenience resulting from the actual doing of the work necessary to improve a street is immaterial to the

59. Duncan *v.* Nassau El. R. Co. (App. Div.), 111 N. Y. Supp. 210.

60. Cedar Rapids, etc. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704; Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495; *In re* Utica, etc. R. Co., 56 Barb. (N. Y.) 456, 464; Acker *v.* Knoxville, 117 Tenn. 224, 96 S. W. 973; Richmond, etc. R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

Verified Photographs are admissible on the question as to the value of land after a street improvement has affected it. Robinson *v.* St. Joseph, 97 Mo. App. 503, 71 S. W. 465.

The Effect of Compliance by the Condemnor With a Statute requiring the grade of a highway to be changed to correspond with the grade of the railroad may be shown. Sioux City & P. R. Co. *v.* Weimer, 16 Neb. 272, 20 N. W. 349.

The Injuries and Inconveniences resulting to a witness from the ordinary running of cars upon his farm cannot be testified to in proceedings to ascertain the value of another farm. Concord R. *v.* Greely, 23 N. H. 237.

61. American Bank-Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302.

62. Durham & N. R. *v.* Trustees of Bullock Church, 104 N. C. 525, 10 S. E. 761.

63. Columbus, etc. R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69.

64. *Illinois.* — Chicago, etc. R. Co. *v.* Moore, 63 Ill. App. 163; Chicago Office Bldg. *v.* Lake St. El. R. Co., 87 Ill. App. 594; Illinois Cent. R. Co. *v.* Schmidgall, 91 Ill. App. 23.

Iowa. — Ham *v.* Wisconsin, etc. R. Co., 61 Iowa 716, 17 N. W. 157; Dudley *v.* Minnesota & N. W. R. Co., 77 Iowa 408, 42 N. W. 359.

Kansas. — Kansas City & E. R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Leroy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Omaha, etc. R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831.

Massachusetts. — Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489.

Minnesota. — County of Blue Earth *v.* St. Paul, etc. R. Co., 28 Minn. 503, 11 N. W. 73.

Nebraska. — Omaha So. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557.

New York. — Long Island R. Co. *v.* Garvey, 159 N. Y. 334, 54 N. E. 60.

Ohio. — Columbus, etc. R. Co. *v.* Gardner, 45 Ohio St. 309, 321, 13 N. E. 69.

Pennsylvania. — Shaw *v.* Philadelphia, 169 Pa. St. 506, 32 Atl. 593.

South Carolina. — Bowen *v.* Atlantic, etc. R. Co., 17 S. C. 574.

Texas. — Gulf, etc. R. Co. *v.* Eddins, 60 Tex. 656.

If Only an Easement Is Taken, evidence as to noise and like annoyances is inadmissible in Pennsylvania. Philips *v.* Philadelphia, etc.

value of the premises affected thereby.[65] But inconvenience resulting in respect of the use of property affected by the condemnation of part of it may be shown,[66] and so where a street is occupied by municipal authority, but without compensation to the owner of the fee.[67]

(4.) Added Expense. — Increased expense in caring for and using property affected by the condemnation of a part of it may be shown, as where the cost of additional fencing must be borne by the owner or he must put in crossings,[68] or make other outlay to adapt his premises to the changed condition.[69] Hence it is proper to show the manner in which the railroad runs through a farm.[70] It is immaterial that the increased cost of using property, part of which has been condemned, results from municipal ordinances.[71]

R. Co., 184 Pa. St. 537, 39 Atl. 298.

65. Acker *v.* Knoxville, 117 Tenn. 224, 96 S. W. 973.

66. Grand Rapids & I. R. Co. *v.* Heisel, 38 Mich. 62; Sherwood *v.* St. Paul, etc. R. Co., 21 Minn. 127; Pennsylvania & P. R. Co. *v.* Root, 53 N. J. L. 253, 21 Atl. 285.

67. Grafton *v.* Baltimore & O. R. Co., 21 Fed. 309; Columbus, etc. R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69, and local cases cited p. 320.

68. *Illinois.* — Chicago, etc. R. Co. *v.* Wolf, 137 Ill. 360, 27 N. E. 78 (expense of conducting mining operations); Peoria, etc. R. Co. *v.* Sawyer, 71 Ill. 361.

Indiana. — New Jersey I. & I. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420.

Kansas. — Atchison & N. R. Co. *v.* Gough, 29 Kan. 94.

Minnesota. — Winona & St. P. R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100.

New Jersey. — Pennsylvania & P. R. Co. *v.* Root, 53 N. J. L. 253, 21 Atl. 285.

North Carolina. — Durham & N. R. Co. *v.* Bullock Church, 104 N. C. 525, 10 S. E. 761 (causing the erection of stalls for the care of horses at a church).

Pennsylvania. — Heilman *v.* Lebanon & A. St. R. Co., 175 Pa. St. 188, 34 Atl. 647; Curtin *v.* Nittany Val. R. Co., 135 Pa. St. 20, 19 Atl. 740.

South Dakota. — Schuler *v.* Board of Supervisors, 12 S. D. 460, 81 N. W. 890 (increased taxes and cost of building fences).

Virginia. — Richmond, etc. R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750 (increased cost of handling freight).

Washington. — Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

69. Butchers' S. & M. Assn. *v.* Com., 163 Mass. 386, 40 N. E. 176.

Increased Cost of Obtaining Ore. The owner of land which contains mineral underneath the condemnor's right of way may show to what extent he is restricted from entering upon the land to remove the mineral, the added expense of so doing and the value of the mineral he is obliged to permit to remain in place to afford surface support. Southern Pac. R. Co. *v.* San Francisco Sav. Union, 146 Cal. 290, 79 Pac. 961, 106 Am. St. 36; Eldorado, etc. R. Co. *v.* Sims, 228 Ill. 9, 81 N. E. 782.

Increased Cost of Transportation and of the erection of temporary works for carrying on business may be shown. Ehret *v.* Schuylkill River, etc. R. Co., 151 Pa. St. 158, 24 Atl. 1068.

70. New Jersey I. & I. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420; Dwight *v.* Hampden, 11 Cush. (Mass.) 201; Winona & St. P. R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100; Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Omaha So. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557; Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

71. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029.

(A.) Drainage. — The obstruction of drainage is also to be regarded.[72]

(B.) Irrigation. — The increased cost of irrigating land may be shown.[73]

(C.) Changing Grade of Lot. — The cost of adjusting the grade of a lot to the new grade of a street is relevant.[74]

(D.) Retaining Wall. — The cost of a retaining wall made necessary by the grading of a street may be shown, as may the resulting freedom from dust and dirt.[75] The defendant city cannot show that it has adopted a general plan of street improvements, the execution of which will lessen such cost.[76]

(E.) Reconstruction of Buildings. — The cost of removing and reconstructing a building situated so near the track of a railroad that it would be imprudent to allow it to remain there may be shown.[77]

(F.) Insurance. — Whether the increased cost of carrying insurance can be shown or not is a point on which there is disagreement.[78]

72. Chicago, etc. R. Co. *v.* Moore, 63 Ill. App. 163; Indiana, etc. R. Co. *v.* Rinehart, 14 Ind. App. 588, 43 N. E. 238; Duncan *v.* Board of Levee Comrs., 74 Miss. 125, 20 So. 838; Seattle & M. R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

73. San Bernardino & E. R. Co. *v.* Haven, 94 Cal. 489, 29 Pac. 875.

74. *Connecticut.* — Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

Georgia. — City Council *v.* Schrameck, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146.

Iowa. — Richardson *v.* Sioux City, 113 N. W. 928; Stewart *v.* Council Bluffs, 84 Iowa 61, 50 N. W. 219; Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920.

Massachusetts. — White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652; Fall River Print Wks. *v.* Fall River, 110 Mass. 428.

Missouri. — Taylor *v.* Kansas City C. R. Co., 38 Mo. App. 668.

Nebraska. — Farwell *v.* Chicago, etc. R. Co., 52 Neb. 614, 72 N. W. 1036.

New Jersey. — Green *v.* Irvington (N. J. L.), 69 Atl. 485.

Pennsylvania. — Mead *v.* Pittsburg, 194 Pa. St. 392, 45 Atl. 59; Patton *v.* Philadelphia, 175 Pa. St. 88, 34 Atl. 344.

Virginia. — Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852.

Such Evidence Must Be Limited to the cost of bringing the property into conformity with the new grade; the cost of changing the location of buildings thereon cannot be proved, nor the cost of a retaining wall unless the necessity for it is shown. The cost of lowering buildings erected without regard to the original grade cannot be proved. Richardson *v.* Sioux City (Iowa), 113 N. W. 928.

Offer To Grade Without Charge. If a large sum is claimed for depreciation in the market value of land on account of the necessity of grading it, evidence is competent to show that an offer to grade it without charge had been declined, and the reason given for declining it. Darlington *v.* Allegheny City, 189 Pa. St. 202, 42 Atl. 112.

75. Acker *v.* Knoxville, 117 Tenn. 224, 96 S. W. 973.

Though the Cost of Retaining Walls and of Grading a Lot affected by the change of the grade of a street does not enter directly into the computation, it may be shown to aid the jury in arriving at the change thereby made in the market value of the estate. Taylor *v.* Kansas City C. R. Co., 38 Mo. App. 668.

76. Estes *v.* Macon, 103 Ga. 780, 30 S. E. 246.

77. Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

78. In the Affirmative. — Indiana, etc. R. Co. *v.* Stauber, 185 Ill. 9, 56

(5.) Loss of Advantage. — The loss of any natural advantage to land may be shown, if the owner was entitled to its enjoyment as a matter of right,[79] as depreciation in the value of improvements by reason of a change in their character or interference with their use,[80] damage caused by passing engines causing smoke, soot or fire to be thrown against buildings.[81] It is competent for the condemnor to show that the advantage lost was of but little value and that it can be replaced,[82] or that it was a revocable privilege.[83]

(A.) Removal of Timber. — The value of timber cut and removed may be proved by a comparison of the yield on contiguous land, though that in question was not measured by the witnesses.[84]

(B.) Increased Danger From Fire. — The increased risk to property from fire is, according to some courts, to be regarded in fixing its

N. E. 1079; Webber *v.* Eastern R. Co., 2 Met. (Mass.) 147; Cedar Rapids, etc. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

In the Negative. — Pingery *v.* Cherokee & D. R. Co., 78 Iowa 438, 43 N. W. 285; St. Louis, etc. R. Co. *v.* North, 31 Mo. App. 345 (if absolute liability is imposed by statute); Sunbury & E. R. Co. *v.* Hummell, 27 Pa. St. 99; Lehigh Val. R. Co. *v.* Lazarus, 28 Pa. St. 203; Patten *v.* Northern Cent. R. Co., 33 Pa. St. 426.

Experience of Another Landowner with fires set on his land by the same railroad company is not relevant. Pittsburgh, etc. R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555.

79. *Arkansas.* — Organ *v.* Memphis, etc. R. Co., 51 Ark. 235, 11 S. W. 96.

Illinois. — Peoria, etc. R. Co. *v.* Bryant, 57 Ill. 473; Chicago, etc. R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Board of Trade Tel. Co. *v.* Darst, 192 Ill. 47, 61 N. E. 398 (unsightliness of poles).

Indiana. — New Jersey I. & I. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420 (interference with access from one part of a farm to another).

Iowa. — Ham *v.* Wisconsin, etc. R. Co., 61 Iowa 716, 17 N. W. 157 (obstruction of view and interference with privacy); Winklemans *v.* Des Moines N. W. R. Co., 62 Iowa 11, 17 N. W. 82.

Massachusetts. — Drury *v.* Midland R., 127 Mass. 571; Trowbridge *v.* Brookline, 144 Mass. 139, 10 N. E. 796; Washburn & M. Mfg. Co. *v.* Worcester, 153 Mass. 494, 27 N. E. 664; Boston & M. R. *v.* Montgomery, 119 Mass. 114; Marsden *v.* Cambridge, 114 Mass. 490.

Minnesota. — Lake Superior, etc. R. Co. *v.* Greve, 17 Minn. 322.

New Hampshire. — Concord R. *v.* Greely, 23 N. H. 237 (loss of sediment valuable as a fertilizer).

Pennsylvania. — Barclay R. etc. Co. *v.* Ingham, 36 Pa. St. 194.

Replacing Water Power by Steam. It may be shown in rebuttal what the cost of replacing lost water power by steam would be, though such evidence does not supply the test for determining depreciation in value because the diversion of the water was but partial. Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184.

Loss of Most Convenient Building Site may be proved. Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283.

80. Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495.

81. Elizabethtown, etc. R. Co. *v.* Combs, 10 Bush (Ky.) 382, 19 Am. Rep. 73.

82. Kiernan *v.* Chicago, etc. R. Co., 123 Ill. 188, 14 N. E. 18; Illinois, etc. R. Co. *v.* Switzer, 117 Ill. 399, 7 N. E. 664, 57 Am. Rep. 875; Gulf, etc. R. Co. *v.* Brugger, 24 Tex. Civ. App. 367, 59 S. W. 556.

83. Wabash, etc. R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207.

84. Perry *v.* Jefferies, 61 S. C. 292, 308, 39 S. E. 515.

value;[85] though there are decisions to the contrary.[86] A late case in Pennsylvania seems to recognize that in so far as the danger from fire does not proceed from actionable negligence it may be regarded.[87]

The Value of the Contents of an Exposed Building at the time of the construction of a railroad cannot be shown,[88] nor can the possi-

85. *Alabama.* — Mobile & O. R. Co. *v.* Hester, 122 Ala. 249, 25 So. 220.

Arkansas. — Little Rock, etc. R. Co. *v.* Allen, 41 Ark. 431.

Illinois. — Jones *v.* Chicago, etc. R. Co., 68 Ill. 380; Chicago, etc. R. Co. *v.* Bowman, 122 Ill. 595, 13 N. E. 814; Indiana, etc. R. Co. *v.* Stauber, 185 Ill. 9, 56 N. E. 1079.

Indiana. — New Jersey I. & I. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420.

Iowa. — Pingery *v.* Cherokee & D. R. Co., 78 Iowa 438, 43 N. W. 285; Dreher *v.* I. S. W. R. Co., 59 Iowa 599, 13 N. W. 754.

Kansas. — Chicago, etc. R. Co. *v.* Palmer, 44 Kan. 110, 24 Pac. 342.

Maine. — Bangor, etc. R. Co. *v.* McComb, 60 Me. 290.

Massachusetts. — Pierce *v.* Worcester, etc. R. Co., 105 Mass. 199.

Minnesota. — Cedar Rapids, etc. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

Missouri. — St. Louis, etc. R. Co. *v.* Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

Nebraska. — Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Omaha So. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557; Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959; Chicago, etc. R. Co. *v.* Shafer, 49 Neb. 25, 68 N. W. 342.

New Hampshire. — Adden *v.* White Mts. N. H. R., 55 N. H. 413, 20 Am. Rep. 220.

New Jersey. — Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495.

Ohio. — Columbus etc. R. Co. *v.* Gardner, 45 Ohio St. 309, 320, 13 N. E. 69; Hatch *v.* Cincinnati, etc. R. Co., 18 Ohio St. 92.

Pennsylvania. — Pittsburg, etc. R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555; Setzler *v.* Pennsylvania, etc. R. Co., 112 Pa. St. 56, 4 Atl. 370; Hewitt *v.* Pittsburg, etc. R. Co., 19 Pa. Super. 304.

Washington. — Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738 (if it be appreciable and imminent).

West Virginia. — Kay *v.* Glade Creek & R. Co., 47 W. Va. 467, 35 S. E. 973 (the danger must be real, imminent and reasonably to be apprehended).

86. Sunbury & E. R Co. *v.* Hummell, 27 Pa. St. 99; Lehigh Val. R. Co. *v.* Lazarus, 28 Pa. St. 203; Patten *v.* Northern Cent. R. Co., 33 Pa. St. 426. See Indiana Nat. Gas. Co. *v.* Jones, 14 Ind. App. 55, 42 N. E. 487; Manufacturers' Nat. Gas Co. *v.* Leslie, 22 Ind. App. 677, 51 N. E. 510.

87. Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

Grounds of Liability. — "As to risk from fire incident to the lawful operation of a road, there are two theories upon which the claimant for damages can properly argue such risk is material evidence in his favor. 1. He can claim that the danger is so imminent that no man of common prudence would maintain his building in such proximity to the railroad. In that case he is entitled to the cost of removal of his building and its reconstruction in a safe place. 2. If the danger be not great, either from the fireproof character of the structure, or its distance from the railroad, yet if it can still be said there is some risk from fire by reason of the lawful operation of the road, he can claim that fact depreciates the market value of the land entered upon. In the first case it is the loss of the improvement; in the second, a disadvantage in the use. This is settled by numerous authorities, among them Railroad Co. *v.* Stauffer, 60 Pa. St. 374; Pittsburg, etc. R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555, and Setzler *v.* Pennsylvania R. Co., 112 Pa. St. 56, 4 Atl. 370."

88. Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

ble or probable damages that may result to the same from fire.[89]

(C.) Danger to Animals. — The enhanced risk to animals is to be regarded in ascertaining the present value of a farm, part of which has been taken for railroad purposes.[90] The authorities are not in harmony.[91]

(D.) Danger to Persons. — The increased danger of personal injury resulting from the lawful operation of a railroad on the premises is an element entering into their market value.[92]

(E.) Increased Danger From Third Parties. — The increased risk resulting from the proximity of strangers in consequence of the proximity of a railroad cannot be proved.[93]

(F.) Extent of Use. — In considering the value of land affected by the condemnation of a part, all the necessary consequences which may result from its use with ordinary care may be regarded.[94] The

89. "What quantity of material will be stored when a possible future accidental fire occurs cannot be foreseen." Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

90. Chicago, etc. R. Co. *v.* Bowman, 122 Ill. 595, 13 N. E. 814. But later cases hold that such evidence is too remote. Centralia & C. R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820; Chicago, etc. R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Omaha So. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557; Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959; Chicago, etc. R. Co. *v.* Shafer, 49 Neb. 25, 68 N. W. 342; Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

91. **The Fact That Horses May Become Frightened** in consequence of the operation of a railroad cannot be regarded. Chicago, etc. R. Co. *v.* Mason, 26 Ind. App. 395, 59 N. E. 185; Atchison, etc. R. Co. *v.* Lyon, 24 Kan. 745; Florence, etc. R. Co. *v.* Pember, 45 Kan. 625, 26 Pac. 1.

92. Laflin *v.* Chicago, etc. R. Co., 33 Fed. 415; Chicago, etc. R. Co. *v.* Shafer, 49 Neb. 25, 68 N. W. 342; Omaha So. R. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495; Weyer *v.* Chicago, etc. R. Co., 68 Wis. 180, 31 N. W. 710.

93. Patten *v.* Northern Cent. R. Co., 33 Pa. St. 426.

94. *Colorado.* — Denver City Irr. & W. Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234.

Indiana. — Union R. T. & S. Y. Co. *v.* Moore, 80 Ind. 458.

Kansas. — Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75; Chicago, etc. R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634 (where land has been devoted to the use for which it was condemned before the trial, in fixing its then value witnesses may regard the effect of the use upon it and assume that it was contemplated at the time it was taken that the existing effect would be produced).

New Hampshire. — Wright *v.* Pemigewasset Power Co., 70 Atl. 290 (decay of vegetable matter caused by flowing land, disagreeable odors and their effect upon the owner's dwelling).

New Jersey. — Van Schoick *v.* Delaware & R. Canal Co., 20 N. J. L. 249.

New York. — Buffalo *v.* Pratt, 131 N. Y. 293, 30 N. E. 233, 27 Am. St. Rep. 592, 15 L. R. A. 413; Henderson *v.* New York Cent. R. Co., 78 N. Y. 423; Duncan *v.* Nassau El. R. Co. (App. Div.), 111 N. Y. Supp. 210.

Pennsylvania. — Lewis *v.* Springfield Water Co., 176 Pa. St. 230, 35 Atl. 186.

Virginia. — James River & K. Co. *v.* Turner, 9 Leigh 313.

Extent of Diversion of Water. Evidence as to the extent of the depreciation in the value of land by diverting water therefrom may properly be based upon the theory that

proximity of the land to a station and the number of tracks laid may be shown.[95] The existence of a contract by the condemnor whereby it bound itself as to the use to be made of the improvement on the land condemned is material,[96] as is the fact that a city had made contracts the execution of which would lessen the depreciation in value of the property in question.[97]

(G.) Actionable Wrongs. — Wrongs done by the condemnor to land not taken are not provable to show its diminished value;[98] it is otherwise as to wrongs which do not give a cause of action.[99]

(H.) Inability To Rent. — If the use of premises for the purpose for which they were condemned increases the difficulty of renting them or prevents them from being rented, the fact may be shown.[1] It is immaterial whether the rent is paid in cash or in a share of the crops.[2] Such testimony is not received to show the measure of recovery, but to establish depreciation in value.[3]

(a.) *Rental Value.* — If land has been held for rent, testimony of its rental value for any purpose for which it is fit is admissible on the theory that the owner must use reasonable efforts to lessen the damage which may result from the wrong done.[4] Proof of the rent paid for property before and after condemnation of a part of it tends to show its present market value;[5] but such testimony is not received in Ohio.[6]

the diversion will be fully up to the limit of the rights of the party entitled to the water, though less has been taken. James *v.* West Chester, 220 Pa. St. 490, 69 Atl. 1042.

Testimony as to Inconveniences, Annoyances and Dangers, and as to the probable effects of using land for the purpose for which it was condemned upon a business conducted upon a part of the land not taken is proper to show the extent of the depreciation in value. Laflin *v.* Chicago, etc. R. Co., 33 Fed. 415.

95. Cedar Rapids, etc. R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

96. Lieberman *v.* Chicago & S. S. R. T. Co., 141 Ill. 140, 30 N. E. 544.

97. Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619, *reversing* 49 Ill. App. 464.

98. Selma, etc. R. Co. *v.* Keith, 53 Ga. 178; Doud *v.* Mason City & Ft. D. R. Co., 76 Iowa 438, 41 N. W. 65; Stephenville, etc. R. Co. *v.* Moore (Tex. Civ. App.), 111 S. W. 758; Neilson *v.* Chicago, etc. R. Co., 58 Wis. 516, 17 N. W. 310; Lyon *v.* Green Bay & M. R. Co., 42 Wis. 538.

99. Lance *v.* C. M. & St. P. R. Co., 57 Iowa 636, 11 N. W. 612; Haislip *v.* Wilmington & W. R. Co., 102 N. C. 376, 8 S. E. 926; Gilmore *v.* Pittsburg, etc. R. Co., 104 Pa. St. 275; Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

1. Streyer *v.* Georgia So. & F. R. Co., 90 Ga. 56, 15 S. E. 637; Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959; Gallagher *v.* Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250, 164 N. Y. 602, 58 N. E. 1087 (no opinion); Pittsburg, etc. R. Co. *v.* Rose, 74 Pa. St. 362; Acker *v.* Knoxville, 117 Tenn. 224, 96 S. W. 973.

2. Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959.

3. Amsden *v.* Dubuque R. Co., 28 Iowa 542.

4. St. Louis, etc. R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159.

5. Selma & M. R. Co. *v.* Knapp, 42 Ala. 480; Denver, etc. R. Co. *v.* Bourne, 11 Colo. 59, 16 Pac. 839 (if market value of land is not shown); Rock Island, etc. R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; City of Omaha *v.* Hansen, 36 Neb. 135, 54 N. W. 83.

6. Columbus, etc. R. Co. *v.* Gard-

(b.) *Rents Paid for Other Properties.* — A lease of property essentially different from that in question affords no criterion of its rental value.[7] The rental value of other like property similarly situated and affected by the same cause cannot be shown.[8]

Loss of Business. — It is competent to show the loss of business in premises affected by condemnation, but only to show that their value has depreciated and to what extent.[9] But estimates of any supposed loss of business are purely speculative.[10] The loss of business upon land affected, but not taken, in consequence of the competition for the establishment of which the land was condemned does not enter into its value.[11] It is competent to show the business to which the property affected by condemnation proceedings was put and their effect upon it.[12]

d. *Rights of Third Parties.* — It is immaterial in condemnation proceedings what effect the use of property by its owner will have upon lower riparian proprietors.[13]

e. *General Benefits.* — Evidence as to the general benefits which may result to property because of the added prosperity the improvement may bring to the community is too remote.[14]

f. *Individual Advantage.* — Testimony as to benefits from an improvement must be limited to the advantage resulting to the estate; benefit to its owner is immaterial.[15] The owner of property abutting on a street may show, in answer to the contention that he has been relieved of the burden of keeping it in repair, the fair cost of doing so.[16]

ner, 45 Ohio St. 309, 324, 13 N. E. 69.

7. Schradsky *v.* Stimson, 76 Fed. 730, 22 C. C. A. 515; Kingsland *v.* Mayor, 60 Hun 489, 15 N. Y. Supp. 232.

8. Selma & M. R. Co. *v.* Knapp, 42 Ala. 480.

9. *Georgia.* — Pause *v.* Atlanta, 98 Ga. 92, 105, 26 S. E. 489.

Massachusetts. — Pegler *v.* Hyde Park, 176 Mass. 101, 57 N. E. 327.

Nebraska. — Omaha *v.* Gavock, 47 Neb. 313, 66 N. W. 415.

New York. — *In re* Grade Crossing Comrs., 17 App. Div. 54, 44 N. Y. Supp. 844, 154 N. Y. 550, 49 N. E. 127, 58 Am. St. Rep. 290; Syracuse *v.* Stacey, 45 App. Div. 249, 61 N. Y. Supp. 165.

Pennsylvania. — Pittsburg, etc. R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Miller *v.* Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132; Shaw *v.* Philadelphia, 169 Pa. St. 506, 32 Atl. 593; Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

10. Pittsburgh & W. R. Co. *v.* Patterson, 107 Pa. St. 461.

11. Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568; Philadelphia & C. Ferry Co. *v.* Intercity Link R. Co. (N. J. L.), 68 Atl. 1093.

12. King *v.* Minneapolis Union R. Co., 32 Minn. 224, 20 N. W. 135; Johnston *v.* Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800 (closing the street); Driver *v.* Western Union R. Co., 32 Wis. 569, 13 Am. Rep. 726.

13. Cox *v.* Philadelphia, etc. R. Co., 215 Pa. St. 506, 64 Atl. 729.

14. Palmer Co. *v.* Ferrill, 17 Pick (Mass.) 58.

15. Hamilton *v.* Pittsburg, etc. R. Co., 190 Pa. St. 51, 42 Atl. 369.

16. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029.

Lessened Liability. — It is immaterial that any person who might be injured on the street would prefer to seek redress against the city rather than the owner of abutting property. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029.

g. *Proposed Improvements.* — The condemnor cannot show its intentions as to future improvements.[17]

O. Opinions of Witnesses. — a. *Of Experts.* — **(1.) Admissible.** Persons possessed of special knowledge concerning the value of the land involved and familiar with the causes which affect its rise or decline may testify as experts to its value. The qualifications required vary somewhat in different states, as is shown in the notes.[18]

17. Brown *v.* Providence, etc. R. Co., 5 Gray (Mass.) 35; Pittsburg, etc. R. Co. *v.* Rose, 74 Pa. St. 362; Miller *v.* Windsor Water Co., 148 Pa. St. 429, 440, 23 Atl. 1132.

18. *United States.* — Montana R. Co. *v.* Warren, 137 U. S. 348; Glasier *v.* Nichols, 112 Fed. 877; Edward P. Allis Co. *v.* Columbia Mill Co., 65 Fed. 52, 12 C. C. A. 511.

California. — Norris *v.* Crandall, 133 Cal. XIX, 65 Pac. 568 (examiner of titles and attorney for local loaning companies); Mabry *v.* Randolph (Cal. App.), 94 Pac. 403.

Colorado. — Rimmer *v.* Wilson, 93 Pac. 1110.

Connecticut. — Hoadley *v.* Seward & Son Co., 71 Conn. 640, 649, 42 Atl. 997 (ownership of such land as in question and knowledge of the effect of fire or a nuisance upon it qualifies a witness to testify to the value of land so affected though he has not seen it).

District of Columbia. — Eckington & Soldiers' Home R. Co. *v.* McDevitt, 18 App. Cas. 497, 507; Lansburgh *v.* Wimsatt, 7 App. Cas. 271.

Indiana. — Pennsylvania Co. *v.* Hunsley, 23 Ind. App. 37, 54 N. E. 1071; Chicago, etc. R. Co. *v.* Brown, 157 Ind. 544, 60 N. E. 346; Chicago, etc. R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155.

Massachusetts. — Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506 (clerk in a real estate office); Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298; Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276 (broker and auctioneer, though he had not sold land on the street that in question is located on); Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127; Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227 (an experienced carpenter and builder may testify of the value of a building whose exterior dimensions he has taken, though he has not seen the interior, that being described hypothetically); Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668; Hills *v.* Home Ins. Co., 129 Mass. 345 (testimony may be based on the plans and specifications of a building).

Michigan. — Yore *v.* Meshew, 146 Mich. 80, 109 N. W. 35.

Minnesota. — Nichols *v.* Chicago, etc. R. Co., 36 Minn. 452, 32 N. W. 176 (a carpenter with some knowledge of the value of destroyed buildings may give an opinion thereof from the testimony describing them).

Missouri. — Robinson *v.* St. Joseph, 97 Mo. App. 503, 71 S. W. 465; Union Elev. Co. *v.* Kansas City S. B. R. Co., 135 Mo. 353, 375, 36 S. W. 1071; Kansas City S. B. R. Co. *v.* Norcross, 137 Mo. 415, 38 S. W. 299; Kansas City & Ft. S. R. Co. *v.* Dawley, 50 Mo. App. 480; Thomas *v.* Mallinckrodt, 43 Mo. 58; St. Louis, etc. R. Co. *v.* St. Louis Union Stock Yds. Co., 120 Mo. 541, 550, 25 S. W. 399; Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82 (residents of the locality if familiar with the land and its value are competent, though not engaged in buying and selling); Mantz *v.* Maguire, 52 Mo. App. 136, 147 (inability of dealer to give instances of specific sales immaterial); Steam Stone-Cutter Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076 (stone quarry; witness had sold local property and knew of other such sales); St. Louis, etc. R. Co. *v.* Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

New Jersey. — Pennsylvania & P. R. Co. *v.* Root, 53 N. J. L. 253, 21 Atl. 285.

New York. — Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78; Jarvis *v.* Furman, 25 Hun 391; Johnston *v.* Manhattan R. Co., 60 Hun 583, 14 N. Y. Supp. 897; Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133 (dealers or builders

(A.) Non-Marketable Property. — The value of property without market value may be so shown.[19]

(B.) Discretion of Court. — The admission of the opinions of experts rests largely in the sound discretion of the trial court; its action will not be disturbed unless there has been a manifest abuse of discretion.[20] The question of the competency of such witnesses is

may testify to the value of a building).

Pennsylvania. — Darlington *v.* Allegheny City, 189 Pa. St. 202, 42 Atl. 112; Griswold *v.* Gebbie, 126 Pa. St. 353, 366, 17 Atl. 673, 12 Am. St. Rep. 878; Stauffer *v.* East Stroudsburg, 215 Pa. St. 143, 64 Atl. 411.

Rhode Island. — Buffum *v.* New York & B. R. Co., 4 R. I. 221.

Wisconsin. — Uniacke *v.* Chicago, etc. R. Co., 67 Wis. 108, 29 N. W. 899.

Experts, Who Are. — The competency of an expert to testify as to the value of land depends on his knowledge of values in the particular locality, the extent of his experience regarding real estate in the place where the land in question is, and the attention which he has given the subject generally; and not upon the fact of his having lived in the locality in question, or having bought or sold land there. Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127; Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298; Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276; Struthers *v.* Philadelphia & D. C. R. Co., 174 Pa. St. 291, 34 Atl. 443.

A witness who has built and sold houses and considers himself a good judge of a house, and who values houses for the purpose of loaning money on them, is not competent to testify to the value of a house as it is and as it would have been if built according to the contract. The court said: "The testimony of experts is not admitted upon ordinary matters of judgment within the experience of ordinary jurymen. In a general way, every business man knows something of the value of a house, just as everyone can say whether another has the appearance of sickness or good health; yet, in questions of disease, we must call a physician, and in questions of values we call one who manufactures or buys and sells the article. To form a rough guess at values, as is done in loaning on property with a large margin, is not what 'the witness' was required to do; this was within the competency of the jurors themselves. He did not show that his experience in the matter of houses was such as to make him, from the nature of his profession, an exact judge of these values, and it cannot be said that the court committed error in rejecting him as an expert." Naughton *v.* Stagg, 4 Mo. App. 271.

A Farmer Is Competent as an Expert to give his opinion with respect to the value of lands, both before and after the laying of a railroad, if the damage done has arisen solely from a change in the agricultural conditions of the property, as by the severance of the fields from each other, necessitating additional fences and producing inconvenience in carrying on farming operations. Pennsylvania & P. R. Co. *v.* Root, 53 N. J. L. 253, 21 Atl. 285.

Extent of Knowledge. — An expert may not testify to the value of a mine unless his opinion is based upon personal knowledge and observation; superficial observation, based on an examination of some of the surface dirt, is not a sufficient qualification. Glasier *v.* Nichols, 112 Fed. 877.

Time Knowledge Acquired is immaterial if conditions testified of have not changed. Stauffer *v.* East Stroudsbury, 215 Pa. St. 143, 64 Atl. 411.

19. Sloan *v.* Baird, 12 App. Div. 481, 42 N. Y. Supp. 38, 162 N. Y. 327, 56 N. E. 752 (no discussion on this point).

Value of Land Having no Market Value, with and without a railroad upon it, may be shown. Eckington & Soldiers' Home R. Co. *v.* McDevitt, 18 App. Cas. (D. C.) 497, 507.

20. *United States.* — Montana R.

one of fact,[21] but the ruling of the court must be sustained by the evidence.[22] Local conditions may have an influence in determining the qualifications of a witness offered as an expert.[23]

(C.) Knowledge Essential. — One may not testify as an expert because he is familiar with the prices paid for land for a special purpose;[24] nor because he has information as to the rent derived from it;[25] nor because he resides in its vicinity and has knowledge of the land.[26] Opinions concerning the value of improvements must be given by witnesses competent to testify to the value of the estate as an entirety, at least where there is ample evidence on that point.[27]

If Value for a Special Purpose is in issue the witness must have knowledge thereof,[28] but he need not have knowledge of its value for general purposes.[29]

A Civil Engineer cannot testify to the best uses to which land can be put,[30] nor a farmer to the lessened value of a farm because of the proximity of a railroad to the buildings and the disturbance of their inmates.[31]

(D.) Not Required. — Expert testimony is not essential to the determination of the value of city real estate.[32] It should not be re-

Co. *v.* Warren, 137 U. S. 348; Glasier *v.* Nichols, 112 Fed. 877.

District of Columbia. — Lansburgh *v.* Wimsatt, 7 App. Cas. 271.

Indiana. — Jenney Elec. Co. *v.* Banham, 41 N. E. 448.

Massachusetts. — Hills v. Home Ins. Co., 129 Mass. 345; Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546; Teele *v.* Boston, 165 Mass. 88, 42 N. E. 556; Lakeside Mfg. Co. *v.* Worcester, 186 Mass. 552, 72 N. E. 81 (especially if other witnesses are not familiar with all the conditions).

Less Strictness will be exercised in passing upon the question than otherwise if it appears that there was no difficulty in procuring competent witnesses. Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547.

21. Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276.

22. Woodworth *v.* Brooklyn El. R. Co., 22 App. Div. 501, 48 N. Y. Supp. 80.

23. Mabry *v.* Randolph (Cal. App.), 94 Pac. 403; Rimmer *v.* Wilson (Colo.), 93 Pac. 1110.

24. Conness *v.* Com., 184 Mass. 541, 69 N. E. 341.

25. Com. *v.* Tryon, 31 Pa. Super. 146.

26. Riley *v.* Camden & T. R. Co., 70 N. J. L. 289, 57 Atl. 445 (mere observation, although continued and attentive, is not enough); Buffum *v.* New York & B. R. Co., 4 R. I. 221.

The Value of Trees standing on land cannot be shown by a witness because he is familiar with the value of lots. Williams *v.* Hathaway, 21 R. I. 566, 45 Atl. 578; Elvins *v.* Delaware & A. Tel. & T. Co., 63 N. J. L. 243, 43 Atl. 903.

27. Devon *v.* Cincinnati (C. C. A.), 162 Fed. 633. An exception to this statement has been made in Cleveland T. & V. R. Co. *v.* Gorsuch, 8 Ohio C. C. (N. S.) 297.

28. Bergen Neck R. Co. *v.* Point Breeze Ferry Imp. Co., 57 N. J. L. 163, 30 Atl. 584 (a witness connected with railroads and familiar with land values is not therefore qualified to testify of the expense and inconvenience of constructing and operating one railroad across another); Brown *v.* Providence & S. R. Co., 12 R. I. 238.

29. St. Louis, etc. R. Co. *v.* Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

30. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 565, 25 Atl. 506.

31. Pennsylvania & P. R. Co. *v.* Root, 53 N. J. L. 253, 21 Atl. 285.

32. Jones *v.* Erie & W. V. R. Co., 151 Pa. St. 30, 49, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758;

ceived as to a matter concerning which the opinion of one intelligent, informed man is as good as that of another.[33]

(2.) Scope of Inquiries. — (A.) Elements of Value. — Such witnesses may testify to the value of the elements of the property in question, as of fruit trees, vines and shrubbery as they were when destroyed,[34] and to the value of a crop in answer to a hypothetical question.[35]

(B.) Change of Property. — The effect of adapting property to a change in the grade of a street and the fact that it will be expensive to do so may be shown by an expert who is not informed as to the value of local property.[36]

(C.) Easements. — The value of the easements of light, air and access appurtenant to premises abutting on a street in which is an elevated railroad cannot be testified to by an expert.[37]

(D.) Land Subject to Easement. — The value of land subject to public easements cannot be testified to by one who has never known of the sale of such property or whose opinions of such value have not been accepted. Such value cannot be shown by expert testimony if the duration of the easement cannot be estimated.[38]

(E.) Value Under Other Conditions. — Expert testimony is not competent to show the value property would have had if a railroad had not been built and operated on the street in front of it.[39]

(F.) Adaptability of Land. — An expert who has specially exam-

Galbraith *v.* Philadelphia Co., 2 Pa. Super. 350; Pennsylvania, etc. Co. *v.* Bunnell, 81 Pa. St. 414, 426; Hope *v.* Philadelphia & W. R. Co., 211 Pa. St. 401, 60 Atl. 996.

33. Kent *v.* Miltenberger, 15 Mo. App. 480; Neilson *v.* Chicago, etc. R. Co., 58 Wis. 516, 17 N. W. 310.

34. Elvins *v.* Delaware & A. Tel. & T. Co., 63 N. J. L. 243, 43 Atl. 903; Haskell *v.* Northern Adirondack Co., 66 Hun 629, 21 N. Y. Supp. 234.

Destroyed Fruit Trees. — A nurseryman familiar with the fruit business, who has heard the testimony concerning the kind, quality and product of fruit trees which have been destroyed may testify of their value though not acquainted with the trees. Whitbeck *v.* New York C. R. Co., 36 Barb. (N. Y.) 644.

35. Huber *v.* Beck, 6 Ind. App. 47, 32 N. E. 1025; Gulf, etc. R. Co. *v.* Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285.

36. Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171.

37. Blumenthal *v.* New York El. R. Co., 60 N. Y. Super. 95, 17 N. Y. Supp. 481. Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486.

Speculative. — Such testimony is speculative, and objectionable, also, because calling for a conclusion. Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486.

38. Boston & W. R. Co. *v.* Old Colony etc. R. Co., 3 Allen (Mass.) 142.

Competency of Witness. — A real estate agent who has no knowledge of any transactions for the sale of the private estate in a separate piece of land lying in a public street is not competent to testify of its value, or as to the damages sustained by the owner of abutting property by its condemnation. Laing *v.* United New Jersey R. & C. Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682.

39. Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, reviewing local cases.

ined land may testify as to the purposes for which it is adapted,[40] and to its value for such purposes.[41]

(G.) Rental Values. — A considerable latitude is allowed in proving the rental value of property as affected by a change in its condition or surroundings.[42]

(3.) Hypothetical Questions. — These are proper.[43] They may embrace the facts which are supposed to have been testified to,[44] and may be put on condition that if the facts assumed are not maintained the answers shall be stricken out.[45] They must be full enough to form the basis for an opinion and include all the important points concerning the value of the property as disclosed by the undisputed evidence.[46]

(4.) Basis of Opinions. — An expert may enumerate the intrinsic characteristics of land which give it a special value.[47] He cannot state that his estimate is based on local sales or knowledge of local

40. Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544; Harris *v.* Schuylkill, etc. R. Co., 141 Pa. St. 242, 253, 21 Atl. 590, 23 Am. St. Rep. 278.

41. St. Louis, etc. R. Co. *v.* Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

An Expert May Not Testify whether a tract of land is large enough for a house and a stable. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

42. Steigerwald *v.* Manhattan R. Co., 50 App. Div. 487, 64 N. Y. Supp. 125.

Causes Affecting Value. — On the issue as to the general effects caused by elevated railroads upon neighboring and abutting properties, experts may give opinions as to there being any cause for the rise of values in streets which have no such road greater than would have existed in the street in question had the road not been there, and the effect of the road on the rental value of property. Hunter *v.* Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400.

Scope of Comparison. — An expert may testify as to the general course and current of real estate values for two or three blocks on either side of the premises affected by the operation of an elevated railroad; and may make a comparison of the uses made of property in the locality as contrasted with the uses on adjoining streets where there is no such road, notwithstanding a difference in the character of the properties in the localities. Shepard *v.* Manhattan R. Co., 169 N. Y. 160, 62 N. E. 151, 48 App. Div. 452, 62 N. Y. Supp. 977; *Compare* Colton *v.* New York El. R. Co., 7 Misc. 626, 31 Abb. N. C. 269, 28 N. Y. Supp. 149.

Experts may testify as to the value land would have with water and its value after the water has been diverted, and also the rental value of the premises with and without the diminished water supply, and upon the assumption that it had not been lessened. Gallagher *v.* Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250, 164 N. Y. 602, 58 N. E. 1087 (no opinion).

The Testimony of Experts is not incompetent because they give the rental value of property at a percentage of its stated value per front foot. Armstrong *v.* St. Louis, 69 Mo. 309.

43. Smith *v.* Indianapolis, etc. R. Co., 80 Ind. 233; Huber *v.* Beck, 6 Ind. App. 484, 33 N. E. 985; Chicago & A. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

44. Chicago & A. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896.

45. Cincinnati, etc. R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113.

46. Chicago, etc. R. Co. *v.* Kendall, 49 Ill. App. 398.

47. Foote *v.* Lorain & C. R. Co., 21 Ohio C. C. 319.

conditions if these have not been proved.[48] Grounds on which opinions are based should not be disclosed on direct examination.[49]

(5.) Cross-Examination. — An expert who has testified as to the value of land on the theory that like lands are scarce may be asked as to the price at which he had offered adjacent lands for sale;[50] and for his opinion of the value of local lands unlike that in question,[51] and as to the assessed value of the land concerning which he has testified and its appraised value in the settlement of the estate of a former owner.[52] He cannot be contradicted by the record of a board of selectmen, of which he was a member, showing the compensation awarded for the land in issue.[53]

(6.) Weight of Testimony. — Expert opinions are not conclusive,[54] though not directly contradicted.[55]

b. *Of Non-Experts.* — **(1.) Generally Competent.** — Because knowledge of value is not always a question of science or skill persons who are not experts may usually testify thereto.[56] The decisions

48. Metropolitan West Side El. R. Co. *v.* Dickinson, 161 Ill. 22, 43 N. E. 706 (knowledge based on operation of a single road in a different part of the city); O'Malley *v.* Com., 182 Mass. 196, 65 N. E. 30.

Erroneous Basis. — The opinion of an expert is not inadmissible because the basis on which it was rested may have affected its weight or credibility. Edward P. Allis Co. *v.* Columbia Mill Co., 65 Fed. 52, 12 C. C. A. 511.

49. Kingsland *v.* Mayor, 60 Hun 489, 15 N. Y. Supp. 232.

50. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

51. Uniacke *v.* Chicago, etc. R. Co., 67 Wis. 108, 29 N. W. 899.

An Expert Who Has Testified to Rental Value may be asked concerning the rental value of other local property, but not as to his estimate of the rental value thereof. Raapke & Katz Co. *v.* Schmoeller & M. Piano Co. (Neb.), 118 N. W. 652.

52. Central Pac. R. Co. *v.* Feldman, 152 Cal. 303, 92 Pac. 849.

53. Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547.

Reasons. — The record of the board, of which the witness was a member, did not show that the amount of damages awarded was the sum which he, acting on his own judgment, thought to have been awarded. "In every judicial or quasi judicial determination of damages by a board composed of more than one person there must be compromises of individual opinion in order that any result may be reached, and a judicial body must give some weight to evidence, and cannot act solely upon the personal knowledge of its members, when evidence is produced before them. Either, then, the record should have been excluded, or, if admitted" the witness "and the other selectmen should have been permitted to testify to the part taken, and to the opinions expressed by" the witness "in the deliberations of the selectmen which resulted in the award, while the deliberations of legislative bodies are usually public, the deliberations of judicial or quasi judicial bodies are private, and there are reasons of public policy why they should not be made public particularly when the purpose to be served is comparatively unimportant." Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547.

54. Johnson *v.* Chicago, etc. R. Co., 37 Minn. 519, 35 N. W. 438; Stevens *v.* Minneapolis, 42 Minn. 136, 43 N. W. 842.

55. Olson *v.* Gjertsen, 42 Minn. 407, 44 N. W. 306.

56. *United States.* — Montana R. Co. *v.* Warren, 137 U. S. 348 (value of undeveloped "prospect" in mineral land); Gorman *v.* Park, 100 Fed. 553, 40 C. C. A. 537.

Arkansas. — St. Louis, etc. R. Co. *v.* Anderson, 39 Ark. 167; St. Louis,

are not in accord as to the degree of knowledge which qualifies a witness to express his opinion; indeed, there is no standard, as the cases cited in the note show. A general statement may be made, though it may not cover all the cases on the subject. Persons residing near the land to be valued, if familiar with its location, uses,

etc. R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159.

California. — San Diego Land & T. Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Mabry *v.* Randolph (Cal. App.), 94 Pac. 403.

Colorado. — Florence *v.* Calmet, 96 Pac. 183.

Florida. — Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 42, 13 So. 444.

Illinois. — Johnson *v.* Freeport & M. R. Co., 111 Ill. 413; Cooper *v.* Randall, 59 Ill. 317; Chicago & E. R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488; White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 543; Peoria, B. & C. Tract. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607.

Indiana. — City of Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Elwood Planing Mill Co. *v.* Harting, 21 Ind. App. 408, 52 N. E. 621; Chicago, etc. R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155; Logansport *v.* McMillen, 49 Ind. 493 (opinions as to damage to land not taken incompetent).

Iowa. — Town of Cherokee *v.* Town Lot Co., 52 Iowa 279, 3 N. W. 42; Richardson *v.* Sioux City, 113 N. W. 928; Thompson *v.* Keokuk & W. R. Co., 116 Iowa 215, 89 N. W. 975; Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Warrick *v.* Reinhardt, 111 N. W. 983.

Kansas. — Kansas City, etc. R. Co. *v.* Weidenmann, 94 Pac. 146.

Maine. — Snow *v.* Boston, etc. R. Co., 65 Me. 230.

Maryland. — Mayor *v.* Smith & S. Brick Co., 80 Md. 458, 31 Atl. 423; Horner *v.* Beasley, 105 Md. 193, 65 Atl. 820; Dailey *v.* Grimes, 27 Md. 440.

Massachusetts. — Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544 (knowledge acquired in performance of public duty, though not officers of town in which land is); Whitman *v.* Boston & M. R., 7 Allen 313; Muskeget Isl. Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61 (witness qualified as a matter of law though he had never been on the land); Swan *v.* Middlesex, 101 Mass. 173; Walker *v.* Boston, 8 Cush. 279.

Michigan. — Wallace *v.* Finch, 24 Mich. 255 (familiarity with land and knowledge of local sales); Stone *v.* Covell, 29 Mich. 359 (non-resident, familiar only with prices put on lands).

Minnesota. — Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283; Lehmicke *v.* St. Paul, etc. R. Co., 19 Minn. 464; Sherman *v.* St. Paul, etc. R. Co., 30 Minn. 227, 15 N. W. 239; Papooshek *v.* Winona & St. P. R. Co., 44 Minn. 195, 46 N. W. 329 (special knowledge).

Mississippi. — Board of Levee Comrs. *v.* Nelms, 82 Miss. 416, 34 So. 149; Board of Levee Comrs. *v.* Dillard, 76 Miss. 641, 25 So. 292 (though the opinion is based on the revenue derived from the land).

Missouri. — Ragan *v.* Kansas City & S. E. R. Co., 111 Mo. 456, 20 S. W. 234; St. Louis, etc. R. Co. *v.* Donovan, 149 Mo. 93, 102, 50 S. W. 286; Chouteau *v.* St. Louis, 8 Mo. App. 48; Anslyn *v.* Frank, 8 Mo. App. 242.

Montana. — Montana Cent. R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641.

Nebraska. — Chicago, etc. R. Co. *v.* Buel, 56 Neb. 205, 76 N. W. 571; Chicago, etc. R. Co. *v.* Shafer, 49 Neb. 25, 68 N. W. 342; Burlington & M. R. Co. *v.* Schluntz, 14 Neb. 421, 16 N. W. 439; Sioux City & P. R. Co. *v.* Weimer, 16 Neb. 272, 20 N. W. 349.

New York. — Colton *v.* New York El. R. Co., 7 Misc. 626, 31 Abb. N. C. 269, 28 N. Y. Supp. 149; Clark *v.* Baird, 9 N. Y. 183, 196; Bedell *v.* Long Isl. R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Conkling *v.* Manhattan R. Co., 58 Hun 611, 12 N. Y. Supp. 846; Shephard *v.* New York El. R. Co., 60 Hun 584, 15 N. Y. Supp. 175; Witmark *v.* New York

improvements, adaptability, environment and market value, and the market value of other similar local lands may testify to their opinions of its value though not experts. Such testimony is competent generally whether it relates to the value of the land before or after it was affected by the exercise of a legal right or the perpetration of

El. R. Co., 149 N. Y. 393, 44 N. E. 78.

North Carolina. — Morrison *v.* Watson, 101 N. C. 332, 7 S. E. 795, 1 L. R. A. 833.

Ohio. — Cleveland & P. R. Co. *v.* Ball, 5 Ohio St. 568.

Pennsylvania. — Scott *v.* Central Val. R. Co., 33 Pa. Super. 574; Markowitz *v.* Pittsburg & C. R. Co., 216 Pa. St. 535, 65 Atl. 1097 (though living in a borough adjoining that in which the land is situated and unable to fix the exact price at which lots in the vicinity had been sold); Reed *v.* Pittsburg, etc. R. Co., 210 Pa. St. 211, 59 Atl. 1067; Jones *v.* Erie & W. V. R. Co., 151 Pa. St. 30, 49, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Galbraith *v.* Philadelphia Co., 2 Pa. Super. 359; Hope *v.* Philadelphia & W. R. Co., 211 Pa. St. 401, 60 Atl. 996; Sutton *v.* Pennsylvania R. Co., 214 Pa. St. 274, 63 Atl. 791; Kellogg *v.* Krauser, 14 Serg. & R. 137, 16 Am. Dec. 480.

South Carolina. — Dent *v.* South-Bound R. Co., 61 S. C. 329, 39 S. E. 527.

Tennessee. — Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 556, 82 S. W. 471; Vaulx *v.* Tennessee Cent. R. Co., 108 S. W. 1142.

Texas. — Gulf, C. & S. F. R. Co. *v.* Abney, 3 Will. Civ. Cas. § 413; Houston & T. C. R. Co. *v.* Knapp, 51 Tex. 592; Ft. Worth Compress Co. *v.* Chicago, etc. R. Co., 18 Tex. Civ. App. 622, 45 S. W. 967; Texas & P. R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134; San Antonio & A. P. R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040.

Vermont. — Blaisdell *v.* Davis, 72 Vt. 295, 307, 48 Atl. 14.

Virginia. — Swift *v.* Newport News, 105 Va. 108, 52 S. E. 821 (effect of improvement on value).

Washington. — Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34; Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

West Virginia. — Kay *v.* Glade Creek & R. Co., 47 W. Va. 467, 35 S. E. 973; Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852.

Wisconsin. — Moore *v.* Chicago, etc. R. Co., 78 Wis. 120, 47 N. W. 273 (hypothetical questions may be answered and witness' competency determined on cross-examination); Andrews *v.* Youmans, 82 Wis. 81, 52 N. W. 23; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328; Diedrich *v.* Northwestern U. R. Co., 47 Wis. 662, 3 N. W. 749; Snyder *v.* Western Union R. Co., 25 Wis. 60.

Knowledge Is Essential. — Reed *v.* Drais, 67 Cal. 491, 8 Pac. 20; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Butsch *v.* Smith, 40 Colo. 64, 90 Pac. 61; Jurada *v.* Cambridge, 171 Mass. 144, 50 N. E. 537 (lack of knowledge of the relative value of land and improvements cause for excluding testimony where value of entire property has been testified to); Whitney *v.* Boston, 98 Mass. 312 (knowledge of rental value not sufficient); Wilson *v.* Southern R. Co., 65 S. C. 421, 43 S. E. 964 (knowledge of value before condemnation is necessary to qualify a witness to testify of value afterward); Houston & T. C. R. Co. *v.* Smith (Tex. Civ. App.), 46 S. W. 1045 (witness must state that he knows or give facts disclosing his qualification); Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738; Westlake *v.* St. Lawrence County Mut. Ins. Co., 14 Barb. (N. Y.) 206; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; Markowitz *v.* Pittsburg & C. R. Co., 216 Pa. St. 535, 65 Atl. 1097; Mewes *v.* Crescent Pipe Line Co., 170 Pa. St. 364, 32 Atl. 1083; *s. c.* 170 Pa. St. 369, 32 Atl. 1085; State Line R. Co. *v.* Playford (Pa. St.), 14 Atl. 355; Gallagher *v.* Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673 (knowledge of value essen-

a wrong, and is also competent to show the rental value of property and the value of destroyed buildings or other improvements.

(2.) Exceptions. — In Rhode Island only experts can testify to

tial); Kansas City & Ft. S. R. Co. *v.* Dawley, 50 Mo. App. 480, 490.

Opportunities for Observation should be special and the data from which estimates are to be made should be in mind. Markowitz *v.* Pittsburg & C. R. Co., 216 Pa. St. 535, 65 Atl. 1097; Pittsburgh, etc. R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764.

Scope of Knowledge. — The knowledge of the value of property should extend to its area, the uses to which it may be put and the extent and condition of the improvements. Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339; Markowitz *v.* Pittsburg & C. R. Co., 216 Pa. St. 535, 65 Atl. 1097.

Knowledge of the Value of Other Similar Lands devoted to like uses is essential. Texas & N. O. R. Co. *v.* Smith, 35 Tex. Civ. App. 351, 80 S. W. 247; Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339; Markowitz *v.* Pittsburg & C. R. Co., 216 Pa. St. 535, 65 Atl. 1097; Spring City G. L. Co. *v.* Pennsylvania S. V. R. Co., 167 Pa. St. 6, 31 Atl. 368; Grier *v.* Homestead, 6 Pa. Super. 542. Such knowledge is sometimes sufficient (City of Paducah *v.* Allen, 111 Ky. 361, 63 S. W. 981; Hewlett *v.* Saratoga Carlsbad Spr. Co., 84 Hun 248, 32 N. Y. Supp. 697; Lewis *v.* Springfield Water Co., 176 Pa. St. 237, 35 Atl. 187), irrespective of information concerning the improvements thereon. Morrison *v.* Watson, 101 N. C. 332, 7 S. E. 795, 1 L. R. A. 833.

In Some States Familiarity With the Particular Property is required. Board of Levee Comrs. *v.* Dillard, 76 Miss. 641, 25 So. 292.

The General Selling Price is not to be shown by evidence of particular sales of alleged similar lots, but is to be fixed in the mind of the witness from a knowledge of the price at which lots are generally held for sale, and at which they are sometimes actually sold in the course of ordinary business in the neighborhood. Reed *v.* Pittsburg, etc. R. Co., 210 Pa. St. 211, 59 Atl. 1067; Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339.

Personal Preference of Witness as to value is not qualifying knowledge. Eastern Texas R. Co. *v.* Scurlock, 97 Tex. 305, 78 S. W. 490; Chicago, etc. R. Co. *v.* Douglass, 33 Tex. Civ. App. 262, 76 S. W. 449; Hochstrasser *v.* Martin, 62 Hun 165, 16 N. Y. Supp. 558.

Witness' Statement of Knowledge is not conclusive. Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615.

The Right To Cross-Examine as to competency must not be denied. Woodworth *v.* Brooklyn El. R. Co., 22 App. Div. 501, 48 N. Y. Supp. 80; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339; Lewis *v.* Springfield Water Co., 176 Pa. St. 230, 35 Atl. 186. The error is not cured by striking out the testimony. Davis *v.* Pennsylvania R. Co., 215 Pa. St. 581, 64 Atl. 774; Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339.

Slight Knowledge has been regarded as sufficient. Stone *v.* Covell, 29 Mich. 359; Lehmicke *v.* St. Paul, etc. R. Co., 19 Minn. 464 (one who knows property "by sight" is acquainted with it); *In re* Rondout & O. R. Co. *v.* Deyo, 5 Lans. (N. Y.) 298. But a mere inspection of property does not qualify a witness without knowledge to testify of its value. Clark *v.* Rockland Water Power Co., 52 Me. 68; Kansas City & Ft. S. R. Co. *v.* Dawley, 50 Mo. App. 480, 490.

No Standard as to Amount of Knowledge; but witness must possess sufficient to enable him to form some estimate of value. Maughan *v.* Burns' Estate, 64 Vt. 316, 23 Atl. 583; Lamoille Val. R. Co. *v.* Bixby, 57 Vt. 548, 563; Montana R. Co. *v.* Warren, 137 U. S. 348.

The standard by which the competency of witnesses to testify of the value of land is to be gauged varies with the circumstances. In neighborhoods where sales are few and

the value of land,[57] and that was the rule in New Hampshire from the earliest time until non-expert testimony was made competent by legislation,[58] notwithstanding evidence of the sales of similar properties and the prices paid for them was given and comparison made between their values and the value of the land in question.[59] It was said in early New York cases that opinions were barely admissible, that it was a departure from the general rule to receive them,[60] and that they were not entitled to much consideration.[61]

(3.) Necessarily Received. — In the absence of a standard value for property the law provides no means for ascertaining its value other than by the opinions of witnesses.[62]

at long intervals it would be unfair and impracticable to require as full and detailed knowledge on the part of witnesses as in other localities where sales are frequent and of public interest and attention. The only test is that the witnesses shall have such knowledge of the subject-matter as can be reasonably expected in view of the particular circumstances. Lally *v.* Central Val. R. Co., 215 Pa. St. 436, 64 Atl. 633.

Inconsistent Statements. — An opinion is not incompetent because of variation in the estimate of value. Bischoff *v.* New York El. R. Co., 61 N. Y. Super. 211, 18 N. Y. Supp. 865.

Witness May Not Fortify His Testimony by detailing, on direct examination, his experience with a like improvement on his own land. Tannehill *v.* Philadelphia Co., 2 Pa. Super. 159.

57. Buffum *v.* New York & B. R. Co., 4 R. I. 221.

58. Low *v.* Connecticut & P. R. Co., 45 N. H. 370, 383, and cases cited.

59. Low *v.* Connecticut & P. R. Co., 45 N. H. 370, 383; Tarleton *v.* Emmons, 17 N. H. 43.

60. *In re* Pearl St., 19 Wend. (N. Y.) 651.

61. *In re* William & Anthony Streets, 19 Wend. (N. Y.) 678.

62. Ohio & M. R. Co. *v.* Long, 52 Ill. App. 670; Crouse *v.* Holman, 19 Ind. 30, 38; Kellogg *v.* Krauser, 14 Serg. & R. (Pa.) 137, 16 Am. Dec. 480.

Reasons. — "The opinions of witnesses as to value are resorted to from necessity. The admissibility of such evidence does not necessarily rest upon the ground that the opinions are based upon facts or information possessed by the witnesses which would themselves be competent primary evidence to prove value (Whitney *v.* Thacher, 117 Mass. 523), but because the experience or knowledge of the witness is such that he is able to estimate values more intelligently and accurately than those persons who have no special qualifications in that regard. Without such evidence it would often be impossible to inform a jury as to the value of real property, which depends upon such a variety of circumstances that no mere description of the property, or statement of facts regarding it, could enable the jury to intelligently estimate its value." *Per* Dickinson, J., in Barnett *v.* St. Anthony Falls W. P. Co., 33 Minn. 265, 22 N. W. 535, *citing* Illinois & W. R. Co. *v.* Von Horn, 18 Ill. 257; Swan *v.* Middlesex, 101 Mass. 173.

"It is settled in this commonwealth that where the value of property, real or personal, is in controversy, persons acquainted with it may state their opinion as to its value. Also where the amount of damage done to property is in controversy, such persons may state their opinions as to the amount of the damage. This is permitted as an exception to the general rule, and not strictly on the ground that such persons are experts; for such an application of that term would greatly extend its signification. The persons who testify are not supposed to have science or skill superior to that of the jurors; they have merely a knowledge of the particular facts in

(4.) Discretion of Court. — The competency of non-expert witnesses is largely left to the reviewable discretion of the trial judge.[63]

Liberal Rule. — The rule governing the competency of opinions is not so strictly applied to questions of value as to many other subjects.[64]

(5.) Qualifications. — (A.) KIND OF KNOWLEDGE. — Opinions may be based on other considerations than the prices at which recent local sales have been made — as the qualities of the land, the development of the surrounding country, general information as to trade and business and other like considerations.[65] But knowledge of sales must be possessed by witnesses unacquainted with the property,[66] and must be based on sales of land not greatly dissimilar in extent.[67]

the particular case which jurors have not. And as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety." Shattuck *v.* Stoneham Branch R., 6 Allen (Mass.) 115; St. Louis, etc. R. Co. *v.* St. Louis Union Stock Yds. Co., 120 Mo. 541, 550, 25 S. W. 399; Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

63. *United States.* — Stillwell & B. Mfg. Co. *v.* Phelps, 130 U. S. 520; Montana R. Co. *v.* Warren, 137 U. S. 348.

Arkansas. — McDonough *v.* Williams, 112 S. W. 164.

Colorado. — Ft. Collins Develop. R. Co. *v.* France, 41 Colo. 512, 92 Pac. 953; Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

Maryland. — Mayor *v.* Smith & S. Brick Co., 80 Md. 458, 31 Atl. 428.

Massachusetts. — Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544; Jurada *v.* Cambridge, 171 Mass. 144, 50 N. E. 537; Warren *v.* Spencer Water Co., 143 Mass. 155, 164, 9 N. E. 527; Lawrence *v.* Boston, 119 Mass. 126.

Nebraska. — Omaha L. & T. Co. *v.* Douglas County, 62 Neb. 1, 86 N. W. 936.

64. Mobile, etc. R. Co. *v.* Riley, 119 Ala. 260, 24 So. 858.

65. *United States.* — Carpenter *v.* Robinson, 1 Holmes 67, 5 Fed. Cas. No. 2,431..

Illinois. — Illinois, etc. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880; Chicago & E. R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488.

Indiana. — Frankfort & K. R. Co. *v.* Windsor, 51 Ind. 238 (of exactly similar lands); Evansville & R. Co. *v.* Fettig, 130 Ind. 61, 29 N. E. 407.

Kansas. — Wickstrum *v.* Carter, 9 Kan. App. 439, 58 Pac. 1020; St. Louis, etc. R. Co. *v.* Chapman, 38 Kan. 307, 16 Pac. 695, 5 Am. St. Rep. 744; Kansas City & S. W. R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. 227; Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 22, 20 Pac. 538; Chicago, etc. R. Co. *v.* Casper, 42 Kan. 561, 22 Pac. 634; Kansas City, etc. R. Co. *v.* Weidenmann, 94 Pac. 146.

Massachusetts. — Whitman *v.* Boston & M. R., 7 Allen 313; Fowler *v.* Middlesex, 6 Allen 92.

Michigan. — Long *v.* Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443.

Mississippi. — Board of Levee Comrs. *v.* Nelms, 82 Miss. 416, 34 So. 149.

Nebraska. — Greeley County *v.* Gebhardt, 89 N. W. 753.

Pennsylvania. — Lewis *v.* Springfield Water Co., 176 Pa. St. 237, 35 Atl. 187.

Knowledge of Sales is sometimes assumed to be important. Town of Cherokee *v.* Town Lots Co., 52 Iowa 279, 3 N. W. 42; Galbraith *v.* Philadelphia Co., 2 Pa. Super. 359. It is sufficient if witness is informed of sales to condemnor. Pittsburgh & L. E. R. Co. *v.* Robinson, 95 Pa. St. 426.

66. Leroy & W. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615.

67. Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506 (sale of five small

(B.) Knowledge Must Be of Local Lands. — General knowledge of values is not sufficient to qualify a witness; he must have information concerning the land in question or like local lands.[68]

(C.) And of Lands of Like Character. — The knowledge which will qualify a witness must be of property available for a like use as that to be valued.[69]

(D.) Of Market Value. — Opinions must be restricted to the fair market value of the land, not the witness' judgment of its value,[70] or its value to the owner.[71] A special value in excess of the market value cannot be shown.[72]

(E.) Value to Owner. — The value of property without market value for the use to which it is devoted may be testified to by a witness who knows its worth to the owner, though not familiar with the market price of local properties.[73]

(F.) Details Need Not Be Known. — Knowledge of details concerning the condition in which land has been left by an improvement is not essential to qualify a witness to testify to its present value.[74] Knowledge of the taking of land for a similar purpose is not essential to qualify witnesses to testify to its present value, though they say on cross-examination that their information concerning value is only that of citizens in general.[75]

(G.) Peculiarities of Land. — Witnesses otherwise competent are not rendered incompetent because of the peculiar condition of the

lots not a qualification to testify to the value of a sixteen acre tract).

68. Lansburgh *v.* Wimsatt, 7 App. Cas. (D. C.) 271; Gulf, etc. R. Co. *v.* Burrough, 27 Tex. Civ. App. 422, 66 S. W. 83; Seattle & N. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Rule Applies Though Land Has no Market Value. — Opinions of value founded solely upon knowledge of transactions in other property, not in the vicinity of that in question, are not admissible, though the latter has no market value and its value was dependent upon its advantages and capacity for development and improvement, as land at seaside summer resorts on the same coast. Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544.

69. Bachert *v.* Lehigh Coal & N. Co., 208 Pa. St. 362, 57 Atl. 765.

Value in Remote Market. — In the absence of a market for land in a wild, unsettled region resort may be had to remote market in which similar lands are sold to any considerable extent. Mains *v.* Haight, 14 Barb. (N. Y.) 76.

70. Peoria, etc. Tract. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607.

Knowledge of Market Value. Only such witnesses are competent as have the requisite personal knowledge of the market value of land, the source, extent and character of which must be satisfactorily shown by requiring them to designate the properties in the vicinity with which they are acquainted. Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339; Mewes *v.* Crescent Pipe Line Co., 170 Pa. St. 364, 32 Atl. 1082, 170 Pa. St. 369, 32 Atl. 1083.

71. St. Louis, etc. R. Co. *v.* St. Louis Union Stock Yds. Co., 120 Mo. 541, 550, 25 S. W. 399.

72. Decatur *v.* Vaughan, 233 Ill. 50, 84 N. E. 50.

73. Sanitary Dist. *v.* Pittsburgh, etc. R. Co., 216 Ill. 575, 75 N. E. 248.

74. Ohio Val. R. & T. Co. *v.* Kerth, 130 Ind. 314, 30 N. E. 298; Scott *v.* Central Val. R. Co., 33 Pa. Super. 574; Galbraith *v.* Philadelphia Co., 5 Pa. Super. 178.

75. Swan *v.* Middlesex, 101 Mass. 173.

land and lack of knowledge of the cost of making it available for use.[76]

(H.) Value for Special Use. — A witness who conducts a business for which land is adapted and for which there is a local demand may testify of its value for such use, though not qualified to give an opinion of its value for other purposes.[77]

(I.) Time Knowledge Acquired. — The knowledge must not have been acquired long before or after the rights of the parties became fixed.[78]

(J.) Source of Knowledge. — Qualifying knowledge may be acquired in the performance of official duty or be derived from information of sales and purchases of similar local lands either by the witness himself or by other persons.[79] But knowledge based merely on hearsay and observation of the place in which the estate is sit-

76. Barnett *v.* St. Anthony Falls W. P. Co., 33 Minn. 265, 22 N. W. 535; Grannis *v.* St. Paul & C. R. Co., 18 Minn. 194.

Cost of Grading Lots. — If there is a difference in the value of some of the lots condemned by reason of a depression of the surface and opinions have been given as to the value of the level lots and the statement made that the others would be of equal value if graded, testimony may, in the discretion of the court, be received to show the cost of grading such lots. Chicago, etc. R. Co. *v.* Griffith, 44 Neb. 690, 62 N. W. 868.

77. Gearhart *v.* Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891.

Knowledge of a Single Instance in which large profits were made on land used for a special purpose does not qualify a witness to testify to the value of land for such purpose. Curry *v.* Sandusky Fish Co., 88 Minn. 485, 93 N. W. 896.

Value of Timber. — A witness who has had long experience in the timber and lumber business and who is familiar with the land in question, the rivers and roads accessible to it and the general character of the country may testify of the practicability of having timber thereon manufactured and sold at a profit. Belding *v.* Archer, 131 N. C. 287, 316, 42 S. E. 800.

Rule Where Occupation Wrongful. Where uncondemned land is actually used for railroad purposes, proof may be made of its value before such use was made of it for the purpose of aiding the jury in determining what the value of it would have been had its condition remained unchanged. Lyon *v.* Green Bay & M. R. Co., 42 Wis. 538.

Knowledge of the Time of the Location of the railroad need not be shown in express terms by the witness' testimony; it is sufficient if the fact that he had such knowledge appears from any evidence or from the record. Pingery *v.* Cherokee & D. R. Co., 78 Iowa 438, 43 N. W. 285.

78. San Diego Land & T. Co. *v.* Neale, 88 Cal. 50, 67, 25 Pac. 977, 11 L. R. A. 604; Burke *v.* Beveridge, 15 Minn. 205 (knowledge of the value of a house and lot acquired one year after the issue arose immaterial); Woodworth *v.* Brooklyn El. R. Co., 22 App. Div. 501, 48 N. Y. Supp. 80 (eight years before).

In New Jersey the owner of land who sold it one year before the issue as to its value arose was not qualified to testify thereof. Walsh *v.* Board of Education, 73 N. J. L. 643, 64 Atl. 1088.

Remoteness. — A witness who valued the lands in question six months before they were taken and then made a memorandum of the value put upon the several pieces, the truth and correctness of which he testified to, may read therefrom; the time was not too remote. Cobb *v.* Boston, 109 Mass. 438.

79. Swan *v.* Middlesex, 101 Mass. 173; Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544.

uated is not a qualification in some states.[80] In some other states the source of a witness' information as to sales is not determinative of his competency if he is familiar with the value of local lands and with the tract in question.[81]

(K.) Residence in Locality Not Essential. — Persons who have examined land and inquired of others informed as to its value, though not residents of the locality in which it is situated, may testify of its value.[82]

(L.) Presumption of Qualification of Owner. — It is presumed that a person who has owned and resided upon land for several years is sufficiently familiar with it and with the value of lands in the vicinity to be qualified to testify thereof.[83]

80. First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444; Eastern Texas R. Co. *v.* Scurlock, 97 Tex. 305, 78 S. W. 490 (and personal preference).

Hearsay. — It is not competent to show the estimated cash value of property by statements of residents of the vicinity. Powell *v.* Governor, 9 Ala. 36; Haldeman *v.* Schuh, 109 Ill. App. 259.

81. Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184; Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279.

Hearsay Knowledge. — The fact that the witnesses' knowledge of values was derived from hearsay does not render it unavailable for or against either party to the suit. A moment's reflection will show that most of the knowledge any of us have, or can have, on this subject comes from the same source. Buyers and sellers do not usually call in outsiders to aid them in their bargaining. Sales of lands, as well as prices asked and received, are generally made known to those not directly interested by the common talk of the neighborhood in the same way that the reputation of men are established." Galbraith *v.* Philadelphia Co., 5 Pa. Super. 178. See *In re* Rondout & O. R. Co., *v.* Deyo, 5 Lans. (N. Y.) 298.

Knowledge may be obtained by making inquiries or in an official capacity. O'Brien *v.* Schenley Park & H. R. Co., 194 Pa. St. 336, 45 Atl. 89; Pittsburgh So. R. Co. *v.* Reed (Pa. St.), 6 Atl. 838.

An opinion as to the value of land per acre is not incompetent because the witness said that he had been told the number of acres in the tract. Means *v.* Means, 7 Rich. L. (S. C.) 533.

Estimates not inadmissible because partly based upon experts' figures. Whiting *v.* Mississippi Val. Mfrs. Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672.

82. Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140; Pittsburgh So. R. Co. *v.* Reed (Pa. St.), 6 Atl. 838.

83. *United States* — Union Pac. R. Co. *v.* Lucas, 136 Fed. 374, 69 C. C. A. 218.

California. — Spring Val. Water-Wks. Co. *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

Kansas. — Kansas City, etc. R. Co. *v.* Weidenmann, 94 Pac. 146.

Massachusetts. — Russell *v.* Horn Pond Branch R. Co., 4 Gray 607; Pinkham *v.* Chelmsford, 109 Mass. 225.

Nebraska. — Chicago, etc. R. Co. *v.* Buel, 56 Neb. 205, 76 N. W. 571; Chicago, etc. R. Co. *v.* Shafer, 49 Neb. 25, 68 N. W. 342; Burlington & M. R. Co. *v.* Schluntz, 14 Neb. 421, 16 N. W. 439; Sioux City & P. R. Co. *v.* Weimer, 16 Neb. 272, 20 N. W. 349.

Pennsylvania. — Galbraith *v.* Philadelphia Co., 2 Pa. Super. 359; State Line R. Co. *v.* Playford, 14 Atl. 355; Curtin *v.* Nittany Val. R. Co., 135 Pa. St. 20, 19 Atl. 740; Hewitt *v.* Pittsburg, etc. R. Co., 19 Pa. Super. 304.

Ownership and Use qualify a witness. Hayden *v.* Albee, 20 Minn. 159; Derby *v.* Gallup, 5 Minn. 119. The owner of land in a wild, unset-

(6.) Scope of Inquiries. — (A.) ELEMENTS OF VALUE. — The value of interests in land or its elements of value may be shown by the opinions of competent non-experts.[84] Thus, farmers conversant with premises on which trees have been destroyed may testify of their value as a shelter to the owner of the land;[85] of the value of the land with and without shade and fruit trees upon it;[86] of the value of a growing crop,[87] and the value of the materials and labor necessary to restore a meadow.[88]

(B.) PRODUCTIVE CAPACITY. — Local farmers may testify to the probable productive capacity of a farm though without knowledge of what it has produced.[89]

(C.) AVAILABILITY OF LAND. — A non-expert may testify to the availability of property for a use to which it has not been devoted.[90]

(D.) DESTROYED BUILDING. — The value of a destroyed building may be testified to by non-experts familiar with it and its cost.[91]

tled region who saw it before he bought and kept it two years is presumed to be competent. Mains *v.* Haight, 14 Barb. (N. Y.) 76.

President of Corporation which owns land is not presumed to know its value. Omaha Loan & T. Co. *v.* Douglas County, 62 Neb. 1, 86 N. W. 936.

Residents of a Farming Neighborhood usually understand the value of land therein, without respect to occupation. Robertson *v.* Knapp, 35 N. Y. 91.

84. St. Louis, etc. R. Co. *v.* St. Louis Union Stock Yds. Co., 120 Mo. 541, 552, 25 S. W. 399.

85. Andrews *v.* Youmans, 82 Wis. 81, 52 N. W. 23.

86. St. Louis, etc. R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159; Peoria, etc. Tract. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607; Chicago, etc. R. Co. *v.* Mouriquand, 45 Kan. 170, 25 Pac. 567; Latham *v.* Brown, 48 Kan. 190, 29 Pac. 400.

87. Railway Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170.

88. Thompson *v.* Keokuk & W. R. Co., 116 Iowa 215, 89 N. W. 975.

Value of Growing Grass. — A farmer conversant with the quantity and value of growing grass and the market value of hay may state the value of such grass if it had not been destroyed. Byrne *v.* Minneapolis & St. L. R. Co., 29 Minn. 200, 12 N. W. 698.

89. Myers *v.* Charlotte, 146 N. C. 246, 59 S. E. 674; Chicago, etc. R. Co. *v.* Seale (Tex. Civ. App.), 89 S. W. 997 (knowledge of the crops raised on like land).

Production of Orchard. — Experienced orchardists, familiar with the orchard in question, may testify of the production of their orchards and what the value of the fruit of the one in question for five years should have been. Bradshaw *v.* Atkins, 110 Ill. 323.

90. McClean *v.* Chicago, etc. R. Co., 67 Iowa 568, 25 N. W. 782; Clagett *v.* Easterday, 42 Md. 617, 629; Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912; Montana R. Co. *v.* Warren, 6 Mont. 275, 284, 12 Pac. 641.

91. Cummins *v.* German-Am. Ins. Co., 192 Pa. St. 359, 43 Atl. 1016 (it is immaterial that the testimony was given nearly two years after the building was destroyed); Galveston, etc. R. Co. *v.* Serafina (Tex. Civ. App.), 45 S. W. 614; Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802; Whiting *v.* Mississippi Val. Mfrs. Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672.

But Knowledge must have been obtained by measuring it or examining its interior. Murphy *v.* Murphy, 22 Mo. App. 18.

Total Loss, How Proved. — On the issue as to whether a building is a total loss within the meaning of a policy, the value of the walls remaining in place, as compared with

(E.) Restoring Property. — Opinions are admissible to show the cost of making changes in property necessary to adapt it to the newly established grade of a street.[92]

(F.) Values Generally. — A dealer in, and appraiser of, realty, if qualified, may testify to the general trend of values in adjacent properties since stated times, both as to the fee and rental.[93]

(G.) Rental Value. — Opinions are competent to show the rental value of property prior to and after a change in the premises;[94] and of the value of a lease, though the witness had not seen the property.[95] Acquaintance with the business for which property is used qualifies a witness to testify to its rental value.[96] And such acquaintance is necessary to qualify a witness to testify to such value from the evidence.[97] Opinions as to the rental value of property

the total cost of rebuilding, and the cost of repairing the walls suitable for that purpose, and for the purpose of showing the value of such walls, in place, after repair, the cost of erecting new walls may be shown. Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272.

92. Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171.

Such Evidence Not Always Necessary. — Though the cost of adapting land to a changed condition may measure the difference in its value, opinions thereof are not admissible if the jury can determine the issue from the facts. Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

93. Colton *v.* New York El. R. Co., 7 Misc. 626, 31 Abb. N. C. 269, 28 N. Y. Supp. 149; Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78.

94. Georgia. — Hunt *v.* Pond, 67 Ga. 578.

Nebraska. — Ish *v.* Marsh, 96 N. W. 58 (lessee of business property).

New Hampshire. — Chapman *v.* Tiffany, 70 N. H. 249, 47 Atl. 603.

New York. — Avery *v.* New York Cent. & H. R. R. Co., 2 N. Y. Supp. 101, 17 N. Y. St. 417.

Tennessee. — Union R. Co. *v.* Hunton, 114 Tenn. 609, 628, 88 S. W. 182 (knowledge of two rental contracts of local lots recently made).

Texas. — Chicago, etc. R. Co. *v.* Seale (Tex. Civ. App.), 89 S. W. 997 (may be based on what has been produced though witness does not know of any land being rented at the price named); Pettus *v.* Dawson, 82 Tex. 18, 17 S. W. 714 (general knowledge of the land); Gulf, C. & S. F. R. Co. *v.* Maetze, 2 Willson Civ. Cas. § 631; Cluck *v.* Houston & T. C. R. Co., 34 Tex. Civ. App. 452, 79 S. W. 80 (renter of adjacent property, in the absence of a rental value).

95. Lawrence *v.* Boston, 119 Mass. 126; Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

Future Value of Lease. — A witness who has had experience as a miller, and stated the business done by a mill during the year preceding the wrong, the monthly receipts, expenses and profits and all the facts and circumstances as to the nature of the business, may testify as to the net value per month of a lease of the mill for a few months in the future. Chamberlain *v.* Dunlop, 54 Hun 639, 8 N. Y. Supp. 125.

96. Boteler *v.* Philadelphia & R. T. R. Co., 164 Pa. St. 397, 30 Atl. 303.

97. Texas Consol. Compress & Mfg. Assn. *v.* Dublin Compress & M. Co. (Tex. Civ. App.), 38 S. W. 404.

Rental Value of Mill. — A witness cannot give his opinion of the rental value of a mill without knowledge of its water power, nor base an estimate of such power upon hearsay, nor unless he has knowledge of the machinery in it. Munson *v.* James Smith Woolen

leased cannot take the place of proof as to the amount of rent paid.[98]

(H.) Value of Use of Railroad. — Familiarity with the business done on a railroad and the expense of doing it qualifies a witness to testify to the value of its use while it was in the hands of a receiver.[99]

(I.) Difference in Value as Affected by Method of Sale. — The price land may bring at public sale as compared with what may be realized for it at a private sale may be shown by opinions.[1]

(J.) Value if Contract Not Broken. — The value which would have been added to land if there had not been a breach of contract for its improvement may be shown by opinions.[2]

(K.) Effect of Incumbrance. — A witness qualified by his own knowledge may testify as to the effect of an incumbrance on the value of land.[3]

(L.) May Cover Details. — Where part of a farm has been condemned opinions may be given of its prior value as a whole,[4] the value of the strip taken, the value of the separate parcels and of the improvements,[5] or of the value of that taken as a part of the entire tract.[6] But in some states opinions must rest upon the value of the property as an entirety and not on the value of its several parts.[7] In the absence of evidence of sales of similar property such testimony is receivable only because of necessity and when given by witnesses whose knowledge is derived from experience in the business for which the land is adapted.[8]

Mach. Co., 118 App. Div. 398, 103 N. Y. Supp. 502.

98. Chanler *v.* New York El. R. Co., 34 App. Div. 305, 54 N. Y. Supp. 341.

Opinions Must Be Based on Knowledge of Local Conditions (Eno *v.* Christ, 25 Misc. 24, 54 N. Y. Supp. 400; Hyman *v.* Boston Chair Mfg. Co., 59 N. Y. Super. 116, 13 N. Y. Supp. 609) obtained by dealing in like property or knowledge of transactions respecting it, though the witness be a dealer in real estate. Keeney *v.* Fargo, 14 N. D. 419, 105 N. W. 92.

Competency of Evidence To Show Rental Value. — A witness who has no knowledge of the rent paid for mills may not testify of the rental value of one on the basis of what could have been made by operating it under favorable conditions. Callahan & Co. *v.* Chickasha Cotton O. Co., 17 Okla. 544, 551, 87 Pac. 331.

99. Sturgis *v.* Knapp, 33 Vt. 486, 531.

1. Ponce *v.* Wiley, 62 Ga. 118.

2. Long *v.* Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443 (breach of warranty of fruit trees set out); Ironton Land Co. *v.* Butchard, 73 Minn. 39, 56, 75 N. W. 749 (part performance of contract).

3. Foster *v.* Foster, 62 N. H. 532.

4. Chicago, etc. R. Co. *v.* Mitchell, 159 Ill. 406, 42 N. E. 973; Indianapolis, etc. R. Co. *v.* Pugh, 85 Ind. 279.

5. Indianapolis, etc. R. Co. *v.* Pugh, 85 Ind. 279.

Opinion Testimony as to the Value of Part of the Property affected by condemnation may be excluded where the witness has testified fully as to the value of the whole of it before and after the taking. Diedrich *v.* Northwestern U. R. Co., 47 Wis. 662, 3 N. W. 479.

6. Chicago, etc. R. Co. *v.* Mitchell, 159 Ill. 406, 42 N. E. 973.

7. Page *v.* Wells, 37 Mich. 415; Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 82 S. W. 471; Vaulx *v.* Tennessee Cent. R. Co. (Tenn.), 108 S. W. 1142, and local cases cited.

8. Cochrane *v.* Com., 175 Mass.

(M.) Value of Easement. — Substantially the same qualifications as are required to enable a witness to testify to the fee value of land entitle him to testify to the value of an easement.[9]

(N.) Value of Mines and Mineral Lands. — Witnesses experienced in the development of mines and who have examined the mine in question when it was being worked may testify of its value;[10] as may witnesses who have taken fair samples of ore from a mine and had them assayed and reported upon;[11] and a manufacturer of iron who has long bought and sold ores, owned and sold mineral lands, and knew the value of the property in issue.[12] But familiarity with the value of mining claims in one district is not a qualification for testifying to the value of such claims in another district.[13]

Knowledge of Sales of the same or like properties is not essential though the claim is undeveloped and such claims are the subject of barter and sale.[14]

(O.) Value of Other Lands. — Opinions as to the value of lands not in controversy and which have not been recently sold are incompetent,[15] notwithstanding comparison be made between them and the land in question.[16]

(7.) Speculative Opinions. — Opinions concerning value, if purely

299, 56 N. E. 610, 78 Am. St. Rep. 491.

9. Whitman *v.* Boston & M. R. 7 Allen (Mass.) 313.

10. Chambers *v.* Brown, 69 Iowa 213, 28 N. W. 561 (a coal mine operator informed of the thickness of a vein of coal, its convenience to transportation facilities and market, may testify of the value of the lease of the land for mining purposes); Blake *v.* Griswold, 103 N. Y. 429, 9 N. E. 434.

Experienced Miners and Prospectors may testify whether the lead in a mine is one which a reasonably prudent person would be justified in, expending time and money in following, with the hope of finding gold in paying quantities. Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395; Noyes *v.* Clifford (Mont.), 94 Pac. 842.

In an Action for Cutting Timber on government land which has been located as placer mining claims, it is competent to show by an experienced miner that such land was not worth locating for placer mining purposes. Anderson *v.* United States, 152 Fed. 87, 81 C. C. A. 311.

11. Cooper *v.* Maggard (Tex. Civ. App.), 79 S. W. 607.

12. Blake *v.* Griswold, 103 N. Y. 429, 9 N. E. 434.

13. McDonough *v.* Williams (Ark.), 112 S. W. 164 (knowledge of the value of local coal lands generally does not qualify a witness to testify concerning a particular mine if he is ignorant of the number of the slopes or mines and the extent and cost of their development); Gillespie *v.* Ashford, 125 Iowa 729, 101 N. W. 649.

A Retail Dealer in Coal, though informed as to the business of mining coal, is not therefore qualified to testify of the market value of unmined coal. Baker *v.* Pittsburg, etc. R. Co., 219 Pa. St. 398, 68 Atl. 1014.

14. Montana R. Co. *v.* Warren, 137 U. S. 348; *s. c.* 6 Mont. 275, 12 Pac. 641.

15. Rand *v.* Newton, 6 Allen (Mass.) 38; Sawyer *v.* Boston, 152 Mass. 168, 25 N. E. 82; Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711; Beale *v.* Boston, 166 Mass. 55, 43 N. E. 1029.

16. Shattuck *v.* Stoneham B. R. 6 Allen (Mass.) 115.

speculative, are inadmissible.[17] It is not competent for a witness to state the price for which other local lands can be bought;[18] nor the income which might be derived from vacant land if improved;[19] nor the probable future use of land affected by condemnation of a part of it;[20] nor the extent to which a farm has been lessened in value by cutting the timber on it;[21] nor give a reason why certain property has not advanced in value as rapidly as other local property,[22] nor as to the effect of an elevated railroad on the value of property.[23] Opinions must be rested upon existing conditions.[24]

(8.) Reasons for Opinions. — Witnesses who give opinions as to value may state the reasons for them.[25] They should be given,[26] and must rest upon relevant facts.[27] If the question was proper, the fact that the witness ignored relevant facts does not affect the admissibility of his answer,[28] nor does his inability to state the items which entered into his calculation.[29] It is otherwise if the question was improper.[30]

17. Currie *v.* Waverly, etc. R. Co., 52 N. J. L. 381, 394, 20 Atl. 56, 19 Am. St. Rep. 452.

18. Union R. T. & S. Y. Co. *v.* Moore, 80 Ind. 458.

19. Burt *v.* Wiggleworth, 117 Mass. 302.

20. Fairbanks *v.* Fitchburg, 110 Mass. 224.

21. Van Deusen *v.* Young, 29 N. Y. 9; Harger & D. *v.* Edmonds, 4 Barb. (N. Y.) 256 (effect of withdrawing water supply from a hotel).

22. Kirkendall *v.* Omaha, 39 Neb. 1, 57 N. W. 752.

23. McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957; Schmidt *v.* New York El. R. Co., 2 App. Div. 481, 37 N. Y. Supp. 1100; Flynn *v.* Kings County El. R. Co., 3 App. Div. 254, 38 N. Y. Supp. 204.

24. **If Compensation Is To Be Based on Consideration of Any Benefits** resulting to the owner of property from the construction of the railroad, witnesses may not testify as to the value of the land affected with the road running near, but not upon it. Carli *v.* Stillwater & St. P. R. Co., 16 Minn. 260; St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 500; Muller *v.* Southern Pac. B. R. Co., 83 Cal. 240, 23 Pac. 265.

Opinions as to the Damage Done to Land by the appropriation of it should be based on the depreciation in its present market value, and not on any future conjectural value. Mason *v.* Postal Tel. C. Co., 74 S. C. 557, 54 S. E. 763.

25. McClean *v.* Chicago, etc. R. Co., 67 Iowa 568, 25 N. W. 782; Nelson County *v.* Bardstown & L. Tpk. Co., 30 Ky. L. Rep. 1254, 100 S. W. 1181; Cobb *v.* Boston, 112 Mass. 181; Board of Levee Comrs. *v.* Nelms, 82 Miss. 416, 34 So. 149; Council *v.* St. Louis, etc. R. Co., 123 Mo. App. 432, 100 S. W. 57; Kay *v.* Glade Creek & R. Co., 47 W. Va. 467, 35 S. E. 973.

26. Currie *v.* Waverly, etc. R. Co., 52 N. J. L. 381, 394, 20 Atl. 56, 19 Am. St. Rep. 452; Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 556, 82 S. W. 471.

A qualified witness cannot testify to the proportion of damage done property without giving any valuations of it or estimating the damage, notwithstanding other witnesses were specific on these points. Baldensperger *v.* Glade Twp., 18 Pa. C. C. 251.

27. Hunt *v.* Boston, 152 Mass. 168, 25 N. E. 82; Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711; Old Colony R. Co. *v.* F. P. Robinson Co., 176 Mass. 387, 57 N. E. 670.

28. St. Louis & K. C. R. Co. *v.* Donovan, 149 Mo. 93, 102, 50 S. W. 286; Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184.

29. Hope *v.* Philadelphia & W. R. Co., 211 Pa. St. 401, 60 Atl. 996.

30. Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184.

(9.) Admissibility of Conclusions. — In some states witnesses may name the sum which in their judgment represents the difference in the value of the property before and after the doing of the act which has affected its value. Such testimony is not regarded as an invasion of the province of the jury.[31] But much depends upon the form of the question; the use of the words "damage," "depreciation," "difference in value" or equivalent terms may make answers incompetent.[32] In some states such testimony is not favored,

31. *Colorado.* — Ft. Collins Develop. R. Co. *v.* France, 41 Colo. 512, 92 Pac. 953.

Illinois. — Peoria, etc. Tract. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607; Spear *v.* Drainage Comrs., 113 Ill. 632; Green *v.* Chicago, 97 Ill. 370; Lovell *v.* Drainage Dist., 159 Ill. 188, 42 N. E. 600; Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290.

Indiana. — City of Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Frankfort & K. R. Co. *v.* Windsor, 51 Ind. 238; Evansville & R. Co. *v.* Fettig, 130 Ind. 61, 29 N. E. 407. But *compare* City of Logansport *v.* McMillen, 49 Ind. 493.

Iowa. — See Swanson *v.* Keokuk & W. R. Co., 116 Iowa 304, 89 N. W. 1088.

Maine. — Snow *v.* Boston & M. R., 65 Me. 230; Haskell *v.* Mitchell, 53 Me. 468; Whiteley *v.* China, 61 Me. 199.

Maryland. — Dailey *v.* Grimes, 27 Md. 440.

Massachusetts. — Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029; Shattuck *v.* Stoneham B. R., 6 Allen 115; Swan *v.* Middlesex, 101 Mass. 173.

Minnesota. — Hueston *v.* Mississippi & R. Boom Co., 76 Minn. 251, 79 N. W. 92; Mandery *v.* Mississippi & R. R. Boom Co., 116 N. W. 1027; Minnesota Belt-Line R. & T. Co. *v.* Gluck, 45 Minn. 463, 48 N. W. 194; Lehmicke *v.* St. Paul, etc. R. Co., 19 Minn. 464; Sherman *v.* St. Paul, etc. R. Co., 30 Minn. 227, 15 N. W. 239 (such testimony is not favored).

Montana. — Yellowstone Park R. Co. *v.* Bridger Coal Co., 34 Mont. 545, 559, 87 Pac. 963.

New York. — Nellis *v.* McCarn, 35 Barb. 115 (amount of damage done by a trespasser).

Tennessee. — Wray *v.* Knoxville, etc. R. Co., 113 Tenn. 544, 555, 82 S. W. 471, *overruling* Paducah & M. R. Co. *v.* Stovall, 12 Heisk. 1.

Texas. — Gulf, etc. R. Co. *v.* Staton (Tex. Civ. App.), 49 S. W. 277; Smith *v.* Eckford, 18 S. W. 210; Burrow *v.* Zapp, 69 Tex. 476, 6 S. W. 783; Texas & P. R. Co. *v.* Boggs (Tex. Civ. App.), 40 S. W. 20; Brennan *v.* Corsicana Cotton-O. Co. (Tex. Civ. App.), 44 S. W. 588.

Washington. — Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Reason for the Rule. — "Where value is a matter of opinion the lessening of that value by an injury must also be a matter of opinion, and because of the great difficulty of giving the jury an adequate description of the thing injured, it is not unusual to permit the witness to express his opinion as to the extent of the damage." Chicago, etc. R. Co. *v.* Schaffer, 26 Ill. App. 280, *citing* Ottawa Gas Light & C. *v.* Graham, 35 Ill. 346; Galena & S. W. R. Co. *v.* Haslam, 73 Ill. 494; Cairo & St. L. R. Co. *v.* Woosley, 85 Ill. 370.

32. *Colorado.* — Old *v.* Keener, 22 Colo. 6, 43 Pac. 127; Ft. Collins Develop. R. Co. *v.* France, 41 Colo. 512, 92 Pac. 953.

Illinois. — Chicago & A. R. Co. *v.* Springfield, etc. R. Co., 67 Ill. 142.

Indiana. — See City of Logansport *v.* McMillen, 49 Ind. 493.

Iowa. — Hartley *v.* Keokuk, etc. R. Co., 85 Iowa 455, 52 N. W. 352.

Kansas. — Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 675, 17 Pac. 322.

Nebraska. — City of Omaha *v.* Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504.

New York. — Roberts *v.* New

but its admission is not cause for reversing the judgment.[33] In yet others witnesses must not go beyond stating the difference in the value of the property by reason of the doing of the act which has given occasion for the action.[34]

(10.) Phraseology of Questions. — "Worth" is synonymous with value.[35] "Usable value" is not synonymous with "rental value."[36] Questions must not call for answers which double the compensation to which the landowner is entitled.[37] The testimony upon direct

York, etc. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499.

Ohio. — Columbus, etc. R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69.

The Use of the Word "Damages" in questions to witnesses is not always fatal if they are so framed as to draw out opinions as to the difference in the value of the land before it was injured and afterward. St. Louis, etc. R. Co. *v.* Brooksher (Ark.), 109 S. W. 1169.

33. Union El. Co. *v.* Kansas City S. B. R. Co., 135 Mo. 353, 36 S. W. 1071; St. Louis & K. C. R. Co. *v.* Donovan, 149 Mo. 93, 102, 50 S. W. 286; McCrary *v.* Chicago & A. R. Co., 109 Mo. App. 567, 83 S. W. 82.

34. *Alabama.* — Central of Georgia R. Co. *v.* Barnett, 151 Ala. 407, 44 So. 392.

Arkansas. — St. Louis, etc. R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159, apparently *disapproving* Railway Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418.

Indiana. — Elwood Planing Mill Co. *v.* Harting, 21 Ind. App. 408, 52 N. E. 621.

Iowa. — Anson *v.* Dwight, 18 Iowa 241; Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

Kansas. — 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, *modifying s. c.*, 38 Kan. 104, 16 Pac. 75.

Nebraska. — Read *v.* Valley Land & C. Co., 66 Neb. 423, 92 N. W. 622.

New York. — Hunter *v.* Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400; Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279.

Ohio. — Powers *v.* Railway Co., 33 Ohio St. 429; Columbus, etc. R. Co. *v.* Gardner, 45 Ohio St. 309, 322, 13 N. E. 69.

Rhode Island. — Tingley Bros. *v.* Providence, 8 R. I. 493; Brown *v.* Providence & S. R. Co., 12 R. I. 238.

West Virginia. — Kay *v.* Glade Creek & R. Co., 47 W. Va. 467, 35 S. E. 973.

Reason of the Rule. — "The rule of evidence in permitting witnesses to give their opinion as to the value of property does not extend to the right to testify as to the quantum of damages sustained. They can state the injuries, and even the value before and after the injury, and the damage would ordinarily be the difference; but it seems, from the weight of authority, that the jury, and not the witness, should ascertain the quantum of damages suffered. . . . The test generally of the damages is the difference in the value of the property before and after the injury, and to which facts a non-expert witness may testify; and it looks rather technical to hold that he should not be permitted to make the mathematical substraction and testify to the damages sustained; yet it might be that the witness, in fixing the value of the damages, would not do so on the legal basis of the difference in the value before and after the injury, and the safer rule is for him to detail the facts tending to show the deterioration in the value of the property, and let the jury fix the quantum of damages." Central of Georgia R. Co. *v.* Barnett, 151 Ala. 407, 44 So. 392.

35. Florence, etc. R. Co. *v.* Pember, 45 Kan. 625, 26 Pac. 1.

36. Randall *v.* U. S. Leather Co., 72 App. Div. 317, 76 N. Y. Supp. 82.

37. Peoria, etc. Tract. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607;

examination need not be limited to the cash value of the property.[38]

(11.) Answers Must Be Positive. — Guesses of competent witnesses are incompetent.[39] But positive answers are not essential.[40]

(12.) Cross-Examination. — A broad scope is open on the cross-examination of witnesses to test their knowledge, reliability and fairness.[41] It is limited only by the scope of the direct examination.[42]

(13.) Weight of Evidence. — The extent of the observations of witnesses as to sales of local land does not, as matter of law, affect the weight of their testimony.[43] The weight of an opinion is not added to by the witness' statement that he was willing to buy the property at the price he named.[44]

Prather *v.* Chicago S. R. Co., 221 Ill. 190, 77 N. E. 430.

38. Cincinnati & G. R. *v.* Mims, 71 Ga. 240.

39. Stephens *v.* Gardner Creamery Co., 9 Kan. App. 883, 57 Pac. 1058; Sanford *v.* Shepard, 14 Kan. 228; Eastern Texas R. Co. *v.* Eddings (Tex. Civ. App.), 111 S. W. 777.

40. Blake *v.* Griswold, 103 N. Y. 429, 9 N. E. 434 (estimates said to be speculative); San Antonio & A. P. R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040.

41. *Indiana.* — Union R. T. & S. Y. Co. *v.* Moore, 80 Ind. 458.

Iowa. — Damon *v.* Weston, 77 Iowa 259, 42 N. W. 187; Eslich *v.* Mason City & Ft. D. R. Co., 75 Iowa 443, 39 N. W. 700.

Massachusetts. — Buck *v.* Boston, 165 Mass. 509, 43 N. E. 496; Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544 (frequency with which witness had been called to testify in such cases); Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 47 N. E. 533; Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

Michigan. — Curren *v.* Ampersee, 96 Mich. 553, 56 N. W. 87.

Missouri. — St. Louis, etc. R. Co. *v.* Continental Brick Co., 198 Mo. 698, 96 S. W. 1011 (as to award of compensation joined in by witness to another local land owner).

Pennsylvania. — Lentz *v.* Carnegie Bros. & Co., 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717.

Tennessee. — Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182.

Texas. — Dittman *v.* Weiss (Tex. Civ. App.), 31 S. W. 67; Gulf, etc. R. Co. *v.* Hepner, 83 Tex. 136, 18 S. W. 441.

Vermont. — Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

Washington. — Seattle & M. R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

Wisconsin. — Munkwitz *v.* Chicago, etc. R. Co., 64 Wis. 403, 25 N. W. 438 (inquiry as to award of compensation for the land in question joined in by witness).

The Market Value of a product at a particular time cannot be inquired into of a witness who has testified of the adaptability of land for producing it and that such value is less than at such time. Gardner *v.* Brookline, 127 Mass. 358.

Collateral Matters. — A party who has secured the testimony of a witness as to the value of his land cannot cross-examine him as to collateral matters to show that the opinion was worthless. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668.

42. City of Florence *v.* Calmet (Colo.), 96 Pac. 183.

A Fair Mode of Testing the Good Faith and Accuracy of the plaintiff's statements in chief as to the value of his land prior to its injury and thereafter is to ask if he will take for it the sum he named as its present value. Eastern Texas R. Co. *v.* Scurlock, 97 Tex. 305, 78 S. W. 490.

Depreciation of Any or All Parts of the land the value of which has been testified to may be inquired about. Davis *v.* Pennsylvania R. Co., 215 Pa. St. 581, 64 Atl. 774.

43. Mewes *v.* Crescent Pipe Line Co., 170 Pa. St. 369, 32 Atl. 1083.

44. Friday *v.* Pennsylvania R.

(14.) Number of Witnesses. — The number of witnesses to prove value should not be limited unless it is clearly apparent that it was not necessary to call others.[45] The court's discretion is subject to review.[46]

P. When Value To Be Fixed. — a. *In Condemnation Proceedings.* — In some states the owner is entitled to the value of the land taken and to the difference in the value of that affected by the taking as of the time it was taken regardless of any influence affecting its value.[47] Land is taken when it is so occupied that the owner can derive no advantage from it.[48] In some states the rights of the parties are fixed as of the date of the filing of the petition for condemnation,[49] or as of the time the commissioners acted.[50] In others, value is to be fixed as of the time of the trial.[51]

Co., 204 Pa. St. 405, 54 Atl. 339.

45. White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 543.

46. Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109.

47. *Arkansas.* — Texas, etc. R. Co. *v.* Cella, 42 Ark. 528.

California. — Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; Stockton & C. R. Co. *v.* Galgiani, 49 Cal. 139 (the code fixes the date of the issue of summons as the time); San Jose & A. R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522.

Iowa. — Snouffer *v.* Chicago & N. W. R. Co., 105 Iowa 681, 75 N. W. 501; Ranck *v.* Cedar Rapids, 134 Iowa 563, 111 N. W. 1027.

Massachusetts. — Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527.

Missouri. — Ragan *v.* Kansas City & S. E. R. Co., 111 Mo. 456, 20 S. W. 234.

Nebraska. — Fremont, etc. R. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959 (deviation not always serious).

Pennsylvania. — Harris *v.* Schuylkill River, etc. R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

Rule Not Absolute. — How long anterior or subsequent to the first appraisement the investigation may be carried must, in a great measure, be left to the sound discretion of the trial court. In some cases financial disturbances depress, and in others speculative movements appreciate, values, and wherever fluctuation exists, the attempt at comparison between different points of time would not only furnish an unsafe guide, but introduce new issues to determine whether there had been a rise or fall, and the extent of it. Montclair R. Co. *v.* Benson, 36 N. J. L. 557.

Evidence of the value of real estate one year before the time the issue was raised is relevant. Freeman's Appeal, 71 Conn. 708, 43 Atl. 185.

Admissions as to Value made nine years before the issue are too remote if the value has fluctuated. Central B. Union Pac. R. Co. *v.* Andrews, 37 Kan. 162, 14 Pac. 509.

48. Whitman *v.* Boston & M. R., 7 Allen (Mass.) 313, 326; Cobb *v.* Boston, 109 Mass. 438 (though improvements have been made upon it since the taking in consequence of the action of the condemnor).

49. Dupuis *v.* Chicago & N. W. R. Co., 115 Ill. 97, 3 N. E. 720.

50. Carli *v.* Stillwater & St. P. R. Co., 16 Minn. 260; Winona & St. P. R. Co. *v.* Denman, 10 Minn. 267 (in the absence of a statute); St. Louis, etc. R. Co. *v.* Fowler, 113 Mo. 458, 472, 20 S. W. 1069; *In re* Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188 (it is held in Kansas City. S. B. R. Co. *v.* Norcross, 137 Mo. 415, 38 S. W. 299, that the time proceedings were begun controls); Milwaukee & M. R. Co. *v.* Eble, 3 Pin. (Wis.) 334; Aspinwall *v.* Chicago & N. R. Co., 41 Wis. 474; Lyon *v.* Green Bay & M. R. Co., 42 Wis. 538, and local cases cited.

51. San Antonio & A. P. R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040.

b. *As Against a Wrongdoer.* — Where a railroad is constructed prior to condemnation the value of the land may be shown as of the time of the trial, excluding structures put upon it, and the comparative value of that not taken may be fixed by proof of its present value, if the road had not been built.[52]

In Equity entry upon land fixes the time when its value is to be ascertained.[53]

c. *As Between Vendor and Purchaser.* — The time within which evidence of value may be received is much extended when the issue arises between vendor and purchaser, as the notes will disclose.[54] The issue as to adequacy of the price paid depends upon the value of the property at the time of sale,[55] though proof of its subsequent value has been held competent.[56] The rights of the parties to the foreclosure of a vendor's lien are governed by the value of the land at the time of the foreclosure.[57] The question as to whether a deed was intended to operate as a mortgage must be determined by the value of the land at the time of the transaction.[58]

d. *Value of Land Exchanged for Stocks.* — Under a statute prohibiting the issue of stock except for such property as is received for the use of the corporation at its fair value, the value of land which constituted the consideration for the stock is to be fixed as of the time of the sale.[59]

e. *Mining Claim.* — As between the locator of a placer claim and a person who contends that a lode or vein within its limits was not included in the claim, evidence of the value of the lode or vein is not restricted to the time of the location.[60]

f. *Advancements.* — In the absence of controlling statutes[61] the

52. Lyon *v.* Green Bay & M. R. Co., 42 Wis. 538.

In Missouri the value may be shown as of the time possession was taken or at any subsequent time the owner may elect down to the institution of the proceedings. Webster *v.* Kansas City & S. R. Co., 116 Mo. 114, 22 S. W. 474.

53. Doremus *v.* Mayor (N. J. Eq.), 69 Atl. 225.

54. Constant *v.* Lehman, 52 Kan. 227, 34 Pac. 745; Abell *v.* Munson, 18 Mich. 305, 100 Am. Dec. 165 (a few months); Thornton *v.* Campton, 18 N. H. 20 (two to six years after auction sale); Stith *v.* McKee, 87 N. C. 389 (seven years after conveyance though there was an exchange of properties).

55. Henry *v.* Everts, 29 Cal. 610; Bowden *v.* Achor, 95 Ga. 243, 259, 22 S. E. 254 (value at time of trial immaterial).

56. Snouffer's Admr. *v.* Hansbrough, 79 Va. 166.

57. Fox *v.* Robbins (Tex. Civ. App.), 70 S. W. 597.

58. Temple Nat. Bank *v.* Warner, 92 Tex. 226, 47 S. W. 515.

59. Huntington *v.* Attrill, 118 N. Y. 365, 382, 23 N. E. 544.

60. Noyes *v.* Clifford (Mont.), 94 Pac. 842, where the issue involved the question whether the vein was such as would justify a location of it and the expenditure of money for the purpose of determining its value. Evidence of what it contained at the date of the location was held evidence of what it contained when the patent was applied for.

61. Under the Iowa statute the value is to be fixed as of the time of decedent's death. Eastwood *v.* Crane, 125 Iowa 707, 101 N. W. 481.

The South Carolina Statute is to

value of advancements is to be fixed as of the time they were made,[62] unless the terms of the conveyance otherwise indicates.[63] Some statutes provide that the value of any estate advanced shall be deemed to be that, if any, which was acknowledged by a written instrument. Under such a provision it will be presumed that the sum named in a deed as the value of land was the estimated value of it at the time the conveyance was made.[64]

Q. MISCELLANEOUS MATTERS. — a. *Weight To Be Given View of Premises.* — In some states jurors who have examined the premises to be valued may take account of what they saw and learned as well as of the testimony of the witnesses.[65] They may fix their value from their own judgment though that may not accord with the verbal testimony;[66] but may not ignore all such testimony and fix a value contrary thereto.[67] In some others the extent to which a view may influence the verdict does not go beyond the right to use the knowledge so obtained in determining the weight of conflicting evidence.[68]

b. *Order of Proof.* — On appeal from the award of commissioners, which is *prima facie* evidence, the order in which testimony may be received is largely in the discretion of the court. If the landowner introduces all his evidence, the fact that the condemnor of-

the same effect. Under it the value of a life insurance policy in favor of a child is to be shown by evidence of its worth at insured's death. Rickenbacker *v.* Zimmerman, 10 S. C. 110, 30 Am. Rep. 37.

62. *Kentucky.* — Bowler *v.* Winchester, 13 Bush 1; Ward *v.* Johnson, 124 Ky. 1, 97 S. W. 1110, 30 Ky. L. Rep. 240.

Mississippi. — Jackson *v.* Jackson, 6 Cushm. 674.

Missouri. — Ray *v.* Loper, 65 Mo. 470.

North Carolina. — Lamb *v.* Carroll, 28 N. C. (6 Ired. L.) 4.

Pennsylvania. — Porter's Appeal, 94 Pa. St. 332; Oyster *v.* Oyster, 1 Serg. & R. 422.

Rhode Island. — Law *v.* Smith, 2 R. I. 244.

Tennessee. — Cawthon *v.* Coppedge, 1 Swan 487.

63. Turner *v.* Kelly, 67 Ala. 173; Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915; Kean *v.* Welch, 1 Gratt. (Va.) 403.

64. Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199.

Some Weight Must Be Given the Intention of a Parent in determining whether advancements are of equal value; his intention is not controlling. Boblett *v.* Baralow, 26 Ky. L. Rep. 1076, 83 S. W. 145.

65. Smith *v.* Morse, 148 Mass. 407, 19 N. E. 393; Shano *v.* Fifth Ave. H. St. Bridge Co., 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808.

66. Kiernan *v.* Chicago, etc. R. Co., 123 Ill. 188, 14 N. E. 18.

67. Atchison, etc. R. Co. *v.* Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422.

68. *Kansas.* — City of Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775.

Michigan. — City of Grand Rapids *v.* Perkins, 78 Mich. 93, 43 N. W. 1037.

North Dakota. — Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

Wisconsin. — Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364, 18 N. W. 328; Seefeld *v.* Chicago, etc. R. Co., 67 Wis. 96, 29 N. W. 904; Munkwitz *v.* Chicago, etc. R. Co., 64 Wis. 403, 25 N. W. 438.

A view does not dispense with the necessity of testimony as to the value of the land not taken. Town of Hingham *v.* United States (C. C. A.), 161 Fed. 295.

fered evidence in chief in contradiction of the report, instead of in rebuttal, will not affect the judgment.[69]

c. *Declarations of Stranger.* — Declarations made by a person not a party to the record when his interests were adverse to one of the parties thereto are admissible only to contradict his testimony.[70]

d. *Form of Questions.* — A question calling for the belief of witness as to value is improper.[71]

e. *Construction of Testimony.* — The word "suppose" used by a witness in testifying to the value of property will be taken to mean that he believed the value to be as stated.[72] Testimony as to value will be construed to mean market value unless another basis of value has been fixed by the witness, or it is apparent that he bases his estimate on a different foundation.[73] Words indicating that a witness has expressed his conclusion will not be given that effect unless the whole testimony tends to support that view.[74] In the absence of an objection on the ground that a hypothetical question did not describe the property in suit, the answer will be construed to cover it.[75]

f. *Weight of Evidence.* — Evidence based on personal knowledge outweighs opinions.[76] Circumstantial evidence may outweigh positive testimony.[77] The price obtained for property at a fair sale is more convincing than opinions.[78] Such evidence is not conclusive as between the parties to an action of replevin or to an execution sale,[79] or as against a third party whose negligence caused the sale[80] unless it is shown that the price obtained was the highest which reasonable diligence could have secured.[81] But it is so as between an execution creditor and the levying officer.[82] Proof of general mar-

69. Decatur *v.* Vaughn, 233 Ill. 50, 84 N. E. 50.

70. Lawrence *v.* Boston, 119 Mass. 126.

71. Lion F. Ins. Co. *v.* Starr, 71 Tex. 733, 12 S. W. 45.

72. Ward *v.* Reynolds, 32 Ala. 384. *Contra,* Gulf, etc. R. Co. *v.* Dunman (Tex. Civ. App.), 31 S. W. 1070.

73. Coyle *v.* Baum, 3 Okla. 695, 717, 41 Pac. 389.

74. Ward *v.* Reynolds, 32 Ala. 384.

75. Lines *v.* Alaska Com. Co., 29 Wash. 133, 69 Pac. 642.

76. McDole *v.* McDole, 39 Ill. App. 274.

77. Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030.

78. Budd *v.* Van Orden, 33 N. J. Eq. 143.

The Price at Which an Article of Fluctuating Value has been contracted to be sold is not evidence of its market value as against a carrier one month after the contract was made. Galveston, etc. R. Co. *v.* Efron (Tex. Civ. App.), 38 S. W. 639.

Sufficiency of Testimony. — The testimony of three dealers in a commodity as to the price at which they sold in the open market, in the absence of testimony showing that such price was not the general market price, is sufficient to support a finding in accordance therewith. Northwestern Fuel Co. *v.* Mahler, 36 Minn. 166, 30 N. W. 756.

79. Roberts *v.* Dunn, 71 Ill. 46; Kennett *v.* Fickel, 41 Kan. 211, 21 Pac. 93.

80. New York, etc. R. Co. *v.* Estill, 147 U. S. 591, 618.

81. Brooks *v.* Western Union Tel. Co., 26 Utah 147, 156, 72 Pac. 499.

82. French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193.

ket value, in the absence of a local market value, is not so conclusive of the latter as to justify the exclusion of other evidence of value.[83] Testimony as to general value is not lessened by the prediction that the property will be less valuable in the future.[84] Proof of the condition of goods when shipped justifies the inference that no change occurred therein while in transit, nothing to the contrary being shown.[85]

2. Value of Minor Estates. — A. EASEMENTS. — a. *Value of Major Estate.* — If the retention of the fee is consistent with the existence of the servitude, evidence of the value of the land in which an easement exists is immaterial to the ascertainment of the value of the latter.[86]

b. *Result of Investment.* — It is immaterial to the value of property affected by an elevated railroad that the investment has been profitable.[87]

c. *Earning Capacity.* — In ascertaining the fair and equitable value of a waterworks system operated in a municipality its earning capacity is material; and proof may be made of the facilities it has for doing business with the inhabitants though the pipes used were the property of the latter.[88] The value of a franchise for waterworks is not to be regarded in fixing the fair and equitable value of the plant when taken over by a city. That act terminated the existence of the franchise.[89]

d. *Future Profits.* — Testimony as to the possible uses which might be made of property, the income derivable therefrom and of the owner's inability to make certain improvements is not competent.[90]

e. *Extent of Use.* — The value of the easement owned by one railroad company and used by another may be shown by the extent of the use made of it; such evidence tends to show the effect of the location of the road of the latter upon the value of the property of the former.[91]

f. *Failure of Land to Increase in Value.* — The effect of the condemnation of easements by appropriating them for the use of an elevated road may be shown by proof that there has not been such

83. Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

84. Western Horse & C. Ins. Co. *v.* Putnam, 20 Neb. 331, 30 N. W. 246.

85. White Sew. Mach. Co. *v.* Phoenix Nerve B. Co., 188 Mass. 407, 74 N. E. 600.

86. *In re* Mallory, 57 Hun 419, *s. c. sub nom. In re* Comr. of Public Wks., 10 N. Y. Supp. 705; *In re* Thompson, 58 Hun 608, 12 N. Y. Supp. 182.

87. Sherwood *v.* Metropolitan El. R. Co., 58 Hun 611, 12 N. Y. Supp. 852.

88. National Waterworks Co. *v.* Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856. See Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 47 N. E. 533.

89. National Waterworks Co. *v.* Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827. See Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

90. Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 56 Hun 182, 9 N. Y. Supp. 207.

91. Boston & W. R. *v.* Old Col-

an increase in the value of property so affected as in the value of that on side streets, and by proof of the character and size of the structure, the manner in which the road has been operated, the effect of its operation, the rent received for property on the street and for property on other adjacent streets not so affected.[92]

g. *General Effect of Wrong.* — The general effect of an elevated road upon the trade and business of the street in which it is operated may be shown,[93] including the extent to which the easement of the air, light and convenience of access to the property in question

ony & F. R. R., 3 Allen (Mass.) 142.

92. Becker *v.* Metropolitan El. R. Co., 131 N. Y. 509, 30 N. E. 499; Meyers *v.* Metropolitan El. R. Co., 19 N. Y. Supp. 223, 46 N. Y. St. 196; Johnston *v.* New York El. R. Co., 10 Misc. 136, 30 N. Y. Supp. 920.

Comparative Increase in the value of similar property adjacent to that in question may be shown. Hitchings *v.* Brooklyn El. R. Co., 6 Misc. 430, 27 N. Y. Supp. 132, *citing* Roberts *v.* New York El. R. Co., 128 N. Y. 455, 473, 28 N. E. 486, 13 L. R. A. 499; Becker *v.* Metropolitan El. R. Co., 131 N. Y. 509, 30 N. E. 499.

Scope of Comparison. — The area which may be used as a basis for comparison may be quite extended though it embraces many kinds of property varying greatly in values. Shepard *v.* Metropolitan El. R. Co., 48 App. Div. 452, 62 N. Y. Supp. 977. The area must not be unrestricted. Sherwood *v.* Metropolitan El. R. Co., 58 Hun 611, 12 N. Y. Supp. 852; Sixth Ave. R. Co *v.* Metropolitan El. R. Co., 56 Hun 182, 9 N. Y. Supp. 207.

Proof of the Rental Value of other property is inadmissible to show the rental value of that in question. Hart *v.* Brooklyn El. R. Co., 89 Hun 82, 35 N. Y. Supp. 41; Winters *v.* Manhattan R. Co., 15 Misc. 8, 36 N. Y. Supp. 772; Clinical Inst. Co. *v.* New York El. R. Co., 2 App. Div. 619, 38 N. Y. Supp. 21; Stuyvesant *v.* New York El. R. Co., 4 App. Div. 159, 38 N. Y. Supp. 595. It may be received in the absence of a special objection. Bischoff *v.* New York El. R. Co., 61 N. Y. Super. 211, 18 N. Y. Supp. 865.

The competency of such testimony has been recognized if explanation of the circumstances under which the lease was executed is made. Thompson *v.* Manhattan R. Co., 16 Daly 64, 8 N. Y. Supp. 641.

93. Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437.

Proof of the General Fact That Rental Values Have Diminished since the coming of the elevated road is competent, but it is otherwise as to proof of the fact as to particular properties on another street, not in the immediate vicinity of the property in question. Golden *v.* Metropolitan E. R. Co., 1 Misc. 142, 20 N. Y. Supp. 630.

Reduction of Rent. — The reduction of the rent of leased premises because of inability to collect the stipulated sum may be shown. Bischoff *v.* New York El. R. Co., 61 N. Y. Super. 211, 18 N. Y. Supp. 865. But proof of a decrease in the rental value of a particular local property is inadmissible if the rental value of that in question has increased since the road was built. Brush *v.* Manhattan R. Co., 17 N. Y. Supp. 540, 44 N. Y. St. 111.

Where property is adapted to but one use and is in use, the effect of the construction of an elevated road upon its value may be shown by proof that, in order to retain the tenant in occupation of it, the rent was reduced because of the injurious effect upon the usable value of the premises. Birch *v.* Lake Roland El. R. Co., 83 Md. 362, 34 Atl. 1013.

Prevented Improvement. — Evidence is competent to show the general improvement of property in the vicinity of the plaintiff's to indicate the probable uses and advantages which might have been derived by

has been impaired.[94] Interference with the privacy of an abutting owner in the occupancy of his property may be shown, as may annoyance caused by noise and the obstruction of a view of the premises from the other side of the street.[95]

h. *Comparison of Rents as Affecting Responsibility.* — The responsibility of a railroad company for decrease in the value of property cannot be shown by proof of the rent received for it before and after the road was built.[96]

i. *Price of Other Property.* — The price at which the owner of the property in question was offered adjoining property at the time he bought is irrelevant.[97]

j. *Increased Operating Expense of Railroad.* — In determining the value of railroad property as affected by the crossing of its tracks by another railroad it is not competent to show the increased cost of operating the former, that being the result of legislation enacted under the police power.[98] Neither is it material to show the

him from the improvement of his property but for the construction of the road, and such improvement may be shown by a photograph of a building. Galway *v.* Metropolitan E. R. Co., 58 Hun 610, 13 N. Y. Supp. 47.

Acts of Individuals. — Testimony that some people passed the premises in question because of the location of a station of an elevated road is immaterial as proof of their value. Bischoff *v.* New York El. R. Co., 61 N. Y. Super. 211, 18 N. Y. Supp. 865.

94. Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437; American Bank-Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302.

A Former Tenant of premises affected by the railroad may testify of the reasons which led him to remove therefrom. Scott *v.* Metropolitan El. R. Co., 2 Misc. 150, 29 Abb. N. C. 435, 21 N. Y. Supp. 630.

Comparative Rentals. — It may be shown that the upper parts of buildings on a street occupied by an elevated road produce better rents than the lower parts because not so near it. Shepard *v.* Metropolitan El. R. Co., 48 App. Div. 452, 62 N. Y. Supp. 977.

The Loss of Money and surrender of leases by former tenants is immaterial if the rental value of a building has increased since the road was constructed. Lazarus *v.* Metropolitan El. R. Co., 5 App. Div. 398, 39 N. Y. Supp. 294.

95. Messenger *v.* Manhattan R. Co., 129 N. Y. 502, 29 N. E. 955.

Misconduct of Trainmen and other annoyances caused by the operation of the road cannot be proved. Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 56 Hun 182, 9 N. Y. Supp. 207.

96. Jamieson *v.* Kings County El. R. Co., 147 N. Y. 322, 41 N. E. 693; Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78. But *compare* Wright *v.* New York El. R. Co., 78 Hun 450, 29 N. Y. Supp. 223.

97. Leale *v.* Metropolitan El. R. Co., 61 Hun 613, 16 N. Y. Supp. 419.

98. Chicago, etc. R. Co. *v.* Chicago, 166 U. S. 226, 247, 251, *affirming* 149 Ill. 457, 37 N. E. 78; Chicago, etc. R. Co. *v.* Morrison, 195 Ill. 271, 63 N. E. 96; Kansas City S. B. R. Co. *v.* Kansas City, etc. R. Co., 118 Mo. 599, 620, 24 S. W. 478 (expense under municipal ordinance); Morris & E. R. Co. *v.* Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363, *overruling* Paterson & N. P. Co. *v.* Newark, 61 N. J. L. 80, 38 Atl. 689; Lake Shore, etc. R. Co. *v.* Cincinnati, etc. R. Co., 30 Ohio St. 604; Chicago, etc. R. Co. *v.* Milwaukee, 97 Wis. 418, 72 N. W. 1118.

dangerous character of the crossing at the point of intersection and the effect thereof on the value of the road crossed.[99]

k. *Value of Franchise.* — In such a case evidence to show how much less valuable all the older company's property is because of such crossing is inadmissible. The proof should be limited to the lessened value of its tangible property.[1]

l. *Value Fixed by Use.* — Evidence of the value of a railroad right of way used for a telegraph line must be directed to its depreciation for railroad purposes, and not to its value for the most advantageous use to which it could be put.[2] Neither can the increased expense of burning grass on the right of way be shown.[3]

B. LEASEHOLDS. — a. *Value of Estate.* — It has been broadly decided that there is no evidentiary relation between the value of an estate and a leasehold interest therein;[4] but this statement may be too broad.[5]

b. *Availability for Business Uses.* — The market value of a lease may be shown by testimony covering all the improvements which

99. Kansas City S. B. R. Co. *v.* Kansas City, etc. R. Co., 118 Mo. 599, 620, 24 S. W. 478.

1. Lake Shore, etc. R. Co. *v.* Cincinnati, etc. R. Co., 30 Ohio St. 604.

Reasons. — The court said that the evidence looked to the burdens imposed on the business of maintaining and operating a railroad, and not to the diminished value of defendant's tangible property. "It involves the idea that damages to its property as a whole, in its general use for its corporate franchises, is to be considered, and that the grant from the state to so use it is not subject to the reserved right of the state to construct other highways across it, or to impose regulations in the mode and manner of operating the road. . . . It ignores the fact that the charter under which this property is held and used allows them to hold it for a public use, and that the right to so use this property is not *property* to be paid for by proceedings to condemn, but a privilege or franchise, subject to reasonable regulations for the public welfare. As the crossing does not take away any part of these corporate franchises, but only regulates their use for the public benefit, there is no sound reason for giving compensation for anything except the damage to the right of way and roadbed, if any, exclusive of the expense of making and keeping up the crossing and keeping the watchman." Lake Shore, etc. R. Co. *v.* Cincinnati, etc. R. Co., 30 Ohio St. 604.

2. Postal Tel. C. Co. *v.* Oregon Short Line R. Co., 104 Fed. 623, 114 Fed. 787; Mobile & O. R. Co. *v.* Postal Tel. C. Co., 120 Ala. 21, 24 So. 408; St. Louis & C. R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Mobile & O. R. Co. *v.* Postal Tel. C. Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223, *overruling* Postal Tel. C. Co. *v.* Alabama & V. R. Co., 68 Miss. 314, 8 So. 375; Railroad Co. *v.* Postal Tel. Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403.

3. Postal Tel. C. Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

The Value of Such Easement may be shown by evidence of the injury and inconvenience caused the railroad company. Cleveland, etc. R. Co. *v.* Ohio Postal Tel. C. Co., 68 Ohio St. 306, 324, 67 N. E. 890, 62 L. R. A. 941.

4. Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

5. See Clarkson *v.* Skidmore, 46 N. Y. 297; Larkin *v.* Misland, 100 N. Y. 212, 3 N. E. 79.

give the property its distinctive character as a place for carrying on any useful business.[6]

c. *Adaptability of Land.* — Rental value may be shown by proof of the adaptability of the land for a mill site; but evidence of the rental value of a suitable mill is inadmissible, regardless of the intention of the purchaser of the land or the vendor's knowledge thereof.[7] The value of a lease of land on which a matured crop stood may be shown by proof of the condition of the land, the kind of the crop, the usual annual yield and the market value.[8]

d. *Stipulated Rent.* — The rent actually received may be shown to establish the value of a leasehold interest, subject to proof that it was less or more than the value of the premises.[9]

e. *A Sub-Lease Is Competent Evidence* of the rental value of premises though based on considerations not existent when the original lease was made.[10]

f. *Rental Value of Part.* — Evidence showing a decrease in the rental value of part of the premises in consequence of the acts of a trespasser is competent as indicating the rental value of the whole.[11]

g. *Remoteness in Point of Time.* — The rental value of a building during the time its completion was delayed by a contractor cannot be established by evidence of the rent received for it years or months afterward.[12] But it has been held competent to receive evidence of the rent paid for land for several years preceding the time plaintiff acquired title to show the average rental value.[13]

h. *Admission of Value of Use.* — Retaining an account without objection is not an admission of liability for the stated value of the use of land under a special contract therefor.[14]

i. *Rent Paid for Other Property.* — The rent paid for adjoining

6. Getz *v.* Philadelphia & R. Co., 105 Pa. St. 547, 113 Pa. St. 214, 6 Atl. 356; McMillin Prtg. Co. *v.* Pittsburg, etc. R. Co., 216 Pa. St. 504, 65 Atl. 1091; Shipley *v.* Pittsburg, etc. R. Co., 216 Pa. St. 512, 65 Atl. 1094.

One Who Wrongfully Detains Property cannot restrict the evidence of its rental value to its worth for the purpose for which it was used. The plaintiff may prove the highest price it would bring for any lawful use to which it was adapted and for which it was available. Raapke & Katz Co. *v.* Schmoeller & M. Piano Co. (Neb.), 118 N. W. 652.

7. Clagett *v.* Easterday, 42 Md. 617, 628.

8. Snodgrass *v.* Reynolds, 79 Ala. 452, 58 Am. Rep. 601.

9. West Chicago Park Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824.

Remoteness. — But the amount of rent paid under a lease two years prior to the time defendant began to hold over wrongfully is too remote. Raapke & Katz Co. *v.* Schmoeller & M. Piano Co. (Neb.), 118 N. W. 652.

10. Ganson *v.* Tifft, 71 N. Y. 48.

11. Hunt *v.* Pond, 67 Ga. 578.

12. Rome R. Co. *v.* Chattanooga, etc. R. Co., 94 Ga. 422, 21 S. E. 69 (the rent paid by one tenant is not evidence of the value of the premises to a former tenant, both making the same use thereof;) Scribner *v.* Jacobs, 56 Hun 649, 9 N. Y. Supp. 856; Reich *v.* Colwell Lead Co., 66 Hun 634, 21 N. Y. Supp. 495.

13. Perry *v.* Jackson, 88 N. C. 103.

14. Valley Lumb. Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216.

property may be shown though it is not in all respects like that in question.[15]

j. *Renewal of Lease.* — It is competent to show that the original lease was renewed before it expired and before the land was taken.[16]

k. *Offer by Tenant.* — The market value of a leasehold interest cannot be shown by evidence of what the lessee is willing to pay rather than vacate the premises.[17]

l. *Expenditures.* — The expenditures made in obtaining a lease and in performance of the lessee's contract thereunder are not evidence of the value of the lease.[18] But a lessee whose use of the premises is limited and who cannot sublet without the lessor's consent may show, as bearing on the value of his lease, expenditures in reconstructing necessary appliances and the increased cost of doing business in consequence of the taking of the property.[19]

m. *Removal of Property.* — If the removal of machinery and appliances of the lessee from leased premises affects their value that fact may be shown as bearing upon the value of the lease only.[20]

n. *Profits of Business.* — The profits made in a business conducted on leased premises are immaterial as to the value of the lease.[21] But evidence of profits made by the lessee in the premises has sometimes been regarded as admissible against the lessor to aid in fixing the value of the lease, but not as measuring its value.[22] The profits made by another person in the premises in question and in the business for which the plaintiff purposes to use them cannot be shown.[23]

o. *Probable Profits.* — The value of a lease without marketable value cannot be shown by evidence of the probable profits of the

15. Clapp *v.* Noble, 84 Ill. 62; Fogg *v.* Hill, 21 Me. 529.

16. Cobb *v.* Boston, 109 Mass. 438.

17. Lawrence *v.* Boston, 119 Mass. 126.

18. Rhodes *v.* Baird, 16 Ohio St. 573.

19. Kersey *v.* Schuylkill River E. S. R. Co., 133 Pa. St. 234, 19 Atl. 553, 19 Am. St. Rep. 632, 7 L. R. A. 409; Ehret *v.* Schuylkill River E. S. R. Co., 151 Pa. St. 158, 24 Atl. 1068.

20. Getz *v.* Philadelphia & R. Co., 105 Pa. St. 547, 113 Pa. St. 214, 6 Atl. 356; McMillin Prtg. Co. *v.* Pittsburgh, etc. R. Co., 216 Pa. St. 504, 65 Atl. 1091; Shipley *v.* Pittsburg, etc. R. Co., 216 Pa. St. 512, 65 Atl. 1094.

21. West Chicago Park Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824; Cobb *v.* Boston, 109 Mass. 438.

The Value of a Firm Lease prematurely and privily obtained by a member of it is to be ascertained by proof of the value of the goodwill in connection with the lease and of the joint assets employed in the business, though these had been disposed of. The aggregate sum for which these would have sold as an entirety measured the value of the lease, the right of the parties or either of them to bid at the sale being regarded. Mitchell *v.* Read, 84 N. Y. 556.

22. Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157; Murphy *v.* Century Bldg. Co., 90 Mo. App. 621; Gildersleeve *v.* Overstolz, 90 Mo. App. 518; Brincefield *v.* Allen, 25 Tex. Civ. App. 258, 60 S. W. 1010. See Hodges *v.* Fries, 34 Fla. 63, 15 So. 682; Cleveland, etc. R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619.

23. Smith *v.* Eubanks, 72 Ga. 280; Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952.

property, such evidence being based upon the result of the use of like property in the same county for ten or fifteen years.[24]

p. *Removal of Business.* — The goodwill attaching to a business conducted on leased premises is not a part of the lease; hence the consequences of removal are not provable.[25] As between partners the value of the goodwill is an element of the value of the lease where one of the firm has privily and prematurely obtained the lease.[26]

q. *Value for Special Purpose.* — A tenant wrongfully dispossessed of premises used for a special purpose may show the quantity of the products obtained and their value to himself, in connection with his preparations to continue in possession for a little more than one year.[27]

r. *Condition of Premises.* — Tenants dispossessed by condemnation proceedings may show the condition of the premises when they took possession and when they were surrendered in so far as their condition was changed in pursuance of the terms of the lease and as a part of the rent reserved therein.[28]

s. *License To Cut Timber.* — The market price for stumpage is the basis on which the value of a license to cut lumber must be fixed, if there is such a price; in its absence the net value of the logs at the place of destination governs.[29]

t. *Railroad Lease.* — The value of the unexpired lease of a railroad may be shown by proof of its clear annual value for the period it had been operated by the lessees and from annuity tables.[30]

u. *Use of Railroad.* — The income derived from the use of a railroad immediately preceding and succeeding the continuance of an injunction which deprived the party who operated it prior thereto and thereafter of its control is evidence of the value of its use during the continuance of the writ.[31]

24. Smith *v.* Phillips, 16 Ky. L. Rep. 615, 29 S. W. 358 (profits of agricultural land); Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157; Giles *v.* O'Toole, 4 Barb. (N. Y.) 261; Rhodes *v.* Baird, 16 Ohio St. 573.

25. Cobb *v.* Boston, 109 Mass. 438.

26. Mitchell *v.* Read, 84 N. Y. 556.

27. Manning *v.* Fitch, 138 Mass. 273.

28. Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

29. Blood *v.* Drummond, 67 Me. 476.

30. West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431.

If Such a Lease Is To Terminate on the Death of Any of the Lessees the cost of insuring their lives for the time the lease has to run and for such sum as their estimated profits was shown to be would be the measure of its value. But evidence showing the cost of operating railroads generally is not competent to show the value of a lease at a rent of one-half its gross earnings, in the absence of proof of their charges. West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431.

31. Sturgis *v.* Knapp, 33 Vt. 486, 530.

Such Evidence Circumstantial. The court said: "The road having been taken from the claimant, proof of its income before and after would strongly tend to show what it would have been in the same hands during the intervening period. Proof of this character is not secondary; it is circumstantial, and the circum-

C. Value of Heir's Interest. — The value of an heir's interest in an estate subject to homestead and dower rights, which have been set out, may be shown by proof of the value of the various portions of it with reference to the interests of the respective parties, and, also, the value of the whole and of the land outside such rights in connection with the rest of the estate.[32]

D. Rents, Issues and Profits. — The value of these is not shown by proof of the fair rental value of the land.[33] The value of the use of an estate is not necessarily to be ascertained by detailed estimates of income. Evidence of the rent paid for such lands as were rented is proper; but if the property has been kept together the profits must be shown by general estimates which may be based on its value as an entirety.[34]

E. Life Estate. — Annuity tables, though competent, are not controlling as to the value of a life estate. The nature of the property must be regarded on the basis of its market value, as must the health, habits and constitution of the owner, the contingencies of business and the expense of maintaining the property.[35]

V. OF PERSONAL PROPERTY.

1. Market Value. — The definition of market value given as applicable to land applies as well to personal property when it has been ascertained what market governs the rights of the parties to

stances of the case do not admit of any other. Proof of what the income was in the hands of the receiver during the period would not be conclusive." Sturgis *v.* Knapp, 33 Vt. 486, 530.

32. Clemmons *v.* Clemmons, 68 Vt. 77, 34 Atl. 34.

33. Poehler *v.* Reese, 78 Minn. 71, 80 N. W. 847.

Rule in Equitable Action for Accounting. — Evidence of the rental value of occupied and cultivated premises is admissible as tending to show the value of the rents and profits received in the absence of a definite showing of the actual receipts. In an equitable accounting the occupying tenant may show as a setoff against the rents and profits received the increased value of the premises resulting from the improvements he has made if the circumstances are such as to render it an obvious hardship to deprive him of such value, and if the allowance may be made consistently with the equity of the co-tenant. Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863.

34. Lewis *v.* Price, 3 Rich. Eq. (S. C.) 172, 197.

As Against a Trustee Who Has Failed To Keep Regular Accounts or rendered none, testimony in some sort speculative is admissible. If the trust estate was a planting interest the account sales of the factor would be more satisfactory proof of the value of the products than opinions as to what might have been made or what was made on an adjoining plantation. As to the value of slaves treated as his own by the trustee, if he is unable to show their actual value, evidence of the price at which they would hire publicly is competent, or if they were employed on a plantation the estimates of experienced planters, with reference to the condition of the negroes and the quality of the land on which they were employed are competent, as is any other fact or circumstance calculated to show their real value. Rainsford *v.* Rainsford, McMull. Eq. (S. C.) 16, 36 Am. Dec. 250.

35. Holt *v.* Hamlin (Tenn.), 111 S. W. 241.

the action. In the absence of unusual circumstances the market value of property measures the rights and liabilities of litigants.[36]

A. Market Value and Reasonable Value. — Under proper pleadings both market value and the reasonable value of property may be shown;[37] and as between vendor and vendee it may be shown that property has a special value because of the circumstances under which it was supplied.[38] As between shipper and carrier such evidence is not competent unless it is shown that the carrier was seasonably informed of the facts.[39]

B. Absence of Market Value. — Before actual value can be shown it must be made to appear that there is no market value.[40] The existence of such value is a question of fact[41] on which opinions are not competent.[42]

C. Immaterial. — Market value is immaterial as between an execution creditor and the officer who levies on property.[43]

D. Existing Market. — The value of the property at the time in issue is the test. Inquiry as to the effect upon the market of putting a large quantity of a commodity on sale is not relevant.[44]

E. Wholesale Market. — The value of a stock of goods or of a manufacturer's products must be shown by their value at whole-

36. Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560 (it is immaterial what it would cost the plaintiff to make the property in question available for the market); Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 176, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772 (the value of hay is not provable by testimony that the owner had stored it for future use in the event of a hard winter, the cost of replacing it, its worth to the owner, what he would have taken for it, or that it was not for sale); Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Reid *v.* New York City R. Co., 93 N. Y. Supp. 533; Aultman Co. *v.* Ferguson, 8 S. D. 458, 66 N. W. 1081; Gulf, etc. R. Co. *v.* Dunman (Tex. Civ. App.), 31 S. W. 1070.

Medium of Payment. — Value must be proved in the medium in which payment may be rightfully made. Peterson *v.* Gresham, 25 Ark. 380.

Under a Policy Stipulating That Liability Shall Not Extend Beyond the Actual Cash Value of the Property and not exceed what it would then cost insured to repair or replace the same with material of like kind and quality, the value of a particular brand of whiskey of varying age is not to be arrived at by evidence of the cost of material, expense of manufacturing, carrying, insuring and interest on the investment, but by its value in the wholesale market at the time it was burned. Frick *v.* United Firemen's Ins. Co., 218 Pa. St. 409, 67 Atl. 743.

37. Houston, etc. R. Co. *v.* Tisdale (Tex. Civ. App.), 109 S. W. 413.

38. Morris *v.* Columbian Iron Wks. Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851.

39. Louisville, etc. R. Co. *v.* Mink, 31 Ky. L. Rep. 833, 103 S. W. 294.

40. Lundvick *v.* Westchester F. Ins. Co., 128 Iowa 376, 104 N. W. 429.

41. Todd *v.* Gamble, 67 Hun 38, 21 N. Y. Supp. 739; Paving Co. *v.* Howell, 4 N. Y. St. Rep. 494.

42. Texas & P. R. Co. *v.* Meeks (Tex. Civ. App.), 74 S. W. 329 (damaged property).

43. French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193.

44. Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

sale,[45] with transportation charges added if incurred.[46] This rule applies between parties who are wholesalers unless it is shown that the goods have no wholesale price.[47]

F. Cost of Replacing Goods. — As between the mortgagee of a stock of drugs and a trespasser, the value thereof is what it would cost to replace the stock at the time of its seizure, and not what it could be sold for as a whole to an occasional purchaser, who would buy only because he saw a large margin in the purchase.[48]

G. Kinds of Evidence. — a. *Best Evidence.* — The best evidence obtainable, whether written or oral, is competent.[49] Oral testimony as to the value of the goods is to be preferred to a bill containing an itemized account of their cost.[50]

b. *Circumstantial Evidence.* — The value or market price of property may be shown by circumstantial evidence.[51]

c. *Hearsay.* — There is conflict in the decisions as to the competency of hearsay testimony to prove value.[52] In some states ac-

45. Little *v.* Lichkoff, 98 Ala. 321, 12 So. 429; Frick *v.* United F. Ins. Co., 218 Pa. St. 409, 67 Atl. 743.

46. State *ex rel.* Clark *v.* Parsons, 109 Mo. App. 432, 84 S. W. 1019.

47. Kilpatrick *v.* Wm. Whitmer & Sons, 118 App. Div. 98, 103 N. Y. Supp. 75.

48. Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578.

49. Idaho Merc. Co. *v.* Kalanquin, 8 Idaho 101, 66 Pac. 933.

50. Savannah, etc. R. Co. *v.* Hoffmayer, 75 Ga. 410.

51. Tobias *v.* Treist, 103 Ala. 664, 15 So. 914; Irvin *v.* Turner, 47 Ga. 382; Carreker *v.* Walton, 47 Ga. 394; Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030.

What Circumstances Relevant. Where the quantity and value of a stock of goods at a designated date is shown and also the quantity and value of the goods bought during the ensuing six months and prior to the sale of the goods to alleged antecedent creditors, it may be shown in an action between them and attaching creditors that the proceeds of all the goods sold during said months were deposited in a designated bank, and the total sum so deposited. Such evidence tended, in connection with the other evidence, to establish the quantity and value of goods on hand when the sale was made. Tobias *v.* Treist, 103 Ala. 664, 15 So. 914.

52. **In Colorado** information obtained by inquiry is competent. Thatcher *v.* Kaucher, 2 Colo. 698.

In New Jersey it is otherwise. Arata *v.* Sullivan, 63 N. J. L. 46, 42 Atl. 839 (statement by person to whom an article was sent for repairs as to their cost).

In New York. — Such testimony is incompetent (O'Brien *v.* Gallagher, 26 Misc. 838, 57 N. Y. Supp. 250), unless the information on which it is based is shown to be correct. Steinmetz *v.* Cosmopolitan Range Co., 47 Misc. 611, 94 N. Y. Supp. 456.

In Rhode Island such testimony is not received. Molton *v.* Smith, 27 R. I. 57, 62, 60 Atl. 681.

In South Carolina the correctness of such testimony will be assumed if no question is raised. Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65.

In Texas the decisions are conflicting, though the later and controlling ones favor the view that information obtained by inquiry is inadmissible. Gulf, etc. R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968; Texas & P. R. Co. *v.* Arnett, 40 Tex. Civ. App. 76, 88 S. W. 448; J. P. Watkins Land Mtg. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424; Wells, Fargo Exp. Co. *v.* Williams (Tex. Civ. App.), 71 S. W. 314; Texas & N. O. R. Co. *v.* White, 25 Tex. Civ. App. 278, 62 S. W. 133; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Eastern Texas R. Co. *v.* Scurlock, 97 Tex.

counts of sales rendered a party by his commission merchant cannot be shown,[53] nor can the contents of a telegraphic message,[54] or a memorandum of the price of goods made by one person as given by another, nothing more being shown except the testimony of the maker based thereon.[55] An estimate of value made by the owner and mortgagor of chattels cannot be shown by another witness in an action between other parties.[56]

H. How Market Value Shown. — Such value is shown by proof of the price paid in the usual course of business for property of the same quality as that in issue, on or near the time in question, and at or near the place with reference to which the parties contracted, or where, in case of tort, the wrong was done;[57] but not by proof of isolated sales or offers to sell.[58]

a. *In the Absence of a Local Market.* — If there is no local market, evidence of a single local sale of like property, the opinions of witnesses and the general understanding of the community are competent to establish value.[59]

305, 78 S. W. 490. It was held in Missouri, etc. R. Co. *v.* Cocreham, 10 Tex. Civ. App. 166, 30 S. W. 1118, and Gulf, etc. R. Co. *v.* Wedel (Tex. Civ. App.), 42 S. W. 1030, that opinions as to value might be rested wholly on information derived from competent persons.

Information Obtained From Dealers concerning prices at which property sold in the market on certain days qualifies a witness to testify thereof on such days; but a statement based on such information to the effect that the market price on those days was so much less than on the day next preceding was hearsay. Southern Kansas R. Co. *v.* Cox (Tex. Civ. App.), 103 S. W. 1122. There the distinction turns on the source of the witness' information. If it came from a private source testimony based on it is inadmissible; if from a public source, such as newspapers, trade journals, price lists and the like it is competent (Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; International & G. N. R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Houston & T. C. R. Co. *v.* Williams (Tex. Civ. App.), 31 S. W. 556; Texas & P. R. Co. *v.* Scott (Tex. Civ. App.), 86 S. W. 1065), as where it is derived in part from market reports and in part from conversations with dealers, (Gulf, etc. R. Co. *v.* Patterson, 5 Tex. Civ. App. 523, 24 S. W. 349); or in part from telegrams. Texas & P. R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10. Statements made by appraisers cannot be shown. Halff *v.* Goldfrank (Tex. Civ. App.), 49 S. W. 1095.

53. Hess *v.* Missouri Pac. R. Co., 40 Mo. App. 202; Haskins *v.* Missouri Pac. R. Co., 19 Mo. App. 315; Golson *v.* Ebert, 52 Mo. 260; International & G. N. R. Co. *v.* Startz, 97 Tex. 167, 77 S. W. 1; Gulf, etc. R. Co. *v.* Baugh (Tex. Civ. App.), 42 S. W. 245; Norfolk & W. R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

54. Fountain *v.* Wabash R. Co., 114 Mo. App. 683, 90 S. W. 395.

55. Stickney *v.* Bronson, 5 Minn. 215.

56. Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630.

57. Ebenreiter *v.* Dahlman, 19 Misc. 9, 42 N. Y. Supp. 867; LaRue *v.* St. Anthony & D. Elev. Co., 17 S. D. 91, 95 N. W. 292.

58. Cobb *v.* Whitsett, 51 Mo. App. 146; Hammond *v.* Decker (Tex. Civ. App.), 102 S. W. 453; Missouri, etc. R. Co. *v.* Dilworth, 95 Tex. 327, 67 S. W. 88; Gulf, etc. R. Co. *v.* Dunman (Tex. App.), 16 S. W. 421 (what a witness thinks property could have been bought for is immaterial).

59. Gulf, C. & S. F. R. Co. *v.* Lowe, 2 Wil. Civ. Cas. (Tex.) § 648.

b. *Value of Part.* — As against a wrongdoer in possession of severable parts of the property in question, proof of the value of a few of them will establish the value of the whole in the absence of testimony concerning the value of those in his possession.[60]

c. *Preparation for Market.* — The value of ore, if it is to be ascertained immediately after severance, may be shown by proof of what it would sell for when brought to the surface, less the cost of bringing it there, or by its worth before removal if it has been removed and sold.[61]

d. *Motives and Circumstances Connected With Wrong.* — It is immaterial what the motive of the buyer of property was or the sum a creditor could have realized for it,[62] as are the circumstances under which the wrong was done or its effect upon the business of the plaintiff.[63]

e. *Non-Payment of Tax.* — It may be shown that property has been shipped without payment of the internal revenue tax.[64]

f. *Use Made of Property.* — Except as the use made of property shows its adaptability and therefore tends to show market value, it is immaterial to the owner.[65]

g. *Agreement of Parties.* — The price fixed in the contract for the sale of property is some evidence of its value under the *quantum meruit,*[66] in the absence of a market value,[67] or if its identity has been lost.[68] The value of property as agreed upon by carrier and shipper a few months before it was converted may be shown,[69] as may the declaration of the owner to the carrier.[70] But a memorandum made by the shipper is not competent, in the absence of testimony to show its correctness as a whole, to prove the value of such items as were verified by his testimony.[71] Such agreements may be conclusive as to the value of property lost by a carrier's negligence.[72] The value of a stock of goods as shown in a partnership contract, made on the coming in of a new partner, is ad-

60. First Nat. Bank *v.* San Antonio & A. P. R. Co., 97 Tex. 201, 214, 77 S. W. 410.

61. Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 420, 43 Am. Rep. 560.

62. Halff *v.* Goldfrank (Tex. Civ. App.), 49 S. W. 1095.

63. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388; Doll *v.* Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625; Montignani *v.* Crandall Co., 34 App. Div. 228, 54 N. Y. Supp. 517.

64. Toledo, etc. R. Co. *v.* Kichler, 48 Ill. 438.

65. Stevens *v.* Springer, 23 Mo. App. 375, 386.

66. Lehigh *v.* Standard Tie Co., 149 Mich. 102, 112 N. W. 481.

67. Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030.

68. Goodman *v.* Baumann, 43 Misc. 83, 86 N. Y. Supp. 287.

69. Girardeau *v.* Southern Exp. Co., 48 S. C. 421, 26 S. E. 711.

70. Savannah, etc. R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87.

71. Louisville & N. R. Co. *v.* Cassibry, 109 Ala. 697, 19 So. 900.

72. Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534 (value inserted in bill of lading which was silent as to the effect of such valuation upon the shipper's liability and he had no information and did not suppose that his statement would affect the carrier's liability in case of loss). See article "CARRIERS," Vol. II, pp. 860, 901.

missible, as an account of stock then on hand, on proof of its accuracy.[73] An exclusive method of proving the value of insured property may be embodied in a contract, and, if it is reasonable, will be enforced.[74] The same rule applies to contracts of sales — as where the parties stipulate that the price shall be fixed by third persons.[75]

h. *Agreement of Third Parties.* — In an action to enforce a mechanic's lien, the agreement between the contractor and a sub-contractor is, as against the owner, *prima facie* evidence of the value of the materials and labor furnished by the sub-contractor.[76] An agreement between holders of a rare quality of goods not on the market as to the price at which they will sell is provable in connection with other circumstances.[77] The price fixed in an incomplete contract, if the result of bona fide negotiations between the owner and an intending purchaser, for the transfer of property converted may be shown against a stranger.[78]

i. *Will.* — A will is competent to show the value of the testator's estate.[79]

j. *Admissions.* — **(1.) By Demand.** — A claim for compensation made before a controversy arose is admissible against the claimant.[80]

(2.) By Tender. — The value put upon property by the owner may be shown by the fact that he tendered it to his creditor in payment of the debt due him.[81]

73. Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121.

74. See articles "INSURANCE," Vol. VII, pp. 496, 561; "CONCLUSIVE EVIDENCE," Vol. III, pp. 267, 284.

75. See article "SALES," Vol. XI, pp. 480, 510.

76. Charles *v.* Hallack Lumb. & M. Co., 22 Colo. 283, 294, 43 Pac. 548; Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675 (note given by sub-contractors for the price of materials is evidence of contract price in lien proceeding).

Reason. — The court, in Charles *v.* Hallack Lumb. Co., *supra*, quoted from § 204, Phillips on Mechanics' Liens: "The owner, when the contract is not made immediately by himself or his duly authorized agent, but by his contractor, may show that the price agreed to be paid by the contractor was beyond the fair market value at the time; but, if there is no evidence to show that the materials furnished by a sub-contractor are worth less than the price agreed on between him and the principal contractor, he is entitled to a lien for this agreed price. The owner, when sued by a sub-contractor would be able to impeach the contract only for fraud or mistake. The contract in either case is admissible in evidence. Cattanach *v.* Ingersoll, 1 Phila. (Pa.) 285; Hilliker *v.* Francisco, 65 Mo. 598; Miller *v.* Whitelaw, 28 Mo. App. 639." To the same effect, see also Deardorff *v.* Everhartt, 74 Mo. 37.

Claim of Lien. — After a witness who ordered the goods for which a lien is claimed has testified that the claim filed was a correct statement of the goods furnished pursuant to his order, the claim filed is admissible. Mooney *v.* Peck, 49 N. J. L. 232, 12 Atl. 177.

77. Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030.

78. Ferguson *v.* Clifford, 37 N. H. 86.

79. Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563.

80. St. Louis S. W. R. Co. *v.* Smith, 33 Tex. Civ. App. 520, 77 S. W. 28.

81. Currey *v.* Chas. Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425 (letter from client to attorney competent

(3.) By Record. — If attached property is replevied and the plaintiff admits on the record the value of the defendant's possession it will be presumed that such value equals or exceeds the sum so admitted.[82]

(4.) Quotations of Prices. — "Prices current" sent by defendant to plaintiff are admissions on the part of the former as to the state of the market upon the dates they represent if reasonably near the time in question.[83]

(5.) Balance Sheet. — A balance sheet executed in the regular course of business and purporting to show the maker's financial condition is competent evidence of the value of his assets.[84]

(6.) In Pleading. — The failure to deny the allegations of the complaint as to the value of materials renders proof thereof unnecessary in an action to enforce a lien,[85] or in a replevin suit.[86] The statement of value in the complaint in an action of replevin is an admission.[87]

(7.) By Default. — Generally a default does not admit the value of the property to be as alleged in the complaint.[88]

k. *Account Books.* — The owner's account books and ledger are admissible to show the amount and value of destroyed goods, the entries being verified.[89]

l. *Inventories.* — **(1.) By Sheriff.** — An inventory of goods levied on by a sheriff and made a part of his return may be received to show value in connection with and as part of the testimony of one who helped to make the inventory, and who so testified, and that the values of the goods were as stated therein;[90] but it is not conclusive.[91]

(2.) In Probate. — An inventory filed in the proper court is, in connection with the appraisement of the estate, *prima facie* evidence of the amount and value thereof[92] coming to the personal representa-

in an action by a third person against former); Curme, D. & Co. *v.* Rauh, 100 Ind. 247.

82. Gamble *v.* Wilson, 33 Neb. 270, 50 N. W. 3.

83. Weidner *v.* Olivit, 108 App. Div. 122, 96 N. Y. Supp. 37, 188 N. Y. 611, 81 N. E. 1178 (no opinion).

84. Curme, D. & Co. *v.* Rauh, 100 Ind. 247.

85. Bringham *v.* Knox, 127 Cal. 40, 59 Pac. 198.

86. Tully *v.* Harloe, 35 Cal. 302.

87. Rosenstreter *v.* Brady, 63 Mo. App. 398, 403.

88. See article "ADMISSIONS," Vol. I, pp. 348, 406.

89. Foster *v.* Sinkler, 1 Bay (S. C.) 40; Fry *v.* Slyfield, 3 Vt. 246. See article "INSURANCE," Vol. VII, pp. 496, 564.

90. Schloss *v.* Inman, 129 Ala. 424, 30 So. 667; Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013.

The same rule applies where the sheriff made the inventory and gave therein his estimate of the value of each article. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

91. Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454.

92. *Alabama.* — Dickie *v.* Dickie, 80 Ala. 57.

California. — Wheeler *v.* Bolton, 92 Cal. 159, 28 Pac. 558; *In re* Slade's Estate, 122 Cal. 434, 55 Pac. 158 (value of property claimed to be exempt).

Massachusetts. — Fitch *v.* Randall, 163 Mass. 381, 40 N. E. 182.

tive, both in favor of[93] and against[94] him and also his suretics.[95]

Weight Of. — Such an inventory is not conclusive upon any person.[96]

(3.) Mercantile. — Inventories made or received in the regular course of business are usually competent evidence in actions on insurance policies.[97]

m. *Invoices.* — Because invoices show the cost of goods, rather than their value, they are not the best evidence of value,[98] especially if made long before the date in issue and in the absence of one of the parties to the action.[99] But an imperfect invoice has been received in connection with parol evidence supplying the missing data.[1] Invoices are usually competent in actions between insured and in-

Mississippi. — McWillie *v.* Van Vacter, 35 Miss. 428.

New York. — Montgomery *v.* Dunning, 2 Bradf. Sur. 220; *In re* Hodgman's Estate, 10 N. Y. Supp. 691; *In re* Rogers' Estate, 153 N. Y. 316, 47 N. E. 589.

South Carolina. — Wright *v.* Wright, 2 McCord Eq. 443.

Texas. — Devine *v.* U. S. Mtg. Co. (Tex. Civ. App.), 48 S. W. 585.

Vermont. — Blaisdell *v.* Davis, 72 Vt. 295, 307, 48 Atl. 14 (financial condition of the decedent prior to death).

West Virginia. — Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

93. Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14; *In re* Shipman's Estate, 82 Hun 108, 31 N. Y. Supp. 571.

94. *In re* Jones, 25 Ga. 414; Hooper *v.* Hooper's Exrs., 29 W. Va. 276, 1 S. E. 280.

95. Wiemann *v.* Mainegra, 112 La. 305, 36 So. 358; Williams *v.* Esty, 36 Me. 243.

96. *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. — Pipkin's Succession, 7 La. Ann. 617; Martin *v.* Boler, 13 La. Ann. 369.

Massachusetts. — Dodge *v.* Lunt, 181 Mass. 320, 63 N. E. 891.

Michigan. — Porter *v.* Long, 124 Mich. 584, 83 N. W. 601; Hilton *v.* Briggs, 54 Mich. 265, 20 N. W. 47.

Nevada. — McNabb *v.* Wixom, 7 Nev. 163.

New York. — Place *v.* Hayward, 117 N. Y. 487, 23 N. E. 25; Willoughby *v.* McCluer, 2 Wend. 608.

North Carolina. — Hoover *v.* Miller, 51 N. C. (6 Jones L.) 79; Grant *v.* Reese, 94 N. C. 720.

Tennessee. — Sanders *v.* Forgasson, 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, 82 Am. Dec. 652.

97. *United States.* — Insurance Co. *v.* Weides, 14 Wall. 375; Fisher *v.* Crescent Ins. Co., 33 Fed. 544.

Georgia. — Scottish Union & Nat. Ins. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180.

Kansas. — German Ins. Co. *v.* Amsbaugh, 8 Kan. App. 197, 55 Pac. 481.

New York. — Wallach *v.* Commercial F. Ins. Co., 12 Daly 387, *affirmed*, 98 N. Y. 634.

Pennsylvania. — West Branch Lumberman's Exch. *v.* American Cent. Ins. Co., 183 Pa. St. 366, 38 Atl. 1081.

Texas. — Phoenix Ins. Co. *v.* Padgett (Tex. Civ. App.), 42 S. W. 800. See article "Insurance," Vol. VII, pp. 496, 564.

98. O'Neal *v.* Brown, 20 Ala. 510 (a witness may testify to the value of goods notwithstanding he had invoiced them); Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578.

99. Sweetser *v.* McCrea, 97 Ind. 404.

1. Doane & Co. *v.* Garretson, 24 Iowa 351.

surer.[2] They may be used by a witness who had seen the articles in question and superintended the charging of them for the purpose of refreshing his memory as to their value.[3]

n. *Market Reports.* — **(1.) Unverified Admissible.** — Standard price lists and market reports in general circulation and relied upon by the commercial world and by those engaged in trading in the articles, quotations of which are therein given, are competent to prove the value of such articles at a given time in the market in which they were to be sold.[4] They are competent against a negligent carrier though there was no engagement to deliver the property in time for any particular market.[5] Local newspaper quotations as to the price of property at the place to which it was consigned are admissible on the issue as to a decline in its value.[6]

(2.) Similarity of Property. — The precise similarity of the property, the sale of which is reported to that in question, need not be shown.[7]

(3.) Verification Required. — In some states market reports and telegraphic messages are not admissible unless it is shown how they were made, where the information upon which they were based was obtained, and that it was founded upon actual sales.[8]

o. *Price Lists.* — Price lists of the vendor are admissible in some states if the property corresponds to the representation therein and the commodities on which prices are given have a market value,[9] they are also competent to show the market value of an article of

2. Insurance Co. *v.* Weide, 9 Wall. (U. S.) 677. See article "Insurance," Vol. VII, pp. 496, 564.

3. Sonneborn & Co. *v.* Southern R., 65 S. C. 502, 44 S. E. 77.

4. *Arkansas.* — St. Louis, etc. R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760.

Maryland. — Mt. Vernon Brew. Co. *v.* Teschner, 69 Atl. 702.

Michigan. — Kibler *v.* Caplis, 140 Mich. 28, 103 N. W. 531; Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119.

Nebraska. — Chicago, etc. R. Co. *v.* Todd, 74 Neb. 712, 105 N. W. 83.

North Carolina. — Moseley *v.* Johnson, 144 N. C. 257, 56 S. E. 922.

Texas. — Bullard *v.* Stewart (Tex. Civ. App.), 102 S. W. 174.

Editor's Conclusion concerning the effect of a decline in prices is not competent to show value. Kent *v.* Miltenberger, 15 Mo. App. 480.

5. St. Louis, etc. R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760.

Market Reports Sent by the Defendant to a third person and verified by testimony are competent to show the value of property quoted therein. Western Wool Com. Co. *v.* Hart (Tex.), 20 S. W. 131.

6. Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68; Texas Cent. R. Co. *v.* Fisher, 18 Tex. Civ. App. 78, 43 S. W. 584.

They are also admissible against the person who furnishes them for publication, (Henkle *v.* Smith, 21 Ill. 238), and to show the value of property the prices of which are quoted therein. Terry *v.* McNiel, 58 Barb. (N. Y.) 241.

7. Ballard *v.* Stewart (Tex. Civ. App.), 102 S. W. 174.

8. Vogt *v.* Cope, 66 Cal. 31, 4 Pac. 915 (sales of stocks); Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393; Meriwether *v.* Quincy, etc. R. Co., 128 Mo. App. 647, 107 S. W. 434; Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202.

9. Cliquot's Champagne, 3 Wall. (U. S.) 114, 140 (a price current furnished by the manufacturer of an article to a witness is admissible as evidence of the value of an article made by him); Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342; Harrison *v.* Glover, 72 N. Y. 451.

imported merchandise of uniform character.[10] They may be used to refresh the recollection of a witness experienced in such goods as are to be valued if authenticated by him as being recognized by dealers as containing the rule by which the prices of such goods are estimated.[11] In Illinois and Missouri price lists are not admissible unless shown to be correct.[12] The existence of a custom to sell property at a discount from the listed price may be shown.[13]

p. *Attachment Bond and Judgment.* — The recital of value in a forthcoming bond given in attachment proceedings is conclusive upon the sureties.[14] The judgment in the attachment suit is not evidence of the value of the property attached in a subsequent action by the attachment creditors on a bond given by the claimants.[15]

q. *Replevin Bond and Affidavit.* — The value put upon property replevied by the plaintiffs in their bond and affidavit is conclusive as to them in some states,[16] notwithstanding defendant's denial of the allegation concerning value, no testimony being offered to sustain it and the affidavit being in evidence.[17] In others the value given in the affidavit is but *prima facie* evidence.[18] The defendant is not concluded by such recital in the bond or writ of execution, the judgment being silent on the question of value.[19] The return

10. Whitney *v.* Thacher, 117 Mass. 523.

11. Morris *v.* Columbian Iron Wks. Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851.

12. Cook County *v.* Harms, 10 Ill. App. 24; Hoskins *v.* Missouri Pac. R. Co., 19 Mo. App. 315; Hess *v.* Missouri Pac. R. Co., 40 Mo. App. 202; Golson *v.* Ebert, 52 Mo. 260.

13. Sager *v.* Tupper, 38 Mich. 258.

14. Wollner *v.* Lehman, D. & Co., 85 Ala. 274, 4 So. 643.

15. Klippel *v.* Oppenstein, 8 Colo. App. 187, 45 Pac. 224; Bruck *v.* Feiner, 26 Misc. 724, 56 N. Y. Supp. 1025.

16. *England.* — Middleton *v.* Bryan, 3 Maule & S. 155.

United States. — Washington Ice Co. *v.* Webster, 125 U. S. 426, 444; Vulcan Iron-Wks. *v.* Cyclone Steam S.-Plow Co., 48 Fed. 652; Cyclone Steam Plow Co. *v.* Vulcan Iron Wks., 52 Fed. 920, 3 C. C. A. 352.

Colorado. — Sopris *v.* Lilley, 2 Colo. 496.

Indiana. — Wiseman *v.* Lynn, 39 Ind. 230; McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120.

Maine. — Tuck *v.* Moses, 58 Me. 461, 477; Thomas *v.* Spofford, 46 Me. 408; Miller *v.* Moses, 56 Me. 128, 141.

Minnesota. — Weyerhaeuser *v.* Foster, 60 Minn. 223, 61 N. W. 1129.

New Mexico. — Butts *v.* Woods, 4 N. M. 343, 16 Pac. 617.

Oregon. — Capital Lumb. Co. *v.* Learned, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

Rule Inapplicable where several chattels are replevied and the bond specifies only their aggregate value, some being returned and others not. Sopris *v.* Lilley, 2 Colo. 496.

17. Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344.

18. *Illinois.* — Farson *v.* Gilbert, 85 Ill. App. 364, 114 Ill. App. 17.

Massachusetts. — Parker *v.* Simonds, 8 Met. 205; Clapp *v.* Guild, 8 Mass. 153; Mattoon *v.* Pearce, 12 Mass. 406; Wright *v.* Quirk, 105 Mass. 44.

New Mexico. — Lamy *v.* Remuson, 2 N. M. 245.

Pennsylvania. — Gibbs *v.* Bartlett, 2 Watts & S. 29.

Texas. — Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282; McLeod Artesian W. Co. *v.* Craig (Tex. Civ. App.), 43 S. W. 934.

Wisconsin. — Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675.

19. Middleton *v.* Bryan, 3 Maule

and appraisal are not evidence against the replevin defendant.[20] If the value fixed in the claim bond is the *ex parte* act of the officer it is immaterial.[21] In a statutory proceeding for the trial of the right of property, if no question is made as to its value, the assessment of value made by the sheriff in order to determine the amount of the bond to be required of the claimant, may be taken as the actual value of the property;[22] but such estimate is not conclusive.[23]

r. *Verdict in Replevin.* — The verdict in a replevin suit as to the value of the property replevied is conclusive upon the sureties on the replevin bond.[24]

s. *Appraisements.* — **(1.) At Time of Levy.** — An appraisement of property made when levied on is some evidence of value,[25] at least as against the attaching officer who appointed the appraisers;[26] and so if made some time thereafter, no material change having occurred in the interim.[27]

(A.) Weight To Be Given. — It is not conclusive, neither is the sheriff's report of the sale.[28]

(B.) Not Competent Against Stranger. — Though an appraisement is provided for by law it is not proof of value as against one claiming ownership of the property.[29]

(2.) Ex Parte. — An appraisement made *ex parte* is not evidence in an action against a sheriff for making an insufficient levy if made by appraisers appointed under a statute designed to prevent a sacrifice of the property of debtors.[30]

(3.) By Unsworn Appraisers. — And is inadmissible if the appraisers were not sworn though embodied in the officer's return.[31]

(4.) Verified by Witnesses. — An appraisement of goods made pursuant to law and authenticated by the appraisers as witnesses is evidence of their value or cost.[32]

& S. (Eng.) 155; Washington Ice Co. *v.* Webster, 125 U. S. 426, 444; Vulcan Iron-Wks. *v.* Cyclone Steam S. Plow Co., 48 Fed. 652; Wiseman *v.* Lynn, 39 Ind. 250; Thomas *v.* Spofford, 46 Me. 408; Tuck *v.* Moses, 58 Me. 461, 477; Miller *v.* Moses, 56 Me. 128, 141.

20. Kafer *v.* Harlow, 5 Allen (Mass.) 348; Leighton *v.* Brown, 98 Mass. 515; Wright *v.* Quirk, 105 Mass. 44.

21. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

22. Wright *v.* Henderson, 12 Tex. 43.

23. Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282.

24. Washington Ice Co. *v.* Webster, 125 U. S. 426, 446.

25. Densmore *v.* Mathews, 58 Mich. 616, 26 N. W. 146.

26. Carson *v.* Golden, 36 Kan. 705, 14 Pac. 166.

27. Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630.

28. Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454.

29. Flannigan *v.* Althouse, 56 Iowa 513, 9 N. W. 381; Cassidy *v.* Elias, 90 Pa. St. 434 (under an exemption statute not evidence in replevin suit).

30. Lawson *v.* State, 10 Ark. 28, 36, 50 Am. Dec. 238.

31. Watkins *v.* Page, 2 Wis. 92.

32. Buckley *v.* United States, 4 How. (U. S.) 251 (fraudulent importation).

An Appraisement Used To Refresh the Recollection of two of the three appraisers who made it, on being confirmed by them, may be received as their testimony. Atherton *v.* Emerson (Mass.), 85 N. E. 530.

(5.) By Agreement. — An appraisement made by agreement is evidence of value as between the parties by whom it was made or who were privy to it,[33] though the proceedings were not conducted according to the formal rules governing the reception of evidence.[34]

(6.) Extra-Legal. — An extra-legal appraisement, not authorized or assented to and of which the parties had no knowledge, cannot be shown.[35]

(7.) In Probate. — In matters connected with the administration of estates the appraisement thereof in connection with the inventory duly filed is evidence tending to show the value of the property.[36] In some states the appraisement must be adopted by the personal representative, as in his petition for authority to sell personal property.[37] In others that is not essential if the appraisement has been approved by the court.[38] But an unapproved and unsigned appraisement is not admissible.[39] An appraisement is not evidence of value except in litigation connected with the estate,[40] and it has been held inadmissible against the distributees thereof.[41]

Weight Of. — An appraisement is not conclusive upon any person.[42]

t. *Insurance.* — **(1.) Sum Named in Policy.** — There is disagreement as to the competency of evidence showing the amount of insurance carried on property as expressed in the policy. Some courts hold such testimony competent in connection with other testimony showing the present condition of the property.[43] In Texas the

33. Brigham *v.* Evans, 113 Mass. 538; Sanborn *v.* Baker, 1 Allen (Mass.) 526; Leighton *v.* Brown, 98 Mass. 515; Wright *v.* Quirk, 105 Mass. 44.

34. DeGroot *v.* Fulton F. Ins. Co., 4 Robt. (N. Y. Super.) 504.

35. Pharr *v.* Bachelor, 3 Ala. 237; Atherton *v.* Emerson (Mass.), 85 N. E. 530; Kafer *v.* Harlow, 5 Allen (Mass.) 348; Adams *v.* Wheeler, 97 Mass. 67; Bradford *v.* Cunard S. S. Co., 147 Mass. 55, 16 N. E. 719; Brewster *v.* Wooster, 8 Misc. 29, 28 N. Y. Supp. 654 (unverified appraisement made by a stranger).

36. *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.

Missouri. — Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252 (*prima facie* evidence by virtue of statute).

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. — Stewart's Appeal, 110 Pa. St. 410, 6 Atl. 321; *In re* Semple's Estate, 189 Pa. St. 385, 42 Atl. 28.

37. Glover *v.* Hill, 85 Ala. 41, 4 So. 613.

38. Carrol *v.* Connet, 2 J. J. Marsh. (Ky.) 195; Rogers' Admx. *v.* Chandler, 3 Munf. (Va.) 65.

39. Carr's Exr. *v.* Anderson, 2 Hen. & M. (Va.) 361.

40. Morrison *v.* Burlington, etc. R. Co., 84 Iowa 663, 51 N. W. 75.

41. Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

42. Dean's Succession, 33 La. Ann. 867; Weed *v.* Lermond, 33 Me. 492; Reese's Appeal, 116 Pa. St. 272, 9 Atl. 315.

43. Mutual Safety Ins. Co. *v.* Cargo, Olcott 89, 17 Fed. Cas. No. 9,981; Tobias *v.* Treist, 103 Ala. 664, 15 So. 914; Winn *v.* Columbian Ins. Co., 12 Pick. (Mass.) 279.

Expired Policies of Insurance on the stock of goods burned are admissible to aid in estimating the

other view is held,[44] and such is apparently the rule where the policy provides that the value of the property shall be fixed as of the time of the loss and its value is not shown to have remained unchanged.[45] The sum named in a policy covering the property of another is not evidence of its value in favor of the party who procured the policy in the absence of the owner.[46] Where a valued policy statute applies to personal property the sum insured is conclusive evidence of its value, subject to proof of depreciation in value or quantity.[47]

(2.) Proofs of Loss. — Proofs of loss supplied pursuant to a policy of insurance are not admissible to show the value of the insured property.[48]

u. *Assessed Value.* — **(1.) Affirmative View.** — If the owner of property has appeared before the authorities and asked for a reduction of the assessment upon it, stating that it was more than its cost or worth, and the sum paid for it, the reduced assessment is evidence as to the value of the property.[49] An assessment list expressing that the affiant has valued the property specified therein at its true cash value to the best of his knowledge and judgment is competent to show the value of any such property unless remoteness of time shall render it valueless.[50] An assessor may testify that the owner listed property at a lower valuation than he claimed it to be worth.[51]

(2.) Negative View. — Records showing the assessed value of chattels for a series of years are not evidence of their value.[52] A

value thereof, where the policy in suit was issued with knowledge of the value placed on the goods by said policies. Their usefulness consisted in the aid they gave as to the value of the stock at the date of the execution of the current policy, and supplemented testimony showing that the quantity and value of the goods remained unchanged up to the time of the fire. Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121.

44. Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454.

45. Linde *v.* Republic F. Ins. Co., 18 Jones & S. (N. Y. Super.) 362; German Ins. Co. *v.* Everett (Tex. Civ. App.), 36 S. W. 125.

46. Campbell *v.* Campbell, 22 Jones & S. (N. Y. Super.) 381.

47. Gragg *v.* Northwestern Nat. Ins. Co. (Mo. App.), 111 S. W. 1184. See article "Insurance," Vol. VII, pp. 496, 555.

48. Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62, 72; Summers *v.* Home Ins. Co., 53 Mo. App. 521; Hiles *v.* Hanover F. Ins. Co., 65 Wis. 585, 27 N. W. 348, 56 Am. Rep. 637. See article "Insurance," Vol. VII, pp. 496, 573.

49. Gossage *v.* Philadelphia, etc. R. Co., 101 Md. 698, 61 Atl. 692.

50. Southern R. Co. *v.* Tharp, 104 Ga. 560, 30 S. E. 795 (last original return specifying sum for which property was to be assessed); Tolleson *v.* Posey, 32 Ga. 372 (such a return is admissible to show liability for exemplary damages); Indiana Union Tract. Co. *v.* Benadum (Ind. App.), 83 N. E. 261; Curme, D. & Co. *v.* Rauh, 100 Ind. 247. The apparently contradictory rulings in Indiana are owing to changes in the statutes.

In Lewis *v.* Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44, the reason for the distinction made under some statutes concerning assessments of personalty and realty as evidence of value is pointed out. See Encyc. of Ev. 1908 Supp., p. 51, 363-18.

51. Dobson *v.* Southern R. Co., 132 N. C. 900, 44 S. E. 593.

52. Carper *v.* Risdon, 19 Colo. App. 530, 76 Pac. 744. But the supreme court seems to have ruled

list verified only as being a correct enumeration of affiant's personal property is not competent to show the value of anything enumerated in it otherwise than for assessment purposes.[53]

v. *Cost of Repairs.* — The cases are not in accord concerning the competency of evidence showing the cost of repairs upon a chattel as bearing upon its value.[54]

2. Elements of Value. — A. Generally. — As an aid to the establishment of the market value of property, if it has such value, or its intrinsic worth in the absence of a market, its quality may be shown.[55]

B. Rule Applicable to Animals. — a. *Generally.* — The record of an animal as a winner of prizes is as material as its physical excellence.[56] The kind of work a horse can do is material,[57] as is his disposition.[58] The value of a brood mare may be shown by the number and value of her foals.[59] It may also be shown that she

otherwise in a case involving the rights of persons to share in the profits of an enterprise. Beckwith *v.* Talbot, 2 Colo. 639.

53. Cincinnati, etc. R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571; German Mut. Ins. Co. *v.* Niewedde, 11 Ind. App. 624, 39 N. E. 534. See Cincinnati, etc. R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571; Swaim *v.* Swaim, 134 Ind. 596, 33 N. E. 792.

54. Hausman *v.* Mulheran, 68 Minn. 48, 70 N. W. 866 (the fair and reasonable cost of repairs is some evidence of value. *Contra,* Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 32 Atl. 896, 13 L. R. A. 431.

55. Jacksonville, etc. R. Co. *v.* Peninsular Land, T. & M. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Lachner Bros. *v.* Adams Exp. Co., 72 Mo. App. 13; Oregon Pottery Co. *v.* Kern, 30 Or. 328, 47 Pac. 917; St. Louis, etc. R. Co. *v.* Pickens, 3 Willson Civ. Cas. (Tex.) § 398; Gulf, etc. R. Co. *v.* Dunman (Tex. App.), 16 S. W. 421; Jaquith Co. *v.* Shumway's Estate, 80 Vt. 556, 69 Atl. 157; Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675.

Tests of the Quality of Property may be proved though made without notice to one of the parties concerned and not within a reasonable time. These facts affect only the weight of the evidence. Crane Co. *v.* Columbus Const. Co., 73 Fed. 984, 20 C. C. A. 233.

Property of Different Grades. — If property possesses several qualities of established market value and there is a dispute about the quality of that in question, it is competent to prove the market price of any of the qualities which the jury may find it to be, and leave it to them to apply the evidence. Moak *v.* Bourne, 13 Wis. 514.

Photograph. — A photograph of furniture is not calculated to inform the jury of the essential elements of its value. Foss *v.* Smith, 79 Vt. 434, 65 Atl. 553.

Circumstantial Evidence. — The value of rare seed being in issue, it was competent to show the price agreed to be paid for that lost, the price paid for seed to replace it, the fact that plaintiff and his witness agreed to fix the price of their seed at a stated sum, the price at which it sold in previous years, and the quality of the seed in question. Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030.

56. Council *v.* St. Louis, etc. R. Co., 123 Mo. App. 432, 100 S. W. 57.

It cannot be assumed that the animal in question is an ordinary one. Thorn *v.* Couchman, 28 How. Pr. (N. Y.) 95.

57. Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465.

58. Whiteley *v.* China, 61 Me. 199.

59. Campbell *v.* Iowa Cent. R. Co., 124 Iowa 248, 99 N. W. 1061.

was in foal when injured.[60] The general reputation of an animal cannot be proved.[61]

b. *Dogs.* — There is no presumption as to the value of dogs.[62] In the absence of proof of market value for a dog, evidence of his special or pecuniary value to his owner, to be ascertained by reference to his usefulness and services, is competent; and so of proof of his pedigree, characteristics and qualities.[63]

c. *Pedigrees.* — The pedigrees of animals are elements of their value,[64] and may be established after proof of identity has been made.[65] They may be shown by books kept for that purpose,[66] and, according to some cases, by proof of general reputation.[67]

C. Use by Wrongdoer. — The use to which converted property has been put by the wrongdoer may be proved.[68]

60. Texas & P. R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603.

61. Cincinnati, etc. R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113 (whether it was "rattle headed," or disposed to break when racing must be shown by its performances).

62. Mobile & O. R. Co. *v.* Holliday, 79 Miss. 294, 30 So. 820.

63. *Georgia.* — Columbus R. Co. *v.* Woolfolk, 128 Ga. 631, 58 S. E. 152, 10 L. R. A. (N. S.) 1136.

Illinois. — Spray *v.* Ammerman, 66 Ill. 309.

Michigan. — Ellis *v.* Simpkins, 81 Mich. 1, 45 N. W. 646.

Mississippi. — Hodges *v.* Causey, 77 Miss. 353, 26 So. 945, 78 Am. St. Rep. 525, 48 L. R. A. 95.

Missouri. — Hamilton *v.* Wabash, etc. R. Co., 21 Mo. App. 152.

New York. — Dunlap *v.* Snyder, 17 Barb. 561.

Tennessee. — Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

Texas. — Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272.

64. Columbus R. Co. *v.* Woolfolk, 128 Ga. 631, 58 S. E. 152, 10 L. R. A. (N. S.) 1136; Ohio & M. R. Co. *v.* Stribling, 38 Ill. App. 17; Pittsburg, etc. R. Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732; Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518; Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898; Texas & P. R. Co. *v.* Slator (Tex. Civ. App.), 102 S. W. 156.

The Qualities of the Sire and Dam of an animal may be shown; but such proof does not establish its value. Richmond & D. R. Co. *v.* Chandler (Miss.), 13 So. 267.

Evidence of the Speed Records of Horses Related to the Horse in Question as shown in the reports of an association which are accepted and acted upon by the owners of such horses is competent; but testimony based upon such reports is inadmissible. Pittsburg, etc. R. Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

65. Wallace *v.* Syracuse Rapid-Transit R. Co., 42 App. Div. 536, 59 N. Y. Supp. 651.

66. Warrick *v.* Reinhardt, 136 Iowa 27, 111 N. W. 983; Louisville & N. R. Co. *v.* Kice, 109 Ky. 786, 22 Ky. L. Rep. 1462, 60 S. W. 705; Ellis *v.* Simpkins, 81 Mich. 1, 45 N. W. 646; Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518; Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898. See article "Pedigree," Vol. IX, p. 748.

67. Jones *v.* Memphis & A. C. Packet Co. (Miss.), 31 So. 201; Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

68. Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 626, 21 So. 748.

D. Demand. — The existence of a demand for damaged property and the use to which it can be put is relevant.[69]

E. Rental Value. — a. *Generally.* — The income derived from property is a material circumstance as related to its value.[70] Special circumstances giving rise to an unusual demand for property detained, being within the knowledge of both parties, may be shown.[71]

b. *Patented Invention.* — The test of the value of the use of a patented invention for which a part of the profits derived therefrom in the manufacture of a product which was open to the public by the use of other means was to be paid is the net result of the total sales of all the product, and not the advantages gained in excess of what would have been derived from the use of other means.[72]

F. Comparison of Properties. — a. *Not Favored.* — In the absence of necessity therefor, it is error to prove the value of the property in question by comparing it with other property and proving the value of the latter,[73] unless it is proposed to show their relative values.[74] But such testimony has been accepted in preference to adopting the presumption of highest market value against the wrongdoer.[75]

b. *Results Produced by Like Machine.* — The value of a machine cannot be shown by evidence of the work of other like machines of the same manufacturer.[76]

G. Non-Marketable Property. — a. *General Statement.* — The value of non-marketable property may be shown by evidence of its cost, manner of use, general condition and quality and degree of

69. Cleland *v.* Thornton, 43 Cal. 437; Spink *v.* New York, etc. R. Co., 26 R. I. 115, 58 Atl. 499 (the value of growing timber may be shown by testimony of the value of the wood it would have made if put to its best use; it tended to show the distinction between wood, as cord wood, and that suitable for use as piles, ties, etc.).

70. Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 474, 36 J. L. 537, 38 N. J. L. 39, 580 (ferry).

71. Hill *v.* Wilson, 8 N. D. 309, 79 N. W. 150.

In the Absence of a Market Rental Value, the value of the use of property may be shown by circumstantial evidence—as by proof that conditions were favorable to its use and the extent to which it could have been used. Gulf, C. & S. F. R. Co. *v.* Maetze, 2 Wil. Civ. Cas. (Tex.) § 631.

72. Curry *v.* Chas. Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425 (in estimating the value of the material furnished for the manufacture of the product, the defendant being engaged in dealing therein as an independent business, and not sustaining any fiduciary relation to the plaintiff, may charge the latter with the fair market value of it, rather than the cost price).

73. Atchison & N. R. Co. *v.* Harper, 19 Kan. 529; Blanchard *v.* New Jersey Steamboat Co., 59 N. Y. 292, 300; Gouge *v.* Roberts, 53 N. Y. 619.

The Value of a Flock of Sheep cannot be proven by testimony showing that it compares favorably with the best flocks in the country in respect to the amount of wool it produces per head. Melvin *v.* Bullard, 35 Vt. 268.

74. Denver Onyx & Marble Mfg. Co. *v.* Reynolds, 72 Fed. 464, 18 C. C. A. 638.

75. Berney *v.* Dinsmore, 141 Mass. 42, 5 N. E. 273, 55 Am. Rep. 445. See Armory *v.* Delamirie, 1 Str. (Eng.) 505.

76. Craver *v.* Hornburg, 26 Kan.

depreciation from use or otherwise,[77] and by any other facts which would naturally affect the minds of parties desiring to buy and sell.[78]

b. *Value to Owner.* — The value of such property to the owner may be shown — not any fanciful price he may put upon it, nor the price for which he could sell it, but his money loss if deprived of it.[79]

c. *Evidence of Value Inadmissible.* — In an Illinois case in which it was sought to recover for lost baggage, it was held that proof of the articles lost might be made, but not of their value.[80] This view does not prevail elsewhere.[81] There are, however, other cases which hold that testimony to value is not essential if the property is described to,[82] or if it is produced in court and examined by, the jury.[83]

d. *Duty To Lessen Damage.* — It may be shown that reasonable care and expense may mitigate the injury done and add to the value of the property, and the expense so doing will entail.[84]

e. *Irrelevant Matters.* — The condition, circumstances and purposes of the owner are immaterial to his right to recover the value of his property.[85] General testimony as to the per cent. of depreciation in value is incompetent.[86]

3. Particular Kinds of Property. — A. Foreign Currency. — a. *How Value Shown.* — The value of foreign currency depends upon

94; Haynie *v.* Plano Mfg. Co. (Tex. Civ. App.), 82 S. W. 532.

77. Jacksonville, etc. R. Co. *v.* Peninsular Land, T. & M. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Lachner Bros. *v.* Adams Exp. Co., 72 Mo. App. 13.

78. St. Louis, etc. R. Co. *v.* Pickens, 3 Willson Civ. Cas. (Tex.) § 308; Gulf, etc. R. Co. *v.* Dunman (Tex. App.), 16 S. W. 421.

It may be shown by proof of the value of that contracted for, of the time it ought to last, the service it ought to render and of the use and endurance of that which was delivered in lieu of that which should have been delivered. Gutta Percha & R. Mfg. Co. *v.* Cleburne (Tex.), 112 S. W. 1047.

79. State *ex rel.* Fissette *v.* Sullivan, 99 Mo. App. 616, 74 S. W. 417; Spooner *v.* Hannibal & St. J. R. Co., 23 Mo. App. 403 (the owner of a silk quilt, family pictures and like property having no market value may testify of their value to himself); International & G. N. R. Co. *v.* Nicholson, 61 Tex. 550.

80. Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749. "By a description of the articles any dealer in such articles can establish their value so that there is no necessity for the evidence of the owner on that point. There is other evidence in every town and city in the state quite accessible to the party; and the jurors themselves, when the property is described, may have a proper measure of damages in their own knowledge of values."

81. Seyfarth *v.* St. Louis & I. M. R. Co., 52 Mo. 449; Battle *v.* Columbia, etc. R. Co., 70 S. C. 329, 49 S. E. 849 (after testimony showing the contents of a lost trunk, the passenger's husband may testify to their value).

82. Craig *v.* Durrett, 1 J. J. Marsh. (Ky.) 365; Louisville & N. R. Co. *v.* Mason, 11 Lea (Tenn.) 116.

83. State *v.* Peach, 70 Vt. 283, 40 Atl. 732.

84. Aultman Co. *v.* Ferguson, 8 S. D. 458, 66 N. W. 1081 (on cross-examination of expert); Houston & T. C. R. Co. *v.* Williams (Tex. Civ. App.), 31 S. W. 556.

85. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

86. International & G. N. R. Co. *v.* Nicholson, 61 Tex. 550.

commercial usage and may be shown by a witness acquainted with that usage.[87] It cannot be proved by newspaper reports.[88]

b. *Law of the Forum.* — The value of foreign money shipped by a carrier is to be estimated in the currency of the country in which the port of delivery is situated and where suit is brought.[89]

B. Foreign Bonds. — In equity the sale of a portion of the foreign currency bonds in question at par does not show that their market and face values are equal. They are to be valued by such sum as they would represent when converted into gold bonds.[90]

C. Depreciated Currency. — On the issue as to the value of land in good money and the value of confederate money, it is competent to prove the price of corn and other articles of produce at the time the land was sold, as tending to show the then value of confederate money.[91] The price offered in gold for property cannot be proved to show the value in greenbacks unless their relative value with gold is shown.[92]

D. Life Insurance Policy. — The equitable value of a life insurance policy, one-half the premium on which was payable in notes, is not to be fixed by insurer's custom, but by proof of the sum due on the notes, less dividends due, and by deducting such sum from the cash payments made. As against an insurer who converts a policy after it has become liable thereon, its value will equal the sum due upon it according to its face.[93]

E. Promissory Notes. — The inquiry should be as to the solvency of the maker and his ability to pay; questions as to the value of the note should not be put.[94] Neglect or refusal to pay a note is material because it tends to show inability to pay.[95] The nature of the defense to an action is relevant.[96] The summons and pleadings in another action upon the note are competent in favor of the defendant, to sustain his contention that the note is worthless.[97] Evidence concerning the value of a note four years before the issue was made is too remote.[98]

F. Stocks. — a. *Existence of Market Value.* — The fact that

87. Kermott *v.* Ayer, 11 Mich. 181; Comstock *v.* Smith, 20 Mich. 338; Ward *v.* Tucker, 7 Wash. 399, 35 Pac. 126, 1086.

88. Schmidt *v.* Herfurth, 5 Robt. (N. Y. Super.) 124, 145.

89. The Patrick Henry, 1 Ben. 292, 18 Fed. Cas. No. 10,805.

90. Hebblethwaite *v.* Flint, 115 App. Div. 597, 101 N. Y. Supp. 43.

91. Johnson *v.* Gray, 49 Ga. 423.

92. Peterson *v.* Gresham, 25 Ark. 380.

93. Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303. See Kohne *v.* Insurance Co., 1 Wash. C. C. 93, 14 Fed. Cas. No. 7,920.

94. McPeters *v.* Phillips, 46 Ala. 496; Zeigler *v.* Wells, F. & Co., 23 Cal. 179, 83 Am. Dec. 87; Latham *v.* Brown, 16 Iowa 118; Potter *v.* Merchants' Bank, 28 N. Y. 641, 655, 86 Am. Dec. 273; Atkinson *v.* Rochester Prtg. Co., 43 Hun (N. Y.) 167; Cothran *v.* Hanover Nat. Bank, 8 Jones & S. (N. Y. Super.) 401; Anderson *v.* First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

95. Booth *v.* Powers, 56 N. Y. 22.

96. Anderson *v.* First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

97. Atkinson *v.* Rochester Prtg. Co., 43 Hun (N. Y.) 167.

98. Stearns *v.* Johnson, 17 Minn. 142.

stocks have been offered for sale must be established before it can be shown that they are without market value.[99]

(1.) What Markets May Be Inquired About. — The value of stocks guaranteed to be worth a stated sum at a given time is not to be fixed by the demand or value in the home market, but by their value in the usual markets for such stocks in any state or in foreign markets, if in the course of dealing the latter were resorted to for the sale of such stocks by speculators.[1]

(2.) Time for Inquiry. — Unless the condition of the corporation which issued stocks is shown at the times their value is inquired about the inquiry must be confined to a time not remote from the origin of the cause of action.[2]

b. *Opinions.* — In the absence of any possible evidence of market value, opinions as to value are competent.[3]

c. *Intrinsic Worth. — How Shown.* — **(1.) Generally.** — In the absence of proof as to market value the intrinsic worth of stocks is to be fixed by the net value of the assets of the corporation.[4] The value of the assets of an insolvent corporation may be established by proof of the sum realized at auction sales made under judicial orders, as shown by the report of the receiver.[5] The returns made by the officers of a corporation to the state authorities pursuant to law and duly verified are competent, but not conclusive, evidence of the value of the capital stock of the corporation. Each of such returns is independent of the others, and any of them are admissible.[6]

99. Doran *v.* Eaton, 40 Minn. 35, 41 N. W. 244.

1. Henegar *v.* Isabella Copper Co., 1 Coldw. (Tenn.) 241.

2. Jones *v.* Ellis, 68 Vt. 544, 35 Atl. 488 (four years' after too remote); McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753 (two years before sale too remote); Noonan *v.* Ilsley, 22 Wis. 27 (transactions had about the time in question, whether prior or subsequent, may be shown).

3. Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425; Aldrich *v.* Bay State Const. Co., 186 Mass. 489, 72 N. E. 53 (the treasurer of the corporation which issued stock and who is also the president of another corporation which owns shares may give his opinion as to its value); Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

4. *United States.* — Crichfield *v.* Julia, 147 Fed. 65, 77 C. C. A. 297; Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425.

Arkansas. — McDonough *v.* Williams, 112 S. W. 164.

Illinois. — McDonald *v.* Danahy, 196 Ill. 133, 63 N. E. 648, 96 Ill. App. 380.

Massachusetts. — Murray *v.* Stanton, 99 Mass. 345.

Minnesota. — Redding *v.* Godwin, 44 Minn. 355, 48 N. W. 563.

Missouri. — Hewitt *v.* Steele, 118 Mo. 463, 475, 24 S. W. 440; Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

New York. — Industrial & G. Tr. *v.* Tod, 180 N. Y. 215, 232, 73 N. E. 7; Butler *v.* Wright, 103 App. Div. 463, 93 N. Y. Supp. 113.

Washington. — Collins *v.* Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

Evidence as to the Value of the Stock of a Water Company in connection with a ranch is inadmissible. Bowker *v.* Goodwin, 7 Nev. 135.

5. Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425.

6. West Chester & W. Plank Road Co. *v.* Chester County, 182 Pa.

(2.) **Earning Capacity.** — The dividend earning capacity is material,[7] but only in so far as it existed when the rights of the parties became fixed.[8] It cannot be shown by what it might have been under other circumstances.[9]

(3.) **Nature of Business.** — The nature of the corporate business, the contracts made in relation thereto and the corporate income are relevant, as are related matters.[10]

d. *Value of Stocks.* — (1.) **Sales.** — In the absence of a market for stocks proof may be made of the price paid for them in a bona fide transaction;[11] but it is otherwise as to the price paid for exceptional reasons or at a remote period, though the latter objection is not forceful if there has been but little variation in the dividends paid.[12] Contracts for options may also be shown.[13]

(2.) **Reputation.** — If the value of mining stocks and the dividends

St. 40, 37 Atl. 905; Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 22 Atl. 896, 13 L. R. A. 431.

Entries in Corporate Books are not admissible to contradict a witness as to the value of stock if he did not make them or they do not bind him. Lemly *v.* Ellis, 143 N. C. 200, 212, 55 S. E. 629.

7. Trust & Sav. Co. *v.* Home Lumb. Co., 118 Mo. 447, 24 S. W. 129; Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252; Butler *v.* Wright, 103 App. Div. 463, 93 N. Y. Supp. 113.

8. Lemly *v.* Ellis, 143 N. C. 200, 214, 55 S. E. 629.

9. Fitz *v.* Bynum, 55 Cal. 459.

10. Butler *v.* Wright, 103 App. Div. 463, 93 N. Y. Supp. 113.

Scope of Testimony. — In addition to proof of the value of the corporate property and assets and the dividends paid, it is competent to show the character and permanency of the business, the control of the stock, the management, the markets for the articles produced by a manufacturing concern and any other facts calculated to show value. Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

11. Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94; Continental Divide Min. Inv. Co. *v.* Bliley, 23 Colo. 160, 46 Pac. 633 (their value is well proved by the books of stockbrokers in the place nearest the concern, showing the sales made by them during the month in which the conversion took place); B. L. Blair Co. *v.* Rose, 26 Ind. App. 487, 60 N. E. 10 (sale of fifteen shares some time before the conversion, sufficient evidence); Newsome *v.* Davis, 133 Mass. 343 (evidence of the price at which one hundred shares without known or uniform price, and which was not salable at any price sometimes, sold the day after that which fixed the rights of the parties, and of the sale of fifty shares thereof three days thereafter, held competent); Humphreys *v.* Minnesota Clay Co., 94 Minn. 469, 103 N. W. 338; Harrow *v.* St. Paul & D. R. Co., 43 Minn. 71, 44 N. W. 881; State *ex rel.* Wann *v.* Dickson (Mo.), 111 S. W. 817 (individual sales).

Newspaper Articles are inadmissible to show the value of stocks. State *ex rel.* Wann *v.* Dickson (Mo.), 111 S. W. 817.

12. Fitz *v.* Bynum, 55 Cal. 459 (deals made for the purpose of giving stocks an apparent market value); Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252 (sale of single share carrying the controlling interest in the corporation, and sales of eight shares two years after the issue arose); State *ex rel.* Wann *v.* Dickson (Mo.), 111 S. W. 817.

Fictitious Value. — It is irrelevant to show that stocks sometimes have a fictitious value in the market unless that is shown to be true of those in question. Commercial & S. Bank *v.* Pott, 150 Cal. 358, 89 Pac. 431.

13. Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94.

paid thereon have been shown, evidence as to the reputation of the mine or of other local mines is immaterial;[14] and so of the salaries paid employes.[15]

(3.) Price at Which Offered. — The price arbitrarily put upon stock by the issuing corporation is not evidence of its value.[16]

G. Bonds of Private Corporation. — a. *Elements of Value.* The value of the bonds of a private corporation which are without market value is to be ascertained by proof of such elements of value as can be shown,[17] as by showing the value of the property which secures them.[18] Bonds do not furnish any legal inference as to their market value.[19]

b. *Probable Value of Unissued.* — The probable value of unissued railroad bonds may be shown by evidence of the financial condition of the company which was to issue them, the length, location, outlet and probable connections of the road, the character of the country through which it ran, the competition it would meet and other such like facts. Expert opinions are admissible to show such value. But evidence of the value they might have had if issued by another company whose obligation would have given them an added element of value is inadmissible though the security would have been the same.[20]

H. Contracts. — a. *Contract for Exclusive Agency.* — The value of a contract for an exclusive agency for the sale of property may be shown by evidence of the capacity of the agent, the profit to be made on the sale of each article, the number of sales made during the existence of the agency, the prospects for making other sales and the sales made by the defendant in the territory included in the contract after the breach thereof.[21]

14. Arnold *v.* Harris, 142 Mich. 275, 105 N. W. 744.

15. McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

16. Fitz *v.* Bynum, 55 Cal. 459.

17. Henry *v.* North American R. Const. Co., 158 Fed. 79, 85 C. C. A. 409.

18. Murray *v.* Stanton, 99 Mass. 345.

Their Purchasing Power has been regarded as the measure of their value when bought at a large discount with knowledge of the lack of authority to sell them and they have been used at their face value to buy the property of the insolvent corporation which issued them. Collins *v.* Smith, 158 Fed. 872.

19. Mayor *v.* Norman, 4 Md. 352.

Sufficiency of Evidence. — The value of second mortgage bonds on unimproved real estate, the first mortgage being past due and other prior liens existing, is not established by proof of the value of the land over above the amount of the liens, nor by assuming that value could be given the land by a rebonding scheme or by an assessment upon the stockholders to remove the prior indebtedness. Minneapolis Tr. Co. *v.* Menage, 81 Minn. 186, 83 N. W. 481.

Remoteness of Sale. — The price at which bonds were sold at a single transaction in San Francisco in August was too remote to prove the value of like bonds in New York in the following December, though no other proof of market value was available. Stein *v.* Hartshorne, 123 App. Div. 467, 108 N. Y. Supp. 323.

20. Houston & T. C. R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291.

21. Wakeman *v.* Wheeler & W. Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; Reed *v.* Mc-

b. *To Form Partnership.* — Evidence of the profits made by a firm is competent to show the value of the partnership contract.[22]

c. *For Support.* — The net value of the property on which a contract for support and clothing rests may be shown to prove the value of the contract. Opinions are also admissible.[23]

I. JUDGMENTS. — The value of a judgment is dependent upon the financial condition of the debtor.[24]

J. VALUE OF A BUSINESS. — The daily receipts and expenses of a business for two weeks before it was broken up may be shown as evidence of its value.[25] It is competent to show the number of patrons.[26]

K. VALUE OF INCUMBRANCE. — The value of an extinguished outstanding title or incumbrance cannot exceed the sum fairly and necessarily paid to remove it. It is competent to show that it was not worth so much or that it could have been procured for less than was paid.[27]

L. VALUE OF CREDIT. — The value of credit may be established by proof of the plaintiff's business capacity, the standing of his credit when the injury was done, his liabilities, capital and the profits made in his business. He cannot testify as to the value of his credit;[28] nor can the value of the credit given by a surety's indorsement be shown by opinions.[29]

M. GOODWILL. — All the elements giving value to the goodwill of a business may be shown.[30]

Connell, 101 N. Y. 270, 4 N. E. 718; Bannatyne *v.* Florence M. & M. Co., 77 Hun 289, 28 N. Y. Supp. 334; Crittenden *v.* Johnston, 7 App. Div. 258, 40 N. Y. Supp. 87; More *v.* Knox, 52 App. Div. 145, 64 N. Y. Supp. 1101. See Parker *v.* McKannon Bros. & Co., 76 Vt. 96, 56 Atl. 536; Wells *v.* National L. Assn., 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33; Hitchcock *v.* Supreme Tent, 100 Mich. 40, 58 N. W. 640, 43 Am. St. Rep. 423; Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592.

22. Bagley *v.* Smith, 10 N. Y. 489, 61 Am. Dec. 756.

23. Borst *v.* Crommie, 19 Hun (N. Y.) 209.

24. Dalby *v.* Lauritzen, 98 Minn. 75, 107 N. W. 826.

It may be shown that a debtor insolvent when judgment against him was wrongfully satisfied subsequently became solvent. Rivinus *v.* Langford, 75 Fed. 959, 21 C. C. A. 581, 33 L. R. A. 250.

25. Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137; Boyer *v.* Little Falls, 5 App. Div. 1, 38 N. Y. Supp. 1114.

26. Boyer *v.* Little Falls, 5 App. Div. 1, 38 N. Y. Supp. 1114.

27. Anderson *v.* Knox, 20 Ala. 156; Pate *v.* Mitchell, 23 Ark. 590, 69 Am. Dec. 114.

28. Kauffman *v.* Babcock (Tex.), 2 S. W. 878; Hernsheim *v.* Babcock (Tex.), 2 S. W. 880.

29. Perrine *v.* Hotchkiss, 58 Barb. (N. Y.) 77.

30. Kirkman *v.* Kirkman, 26 App. Div. 395, 49 N. Y. Supp. 683.

Relevant Facts. — The premium paid for the lease of premises, the lease being silent as to the goodwill of the business conducted thereon, is not conclusive as to the value of the latter as between the lessor and a former tenant who had agreed for the payment and receipt of such sum as should be procured for the goodwill. Its value was to be arrived at by considering all the circumstances calculated to establish it under the usual conditions as testified to by witnesses accustomed to valuing goodwill, including the gen-

N. Immature Crops. — a. *Rental Value of Land.* — The value of immature growing crops may be shown by proof, among other things, of the rental value of the land on which they were planted.[31]

b. *Capacity of Land.* — It is competent to show the kinds of crops the land in question was capable of producing, the kinds destroyed and the average yield per acre of each kind,[32] and those actually raised in previous years.[33]

c. *Capacity of Like Land.* — The general rule is that it is also competent to show the average yield per acre on similar local lands cultivated in like manner,[34] and the average market price paid therefor.[35] It is otherwise in South Carolina.[36]

d. *Lessened Value of Farm.* — In Minnesota the lessened value of the farm in consequence of the destruction of the crop may be shown, as may the fact that another crop could be raised on the land and its probable value.[37]

eral improvement in the locality where the premises were situated. Llewellyn *v.* Rutherford, L. R. 10 C. P. (Eng.) 456, 44 L. J. C. P. 281, 32 L. T. 610.

Expert Opinions. — In New York expert opinions are not competent to show the value of the goodwill of a manufacturing business. Kirkman *v.* Kirkman, 26 App. Div. 395, 49 N. Y. Supp. 683. In Massachusetts the value of the goodwill connected with a milk route may be so shown. Page *v.* Cole, 120 Mass. 37.

31. Chicago, etc. R. Co. *v.* Schaffer, 26 Ill. App. 280; Horres *v.* Berkeley Chemical Co., 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36.

The Rental Paid by a Stranger is not relevant to the value of destroyed grass. International & G. N. R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

32. Lester *v.* Highland Boy Gold Min. Co., 27 Utah 470, 76 Pac. 341, 101 Am. St. Rep. 988, *approved* in Teller *v.* Bay & River Dredg. Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, and in Dennis *v.* Crocker-H. L. & W. Co., 6 Cal. App. 58, 91 Pac. 425.

33. Railway Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Hosmer *v.* Warner, 15 Gray (Mass.) 46.

The Yield Obtained From Land several years before the crop in question was destroyed may be proved; the lapse of time affects the weight rather than the competency of such evidence, which has a special bearing upon the value of the land for producing a crop of the kind destroyed and to which such evidence related. Dennis *v.* Crocker-H. L. & W. Co., 6 Cal. App. 58, 91 Pac. 425.

34. St. Joseph & G. I. R. Co. *v.* McCarty (Neb.), 92 N. W. 750 (in the fall following the loss); Ward *v.* Chicago, etc. R. Co., 61 Minn. 449, 63 N. W. 1104; Burnett *v.* Great Northern R. Co., 76 Minn. 461, 79 N. W. 523; Gulf, etc. R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336; International & G. N. R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526; Galveston, etc. R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011; Lester *v.* Highland Boy Gold Min. Co., 27 Utah 470, 76 Pac. 341, 101 Am. St. Rep. 988.

35. Ward *v.* Chicago, etc. R. Co., 61 Minn. 449, 63 N. W. 1104; Burnett *v.* Great Northern R. Co., 76 Minn. 461, 79 N. W. 523.

The Value of Part of a Burned Meadow cannot be shown by a comparison with the condition of the unburned part at a later time unless it is proved that the condition of the former was essentially the same at the time testified of as when burned. Swanson *v.* Keokuk & W. R. Co., 116 Iowa 304, 89 N. W. 1088.

36. Horres *v.* Berkeley Chem. Co., 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36.

37. Ward *v.* Chicago, etc. R. Co., 61 Minn. 449, 63 N. W. 1104; Bur-

e. *Condition and Probable Value.* — The condition of the crops before they were destroyed and their market value when they should have matured or within a reasonable time after their destruction are relevant matters.[38]

f. *Expenditures.* — The cost of the seed and fertilizer used and the value of the labor expended in the cultivation of the destroyed crops may be shown in some states;[39] though it has been held that such facts do not tend to show value.[40]

g. *Future Expenditures.* — Where the cost of bringing a crop forward to the time of the destruction may be shown, it is also necessary to show the expenditure required to harvest and market it if it had matured,[41] with, in addition, estimates and allowances for the attendant contingencies.[42]

h. *Subsequent Conditions.* — Evidence of conditions existing at a time subsequent to the wrong as the result of causes over which neither party had any control is not admissible.[43]

O. FRANCHISES. — a. *Cost.* — The price paid for a wharf franchise, though not conclusive on third parties, may be shown.[44]

b. *Income.* — The revenues derived from a toll bridge or ferry,

nett *v.* Great Northern R. Co., 76 Minn. 461, 76 N. W. 523.

38. *California.* — Dennis *v.* Crocker-H. L. & W. Co., 6 Cal. App. 58, 91 Pac. 425.

Illinois. — Chicago, etc. R. Co. *v.* Schaffer, 26 Ill. App. 280.

Minnesota. — Ward *v.* Chicago, etc. R. Co., 61 Minn. 449, 63 N. W. 1104; Burnett *v.* Great Northern R. Co., 76 Minn. 461, 76 N. W. 523.

Texas. — Ft. Worth & R. G. R. Co. *v.* Brown (Tex. Civ. App.), 101 S. W. 266; Galveston, etc. R. Co. *v.* Polk (Tex. Civ. App.), 28 S. W. 353.

Utah. — Lester *v.* Highland Boy Gold Min. Co., 27 Utah 470, 76 Pac. 341, 101 Am. St. Rep. 988.

Insufficient Evidence. — Value at the time and place of loss and in the then condition of the crop is not shown by proof of the additional yield there would have been if the wrong had not been done and the net sum which would have been realized. International & G. N. R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526.

39. Chicago, etc. R. Co. *v.* Schaffer, 26 Ill. App. 280; Horres *v.* Berkeley Chem. Co., 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36.

40. Galveston, etc. R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011.

41. Ward *v.* Chicago, etc. R. Co., 61 Minn. 449, 63 N. W. 1104; Burnett *v.* Great Northern R. Co., 76 Minn. 461, 76 N. W. 523; St. Joseph & G. I. R. Co. *v.* McCarty (Neb.), 92 N. W. 750; Lester *v.* Highland Boy Gold Min. Co., 27 Utah 470, 76 Pac. 341, 101 Am. St. Rep. 988.

The Testimony of an Expert as to the relative value of the labor required to produce a crop to that necessary to prepare it for shipment and for its shipment to market, is immaterial in an action to recover one-half the value of the crop. Kelly *v.* Northington, 73 Ind. 152.

42. Chicago, etc. R. Co. *v.* Schaffer, 26 Ill. App. 280; Gulf, etc. R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336; International & G. N. R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526; Galveston, etc. R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011.

43. Chicago *v.* Dickman, 105 Ill. App. 209 (as that all crops in the vicinity were destroyed by frost or storm, or the market price of crops four months later); Ward *v.* Chicago, etc. R. Co., 61 Minn. 449, 63 N. W. 1104; Burnett *v.* Great Northern R. Co., 76 Minn. 461, 76 N. W. 523.

44. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

whether as rental or otherwise,[45] may be shown, though the boat was landed on the property of another without his consent.[46]

c. *Condition of Property and Value of Stock.* — The condition of the property and the cost of putting it in good order may be shown,[47] as may its cost or value and the market value of the capital stock.[48]

d. *Continuance of Franchise.* — The conditions upon which a franchise is subject to forfeiture affect its value.[49]

e. *Value to Witness.* — It is not material what a witness may be willing to pay for a franchise.[50]

f. *Opinions.* — A witness who has managed a wharf and is familiar with the one in question may testify of its value in connection with the franchise, though unable to do so regardless of the ability of the franchise holder to build a wharf and secure business for it.[51]

P. PATENTS. — The rule that the established price for the use of a patented article may be taken as the measure of an infringer's liability applies only where the sales are of such frequent occurrence as to show a market price. Such price must be shown, as against a stranger, by payments made or secured before the infringement by such a number of persons as to indicate a general acquiescence in the reasonableness of the price, which must be shown to be uniform at the places where licenses are granted.[52]

45. Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 22 Atl. 896, 13 L. R. A. 431; Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407 (receipts for five years prior to condemnation of bridge sufficient; it was immaterial that unlawful dividends had been declared).

The Rates of Toll fixed by the authorities prior to the time the franchise for a ferry was granted may be shown as bearing on the question as to the reasonableness of tolls. Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39, 580.

46. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

47. West Chester & W. Plank Road Co. *v.* Chester County, 182 Pa. St. 40, 37 Atl. 905; Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

The Value of a Wharf Franchise must be estimated in connection with the wharf; of itself, it has no value. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

48. Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 22 Atl. 896, 13 L. R. A. 431.

Assessed Value may be shown. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223; Fox *v.* Baltimore & O. R. Co., 34 W. Va. 466, 12 S. E. 757.

49. West Chester & W. Plank Road Co. *v.* Chester County, 182 Pa. St. 40, 37 Atl. 905.

Hostile Legislation. — Where a ferry franchise over a river which is the boundary between the state granting it and another state is affected by hostile legislation of the latter, the effect thereof on the value of the franchise is to be considered. Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39, 580.

50. Covington *v.* St. Francis County, 77 Ark. 258, 91 S. W. 186.

51. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388; Rosenblum *v.* Riley, 84 N. Y. Supp. 884.

52. Rude *v.* Westcott, 130 U. S. 152, 165.

Evidence Insufficient. — Market value for a patent is not shown by proof of three sales made years before the infringement complained of where the patent had been continuously on the market for ten years. Houston, etc. R. Co. *v.* Stern, 74 Fed. 636, 20 C. C. A. 568.

a. *Sales in Different States.* — Proof of sales of the right to use a patented article in one state is relevant to the value of its use in other states where conditions are similar.[53]

b. *Limitation as to Time.* — If the patent in question has a long time to run, proof of the price at which sales have been made need not be limited to about the time of the sale in question.[54]

c. *Opinions.* — In a legal action for the infringement of a patent, opinions as to what would be the fair, reasonable value of the right to use the invention are irrelevant and immaterial.[55] But not to show the right to use it in a particular county.[56] A witness familiar with an article, its manufacture and sale may testify as to the value of a patent for such an article.[57] The value of a license to use an invention before a patent for it was obtained may be shown by opinion evidence.[58]

4. Cost of the Property in Question. — A. NON-MARKETABLE. a. *Evidence Admissible.* — In the absence of proof of market value the cost of non-marketable property may be shown if the price was paid bona fide, in the ordinary course of business and in the absence of unusual circumstances, such testimony being connected by full proof of its present condition,[59] or its condition at the time it was

Evidence of payment of a sum in settlement of a claim for an alleged infringement of a patent is not proof of the value of the improvements patented as between the patentees and other infringers. Rude *v.* Westcott, 130 U. S. 152, 164.

The value of the right to use a patented article in a particular county cannot be shown by testimony that an unknown person had offered a person not authorized to sell it a certain sum for such right. Gatling *v.* Newell, 9 Ind. 572, 583.

53. Gatling *v.* Newell, 9 Ind. 572, 582.

54. Gatling *v.* Newell, 9 Ind. 572, 582.

55. Houston, etc. R. Co. *v.* Stern, 74 Fed. 636, 20 C. C. A. 568.

On the Question of the Value of a Patented Article, a medal awarded by a scientific society and a notice of the article in the proceedings of a state board of agriculture are immaterial or objectionable (as to the last) as hearsay. Gatling *v.* Newell, 9 Ind. 572, 582.

56. Gatling *v.* Newell, 9 Ind. 572, 583.

57. Cortland Howe Ventilating S. Co. *v.* Howe, 92 Hun 113, 36 N. Y. Supp. 701.

58. Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029.

59. *California.* — Greenebaum *v.* Taylor, 102 Cal. 624, 36 Pac. 957; Angell *v.* Hopkins, 79 Cal. 181, 21 Pac. 729; Bunting *v.* Salz, 22 Pac. 1132; Cleland *v.* Thornton, 43 Cal. 437 (cost of new buildings to establish value of those several years old).

Colorado. — Denver, etc. R. Co. *v.* Frame, 6 Colo. 382; Mouat Lumb. Co. *v.* Wilmore, 15 Colo. 136, 25 Pac. 556 (wearing apparel).

Florida. — Jacksonville, etc. R. Co. *v.* Peninsular Land, T. & M. Co., 27 Fla. 1, 122, 2 So. 661, 27 L. R. A. 65.

Georgia. — Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030.

Illinois. — Farson *v.* Gilbert, 114 Ill. App. 17; Travis *v.* Pierson, 43 Ill. App. 579 (sum paid for repairs evidence of their value).

Iowa. — Thompson *v.* Anderson, 94 Iowa 554, 63 N. W. 355 (in trover against one who bought property from a person who did not own it, the agreed price may be shown); Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342; Clausen *v.* Tjernagel, 91 Iowa 285, 59 N. W. 277 (it is relevant on the issue as to false representations); Scott *v.* Security F. Ins.

sold.[60] The same rule governs when property intended for consumption is without market value at its destination.[61]

b. *Competent Against Stranger.* — The price a consignee agreed to pay, it being based on market value at the place to which the property was to be carried, is evidence against a negligent carrier,[62] at least if there is no local market value for it.[63] And such evidence is competent to meet the charge of deceit on the part of the purchaser in dealing with a third party.[64]

Co., 98 Iowa 67, 66 N. W. 1054 (if a house is without marketable value apart fom the land on which it was, evidence of its cost when built is admissible though that was twenty-years before it was burned, and there had been marked changes in the cost of erecting houses in the meantime).

Kansas. — Truitt *v.* Baird, 12 Kan. 420 (it is strong evidence on the issue of the lowest selling price of such property where the sale was made).

Massachusetts. — Eaton *v.* Mellus, 7 Gray 566, 579.

Michigan. — Ruppel *v.* Adrian Mfg. Co., 96 Mich. 455, 55 N. W. 995; Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5 (as against a wrongdoer).

Minnesota. — Hausman *v.* Mulheran, 68 Minn. 48, 70 N. W. 866 (amount paid for repairs some evidence of their value).

Missouri. — Stevens *v.* Springer, 23 Mo. App. 375, 386; State *ex rel.* Clark *v.* Parsons, 109 Mo. App. 432, 84 S. W. 1019; Lachner Bros. *v.* Adams Exp. Co., 72 Mo. App. 13.

New Hampshire. — Fisk *v.* Hicks, 31 N. H. 535; Carr *v.* Moore, 41 N. H. 131.

New York. — Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Hoffman *v.* Hand, 26 Misc. 370, 55 N. Y. Supp. 955; Hoffman *v.* Conner, 76 N. Y. 121; Hawyer *v.* Bell, 141 N. Y. 140, 36 N. E. 6; Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137; Bird *v.* Everard, 4 Misc. 104, 23 N. Y. Supp. 1008.

North Carolina. — Small *v.* Pool, 30 N. C. (8 Ired. L.) 47.

Ohio. — Pratt *v.* State, 35 Ohio St. 514, 35 Am. Rep. 617.

Pennsylvania. — Laubaugh *v.* Pennsylvania R. Co., 28 Pa. Super. 247.

Texas. — Texas & P. R. Co. *v.* Wilson Hack Line (Tex. Civ. App.), 101 S. W. 1042; Wells, Fargo Exp. Co. *v.* Williams (Tex. Civ. App.), 71 S. W. 314; Galveston, etc. R. Co. *v.* Levy (Tex. Civ. App.), 100 S. W. 195.

Evidence of Value when property bought. Luse *v.* Jones, 39 N. J. L. 707.

Cost of Part of a Machine. — In an action for the breach of warranty as to a machine if the defect is traceable to some detachable part which may be replaced, irrespective of the whole, or which does not necessarily render the remainder of the machine useless, such facts and the cost of such part may be shown to establish the value of the machine for any purpose. Benson *v.* Port Huron Engine & T. Co., 83 Minn. 321, 86 N. W. 327; Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253.

The Cost of a Building should not be proved in the absence of necessity. Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315.

The Lapse of a Long Time sometimes renders such testimony incompetent. Beach *v.* Raritan & D. B. R. Co., 37 N. Y. 457, 470 (sale of barge six years old); Hensley *v.* Orendorff (Ala.), 44 So. 869 (two years too remote if property used).

60. Carper *v.* Risdon, 19 Colo. App. 530, 76 Pac. 744.

61. Northern Commercial Co. *v.* Lindblom (C. C. A.), 162 Fed. 250.

62. Garlington *v.* Ft. Worth & D. C. R. Co., 34 Tex. Civ. App. 274, 78 S. W. 368.

63. Northern Commercial Co. *v.* Lindblom (C. C. A.), 162 Fed. 250; Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

64. McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

In Pennsylvania because the buyer may have paid too much or secured

c. *Compromise Price.* — A price fixed by the parties as a compromise may not be proved.[65]

d. *Proof of Cost.* — The cost of goods may be shown by a witness who saw the invoice when they were delivered.[66]

In Texas testimony as to the price for which property sold cannot be based solely on accounts of sales rendered the witness[67] nor on records kept by a commission house.[68] Such an account is admissible if verified by a witness present at the sale and who knew the price paid for the goods.[69] The cost of the material and the value of the labor required to produce the article may be shown.[70] The value of goods is some evidence of their cost.[71] As between vendor and purchaser a bill of sale is relevant evidence in an action to recover the purchase-money, the defense being fraud and failure of consideration.[72]

Sufficiency of Evidence. — Proof of the cost of property is sufficient evidence of its value in the absence of other testimony,[73] or in connection with evidence of the condition of the property,[74] or the expense of putting it in proper condition.[75] But the buyer, if a party to the action, is not concluded by proof of cost; he may show the circumstances under which he bought.[76]

e. *Immaterial.* — Such evidence is immaterial as between the parties to a contract for the resale of the property, even on cross-examination,[77] especially if the vendor bought in another market than that in question.[78]

f. *Expense and Profits.* — To the cost of making a like article

the property for less than its value, evidence of cost is not competent to show value against a third party. Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 22 Atl. 896, 13 L. R. A. 431.

65. Sipp *v.* Siegel-Cooper Co., 23 Misc. 141, 50 N. Y. Supp. 658.

66. Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.

67. Texas & P. R. Co. *v.* Scott (Tex. Civ. App.), 86 S. W. 1065.

68. Texas & P. R. Co. *v.* Leggett (Tex. Civ. App.), 86 S. W. 1066.

69. Texas & P. R. Co. *v.* Birdwell (Tex. Civ. App.), 86 S. W. 1067.

70. Union Pac., etc. R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

71. Watts *v.* Sawyer, 55 N. H. 38.

72. Ward *v.* Reynolds, 32 Ala. 384.

73. Bird *v.* Everard, 4 Misc. 104, 23 N. Y. Supp. 1008.

74. Motton *v.* Smith, 27 R. I. 57, 62, 60 Atl. 681.

75. Jamieson *v.* New York & R. B. R. Co., 11 App. Div. 50, 42 N. Y. Supp. 915, 162 N. Y. 630, 57 N. E. 1113 (no opinion).

76. Doll *v.* Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625; Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 173, 44 Pac. 423, 46 Pac. 52, 726 (cost is not a standard of value because it may be inconsiderable and the value great, and vice versa); Fisk *v.* Hicks, 31 N. H. 535; Carr *v.* Moore, 41 N. H. 131 (evidence very strong, but not conclusive); Small *v.* Pool, 30 N. C. (8 Ired. L.) 47. (It is some evidence).

77. Kadish *v.* Young, 108 Ill. 170, 186, 43 Am. Rep. 548.

The Wholesale Cost of machines like the one in question cannot be shown to prove the consideration for a note given for a machine sold at retail. Howe Mach. Co. *v.* Rosine, 87 Ill. 105.

78. Franklin *v.* Krum 171 Ill. 378, 49 N. E. 513.

must be added the cost of transporting it to the place in question,[79] and a reasonable profit[80] or interest.[81]

B. Lost Property. — The cost of lost property may be proved,[82] and may be sufficient to establish its value when the loss occurred.[83]

C. Marketable Property. — a. *Evidence of Cost Admissible Under Some Circumstances.* — Evidence of the cost of property having a market value is only proper in some courts if it has been removed from a locality where there is a market, unless the cost is in some way connected with its market value,[84] as where it was bought but a short time before the issue arose.[85] In some cases the rule is stated more broadly — as excluding proof of cost if the property has a market value.[86]

b. *Admissible Generally.* — In many cases no distinction is made concerning the competency of evidence of the cost of property based upon its being with or without market value; such evidence is competent[87] if the price was paid by a party to the action,[88] and the tes-

79. Farson *v.* Gilbert, 114 Ill. App. 17; Eaton *v.* Mellus, 7 Gray (Mass.) 566, 579; Gulf, etc. R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968.

80. Eaton *v.* Mellus, 7 Gray (Mass.) 566, 579.

81. Northern Commercial Co. *v.* Lindblom (C. C. A.), 162 Fed. 250.

82. Glaser *v.* Home Ins. Co., 47 Misc. 89, 93 N. Y. Supp. 524; Burress *v.* Atlantic C. L. R. Co., 79 S. C. 250, 60 S. E. 692.

83. Curren *v.* Ampersee, 96 Mich. 553, 56 N. W. 87; Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Bird *v.* Everard, 4 Misc. 104, 23 N. Y. Supp. 1008. But see Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82.

84. Jacksonville, etc. R. Co. *v.* Prior, 34 Fla. 271, 15 So. 760.

As a Rule the Cost of the Production and Transportation of an article is not the best, or even competent, evidence of its value; it is not provable when the market value is shown. Denver Onyx & M. Mfg. Co. *v.* Reynolds, 72 Fed. 464, 18 C. C. A. 638.

85. Louisville Jeans Cloth. Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436; Jacksonville, etc. R. Co. *v.* Jones, 34 Fla. 286, 15 So. 924; Johnson *v.* B. & O. R. Co., 25 W. Va. 570.

86. Denver Onyx & M. Mfg. Co. *v.* Reynolds, 72 Fed. 464, 18 C. C. A. 638; Galveston, etc. R. Co. *v.* Levy (Tex. Civ. App.), 100 S. W. 195.

87. *United States.* — Burke *v.* Pierce, 83 Fed. 95, 27 C. C. A. 462.

Missouri. — State *v.* Steele Co., 108 Mo. App. 363, 83 S. W. 1023.

Montana. — Doll *v.* Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625.

Nebraska. — Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770.

Nevada. — Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 173, 44 Pac. 423, 46 Pac. 52, 726.

New York. — Gleason *v.* Morrison, 20 Misc. 320. 45 N. Y. Supp. 684; Fishbach *v.* Steinway R. Co., 11 App. Div. 152, 42 N. Y. Supp. 883; Robinson *v.* Lewis, 7 Misc. 536, 27 N. Y. Supp. 989 (a dealer may always support his opinion of value by testifying to the cost); Akers *v.* New York, 14 Misc. 524, 35 N. Y. Supp. 1099; Brizsee *v.* Maybee, 21 Wend. 144.

Tennessee. — Memphis *v.* Kimbrough, 12 Heisk. 133.

Texas. — Gulf, etc. R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968; Parlin & O. Co. *v.* Hanson, 21 Tex. Civ. App. 401, 53 S. W. 62; Gulf, etc. R. Co. *v.* Anson (Tex. Civ. App.), 82 S. W. 785. But *compare* Galveston, etc. R. Co. *v.* Levy (Tex. Civ. App.), 100 S. W. 195.

Vermont. — Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628.

88. Boggan *v.* Horne, 97 N. C. 268, 2 S. E. 224.

timony discloses the time, place, market and circumstances under which the purchase was made.[89]

c. *Cross-Examination.* — The question of cost may be gone into on cross-examination to test the value of opinions.[90] And a witness' declarations as to cost may be shown.[91]

D. Competitive Bid. — A written offer for the erection of a structure is evidence of its value.[92]

5. Cost of Similar Property. — In some courts the cost of like property may be shown on direct examination if it was purchased within a reasonable time as compared with that in question.[93] There is, however, dissent from this view.[94] Such cost may be shown on cross-examination if the witness bought it at the same time as that of which he has testified.[95] But the similarity of the properties must be established.[96]

6. Sale of the Property in Question. — A. Private Sales. — In several jurisdictions the price obtained at a private sale made on or about the time which is determinative of the rights for the property to be valued, after a fair trial to secure the best price, is regarded as of more or less evidentiary value.[97]

a. *Conditions Affecting Competency of Evidence.* — Such evidence may be received if the condition of the property has not been

89. Jacksonville, etc. R. Co. *v.* Prior, 34 Fla. 271, 15 So. 760; Miller *v.* Bryden, 34 Mo. App. 602.

90. Rosenstein *v.* Fair Haven & W. R. Co., 78 Conn. 29, 60 Atl. 1061; Wells *v.* Kelsey, 37 N. Y. 143, *reversing* 15 Abb. Prac. 53.

91. Little *v.* Lichkoff, 98 Ala. 321, 12 So. 429.

92. Com. *v.* Sunderlin, 31 Pa. Super. 349.

93. Whipple *v.* Walpole, 10 N. H. 130; White *v.* Concord R. Co., 30 N. H. 188, 208 (though there is a little difference in the quality); Small *v.* Pool, 30 N. C. (8 Ired. L.) 47.

94. The Oceanica, 156 Fed. 306 (*distinguishing* The Laura Lee, 24 Fed. 483, on the ground that testimony of that kind was received as corroborative of opinions concerning value); Neely *v.* West Allegheny R. Co., 219 Pa. St. 349, 68 Atl. 829.

95. The Oceanica, 156 Fed. 306; Wells *v.* Kelsey, 37 N. Y. 143, *reversing* 15 Abb. Prac. 53.

96. Den Bleyker *v.* Gaston, 97 Mich. 354, 56 N. W. 763 (evidence of the value of a lower grade of lumber and the cost of cutting it into strips, rejecting all which is not up to the required grade, is not competent to prove the value of lumber of a particular grade cut into strips for a special use); Com. *v.* Sunderlin, 31 Pa. Super. 349.

97. *United States.* — Hamilton *v.* Bark Kate Irving, 5 Fed. 630.

Illinois. — Roberts *v.* Dunn, 71 Ill. 46; E. L. Hasler Co. *v.* Griffing Florida Orchard Co., 133 Ill. App. 635 (sale by commission firm).

Iowa. — State *v.* Jackson, 128 Iowa 543, 105 N. W. 51 (may be shown on cross-examination).

Maine. — Norton *v.* Willis, 73 Me. 580.

Massachusetts. — Raymond Syndicate *v.* Guttentag, 177 Mass. 562, 59 N. E. 446; Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Brigham *v.* Evans, 113 Mass. 538; Kent *v.* Whitney, 9 Allen 62.

Minnesota. — Northwestern Fuel Co. *v.* Mahler, 36 Minn. 166, 30 N. W. 756.

Mississippi. — Alabama & V. R. Co. *v.* Searles, 71 Miss. 744, 16 So. 255.

Nebraska. — Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770.

New Hampshire. — Whipple *v.* Walpole, 10 N. H. 130; Thornton *v.* Campton, 18 N. H. 20; Hoit *v.* Rus-

materially changed,[98] or if the property is of a kind the value of which is subject to change, it may be shown that it has not changed,[99] and if payment was made in cash or its equivalent.[1] In some cases the competency of such evidence is conditional upon the absence of other evidence of value.[2]

b. *Value of Such Evidence.* — Testimony of the selling price is regarded with favor.[3]

c. *Not Competent in Favor of Fraudulent Purchaser.* — The price obtained for property by its alleged fraudulent purchaser is not evidence of its value when he received it.[4]

sell, 56 N. H. 559; Watts *v.* Sawyer, 55 N. H. 38.

New Jersey. — Budd *v.* Van Orden, 33 N. J. Eq. 143; Farnsworth *v.* Miller (N. J. L.), 60 Atl. 1100, *affirmed*, 74 N. J. L. 599, 70 A. 1100.

New York. — Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Matter of Johnston, 144 N. Y. 563, 39 N. E. 643 (though the sale was not made where or when the conversion occurred, the value not being affected thereby).

Tennessee. — Cole *v.* Rankin (Tenn. Ch. App.), 42 S. W. 72 (may be sufficient evidence).

Texas. — Garlington *v.* Ft. Worth & D. C. R. Co., 34 Tex. Civ. App. 274, 78 S. W. 368 (damaged property).

Restitution Made for Stolen Property is not evidence of its value. Peyser *v.* Lund, 89 App. Div. 195, 85 N. Y. Supp. 881.

98. Cleveland, etc. R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804; Comingor *v.* Louisville Tr. Co., 33 Ky. L. Rep. 884, 111 S. W. 681, 33 Ky. L. Rep. 53, 108 S. W. 950; Miner *v.* Connecticut River R. Co., 153 Mass. 398, 26 N. E. 994 (it is within the discretion of the court to exclude evidence of the price paid for a horse two years before the time in issue).

It Is Within the Discretion of the Court to admit testimony of the price at which a cow was sold three years after the transaction. Kelsea *v.* Fletcher, 48 N. H. 282.

99. Alling *v.* Weissman, 77 Conn. 394, 59 Atl. 419 (the price at which a garment sold two years after its conversion is immaterial in the absence of a showing that it was then, as respects style, condition and fashion as valuable as it was two years before).

1. *Ex parte* Pittinger, 142 N. C. 85, 54 S. E. 845.

2. St. Louis, etc. R. Co. *v.* Rogers (Tex. Civ. App.), 108 S. W. 1027 (writ of error denied by supreme court).

3. "The only absolute test we can have of the value of a merchantable article is what it has been sold for at a fair sale. All other means of ascertaining the value of a merchantable commodity are speculative, and must, to a greater or less extent, be uncertain. A sale is a demonstration of the fact, while estimates, even by the best judges, are simply matters of opinion, which, at best, are only approaches to the fact." Budd *v.* Van Orden, 33 N. J. Eq. 143.

4. Moore *v.* Temple Grocer Co. (Tex. Civ. App.), 43 S. W. 843; Oppenheimer *v.* Halff, 68 Tex. 409, 4 S. W. 562.

Reasons. — The goods were sold after they were seized under the attachment sued out by the plaintiffs. The court said: "In so far as the value of the merchandise was material, the value at the time the plaintiffs purchased was the true inquiry, and not their value at some subsequent time. This was a matter susceptible of proof, and the very issues raised in this case illustrate the impropriety of admitting proof of the sum for which the claimants sold the goods. It became to their interest, under their view of the case, to sell the goods for a sum not exceeding that due them by their debtor, and thus establish, if it could be done in that way, that other creditors were not hindered, delayed

d. *Immaterial Between Vendor and Vendee.* — And evidence of such price is immaterial as between vendor and vendee who have agreed upon a time and place for the delivery of the property, unless it is shown when and where the sale was made.[5]

e. *Sale of Undivided Interest.* — The sale of an undivided interest in property is not evidence of the value of another such interest against one not a party to the transaction.[6] But it has been held competent to show the price paid for such an interest a few months prior to the resale thereof.[7]

f. *Sale of Severable Part.* — If only a part of the property sold is involved, the price for all of it may be proved because it may help in a general way, in connection with other facts, to aid in fixing value.[8] But the comparative qualities of the part sold and of the unsold part must be shown.[9]

g. *Value of Raw Material.* — The value of raw material without market value may be established by proof of the price of the product made therefrom and of the cost of manufacturing it.[10]

h. *Circumstances of Sale.* — All the circumstances connected with the sale may be proved.[11]

i. *Cross-Examination.* — The price for which property sold may be shown on the cross-examination of a witness who has testified to its value.[12]

j. *Not Admissible.* — There is, however, dissent from the view that such price is competent evidence of value.[13]

k. *Price at Resale.* — The price obtained for property on a resale is not evidence of its value unless the sale was made in the usual

or defrauded by the transaction. It may have been thought advantageous to the claimants to sell the goods for less than their real value, and thus show that they were not worth more than the sum due them, rather than to sell them for their full value and thus show that they were worth more, and expose them to the claims of other creditors. Oppenheimer *v.* Halff, 68 Tex. 409, 4 S. W. 562.

5. Moye *v.* Pope, 64 N. C. 543.

6. Gresham *v.* Harcourt, 33 Tex. Civ. App. 196, 75 S. W. 808.

7. Hunt *v.* Hardwick, 68 Ga. 100.

8. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642 (to rebut the claim that goods were sold for less than their value); Norton *v.* Willis, 73 Me. 580; LaRue *v.* St. Anthony & D. Elev. Co., 17 S. D. 91, 95 N. W. 292.

On the Issue of Fraud in the sale of a stock of goods, there being no positively accurate means of showing its value, it was competent to show the price at which a part of the stock was sold, and that the purchasers retailed it for a time, got the purchase money back and divided the unsold goods between them. Evidence was also admissible to show that the defendants had received a large quantity of new goods. Harris *v.* Schuttler (Tex. Civ. App.), 24 S. W. 989.

9. DeGroot *v.* Fulton F. Ins. Co., 4 Robt. (N. Y. Super.) 504.

10. Meeker *v.* Chicago Cast Steel Co., 84 Ill. 276.

11. Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770; Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65 (that the value of the property was not obtained because the sale was made on the basis of an erroneous telegram).

12. New York, etc. R. Co. *v.* Estill, 147 U. S. 591, 618; St. Paul White Lead & O. Co. *v.* Tibbetts, 13 S. D. 446, 83 N. W. 564.

13. Cassidy *v.* Elias, 90 Pa. St. 434.

and ordinary course of business.[14] Resale as between the parties to the original sale may be shown if the property is without market value at the place where the transaction occurred,[15] if it was made there.[16] The price at which a vendor in default resold the property at private sale is not evidence of its value in his favor;[17] nor is the price obtained by a purchaser provable in an action against his vendor for breach of warranty.[18] A resale after reasonable efforts to secure the best price, or for a fair price, is conclusive upon a vendee in default.[19] The price so obtained may be shown on the issue of the fairness of the valuation put upon it for customs duties.[20]

B. Judicial and Official Sales. — a. *Generally.* — The price obtained for property, after reasonable efforts to get the highest practicable price, at a sale made by an officer of the court may be proved,[21] if made in apt time with respect to the rights of the par-

14. Knudtson *v.* Schjelderup, 98 Minn. 531, 107 N. W. 1134.

15. Eaton *v.* Mellus, 7 Gray (Mass.) 566, 579.

16. Rickey *v.* Tenbroeck, 63 Mo. 563.

17. Latimer *v.* Burrows, 163 N. Y. 7, 57 N. E. 95; Flannagan *v.* Maddin, 81 N. Y. 623.

18. Roe *v.* Hanson, 5 Lans. (N. Y.) 304.

19. Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797.

20. Buckley *v.* United States, 4 How (U. S.) 251. The court said: "We know that the prices of commodities fluctuate from many causes, and that enhanced prices can of themselves be no proof of unfair dealing, or of an entry having been made at the custom house upon an under-valued invoice. But if in a particular business testimony can be found to establish that an importer has received prices extravagantly above invoice prices, such as others engaged in the same trade, at the same time, declare could not have been made in the state of the market during the time, a strong presumption arises that unfair means have been used to produce effects contrary to the usual results of contemporary trade. Such a fact may well, then, be considered as good evidence, when the issue in a case is fraud or no fraud in the importation of goods.

21. *United States.* — Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425.

Arkansas. — Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

Massachusetts. — Atherton *v.* Emerson, 85 N. E. 530; Kent *v.* Whitney, 9 Allen 62, 85 Am. Dec. 739.

Missouri. — Stevens *v.* Springer, 23 Mo. App. 375, 386.

New York. — Campbell *v.* Woodworth, 20 N. Y. 499; Gill *v.* McNamee, 42 N. Y. 44; McIlhargy *v.* Chambers, 117 N. Y. 532, 23 N. E. 561 (forced sales of stocks of dry goods in a city in which such sales were occasionally made); Montignani *v.* Crandall Co., 34 App. Div. 228, 54 N. Y. Supp. 517; Dixon *v.* Buck, 42 Barb. 70; Heinmuller *v.* Abbott, 2 Jones & S. (34 N. Y. Super.) 228; Jacob *v.* Watkins, 3 App. Div. 422, 38 N. Y. Supp. 763; Hoffman *v.* Gundrum, 15 N. Y. Supp. 98, 39 N. Y. St. 203.

Utah. — White *v.* Pease, 15 Utah 170, 49 Pac. 416 (is *prima facie* evidence).

Vermont. — Hildreth *v.* Fitts, 53 Vt. 684.

Not Invariably Valuable. — "In many cases the result of a forced sale of goods ought not to influence the jury in assessing the damages against a party who has wrongfully taken them—but in some other cases a sale at auction would afford high evidence upon a question of value." Campbell *v.* Woodworth, 20 N. Y. 499.

ties, after fair notice and upon reasonable terms.[22] There is, however, judicial disagreement on the subject.[23]

b. *Property in Custodia Legis.* — The lapse of time is not of much significance where the property of an insolvent has been in the custody of the court from the time of seizure until sale.[24]

c. *Weight of Evidence.* — It is generally held that such evidence is not conclusive as against third parties,[25] although it may be per-

22. *United States.* — Clarion Bank *v.* Jones, 21 Wall. 325.

Arkansas. — Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

Kentucky. — Woolfolk *v.* Lyons, 22 Ky. L. Rep. 918, 59 S. W. 21.

Missouri. — State *ex rel.* Clark *v.* Parsons, 109 Mo. App. 432, 84 S. W. 1019.

New York. — Dixon *v.* Buck, 42 Barb. 70; Heinmuller *v.* Abbott, 2 Jones & S. (34 N. Y. Super.) 228; Jacob *v.* Watkins, 3 App. Div. 422, 38 N. Y. Supp. 763; Hoffman *v.* Gundrum, 15 N. Y. Supp. 98, 39 N. Y. St. 203.

North Carolina. — Moseley *v.* Johnson, 144 N. C. 257, 56 S. E. 922.

Ohio. — McCracken *v.* West, 17 Ohio 16.

Texas. — McCown *v.* Kitchen (Tex. Civ. App.), 52 S. W. 801 (on rehearing).

Remoteness. — Evidence of the value of a stock of goods in the fall is immaterial as to its value in the following May. McLaren *v.* Birdsong, 24 Ga. 265. But *compare* Hunt *v.* Hardwick, 68 Ga. 100. See McCracken *v.* West, 17 Ohio 16; McCown *v.* Kitchen (Tex. Civ. App.), 52 S. W. 801.

23. Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365; Cassin *v.* Marshall, 18 Cal. 689; Martinett *v.* Maczkewicz, 59 N. J. L. 11, 35 Atl. 662.

24. Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425 (three and one-half years elapsed between the date of issue and the sale).

Distinction Between Judicial and Private Sale. — The court said that the objection of remoteness of time would have been fatal if the property had not been in the custody of the law or if it could have been withdrawn from it. "But the assets of these corporations were not in this situation when this stock was exchanged. They were in the custody of the court, and no stockholder or creditor could reach or sell any of them without its order. They could be sold only under the orders of the court, and in accordance with the provisions of the statutes relative to the winding up of the insolvent corporations; and the owners of this stock could obtain nothing from these assets except through the proceeds of such a sale. The actual value of the stock did not then depend upon the value of the assets of these corporations to sell at private sale in the open market at that time, but it depended entirely upon the amounts that could be realized from these assets by the court through the administration of the trust imposed upon it by the statutes. To say that the amounts which the court did realize from this property are no evidence of the amounts which it should or could have realized is to fly in the face of the presumption of sound judgment, wise discretion and reasonable diligence, raised by the fact that the administration of the affairs of these corporations was conducted, and these sales were made, under the orders of a court of general equity jurisdiction." Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425.

25. *United States.* — Clarion Bank *v.* Jones, 21 Wall. 325.

Arkansas. — Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

Kentucky. — Woolfolk *v.* Lyons, 22 Ky. L. Rep. 918, 59 S. W. 21.

Missouri. — State *ex rel.* Clark *v.* Parsons, 109 Mo. App. 432, 84 S. W. 1019.

New York. — Dixon *v.* Buck, 42 Barb. 70; Heinmuller *v.* Abbott, 2 Jones & S. (34 N. Y. Super.) 228; Jacob *v.* Watkins, 3 App. Div. 422, 38 N. Y. Supp. 763; Hoffman *v.*

suasive evidence.[26] All the circumstances connected with the sale may be shown.[27]

C. Unofficial Auction Sales. — Price Paid Competent. The price paid for property at an unofficial auction sale, fairly made after proper notice, is admissible to show its value,[28] though the party against whom the evidence is used had no notice of the sale.[29]

a. *Value of Evidence.* — A fair public sale is ordinarily satisfactory evidence of the value of the thing sold as between vendor and vendee.[30] But it is otherwise if the defendant asserted at the time of sale that the property was exempt.[31] The price obtained is not conclusive on the question of value.[32] Change in value may be proved if the sale occurs a material length of time after the parties' rights have accrued.[33]

Gundrum, 15 N. Y. Supp. 98, 39 N. Y. St. 203.

North Carolina. — Moseley *v.* Johnson, 144 N. C. 257, 56 S. E. 922 (administrator's sale).

26. Kent *v.* Whitney, 9 Allen (Mass.) 62, 85 Am. Dec. 739.

27. Clewis *v.* Malone, 131 Ala. 465, 31 So. 596 (the number of times the property was offered before a sale was effected).

It Is Immaterial and Irrelevant whether the attorney for the attachment plaintiff was present at the sale of the attached property, and made no bid therefor, unless it is shown that he had authority to bid for his client. If he had such authority the fact of his failure to bid might be shown as having a tendency to show that the price at which the property sold was fair. Clewis *v.* Malone, 131 Ala. 465, 31 So. 596.

28. *United States.* — The Queen, 78 Fed. 155, 171; Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 190, 36 C. C. A. 135.

Connecticut. — Sanford *v.* Peck, 63 Conn. 486, 27 Atl. 1057 (auction sales are ordinarily a fair test of value, and evidence as to the price property sold for thereat is admissible regardless of the mode, form or particular terms of the contract of sale, though these may be shown).

Kentucky. — Southern R. Co. *v.* Graddy, 33 Ky. L. Rep. 183, 109 S. W. 881.

Massachusetts. — Brigham *v.* Evans, 133 Mass. 538.

Michigan. — Smith *v.* Mitchell, 12 Mich. 180; Jennings *v.* Prentice, 39 Mich. 421.

New York. — Bigelow *v.* Legg, 102 N. Y. 652, 6 N. E. 107; Gray *v.* Walton, 107 N. Y. 254, 14 N. E. 191; Crounse *v.* Fitch, 1 Abb. App. Dec. 475, 6 Abb. Prac. (N. S.) 185; Ackerman *v.* Rubens, 167 N. Y. 405, 60 N. E. 750, 82 Am. St. Rep. 728, 53 L. R. A. 867.

Tennessee. — Mayberry *v.* Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401.

29. Guiterman *v.* Liverpool, etc. S. S. Co., 83 N. Y. 358.

30. Mayberry *v.* Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401.

Value of Such Evidence. — "Sale by auction is in the great marts of commerce so commonly resorted to by merchants to ascertain the value of deteriorated merchandise that it may almost amount to a usage of trade. It furnishes, cheaply and promptly, all the accuracy which can be expected in any known measure of damage, and it is peculiarly fitting, in cases of this character, that the court should sanction and sustain it as the method best adapted to protect the interest of all parties concerned." The Columbus, 1 Abb. Adm. 37, 6 Fed. Cas. No. 3,041; The Queen, 78 Fed. 155, 172; Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 190, 36 C. C. A. 135.

31. Gibson *v.* People, 122 Ill. App. 217.

32. Southern R. Co. *v.* Graddy, 33 Ky. L. Rep. 183, 109 S. W. 881.

33. Crounse *v.* Fitch, 1 Abb. App. Dec. (N. Y.) 475, 6 Abb. Prac. (N. S.) 185.

b. *Proof of Price.* — The sum received from the auctioneer is not evidence of the value of the property sold.[34]

D. Exchange Value. — The estimate put upon the value of goods when they were exchanged may be shown,[35] but not as against a stranger to the transaction.[36] The relative values of the exchanged properties are material in an action to recover the cash difference, the issue being a breach of warranty.[37]

7. Offers To Sell and Buy. — A. Private Offers To Sell. — a. *Not Usually Competent.* — Because of the contingency and uncertainty about offers to sell and the facility with which evidence concerning them may be fabricated, proof thereof may not usually be made;[38] at least if the offer was remote.[39] They may be shown, in connection with other facts, to prove the value of second-hand property.[40] The price put on an article by an agent authorized to sell it is some evidence that its value does not exceed that price.[41]

b. *Competent in Collateral Actions.* — Private offers to sell may be shown on the question of contemporaneous representations concerning value,[42] and on the issue of a breach of warranty as to its quality.[43]

B. Offers To Sell in Public Market. — If property is publicly offered for sale the asking price for it may be proved.[44]

C. Offers for Property. — a. *Private Offers, Negative View.* Generally an unaccepted offer made otherwise than in a public market is not competent to show the value of the property for which it was made.[45] Sometimes the rule has been qualified by adding un-

34. Perlman *v.* Levy (Misc.), 109 N. Y. Supp. 785.

35. Castner *v.* Darby, 128 Mich. 241, 87 N. W. 199; Carr *v.* Moore, 41 N. H. 131; Fisk *v.* Hicks, 31 N. H. 535 (in an action for deceit in an exchange of horses the appearance and qualities of one of the horses and the price for which it was sold may be shown as bearing upon the value of the other).

36. Galliers *v.* Chicago, etc. R. Co., 116 Iowa 319, 89 N. W. 1109.

37. Thomas *v.* Howe, 38 Vt. 600.

38. Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234 (the value of a lease and option on property is not provable by the price at which a party interested in it would be willing to take for his interest); Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030; Norton *v.* Willis, 73 Me. 580.

39. McKesson *v.* Sherman, 51 Wis. 308, 8 N. W. 200.

40. Texas & P. R. Co. *v.* Wilson Hack Line (Tex. Civ. App.), 101 S. W. 1042.

41. Banks *v.* Gidrot, 19 Ga. 421.

42. Gilluly *v.* Hosford, 45 Wash. 594, 88 Pac. 1027.

43. Rowland *v.* Walker, 18 Ala. 749.

44. Findlay *v.* Pertz, 74 Fed. 681, 20 C. C. A. 662.

45. *California.* — Ramish *v.* Kirschbraun, 90 Cal. 581, 27 Pac. 433 (as between the owner and his vendor).

Kentucky. — Woolfolk *v.* Lyons, 22 Ky. L. Rep. 918, 59 S. W. 21.

Maine. — Norton *v.* Willis, 73 Me. 580.

Massachusetts. — Wood *v.* Firemen's F. Ins. Co., 126 Mass. 316 (offers cannot be proved to show good faith in valuing property).

Minnesota. — Finley *v.* Quirk, 9 Minn. 194, 8 Am. Dec. 93.

Mississippi. — Illinois Cent. R. Co. *v.* LeBlanc, 74 Miss. 626, 21 So. 748.

Texas. — Texas & P. R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603.

Vermont. — Melvin *v.* Bullard, 35 Vt. 268 (an offer made for animals

less made within a reasonable time before the rights of the parties became fixed.[46]

b. *Opposing View.* — In some states an unconditional and bona fide offer so made is competent as tending to show value.[47]

c. *Admissible To Contradict.* — An offer for like property may be shown to contradict a witness who has testified to the value of that in question.[48]

d. *Offer in Market.* — An offer in a market regularly attended by buyers and sellers may be proven to show that the market value of the article offered did not then exceed the price at which it was offered; it is presumed that it would have been sold if the offer had been below the market.[49]

e. *Offers for Product.* — The value of logs in a pond is not provable by the cost of getting them from there to the mill, the cost of sawing, and the best offer received for the lumber made therefrom.[50]

D. Sale of Like Property. — a. *Generally.* — It has been broadly held that the price for which like property sold is not evidence of the value of other property;[51] but this is contrary to the weight of authority if the sale was made bona fide and in the regular course of business and was not remote from the time in question,[52] especially if the property was of a stable value,[53] and the sale was made at the right time and place.[54]

of the same kind and owned by the same person is not competent to show the value of other animals so owned, the person making the offer having no knowledge of them).

46. Southern R. Co. *v.* Parnell, 142 Ala. 146, 37 So. 925 (offer for a dog two years before too remote).

47. Tierney *v.* New York Cent. & H. R. R. Co., 67 Barb. (N. Y.) 538. But it seems to be held otherwise in Young *v.* Atwood, 5 Hun (N. Y.) 234 (value of use); German-Am. State Bank *v.* Spokane-Columbia River R. & N. Co., 49 Wash. 359, 95 Pac. 261.

The Price Offered for a Note may be proved against the pledgee. German-Am. State Bank *v.* Spokane-Columbia River R. & N. Co., 49 Wash. 359, 95 Pac. 261.

48. St. Paul W. L. & O. Co. *v.* Tibbetts, 13 S. D. 446, 83 N. W. 564.

49. Whitney *v.* Thacher, 117 Mass. 523.

50. Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193.

51. Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68 (though the sale was by one of the parties).

The Rent Paid for grass land by a third party cannot be proved to show the value of grass destroyed. International & G. N. R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

52. Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569; Western & A. R. Co. *v.* Calhoun, 104 Ga. 384, 30 S. E. 868. See Cleghorn *v.* Love, 24 Ga. 590; Lawton *v.* Chase, 108 Mass. 238; Eaton *v.* Mellus, 7 Gray (Mass.) 566, 579 (in the absence of a local market); Burger *v.* Northern Pac. R. Co., 22 Minn. 343 (no local market); Hoffman *v.* Aetna F. Ins. Co., 1 Robt. (24 N. Y. Super.) 501, 518.

The Value of Four Bales of Cotton in Georgia is not shown by proof of the value of six bales in Ohio, nor by the sale of two bales in Georgia, in the absence of evidence showing that the six bales and the two bales were of the same average quality, or of like size or weight as the four bales. Simpson *v.* Cincinnati, etc. R. Co., 81 Ga. 495, 8 S. E. 524.

53. Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

54. Western & A. R. Co. *v.* Calhoun, 104 Ga. 384, 30 S. E. 868; Reeves *v.* Texas & P. R. Co., 11

b. *Circumstances Affecting Admissibility.* — The place at which the sale was made may make such evidence inadmissible unless account is taken of the cost of transportation and other circumstances bearing on the question of value.[55]

E. Offers To Sell Other Property. — The value of property is not provable by the price at which similar property has been offered for sale.[56]

8. Proof of Value in Criminal Cases. — Judicial notice will not be taken of the value of personal property unless its value is recognized by law — as in the case of coin or currency notes.[57] Hence proof that the property in question was of the prescribed value is essential in any other case where the degree of punishment depends upon its value.[58]

A. Nature of Competent Evidence. — Any evidence from which the jury can infer the value of a stolen chattel is competent; as its value to the owner, the opinions of witnesses acquainted with the value of like property, what such property has sold for, and circumstantial evidence generally.[59]

Tex. Civ. App. 514, 32 S. W. 920 (in corroboration of opinion concerning value).

The Value of Goods cannot be shown by the profit on sales made more than a year before the question at issue arose. Louisville Jeans Cloth. Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436.

The Price at Which a Rare Article not purchasable in the open market has sold at in previous years has been shown in connection with other circumstances. Atlantic Coast Line R. Co. *v.* Harris, 1 Ga. App. 667, 57 S. E. 1030.

55. Illinois Cent. R. Co. *v.* LeBlanc, 74 Miss. 626, 21 So. 748.

56. Ward *v.* Kadel, 38 Ark. 174; Thompson *v.* Moiles, 46 Mich. 42, 8 N. W. 577.

57. *Alabama.* — Grant *v.* State, 55 Ala. 201.

Georgia. — Ector *v.* State, 120 Ga. 543, 48 S. E. 315; Lane *v.* State, 113 Ga. 1040, 39 S. E. 463; Portwood *v.* State, 124 Ga. 783, 53 S. E. 99.

Illinois. — Keating *v.* People, 160 Ill. 480, 43 N. E. 724; Collins *v.* People, 39 Ill. 233.

Iowa. — State *v.* Pratt, 20 Iowa 267.

Missouri. — State *v.* Moseley, 38 Mo. 380.

58. Parker *v.* State, 111 Ala. 72, 20 So. 641; Ayers *v.* State, 3 Ga. App. 305, 59 S. E. 924; Wright *v.* State, 1 Ga. App. 158, 57 S. E. 1050; Johnson *v.* State, 109 Ga. 268, 34 S. E. 573; May *v.* State, 111 Ga. 840, 36 S. E. 222; Com. *v.* McKenney, 9 Gray (Mass.) 114; Ellison *v.* State, 25 Tex. App. 328, 8 S. W. 462.

59. Roberts *v.* State, 55 Ga. 220; Jenkins *v.* State, 50 Ga. 258; McCrary *v.* State, 96 Ga. 348, 23 S. E. 409; Ayers *v.* State, 3 Ga. App. 305, 59 S. E. 924; Martinez *v.* State, 16 Tex. App. 122; Saddler *v.* State, 20 Tex. App. 195. See article "Larceny," Vol. VIII, p. 142.

If the Precise Value of Property alleged to have been stolen need not be proved, the fact that it was of some value may be inferred from slight circumstances. It may be shown that the accused stated that he borrowed the horse, and also that he had stolen him; that witnesses traveled more than one hundred miles in search of the horse, and that the horse traveled two hundred miles. Houston *v.* State, 13 Ark. 66.

Sufficiency of Proof. — "The jury would have the right to infer that an engine and boiler recently in actual use, and about to be moved and put to work again, part of a mill outfit worth $500, was of some value. Likewise, the circumstance that the defendant hired teams and men to move the property, tends to negative the idea that it was valueless."

B. MARKET VALUE. — Proof of market value is not essential and non-expert opinions need not be based thereon.[60] But it has been held that if stolen property has a market value in the place it was stolen and at the time the larceny was committed, proof thereof must be made.[61]

C. VALUE TO OWNER. — If property had no market value at the time and place it was stolen, its reasonable value to the owner then and there may be shown,[62] or its actual value.[63] It has been held, however, that evidence of the value of second-hand clothing to its owner is incompetent.[64]

D. COST. — The cost of property may be shown.[65]

E. SALE. — The sale of property is evidence that it possessed value.[66]

F. SELLING PRICE. — The value of second-hand clothing is not established by proof of the selling price of dealers therein.[67]

Ayers *v.* State, 3 Ga. App. 305, 59 S. E. 924.

The introduction of a national bank note in evidence is sufficient proof that it is worth its face value. Joiner *v.* State, 124 Ga. 102, 52 S. E. 151; Keating *v.* People, 160 Ill. 480, 43 N. E. 724.

Weight of Animals may be shown and their value per pound, though if some of them were valuable for their breeding qualities the weight and price per pound might not be the standard. Cannon *v.* State, 18 Tex. App. 172; Saddler *v.* State, 20 Tex. App. 195.

Opinion as to Value of Bank Bills. A money broker who buys and sells bank bills may testify that certain bills were not current and had no market value in the place in which he did business, but cannot testify that there was no such bank as that by which the bills purported to have been issued, or that, if there were, its bills were absolutely valueless. People *v.* Chandler, 4 Park. Crim. (N. Y.) 231.

Opinions are not conclusive. Schwartz *v.* State, 53 Tex. Crim. 449, 111 S. W. 399.

60. Vandergrift *v.* State, 151 Ala. 105, 43 So. 852.

61. Keipp *v.* State, 51 Tex. Crim. 417, 103 S. W. 392; Baden *v.* State (Tex. Crim.), 74 S. W. 769; McBroom *v.* State (Tex. Crim.), 61 S. W. 480; Martinez *v.* State, 16 Tex. App. 122; Cannon *v.* State, 18 Tex. App. 172; Saddler *v.* State, 20 Tex. App. 195.

62. Cohen *v.* State, 50 Ala. 108; State *v.* Allen, Charlt. (Ga.) 518; Ayers *v.* State, 3 Ga. App. 305, 59 S. E. 924 (the interest of an officer in bringing property to sale so as to protect himself against a rule for contempt made each and every part of it valuable to him); Keipp *v.* State, 51 Tex. Crim. 417, 103 S. W. 392.

63. State *v.* Walker, 119 Mo. 467, 24 S. W. 1011.

64. Brooks *v.* State, 28 Neb. 389, 44 N. W. 436.

65. State *v.* McDermet (Iowa), 115 N. W. 884; Pratt *v.* State, 35 Ohio St. 514, 35 Am. Rep. 617; Cooksie *v.* State, 26 Tex. App. 72, 9 S. W. 58; Odell *v.* State, 44 Tex. Crim. 307, 70 S. W. 964.

66. Reg. *v.* Edwards, 13 Cox C. C. (Eng.) 384. In this case pigs bitten by a mad dog were killed and buried, without intention of digging them up. Defendant dug them up and sold them. The jury found that the owner had not abandoned the pigs, and a conviction was sustained.

In Vought *v.* State (Wis.), 114 N. W. 518, the value of town orders unlawfully issued, but regular on their face and according to the records, was well shown by proof that defendant, in a prosecution for larceny, obtained money upon them. See dissenting opinion, 114 N. W. 646.

67. Cooksie *v.* State, 26 Tex. App. 72, 9 S. W. 58.

G. Price Lists. — Catalogue price lists may be used by a witness as a basis on which to fix the value of an article like that in question.[68]

H. Equivalent of Value. — The value of stolen property may be shown in national currency.[69]

I. Time and Place. — If property has the same value everywhere, evidence of its value outside the county in which it was stolen is competent.[70] The theft is continued so long as the thief remains in possession; hence evidence of value at the time and place he possessed himself of it or the time and place he sold it is competent.[71] In Michigan the time and place of the larceny control the evidence respecting value.[72] And in Texas if the trial occurs in a county other than that in which the crime was committed, a complete offense must be shown in the county in which a conviction is sought; hence the value of the property when defendant carried it into that county must be shown.[73]

J. Quantum of Proof. — In prosecutions for felonies, the value of the stolen property being in issue, it must be shown beyond a reasonable doubt.[74]

K. Value of Bank Assets. — The value of the assets of a bank may be shown by the testimony of experienced bankers, brokers and real estate dealers who have made an examination thereof. In the absence of proof that the stock is without market value, evidence of the value of a building, apart from the land on which it stood, is improper if based on knowledge of its cost.[75]

9. Opinions. — A. Of Experts. — a. *Non-Marketable Property.* The opinions of experts are competent to show the intrinsic value of personal property which is without market value or for which such value has not been shown.[76]

68. Keipp *v.* State, 51 Tex. Crim. 417, 103 S. W. 392.

An Anonymous Letter is not admissible to show that a discount from the catalogue price is given. Keipp *v.* State, 51 Tex. Crim. 417, 103 S. W. 392.

69. Hubotter *v.* State, 32 Tex. 479.

70. Odell *v.* State, 44 Tex. Crim. 307, 70 S. W. 964.

71. State *v.* Brown, 55 Kan. 611, 40 Pac. 1001.

72. People *v.* Cole, 54 Mich. 238, 19 N. W. 968.

73. Clark *v.* State, 23 Tex. App. 612, 5 S. W. 178.

74. See article "Larceny," Vol. VIII, p. 140.

75. State *v.* Sattley, 131 Mo. 464, 488, 33 S. W. 41 (the issue being the solvency of the bank, the question of the value of its realty concerned the market value).

76. *United States.* — Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425; The Colon, 10 Ben. 366, 6 Fed. Cas. No. 3,025.

Illinois. — Walker *v.* Bernstein, 43 Ill. App. 568; Chicago, etc. R. Co. *v.* Kendall, 49 Ill. App. 398.

Iowa. — Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342 (second hand machines).

Maine. — Tebbetts *v.* Haskins, 16 Me. 283.

Michigan. — Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768.

Missouri. — Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252; Cantling *v.* Hannibal & St. J. R. Co., 54 Mo. 385, 14 Am. Rep. 476; Price *v.* Connecticut Mut. L. Ins. Co., 48 Mo. App. 281, 295.

New York. — Hicks *v.* Monarch

b. *Representatives of Value.* — The probable value securities would have had if issued may be shown by such testimony,[77] as may the value of the stock and assets of an insolvent corporation.[78]

c. *Marketable Property.* — **(1.) Competent.** — Such opinions are also competent to show the value of chattels for which there is a market value.[79]

(2.) Value for Different Uses. — They are also admissible to show the value of property for different purposes.[80]

(3.) Depreciation. — The extent of depreciation in value as the result of hard usage and unusual delay in transportation may be shown by expert testimony.[81]

(4.) Intangible Property. — The value of that which represents

Cycle Mfg. Co., 176 N. Y. 111, 68 N. E. 127 (cost of reproducing by hand a model fashioned after a patent); Vroom *v.* Sage, 100 App. Div. 285, 91 N. Y. Supp. 456 (value of contract to deliver stocks).

Ohio. — Steamboat Clipper *v.* Logan, 18 Ohio 375.

South Carolina. — Sonneborn & Co. *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77.

77. Houston & T. C. R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291.

78. Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425; State *v.* Darrah, 152 Mo. 522, 541, 54 S. W. 226.

79. *United States.* — McGowan *v.* American Pressed Tan Bark Co., 121 U. S. 575, 609; Missouri, etc. R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179.

Alabama. — Blackman *v.* Collier, 65 Ala. 311; Dixon *v.* Barclay, 22 Ala. 370, 382; Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121.

Colorado. — Colorado Farm & L. S. Co. *v.* York, 38 Colo. 239, 88 Pac. 181; Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434; Butler *v.* Howell, 15 Colo. 249, 25 Pac. 313.

Connecticut. — Beach *v.* Clark, 51 Conn. 200.

Iowa. — Humphrey *v.* Young, 92 Iowa 126, 60 N. W. 213.

Kansas. — Edwards *v.* Renstrom, 63 Kan. 883, 65 Pac. 249; Atchison, etc. R. Co. *v.* Gabbert, 34 Kan. 132, 8 Pac. 218.

Kentucky. — Southern R. Co. *v.* Graddy, 33 Ky. L. Rep. 183, 109 S. W. 881.

Maryland. — Gossage *v.* Philadelphia, etc. R. Co., 101 Md. 698, 61 Atl. 692.

Massachusetts. — Draper *v.* Saxton, 118 Mass. 427 (value of crop); Lawton *v.* Chase, 108 Mass. 238; Whitney *v.* Thacher, 117 Mass. 523.

Michigan. — Dalton *v.* Stiles, 74 Mich. 726, 42 N. W. 169; Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578.

Minnesota. — Brackett *v.* Edgerton, 14 Minn. 174.

Missouri. — Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351; Harris *v.* Quincy, etc. R. Co., 115 Mo. App. 527, 91 S. W. 1010.

Nebraska. — Connelly *v.* Edgerton, 22 Neb. 82, 34 N. W. 76; Jensen *v.* Palatine Ins. Co., 116 N. W. 286.

New York. — Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137; Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802.

Pennsylvania. — Mish *v.* Wood, 34 Pa. St. 451; Girard F. Ins. Co. *v.* Braden, 96 Pa. St. 81.

Texas. — Baden *v.* State (Tex. Crim.), 74 S. W. 769; Consolidated Kansas City S. & R. Co. *v.* Gonzales (Tex. Civ. App.), 109 S. W. 946 (writ of error denied by supreme court).

80. Jordan *v.* Patterson, 67 Conn. 473, 484, 35 Atl. 521 (retail value of goods ordered for resale and not delivered); Bradley *v.* Hooker, 175 Mass. 142, 55 N. E. 848 (value of second hand furniture as antique and for ordinary use); Dalton *v.* Stiles, 74 Mich. 726, 42 N. W. 169 (the value of a stock of goods for immediate sale and its value to a person going into business).

81. Missouri, etc. R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179; The Colon, 10 Ben. 366, 6 Fed. Cas. No. 3,025.

property may be shown by expert testimony[82] as the net value of a life insurance policy depending partly on extraneous facts and partly on the accuracy of an intricate computation;[83] but not the value of secured notes of solvent parties.[84]

(5.) Destroyed and Damaged Property. — The value of destroyed property may be shown by expert testimony,[85] as may the value of that damaged,[86] and the value of the different kinds of labor and materials necessary to restore it.[87]

d. *Basis of Estimates.* — **(1.) Testimony.** — Opinions may be based upon the testimony in some states if the data given are sufficient[88] and the witness has heard it all,[89] in which case it may be assumed that the appearance and condition of the property have been correctly described.[90]

d. *Basis of Estimates.* — **(1.) Testimony.** — Opinions may be based upon the testimony in some states if the data given are sufficient[88] and the witness has heard it all,[89] in which case it may be assumed that the appearance and condition of the property have been correctly described.[90]

(2.) Value of Separate Articles. — Estimates may be given on the separate articles constituting the chattel in question.[91]

(3.) Personal Estimate. — An opinion is not inadmissible because the witness stated on cross-examination that it was based on the sum he would give for the property.[92]

82. Llewellyn *v.* Rutherford, 44 L. J., C. P. 281, L. R. 10 C. P. (Eng.) 456, 32 L. T. 610 (value of good-will as between landlord and tenant); World's Columbian Exposition *v.* Pasteur-Chamberland F. Co., 82 Ill. App. 94 (out of doors advertising space); Page *v.* Cole, 120 Mass. 37 (value of the right and good-will connected with a milk route).

Expert Opinions as to the Value of the Good-Will of a manufacturing business are incompetent. Kirkman *v.* Kirkman, 26 App. Div. 395, 49 N. Y. Supp. 683.

83. Price *v.* Connecticut Mut. L. Ins. Co., 48 Mo. App. 281, 295.

84. Anderson *v.* First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

85. Phoenix Ins. Co. *v.* Copeland, 86 Ala. 551, 6 So. 143 (an expert may testify to the value of a house burned, the pillars and chimneys standing enabling him to determine its dimensions; and if he heard descriptions of the house by other witnesses may testify as to its value and the cost of rebuilding it as a matter of skilled opinion in answer to hypothetical questions).

86. Sonneborn *v.* Southern R., 65 S. C. 502, 44 S. E. 77.

87. Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351; Wynkoop *v.* Niagara F. Ins. Co., 91 N. Y. 478, 43 Am. Rep. 686.

88. Hook *v.* Stovall, 30 Ga. 418; Galveston, etc. R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011. *Contra,* Battle *v.* Columbia, etc. R. Co., 70 S. C. 329, 49 S. E. 849; Aultman Co. *v.* Ferguson, 8 S. D. 458, 66 N. W. 1081.

Stored Goods. — Testimony of the value of a stock of dry goods which had been in a store for some time as compared with its original must be based on personal knowledge. Smith *v.* First Nat. Bank, 45 Neb. 444, 63 N. W. 796.

89. Chicago, etc. R. Co. *v.* Kendall, 49 Ill. App. 398.

90. Walker *v.* Bernstein, 43 Ill. App. 568.

91. Hicks *v.* Monarch Cycle Mfg. Co., 176 N. Y. 111, 68 N. E. 127.

92. Connelly *v.* Edgerton, 22 Neb. 82, 34 N. W. 76.

e. *Not Required.* — The value of ordinary property may be established without expert testimony.[93] It is not admissible to show the damage done to growing crops.[94]

f. *Who Are Experts.* — (1.) **Special Knowledge.** — Witnesses having a special knowledge of such property as is in question and its value and of the identical property may testify to its value.[95]

Experienced Dealers are generally considered to be experts,[96] though their information as to prices in the controlling market is derived from circulars, letters, price current lists, returns of sales, market reports, conferences with commission men, knowledge of sales, general observation and experience,[97] irrespective of knowledge of partic-

93. Carberry *v.* Burns, 68 Miss. 573, 584, 9 So. 290; Lincoln Nat. Bank *v.* Davis, 32 Neb. 1, 48 N. W. 892.

94. Burlington & M. R. Co. *v.* Schluntz, 14 Neb. 421, 16 N. W. 439.

95. Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121; Tebbetts *v.* Haskins, 16 Me. 283 (a master builder); Gossage *v.* Philadelphia, etc. R. Co., 101 Md. 698, 61 Atl. 692; Steamboat Clipper *v.* Logan, 18 Ohio 375 (a steamboat engineer who had seen a damaged boat).

Physicians Are Not Experts as to the value of negroes, and their opinions are not entitled to greater weight than those of other witnesses. Hook *v.* Stovall, 26 Ga. 704.

96. *United States.* — Missouri, etc. R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179.

Alabama. — Dixon *v.* Barclay, 22 Ala. 370, 382 (a dealer in slaves may testify to the value of a particular slave two and a half years before he saw him).

Colorado. — Colorado Farm & L. S. Co. *v.* York, 38 Colo. 239, 88 Pac. 181; Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434; Butler *v.* Howell, 15 Colo. 249, 25 Pac. 313.

Illinois. — Walker *v.* Bernstein, 43 Ill. App. 568; Chicago, etc. R. Co. *v.* Kendall, 49 Ill. App. 398.

Iowa. — Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786 (a salesman of five or six years' experience who sold the article in question may testify as to its value from statements in evidence as to its condition).

Kansas. — Missouri Pac. R. Co. *v.* Shumaker, 46 Kan. 769, 27 Pac. 126.

Massachusetts. — Lawton *v.* Chase, 108 Mass. 238; Whitney *v.* Thacher, 117 Mass. 523.

Michigan. — Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578.

Missouri. — Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

New York. — Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137; Glaser *v.* Home Ins. Co., 93 N. Y. Supp. 524.

Pennsylvania. — Mish *v.* Wood, 34 Pa. St. 451; Girard F. Ins. Co. *v.* Braden, 96 Pa. St. 81.

97. *United States.* — Missouri, etc. R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179.

Iowa. — Humphrey *v.* Young, 92 Iowa 126, 60 N. W. 213.

Massachusetts. — Whitney *v.* Thacher, 117 Mass. 523.

Minnesota. — Brackett *v.* Edgerton, 14 Minn. 174.

Missouri. — State *v.* Darrah, 152 Mo. 522, 541, 54 S. W. 226; Cantling *v.* Hannibal & St. J. R. Co., 54 Mo. 385, 14 Am. Rep. 476 (value of a dog); Harris *v.* Quincy, etc. R. Co., 115 Mo. App. 527, 91 S. W. 1010; Genesee Fruit Co. *v.* Clarksville Cider Co., 114 Mo. App. 422, 89 S. W. 914.

New York. — Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802.

Witnesses Engaged in the Purchase, Sale and Breeding of Race Horses and familiar with the pedigrees and breeding of the colts in question, and who have heard descriptions of them, may, after examining a catalogue containing descriptions and pedigrees, state the value of each colt. Southern R. Co. *v.*

ular sales of the commodity the value of which is in question.[98]

Practical Knowledge qualifies a witness to testify as an expert.[99]

(2.) Knowledge of Demand and Supply. — It is not material that the knowledge of the supply of, and demand for, the property in question was obtained after it was converted, and that the estimate of its value was based thereon.[1]

(3.) Extent of Knowledge. — It is not essential that an expert's knowledge shall extend to the value of all the component parts of an article.[2]

(4.) Necessary Similarity of Properties. — It is not required that an expert shall be familiar with property exactly like that to be valued; it is enough if that he is familiar with is similar in character, has a like combination of properties and qualities and was made for the same purpose.[3]

(5.) Discretion of Court. — The competency of witnesses offered as experts is largely a question for the trial court,[4] if not wholly so.[5]

g. *Hypothetical Questions.* — The usual rules governing the form of questions to experts apply to experts who testify to value.[6]

B. Of Non-Experts. — a. *Generally.* — **(1.) Usually Competent.** Unless the property in question is of such a nature that only expert testimony[7] is competent, non-experts with the requisite knowl-

Graddy, 33 Ky. L. Rep. 183, 109 S. W. 881.

98. Cleveland *v.* Rowe, 99 Minn. 444, 109 N. W. 817; Beaudry *v.* Duquette, 92 Minn. 158, 99 N. W. 635; Linde *v.* Gaffke, 81 Minn. 304, 84 N. W. 41; Hoxsie *v.* Empire Lumb. Co., 41 Minn. 548, 43 N. W. 476; Genesee Fruit Co. *v.* Clarksville Cider Co., 114 Mo. App. 422, 89 S. W. 914.

99. McGowan *v.* American Pressed Tan Bark Co., 121 U. S. 575, 609 (a hydraulic engineer who has been engaged in the construction of steam engines may testify to the value of a steam engine he examined); Beach *v.* Clark, 51 Conn. 200; Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342; Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137.

1. Burger *v.* Northern Pac. R. Co., 22 Minn. 343.

2. Brody *v.* Birnbaum, 108 N. Y. Supp. 581.

3. Blackman *v.* Collier, 65 Ala. 311; Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279; Smith *v.* Smith, 32 Misc. 702, 65 N. Y. Supp. 497.

Illustrations. — One who has made a specialty of handling household and art sales is not thereby qualified to testify of the value of oil paintings. Ellis *v.* Thomas, 84 App. Div. 626, 82 N. Y. Supp. 1064. Familiarity with property of the same generic kind is not a qualification. Staats *v.* Hansling, 22 Misc. 526, 50 N. Y. Supp. 222.

4. Jensen *v.* Palatine Ins. Co. (Neb.), 116 N. W. 286; Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802.

5. Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

6. See article "Expert and Opinion Evidence," Vol. V, p. 615.

7. *United States.* — Buckley *v.* United States, 4 How. 251; Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425.

Alabama. — Burks *v.* Hubbard, 69 Ala. 379; Little *v.* Lichkoff, 98 Ala. 321, 12 So. 429; Alabama G. S. R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238; Southern R. Co. *v.* Morris, 42 So. 17; Ward *v.* Reynolds, 32 Ala. 384; O'Neal *v.* Brown, 20 Ala. 510; American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644; Louisville Jeans Clothing Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436; Rawles *v.*

edge may testify as to its market value, or, where it has no such

James, 49 Ala. 183; Chandler Bros. *v.* Higgins, 47 So. 284.

Arkansas. — Railway Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; St. Louis, etc. R. Co. *v.* Philpot, 72 Ark. 23, 77 S. W. 901.

California. — Paden *v.* Goldbaum, 37 Pac. 759; Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Colorado. — Burlington & M. R. Co. *v.* Campbell, 14 Colo. App. 141, 59 Pac. 424; Union Pac. etc. R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731; Rimmer *v.* Wilson, 93 Pac. 1110.

Florida. — Jacksonville, etc. R. Co. *v.* Peninsular Land, T. & M. Co., 27 Fla. 1, 157, 2 So. 661, 17 L. R. A. 65.

Georgia. — Central R. *v.* Wolff, 74 Ga. 664; Columbus R. Co. *v.* Woolfolk, 128 Ga. 631, 58 S. E. 152, 10 L. R. A. (N. S.) 1136 (dogs).

Illinois. — Lycoming Ins. Co. *v.* Jackson, 83 Ill. 302; Chicago & N. W. R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095; Hey *v.* Hawkins, 120 Ill. App. 483; Reebie *v.* Brackett, 109 Ill. App. 631; Ohio & M. R. Co. *v.* Irvin, 27 Ill. 178; White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 513; Chicago, etc. R. Co. *v.* Kendall, 49 Ill. App. 398.

Indiana. — Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129; Burke *v.* Howell, 14 Ind. App. 296, 42 N. E. 952; Fredericks *v.* Sault, 19 Ind. App. 604, 49 N. E. 909; Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92; Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991.

Indian Territory. — German-Am. Ins. Co. *v.* Paul, 2 Ind. Ter. 625, 53 S. W. 442.

Iowa. — Houghtaling *v.* Chicago, G. W. R. Co., 117 Iowa 540, 91 N. W. 811; Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14; Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786 (cases concerning second hand clothing and furniture); Anson *v.* Dwight, 18 Iowa 241 (dogs).

Kansas. — Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315; Atchison, etc. R. Co. *v.* Bartlett, 2 Kan. App. 167, 43 Pac. 284.

Kentucky. — Louisville & N. R. Co. *v.* Jones, 21 Ky. L. Rep. 749, 52 S. W. 938.

Louisiana. — Baillie *v.* Western Assur. Co., 49 La. Ann. 658, 21 So. 736.

Maryland. — Dailey *v.* Grimes, 27 Md. 440.

Massachusetts. — Miller *v.* Smith, 112 Mass. 470 ("Whenever the value of any peculiar kind of property, which may not be presumed to be within the actual knowledge of all jurors, is in issue, the testimony of witnesses acquainted with the value of similar property is admissible, although they may never have seen the very article in question"); Vandine *v.* Burpee, 13 Met. 288; Com. *v.* Dorsey, 103 Mass. 412; Wright *v.* Quirk, 105 Mass. 44.

Michigan. — Woods *v.* Gaar, Scott & Co., 99 Mich. 301, 58 N. W. 307; Bowers *v.* Horen, 93 Mich. 420, 53 N. W. 535, 32 Am. St. Rep. 513, 17 L. R. A. 773; Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; Browne *v.* Moore, 32 Mich. 254.

Minnesota. — Burger *v.* Northern Pac. R. Co., 22 Minn. 343.

Mississippi. — Carberry *v.* Burns, 68 Miss. 573, 584, 9 So. 290; Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri. — Nelson Mfg. Co. *v.* Shreve, 104 Mo. App. 474, 79 S. W. 488; Simmons *v.* Carrier, 68 Mo. 416; Fry *v.* Estes, 52 Mo. App. 1; Willison *v.* Smith, 60 Mo. App. 469; McCrary *v.* Chicago & A. R. Co., 109 Mo. App. 567, 83 S. W. 82.

Montana. — Porter *v.* Hawkins, 27 Mont. 486, 71 Pac. 664; Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390; Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621.

Nebraska. — Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770; Langdon *v.* Wintersteen, 58 Neb. 278, 78 N. W. 501; St. Joseph & G. I. R. Co. *v.* McCarty, 92 N. W. 750.

New York. — Weidner *v.* Olivit, 108 App. Div. 122, 96 N. Y. Supp. 37, 188 N. Y. 611, 81 N. E. 1178 (no opinion); Kilpatrick *v.* Wm. Whitmer & Sons, 118 App. Div. 98, 103 N. Y. Supp. 75; Jamieson *v.* New

value, to its intrinsic worth, if the subject-matter is not of such a

York & R. B. R. Co., 11 App. Div. 50, 42 N. Y. Supp. 915, 162 N. Y. 630, 57 N. E. 1113 (no opinion); Moore *v.* Baylies, 56 Hun 647, 10 N. Y. Supp. 62; Rogers *v.* Ackerman, 22 Barb. 134; Smith *v.* Hill, 22 Barb. 656; Merrill *v.* Grinnell, 30 N. Y. 594, 613.

Oklahoma. — Robinson *v.* Peru Plow & W. Co., 1 Okla. 140, 158, 31 Pac. 988.

Oregon. — Ruckman *v.* Imbler Lumb. Co., 42 Or. 231, 70 Pac. 811.

Pennsylvania. — Commercial Bank *v.* Wood, 7 Watts & S. 89.

South Carolina. — Kean *v.* Landrum, 72 S. C. 556, 52 S. E. 421; Millam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571; Battle *v.* Columbia, etc. R. Co., 70 S. C. 329, 49 S. E. 849.

South Dakota. — Gleckler *v.* Slavens, 5 S. D. 364, 384, 59 N. W. 323; Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070; State *v.* Montgomery, 17 S. D. 500, 97 N. W. 716; Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 657, 57 N. W. 919, 46 Am. St. Rep. 796.

Texas. — St. Louis S. W. R. Co. *v.* Campbell (Tex. Civ. App.), 34 S. W. 186; International & G. N. R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39; Gulf, etc. R. Co. *v.* Calhoun (Tex. Civ. App.), 24 S. W. 362 (the four cases last cited hold opinions competent to show the value of growing grass which was without market value); Ft. Worth & R. G. Co. *v.* Brown (Tex. Civ. App.), 101 S. W. 266; Texas & P. R. Co. *v.* Wilson Hack Line Co. (Tex. Civ. App.), 101 S. W. 1042; Ft. Worth & R. G. R. Co. *v.* Hickox (Tex. Civ. App.), 103 S. W. 202; Galveston, etc. R. Co. *v.* Polk (Tex. Civ. App.), 28 S. W. 353; Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75; Galveston, etc. R. Co. *v.* Rheiner (Tex. Civ. App.), 25 S. W. 971; St. Louis, etc. R. Co. *v.* Rogers (Tex. Civ. App.), 108 S. W. 1027; St. Louis, etc. R. Co. *v.* Boshear (Tex. Civ. App.), 108 S. W. 1032 (in the first case a writ of error was denied by the supreme court; but it was granted in the second case).

Utah. — Rich *v.* Utah Com. & S. Bank, 30 Utah 334, 84 Pac. 1105.

Vermont. — Maughan *v.* Estate of Burns, 64 Vt. 316, 23 Atl. 583.

Virginia. — Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 115, 48 S. E. 521.

Washington. — Glass *v.* Buttner, 39 Wash. 296, 81 Pac. 699; Lines *v.* Alaska Com. Co., 29 Wash. 133, 69 Pac. 642.

Wisconsin. — Erd *v.* Chicago & N. R. Co., 41 Wis. 65 (in the absence of market value); Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499; Plunkett *v.* Minneapolis, etc. R. Co., 79 Wis. 222, 48 N. W. 519; Phillips *v.* Eggert, 133 Wis. 318, 113 N. W. 686; Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680.

Basis of Competency. — "It is not necessary in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify." Whitney *v.* Thacher, 117 Mass. 523; Gleckler *v.* Slavens, 5 S. D. 364, 384, 59 N. W. 323; Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499.

One Who Has Made an Inventory of Goods and testifies that it is correct may testify as to their value as shown by it. Coleman *v.* Retail Lumbermen's Ins. Assn., 77 Minn. 31, 79 N. W. 588.

Basis on Which Property Inspected. — A witness who has sent property to a certain market and seen the report of the inspection of it made there may give an opinion as to the basis of an inspection there of property with which he is familiar, though he had no other experience in that market. Lehigh *v.* Standard Tie Co., 149 Mich. 102, 112 N. W. 481.

nature that the jury may be presumed to have knowledge equal to that of the witness.[8]

(2.) Value in Foreign Market. — Such testimony is competent to show the value of goods in a foreign market on a given day.[9]

(3.) Value in Different Markets. — The relative value of property in different markets may be shown by such testimony.[10]

(4.) At Auction and Under Various Circumstances. — The price property of a kind ordinarily sold at auction would bring thereat may be so shown,[11] and its value in all the various situations and circumstances under which it could probably have been converted into money.[12]

(5.) Book Accounts and Contracts. — The value of these may also be so shown.[13]

(6.) Depreciation. — The extent to which depreciation in value has resulted from use, delay in shipment, disease or vicious habits may be testified to by competent witnesses,[14] unless their opinions are inadmissible as conclusions.[15]

(7.) Difference Between Fact and Representation. — Such testimony is also competent to show the difference in the value of property

8. Winter *v.* Burt, 31 Ala. 33 (machinery). *Contra,* Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92; Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray (Mass.) 432. Minnesota Threshing Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993, is in accord with the Alabama case.

9. Buckley *v.* United States, 4 How. (U. S.) 251.

10. Mount Vernon Brew. Co. *v.* Teschner (Md.), 69 Atl. 702.

11. Sheldon *v.* Wood, 2 Bosw. (N. Y. Super.) 267, 287.

12. Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770.

13. Moore *v.* Temple Grocer Co. (Tex. Civ. App.), 43 S. W. 843; Borst *v.* Crommie, 19 Hun (N. Y.) 209 (contract for support).

14. *Illinois.* — Chicago & N. W. R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095.

Massachusetts. — Miller *v.* Smith, 112 Mass. 470 (testimony as to the value of fast trotting horses of a given age, size, gait, speed and other qualities is competent, as is the effect of cribbing or wind sucking upon the value of such horses for use or in market); Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114.

Michigan. — Woods *v.* Gaar, Scott & Co., 99 Mich. 301, 58 N. W. 307; Printz *v.* People, 42 Mich. 144, 3 N. W. 306, 36 Am. Rep. 437.

Montana. — Russell *v.* Chicago, etc. R. Co., 94 Pac. 488.

South Dakota. — Standard Rope & T. Co. *v.* Olmem, 13 S. D. 296, 83 N. W. 271; Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942.

Texas. — Texas & P. R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; Trout *v.* Gulf, etc. R. Co. (Tex. Civ. App.), 111 S. W. 220; St. Louis, etc. R. Co. *v.* Rogers (Tex. Civ. App.), 108 S. W. 1027 (writ of error denied by supreme court); St. Louis, etc. R. Co. *v.* Boshear (Tex. Civ. App.), 108 S. W. 1032 (writ of error granted by supreme court).

15. Testimony That if Property had been transported to a given point within a reasonable time and with ordinary care its reasonable value there would have been a given sum is incompetent because covering a mixed question of law and fact. Houston, etc. R. Co. *v.* Davis (Tex. Civ. App.), 109 S. W. 422; Houston, etc. R. Co. *v.* Roberts (Tex.), 108 S. W. 808; Gulf, etc. R. Co. *v.* Kimble (Tex. Civ. App.), 109 S. W. 234. But *compare* Southern R. Co. *v.* Graddy, 33 Ky. L. Rep. 183, 109 S. W. 881, such

as it is and as it was represented to be,[16] unless excepted to because embodying a conclusion,[17] and what its value would have been if it had been cared for as was stipulated.[18]

(8.) Worthlessness. — It is immaterial that the testimony shows that the property is worthless. In such a case the rule that the quantum of damage must not be shown by opinions does not apply.[19]

(9.) Value of Use. — The value of the use of property may be shown by the testimony of witnesses similarly qualified.[20]

(10.) Condition of Property. — Such evidence is also competent to show the condition of property at a given time.[21]

b. *Necessity.* — The opinions of non-experts are often necessarily received,[22] as where the property in question has been lost or de-

evidence being received without objection.

16. Haskell *v.* Mitchell, 53 Me. 468, 89 Am. Dec. 711; Williamson *v.* Dillon, 1 Har. & J. (Md.) 444, 466; Joy *v.* Hopkins, 5 Denio (N. Y.) 84; Whitney *v.* Taylor, 54 Barb. (N. Y.) 536; Rogers *v.* Ackerman, 22 Barb. (N. Y.) 134; Decker *v.* Myers, 31 How. Prac. (N. Y.) 372.

17. Miller *v.* Mayer, 124 Ala. 434, 26 So. 892; Hunt *v.* Curtis, 151 Ala. 507, 44 So. 54; Darner *v.* Daggett, 35 Neb. 695, 53 N. W. 608; Decker *v.* Myers, 31 How. Prac. (N. Y.) 372; Cothran *v.* Knight, 45 S. C. 1, 22 S. E. 596.

18. As Against a Trespasser Who Has Deprived the Owner of Cattle of Pasturage for Them, the testimony of farmers, graziers and drovers of knowledge and experience of cattle and the feeding of them in pastures is competent to show the condition of the cattle when put in the pasture, their previous mode of keeping, their condition when taken away, and what they might be expected to gain or shrink in a pasture stocked or overstocked as was the one in question, and what would have been their market value but for the excessive number put in the pasture, and the reduced market value by reason thereof, and the difference in the price per head and per pound in cattle of different weights or conditions. Gilbert *v.* Kennedy, 22 Mich. 117.

19. Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188.

20. Kennett *v.* Fickel, 41 Kan. 211, 21 Pac. 93; Cornell *v.* Dean, 105 Mass. 435 (the value of pasturing cattle and the comparative value of doing so transiently or by the season); McCormick *v.* Stowell, 138 Mass. 431; Chamberlain *v.* Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807; Ruckman *v.* Imbler Lumb. Co., 42 Or. 231, 70 Pac. 811; Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

Basis for Opinions. — Opinions as to the value of the use of property may be based upon the belief of a witness as to what he could make by its use, or upon experience he has had in the use of similar property, or by a knowledge of what others have made by using the identical property. Butler *v.* Mehrling, 15 Ill. 488.

21. Colorado Farm & Live Stock Co. *v.* York, 38 Colo. 239, 88 Pac. 181 (a farmer who has raised various kinds of crops, although he had never raised cantaloupes, or paid any attention to the manner of raising them, may testify as to the stand of cantaloupes in a field he had examined).

Loss of Weight in Shipment. One who has bought cattle for several years and shipped them to the market in question, and knew the condition of the cattle involved in the case, may testify how much they would lose in weight while being transported a certain distance in a given time. Cleveland, etc. R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198.

22. Burks *v.* Hubbard, 69 Ala. 379; Baillie *v.* Western Assur. Co., 49 La. Ann. 658, 21 So. 736.

stroyed.[23] There are occasional expressions unfavorable to such testimony, indicating that its reception is contrary to the general rule and that it should be received only in case of necessity.[24] These are quite unusual. Usually courts are very liberal in receiving them.

c. *Knowledge Essential.* — The competency of witnesses depends upon knowledge of the value of the property in issue or of the value of like property in the local market or in the controlling market, if the property has a market value, or, in the absence of such value, of the qualities which give value to property.[25]

23. German-Am. Ins. Co. *v.* Paul, 2 Ind. Ter. 625, 53 S. W. 442; St. Joseph & G. I. R. Co. *v.* McCarty (Neb.), 92 N. W. 750; Orr *v.* Mayor, 64 Barb. (N. Y.) 106; Merrill *v.* Grinnell, 30 N. Y. 594, 613; Battle *v.* Columbia, etc. R. Co., 70 S. C. 329, 49 S. E. 849.

24. Teerpenning *v.* Com. Exch. Ins. Co., 43 N. Y. 279.

In New York opinions as to the value of dogs are inadmissible unless they have a value in the market. Smith *v.* Griswold, 15 Hun 273; Dunlap *v.* Snyder, 17 Barb. 561 (*overruling* Brill *v.* Flagler, 23 Wend. 354); Brown *v.* Hoburger, 52 Barb. 15.

25. *United States.* — New York & C. Min. Synd. Co. *v.* Fraser, 130 U. S. 611; Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425; United States *v.* Baxter, 46 Fed. 350 (testimony according to a witness' best recollection is valueless); The Oregon, 89 Fed. 520 (a seaman's testimony as to the value of the wardrobe of the captain's family is valueless).

Alabama. — Roden *v.* Brown, 103 Ala. 324, 15 So. 598; McAllister-Coman Co. *v.* Matthews, 150 Ala. 167, 43 So. 747; Thomas *v.* DeGraffenreid, 17 Ala. 602; Nelson *v.* Iverson, 24 Ala. 9.

Illinois. — Frederick *v.* Case, 28 Ill. App. 215 (must have knowledge of the property in question).

Indiana. — Burke *v.* Howell, 14 Ind. App. 296, 42 N. E. 952 (knowledge of market value of the particular property or of the property itself is essential).

Iowa. — Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498 (a witness is competent if he knows the stock, its cost and value); State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193 though the stock of goods in question was not carefully examined to ascertain its value); Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Daly *v.* W. W. Kimball Co., 67 Iowa 132, 24 N. W. 756; Clausen *v.* Tjernagel, 91 Iowa 285, 59 N. W. 277.

Massachusetts. — Lawton *v.* Chase, 108 Mass. 238.

Michigan. — Greeley *v.* Stilson, 27 Mich. 153; Grabowsky *v.* Baumgart, 128 Mich. 267, 87 N. W. 891 (merely glancing over a stock of goods does not qualify a witness to testify to its value); Woods *v.* Gaar, Scott & Co., 99 Mich. 301, 58 N. W. 307.

Minnesota. — Berg *v.* Spink, 24 Minn. 138; Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1; Russell *v.* Hayden, 40 Minn. 88, 41 N. W. 456.

Missouri. — Schaaf *v.* Fries, 77 Mo. App. 346, 357 (inspection of part of a stock of goods does not qualify a witness to testify to the value of the whole); Willison *v.* Smith, 60 Mo. App. 469.

Nebraska. — Engster *v.* State, 11 Neb. 539, 10 N. W. 453; Brooks *v.* State, 28 Neb. 389, 44 N. W. 436; Dunbar *v.* Briggs, 13 Neb. 332, 14 N. W. 414.

New York. — Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279 (a farmer whose knowledge of a stock of goods was derived from his being in the store frequently is not a competent witness); Thorn *v.* Couchman, 28 How. Prac. 95; Dixon *v.* LaFarge, 1 E. D. Smith 722; Chambovet *v.* Cagney, 3 Jones & S. (N. Y. Super.) 474 (a witness who testifies merely that he could not buy the property in question for less than a sum stated does not show himself competent to testify of its value); Manning *v.* Interurban St. R. Co., 88 N. Y. Supp. 386 (a witness who had not seen an animal before it was

(1.) Absolute Knowledge Not Required. — Approximate knowledge is sufficient in many cases,[26] if it be such as any man of ordinary intelligence might have,[27] and extends to the value of all the property in question.[28]

(2.) Practical Knowledge. — Experience in the business in which property is used qualifies a witness to testify to the value of the latter.[29] Experienced local dealers in such property as is in ques-

injured cannot testify to its value); Ebenreiter *v.* Dahlman, 19 Misc. 9, 42 N. Y. Supp. 867 (ordinary commodities).

North Dakota. — Minnesota Thresh. Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

Oregon. — Oregon Pottery Co. *v.* Kern, 30 Or. 328, 47 Pac. 917.

Pennsylvania. — Com. *v.* Sunderlin, 31 Pa. Super. 349.

Rhode Island. — Forbes *v.* Howard, 4 R. I. 364 (a witness who has served as a member of a committee in fitting up a theatre in one city and consulted stage carpenters and artists concerning the same, is not competent to give his opinion of the cost of scenery and fixtures of a theatre of about the same size in another city).

Texas. — Texas & P. R. Co. *v.* Sherrod, 99 Tex. 382, 89 S. W. 956 (a witness is not qualified to testify of the value of property at its destination merely because he knew its value where it was shipped); Gulf, etc. R. Co. *v.* Staton (Tex. Civ. App.), 49 S. W. 277 (the statement of a witness as to his knowledge is not final).

26. *Connecticut.* — O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325 (a practical builder of experience who has examined the exterior of a building may estimate its value though he has not seen the interior).

Illinois. — Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513.

Kansas. — Atchison, etc. R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051.

Michigan. — Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5.

Missouri. — Nelson Mfg. Co. *v.* Shreve, 104 Mo. App. 474, 79 S. W. 488 (on the issue of a dealer's solvency and the value of his stock); Willison *v.* Smith, 60 Mo. App. 469.

Montana. — Porter *v.* Hawkins, 27 Mont. 486, 71 Pac. 664; Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390 (a loose application of the rule).

New York. — Fishbach *v.* Steinway R. Co., 11 App. Div. 152, 42 N. Y. Supp. 883.

An Experienced Merchant who has examined the tickets attached to the articles constituting a stock of goods may testify as to his opinion whether the prices so indicated approximate to the wholesale prices. Sylvester *v.* Ammons, 126 Iowa 140, 101 N. W. 782.

27. State *v.* Finch, 70 Iowa 316, 30 N. W. 578, 59 Am. Rep. 443 (a witness who saw and examined a sealskin overcoat held competent though it was the only one he had seen and he had no other knowledge of its value than might be possessed by any one of ordinary intelligence); Jensen *v.* Palatine Ins. Co. (Neb.), 116 N. W. 286 (traveling salesmen who are charged by their employers with the duty of observing the quantity and condition of their customers' stocks and estimating their value, may testify thereof when they regularly visit their customers); Ochsenreiter *v.* George C. Bagley Elev. Co., 11 S. D. 91, 75 N. W. 822 (any man of ordinary intelligence residing in a grain growing country, after having seen a field of flax in which he is interested, may testify of its probable yield); State *v.* Montgomery, 17 S. D. 500, 97 N. W. 716.

Opinions Based, Not on Knowledge of Actual Conditions, but on an inference from facts observed at times somewhat remote from the time in question may be excluded in the discretion of the court. Anthony *v.* New York, etc. R. Co., 162 Mass. 60, 37 N. E. 780.

28. Dunbar *v.* Briggs, 13 Neb. 332, 14 N. W. 414.

29. Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768 (the purchaser of

tion may testify of its value if familiar with it,[30] regardless of the extent of their business,[31] and though engaged in another line of trade,[32] as may their employes if familiar with the property.[33]

(A.) Incidentally Obtained. — Persons who buy and sell as an incident of their business may testify to the value of such property as they ordinarily handle.[34]

non-marketable property who has used it for the purpose for which it was obtained may testify to its value for such purpose); Fry *v.* Estes, 52 Mo. App. 1 (experienced farmers may testify to the value of crops, cattle and farming implements); Texas & P. R. Co. *v.* Virginia Ranch L. & C. Co. (Tex.), 7 S. W. 341.

Qualification. — Machinery. — One who owned and ran the machinery in question a year before the plaintiff bought it, who knew its quality and value, and had made and procured estimates of the cost of making such machines, may testify as to its value. Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray (Mass.) 432. *Compare* Minnesota Thresh. Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

30. *California.* — Grunwald *v.* Freese, 34 Pac. 73 (if its condition can be ascertained from its appearance and by handling it).

Colorado. — Rimmer *v.* Wilson, 93 Pac. 1110.

Georgia. — Central R. & B. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

Illinois. — Cleveland, etc. R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804 (limited knowledge of value in a particular market does not disqualify); Chicago & N. W. R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095.

Mississippi. — Carberry *v.* Burns, 68 Miss. 573, 584, 9 So. 290; Alabama & V. R. Co. *v.* Searles, 71 Miss. 744, 16 So. 255.

Missouri. — Simmons *v.* Carrier, 68 Mo. 416.

Nebraska. — Reed Bros. & Co. *v.* Davis Mill. Co., 37 Neb. 391, 55 N. W. 1068.

New Hampshire. — Melendy *v.* Ferson, 51 N. H. 419 (may testify as to depreciation of price at a fixed time and extent thereof).

New York. — McDonald *v.* Christie, 42 Barb. 36 (though without particular knowledge of the disease which affected an animal); Browning *v.* Long Island R. Co., 2 Daly 117; Weidner *v.* Olivit, 108 App. Div. 122, 96 N. Y. Supp. 37, 188 N. Y. 611, 81 N. E. 1178 (no opinion).

South Carolina. — Millam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571.

South Dakota. — Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070; Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

Texas. — Texas & P. R. Co. *v.* Wilson Hack Line (Tex. Civ. App.), 101 S. W. 1042 (a carriage repairer may testify of the value of second hand carriages); Belknap *v.* Groover (Tex. Civ. App.), 56 S. W. 249.

Wisconsin. — Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499; Plunkett *v.* Minneapolis, etc. R. Co., 79 Wis. 222, 48 N. W. 519.

Merchants of Long Experience who have invoiced a stock of goods may testify as to the difference between its actual cost at wholesale as inventoried and the amount of their invoice. It was not essential that the value of each article should be estimated separately. Sylvester *v.* Ammons, 126 Iowa 140, 101 N. W. 782.

31. St. Louis, etc. R. Co. *v.* Philpot, 72 Ark. 23, 77 S. W. 901 (value of dogs shown by opinion of breeder on small scale); Commercial Bank *v.* Wood, 7 Watts & S. (Pa.) 89 (sale of single draft).

32. Graves *v.* Merchants' & B. Ins. Co., 82 Iowa 637, 49 N. W. 65, 31 Am. St. Rep. 507.

33. Grunwald *v.* Freese (Cal.), 34 Pac. 73; Kerr *v.* McGuire, 28 N. Y. 446; Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013.

34. *California.* — Paden *v.* Goldbaum, 37 Pac. 759.

Colorado. — Union Pac. R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731; Chicago, etc. R. Co. *v.* Larsen,

(B.) Owners. — The owner of property may generally testify of its worth if he bought it and knows what he paid for it[35] in the usual course of trade,[36] if he has priced similar articles,[37] though

19 Colo. 71, 34 Pac. 477 (a farmer is presumed to know the value of a crop he raised; and though not a horse dealer may testify to the value of horses used on his farm, having seen horses sold both at private sale and auction); Burlington & M. R. *v.* Campbell, 14 Colo. App. 141, 59 Pac. 424 (the opinions of farmers who own and occasionally buy and sell such horses as the one in question, which they knew, are competent though they testified that they did not know its market value or know that there was any such value for horses in the vicinity where they lived).

Kansas. — Chandler *v.* Parker, 65 Kan. 860, 70 Pac. 368.

Massachusetts. — Brady *v.* Brady, 8 Allen 101.

Nebraska. — Langdon *v.* Wintersteen, 58 Neb. 278, 78 N. W. 501.

New York. — Phillips *v.* McNab, 16 Daly 150, 9 N. Y. Supp. 526; Jamieson *v.* New York & R. B. R. Co., 11 App. Div. 50, 42 N. Y. Supp. 915, 162 N. Y. 630, 57 N. E. 1113 (no opinion).

35. *United States.* — Gorman *v.* Park, 100 Fed. 553, 40 C. C. A. 537; Union Pac. R. Co. *v.* Lucas, 136 Fed. 374, 69 C. C. A. 218; Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642 (owner for but three days; had aided in invoicing stock of goods).

Indiana. — Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991 (farmers may testify to the value of their barns).

Iowa. — Tubbs *v.* Garrison, 68 Iowa 44, 25 N. W. 921; Thomason *v.* Capital Ins. Co., 92 Iowa 72, 61 N. W. 843 (ordinary household goods); City Nat. Bank *v.* Jordan, 117 N. W. 758.

Massachusetts. — Berry *v.* Ingalls, 199 Mass. 77, 85 N. E. 191; Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489; Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114.

Michigan. — Michaud *v.* Grace Harbor Lumb. Co., 122 Mich. 305, 81 N. W. 93; Continental Ins. Co. *v.* Horton, 28 Mich. 173; Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283 (householders are presumed to be competent to testify to the value of such articles as they are accustomed to buy); Mason *v.* Partrick, 100 Mich. 577, 59 N. W. 239.

Minnesota. — Paterson *v.* Chicago, etc. R. Co., 95 Minn. 57, 103 N. W. 621.

Missouri. — Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473.

Nebraska. — Omaha Auction & S. Co. *v.* Rogers, 35 Neb. 61, 52 N. W. 826 (household goods); Lincoln Supply Co. *v.* Graves, 73 Neb. 214, 102 N. W. 457 (husband and wife may testify to value of their household goods); Jensen *v.* Palatine Ins. Co., 116 N. W. 286; Langdon *v.* Wintersteen, 58 Neb. 278, 78 N. W. 501.

New York. — Rademacher *v.* Greenwich Ins. Co., 16 Misc. 286, 38 N. Y. Supp. 112; Rademacher *v.* Greenwich Ins. Co., 75 Hun 83, 27 N. Y. Supp. 155 (a housewife may testify of the value of household furniture and personal effects, having bought many of the articles and knowing the value of others); Williamson *v.* New York, etc. R. Co., 56 N. Y. Super. 508, 4 N. Y. Supp. 834.

Pennsylvania. — Betz *v.* Hummel, 13 Atl. 938.

Texas. — Texarkana & Ft. S. R. Co. *v.* Bell (Tex. Civ. App.), 101 S. W. 1167 (if he buys it occasionally and knows of sales made to others).

It Must Be Assumed that farmers who raise and sell produce know its market value. McLennan *v.* Minneapolis & N. E. Co., 57 Minn. 317, 59 N. W. 628; Nichols *v.* Chicago, etc. R. Co., 36 Minn. 452, 32 N. W. 176.

The Purchase of Jewels is not proof of the witness' acquaintance with their value, no evidence being given of the price paid. Gregory *v.* Fichtner, 27 Abb. N. C. 86, 14 N. Y. Supp. 891.

36. Campbell *v.* Campbell, 22 Jones & S. (N. Y. Super.) 381.

37. Printz *v.* People, 42 Mich.

he does not deal in them,[38] if informed of their quality and condition.[39] A part owner may also testify under the same conditions as a full owner.[40] It is otherwise as to the donee of property.[41] The general rule is not recognized in Rhode Island.[42]

(C.) Former Owners. — One who has recently owned a chattel may testify to its value[43] if he purchased it.[44]

(D.) Knowledge of Cost. — A witness who knows what was paid for property may testify to its value.[45]

(E.) Value for Special Purpose. — Knowledge of the value of property for a special purpose is sometimes necessary, in which event knowledge of general market value is not a qualification.[46] One who deals only in new goods may not testify of their value as compared with the value of second-hand goods, in the absence of expert knowledge as to the latter.[47] Knowledge of the retail price of goods does not qualify a witness to testify of the value of the stock.[48]

(F.) Knowledge of Qualities. — Farmers familiar with a dog's pedigree and the value of such a dog to a farmer who keeps stock and who have heard the testimony as to the qualities of the dog in question and his usefulness as a herder of animals, may give opinions of his value though there is no testimony as to his market value.[49]

(G.) Cost of Repairs. — Knowledge of the cost of repairing a de-

144, 3 N. W. 306, 36 Am. Rep. 437.

38. Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114.

39. Texas & P. R. Co. *v.* Slator (Tex. Civ. App.), 102 S. W. 156.

The Owner of a Stock of Goods Which Has Been Destroyed may give an estimate of the total amount of purchases made by him since he occupied the location at which he was when the stock was burned, and his annual sales during the same time. Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 114, 48 S. E. 521.

40. Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 657, 57 N. W. 919, 46 Am. St. Rep. 796.

41. Campbell *v.* Campbell, 22 Jones & S. (N. Y. Super.) 381.

42. Motton *v.* Smith, 27 R. I. 57, 60 Atl. 681 (in the absence of proof of knowledge of the value of property having a commercial value the owner of it may not give an opinion of its value. If he was present when it was bought or the defendant admitted its value, evidence of these facts would be admissible).

43. Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray (Mass.) 432; Paterson *v.* Chicago, etc. R. Co., 95 Minn. 57, 103 N. W. 621.

44. Allen *v.* Carpenter, 66 Tex. 138, 18 S. W. 347.

45. Continental Ins. Co. *v.* Horton, 28 Mich. 173.

46. Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129.

The Distinction Is Not Always Observed. — Thus a farmer with a knowledge of the value of horses generally has been held qualified to testify to the value of a horse for breeding purposes. Humphrey *v.* Young, 92 Iowa 126, 60 N. W. 213.

47. International & G. N. R. Co. *v.* Nicholson, 61 Tex. 550.

48. Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

49. Bowers *v.* Horen, 93 Mich. 420, 53 N. W. 535, 32 Am. St. Rep. 513, 17 L. R. A. 773, *disapproving* Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561; Brown *v.* Hoburger, 52 Barb. (N. Y.) 15; Smith *v.* Griswold, 15 Hun (N. Y.) 273, which cases *overrule* Brill *v.* Flagler, 23 Wend. (N. Y.) 354; Hodges *v.* Causey, 77 Miss. 353, 26 So. 945.

fective article is necessary to qualify a witness to testify to its value.[50]

(H.) Plans and Specifications. — An examination of the plans and specifications for a bridge does not qualify a non-expert to testify to its value if he has not examined it.[51] Testimony as to the difference in the value of a structure as built and its value if it had been built according to the contract must be based upon the latter.[52]

(I.) Testimony of Witnesses. — The testimony of witnesses is a sufficient basis for opinions concerning the value of lost or destroyed property.[53]

(J.) Addition to Cost. — It is immaterial that opinions as to the value of a stock of goods are based on its cost, with a percentage added.[54]

(K.) Special Local Demand. — Though the weight of testimony based on a special local demand for property may be affected by the reason on which it rests, such testimony is competent.[55]

(3.) Effect of Limited Knowledge. — The scope of a witness' knowledge affects the weight rather than the competency of his testimony.[56] It may be fully tested on cross-examination.[57]

(4.) Non-Residents. — Residence in the locality of the market in question is not essential if the witness is informed concerning value there.[58]

(5.) Comparative Value. — Testimony as to the comparative value of two chattels is competent though the witness does not know the worth of either.[59]

(6.) Discretion of Court. — The question of the competency of a witness to testify rests largely in the discretion of the trial judge.[60]

50. Aultman Co. *v.* Mosloski, 77 Minn. 27, 79 N. W. 593.

51. Com. *v.* Sunderlin, 31 Pa. Super. 349.

52. Brooks *v.* Hazen, 3 G. Gr. (Iowa) 553.

53. Orr *v.* Mayor, 64 Barb. (N. Y.) 106.

54. Little *v.* Lichkoff, 98 Ala. 321, 12 So. 429.

55. Western R. Co. *v.* Lazarus, 88 Ala. 453, 6 So. 877.

56. Tuttle *v.* Cone, 108 Iowa 468, 79 N. W. 267; Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315; Texas & P. R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

In the Absence of Better Evidence as to the value of a stock of goods a witness who had cursorily seen it the day before it was burned may give an opinion of its value, though he made no examination of it. Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 115, 48 S. E. 521. But *compare* Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279.

57. Chandler Bros. *v.* Higgins (Ala.), 47 So. 284.

58. Kilpatrick *v.* Wm. Whitmer & Sons, 118 App. Div. 98, 103 N. Y. Supp. 75.

If There Is No Market Value for mares with foal for livery purposes a witness cannot give his opinion of the value of a mare in that condition for such purposes and his opinion of her value if not in that condition. Whitney *v.* Taylor, 54 Barb. (N. Y.) 536.

59. Kronschnable *v.* Knoblauch, 21 Minn. 56.

60. Meyers *v.* McAllister, 94 Minn. 510, 103 N. W. 564; Cleveland *v.* Rowe, 99 Minn. 444, 109 N. W. 817; Stevens *v.* Minneapolis, 42 Minn. 136, 43 N. W. 842.

If there is any evidence fairly tending to sustain his action it will not be disturbed,[61] if no error of law was committed.[62]

(7.) Source of Knowledge. — (A.) Market Reports, Etc. — There is disagreement as to the character of the information which qualifies a witness to testify of the market value of property. In Michigan knowledge of prices in a remote market derived from newspaper reports qualifies a witness; the paper need not be received in evidence.[63] Some other states consider knowledge of market value generally so obtained as sufficient.[64] Opinions of the market value of a staple article of commerce are competent though largely based on presumptions and in part on hearsay,[65] or wholly so in Vermont.[66]

In Texas it must appear that the papers from which the information was derived made a business of reporting the markets.[67] The decisions there, however, are not consistent.[68]

61. Paterson *v.* Chicago, etc. R. Co., 95 Minn. 57, 103 N. W. 621; Meyers *v.* McAllister, 94 Minn. 510, 103 N. W. 564.

62. Maughan *v.* Estate of Burns, 64 Vt. 316, 23 Atl. 583; Lamoille Val. R. Co. *v.* Bixby, 57 Vt. 548, 563. In the case first cited it was said: "There is no rule of law defining the amount of knowledge the witness must possess in order to make him competent, though he must possess sufficient to enable him to form some estimate of the value and the worth, but whether he does possess sufficient or not is a preliminary question for the tribunal before which he is called, and its decision is conclusive, unless it appears from the evidence to have been erroneous or founded on an error in law."

63. Cleveland & T. R. Co. *v.* Perkins, 17 Mich. 296; Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489, 496, 90 Am. Dec. 252; Sirrine *v.* Briggs, 31 Mich. 443 (dealers' market lists).

64. Central R. & B. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017 (the place of witness' residence is immaterial); Mount Vernon Brew. Co. *v.* Teschner (Md.), 69 Atl. 702; Alabama & V. R. Co. *v.* Searles, 71 Miss. 744, 16 So. 255 (and by his own sales).

65. Cliquot's Champagne, 3 Wall. (U. S.) 114 (inquiries of dealers and examination of their books;) Burks *v.* Hubbard, 69 Ala. 379; Lush *v.* Druse, 4 Wend. (N. Y.) 313; Merrill *v.* Grinnell, 30 N. Y. 594, 613 (information obtained by inquiring); Ft. Worth & D. C. R. Co. *v.* Daggett (Tex. Civ. App.), 27 S. W. 186.

Knowledge Derived From General Discussion does not qualify a witness. Oregon Pottery Co. *v.* Kern, 30 Or. 328, 47 Pac. 917.

66. Laurent *v.* Vaughn, 30 Vt. 90.

67. Chicago, etc. R. Co. *v.* Halsell, 36 Tex. Civ. App. 522, 81 S. W. 1243; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Texas & P. R. Co. *v.* Scott (Tex. Civ. App.), 86 S. W. 1065; Texas & P. R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10; Texas & P. R. Co. *v.* Slator (Tex. Civ. App.), 102 S. W. 156; Southern Kansas R. Co. *v.* Bennett (Tex. Civ. App.), 103 S. W. 1115; Ft. Worth, etc. R. Co. *v.* Hickox (Tex. Civ. App.), 103 S. W. 202.

68. Nature of Information. — A dealer in property in a certain market who receives daily accounts of sales, current prices, and telegrams from parties interested with him in business may testify of the value of property in that market at a time anterior to his examination, though he was unable to state that his advices covered the very days in question. Texas & P. R. Co. *v.* Donovan (Tex. Civ. App.), 23 S. W. 735.

Information Based on Mere Private Advices is inadmissible. Texas & P. R. Co. *v.* Slator (Tex. Civ. App.), 102 S. W. 156; Pecos & N. T. R.

In Virginia opinions must rest on information obtained from publications which would be admissible in evidence.[69]

In Missouri testimony based on market reports in trade journals is not competent,[70] but an experienced dealer may refresh his memory concerning prices on particular days by reading such a journal.[71] The contents of a telegraphic message cannot be given,[72] nor may a witness testify on the basis of knowledge derived from his partner as to the price at which firm property sold.[73]

In New York knowledge based solely on a newspaper report which is not produced and the reliability of which is not shown is insufficient.[74]

In North Carolina testimony to the value of property in a distant market is inadmissible if based on the reports in a single newspaper published at a place remote therefrom, it not being shown that business men acted upon the information given therein, nor from what source the information was obtained.[75] But a dealer in a commodity may testify of its market value in a remote city though his knowledge is based on accounts of sales received from there, telegrams, circulars and correspondence. Such a witness must be regarded in the same light as a scientific expert, whose opinions are admissible, although partly derived from books of science, which are not admissible.[76]

(B.) Sales. — Knowledge of sales at the place in question is not essential if the witness is informed by general observation and experience, knowledge of the property and its intrinsic merits,[77] and

Co. *v.* Hughes (Tex. Civ. App.), 98 S. W. 410; Kirby Lumb. Co. *v.* Cummings (Tex. Civ. App.), 87 S. W. 231.

69. Norfolk & W. R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

70. Henderson *v.* Wabash R. Co., 126 Mo. App. 610, 105 S. W. 13. But *compare* Genesee Fruit Co. *v.* Clarksville Cider Co., 114 Mo. App. 422, 89 S. W. 914; Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393.

71. Meriwether *v.* Quincy, etc. R. Co., 128 Mo. App. 647, 107 S. W. 434.

72. Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393.

73. Flynn *v.* Wohl, 10 Mo. App. 582.

74. The Only Evidence was that of plaintiff himself who undertook to state the market price, but his cross-examination shows that he had no knowledge on the subject, and derived the information on which he based his valuation on something he had read in a daily newspaper; but the paper itself was not produced, nor was any evidence given as to how the reports in the newspaper were made up, or from what information they were compiled; consequently no proper foundation was laid for the use of the newspaper report as evidence, even if the paper itself had been produced." Bunte *v.* Schumann, 46 Misc. 593, 92 N. Y. Supp. 806, *citing* Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202.

75. Fairley *v.* Smith, 87 N. C. 367, 42 Am. Rep. 522.

76. Smith *v.* N. C. R. Co., 68 N. C. 107, 42 Am. Rep. 522; Suttle *v.* Falls, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338.

77. Alabama G. S. R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238; Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390; Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621; Rich *v.* Utah Com. & S. Bank, 30 Utah 334, 84 Pac. 1105; Lines *v.* Alaska Com. Co., 29

the prices at which owners of like property hold it.[78] But the sale of similar property by a witness is sometimes emphasized as a reason for receiving his testimony.[79]

(C.) The Testimony. — Opinions cannot be based on a description of the property not given the jury.[80]

(D.) Availability of Property. — Opinions may be based upon any use for which the property would have been available had it not been destroyed,[81] regard being had to its use for the purpose for which it was intended.[82]

(E.) Speculative Opinions. — Opinions based on remote and speculative contingencies are inadmissible.[83]

d. *May Give Details.* — A witness may state in detail the facts upon which his testimony is rested.[84]

e. *Articles Need Not Be Valued.* — Direct testimony need not be based on the value of each article if the number of articles is large and the witnesses have examined them all.[85] Evidence concerning details may be brought out on cross-examination.[86]

f. *Reasons.* — Witnesses need not give reasons for their opinions.[87]

g. *Necessary Similarity of Properties.* — There must be substantial similarity between the property in question and that the value of which is testified to or with which the witness is familiar.[88] The

Wash. 133, 69 Pac. 642 (the fact that the sales were not recent affects only the value of testimony).

78. Lines *v.* Alaska Com. Co., 29 Wash. 133, 69 Pac. 642.

79. Commercial Bank *v.* Wood, 7 Watts & S. (Pa.) 89; Kean *v.* Landrum, 72 S. C. 556, 52 S. E. 421.

80. Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768.

81. Galveston, etc. R. Co. *v.* Rheiner (Tex. Civ. App.), 25 S. W. 971.

82. Greenebaum *v.* Taylor, 102 Cal. 624, 36 Pac. 957.

83. Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130 (effect upon the price of a commodity of putting a large quantity of it on the market, and concerning the difference in its price in large and small lots); Reed *v.* McConnell, 101 N. Y. 270, 4 N. E. 718 (value of contract to take a man into business partnership); Wakeman *v.* Wheeler & W. Mfg. Co., 101 N. Y. 205, 4 N. E. 264 (value of contract for exclusive agency for sale of property on commission); Perrine *v.* Hotchkiss, 58 Barb. (N. Y.) 77 (value of credit); Texas & P. R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603 (value of a colt if foaled injured); Bonesteel *v.* Orvis, 22 Wis. 522 (the value of merchandise cannot be shown by testimony of its value in view of the hazards and chances of plaintiff's business or their worth to him in the ordinary course of the business in which he was engaged, no change in its value being shown).

84. Galveston, etc. R. Co. *v.* Parr, 8 Tex. Civ. App. 280, 28 S. W. 264 (cost of planting, cultivating, harvesting, marketing, and probable yield).

85. Union Pac. R. Co. *v.* Lucas, 136 Fed. 374, 69 C. C. A. 218; Munro *v.* Stowe, 175 Mass. 169, 55 N. E. 992; Seyfarth *v.* St. Louis & I. M. R. Co., 52 Mo. 449 (contents of lost trunk); Western Home Ins. Co. *v.* Richardson, 40 Neb. 1, 58 N. W. 597.

86. Western Home Ins. Co. *v.* Richardson, 40 Neb. 1, 58 N. W. 597.

87. Seyfarth *v.* St. Louis & I. M. R. Co., 52 Mo. 449.

88. *Alabama.* — Western R. Co. *v.* Lazarus, 88 Ala. 453, 6 So. 877 (the value of a thoroughbred is not

properties need not be identical.[89] The rule applies to the cross-examination of witnesses.[90]

10. Time at Which Value Must Be Shown. — A. Presumption as to Continuance of Market Price. — The rule that a state of affairs once shown to exist is presumed to continue[91] has been applied to the grain market for a single day.[92]

B. Growing Crops. — The value of destroyed crops must be shown by proof of their worth at the time of loss,[93] unless they were nearly mature, in which case proof of the net value of the product in the nearest market has been received.[94] If the rent of land is payable in a part of the crop, evidence of its value when delivered is proper.[95]

C. Property of Variable Value. — If the property involved is of such a nature that change in value may occur, the proof must be restricted within reasonable limits,[96] unless it is offered for a collateral purpose.[97]

D. No Time Fixed for Delivery. — If there is no time fixed for delivery the value of property may be established by a schedule showing its price at the stipulated place on the dates at which it might have been delivered. The objection that such testimony is speculative because showing an average of prices is not good.[98]

E. In Actions for Negligence. — As against a negligent carrier proof of value cannot be made at a time later than that at which the property reached its destination.[99] If goods are lost their value

material to the value of a graded animal).

California. — *In re* Slade's Estate, 122 Cal. 434, 55 Pac. 158 (the cost of new implements is immaterial as to the value of old ones).

Georgia. — Western & A. R. Co. *v.* Calhoun, 104 Ga. 384, 30 S. E. 868 (mule and horse too dissimilar).

New York. — Hamlin *v.* Sears, 82 N. Y. 327; Dean *v.* Van Nostrand, 101 N. Y. 621, 4 N. E. 134 (the value of goods the most nearly equivalent of those in question may be used as a comparison if the latter are not in the market); Dixon *v.* LaFarge, 1 E. D. Smith 722.

North Dakota. — Minnesota Thresh. Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

Texas. — Gill *v.* Jackson, 3 Wills. Civ. Cas. § 356 (in the absence of a necessity for admitting it, evidence of the general market value of stock cattle upon the range is incompetent to prove the value of a milch cow).

89. Ruckman *v.* Imbler Lumb. Co., 42 Or. 231, 70 Pac. 811.

90. Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675.

91. See article "Presumptions," Vol. IX, p. 906.

92. Nash *v.* Classon, 55 Ill. App. 356; Howland *v.* Davis, 40 Mich. 545; Merrill Chem. Co. *v.* Nickells, 66 Mo. App. 678; Jennings *v.* Sparkman, 48 Mo. App. 246.

93. Hays *v.* Crist, 4 Kan. 300.

94. Leroy & W. R. Co. *v.* Butts, 40 Kan. 159, 19 Pac. 625.

95. Ashley *v.* Wilson, 61 Ga. 297.

96. Galliers *v.* Chicago, etc. R. Co., 116 Iowa 319, 89 N. W. 1109.

97. Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061 (motive for breaking contract).

98. Paragon Ref. Co. *v.* Lee, 98 Tenn. 643, 41 S. W. 362.

99. Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623; San Antonio, etc. R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 49 S. W. 147.

The Price at Which Injured Horses Sold a month after they should have reached market and after they had been put in condition

at the time of loss must be shown.[1] If property has been damaged, proof of its condition a considerable length of time thereafter may be shown in an action to recover its possession,[2] unless its value at or about the time in question can be proved.[3]

F. Fraud or Mistake. — The state of the business of a partnership after the defendant had sold his interest and withdrawn has no relevancy on the value of that interest at the time of sale, the issue being as to fraud or mistake therein. This is the rule as to the proof of a judgment in favor of third persons against the new firm.[4]

G. Claim of Exemption. — The value of property at the time of asserting the right to hold it as exempt or at the time of trial may be shown.[5]

H. In Actions on Contracts. — If there has been no material change in the value of property, testimony on that point is not objectionable because it fixes the value at a period a few months prior to the controlling time.[6]

11. What Market Controls. — A. Question of Fact. — It is competent to show what is the usual and proper market for the property to be valued. If there is a local market, testimony must relate to its value there except in special cases.[7] If there is more than one local market opinions may be based on the value of the property in either.[8]

to sell is immaterial as to their value at such prior time in marketable condition. Cleveland, etc. R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804.

1. Smith *v.* Griffith, 3 Hill (N. Y.) 333.

2. Miami Powder Co. *v.* Port Royal & W. C. R. Co., 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880.

3. Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421.

4. Dortic *v.* Dugas, 55 Ga. 484.

5. Roden *v.* Brown, 103 Ala. 324, 15 So. 598.

6. Caledonian Ins. Co. *v.* Traub, 83 Md. 524, 35 Atl. 13; Cross *v.* Wilkins, 43 N. H. 332 (the value of board from May to October may be shown by the price in November of the same year).

7. *United States.* — United States *v.* Baxter, 46 Fed. 350.

Alabama. — Warrior Coal & C. Co. *v.* Mabel Min. Co., 112 Ala. 624, 20 So. 918; Searcy *v.* Fearn, 2 Stew. & P. 128.

Indiana. — Western Assur. Co. *v.* Studebaker Bros. Mfg. Co., 124 Ind. 176, 23 N. E. 1138.

Kansas. — McCarty *v.* Quimby, 12 Kan. 494; Kansas Stock Yard Co. *v.* Couch, 12 Kan. 612.

Michigan. — Powers *v.* Irish, 23 Mich. 429.

Minnesota. — Porter *v.* Chandler, 27 Minn. 301, 7 N. W. 142, 38 Am. Rep. 293.

The Party Responsible for Damages may not complain of evidence showing the market value of the property in question at a place where such value is less than at the place where the value governs. Savercool *v.* Farwell, 17 Mich. 308.

8. Johnson *v.* West, 43 Ala. 689; Acrea *v.* Brayton, 75 Iowa 719, 38 N. W. 171.

Local Value. — Opinions are not inadmissible because based on the value of the property at a place a few miles distant from that in question. Foster *v.* Ward, 75 Ind. 594; Terre Haute & I. R. Co. *v.* Jarvis, 9 Ind. App. 438, 36 N. E. 774; Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580 (value of horse one hundred miles distant; local conditions not likely to affect question); Rari-

B. Elements of the Question. — Various considerations enter into the question — the nature of the property, the relation of one market to another, the means of communication between the places in question,[9] the contemplation of the parties to the transaction at the time it was had,[10] and the motive of the wrongdoer.[11]

C. General Rule in Tort Actions. — The general rule in actions for conversion and actions of a like character is that the value of the property where it was when wrongfully interfered with must be shown.[12] While this rule is generally recognized it is sometimes departed from.[13]

Conversion of Property in Transit. — If the conversion occurs through the act of a stranger while the property is in transit, its net market value at the place of destination may be shown, regardless of the defendant's knowledge on that point.[14]

D. Nearest Market. — In the absence of a market at the place determinative of the parties' rights or of a special contract relating to the subject, the value of property in the market nearest to such place may be proved regardless of its remoteness;[15] and so if proof

dan *v.* Central Iowa R. Co., 69 Iowa 527, 29 N. W. 599.

9. Wyley Fort *v.* Saunders, 5 Heisk. (Tenn.) 487; Louisville & N. R. Co. *v.* Mason, 11 Lea (Tenn.) 116.

The Value of Board at a hotel may be shown by the price charged therefor at a similar hotel in a place ten miles distant. Cross *v.* Wilkins, 43 N. H. 332.

10. Missouri, etc. R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179; Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119; Reeves *v.* Texas & P. R. Co., 11 Tex. Civ. App. 514, 32 S. W. 920.

11. Nashville, etc. R. Co. *v.* Karthaus, 150 Ala. 633, 43 So. 791 (the value of property wilfully converted may be shown at the place to which the wrongdoer removed and sold it).

12. Hamer *v.* Hathaway, 33 Cal. 117; State *v.* Parsons, 109 Mo. App. 432, 84 S. W. 1019; Wallingford *v.* Kaiser, 191 N. Y. 392, 84 N. E. 295; Tiffany *v.* Lord, 65 N. Y. 310; Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Fleischmann *v.* Samuel, 18 App. Div. 97, 45 N. Y. Supp. 404.

13. Peterson *v.* Gresham, 25 Ark. 380 (value of staple article shown at another place in the same state). *Compare* Johnson *v.* Kathan, 88 Hun 456, 34 N. Y. Supp. 864; Hill *v.* Canfield, 56 Pa. St. 454; Ward *v.* Reynolds, 32 Ala. 384 (is to the same effect as the Arkansas case); Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770 (as against parties who have dispossessed an officer the proof of value may cover the market in which he could sell); Gregory *v.* Rosenkrans, 78 Wis. 451, 47 N. W. 832 (forty miles distant from place of conversion).

14. Farwell *v.* Price, 30 Mo. 587; Wallingford *v.* Kaiser, 191 N. Y. 392, 84 N. E. 295, 118 App. Div. 918, 103 N. Y. Supp. 1145.

15. *United States.* — Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441; Bourne *v.* Ashley, 1 Lowell 27, 3 Fed. Cas. No. 1,698.

Arkansas. — Jones *v.* Railway, 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175.

Kansas. — Hanson *v.* Lawson, 19 Kan. 201; Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 651; Leroy & W. R. Co. *v.* Butts, 40 Kan. 159, 19 Pac. 625 (applying the principle to a crop of wheat in the milk).

Missouri. — Warden *v.* Missouri, etc. R. Co., 78 Mo. App. 664.

Nevada. — Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726.

New Hampshire. — Adams *v.*

of value in the local market is not clear;[16] or in the market where the people of the locality in which the contract was made sell the commodity in question.[17] Nearby markets generally may be resorted to if prices therein do not vary from those prevailing in the stipulated or otherwise proper market.[18]

a. *No Price in Nearest Market.* — In the absence of a price in the nearest market on the day in question the price for like property at a nearby market may be proved if it is shown that the price is usually the same at both places,[19] or that the nearby market controlled the local market.[20] In such cases resort may be had to remote markets if they control the local market.[21]

b. *Property Remote From Market.* — If the property is situated a long distance from any market the parties are not necessarily confined to proof of its value at the nearest market or in any one market, but may prove the prices in several of the nearest markets,[22] or in a remote market if the cost of transporting it thither be shown.[23]

c. *Particular Market.* — If the only market for property is in a particular place, its value there and the cost of transportation may be proved to show its value where it is,[24] regardless of the distance between the two places.[25] The liability of one who has converted property made for a special market may be measured if it was without practical value where it was, regardless of his knowledge of the market for which it was intended.[26]

Blodgett, 47 N. H. 219, 90 Am. Dec. 569.

New York. — Harris *v.* Panama R. Co., 3 Bosw. (N. Y. Super.) 7; Keller *v.* Paine, 34 Hun 167, 176; Wallingford *v.* Kaiser, 191 N. Y. 392, 84 N. E. 295.

Rhode Island. — Forbes *v.* Howard, 4 R. I. 364 (the value of theater scenery and fixtures in one city is not evidence of their value in another).

16. Siegbert *v.* Stiles, 39 Wis. 533.

17. Berry *v.* Nall, 54 Ala. 446.

18. Mount Vernon Brew. Co. *v.* Teschner (Md.), 69 Atl. 702; Bump *v.* Cooper, 20 Or. 527, 26 Pac. 848; Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291; Moak *v.* Bourne, 13 Wis. 514.

19. Abbott *v.* Wyse, 15 Conn. 254; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203; Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Diefendorff *v.* Gage, 7 Barb. (N. Y.) 18.

20. McDonald *v.* Unaka Timb. Co., 88 Tenn. 38, 12 S. W. 420.

21. Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203; Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154.

Controlling Market. — If regulated by the price in a particular market, proof of its value there is proper. Hittson *v.* Davenport, 4 Colo. 169; Gilbert *v.* Kennedy, 22 Mich. 117.

22. St. Louis, etc. R. Co. *v.* Philpot, 72 Ark. 23, 77 S. W. 901; Sellar *v.* Clelland, 2 Colo. 532, 550.

23. Union Pac. R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

24. Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 80.

25. French *v.* Piper, 43 N. H. 439.

26. Lathers *v.* Wyman, 76 Wis. 616, 45 N. W. 669.

Goods Made for a Particular Market. — If a manufacturer knows that the goods he has agreed to make are intended for a particular market their value there may be shown, especially if the buyer is unable to obtain them elsewhere. Alabama

E. Place of Delivery or Location. — In the absence of a special contract the market value of property at the place of delivery or location controls if there was such value there on the day in question. This rule has special application in actions against carriers, between vendors and vendees, and against insurers.[27] In such cases proof of market value elsewhere must be confined to showing value at such place,[28] unless it is given to corroborate the testimony to its value at the place in question.[29] Value at the place to which property is billed may be shown against the initial carrier responsible for the injury, though its liability was limited to its own line which did not reach such place.[30]

Either One of Two Markets. — If the carriage of property has been

Iron Wks. *v.* Hurley, 86 Ala. 217, 5 So. 418.

27. *Alabama.* — Comer *v.* Way, 107 Ala. 300, 310, 19 So. 966 (place of location).

Florida. — Merritt *v.* Wittice, 20 Fla. 27.

Maryland. — Lazard *v.* Merchants' & M. F. Co., 78 Md. 1, 20, 26 Atl. 897.

Mississippi. — Phillips *v.* Commercial Bank, 1 Smed. & M. 636.

New York. — Gregory *v.* McDowell, 8 Wend. 435; Sturgess *v.* Bissell, 46 N. Y. 462; Holden *v.* New York Cent. R. Co., 54 N. Y. 662 (though property be damaged or lost in transit its value at destination may be shown).

North Carolina. — Moye *v.* Pope, 64 N. C. 543.

Tennessee. — East Tennessee, etc. R. Co. *v.* Hale, 85 Tenn. 69, 1 S. W. 620 (in the absence of proof showing no market value at the place to which property has been consigned, evidence of such value elsewhere is incompetent as against a carrier).

Texas. — Texas & P. R. Co. *v.* Wilson Hack Line (Tex. Civ. App.), 101 S. W. 1042; Texas & P. R. Co. *v.* Stephens (Tex. Civ. App.), 86 S. W. 933; San Antonio, etc. R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 49 S. W. 147.

As Against an Insurer whose obligation is to pay the value of property at the time and place of its loss, evidence must be confined thereto unless it is shown that no change occurred, or, if there was a change in value, the extent thereof. Lundvick *v.* Westchester F. Ins Co., 128 Iowa 376, 104 N. W. 429.

In an Action on Marine Policies the value of the property at the time and place of the inception of the risk, and not that at the place of destination is to be shown. Wolf *v.* National M. F. Ins. Co., 20 La Ann. 583.

28. Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623 (evidence of value at a place beyond the destination of property cannot be shown against a negligent carrier); Gregory *v.* McDowell, 8 Wend. (N. Y.) 435.

29. Gordon *v.* Bowers, 16 Pa. St. 226.

Local Market Value as Corroborative Evidence. — On the issue as to the value of property in London, evidence having been offered to show that it was not in the best condition when received there, and to show that it was of the best quality when packed and was put up with the greatest care, proof of its value in the local market when shipped is proper as tending to corroborate the value given in the invoice, which had been received in evidence. Capron *v.* Adams, 28 Md. 529, 543.

Exception to the Rule. — If the risk involved in getting property to the place stipulated for its delivery is so great as to render the proof of its market value at another place, plus the cost of transportation to the former place, of no use as a test of its value, such evidence is not to be received. Fessler *v.* Love, 48 Pa. St. 407.

30. Texas & P. R. Co. *v.* White, 35 Tex. Civ. App. 521, 80 S. W. 641.

undertaken with knowledge that it was destined for one of two markets, evidence of its value at both such places is competent.[31]

F. Place of Shipment. — If property shipped has not reached its destination its value at the place of shipment may be shown,[32] or, if it was detained while in transit, at the place where the detention occurs. In such a case value at the place to which it was consigned may be shown to aid in establishing its value at the former place.[33] The rule is flexible enough to permit proof of the value of like property in the markets nearest to the place of shipment at which sales were usually made, consideration being given the cost of transportation.[34]

G. Abnormal Condition of Market. — The state of the proper market may not always control the value of property, as when it is shown that the price for it is arbitrarily fixed by dealers. In such case resort may be had to the prices in other markets.[35]

H. Cost of Transportation. — In ordinary cases if the proof of value relates to another than the nearest market or the market in the contemplation of the parties when they completed the transaction, the cost of transporting the property there and the risk incident thereto are to be regarded if the property were to be sold,[36] or its added value if it was held for use.[37]

12. Services. — A. Of Attorneys and Counselors. — a. *Judicial Notice.* — The report of an argument in the official court reports

See New York, etc. R. Co. *v.* Estill, 147 U. S. 591, 614.

31. Missouri, etc. R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179.

32. South & N. Alabama R. Co. *v.* Wood, 72 Ala. 451; Echols *v.* Louisville & N. R. Co., 90 Ala. 366, 7 So. 655; Ross *v.* Chicago, etc. R. Co., 119 Mo. App. 290, 95 S. W. 977.

33. Newton *v.* Brown, 1 Utah 287.

34. Berry *v.* Dwinel, 44 Me. 255; Williamson *v.* Dillon, 1 Har. & G. (Md.) 444, 466; Hill *v.* Canfield, 56 Pa. St. 454; Houston & T. C. R. Co. *v.* Williams (Tex. Civ. App.), 31 S. W. 556; Gulf, etc. R. Co. *v.* Dunman (Tex. App.), 16 S. W. 421.

Under the Federal Revenue Act of 1863, proof of the market value of imported goods in the principal markets of the country from whence they came was proper. Cliquot's Champagne, 3 Wall. (U. S.) 114, 142. The statute provided that foreign goods coming into the United States, otherwise than by purchase, shall be invoiced at their actual market value at the time and place where procured.

35. Hogan *v.* Donohue, 49 Ill. App. 432.

36. *United States.* — Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441.

Alabama. — Berry *v.* Nall, 54 Ala. 446.

Arkansas. — Jones *v.* Railway, 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175.

Kansas. — Hanson *v.* Lawson, 19 Kan. 201; Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Leroy & W. R. Co. *v.* Butts, 40 Kan. 159, 19 Pac. 625.

Maryland. — Mount Vernon Brew. Co. *v.* Teschner, 69 Atl. 702.

New York. — Harris *v.* Panama R. Co., 3 Bosw. (N. Y. Super.) 7; Johnson *v.* Kathan, 88 Hun 456, 34 N. Y. Supp. 864.

Tennessee. — McDonald *v.* Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420.

37. Jones *v.* Railway, 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175.

will not be noticed for the purpose of fixing the value of the services rendered in preparing and making it.[38]

b. *Nature of Services.* — It is competent to show the nature of the services rendered,[39]

38. Pearson *v.* Darrington, 32 Ala. 227, 262. See Rovaback *v.* Pennsylvania Co., 58 Conn. 292, 20 Atl. 465.

39. *United States.* — Head *v.* Hargrave, 105 U. S. 45.

Alabama. — Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

California. — Cusick *v.* Boyne, 1 Cal. App. 643, 82 Pac. 985.

Iowa. — Graham *v.* Dubuque Specialty Mach. Wks., 114 N. W. 619; Berry *v.* Davis, 34 Iowa 594; Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683; Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Louisiana. —Breaux *v.* Francke, 30 La. Ann. 336.

Michigan. — Eggleston *v.* Boardman, 37 Mich. 14, 26 Am. Rep. 491.

Minnesota. — Selover *v.* Bryant, 54 Minn. 434, 56 N. W. 58, 31 L. R. A. 418.

Mississippi. — Holly Springs *v.* Manning, 55 Miss. 380.

New York. — Randall *v.* Packard, 142 N. Y. 47, 36 N. E. 823; People *v.* Bond St. Sav. Bank, 10 Abb. N. C. 15.

Texas. — International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Wisconsin. — Yates *v.* Shepardson, 27 Wis. 238; Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401.

Evidence as to the Services Rendered by Associate Counsel is immaterial if the plaintiff seeks a recovery only for his individual work. Wright *v.* Gillespie, 43 Mo. App. 244.

The Record in the Case in which the services sued for were rendered is competent to show their character and nature, and so is a statute relating to the subject of the suit. Caverly *v.* McOwen, 123 Mass. 574; McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107 (supreme court record).

The Pleadings are also competent though plaintiff's connection with the cause began after the issues were formed. Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015.

It May Be Shown in Defense of an Action to recover for attorney's services that the case in which they were rendered required but little labor, learning, skill or time or if these were required, they were not given; though the result of the trial was in favor of the client who is sued he may show that, in consequence of the plaintiff's negligence, he was put to expense and trouble, and that the court erred in holding that errors negligently committed were not fatal to the case. Bridges *v.* Paige, 13 Cal. 640.

Parol Evidence. — Attorneys employed to advise and assist other attorneys may prove the nature and extent of their services by parol; their signatures to the pleadings in the cause they were employed in are immaterial. Brewer *v.* Cook, 11 La. Ann. 637.

On appeal from the action of the county fiscal court in establishing the salary of the county judge, testimony as to the duties and responsibilities of the office should be received. It was error to substitute therefor sixty-eight sections of the statutes. It was proper to show that the judge was interested in business, and the time and attention he gave it. Daniel *v.* Bullitt County, 115 Ky. 741, 74 S. W. 1057.

The Evidence Cannot Include Services Rendered in an Action Not Specified in the Complaint though the same property was involved in that as in the other. Hart *v.* Vidal, 6 Cal. 56; Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015.

The Value of Services Rendered in the Trial Court may be proven in an action to recover for services in the supreme court, the issue being whether the sum paid covered services in both courts. Ellis *v.* Warfield, 82 Iowa 659, 48 N W. 1058.

c. *Time Required.* — It is competent to show the time and labor necessarily devoted to the work.[40]

d. *Expense Incurred.* — The reasonable expense incurred in performing the service is a relevant fact in determining the amount of the recovery.[41]

e. *Chance of Success.* — The hazards of the litigation are to be regarded.[42]

f. *Results.* — The results of the services performed may be shown[43] by the judgment,[44] though they were indirect in their effect upon another matter of difference between the parties to the litigation in which they were rendered.[45]

40. *United States.* — Head *v.* Hargrave, 105 U. S. 45.

Alabama. — Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

Illinois. — Campbell *v.* Goddard, 17 Ill. App. 385.

New York. — Randall *v.* Packard, 142 N. Y. 47, 56, 36 N. E. 823; Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. Supp. 1014 (disbarment in another state may be shown); Harland *v.* Lilienthal, 53 N. Y. 438 (*compare* the last case with Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2).

Pennsylvania. — Heblich *v.* Slater, 217 Pa. St. 404, 66 Atl. 655; Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019.

Tennessee. — Bowling *v.* Scales, 1 Tenn. Ch. 618.

Texas. — International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Vermont. — Vilas *v.* Downer, 21 Vt. 419.

Wisconsin. — Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401.

41. Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

42. Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401.

43. *Alabama.* — Holloway *v.* Lowe, 1 Ala. 246.

California. — Hinckley *v.* Krug, 34 Pac. 118 (failure to find defect in title passed upon).

Colorado. — Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

Illinois. — Haish *v.* Payson, 107 Ill. 365.

Iowa. — Graham *v.* Dubuque Specialty Mach. Wks., 114 N. W. 619; Berry *v.* Davis, 34 Iowa 594; Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

Kentucky. — Germania Safety V. & T. Co. *v.* Hargis, 23 Ky. L. Rep. 874, 64 S. W. 516 (failure in action in which services rendered).

Michigan. — Eggleston *v.* Boardman, 37 Mich. 14, 26 Am. Rep. 491.

New York. — Jackson *v.* New York Cent. R. Co., 2 Thomp. & C. 653, *affirmed*, without opinion, 58 N. Y. 623 (the considerations which gave the services value may be shown); Randall *v.* Packard, 142 N. Y. 47, 56, 36 N. E. 823.

Texas. — International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Wisconsin. — Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401.

An Admission Made in a Letter from a client to his attorney concerning the satisfactory nature of the work done by the latter is not inadmissible because it tenders a certain sum as compensation, and indicates a difference as to the value of the services rendered. The objection should have been limited to the offer to pay in compromise of the claim. Wright *v.* Gillespie, 43 Mo. App. 244.

A Deposition containing a statement in the plaintiff's handwriting over his signature, importing that the defendant's success in litigation was attributable solely to the plaintiff, is inadmissible. Robbins *v.* Harvey, 5 Conn. 335.

44. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

45. Berry *v.* Davis, 34 Iowa 594; Heblich *v.* Slater, 217 Pa. St. 404, 66 Atl. 655 (an instruction to that

g. *Amount Involved.* — Evidence showing the amount involved and recovered or the general importance of the litigation or matter advised about is admissible.[46]

h. *Ability and Experience.* — The ability, learning, experience and professional standing of the plaintiff are relevant matters.[47]

effect is improper where the burden is decidedly against the party claiming to have been benefited).

46. *United States.* — Stanton *v.* Embrey, 93 U. S. 548, 557; Head *v.* Hargrave, 105 U. S. 45.

Alabama. — Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

California. — Cusick *v.* Boyne, 1 Cal. App. 643, 82 Pac. 985.

Colorado. — Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698 (may be shown by an attorney employed by the chief attorney and promised a good fee).

Illinois. — Haish *v.* Payson, 107 Ill. 365; Campbell *v.* Goddard, 17 Ill. App. 385.

Iowa. — Graham *v.* Dubuque Specialty Mach. Wks., 114 N. W. 619; Smith *v.* Chicago & N. W. R. Co., 60 Iowa 515, 15 N. W. 291; Parsons *v.* Hawley, 92 Iowa 175, 60 N. W. 520; Berry *v.* Davis, 34 Iowa 594.

Kansas. — Ottawa University *v.* Parkinson, 14 Kan. 159; Ottawa University *v.* Welsh, 14 Kan. 164.

Louisiana. — Rutland *v.* Cobb, 32 La. Ann. 857.

Michigan. — Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Chamberlain *v.* Rodgers, 79 Mich. 219, 44 N. W. 598; Eggleston *v.* Boardman, 37 Mich. 14, 26 Am. Rep. 491.

Minnesota. — Sclover *v.* Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418.

Mississippi. — Holly Springs *v.* Manning, 55 Miss. 380.

Nevada. — Quint *v.* Opher Silver Min. Co., 4 Nev. 304.

New York. — Randall *v.* Packard, 142 N. Y. 46, 56, 36 N. E. 823; Harland *v.* Lilienthal, 53 N. Y. 438; Garfield *v.* Kirk, 65 Barb. 464.

Pennsylvania. — Kentucky Bank *v.* Combs, 7 Pa. St. 543.

Texas. — International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Vermont. — Vilas *v.* Downer, 21 Vt. 419.

Wisconsin. — Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401.

Where Services Prevent the Sacrifice of Real Property and bring about a favorable sale of it, evidence as to its character and possible value as a future suburb of a large city is competent. Forsyth *v.* Doolittle, 120 U. S. 73.

The Value of Land Affected by Abstracts of Title passed upon by an attorney may be shown to aid in establishing the reasonable compensation to which he is entitled. Morehead *v.* Anderson, 30 Ky. L. Rep. 1137, 100 S. W. 340.

The Importance of the Litigation may be shown by proof of the prominence of the defendants, at least where want of fidelity in trust relations must be disclosed. Graham *v.* Dubuque Specialty Mach. Wks. (Iowa), 114 N. W. 619.

An Admission Made by the Defendant as to the benefits conferred by the services of the plaintiff as his attorney is competent. McNiel *v.* Davidson, 37 Ind. 336.

The Defendant's Life Expectancy may be shown where plaintiff's services secured for him a life estate. Cusick *v.* Boyne, 1 Cal. App. 643, 82 Pac. 985.

Judgment Is Competent to prove amount recovered. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

The Evidence as to the Value of a Mine in Litigation may cover the whole period between the time the services sued for were rendered and the time of instituting an action to recover for them, and the amount defendant received as his share of the proceeds of the mine. Gilmore *v.* McBride, 156 Fed. 464, 84 C. C. A. 274.

47. *United States.* — Stanton *v.* Embry, 93 U. S. 548, 557.

Alabama. — Humes *v.* Decatur

i. *Client's Financial Ability.* — The financial ability of the defendant may be proved;[48] but this depends, in some courts, upon whether it enters into the elements of the compensation to be recovered,[49] and is said to be wholly immaterial,[50] as where it is sought to recover from a husband for services rendered his wife in a divorce suit.[51] But if the subject-matter of the litigation is of great importance and of a character to lead the parties to use every legitimate effort to succeed, the wealth of the husband in such a suit and his consequent ability to make a severe contest may be considered, in connection with his disposition to do so, as tending to show the importance and value of the plaintiff's services.[52]

j. *How Foregoing Matters Considered.* — The foregoing matters are not to be considered in their entirety, and may be made the separate subjects of inquiry on cross-examination.[53]

k. *Value of Services.* — **(1.) Usual Charge.** — For the purpose of aiding the jury in determining what an attorney is reasonably entitled to it may be shown what price is usually charged and received for similar services by other attorneys practicing in the same court.[54]

Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

California. — Knight *v.* Russ, 77 Cal. 410, 19 Pac. 698.

Connecticut. — Robbins *v.* Harvey, 5 Conn. 335; Phelps *v.* Hunt, 40 Conn. 97.

Indiana. — Blizzard *v.* Applegate, 77 Ind. 516.

Iowa. — Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023; Graham *v.* Dubuque Specialty Mach. Wks., 114 N. W. 619.

Maryland. — Calvert *v.* Coxe, 1 Gill 95.

Michigan. — Eggleston *v.* Boardman, 37 Mich. 14, 26 Am. Rep. 491; Chamberlain *v.* Rodgers, 79 Mich. 219, 44 N. W. 598.

48. Randall *v.* Packard, 142 N. Y. 47, 36 N. E. 823; Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401.

49. Hamman *v.* Willis, 62 Tex. 507.

50. Robbins *v.* Harvey, 5 Conn. 335.

51. Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

52. Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

53. Humes *v.* Decatur Land Imp. & F. Co., 98 Ala. 461, 13 So. 368.

54. *United States.* — Stanton *v.* Embrey, 93 U. S. 548, 557; Ward *v.* Kohn, 58 Fed. 462, 7 C. C. A. 314.

Alabama. — Fuller *v.* Stevens, 39 So. 623; Holloway *v.* Lowe, 1 Ala. 246.

California. — Knight *v.* Russ, 77 Cal. 410, 19 Pac. 698.

Illinois. — Nathan *v.* Brand, 167 Ill. 607, 47 N. E. 771; Louisville, etc. R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493; Reynolds *v.* McMillan, 63 Ill. 46.

Indiana. — McNiel *v.* Davidson, 37 Ind. 336.

Maine. — Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611 (if the contract was made with reference thereto).

Maryland. — Calvert *v.* Coxe, 1 Gill 95, 116.

Michigan. — Eggleston *v.* Boardman, 37 Mich. 14, 26 Am. Rep. 491; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

Ohio. — Christy *v.* Douglas, Wright 485.

Pennsylvania. — Thompson *v.* Boyle, 85 Pa. St. 477 (charges of the local bar).

Texas. — Hamman *v.* Willis, 62 Tex. 507.

Vermont. — Vilas *v.* Downer, 21 Vt. 419.

Wisconsin. — Cunning *v.* Kemp, 22 Wis. 509 (payments made by other defendants in same case).

How Usual Charge Shown. — In ascertaining what is a reasonable fee the testimony should be confined to

(2.) Local Fee Bill. — The existence of an agreed rate of local charges may be shown;[55] but that is immaterial if the services were rendered in another state.[56]

(3.) No Customary Fee. — Unless it is proved that there is a usual and customary fee for like services the testimony must be directed to showing their fair and reasonable value,[57] or what is a usual, customary and reasonable compensation.[58]

(4.) Payment Under Contract. — The sum paid for dissimilar services under a special agreement is immaterial in an action on the *quantum meruit*.[59]

(5.) Charges by Plaintiff. — Evidence of what plaintiff had charged in particular matters is incompetent because the services rendered therein might so vary in their nature from those in question as to open a wide door for controversy.[60]

(6.) Account Rendered. —The charges made in a bill are not conclusive against the party who rendered it, the other not having assented thereto.[61]

(7.) Estimated Cost. —An estimate of the cost of defending the actions in which the services were rendered is immaterial if it were a mere conjecture.[62]

(8.) Prior Negotiations. — Evidence of negotiations between the

showing what is customary for such services where contracts have been made with competent persons, and not what is just and proper in the particular case. Especial care in this respect should be taken when the estates of infants are concerned. Reynolds *v.* McMillan, 63 Ill. 46.

The Reasonableness of a Contract for compensation may be shown by proof that similar contracts were usually made, but not the usual charge made in such cases. The defendant cannot prove facts concerning the proceedings in question to show that the probability was against the making of the contract. Allison *v.* Scheeper, 9 Daly (N. Y.) 365.

Defendant's Ignorance of the usual charge is immaterial. Wilson *v.* Union Distill. Co., 16 Colo. App. 429, 66 Pac. 170. But *compare* Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

55. Hamman *v.* Willis, 62 Tex. 507.

56. Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2.

57. Maneaty *v.* Steele, 112 Ill. App. 19.

58. Sexton *v.* Bradley, 118 Ill. App. 495.

59. Robbins *v.* Harvey, 5 Conn. 335.

60. Fuller *v.* Stevens (Ala.), 39 So. 623.

61. Allis *v.* Day, 14 Minn. 516; Wilson *v.* Minneapolis & N. W. R. Co., 31 Minn. 481, 18 N. W. 291.

On the Denial of the Justness of an Account Rendered and a full rejection of it to the point of forcing the bringing of an action the plaintiff is not thereby precluded from recovering for services not included in the account, nor from recovering more for the services covered by it if the price specified was less than their fair value. Romeyn *v.* Campau, 17 Mich. 326.

Notice Claiming a Lien is not conclusive. Gilmore *v.* McBride, 156 Fed. 464, 84 C. C. A. 274.

62. Lamprey *v.* Langevin, 25 Minn. 122.

After Proof of the Value of Services it is immaterial that the plaintiff said to the defendant his charge would be less owing to the circumstances—no statement being made of any amount. Lamprey *v.* Langevin, 25 Minn. 122.

parties respecting compensation long prior to the rendition of the services is inadmissible.[63]

(9.) Employment of Another. — In the absence of a denial that the services for which a recovery is sought were rendered, it is immaterial that defendant consulted other attorneys during the time the services were being rendered,[64] or had the assistance of defendant's regular attorney without charge.[65]

(10.) Sum Paid Another. — It is immaterial what amount was paid another attorney for services rendered in the same cause unless their nature is shown and the professional standing and ability of the attorneys were similar.[66]

(11.) Taxation of Costs. — It has been ruled that the *ex parte* taxation of an attorney's bill is not conclusive upon a party not served as to the value of the services charged for or as to the disbursements made.[67] But it has been held in the same state in a case decided in the same year that the taxation of costs is a judicial proceeding, not impeachable collaterally, if the taxing officer had jurisdiction, and that notice is not essential thereto.[68]

(12.) Offer of Compromise. — A rejected offer of compromise is inadmissible on the issue as to the value of services.[69]

(13.) Comparison of Compromise. — A comparison of the terms of the compromise resulting from plaintiff's services with the terms of compromise made with other parties should not be allowed.[70]

(14.) Effect of Bill of Particulars. — A bill of particulars limits evidence of services to those specified therein.[71]

(15.) Merits of the Action. — The right to recover is not affected by the fact that the client's cause was without merit.[72]

(16.) Annual Retainer. — Proof of the right to recover an annual retainer cannot be made in an action upon a *quantum meruit*.[73]

(17.) Opinions. — (A.) Of Professional Men. — The opinions of

63. Crowell *v.* Truax, 94 Mich. 585, 54 N. W. 384.

64. *In re* Simpson's Estate, 53 Hun 629, 5 N. Y. Supp. 863.

65. Hutchinson *v.* Dunham, 41 Ill. App. 107.

66. Calvert *v.* Coxe, 1 Gill (Md.) 95; Eggleston *v.* Boardman, 37 Mich. 14, 26 Am. Rep. 491; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Heblich *v.* Slater, 217 Pa. St. 404, 66 Atl. 655; Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019.

Payment to Chief Counsel. — It is immaterial in an action brought by assistant counsel, employed by the chief counsel in consideration of a "good" fee, what sum was paid the latter as a contingent fee. Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698.

67. Cook *v.* Stilson, 3 Barb. (N. Y.) 337.

68. Brady *v.* Mayor, 1 Sandf. (N. Y. Super.) 569; Gleason *v.* Clark, 9 Cow. (N. Y.) 57; Onondaga *v.* Briggs, 2 Hill (N. Y.) 135; *s. c.*, 2 Denio (N. Y.) 26.

69. Jackson *v.* New York Cent. R. Co., 2 Thomp. & C. (N. Y.) 653, *affirmed*, without opinion, 58 N. Y. 623.

70. Haish *v.* Payson, 107 Ill. 365.

71. Yates *v.* Shepardson, 27 Wis. 238 (under an item in a bill for "small and miscellaneous services," no sum being specified, neither the character nor value of the business can be shown).

72. Case *v.* Hotchkiss, 1 Abb. App. Dec. (N. Y.) 324.

73. Yates *v.* Shepardson, 27 Wis. 238.

competent witnesses are admissible to show the character and value of the services of an attorney.[74] The test is said to be knowledge of the usual and customary charges for like services.[75] Such opinions are also competent to show whether services have been properly performed.[76] They are not competent to show the future benefits to be realized by the defendant from the services rendered if they tend to create the impression that such benefits are the measure of compensation.[77]

The Plaintiff May Give His Opinion as to the value of his services.[78]

74. *United States.* — Forsyth *v.* Doolittle, 120 U. S. 73; Sanders *v.* Graves, 105 Fed. 849.

Alabama. — Fuller *v.* Stevens, 39 So. 623.

Arkansas. — Bell *v.* Welch, 38 Ark. 139.

Colorado. — Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172; Bachman *v.* O'Reilly, 14 Colo. 433, 24 Pac. 546 (need not be practitioner in the particular department of the law in which the services were rendered).

Illinois. — Haish *v.* Payson, 107 Ill. 365; Louisville, etc. R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787.

Indiana. — Covey *v.* Campbell, 52 Ind. 157.

Iowa. — Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Kansas. — Ottawa University *v.* Parkinson, 14 Kan. 159.

Kentucky. — Morehead *v.* Anderson, 30 Ky. L. Rep. 1137, 100 S. W. 340; Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2.

Louisiana. — Jackson's Succession, 30 La. Ann. 463.

Maine. — Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

Michigan. — Kelley *v.* Richardson, 69 Mich. 430, 37 N. W. 514; Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973.

Minnesota. — Allis *v.* Day, 14 Minn. 516.

Nebraska. — Cate *v.* Hutchinson, 58 Neb. 232, 78 N. W. 500.

New York. — Harnett *v.* Garvey, 66 N. Y. 641; Garfield *v.* Kirk, 65 Barb. 464.

Ohio. — Williams *v.* Brown, 28 Ohio St. 547.

Pennsylvania. — Thompson *v.* Boyle, 85 Pa. St. 477.

South Carolina. — Jones *v.* Fitzpatrick, 47 S. C. 40, 24 S. E. 1030.

Texas. — International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Basis for Opinions. — In a suit to recover for services rendered in taking depositions, a transcript of the testimony, verified by the oath of a competent witness, is admissible as the basis upon which experts should testify as to whether the plaintiff had performed his duty in a reasonably skilful manner. Stark *v.* Hill, 31 Mo. App. 101.

75. McNiel *v.* Davidson, 37 Ind. 336.

The Extent of the Knowledge of those testifying as to the value of legal services need not be great; and it is sufficient to allow the admission of testimony if it appears that the witnesses knew that the services in question were rendered in a particular county. Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

An attorney acquainted with the value of professional services at the place of trial may testify as to the value of services rendered in an ordinary action though not engaged in it, and though it did not appear that he was informed as to the issues, the sum involved, or had ever tried a like case. Missouri Pac. R. Co. *v.* Henning, 48 Kan. 465, 29 Pac. 597.

No More Weight is to be given the opinions of practicing attorneys than are to be given the opinions of attorneys who are not practicing, if the opportunities for information are equal. Blizzard *v.* Applegate, 61 Ind. 368.

76. Artz *v.* Robertson, 50 Ill. App. 27.

77. Haish *v.* Payson, 107 Ill. 365.

78. Ellis *v.* Warfield, 82 Iowa

(a.) *Must Be Based Upon Local Considerations.* — Opinions concerning the value of professional services must be based on their value in the state where they were contracted for, the parties residing there, though rendered in another state.[79] In some cases the proofs of value must be based on the standard prevailing in the county in which the services were rendered.[80]

(b.) *Not Conclusive.* — Professional opinions as to the value of legal services are not binding upon the court or jury in the sense that it or they are not to exercise their own knowledge and ideas on the subject.[81]

659, 48 N. W. 1058; Anthony *v.* Stinson, 4 Kan. 180; Chamberlain *v.* Rodgers, 79 Mich. 219, 44 N. W. 598; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Garfield *v.* Kirk, 65 Barb. (N. Y.) 464; Sheil *v.* Muir, 4 N. Y. Supp. 272 (may state the time devoted to the work). See *In re* Simpson's Estate, 5 N. Y. Supp. 863.

79. Stanberry *v.* Dickerson, 35 Iowa 493.

A Non-Resident Attorney, otherwise qualified, is not incompetent to testify to the value of professional services in the absence of evidence showing that their value is to be estimated upon a different footing in the place they were rendered than in the place of the witness' residence. Frye *v.* Ferguson, 6 S. D. 392, 61 N. W. 161.

80. Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

81. *United States.* — Head *v.* Hargrave, 105 U. S. 45; Greeff *v.* Miller, 87 Fed. 33; Sanders *v.* Graves, 105 Fed. 849.

California. — Dorland's Estate, 63 Cal. 281; Hansen *v.* Martin, 63 Cal. 282.

Colorado. — Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37; Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172; Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207.

Florida. — Young *v.* Whitney, 18 Fla. 54.

Illinois. — Dorsey *v.* Corn, 2 Ill. App. 533.

Indiana. — Blizzard *v.* Applegate, 61 Ind. 368.

Iowa. — Arndt *v.* Hosford, 82 Iowa 499, 48 N. W. 981; Schlicht *v.* Stivers, 61 Iowa 746, 16 N. W. 74; Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Kansas. — Bentley *v.* Brown, 37 Kan. 17, 14 Pac. 435; Anthony *v.* Stinson, 4 Kan. 180.

Kentucky. — Germania Safety V. & T. Co. *v.* Hargis, 23 Ky. L. Rep. 874, 64 S. W. 516.

Louisiana. — Breaux *v.* Francke, 30 La. Ann. 336; Lee's Succession, 4 La. Ann. 578; Macarty's Succession, 3 La. Ann. 517; Cullom *v.* Mock, 21 La. Ann. 687; Randolph *v.* Carroll, 27 La. Ann. 467. See Brewer *v.* Cook, 11 La. Ann. 637.

Michigan. — Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973; Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

Minnesota. — Olson *v.* Gjertsen, 42 Minn. 407, 44 N. W. 306.

Missouri. — Rose *v.* Spies, 44 Mo. 20; Cosgrove *v.* Leonard, 134 Mo. 419, 33 S. W. 77, 35 S. W. 1137; Sackman *v.* Freeman, 130 Mo. App. 384, 109 S. W. 818.

New York. — Brooklyn Heights R. Co. *v.* Brooklyn City R. Co., 124 App. Div. 896, 109 N. Y. Supp. 31 (especially if given by an interested witness); Bramble *v.* Hunt, 22 N. Y. Supp. 842; Randall *v.* Packard, 1 Misc. 344, 20 N. Y. Supp. 716 *affirmed*, 142 N. Y. 47, 36 N. E. 823.

Pennsylvania. — Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019.

South Carolina. — Jones *v.* Fitzpatrick, 47 S. C. 40, 58, 24 S. E. 1030.

Texas. — Hamman *v.* Willis, 62 Tex. 507; International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

(B.) Of Laymen. — There is disagreement as to the competency of the opinions of laymen to show the value of legal services. In some states they are competent if the witnesses have knowledge;[82] in others such opinions are broadly held to be inadmissible.[83]

(C.) Hypothetical Questions. — Hypothetical questions must include all the services concerning which an opinion is asked.[84] The inquiry must be limited to the value of professional services.[85] Parts of the opinion of the appellate court giving its reasons for the decision reached should not be embodied.[86] The question need not embody a statement of the attainments and experience of the plaintiff; that may be brought out on cross-examination.[87]

(D.) Cross-Examination. — It is proper to ask on cross-examination what is the ordinary local charge for performing like services, and as to witness' knowledge concerning the payment of such a fee as is demanded for like services in the court in which plaintiff appeared.[88] The plaintiff may be questioned concerning the actual value of his services.[89] Letters written by the plaintiff to the defendant after the services were rendered are competent to show his estimate of their value, and after these have been received the plaintiff may offer other letters of his written to the defendant.[90]

B. Of Physicians. — a. *Defendant's Knowledge of Usual Charge.* The plaintiff may show by his books and otherwise that the services

Wisconsin. — Moore *v.* Ellis, 89 Wis. 108, 61 N. W. 291.

82. McNiel *v.* Davidson, 37 Ind. 336; Arndt *v.* Hosford, 82 Iowa 499, 48 N. W. 981; Gregory Groc. Co. *v.* Beaton, 10 Kan. App. 256, 62 Pac. 732; Hand *v.* Church, 39 Hun (N. Y.) 303 (one who has often procured and paid for the services of lawyers may be so instructed by experience as to be qualified to testify as an expert).

Opinions of Non-Experts. — Evidence of witnesses who have employed the plaintiff or been employed by him and have seen the results of his skill and know his professional standing, though they are not experts and know of the particular services rendered only from a statement in the interrogatories, may testify of the value of his services. But such evidence is barely admissible, because it goes rather to the plaintiff's capacity than his achievement. Eagle & P. Mfg. Co. *v.* Browne, 58 Ga. 240.

83. Hart *v.* Vidal, 6 Cal. 56; Howell *v.* Smith, 108 Mich. 350, 66 N. W. 218 (notwithstanding employment of other attorneys of as good standing as the plaintiff); Fry *v.* Estes, 52 Mo. App. 1.

84. Allison *v.* Scheeper, 9 Daly (N. Y.) 365.

Form of Questions. — It is not an objection to hypothetical questions that they embrace facts, assumed or proven, which are not, standing alone, the subject of expert testimony; nor that all the facts are not stated; if those stated are in the case, or are proven later, and are such as to form the basis of an opinion by an expert, it is sufficient. Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

85. Turnbull *v.* Richardson, 69 Mich. 400, 411, 37 N. W. 499.

86. Crawford *v.* Tyng, 2 Misc. 469, 21 N. Y. Supp. 1041.

87. Fuller *v.* Stevens (Ala.), 39 So. 623.

88. Thompson *v.* Boyle, 85 Pa. St. 477.

89. Caverly *v.* McOwen, 123 Mass. 574; Bowman *v.* Tallman, 40 How. Prac. (N. Y.) 1; Cranmer *v.* Bldg. & L. Assn., 6 S. D. 341, 61 N. W. 35.

90. Stringer *v.* Breen 7 Ind. App. 557, 34 N. E. 1015.

rendered the defendant were charged for according to the usual rates charged others in the vicinity and that his rates were known by the defendant.[91] And as tending to show an implied contract as to the charges to be made the defendant may show the plaintiff's former charges against him.[92]

b. *Professional Standing and Income.* — The plaintiff's professional standing is relevant,[93] as is proof of his annual income prior to the time he was engaged by the defendant; such testimony tends to prove the value of his time.[94] But where the services rendered did not interfere with the ordinary practice of the plaintiff, proof of his income is immaterial.[95]

c. *Amount Charged.* — Proof of the sum charged on a bill is not evidence of the value of the services as between the patient and a third party;[96] but the rendition of a bill for a sum less than is sued for may be shown.[97]

d. *Usual and Customary Charge.* — In the absence of a contract fixing the physician's compensation, the proof must be directed to showing the usual and customary local charge for like services. Their value to the defendant is immaterial,[98] as is proof of what other physicians would have charged.[99] The inquiry as to the usual and customary charge involves proof of the patient's condition and the care and attention given him.[1] It is competent to show that the services rendered were worth less than the usual fee because of the plaintiff's misconduct resulting in injury to the defendant.[2] Evidence of the defendant's financial ability is immaterial in some courts

91. Paige *v.* Morgan, 28 Vt. 565.

92. Sidener *v.* Fetter, 19 Ind. 310.

93. Heintz *v.* Cooper (Cal.), 47 Pac. 360; Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Lange *v.* Kearney, 51 Hun 640, 4 N. Y. Supp. 14, 127 N. Y. 676, 28 N. E. 255. *Compare* Baker *v.* Wentworth, 155 Mass. 338, 29 N. E. 589.

The General Character of a Physician as Such is not in issue in an action to recover for his services. The defendant may show that the plaintiff was not a regularly educated physician. Jeffries *v.* Harris, 10 N. C. (3 Hawks) 105.

94. Burke *v.* Mulgrew (App. Div.), 111 N. Y. Supp. 899.

The Length of a Physician's Visits Upon a Patient may be shown to have been on account of social pleasures, and that there was a consequent overcharge for time. Burke *v.* Mulgrew (App. Div.), 111 N. Y. Supp. 899.

The Presumption is that a physician is the best judge of the necessity of frequent calls upon his patients. Todd *v.* Myres, 40 Cal. 355. See Ebner *v.* Mackey, 186 Ill. 297, 57 N. E. 834, 78 Am. St. Rep. 280, 51 L. R. A. 298.

95. Marion Co. *v.* Chambers, 75 Ind. 409; Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369 (evidence of usual receipts is not so convincing as to render opinions unnecessary).

96. Gumb *v.* Twenty-Third St. R. Co., 114 N. Y. 411, 21 N. E. 993; Klingaman *v.* Fish, 19 S. D. 139, 148, 102 N. W. 601.

97. Heath *v.* Kyles, 1 N. Y. Supp. 770. See article "Admissions," Vol. I, p. 348.

98. Jonas *v.* King, 81 Ala. 285, 1 So. 591; Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165.

99. Marion Co. *v.* Chambers, 75 Ind. 409.

1. Trenor *v.* Central Pac. R. Co., 50 Cal. 222; Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547.

2. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

on the question of the reasonableness of the plaintiff's charges.[3] The general rule may not apply where a physician gives his entire time to a patient.[4]

e. *Decrease of Income.* — A decline in the receipts of the plaintiff during the time he was treating the defendant may not be shown because other reasons than the time given the latter may have been responsible therefor.[5]

f. *Charges Against a Stranger.* — It is not competent to show what the plaintiff charged a third person because the question would recur whether that charge was reasonable and according to the local standard.[6]

g. *Services in Consultation.* — In the absence of any definite data as to the value of services rendered in consultation during a series of years the relations of the parties may be shown, the circumstances under which the services were rendered, the time required, the nature and extent of the consultations and all the attendant circumstances. But fee-bill charges are immaterial.[7]

h. *Exhibition of Injured Part.* — In an action to recover for services against a third party, a witness who was treated by the plaintiff cannot be compelled to exhibit the injured member of his body to the jury.[8]

i. *Opinions.* — **(1.) Of Experts.** — Physicians who know of the disease from which the defendant suffered and of the services rendered in caring for him may testify of their value,[9] as may the plaintiff,[10] unless the testimony relates to transactions with a decedent.[11]

(A.) Not Conclusive. — The opinions of experts are not conclusive upon the jury;[12] though they are not to be ignored and the value of services established according to their own judgment.[13]

(B.) Hypothetical Questions. — Such questions to a medical witness may assume that the plaintiff properly prescribed for and ad-

3. Robinson *v.* Campbell, 47 Iowa 625. *Contra,* Haley's Succession, 50 La. Ann. 840, 24 So. 285. See Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127.

4. Maddin *v.* Head, 1 Lea (Tenn.) 664.

5. Burke *v.* Mulgrew (App. Div.), 111 N. Y. Supp. 899.

6. Collins *v.* Fowler, 4 Ala. 647; Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

7. McNamara *v.* McNamara, 108 Wis. 613, 84 N. W. 901.

8. McKnight *v.* Detroit & M. R. Co., 135 Mich. 307, 97 N. W. 772.

9. Marion Co. *v.* Chambers, 75 Ind. 409; McKnight *v.* Detroit & M. R. Co., 135 Mich. 307, 97 N. W. 772; Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369 (though proof of plaintiff's daily receipts be made); Reynolds *v.* Robinson, 64 N. Y. 589; MacEvitt *v.* Maass, 64 App. Div. 382, 72 N. Y. Supp. 158; Ward *v.* Ohio River & C. R. Co., 53 S. C. 10, 30 S. E. 594; Camp *v.* Ristine, 101 Tenn. 534, 47 S. W. 1098.

10. Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701.

11. See Ross *v.* Ross, 6 Hun (N. Y.) 182, and article "Transactions With Deceased Persons," Vol. XII, pp. 676, 892.

12. McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596; *In re* Smith, 18 Misc. 139, 41 N. Y. Supp. 1093.

13. Wood *v.* Barker, 49 Mich.

ministered to the decedent; they must not, however, recite the latter's declarations to that effect.[14] They must cover the material facts in evidence.[15]

(2.) Of Laymen. — The opinions of non-experts are generally inadmissible,[16] though in Illinois it has been said that the question is one of fact and not of science.[17]

j. *Cross-Examination.* — The plaintiff may be asked concerning the ingredients and nature of the remedies prescribed for the purpose of showing that they were inefficacious.[18]

k. *Is Evidence Necessary in Action by Injured Person Against Wrongdoer?* — There is disagreement as to the need of proving the value of medical services rendered to an injured person in an action by him against the party responsible for the injury. The weight of authority probably requires such proof.[19] In some jurisdictions the rule is that jurors have sufficient knowledge, in common with other men, of the charges usually made by physicians, and that such knowledge may be availed of for the purpose of determining what sum the plaintiff should recover for the expense incurred in the attempt to be cured, it being shown what services were rendered.[20] This view is supported by analogous cases concerning proof of the value of the services of nurses, the value of a wife's services to her husband and the probability of the need of further medical attention.[21]

C. General Services. — a. *Judicial Notice.* — The fair and usual commissions charged and paid on acceptances without funds will not be judicially noticed.[22] But it has been presumed that jurors

295, 13 N. W. 597; Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

14. Burke *v.* Mulgrew (App. Div.), 111 N. Y. Supp. 899.

15. McNamara *v.* McNamara, 108 Wis. 613, 84 N. W. 901.

16. Mock *v.* Kelly, 3 Ala. 387; Griffith *v.* McCandless, 9 Kan. App. 794, 59 Pac. 729 (one whose medical experience has been confined to treating cancers according to the formula of another cancer specialist, and who never attended a medical institution or read any course in medicine or surgery is not qualified to testify as an expert concerning the value of the services of a physician in the treatment of cancers); Missouri, etc. R. Co. *v.* Craig, 44 Tex. Civ. App. 583, 98 S. W. 907.

17. Walker *v.* Cook, 33 Ill. App. 561.

18. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

19. Hobbs *v.* Marion, 123 Iowa 726, 99 N. W. 577; Nelson *v.* Metropolitan St. R. Co., 113 Mo. App. 659, 88 S. W. 781; Brown *v.* White, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321; Houston, etc. R. Co. *v.* Garcia (Tex. Civ. App.), 90 S. W. 713.

20. Western Gas Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528; St. Louis, etc. R. Co. *v.* Stell (Ark.), 112 S. W. 876; McGarrahan *v.* New York, etc. R. Co., 171 Mass. 211, 220, 50 N. E. 610; Scullane *v.* Kellogg, 169 Mass. 544, 48 N. E. 622; Moran *v.* Dover, S. & R. St. R. Co., 74 N. H. 500, 69 Atl. 884; Feeney *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544.

21. See Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601; Kelley *v.* Mayberry Tp., 154 Pa. St. 440, 26 Atl. 595; Northern Texas Tract. Co. *v.* Mullins, 44 Tex. Civ. App. 566, 99 S. W. 433.

22. Seymour *v.* Marvin, 11 Barb. (N. Y.) 80.

are familiar with the value of the services rendered in the capacity of a nurse,[23] though it is otherwise as to the value of the services in "puffing" mineral lands.[24]

b. *Burden of Proof.* — The party seeking to recover for services must show their value.[25] The defendant has the burden of showing that services rendered were to be gratuitous or were to be paid for only under a contingency.[26] The value of a ward's services to her guardian, when pleaded as a counter-claim, must be shown by the ward.[27]

c. *Contracts as Evidence.* — **(1.) Broken Contract.** — A broken contract for services may be received at the instance of the plaintiff in an action on a *quantum meruit*.[28] The contract price is only *prima facie* evidence of the value of the work done under it.[29] Under a general denial the defendant cannot show that a contract for compensation was made after the services were rendered.[30]

(2.) Price Stipulated in Executed Contract. — If services have been rendered under an express contract which is fully executed except as to payment and the plaintiff frames his petition upon the implied promise, using the ancient common counts, the contract is conclusive evidence of the value of the work specified in it and of the value of all extra work done by mutual consent, so far as its terms apply thereto.[31]

(3.) Former Contract. — The presumption that one who returns to a service which he had quit does so on the same terms as he had previously contracted for, has no application where several months intervene between the two periods of service, and the character of the services rendered differs.[32]

23. Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817. See last preceding paragraph.

24. Sayers *v.* Craven, 107 Mo. App. 407. 81 S. W. 473.

25. Bell *v.* Welch, 38 Ark. 139; Fry *v.* Lofton, 45 Ga. 171; Caverly *v.* McOwen, 123 Mass. 574; Garr *v.* Mairet, 1 Hitt. (N. Y.) 498. See Stanton *v.* Clinton, 52 Iowa 109, 2 N. W. 1027; Nixon *v.* Phelps, 29 Vt. 198.

26. Cusick *v.* Boyne, 1 Cal. App. 643, 82 Pac. 985; Woodbury *v.* Conger, 61 Hun 624, 15 N. Y. Supp. 926; Kelly *v.* Houghton, 59 Wis. 400. 18 N. W. 326.

27. Thompson *v.* Hartline, 84 Ala. 65, 4 So. 18.

28. Pope *v.* Randolph, 13 Ala. 214; Higgins *v.* Newton & F. R. Co., 66 N. Y. 604; Boyd *v.* Vale, 84 App. Div. 414, 82 N. Y. Supp. 932; Shirk *v.* Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225.

29. Ibers *v.* O'Donnell, 25 Mo. App. 120.

30. Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015.

31. Emslie *v.* Leavenworth, 20 Kan. 562.

"While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue on the contract, or in *indebitatus assumpsit*, and rely upon the common counts. In either case the contract will determine the rights of the parties." Dermott *v.* Jones, 2 Wall. (U. S.) 1, 9.

32. Harris *v.* Russell, 93 Ala. 59, 9 So. 541.

Continuance in Same Employment Without a New Contract justifies presumption that stipulated compensation is to be continued, notwithstanding a nominal change in

(4.) Void Contract. — If the contract under which services were rendered was void because not in writing it is not admissible to fix their value;[33] but is competent to show that the services were not rendered gratuitously.[34]

Payment Under Void Contract. — The sum accepted in full payment for services rendered under a void contract is conclusive as to their value for all the time represented by the several payments.[35]

(5.) Abandoned Contract. — An abandoned contract may be competent evidence of the value of performance.[36] But if several agreements for compensation have been abandoned by the parties, none of them is admissible.[37]

(6.) Evidence Affected by Contract. — In the absence of fraud or mistake the decision of a third party may be made binding as to the value of services — a common instance is afforded by building and construction contracts which provide that the decision of the architect or engineer shall be final and conclusive.[38]

(7.) Prima Facie Case. — The plaintiff makes a *prima facie* case by showing that services were rendered and accepted.[39]

(8.) Burden of Proof. — A ward who pleads a counter-claim against her guardian for the value of services rendered must show their value.[40]

d. *Other Methods of Proof.* — **(1.) Admission.** — (A.) In Pleadings. The amount stated in the complaint is an implied admission that the services rendered were not worth more; but the admission is not conclusive, and their value may be shown to be greater than stated in the *ad damnum*.[41]

employer. Perry *v.* J. Noonan Furn. Co. (Cal. App.), 95 Pac. 1128, and local cases cited.

33. Hillebrands *v.* Nibbelink, 40 Mich. 646 (the value of land verbally agreed to be conveyed in payment for services cannot be proved in an action to recover their value); Cohen *v.* Stein, 61 Wis. 508, 21 N. W. 514.

34. Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666, 5 Am. Rep. 222; Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55.

35. Cohen *v.* Stein, 61 Wis. 508, 21 N. W. 514.

36. Scott *v.* Congdon, 106 Ind. 268, 6 N. E. 625; Shilling *v.* Templeton, 66 Ind. 585; Tebbetts *v.* Haskins, 16 Me. 283; Jones *v.* Mial, 89 N. C. 89; Houston *v.* Starnes, 34 N. C. (12 Ired. L.) 313.

37. Carruthers *v.* Towne, 86 Iowa 318, 53 N. W. 240.

38. See "Conclusive Evidence," Vol. III, p. 284.

Testimony Not Excluded. — A contract stipulating that the work called for should be done under direction of an engineer or his assistants, by whose calculations the value of the work should be determined, does not preclude testimony of witnesses on that point Byron *v.* Bell, 16 Daly 198, 10 N. Y. Supp. 693.

Where a contract specifies that estimates certified to by a railroad engineer as to the value of work done by contractors shall be accepted as correct, the *ex parte* and unsworn estimates of another of the company's engineers is inadmissible. Tennessee & C. R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502.

39. Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074.

40. Thompson *v.* Hartline, 84 Ala. 65, 4 So. 18.

41. Maughan *v.* Estate of Burns, 64 Vt. 316, 23 Atl. 583.

(B.) By Charge. — The same rule applies in respect to a charge made on the books of the plaintiff or a bill presented by him.[42]

(C.) By Obligation. — The value placed on services rendered to a decedent may be shown by parol proof that he gave the plaintiff a note therefor payable after his death. The note need not be produced or accounted for.[43]

(2.) Declarations. — (A.) Of Strangers. — Unsworn declarations of strangers to the action are inadmissible.[44]

(B.) Of Decedent. — Statements of a deceased person as to the purposed disposition of property and its value are not admissible to show the value of services rendered him.[45] But the declarations of a decedent as to the value of personal services rendered him are competent.[46]

(3.) Usual and Customary Charge. — (A.) Generally. — In the absence of a contract the value of ordinary services may be shown by proof of the price at which competent persons could have been procured to render them,[47] and such testimony has been received notwithstanding evidence of the existence of a special contract.[48] If compensation was to be based on commission, the usual commission paid may be shown.[49]

(B.) Similarity of Services. — The similarity of the services in question with others must be shown as a basis for proving the value of the former.[50] But it is not necessary that the similarity should

42. Wilkinson *v.* Crookston, 75 Minn. 184, 77 N. W. 797 (explanation may be made in rebuttal); Williams *v.* Glenny, 16 N. Y. 389; Hard *v.* Burton, 62 Vt. 314, 325, 20 Atl. 269.

Book Entries made in accordance with statements made to the plaintiff by other witnesses, when these testify that such statements were true, are competent. Payne *v.* Hodge, 7 Hun (N. Y.) 612, *affirmed*, without opinion, 71 N. Y. 598.

43. Jack *v.* McKee, 9 Pa. St. 235.

44. Miner *v.* Rickey, 5 Cal. App. 451, 90 Pac. 718.

45. Lathrop *v.* Sinclair, 110 Mich. 329, 68 N. W. 248.

46. Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396; Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563; Harrington *v.* Hickman, 148 Pa. St. 401, 23 Atl. 1071; *In re* Harper's Estate, 196 Pa. St. 137, 46 Atl. 302.

47. *Kentucky.* — French *v.* Frazier's Admr., 7 J. J. Marsh. 425; Murray *v.* Ware, 1 Bibb. 325.

Maryland. — Morris *v.* Columbian Iron, etc. Wks., 76 Md. 354, 25 Atl. 417.

Missouri. — Gurley *v.* Bunch (Mo. App.), 108 S. W. 1109 (services of horse); Cornelius *v.* Grant, 8 Mo. 59.

New York. — Harrison *v.* Tinker, 8 Jones & S. (N. Y. Super.) 544; Perrine *v.* Hotchkiss, 58 Barb. 77.

Texas. — Cooper *v.* Gordon (Tex. Civ. App.), 23 S. W. 608.

Wisconsin. — Pfeil *v.* Kemper, 3 Wis. 315.

The Value of Services cannot be established by proof of the kind and value of the hands plaintiff employed, or what their services were worth by the day. Governor *v.* Justices, 20 Ga. 359.

48. Harrington *v.* Baker, 15 Gray (Mass.) 538.

49. Jenney Elec. Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448; Hurt *v.* Jones, 105 Mo. App. 106, 79 S. W. 486; Glover *v.* Henderson, 120 Mo. 367, 380, 25 S. W. 175, 41 Am. St. Rep. 695 (the commissions paid in the same city for selling lots in other additions thereto may be shown).

50. Maurice *v.* Hunt, 80 Ark. 476, 97 S. W. 664 (the value of the services of a man and team can-

extend to details.[51] It need not be shown on the issue of the reasonableness of a contract for personal services.[52]

(4.) Defendant's Charge for Plaintiff's Work. — The value of work done by the day may be shown by parol evidence of the sum defendant received therefor from the person on whose property the plaintiff worked, notwithstanding a receipt was given such person.[53]

(5.) Cost of Completing Contract. — The reasonable cost of completing a contract may be shown by independent evidence of the sum paid therefor.[54] Such evidence does not show the reasonable value of the work done under the contract.[55]

(6.) Cost of Repaired Article. — The value of services in repairing an article cannot be shown by proof of its cost when new, nor by what the plaintiff charged for a similar article.[56]

(7.) Officer's Return. — The return of an officer who has levied an attachment on cars is not evidence on the question of the value of storing them.[57]

(8.) Gratuitous Services. — It is immaterial that like services have been performed without charge.[58]

(9.) Result of Work. — It is immaterial to the rights of the plaintiff what profit resulted from the services rendered.[59] But the general result of the plaintiff's efforts may be shown.[60]

(10.) Compensation Paid Individuals. — It is competent to show the compensation paid others for similar services, the reasons why such compensation varies from that claimed by the plaintiff and their

not be proved by what another paid for the use of teams); Peters *v.* Davenport, 104 Iowa 625, 74 N. W. 6; Kvammen *v.* Meridean M. Co., 58 Wis. 399, 17 N. W. 22.

51. Edgecomb *v.* Buckhout, 146 N. Y. 332, 40 N. E. 991, 28 L. R. A. 816; Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563.

Statement of the Rule. — A housekeeper seeking to recover the value of her services may call as witnesses people who had hired individuals to do the same class of services in some respects, although not to the same extent or precisely of the same character as those she performed, and show by them the sum paid to the persons they employed, and the worth of the services rendered; such witnesses, having seen the plaintiff render services other than those usually rendered by housekeepers, may testify to the value thereof on the assumption that a proportionate amount of her time was given thereto in stated periods as in the time designated by the witness, and the value of such services. Edgecomb *v.* Buckhout, 146 N. Y. 332, 40 N. E. 991, 28 L. R. A. 816.

52. Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41.

53. Kingsbury *v.* Moses, 45 N. H. 222.

54. Feaster *v.* Richland Cotton Mills, 51 S. C. 143, 28 S. E. 301. The court was equally divided, thus affirming the judgment.

55. Ahern *v.* Boyce, 19 Mo. App. 552.

56. Singer Mfg. Co. *v.* Armstrong, 17 Mich. 517.

57. Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600.

58. Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600.

59. Harrington *v.* Baker, 15 Gray (Mass.) 538; Perrine *v.* Hotchkiss, 58 Barb. (N. Y.) 77.

60. Low *v.* Connecticut & P. R. R., 45 N. H. 370, 380.

The Efficiency of a Broker's Serv-

and his comparative claims in similar employments.[61] But such testimony is not received in some states.[62]

(11.) Plaintiff's Previous Compensation. — (A.) GENERALLY. — It is immaterial what others paid the plaintiff[63] for like services at the time the work in question was being done.[64] But it has been held to be competent for a witness to sustain his estimate of the value of services by stating what he had previously paid the plaintiff,[65] and that after proving the usual and customary rate of compensation for architects the defendant may show the highest price he paid the plaintiff for the same kind of services and the lowest cost of any house built by him and the services covered by such payments.[66]

(B.) ON COMMISSION. — If compensation is to be made on the basis of commissions during a certain season, those earned the preceding season may be shown.[67]

(12.) Nature of Services. — The difficulty of the services rendered may be shown,[68] and it is competent to show their nature and ex-

ices in procuring a purchaser for real estate may be shown by the purchaser's statements to the seller and a third party, made at the time of the sale and in plaintiff's absence. Mead *v.* Arnold (Mo. App.), 110 S. W. 656.

61. Craighead *v.* Wells, 21 Mo. 404 (the wages paid a witness may be shown on the question of the value of labor in a distant state); Holman *v.* Fesler, 7 Watts & S. (Pa.) 313 (defendant may show the wages paid others who worked for him with plaintiff).

Reasons. — In Murray *v.* Ware, 1 Bibb (Ky.) 325, the court said: "The proper criterion in the assessment of quantum meruit would have been the usual or reasonable price which others have received for similar services. The estimate must not be made upon the time of service solely, but should also be compounded by the ability, capacity and fitness of the person to render service in his employment. If a witness should state that the person employed deserved so much, such valuation is evidently a deduction of the witness from the premises he has assumed, as well in respect of the qualifications of the employed, as of the prices paid by other employers. Therefore, it seems proper to permit either party to require the witness to submit his premises to the jury, that any error, either in the major or minor propositions, or in the conclusion, may be corrected. The witness may have taken a view of the subject too limited; the facts from which he has drawn his inferences are of higher consideration and more satisfactory than the inferences without the facts, and the true inference of the jury from the relevant facts is the end proposed in submitting the case to their consideration."

62. Harris *v.* Russell, 93 Ala. 59, 9 So. 541 (on the ground that such evidence raises numerous collateral issues); Forey *v.* Western Stage Co., 19 Iowa 535; McKnight *v.* Detroit & M. R. Co., 135 Mich. 307, 97 N. W. 772; Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283 (sum paid plaintiff's fellow workman by their common employer); Cooper *v.* Gordon (Tex. Civ. App.), 23 S. W. 608.

63. Graves *v.* Jacobs, 8 Allen (Mass.) 141.

64. Cornelius *v.* Grant, 8 Mo. 59; Stevens *v.* Benton, 39 How. Prac. (N. Y.) 13.

65. McPeters *v.* Ray, 85 N. C. 462.

66. Harrison *v.* Tinker, 8 Jones & S. (N. Y. Super.) 544.

67. Hess *v.* Citron, 37 Misc. 849, 76 N. Y. Supp. 994.

68. Carruthers *v.* Towne, 86 Iowa 318, 53 N. W. 240.

Effect Upon Plaintiff's Health. The effect of the service rendered upon the health of the plaintiff may be testified to for the purpose of showing the nature of the service.

tent,[69] including the amount of the estate managed in connection with caring for the personal wants of its owner.[70] The capacity in which the plaintiff served is a material matter,[71] as is the time required to perform the service,[72] notwithstanding expert testimony as to the value of the services.[73]

(13.) Attendant Circumstances. — It is competent to show the circumstances connected with the performance of the service,[74] as their interruption by illness and the resultant expense.[75]

(14.) Extra Work Under Contract. — If a contract provides that extra work shall be done only in pursuance of a writing, parol proof of the performance of such work cannot be made unless a waiver of that provision be shown.[76]

(15.) Plaintiff's Attainments. — Evidence showing the character and ability of the plaintiff is competent if the duty assigned him required the best judgment, skill and ability beyond the average, was of a

Reynolds *v.* Robinson, 64 N. Y. 589; Thompson *v.* Stevens, 71 Pa. St. 161 (as affecting the value of the services).

69. Shirk *v.* Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225.

Correspondence Between the Person Who Has Rendered Services and those with whom he has done business is admissible as bearing upon the extent of the services. Low *v.* Connecticut & P. R., 45 N. H. 370, 380.

Books Admissible. — In an action by a bookkeeper to recover for services the books kept are admissible to show the character and amount of the work done and the extent of the defendant's business. Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700.

Parol Evidence Competent Though Result of Work in Existence. — The nature and extent of the services rendered in preparing an unpublished memoir, though it is in possession of the plaintiff, may be shown by his testimony without producing the manuscript. Houghton *v.* Paine, 29 Vt. 57.

Letter of Plaintiff. — In such an action a copy of a letter written by the plaintiff to the executors of the deceased, containing a full statement of his services, was proper evidence. Houghton *v.* Paine, 29 Vt. 57.

The Condition of the House in which a person died may be shown, in so far as his sickness was responsible for such condition, in an action to recover for board and nursing. Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644.

Character of Services Performed for Decedent. — One who has performed service for a deceased person may testify as to their character after testimony has been offered by the administrator on that point, the statute prohibiting evidence of transactions with deceased persons containing an exception when the administrator shall be examined concerning them on his own behalf. Ridler *v.* Ridler, 103 Iowa 470, 72 N. W. 671.

70. Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563 (decedent's will is competent to show the value of his estate); Horne *v.* McRae, 53 S. C. 51, 64, 30 S. E. 701.

The Value of the Farm on which services were rendered is immaterial in ascertaining their worth if the plaintiff did not have entire charge of it. Thomas *v.* Carey, 26 Colo. 485, 494, 58 Pac. 1093.

71. Kingsbury *v.* Moses, 45 N. H. 222.

72. Bagley *v.* Carthage, etc. R. Co., 25 App. Div. 475, 49 N. Y. Supp. 718.

73. Ehlers *v.* Wannack, 118 Cal. 310, 50 Pac. 433.

74. Shirk *v.* Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225.

75. Low *v.* Connecticut & P. R., 45 N. H. 370, 380.

76. Ahern *v.* Boyce, 19 Mo. App. 552.

confidential character, and had no common and general market value.[77] Plaintiff's reliability and general qualifications are relevant matters.[78]

(16.) Prospective Profits. — The prospective profits of an orchard which has not begun to bear may be shown by proof of its value at the time of the trial as bearing upon the remuneration due plaintiff, who was to be compensated for his services by a share therein.[79] The compensation due for services rendered in consideration of a proportion of the net profits to be realized from the manufacture of a raw material are determinable from the value of the manufactured article, the cost of the raw material and the expense of manufacturing.[80] One who is justified in treating a contract as terminated may show the cost of doing the work performed under it as a basis for ascertainment of the profits he would have received from a full performance.[81]

(17.) Offer To Do Work. — It has been held that it may be shown that the plaintiff knew that a third party had offered to do the work for which a recovery is sought at a stipulated price;[82] but the general view is that a bid to do the work is not evidence of its value.[83]

(18.) Individual's Customary Charge. — It is not competent to show what an individual was in the habit of charging for his services.[84]

(19.) Circumstances of Parties. — It is not competent to show the financial circumstances of either of the parties.[85]

(20.) Compensation From Other Source. — It has been held to be immaterial that plaintiff's time was paid for by another.[86]

77. Johnson *v.* Myers, 103 N. Y. 663, 9 N. E. 52; Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563 (decedent's declarations are competent to show the previous business position occupied by the plaintiff).

The Value of the Services of an Experienced Nurse is not measurable by what a witness of considerable experience in caring for the sick in his own family and among his neighbors would have been willing to render such services for; nor by what a competent man could have been obtained for. Hull *v.* Gallup, 49 Conn. 279.

78. Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Low *v.* Connecticut & P. R., 45 N. H. 370, 380 (that he was accustomed to conduct a large business requiring the qualities needed for the business in question).

79. The code provides that the measure of damages for the breach of a contract shall be the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the usual course of things would be likely to result therefrom. Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62.

80. Boyce *v.* Brady, 61 Ind. 432.

81. Tennessee & C. R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502 (it is not an objection to so doing that there is not absolute uniformity in the nature of the soil through which excavation is to be made, nor that the contractor intended to have the work done by subcontractors).

82. Klopp *v.* Jill, 4 Kan. 414.

83. Horne *v.* McRae, 53 S. C. 51, 66, 30 S. E. 701; Hulst *v.* Benevolent Hall Assn., 9 S. D. 144, 68 N. W. 200.

84. French *v.* Frazier's Admr., 7 J. J. Marsh. (Ky.) 425; Pfeil *v.* Kemper, 3 Wis. 315.

85. Riddler *v.* Riddler, 103 Iowa 470, 72 N. W. 671; Sabine *v.* Merrill, 67 N. H. 226, 38 Atl. 733.

86. Firman *v.* Bateman, 2 Utah 268.

In Michigan if the plaintiff has rendered services simultaneously to

(21.) Opinions. — (A.) Of Experts. — (a.) *Competent.* — Persons who have knowledge of the business in which services have been rendered and of their value may testify to the latter.[87] Knowledge of what has been paid for like services is not always essential,[88] though the lack of it is a disqualification if the witness has had no experience in the business,[89] or if the work was done in another state than that in which the work in question was performed.[90]

(b.) *Not Necessary.* — The opinions of experts are not necessary to show the value of domestic services,[91] (they have, however, been received),[92] nor the cost of filling a depression in land.[93] If compensation is not dependent upon the value of the work when done,

two parties the defendant may show the amount he is seeking to recover in an action brought against another. Ruttle *v.* What Cheer Coal Min. Co. (Mich.), 117 N. W. 168.

87. *United States.* — Harvey *v.* United States, 113 U. S. 243.

California. — Cowdery *v.* McChesney, 125 Cal. xix, 58 Pac. 62 (not inadmissible because witness told what she "thought"); Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700.

Maryland. — Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324 (a trained nurse familiar with the compensation paid for untrained nursing may testify of the value of such service).

Massachusetts. — Shattuck *v.* Train, 116 Mass. 296 (an experienced accountant, who knew of the ability of a bookkeeper, may give an opinion as to the value of the latter's services, and may examine the books kept by him and state what was a fair compensation for keeping such books, and the reasonable charge per day for the services of an accountant in fixing up complicated accounts); Fitchburg R. Co. *v.* Freeman, 12 Gray 401, 74 Am. Dec. 600 (railroad freight agents may testify to the value of storing cars).

Missouri. — Ryans *v.* Hospes, 167 Mo. 342, 365, 67 S. W. 285 (a trained nurse may testify to the value of the services of a valet); Bosard *v.* Powell, 79 Mo. App. 184; Kelly *v.* Rowane, 33 Mo. App. 440 (carpenters may testify to the value of the services of boys in aid of their work).

New York. — Mercer *v.* Vose, 67 N. Y. 56; Shirk *v.* Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225; Tyng *v.* Fields, 3 Hun 75 (the possibility of an engine being so damaged as to require repairs to the value claimed by the plaintiff may be testified to); Bagley *v.* Carthage, etc. R. Co., 25 App. Div. 475, 49 N. Y. Supp. 718 (a member of a banking house through which a loan has been negotiated may testify to the time spent and the value of the services rendered in securing it).

Pennsylvania. — Worden *v.* Connell, 196 Pa. St. 281, 46 Atl. 298 (an experienced carpenter and builder who has examined the work done on a building may testify to the value of the labor).

88. Boyd *v.* Vale, 84 App. Div. 414, 82 N. Y. Supp. 932.

Compensation of Promoter. — The value of services rendered in the procurement of capital for investment may be testified to by a witness without personal knowledge of what had been paid for like services with reference to the same line of business as the investment was to be made in, he having an extrinsic general knowledge concerning the promotion of various kinds of enterprises in that general section of country, and what had been paid for such services. Boyd *v.* Vale, 84 App. Div. 414, 82 N. Y. Supp. 932.

89. Story *v.* Maclay, 3 Mont. 480.

90. Noyes *v.* Fitzgerald, 55 Vt. 49.

91. Hufford *v.* Neher, 15 Ind. App. 396, 44 N. E. 61.

92. Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336; Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074 (from a witness of large experience in housekeeping and hiring servants).

93. Terre Haute & L. R. Co. *v.* Crawford, 100 Ind. 550.

expert opinions as to the time required to do it are incompetent — the time required to do a particular work not being a matter of skill or science.[94]

(c.) *Discretion of Court.* — The ruling of the trial court as to the competency of a witness offered as an expert will not be reversed if supported by any evidence.[95]

(B.) Of Plaintiff. — The party who has rendered services may testify to their value after stating in detail their nature and extent,[96] and without proving knowledge of their value in the place where they were rendered or elsewhere.[97]

(C.) Of Non-Experts. — Witnesses who are informed concerning the services performed and the compensation customarily paid at or near the place and time in question for like services, may testify to the value of those rendered by the plaintiff,[98] if those rendered

94. Payne *v.* Hodge, 7 Hun (N. Y.) 612, *affirmed*, without opinion, 71 N. Y. 598.

95. Garr *v.* Cranney, 25 Utah 193, 70 Pac. 853; Watriss *v.* Trendall, 74 Vt. 54, 52 Atl. 118.

96. *Colorado.* — Stevens *v.* Walton, 17 Colo. App. 440, 68 Pac. 834.

Dakota. — Edwards *v.* Fargo & S. R. Co., 4 Dak. 549, 33 N. W. 100.

Illinois. — Chicago & E. I. R. Co. *v.* Bivans, 142 Ill. 401, 32 N. E. 456.

Kansas. — Carter *v.* Christie, 1 Kan. App. 604, 42 Pac. 256.

Michigan. — Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336; Richardson *v.* McGoldrick, 43 Mich. 476, 5 N. W. 672.

Minnesota. — Loucks *v.* Chicago, etc. R. Co., 31 Minn. 526, 18 N. W. 651.

Nebraska. — McCormick Harv. Mach. Co. *v.* Davis, 61 Neb. 406, 85 N. W. 390; Missouri Pac. R. Co. *v.* Palmer, 55 Neb. 559, 76 N. W. 169 (though he has obtained information by inquiry).

New York. — Mercer *v.* Vose, 67 N. Y. 56; Mourry *v.* Lord, 3 Abb. Ct. App. 392; Hook *v.* Kenyon, 55 Hun 598, 9 N. Y. Supp. 40.

Value of Services Rendered Decedent. — If joint services have been rendered a decedent by husband and wife under a contract to which the decedent and the husband were the only parties, the wife may testify of the value of their services. Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701.

97. Wahl *v.* Shoulder, 214 Ill. 665, 43 N. E. 458; Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644.

98. *Alabama.* — Parker *v.* Parker, 33 Ala. 459.

Arkansas. — Covington *v.* St. Francis County, 77 Ark. 258, 91 S. W. 186 (reasonableness of ferry tolls).

Colorado. — Stevens *v.* Walton, 17 Colo. App. 440, 68 Pac. 834.

Dakota. — Edwards *v.* Fargo & S. R. Co., 4 Dak. 549, 33 N. W. 100.

Illinois. — Heffron *v.* Brown, 155 Ill. 322, 40 N. E. 583.

Louisiana. — Figuras *v.* Benoist, 11 La. Ann. 683 (value of nurse's services may be shown by others than nurses or physicians).

Massachusetts. — Kendall *v.* May, 10 Allen 59 (value of the board and care of a lunatic may be shown by a witness experienced in caring for such unfortunates).

Michigan. — Carter *v.* Carter, 36 Mich. 207.

Minnesota. — Stevens *v.* Minneapolis, 42 Minn. 136, 43 N. W. 842.

Missouri. — Glover *v.* Henderson, 120 Mo. 367, 380, 25 S. W. 175, 41 Am. St. Rep. 695.

Nebraska. — Green *v.* Lancaster County, 61 Neb. 473, 484, 85 N. W. 439.

Nevada. — Alt *v.* California Fig Syrup Co., 19 Nev. 118, 7 Pac. 174 (though the services were rendered in the preparation of a proprietary medicine, the process of compounding which was a secret).

New York. — Lewis *v.* Trickey, 20 Barb. 387; Scott *v.* Lilienthal, 9 Bosw. (N. Y. Super.) 224; Major

have a market value.[99] The competency of the plaintiff as a workman may also be shown by the opinions of qualified witnesses.[1]

(a.) *Knowledge Essential.* — To be admissible the opinions of witnesses must be based on means of knowledge superior to that possessed by the jurors. It may be the result of ordinary observation and experience.[2] Opinions based on hearsay are not admissible.[3]

(b.) *Extent of Knowledge.* — Qualifying knowledge must extend to the usual compensation paid at or about the time and place in question.[4] Slight knowledge of the value of services qualifies a witness

v. Spies, 66 Barb. 576; Harris *v.* Roof's Exr., 10 Barb. 489 (knowledge of compensation paid is essential as is knowledge of all the services rendered); Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563; Keenan *v.* Getsinger, 1 App. Div. 172, 37 N. Y. Supp. 826 (physician may testify to value of services of nurse); Woodward *v.* Bugsbee, 2 Hun 128 (same as last above).

North Carolina. — McLamb *v.* Wilmington & W. R. Co., 122 N. C. 862, 29 S. E. 894.

Novelty of Method. — The fact that real estate agents generally work under a contract does not render them incompetent to testify as to the reasonable value of services in selling lots, though the sales were made under a unique and unusual plan. Glover *v.* Henderson, 120 Mo. 367, 380, 25 S. W. 175, 41 Am. St. Rep. 695.

99. First Nat. Bank *v.* St. Cloud, 73 Minn. 219, 75 N. W. 1054.

1. Missouri Pac. R. Co. *v.* Palmer, 55 Neb. 559, 76 N. W. 169; Major *v.* Spies, 66 Barb. (N. Y.) 576.

2. *United States.* — Crane Co. *v.* Columbus Const. Co., 73 Fed. 984, 20 C. C. A. 233 (there must be either personal knowledge or sufficient data to support a conclusion).

Illinois. — Byrne *v.* Byrne, 47 Ill. 507; Louisville, etc. R. Co. *v.* Cox, 30 Ill. App. 380.

Kentucky. — Miller *v.* Early, 22 Ky. L. Rep. 825, 58 S. W. 789; Daniel *v.* Bullitt County, 115 Ky. 741, 74 S. W. 1057.

Michigan. — Lathrop *v.* Sinclair, 110 Mich. 329, 68 N. W. 248.

New Hampshire. — Harris *v.* Smith, 71 N. H. 330, 52 Atl. 854.

New York. — Schou *v.* Blum (App. Div.), 104 N. Y. Supp. 887; Lamoure *v.* Caryl, 4 Denio 370; Smith *v.* Kobbe, 59 Barb. 289.

North Carolina. — Madden *v.* Porterfield, 53 N. C. (8 Jones L.) 166.

Freight Rates. — One who has no special knowledge or skill concerning freight rates is not competent to testify as to their reasonableness. Railway Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363.

The Net Value of Services cannot be testified to by witnesses who are not familiar with the value of what the plaintiff has received. Lewis *v.* Trickey, 20 Barb. (N. Y.) 387. But in another case witnesses were allowed to testify as to the value of the plaintiff's services with board and over and above his board, without showing themselves competent to speak of the value of the board. It seems to have been assumed that the board furnished was such as was usually supplied to laborers, and that the witnesses knew its value. Stevens *v.* Benton, 39 How. Prac. (N. Y.) 13.

3. Little Rock, etc. R. Co. *v.* Allister, 62 Ark. 1, 34 S. W. 82; Lewis *v.* Eagle Ins. Co., 10 Gray (Mass.) 508; Cameron Mill & E. Co. *v.* Anderson, 34 Tex. Civ. App. 229, 78 S. W. 971.

It Cannot Be Shown That Others Have Said, after examining the work and materials in question and making written estimates thereof, that they would have done work for less than the plaintiff claims. Morris *v.* Columbian Iron Wks. Co., 76 Md. 354, 25 Atl. 417.

4. Louisville, etc. R. Co. *v.* Cox, 30 Ill. App. 380; Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324 (unless the contrary appears it will be assumed that knowledge was based on local conditions); Shepard *v.* Ashley, 10

to testify thereto.[5] In some states the rule is more guardedly stated.[6] The extent of a witness' knowledge goes rather to the value than to the competency of his testimony.[7]

(c.) *Local Residence Not Necessary.* — Non-residents may answer hypothetical questions if instructed that they relate to the value of the services at the place they were rendered.[8]

(d.) *Speculative.* — Opinions based on the returns received from the investment of large sums of money in stocks are inadmissible.[9]

(e.) *Conclusions.* — Witnesses may not state conclusions, as that the services rendered were worth as much as the remuneration received;[10] but a conclusion as to the efficiency of the services rendered is not improper.[11]

Allen (Mass.) 542 (ten years before and in a distant state too remote); Stevens *v.* Minneapolis, 42 Minn. 136, 43 N. W. 842.

The Reasonable Value of Board may be testified to by local witnesses informed thereof (Watriss *v.* Trendall, 74 Vt. 54, 52 Atl. 118), and by local housekeepers with no special experience as to its value. Kelsey *v.* Kelley, 63 Vt. 41, 52, 22 Atl. 597, 13 L. R. A. 640; Hook *v.* Kenyon, 55 Hun 598, 9 N. Y. Supp. 40.

5. Bowen *v.* Bowen, 74 Ind. 470; Loy *v.* Petty, 3 Ind. App. 241, 29 N. E. 788; Jenney Elec. Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448 (sale of electric lighting plant); Hufford *v.* Neher, 15 Ind. App. 396, 44 N. E. 61 (domestic services); Hillebrands *v.* Nibbelink, 40 Mich. 646 (value of outlays made in building).

If the Services Rendered by a Layman were of the same general character as those frequently performed by lawyers, the opinions of the latter as to the value of such services are competent. McClellan *v.* Duncombe, 52 App. Div. 189, 65 N. Y. Supp. 19.

6. Green *v.* Green, 26 Ky. L. Rep. 1007, 82 S. W. 1011; Seuer *v.* Horst, 31 Minn. 479, 18 N. W. 283 (special knowledge essential); Stone *v.* Tupper, 58 Vt. 409, 5 Atl. 387 (a witness acquainted with the kind of work done by the plaintiff and who has a general knowledge of the character, extent and quality of his work may estimate the value of his services).

Relative Value of Services and Compensation. — Where the person suing to recover for services has received from the defendant money, schooling, clothing, medical attendance, and other things of value, witnesses familiar with the facts may testify as to the relative value of the services and the things received as compensation. Johnson *v.* Thompson, 72 Ind. 167, 37 Am. Rep. 152.

7. Stoner *v.* Devilbiss, 70 Md. 144, 16 Atl. 440.

8. Nelson *v.* Masterton, 2 Ind. App. 524, 28 N. E. 731.

Place of Witness' Residence. Though it appears that a witness who testified to the value of services lived at another place than that in which they were rendered, such testimony will not be considered incompetent on appeal unless it appears that the places were not in the same neighborhood. Boyd *v.* Starbuck, 18 Ind. App. 310, 47 N. E. 1079.

Disqualification Must Be Shown. In the absence of anything to show that witnesses living in one state did not know anything about the value of wages in the place of their residence nor the value of services in another state, it will not be assumed that they were not qualified, or that there was any difference in the prices paid for, or the value of, labor between those places. Kent Furn. Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 N. W. 454.

9. Hastings *v.* Steamer Uncle Sam. 10 Cal. 341.

10. Thompson *v.* Hartline, 84 Ala. 65, 4 So. 18; Central of Georgia R. Co. *v.* Barnett, 151 Ala. 407, 44 So. 392; Hastings *v.* Steamer Uncle Sam, 10 Cal. 341.

11. Missouri Pac. R. Co. *v.*

(f.) *Not Necessary.* — Where the quantity of material made and the place where the work was done are testified to, it will be assumed that the jurors had some knowledge of the value of labor and the time required to make the article; hence they may find the value of the services without other evidence.[12]

(g.) *Not Conclusive.* — Opinions, expert or otherwise, concerning the value of services are not conclusive.[13]

(h.) *Hypothetical Questions.* — A hypothetical question must not be rested on positive assertions of fact, not within the range of proper evidence, or upon conclusions.[14] It may include all the circumstances connected with the rendition of the services, these being stated to illustrate their character; and need not call for opinions as to the separate value of the different kinds of services.[15] It may be based on facts assumed to have been proved;[16] but should not be so framed as to authorize the witness to give weight to his personal knowledge of the facts.[17] Unless a question is put in hypothetical form testimony as to the value of services cannot be based on the testimony of other witnesses.[18]

(i.) *Cross-Examination.* — A witness may be asked concerning previous statements in relation to the value of the services testified of.[19] And as to the compensation received for work done by him and of which he has testified.[20] An admission testified to may be explained.[21]

(D.) Of Executors and Administrators. — It is competent to show the value of the estate,[22] and any circumstances affecting the nature and extent of the services rendered.[23] The inventory and appraisement are but *prima facie* evidence in favor of the administrator or executor in fixing his compensation.[24]

(E.) Of Receivers. — The compensation of receivers is fixed upon the basis of the business capacity, integrity and responsibility required in the performance of their duties.[25] Proof of the usages or rates of profit in any branch of commercial or other business, or

Palmer, 55 Neb. 559, 76 N. W. 169.

12. Craig *v.* Durrett, 1 J. J. Marsh. (Ky.) 365; Madden *v.* Porterfield, 53 N. C. (8 Jones L.) 166.

13. Ehlers *v.* Wannack, 118 Cal. 310, 50 Pac. 433; Brewer *v.* Cook, 11 La. Ann. 637; Bramble *v.* Hunt, 68 Hun 204, 22 N. Y. Supp. 842; Isear *v.* Burstein, 30 Abb. N. C. 71, 24 N. Y. Supp. 918.

14. Haish *v.* Payson, 107 Ill. 365.

15. Gall *v.* Gall, 27 App. Div. 173, 50 N. Y. Supp. 563.

16. Jackson *v.* New York Cent. R. Co., 2 Thomp. & C. (N. Y.) 653, *affirmed*, without opinion, 58 N. Y. 623.

17. Bramble *v.* Hunt, 68 Hun 204, 22 N. Y. Supp. 842.

18. Reynolds *v.* Robinson, 64 N. Y. 589; Scott *v.* Lilienthal, 9 Bosw. (N. Y. Super.) 224.

19. McKnight *v.* Detroit & M. R. Co., 135 Mich. 307, 97 N. W. 772.

20. Norton *v.* Griffin, 160 Mass. 236, 35 N. E. 462.

21. Loy *v.* Petty, 3 Ind. App. 241, 29 N. E. 788.

22. Carter *v.* Christie, 1 Kan. App. 604, 42 Pac. 256; Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701.

23. Kenan *v.* Graham, 135 Ala. 585, 33 So. 699.

24. *In re* Estate of Fernandez, 119 Cal. 579, 51 Pac. 851; Estate of Simmons, 43 Cal. 543; Horton *v.* Barto, 17 Wash. 675, 50 Pac. 587.

25. French *v.* Gifford, 31 Iowa

of the special qualifications and standing of the person who has been appointed, is not determinative of the issue; the evidence must be directed to the reasonable value of the services performed at the hands of a person of ordinary ability competent to render them.[26] Receivers of railroads are an exception to the foregoing rule, which applies in the main to receivers to take and hold property and convert it into money. The duties and responsibilities of a receiver who operates a railroad are peculiar, and the test is not what another competent person would have performed the service for, but, rather, fitness, experience, fidelity and time devoted to the work.[27]

13. Evidence of Value in Aid of Contracts. — A. GENERALLY. Testimony concerning the value of real property, chattels or services at or about the time a contract relating to either was consummated is competent to show what its terms probably were if there is no writing evidencing them and the parties are disagreed as to the price stipulated to be paid and received.[28]

428; Jones *v.* Keen, 115 Mass. 170; Special Bank Comrs. *v.* Franklin Inst., 11 R. I. 557.

26. Grant *v.* Bryant, 101 Mass. 567.

27. Cowdrey *v.* Railroad Co., 1 Woods 331, 6 Fed. Cas. No. 3,293; Farmers' Loan & T. Co. *v.* Central Railroad Co., 8 Fed. 60; McArthur *v.* Montclair R. Co., 27 N. J. Eq. 77.

28. *California.* — Ellis *v.* Woodburn, 89 Cal. 129, 26 Pac. 963; Whitton *v.* Sullivan, 96 Cal. 480, 31 Pac. 1115.

Georgia. — Stewart *v.* Berry, 84 Ga. 177, 10 S. E. 601.

Idaho. — Lewis *v.* Utah Const. Co., 10 Idaho 214, 77 Pac. 336 (cost of performing the work).

Illinois. — Harms *v.* Harms, 10 Ill. App. 543; Cooper *v.* Cooper, 29 Ill. App. 356; Freischel *v.* Weise, 34 Ill. App. 81; Kirk *v.* Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815.

Iowa. — Roberts *v.* Roberts, 91 Iowa 228, 59 N. W. 25; Johnson *v.* Harder, 45 Iowa 677 (if the discrepancy in the testimony is great).

Maine. — Fogg *v.* Hill, 21 Me. 529.

Massachusetts. — Bradbury *v.* Dwight, 3 Met. 31 (value of wood on a lot, parol evidence as to terms of lost contract being conflicting); Parker *v.* Coburn, 10 Allen 82.

Michigan. — Grabowsky *v.* Baumgart, 128 Mich. 267, 87 N. W. 891; Richardson *v.* McGoldrick, 43 Mich. 476, 5 N. W. 672; Sager *v.* Tupper, 38 Mich. 258 (as to the property included in a contract of sale).

Minnesota. — Kumler *v.* Ferguson, 7 Minn. 442.

New Hampshire. — Swain *v.* Cheney, 41 N. H. 232.

New York. — Kerr *v.* McGuire, 28 N. Y. 446; Barney *v.* Fuller, 133 N. Y. 605, 30 N. E. 1007; Sturgis *v.* Hendricks, 51 N. Y. 635; Kavanagh *v.* Wilson, 70 N. Y. 177; Cornell *v.* Markham, 19 Hun 275; Cornish *v.* Graff, 36 Hun 160; Knallakan *v.* Beck, 47 Hun 117.

Ohio. — Allison *v.* Horning, 22 Ohio St. 138.

South Carolina. — Tarrant *v.* Gittelson, 16 S. C. 231.

Vermont. — Houghton *v.* Clough, 30 Vt. 312; Kidder *v.* Smith, 34 Vt. 294; Green *v.* Dodge, 79 Vt. 73, 64 Atl. 499; Kimball *v.* Locke, 31 Vt. 683.

Washington. — Warwick *v.* Hitchings, 96 Pac. 960.

Wisconsin. — Valley Lumb. Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216.

Expert Testimony as to the value of one of several articles transferred by a written contract is competent to meet the contention that some of them were given the purchaser if it would show that the other articles were not worth anything like the price paid. McRae *v.* Lonsby, 130 Fed. 17, 64 C. C. A. 385.

Value of Such Evidence. — Where the difference in the alleged terms of the trade is not great, the value of the property would be a fact en-

Conditions Affecting Admissibility.— But such evidence is incompetent unless the conditions under which the usual price is paid corresponds with those under which the service in question was rendered,[29] and unless the disparity between the contentions of the parties as to the price is quite considerable, so great as to be beyond the range of a fair difference in judgment.[30]

B. Value of Land. — After land has been conveyed in satisfaction of a mortgage, evidence of its value is relevant upon the issue as to whether personal property claimed by the mortgagee formed part of the consideration for such satisfaction or whether it was sold to him.[31] Proof of the value of land exchanged for other land is competent as a circumstance to show that the owner of the former relied upon representations concerning the value of the latter.[32]

a. *Rental Value.* — Proof of the rental value of land is also material.[33] It may be shown what the premises in question had rented for in years immediately preceding the defendant's occupancy, and also what other similar tenements rented for in the vicinity at and about the same time. Leases of the premises in question in former years, one of the defendants being a party thereto, are competent as an admission, subject to evidence showing a decrease in rental value.[34]

b. *Depreciation.* — It is also competent to show that the property contracted for has depreciated in value since the transaction.[35]

C. Value of Use of Chattels. — Evidence of the market value of a chattel is irrelevant to show the sum stipulated to be paid for its use.[36]

D. Value of Services. — It is competent to show the reasonable

titled to only the slightest, if any, weight. Evidence of this kind should be admitted with great caution, and limited to its strictly legitimate province. Johnson *v.* Harder, 45 Iowa 677.

29. Kvammen *v.* Meridean M. Co., 58 Wis. 399, 17 N. W. 22.

30. Short *v.* Cure, 100 Mich. 418, 59 N. W. 173; Shakespeare *v.* Baughman, 113 Mich. 551, 71 N. W. 874; Kidder *v.* Smith, 34 Vt. 294 ("Where the disparity between the value of property and what is claimed to have been the contract price is small, and within the fair range of what different persons might esteem to be a fair value, such evidence would be very slight, perhaps too slight to be admissible, but when the difference is very great, and beyond the range of fair difference in judgment, it might be entitled to much weight, and under the difference, proportionably stronger would be the evidence furnished by it.") See Kimball *v.* Locke, 31 Vt. 683; Anderson *v.* Arpin Hardwood Lumb. Co., 131 Wis. 34, 110 N. W. 788; Bell *v.* Radford, 72 Wis. 402, 39 N. W. 482; Mygatt *v.* Tarbell, 85 Wis. 457, 467, 55 N. W. 1031.

31. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356; Paddleford *v.* Cook, 74 Iowa 433, 38 N. W. 137.

32. Hibbetts *v.* Threlkeld, 137 Iowa 164, 114 N. W. 1045.

33. Stewart *v.* Berry, 84 Ga. 177, 10 S. E. 601; Sennett *v.* Bucher, 3 Pen. & W. (Pa.) 392 (to aid in fixing terms of a parol lease).

34. Fogg *v.* Hill, 21 Me. 529.

35. Houghton *v.* Clough, 30 Vt. 312; Kidder *v.* Smith, 34 Vt. 294; Green *v.* Dodge, 79 Vt. 73, 64 Atl. 499.

36. Alling *v.* Cook, 49 Conn. 574.

value of services in order to ascertain whether the contract was for such value or for a specific sum.[37]

E. Not Admissible To Establish Contract. — But such evidence is not competent in aid of the establishment of a contract,[38] though it has been held that the probabilities may be affected by proof of the value of the property,[39] and as to what was in fact sold.[40]

F. Competency to Affect Testimony. — In order that proof of reasonable value may be made to discredit testimony concerning the price agreed upon before performance began, there must be a direct conflict concerning the contract price and the difference between the parties must be material, as heretofore stated.[41]

14. Of Time Lost Because of Injury. — A. Relevant Facts. — a. *Age, Health and Capacity.* — The age and previous health[42] and the capacity of an injured person for employment are relevant matters.[43]

b. *Value of Service.* — The plaintiff may testify to the reasonable worth of the service in which he was engaged when injured;[44]

37. Carruthers *v.* Towne, 86 Iowa 318, 53 N. W. 240; Barney *v.* Fuller, 133 N. Y. 605, 30 N. E. 1007.

The Amount Paid a Stranger to the Suit for like services as the plaintiff rendered may be shown for the purpose of aiding in fixing the contract price agreed upon by him and the defendant. Swain *v.* Cheney, 41 N. H. 232.

The Issue Being as to the Existence of a Contract To Pay a Contingent Fee, evidence as to what would be a reasonable fee is inadmissible; and so where the action is on an implied contract for the recovery of the reasonable worth of the services. Ellis *v.* Woodburn, 89 Cal. 129, 26 Pac. 963.

38. Hodges *v.* Richmond Mfg. Co., 10 R. I. 91.

39. Bedell *v.* Foss, 50 Vt. 94.

40. Staats *v.* Hausling, 22 Misc. 526, 50 N. Y. Supp. 222.

41. Shakespeare *v.* Baughman, 113 Mich. 551, 71 N. W. 874; Anderson *v.* Arpin Hardwood Lumb. Co., 131 Wis. 34, 110 N. W. 788.

42. Atchison, etc. R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60; Greer *v.* Louisville & N. R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; Mabrey *v.* Cape Girardeau & J. G. R. Co., 92 Mo. App. 596; Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

43. Helton *v.* Alabama M. R. Co., 97 Ala. 275, 12 So. 276; McCoy *v.* Milwaukee St. R. Co., 88 Wis. 56, 59 N. W. 453. See article "Injuries to Person," Vol. VII, p. 407.

44. *Alabama.* — Southern, etc. R. Co. *v.* McLendon, 63 Ala. 266.

Arkansas. — Arkansas M. R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550 (a farmer who has testified of the sum required to make him a living may state the value of his services as a farmer, though he had not employed any one to do farm work and did not know of any person who had).

Iowa. — Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505.

Minnesota. — Palmer *v.* Winona R. & L. Co., 78 Minn. 138, 80 N. W. 869, 83 Minn. 85, 85 N. W. 941; Loucks *v.* Chicago, etc. R. Co., 31 Minn. 526, 18 N. W. 651 (a farmer may testify to the value of his services rendered on his own farm).

Nebraska. — Howard *v.* McCabe, 112 N. W. 305 (value of services in mercantile business).

Pennsylvania. — Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

Texas. — International & G. N. R. Co. *v.* Locke (Tex. Civ. App.), 67 S. W. 1082; Texas & P. R. Co. *v.* Watts, 36 Tex. Civ. App. 29, 81 S. W. 326; Gulf, etc. R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614.

the value of his time since he was disabled,[45] and, after giving proper data, state the extent of his lessened capacity to earn money,[46] provided he was regularly employed at fixed compensation,[47] and the amount of his wages, if the employer is defendant.[48] Opinions as to what he might earn in vocations in which he had never engaged are inadmissible;[49] and so is a contract made between the plaintiff and his co-partners after the injury.[50] A husband cannot, in an action to recover for injuries sustained by his wife, testify to the value of her services to him,[51] nor can the plaintiff testify to the value of his time to his family.[52]

c. *Previous Income.* — Proof of the net income received by an injured person engaged in the practice of his profession on his own account during the year preceding the injury has been held proper, though it has been acknowledged as an extension of the general rule.[53] But in England proof of the net income for three years preceding the injury has been received notwithstanding much of it came from a few patients in the form of unusually large fees.[54]

d. *Professional Income While Disabled.* — After showing the preparation made for professional work and his earnings therein, the plaintiff may testify to the amount he could have earned while disabled. But expert testimony on that question is inadmissible.[55]

e. *Earnings.* — Proof may be made of the plaintiff's earnings at

45. Baxter *v.* Chicago, etc. R. Co., 87 Iowa 488, 54 N. W. 350; Gulf, etc. R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 594, 58 S. W. 614.

46. District of Columbia *v.* Woodbury, 136 U. S. 450; Central R. Co. *v.* Coggin, 73 Ga. 689.

47. Whipple *v.* Rich, 180 Mass. 477, 63 N. E. 5.

48. Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734.

49. Atlantic & W. P. R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776; Atchison, etc. R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

50. Mt. Adams, etc. R. Co. *v.* Isaacs, 18 Ohio C. C. 177.

51. Schuhle *v.* Cunningham, 14 Daly (N. Y.) 404.

52. City of Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

53. Lake Shore, etc. R. Co. *v.* Teeters (Ind. App.), 74 N. E. 1014, 1023; Cleveland, etc. R. Co. *v.* Gray, 148 Ind. 266, 278, 46 N. E. 675; Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260; Grant *v.* Brooklyn, 41 Barb. (N. Y.) 381.

Rule Not To Be Extended. — It has been said of the holding in Walker *v.* R. Co., 63 Barb. (N. Y.) 260: "This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended. Whether proof of the income derived by a lawyer from the past practice of his profession is competent for the purpose of authorizing the jury to draw an inference as to the extent of the loss sustained by inability to personally attend to business, may, I think, well be doubted. There is no such uniformity in the amount in different years, as a general rule, as to make such inference reliable." Masterton *v.* Mount Vernon, 58 N. Y. 391.

Evidence of the Value of the Property of the Plaintiff as returned for taxation is not competent to rebut his testimony as to the value of his annual accumulation from his practice. International & G. N. R. Co. *v.* Goswick (Tex. Civ. App.), 83 S. W. 423; Railway *v.* Kell (Tex. App.), 16 S. W. 936.

54. Phillips *v.* London, etc. R. Co., 5 Q. B. Div. 78, 42 L. T. Rep. 6, 41 L. T. 121, 28 W. R. 10.

55. Nelson *v.* Boston & M. R. Co., 155 Mass. 356, 29 N. E. 586.

the time of and immediately preceding his injury.[56] His average monthly earnings may be shown,[57] and his income before and after the injury.[58] The defendant may not show what the plaintiff could have earned if he had been employed elsewhere.[59] The inquiry must not extend beyond a reasonable time, though as to how far that may be the cases are not agreed.[60] There is likewise disagreement as to the competency of evidence showing the earnings of persons in the same locality and of like situation with the plaintiff.[61]

56. *Alabama.* — Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6.

Connecticut. — Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670.

Kansas. — Atchison, etc. R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

Michigan. — Joslin *v.* Grand Rapids Ice & C. Co., 53 Mich. 322, 19 N. W. 17 (professional standing and extent of practice).

Montana. — Bourke *v.* Butte Elec. & P. Co., 33 Mont. 267, 287, 83 Pac. 470 (one year before).

Nebraska. — Lincoln *v.* Beckman, 23 Neb. 677, 37 N. W. 593.

New York. — Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; Nash *v.* Sharpe, 19 Hun 365 (professional earnings); Ehrgott *v.* Mayor, 96 N. Y. 264, 48 Am. Rep. 622 (book canvasser).

North Carolina. — Wilkie *v.* Raleigh, etc. R. Co., 127 N. C. 203, 37 S. E. 204.

Pennsylvania. — Simpson *v.* Pennsylvania R. Co., 210 Pa. St. 101, 59 Atl. 693 (the money value of the work done by a person before he was injured is competent proof of the value of his time); Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705; McKenna *v.* Citizens' Nat. Gas Co., 201 Pa. St. 146, 50 Atl. 922; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396 (annual sales of peddler).

Virginia. — Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713 (testimony as to earnings some years before is proper when connected with testimony that plaintiff was earning more than that when injured, though the precise sum could not be stated).

Slight Evidence is sufficient in case of very young persons. Baker *v.* Irish, 172 Pa. St. 528, 33 Atl. 558.

It Is Presumed that jurors are usually familiar with the value of the services of ordinary laborers. Loe *v.* Chicago, etc. R. Co., 57 Mo. App. 350; Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601 (services of a nurse); Feinstein *v.* Jacobs, 15 Misc. 474, 37 N. Y. Supp. 345 (peddler's earnings).

57. Murdock *v.* New York, etc. Exp. Co., 167 Mass. 549, 46 N. E. 57; Paul *v.* Omaha & St. L. R. Co., 82 Mo. App. 500; Symons *v.* Metropolitan St. R. Co., 27 Misc. 502, 58 N. Y. Supp. 327.

58. Louisville & N. R. Co. *v.* Woods, 115 Ala. 527, 22 So. 33; Roche *v.* Redington, 125 Cal. 174, 57 Pac. 890; Chicago & E. R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290, 59 Ill. App. 69; Louisville, etc. R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9.

59. Omaha, etc. R. Co. *v.* Ryburn, 40 Neb. 87, 58 N. W. 541.

60. *Georgia.* — Central of Georgia R. Co. *v.* Perkerson, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210.

Illinois. — Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376, 62 N. E. 822.

Michigan. — Sias *v.* Reed City, 103 Mich. 312, 61 N. W. 502.

Missouri. — Hamman *v.* Central Coal & C. Co., 156 Mo. 232, 56 S. W. 1091; Griveaud *v.* St. Louis, etc. R. Co., 33 Mo. App. 458; Grant *v.* Brooklyn, 41 Barb. 381; Nash *v.* Sharpe, 19 Hun 365.

Texas. — Houston, etc. R. Co. *v.* Gee, 27 Tex. Civ. App. 414, 66 S. W. 78.

61. Simonson *v.* Chicago, etc. R. Co., 49 Iowa 87 (*holding* such evidence inadmissible); Ft. Worth, etc. R. Co. *v.* Measles, 81 Tex. 474, 17 S. W. 124 (*holding* that the av-

Payment of wages during the period of disability may be shown to overcome the proof of value of time lost.[62]

f. *Business Profits.* — It is not competent to prove the profits of a business in which the plaintiff was engaged if they were uncertain,[63] at least if he was not engaged therein at the time of the injury,[64] though it is recognized that such evidence may tend to show the plaintiff's business ability.[65] Many cases limit the doctrine to the profits derived from capital, and hold it competent to show the profits obtained from the management of a business which requires and receives the personal attention and labor of the owner.[66]

g. *Employment.* — It is relevant for the plaintiff to show the employment or business he was engaged in, its extent and the particular part of it to which his attention was devoted.[67]

erage earnings of such persons as the plaintiff might be shown); St. Louis, etc. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

62. City of Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499; Rogan *v.* Montana Cent. R. Co., 20 Mont. 503, 52 Pac. 206; Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Minick *v.* Troy, 19 Hun (N. Y.) 253.

63. Ballou *v.* Farnum, 11 Allen (Mass.) 73; Silsby *v.* Michigan Car Co., 95 Mich. 204, 54 N. W. 761; Masterton *v.* Mount Vernon, 58 N. Y. 391; Johnson *v.* Manhattan R. Co., 4 N. Y. Supp. 848; Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

64. Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484; Chicago, etc. R. Co. *v.* Warner, 108 Ill. 538.

65. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705; Wallace *v.* Pennsylvania R. Co., 195 Pa. St. 127, 45 Atl. 685, 52 L. R. A. 33.

66. *United States.* — Wade *v.* Leroy, 20 How. 34.

Alabama. — Alabama, etc. R. Co. *v.* Yarbrough, 83 Ala. 238, 3 So. 447.

California. — Storrs *v.* Los Angeles Tract. Co., 134 Cal. 91, 66 Pac. 72.

Indiana. — Elkhart *v.* Ritter, 66 Ind. 136.

Kansas. — Chicago, etc. R. Co. *v.* Scheinkoenig, 62 Kan. 57, 61 Pac. 414.

New Jersey. — New Jersey Exp. Co. *v.* Nichols, 33 N. J. L. 434.

New York. — Grant *v.* Brooklyn, 41 Barb. 381; Lincoln *v.* Saratoga & S. R. Co., 23 Wend. 425; Pill *v.* Brooklyn Heights R. Co., 6 Misc. 267, 27 N. Y. Supp. 230.

North Carolina. — Wallace *v.* Western North Carolina R. Co., 104 N. C. 442, 10 S. E. 552.

Pennsylvania. — Wallace *v.* Pennsylvania R. Co., 195 Pa. St. 127, 45 Atl. 685, 52 L. R. A. 33 (*overruling* Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705); Simpson *v.* Pennsylvania R. Co., 210 Pa. St. 101, 59 Atl. 693.

Texas. — Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505.

Wisconsin. — Heer *v.* Warren-Scharf Asphalt Pav. Co., 118 Wis. 57, 94 N. W. 789.

67. *United States.* — District of Columbia *v.* Woodbury, 136 U. S. 450; Nebraska City *v.* Campbell, 2 Black 590; Lombard *v.* Chicago, 4 Biss. 460, 15 Fed. Cas. No. 8,470; Parshall *v.* Minneapolis, etc. R. Co., 35 Fed. 649.

Indiana. — Elkhart *v.* Ritter, 66 Ind. 136.

Iowa. — Brown *v.* Chicago, etc. R. Co., 64 Iowa 652, 21 N. W. 193.

Kansas. — Atchison, etc. R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

Massachusetts. — Ballou *v.* Farnum, 11 Allen 73.

Missouri. — Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731.

Nebraska. — Roose *v.* Perkins, 9

h. *Earning Capacity.* — **(1.) Where Plaintiff Employed.** — The earning capacity of an injured person is not measured by what he was receiving when the injury was sustained. He may show that he has a trade and can earn more than was then being paid him.[68] But the fact that he accepted employment at the agreed price is significant as to his judgment that it was fair.[69]

(2.) Where Plaintiff Unemployed. — The earning capacity of a person not employed at wages for the future and not shown to have peculiar skill or knowledge of a definite financial value may be shown by evidence of his age, the business or employments in which he had been engaged, his health and the nature of his injuries. Proof of these facts must be connected with the knowledge and experience of the jurors.[70] Evidence of earnings in an employment

Neb. 304, 2 N. W. 715, 31 Am. Rep. 409.

New Jersey. — New Jersey Exp. Co. *v.* Nichols, 33 N. J. L. 434; *s. c.*, 32 N. J. L. 166; Schwartz *v.* North Jersey St. R. Co. (N. J. L.), 49 Atl. 676.

New York. — Masterton *v.* Mount Vernon, 58 N. Y. 391; Clifford *v.* Dam, 12 Jones & S. (N. Y. Super.) 391.

North Carolina. — Burton *v.* Wilmington & W. R. Co., 82 N. C. 504.

Pennsylvania. — McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574; Pennsylvania R. Co. *v.* Dale, 76 Pa. St. 47.

Texas. — Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505; Galveston, etc. R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990; International & G. N. R. Co. *v.* Locke (Tex. Civ. App.), 67 S. W. 1082; Texas & P. R. Co. *v.* Watts, 36 Tex. Civ. App. 29, 81 S. W. 326.

Wisconsin. — Luck *v.* Ripon, 52 Wis. 196, 8 N. W. 815 (under an allegation that plaintiff was rendered unable to pursue his lawful business, evidence of his particular business is competent).

Effect of Evidence. — In the case of a man working on a farm with his father, sufficient proof of the value of time lost by an accidental injury is made when it is shown, in addition that he was previously in good health and the time during which he was disabled. Mabrey *v.* Cape Girardeau & J. Gravel Road Co., 92 Mo. App. 596.

68. *Indiana.* — Linton C. & M. Co. *v.* Persons, 15 Ind. App. 69, 43 N. E. 651.

Iowa. — Grimmelman *v.* Union Pac. R. Co., 101 Iowa 74, 70 N. W. 90; Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520.

South Carolina. — Montgomery *v.* Seaboard Air Line R. Co., 73 S. C. 503, 53 S. E. 987 (may show an offer of employment at larger compensation than was received when injured).

Tennessee. — Louisville, etc. R. Co. *v.* Howard, 90 Tenn. 144, 19 S. W. 116.

Texas. — Chicago, etc. R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882; Missouri, etc. R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666.

Washington. — Peterson *v.* Seattle Tract. Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

Wisconsin. — McCoy *v.* Milwaukee St. R. Co., 88 Wis. 56, 59 N. W. 453.

69. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 16, 35 Atl. 191, 55 Am. St. Rep. 705.

70. Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484; Chicago, etc. R. Co. *v.* Warner, 108 Ill. 538.

In the Case of Infants who have never been employed, the value of their time after they shall attain majority is largely left to the jurors in connection with the proven facts. See Netherland American Steam Nav. Co. *v.* Hollander, 59 Fed. 417,

long since abandoned is inadmissible.[71] The market value of the services rendered by a person on his own account may be shown if they have such value.[72]

i. *Prospect of Promotion.* — The salary which might have been earned by the plaintiff in the railway mail service after his promotion under the rules governing the civil service may be shown, he having passed the principal examination.[73] But, such rules aside, evidence as to probable promotion and increased earnings is inadmissible,[74] as is proof of the loss of an office as the result of an assault and battery.[75] Evidence as to the earnings which might have been made in a calling for which the plaintiff was preparing himself is also objectionable.[76] It is otherwise as to showing the right to increased earnings under a conditional contract in force when the injury was sustained.[77]

j. *Prospective Attainments.* — The prospective musical talent of a child of four years may be shown in connection with a permanent injury to some of her fingers.[78]

k. *Industrial Character.* — It is relevant where permanent injuries have been sustained to show that the plaintiff was industrious, obedient, economical and of good habits.[79] And it is open to the defendant to show the facts.[80]

8 C. C. A. 169; Rosenkrantz *v.* Lindell R. Co., 108 Mo. 9, 18 S. W. 890, 32 Am. St. Rep. 588.

71. West Chicago St. R. Co. *v.* Maday, 188 Ill. 308, 58 N. E. 933.

72. Harmon *v.* Old Colony R. Co., 168 Mass. 377, 47 N. E. 100, 30 L. R. A. 658; Matteson *v.* New York Cent. R. Co., 35 N. Y. 487, 91 Am. Dec. 67.

73. Williams *v.* Spokane Falls & N. R. Co., 42 Wash. 597, 84 Pac. 1129.

74. Richmond & D. R. Co. *v.* Elliott, 149 U. S. 266; Colorado Coal & I. Co. *v.* Lamb, 8 Colo. App. 255, 40 Pac. 251; Richmond & D. R. Co. *v.* Allison, 86 Ga. 145, 12 S. E. 352; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550; Brown *v.* Chicago, etc. R. Co., 64 Iowa 652, 21 N. W. 193.

75. Brown *v.* Cummings, 7 Allen (Mass.) 507.

76. Bonnet *v.* Galveston, etc. R. Co., 89 Tex. 72, 33 S. W. 334.

77. Bryant *v.* Omaha, etc. R. & B. Co., 98 Iowa 483, 67 N. W. 392.

78. Gulf, etc. R. Co. *v.* Sauter (Tex. Civ. App.), 103 S. W. 201.

79. *United States.* — Collins *v.* Davidson, 19 Fed. 83; Hall *v.* Galveston, etc. R. Co., 39 Fed. 18; Metropolitan St. R. Co. *v.* Kennedy, 82 Fed. 158, 27 C. C. A. 136.

Alabama. — Richmond & D. R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577; James *v.* Richmond & D. R. Co., 92 Ala. 231, 9 So. 335.

Iowa. — Wheelan *v.* Chicago, etc. R. Co., 85 Iowa 167, 52 N. W. 119.

Minnesota. — Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575.

Nebraska. — Roose *v.* Perkins, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409.

Ohio. — Cleveland & P. R. Co. *v.* Sutherland, 19 Ohio St. 151.

Pennsylvania. — Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705; McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574.

Texas. — Cameron Mill & E. Co. *v.* Anderson, 98 Tex. 156, 81 S. W. 282, 34 Tex. Civ. App. 229, 78 S. W. 971, *disapproving* Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339; Houston & T. R. Co. *v.* Cowser, 57 Tex. 293, 304; Texas Midland R. Co. *v.* Douglas, 73 Tex. 325, 11 S. W. 333.

80. Jacques *v.* Bridgeport Horse R. Co., 41 Conn. 61, 19 Am. Rep. 483. In this case it was held competent to show that the plaintiff's medical

B. Expert Opinions. — The earning power of an injured person cannot be shown by expert testimony.[81]

C. Mortality Tables. — If the evidence shows or tends to show that the injuries are permanent, mortality tables are competent to show the plaintiff's life expectancy,[82] though the disability is only partial.[83] It is otherwise if there is no such evidence.[84] In Pennsylvania such tables are not admissible.[85]

15. Of Life. — A. General Statement. — The pecuniary value of a life is to be shown by proof of the gross amount of the prospective income or earnings of the deceased, less what he would expend as a producer to render the service or to acquire the money that he might be expected to produce, such expenses to be computed according to the evidence showing his station in life, his means and personal habits, and proof of the present value of the net result so obtained.[86] Where liability is measured by the injury suffered by decedent's estate, proof of the expense of living for the probable duration of his life has been considered immaterial in Kentucky,[87] though later cases indicate dissatisfaction with this view.[88]

practice was *reputed* to be unlawful and his professional reputation bad. *Compare* Baldwin *v.* Western R. Co., 4 Gray (Mass.) 333.

81. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

82. Hyland *v.* Southern Bell Tel. & T. Co., 70 S. C. 315, 49 S. E. 879; Galveston, etc. R. Co. *v.* Hubbard (Tex. Civ. App.), 70 S. W. 112; Missouri, etc. R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666; International & G. N. R. Co. *v.* Tisdale, 36 Tex. Civ. App. 174, 81 S. W. 347 (the fact that such tables are based on experience in ordinary avocations does not render them inadmissible in a case where the plaintiff's injury was sustained in an extra hazardous avocation).

A Witness Familiar With Mortality Tables may testify of the life expectancy of a person permanently injured. Consumers Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Texas & N. O. R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073.

83. Gulf, etc. R. Co. *v.* Mangham, 95 Tex. 413, 67 S. W. 765, *overruling* Texas M. R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77.

84. Foster *v.* Bellaire, 127 Mich. 13, 86 N. W. 383; Tenney *v.* Rapid City, 17 S. D. 283, 96 N. W. 96.

85. Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069.

86. *California.* —Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019.

Georgia. —Central R. *v.* Rouse, 77 Ga. 393, 3 S. E. 307.

Indiana. —Ohio & M. R. Co. *v.* Voight, 122 Ind. 288, 23 N. E. 774.

North Carolina. — Benton *v.* North Carolina R. Co., 122 N. C. 1007, 30 S. E. 33; Kesler *v.* Smith, 66 N. C. 154; Burton *v.* Wilmington & W. R. Co., 82 N. C. 504.

Pennsylvania. — Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; Mansfield Coal & C. Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291.

Rhode Island. — McCabe *v.* Narragansett Elec. L. Co., 26 R. I. 427, 59 Atl. 112; Reynolds *v.* Narragansett Elec. L. Co., 26 R. I. 457, 59 Atl. 393.

Religious Affiliations. — The church affiliations and habits of speech of decedent are immaterial. Lipscomb *v.* Houston & T. C. R. Co., 95 Tex. 5, 21, 64 S. W. 923.

87. Louisville & N. R. Co. *v.* Morris, 14 Ky. L. Rep. 466, 20 S. W. 539.

88. See Chesapeake & O. R. Co. *v.* Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Louis-

But in other states evidence of such expense has been received.[89]

B. Probable Earnings. — a. *Generally.* — Such value to the decedent's next of kin may be shown by evidence of his occupation, age, health, habits of industry, sobriety and economy, skill and capacity for business, the amount of his property, his annual or other earnings, and the probable duration of his life and that of the beneficiary. These facts are relevant regardless of whether the action is by a husband or wife, or child or more remote relatives, or whether the statute provides that the recovery shall be such amount as will equal the damage to the estate of the decedent.[90]

ville & N. R. Co. *v.* Kelly, 100 Ky. 421, 88 S. W. 852, 40 S. W. 452.

89. Wheelan *v.* Chicago, etc. R. Co., 85 Iowa 167, 52 N. W. 119; Lowe *v.* Chicago, etc. R. Co., 89 Iowa 420, 56 N. W. 519; Carlson *v.* Oregon Short Line, etc. Co., 21 Or. 450, 28 Pac. 497.

90. *United States.* — Holmes *v.* Oregon, etc. R. Co., 6 Sawy. 262; Au *v.* New York, etc. R. Co., 29 Fed. 72; Louisville, etc. R. Co. *v.* Clarke, 152 U. S. 230; Hunt *v.* Kile, 98 Fed. 49, 38 C. C. A. 641.

Alabama. — Louisville & N. R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586 (experience of decedent in his occupation); Louisville & N. R. Co. *v.* York, 128 Ala. 305, 30 So. 676 (frugality).

Arkansas. — Railway Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

California. — Munro *v.* Pacific Coast Dredging & R. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Taylor *v.* Western Pac. R. Co., 45 Cal. 323.

Colorado. — Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94; Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721.

Connecticut. — Broughel *v.* Southern New England Tel. Co., 73 Conn. 614, 48 Atl. 751.

Georgia. — Central R. Co. *v.* Thompson, 76 Ga. 770.

Illinois. — Betting *v.* Hobbett, 142 Ill. 72, 30 N. E. 1048; Chicago, etc. R. Co. *v.* Moranda, 93 Ill. 302, 320, 34 Am. Rep. 168; Chicago *v.* Scholten, 75 Ill. 468; Rockford, etc. R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Stafford *v.* Rubens, 115 Ill. 196, 3 N. E. 568.

Indiana. — Pittsburgh, etc. R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120 (skilfulness in employment); Ohio & M. R. Co. *v.* Voight, 122 Ind. 288, 23 N. E. 774; Wright *v.* Crawfordsville, 142 Ind. 636, 42 N. E. 227 (specific instances of intoxication).

Iowa. — Wheelan *v.* Chicago, etc. R. Co., 85 Iowa 167, 52 N. W. 119; Spaulding *v.* Chicago, etc. R. Co., 98 Iowa 205, 219, 62 N. W. 227.

Kansas. — Coffeyville Min. & G. Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635.

Kentucky. — Louisville & N. R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229.

Maine. — Oakes *v.* Maine Cent. R. Co., 95 Me. 103, 49 Atl. 418.

Maryland. — State *v.* Cecil County, 54 Md. 426.

Michigan. — Snyder *v.* Lake Shore, etc. R. Co., 131 Mich. 418, 91 N. W. 643.

Minnesota. — Shaber *v.* St. Paul, etc. R. Co., 28 Minn. 103, 9 N. W. 575; Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575; Robel *v.* Chicago, etc. R. Co., 35 Minn. 84, 27 N. W. 305.

Mississippi. — City of Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

Missouri. — Schaub *v.* Hannibal, etc. R. Co., 106 Mo. 74, 16 S. W. 924; McGowan *v.* St. Louis Ore & S. Co., 109 Mo. 518, 533, 19 S. W. 199.

Nebraska. — Roose *v.* Perkins, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409; Anderson *v.* Chicago, etc. R. Co., 35 Neb. 95, 52 N. W. 840.

New Jersey. — Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York. — McIntyre *v.* New York Cent. R. Co., 37 N. Y. 287 (usual earnings); Tilley *v.* Hudson River R. Co., 29 N. Y. 252, 289, 24 N. Y. 471 (capacity); Etherington

b. *Proof of Earnings.* — The evidence of decedent's earnings may be as of a particular period,[91] and need not be restricted to the time immediately preceding death.[92] But earnings cannot be shown by proof of the profits of a partnership of which deceased was a mem-

v. Prospect Park, etc. R. Co., 88 N. Y. 641 (age, health, intelligence and sex of decedent); Lockwood *v.* New York, etc. R. Co., 98 N. Y. 523; Houghkirk *v.* Delaware, etc. Canal Co., 92 N. Y. 219, 44 Am. Rep. 370.

North Carolina. — Benton *v.* North Carolina R. Co., 122 N. C. 1007, 30 S. E. 333 (general statement); Burton *v.* Wilmington & W. R. Co., 82 N. C. 504 (employment, business qualifications and usual remuneration in the business in which decedent was engaged); Kesler *v.* Smith, 66 N. C. 154.

Ohio. — Hesse *v.* Columbus, etc. R. Co., 58 Ohio St. 167, 50 N. E. 354 (habits, health, position, earning capacity and other like circumstances); Russell *v.* Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523.

Oregon. — Carlson *v.* Oregon Short Line R. Co., 21 Or. 450, 28 Pac. 497.

Pennsylvania. — Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; Mansfield Coal & C. Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574 (age, ability, disposition to labor, habits).

Rhode Island. — Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634.

Tennessee. — Nashville, etc. R. Co. *v.* Prince, 2 Heisk. 580; Louisville, etc. R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840.

Texas. — Houston & T. R. Co. *v.* Cowser, 57 Tex. 293, 304 (general statement, substantially as in the text); Standlee *v.* St. Louis & S. W. R. Co., 25 Tex. Civ. App. 340, 60 S. W. 781; Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857.

Utah. — English *v.* Southern Pac. Co., 13 Utah 407, 422, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

Virginia. — Baltimore & O. R. Co. *v.* Noell, 32 Gratt. 394; Pocahontas Collieries Co. *v.* Rukas' Admr., 104 Va. 278, 51 S. E. 449; Portsmouth St. R. Co. *v.* Peed's Admr., 102 Va. 662, 47 S. E. 850 (general statement, similar to the text); Baltimore, etc. R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384.

Washington. — Archibald *v.* Lincoln County, 96 Pac. 831.

Wisconsin. — Johnson *v.* Chicago, etc. R. Co., 64 Wis. 425, 25 N. W. 223; Schadewald *v.* Milwaukee, etc. R. Co., 55 Wis. 569, 13 N. W. 458.

Earning Capacity must be regarded in connection with increasing age and the contingencies attendant upon continuous employment. Central of Georgia R. Co. *v.* Ray, 129 Ga. 349, 58 S. E. 844.

Gross Earnings include moneys expended for a brother and laid aside for investment. Louisville & N. R. Co. *v.* Morgan, 114 Ala. 449, 22 So. 20.

Accumulations the deceased would probably have made are not to be shown by the income he would probably have derived from property, investments or the employment of capital. McAdory *v.* Louisville & N. R. Co., 94 Ala. 272, 10 So. 507. Nor by the proceeds of a policy on his life. Nevers Lumb. Co. *v.* Fields, 151 Ala. 367, 44 So. 81.

Proof of Pecuniary Value of decedent's services is not always required if the other controlling facts are shown. See Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343, and *compare* McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574. In Kentucky, earning power is the pivotal question. Louisville & N. R. Co. *v.* Berry, 96 Ky. 604, 29 S. W. 449.

91. Louisville, etc. R. Co. *v.* Clarke, 152 U. S. 230, 242.

92. Christian *v.* Columbus & R. R. Co., 90 Ga. 124, 15 S. E. 701; Central of Georgia R. Co. *v.* Perkerson, 112 Ga. 923, 38 S. E. 365; Grimmelman *v.* Union Pac. R. Co., 101 Iowa 74, 70 N. W. 90; McIntyre *v.* New York Cent. R. Co., 37

ber and to which he had contributed capital.[93] In the absence of other testimony as to earning power, the capacity of decedent to manage affairs may be shown.[94] It has been held competent to show that he supplied money to his relatives and had taken life insurance.[95]

(1.) Inventory of Estate. — Neither the inventory of a decedent's estate nor the annual account of its administrator is competent to show his capacity to earn and accumulate money.[96]

(2.) Change of Circumstances. — It is not competent to show what the opportunities of decedent to acquire wealth by reason of a change in his circumstances would have been.[97] But consideration has been given the additional experience and skill decedent would have acquired and the resulting remuneration.[98]

(3.) Opportunity for Promotion. — It cannot usually be shown that decedent was in the line of promotion when the injury resulting in death was sustained;[99] but in New York the prospect of advancement and increased salary open to the member of a fire department is relevant, though proof of the specific salaries attached to the higher positions may not be made.[1]

c. *Health.* — The health of the next of kin of decedent or of any of them may be proved.[2]

C. PARENT'S ACTION. — a. *Pecuniary Circumstances.* — In an action by parents to recover for the death of a child, testimony as to

N. Y. 287; Tilley *v.* Hudson River R. Co., 29 N. Y. 252, 285, 24 N. Y. 471; Baltimore & O. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; Baltimore & O. R. Co. *v.* Noell, 32 Gratt. (Va.) 394.

93. Read *v.* Brooklyn Heights R. Co., 32 App. Div. 503, 53 N. Y. Supp. 209; McCracken *v.* Traction Co., 201 Pa. St. 384, 50 Atl. 832.

A Broader Scope Is Given the Testimony in some cases. This, in Grand Trunk Western R. Co. *v.* Reddick (C. C. A.), 160 Fed. 898, testimony to the health and character of the deceased back to his young manhood was received as was proof of his earnings as a member of a partnership fifteen years prior to his death.

94. McLamb *v.* Wilmington & W. R. Co., 122 N. C. 862, 29 S. E. 894; Skottowe *v.* Oregon Short Line R. Co., 22 Or. 430, 451, 30 Pac. 222, 16 L. R. A. 593.

The Minimum Value of a Farmer's Crops cannot be shown. Railway Co. *v.* Howard, 90 Tenn. 144, 19 S. W. 116.

95. Omaha Water Co. *v.* Schamel, 147 Fed. 502, 78 C. C. A. 68; Spaulding *v.* Chicago, etc. R. Co., 98 Iowa 205, 67 N. W. 227.

96. Cooper *v.* Railroad, 140 N. C. 209, 222, 52 S. E. 932.

97. Mansfield Coal & C. Co. *v.* McEnery, 91 Pa. St. 185.

98. St. Louis, etc. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; International & G. N. R. Co. *v.* Ormond, 64 Tex. 485.

99. Brown *v.* Chicago, etc. R. Co., 64 Iowa 652, 21 N. W. 193; Hesse *v.* Columbus, etc. R. Co., 58 Ohio St. 167, 50 N. E. 354.

1. Geary *v.* Metropolitan St. R. Co., 73 App. Div. 441, 77 N. Y. Supp. 54. See Douglass *v.* Northern Cent. R. Co., 59 App. Div. 470, 69 N. Y. Supp. 370.

2. De Witt *v.* Floriston Pulp & P. Co. (Cal. App.), 96 Pac. 397 (the fact that plaintiff has not been ill since childhood); Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50; Coffeyville Min. & G. Co. *v.* Carter, 65 Kan. 565, 70 Pac. 635; Cincinnati St. R. Co. *v.* Altemeier, 60 Ohio St. 10, 53 N. E. 300; McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298

their pecuniary circumstances is competent.[3] Such evidence is received though deceased was very young. It is admissible only because it tends to establish a moral obligation to demand in the future assistance from one incapable of giving it at the time in question.[4]

b. *Plaintiff's Situation.* — The situation and standing of the plaintiff may be shown.[5]

c. *Value of Child's Services.* — It is presumed that pecuniary loss follows the death of a minor child who was able to render service to his parents, their right thereto existing.[6] Evidence of the value of the services of a deceased minor is competent,[7] including, under some statutes, the worth of his society and comfort to his parents.[8]

(1.) How Shown. — Fathers who have reared children to manhood may testify to the net pecuniary value to a parent of a boy from the age of five years until he should have attained his majority,[9] as may persons acquainted with the deceased.[10] There are, however, cases which regard opinions as to the future value of decedent's services as valueless because of the remoteness of the contingencies involved.[11]

(2.) Cost of Maintenance. — The measure of recovery is the net value of the services of decedent; hence the expense of maintenance and education is relevant.[12]

(3.) Child's Disposition. — It has been said that it is entering upon the field of vague speculation to show the chances of a child's survivorship, ability and willingness after attaining majority to support

(the poor health of some of them though the others may be benefited).

3. Barley *v.* Chicago, etc. R. Co., 4 Biss. 430, 2 Fed. Cas. No. 997; Chicago *v.* Powers, 42 Ill. 169; Cooper *v.* Lake Shore, etc. R. Co., 66 Mich. 261, 33 N. W. 306; Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575; Cincinnati St. R. Co. *v.* Altemeier, 60 Ohio St. 10, 53 N. E. 300; Ewen *v.* Chicago, etc. R. Co., 38 Wis. 613; Hoppe *v.* Chicago, etc. R. Co., 61 Wis. 357, 369, 21 N. W. 227.

4. Chicago, etc. R. Co. *v.* Bayfield, 37 Mich. 205, 215.

5. Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634.

6. Graham *v.* Consol. Tract. Co., 62 N. J. L. 90, 40 Atl. 773.

Judicial Notice has been taken of the inability of a child under three years to render service. Atlanta Consol. St. R. Co. *v.* Arnold, 100 Ga. 566, 28 S. E. 224; Southern R. Co. *v.* Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253.

It Is a Question of Fact whether a child of four and a half years is capable of rendering valuable service. Crawford *v.* Southern R. Co., 106 Ga. 870, 33 S. E. 826. See "The Oceanic," 61 Fed. 338.

7. Lehigh Iron Co. *v.* Rupp, 100 Pa. St. 95.

8. Corbett *v.* Oregon Short Line R. Co., 25 Utah 449, 71 Pac. 1065.

9. Rajnowski *v.* Detroit, etc. R. Co., 74 Mich. 20, 41 N. W. 847.

10. Miller *v.* Meade Twp., 128 Mich. 98, 87 N. W. 131.

The Father of a Deceased Child cannot state his opinion of the value of the services the child would have rendered to him and his family had she lived. Cincinnati Tract. Co. *v.* Stephens, 75 Ohio St. 171, 79 N. E. 235.

Juror's Knowledge. — The value of the services a young child might have rendered must, in the absence of any opinions, be arrived at from the facts shown and the knowledge and experience of the juniors. Chicago *v.* Major, 18 Ill. 349, 360.

11. Atlantic & W. P. R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776.

12. Ihl *v.* Forty-Second St. R.

others.[13] But under some statutes proof may be made of the reasonable expectation of pecuniary benefit to the next of kin of a deceased infant.[14]

D. Wife's Action. — In estimating the pecuniary value of a husband's life to his wife, evidence may be received to show whether or not he was a good husband, able and willing to provide well for her. The loss of society or anguish resulting from the death can be shown for no other purpose than to prove pecuniary injury.[15]

E. Husband's Action. — The value of the household service performed by the deceased wife may be shown, as also the loss to the children of her care and training.[16]

F. Child's Action. — a. *Loss of Nurture.* — Evidence of the loss of a parent's bodily care, intellectual culture or moral training is competent.[17] Such evidence need not be limited to the minority

Co., 47 N. Y. 317, 7 Am. Rep. 450; Atrops *v.* Costello, 8 Wash. 149, 35 Pac. 620.

13. State *v.* Baltimore & O. R. Co., 24 Md. 84; Cooper *v.* Lake Shore, etc. R. Co., 66 Mich. 261, 33 N. W. 306; Lehigh Iron Co. *v.* Rupp, 100 Pa. St. 95; Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634.

14. Grotenkemper *v.* Harris, 25 Ohio St. 510. The statute authorized such award of damages as the jury shall deem fair and just with reference to the pecuniary injury resulting from the death.

Evidence Admissible. — The proof that the next of kin would have received financial aid from the deceased had he lived, and the approximate amount thereof may be made by showing that he had supplied aid, support or financial assistance and would likely have continued to do so had he lived; the relation of the parties may also be shown and the disposition and good will of the deceased to the beneficiary as likely to result in gifts or inheritances, and to that end his age, health and ability to make and save money may be shown. The financial circumstances and health of the next of kin may be testified to. Cincinnati St. R. Co. *v.* Altemeier, 60 Ohio St. 10, 53 N. E. 300.

Pecuniary Assistance rendered to a parent some years before the child's death may be shown. Hetherington *v.* Northeastern R. Co., 51 L. J., Q. B. 495, 9 Q. B. Div. (Eng.) 160, 30 W. R. 797.

Prospective Marriage. — The fact that an unmarried youth was paying attentions to a young lady just prior to his death is too remote to have a bearing on the value of his life to his parents. Fritz *v.* Western Union Tel. Co., 25 Utah 263, 278, 71 Pac. 209.

15. Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20, as limited by Morgan *v.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, which also limits Cleary *v.* City R. Co., 76 Cal. 240, 18 Pac. 269; Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019.

16. St. Lawrence, etc. R. Co. *v.* Lett, 11 Can. Sup. 422, 26 Am. & Eng. R. R. Cas. 454; Redfield *v.* Oakland Consol. St. R. Co., 112 Cal. 220, 43 Pac. 1117; Board of Comrs. *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390; Nelson *v.* Lake Shore, etc. R. Co., 104 Mich. 582, 62 N. W. 993; May *v.* West Jersey, etc. R. Co., 62 N. J. L. 63, 42 Atl. 163; Meyer *v.* Hart, 23 App. Div. 131, 48 N. Y. Supp. 904; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329.

Proof Need Not Show Value as if wife had been a horse or other animal. Delaware, etc. R. Co. *v.* Jones, 128 Pa. St. 308, 18 Atl. 330.

17. Omaha Water Co. *v.* Schamel, 147 Fed. 502, 78 C. C. A. 68; Railway Co. *v.* Sweet, 57 Ark. 287, 21 S. W. 587; St. Louis, etc. R. Co. *v.* Standifer, 81 Ark. 275, 99 S. W. 81; Goddard *v.* Enzler, 222 Ill. 462,

of a child,[18] except in states where only children legally entitled to support can sue.[19] But it must be shown in some states that the loss of advice and counsel will probably result in pecuniary injury,[20] and that it would have been given in the capacity of parent, not as a partner in business.[21] In connection with evidence of the value of the father's care and training to the children, it is competent to show the condition of their mother's health.[22]

b. *Loss of Inheritance.* — During the life of a husband the children of a deceased mother cannot prove any loss because of being deprived of the succession of wealth she might have earned; her earnings would have gone to him.[23]

c. *Dependence.* — It is not competent to show that children are dependent upon their relatives or the circumstances of the latter.[24] But when an adult child is plaintiff, the value of his estate and that of his deceased parent may be shown as bearing upon the probability that the legal duty of support might have been met by him if occasion required.[25]

G. Duration of Life. — Annuity and mortality tables are competent to aid in arriving at the pecuniary value of the life of decedent; they are not absolute guides.[26] The probable duration of life may be shown by evidence of decedent's age, health, habits and other facts affecting its probable continuance.[27] A physician may testify as to the decedent's expectation of life as shown by mortality tables,[28] but not without reference thereto.[29]

78 N. E. 805; Indianapolis Tract. & T. Co. *v.* Romans, 40 Ind. App. 184, 79 N. E. 1068; Houston, etc. R. Co. *v.* Rutland (Tex. Civ. App.), 101 S. W. 529.

18. Tilley *v.* Hudson River R. Co., 29 N. Y. 252, 285. *Contra*, Baltimore & P. R. Co. *v.* Golway, 6 App. Cas. (D. C.) 143, 177.

19. Rouse *v.* Detroit Elec. R., 128 Mich. 149, 87 N. W. 68.

20. May *v.* West Jersey & S. R. Co., 62 N. J. L. 63, 42 Atl. 163.

21. Demarest *v.* Little, 47 N. J. L. 28.

22. International, etc. R. Co. *v.* McVey (Tex. Civ. App.), 102 S. W. 172.

23. Tilley *v.* Hudson River R. Co., 24 N. Y. 471.

24. Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335.

25. Lazelle *v.* Newfane, 70 Vt. 449, 41 Atl. 511.

26. Vicksburg, etc. R. Co. *v.* Putnam, 118 U. S. 545; Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019; Cooper *v.* Lake Shore, etc. R. Co., 66 Mich. 261, 33 N. W. 306; Sauter *v.* New York Cent. R. Co., 66 N. Y. 50; Reynolds *v.* Narragansett Elec. L. Co., 26 R. I. 457, 59 Atl. 393; Norfolk & W. R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310; Baltimore & O. R. Co. *v.* Noell, 32 Gratt. (Va.) 394. See article "Mortality Tables," Vol. VIII, p. 633.

27. Kansas City So. R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363; Boswell *v.* Barnhart, 96 Ga. 521, 23 S. E. 414; Beems *v.* Chicago, etc. R. Co., 67 Iowa 435, 443, 25 N. W. 693; Atchison, etc. R. Co. *v.* Hughes, 55 Kan. 491, 502, 40 Pac. 919; Meekins *v.* Railway Co., 134 N. C. 217, 46 S. E. 493.

28. Kansas City So. R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363.

29. Chicago, etc. R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

VALUED POLICIES.—See Insurance.

VARIANCE.

By Charles E. Hogg.

I. IN GENERAL.

1. Definitions and Observations. — A variance is a substantial departure of the evidence from the allegations in the pleadings.[1]

1. *United States.* — Mulligan *v.* United States, 120 Fed. 98, 56 C. C. A. 50.
Alabama. — Mobile, etc. R. Co. *v.* George, 94 Ala. 199, 10 So. 145.
Connecticut. — Plumb *v.* Griffin, 74 Conn. 132, 50 Atl. 1; House *v.* Metcalf, 27 Conn. 631; State *v.* Wadsworth, 30 Conn. 55.
Georgia. — Central R. Co. *v.* Hubbard, 86 Ga. 623, 12 S. E. 1020.
Illinois. — Keiser *v.* Topping, 72 Ill. 226; Gilman *v.* Ferguson, 116 Ill. App. 347; Toledo, etc. R. Co. *v.* Harnsberger, 41 Ill. App. 494.
Indiana. — Becker *v.* Baumgartner, 5 Ind. App. 576, 32 N. E. 786.
Minnesota. — Dennis *v.* Spencer, 45 Minn. 250, 47 N. W. 795.
Missouri. — Haughey Livery etc. Co. *v.* Joyce, 41 Mo. App. 564.
Nebraska. — State Ins. Co. *v.* Schreck, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696.
Texas. — Warrington *v.* State, 1 Tex. App. 168.
Vermont. — Skinner *v.* Grant, 12 Vt. 456.

Definitions. — Substantial Departure. — "A variance is a substantial departure from the issue in the evidence adduced, and must be in some matter which, in point of law, is essential to the charge or claim." Keiser *v.* Topping, 72 Ill. 226.

In Plumb *v.* Griffin, 74 Conn. 132, 50 Atl. 1, the complaint alleged that the defendant had cut on the plaintiff's land twenty-three trees, each of a greater diameter than one foot, and that each was of the value of one dollar. The court found that only fifteen such trees had been cut, and that each of them was worth two dollars, and rendered judgment accordingly. The defendant contended that the finding as to the value was error. The appellate court refused to agree with the defendant in this contention. In disposing of this point, the court said: "Technically, the objection is that there is a variance between the value alleged and the value proved and found. A variance, however, to be available, must be a disagreement

The principle is well settled that the *probata* and *allegata* must agree.[2] The admissibility of evidence, as hereinafter considered, relates only to the pleadings, and is intended to illustrate the prin-

between the allegation and the proof in some matter essential to the charge or claim, and there is no such disagreement in the case at bar."

Essential Difference. — "A variance is an essential difference between the pleading and the proof." Mulligan *v.* United States, 120 Fed. 98, 56 C. C. A. 50.

Under Certain Statutes. — In many of the code states, by virtue of statute, a variance may be properly defined to be any substantial disagreement between the pleadings and the evidence, whereby the adverse party is misled to his prejudice. Deakin *v.* Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827; Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326; Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

Proof That Party Was Misled. In many jurisdictions it is not sufficient that the party was misled to render a variance material, without proving that the party was misled. Reddick *v.* Keesling, 129 Ind. 128, 28 N. E. 316. In this case the court, in the course of its opinion, says: "Whenever it is alleged that a party has been so misled, the fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled." See in this connection the following cases:

United States. — Liverpool, etc. Ins. Co. *v.* Gunther, 116 U. S. 113.

Indiana. — Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98.

Iowa. — Robbins *v.* Diggins, 78 Iowa 521, 43 N. W. 306; Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510.

Mississippi. — Illinois Cent. R. Co. *v.* Price, 72 Miss. 862, 18 So. 615.

Missouri. — Murphy *v.* Wilson, 44 Mo. 313; Pleasant Hill Bank *v.* Wills, 79 Mo. 275; Meyer *v.* Chambers, 68 Mo. 626.

New York. — Place *v.* Minister, 65 N. Y. 89; Catlin *v.* Gunter, 11 N. Y. 368.

Ohio. — Hoffman *v.* Gordon, 15 Ohio St. 211.

Oregon. — Stokes *v.* Brown, 20 Or. 530, 26 Pac. 561; Dodd *v.* Denny, 6 Or. 157.

South Carolina. — Ahrens *v.* State Bank, 3 S. C. 406.

South Dakota. — North Star Boot etc. Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

Washington. — Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380.

Wisconsin. — McNally *v.* Andrews, 98 Wis. 62, 73 N. W. 315; Fox River Val. R. Co. *v.* Shoyer, 7 Wis. 365; Thayer *v.* Jarvis, 44 Wis. 338.

Affidavit Required To Show That Party Was Misled. — In some states it is required by statute that the proof showing that a party was misled shall be by affidavit. Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Place *v.* Minister, 65 N. Y. 89; Ahrens *v.* State Bank, 3 S. C. 406; St. Louis, etc. R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798.

In Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, the court in holding that there was no variance between the facts alleged and those proved, said: "And, if there was, the conclusive answer to such a contention is that defendant did not take advantage of the supposed variance in the manner pointed out by the statute, as no affidavit was filed, stating that defendant was misled. Rev. Stat. 1879, § 3565; Turner *v.* Railroad Co., 51 Mo. 501; Clements *v.* Maloney, 55 Mo. 514; Ely *v.* Porter, 58 Mo. 158; Bank *v.* Wills, 79 Mo. 275; Olmstead *v.* Smith, 87 Mo. 607."

2. *Alabama.* — Wharton *v.* Cunningham, 46 Ala. 590.

California. — Thompson *v.* Lyon, 14 Cal. 39; Fox *v.* Hale & N. Silv. Min. So. 108 Cal. 369, 41 Pac. 308; Gibson *v.* Wheeler, 110 Cal. 243, 42 Pac. 810.

Florida. — Withers *v.* Sandlin, 36 Fla. 619, 18 So. 856; Wilkinson *v.* Pensacola & A. R. Co., 35 Fla. 82, 17 So. 71.

Illinois. — Moss *v.* Johnson, 22 Ill. 633; Humphreys *v.* Roth, 158 Ill.

ciple which rejects all evidence of any material matter which is not averred in the pleadings.[3] If the case is presented by the pleadings

186, 41 N. E. 751; Adams *v.* Gill, 158 Ill. 190, 41 N. E. 738; Rass *v.* Sebastian, 160 Ill. 602, 43 N. E. 708.

Indiana. — Brown *v.* Will, 103 Ind. 71, 2 N. E. 283; Terry *v.* Shively, 64 Ind. 106; Phoenix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1; Thomas *v.* Dale, 86 Ind. 435; Carter *v.* Carter, 101 Ind. 450; McKinney *v.* Hartman, 143 Ind. 224, 42 N. E. 681.

Maine. — Whittemore *v.* Merrill, 87 Me. 456, 32 Atl. 1008.

Massachusetts. — Bowker *v.* Childs, 3 Allen 434.

Missouri. — Jones *v.* Louderman, 39 Mo. 287.

Montana. — Kennelly *v.* Savage, 18 Mont. 119, 44 Pac. 400.

New Jersey. — Mulford *v.* Bowen, 9 N. J. L. 315.

Ohio. — Hough *v.* Young, 1 Ohio 504.

South Carolina. — Simkins *v.* Montgomery, 1 Nott & McC. 589.

Washington. — Seattle *v.* Parker, 13 Wash. 450, 43 Pac. 369; Ellensburgh Water Supply Co. *v.* Ellensburgh, 13 Wash. 554, 43 Pac. 531.

The Common Law Principle Stated in the Text Unchanged by the Code Practice. — In Jones *v.* Louderman, 39 Mo. 288, it was contended by the appellant and by him urged in argument that there was a variance between the contract, as set out in the petition, and the one read in evidence. In disposing of this contention the court in its opinion said: "The Code of practice has not changed the well-known rule of evidence as it existed at common law, that the allegations and the proof must substantially correspond. A party cannot declare for one cause of action and recover on an entirely different and distinct cause."

Illustrations of the Rule That the Allegata and Probata Must Agree. Where the promise is alleged to be on the part of a testator, evidence of a promise by the personal representative is not admissible. Quarles' Admx. *v.* Littlepage & Co., 2 Hen. & M. (Va.) 401, 3 Am. Dec. 637.

Where the allegations in the pleading was the issuance of a patent right dated November 17, 1810, for "a steam-still and water boiler," evidence of a patent dated January 16, 1811, for "a water-boiler and steam-still" was not admissible. Bellas *v.* Hays, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385.

It has been aptly stated, following the rule announced in the text, that proof without corresponding pleadings is as ineffectual as pleadings without corresponding proof. Gilman *v.* Ferguson, 116 Ill. App. 347.

Rationale of Rule Stated in Text. The object of this rule is that the defendant may not be taken by surprise at the trial with reference to the case he is to meet, as made out by the pleadings. If the plaintiff were permitted to state one case in his declaration and be permitted to make out another by his proof, the purpose of pleadings would be subverted, and the defendant would not be able to support his defense which he was advised he could. Any other rule would operate to defeat the ends of justice. House *v.* Metcalf, 27 Conn. 631; Gilmer *v.* Wallace, 75 Ala. 220; Shepard *v.* New Haven, etc. Co., 45 Conn. 54; Reed *v.* State, 16 Ark. 499; Wabash Western R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; Watson *v.* Brightwell, 60 Ga. 212.

In Shepard *v.* New Haven etc. Co., 45 Conn. 54, the court in its opinion, says: "Every allegation essential to the issue must be proved in the form stated; the facts proven must be legally identical with the claim set forth; and this for the defendant's protection: first, that he may know the charge which he is to meet; secondly, if he is unable to disprove it, that the verdict and judgment may protect him from another action based upon the same wrong."

3. *California.* — Owen *v.* Meade, 104 Cal. 179, 37 Pac. 923.

Georgia. — Goodrich *v.* Atlanta Nat. Bldg. & L. Assn., 96 Ga. 803, 22 S. E. 585.

Illinois. — A. M. Rothschild & Co. *v.* Levy, 118 Ill. App. 78.

Indiana. — Dearmond *v.* Dearmond, 12 Ind. 455.

but not in the form shown by the evidence, a variance arises;[4] but if the evidence makes a case where no issue is raised to which it is applicable, the evidence is not admissible under the pleadings.[5]

Iowa. — Tubbs *v.* Mechanics' Ins. Co., 131 Iowa 217, 108 N. W. 324; Woolsey *v.* Williams, 34 Iowa 413.

Louisiana. — Abat *v.* Penny, 19 La. Ann. 289.

Massachusetts. — New York Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391, 78 N. E. 463.

Missouri. — Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

Washington. — Murray *v.* Okanogan L. S. & D. B. Co., 12 Wash. 259, 40 Pac. 942.

Wisconsin. — Warren *v.* Bean, 6 Wis. 120.

Illustrations. — The state of Tennessee has a statute which provides that "an account on which an action is brought," coming from another county or state, with the affidavit of the plaintiff to the correctness of the account, and certified as required, is conclusive evidence against the party sought to be charged, unless he shall, on oath, deny the account. In a case involving such an account, unless the declaration avers that the account comes from another county or state and makes profert thereof as required by the law, the defendant cannot be required to deny the account on oath; nor will the plaintiff be entitled to read the account in evidence on the trial. Hunter *v.* Anderson, 1 Heisk. (Tenn.) 1.

Under the declaration averring that a request was made, it is not competent to prove an excuse for not making a request, as the state of the pleadings does not render such evidence admissible. Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415. A fact which defeats the action, if not pleaded, cannot be given in evidence. Yeaton *v.* Lynn, 5 Pet. (U. S.) 224. These cases serve to illustrate the principle that where the matter is not alleged in the pleadings, evidence relating to such matter is not admissible.

4. *Alabama.* — Birmingham R. & E. Co. *v.* Clay, 108 Ala. 233, 19 So. 309,

Arkansas. — Starchman *v.* State, 62 Ark. 538, 36 S. W. 940.

California. — McLaughlin *v.* San Francisco & S. M. R. Co., 113 Cal. 590, 45 Pac. 839.

Florida. — Tate *v.* Pensacola, etc. Co., 37 Fla. 439, 20 So. 542.

Georgia. — Fidelity & C. Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821.

Illinois. — Ebsary *v.* Chicago City R. Co., 164 Ill. 518, 45 N. E. 1017.

Kentucky. — Newton's Exr. *v.* Field, 98 Ky. 186, 32 S. W. 623, 17 Ky. L. Rep. 769.

Missouri. — Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444.

Nebraska. — Strahle *v.* First Nat. Bank, 47 Neb. 319, 66 N. W. 415.

Oregon. — Daly *v.* Larsen, 29 Or. 535, 46 Pac. 143.

Vermont. — Powers *v.* New England F. Ins. Co., 68 Vt. 390, 55 Atl. 331.

Wisconsin. — Babcock *v.* Appleton Mfg. Co., 93 Wis. 124, 67 N. W. 33.

5. *Arkansas.* — State Bank *v.* Arnold, 12 Ark. 180; Matlock *v.* Purefoy, 18 Ark. 492.

California. — Hicks *v.* Murray, 43 Cal. 515; Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299; Hegler *v.* Eddy, 53 Cal. 597.

Connecticut. — Bray *v.* Loomer, 61 Conn. 456, 23 Atl. 831.

Iowa. — Allen *v.* Newberry, 8 Iowa 65.

Louisiana. — Gay *v.* Nicol, 28 La. Ann. 227.

Minnesota. — Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Payette *v.* Day, 37 Minn. 366, 34 N. W. 502.

Nebraska. — Hamilton *v.* Lau, 24 Neb. 59, 37 N. W. 688.

Texas. — Smith *v.* Sherwood, 2 Tex. 460; Rivers *v.* Foote, 11 Tex. 662; Denison *v.* League, 16 Tex. 399.

Vermont. — Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

Wisconsin. — Warren *v.* Bean, 6 Wis. 120.

In Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93, the court in its opinion, said: "It is doubtless true

While the subjects of variance and admissibility relating to evidence are of a kindred nature,[6] they are not synonymous.[7]

2. Cases in Which Variance Applies. — A In General. — The principle that the evidence adduced must correspond to the allegations made in the pleadings applies to actions at law, civil[8] and crim-

that evidence must correspond with the allegations and be confined to the point in issue, and if in the examination of witnesses facts come out which, had they been alleged, would furnish ground of relief or defense, such facts must be disregarded, unless they are warranted by the allegations of the pleadings: Stuart *v.* Merchants' & Farmers' Bank, 19 Johns. 505; Field *v.* Mayor of New York, 6 N. Y. 179, 57 Am. Dec. 435."

Under the code of the state of New York, § 275, the court is not empowered to grant any relief to which the plaintiff's proof on the trial of the case may entitle him, but only such as is admissible as to the case made by the pleadings, and which is embraced in the complaint. Cowenhoven *v.* City of Brooklyn, 38 Barb. (N. Y.) 9.

As illustrative of what is meant by inadmissibility of evidence because of the state of the pleadings, we here quote from the opinion of the court in McLaurin *v.* Conly, 90 N. C. 50, 62: "In every action brought in the superior court, the cause of action and the various defenses thereto, must be set forth in the record by proper pleadings. Pleading is essential, and cannot be dispensed with, certainly in litigated matters. Reason and common justice, as well as the Code, require that the plaintiff shall state in a plain, strong, intelligible manner his grounds of action, and that the defendant shall in like manner state the grounds of his defense, and any counter-claims or demands he may have and desires to set up. This is not mere matter of form. It is of the essential substance of the litigation. It is necessary to the end the contending parties may understand and prepare to meet, each the other's contention, and prepare himself for the trial of issues of law or fact presented, that the court may have a proper, just and thorough apprehension of the controversy, and that the same may go into the record and stand as a perpetual memorial of the litigation, and all that it embraces. Any other course of procedure would lead to endless confusion and litigation. If this were not done, it would be difficult to show what any litigation embraced or that it had been settled and ended, and when and how. It is not sufficient that the plaintiff has a cause of action and can prove it; he must first plead it, then prove it. Likewise, it is not sufficient that the defendant has a good and meritorious defense; he, too, must first plead it, and then prove it. Hence, in McKee *v.* Lineberger, 69 N. C. 217, the late Chief Justice Pearson said: 'There must be allegata et probata; and under the new system as under the old, the court cannot take notice of any proof, unless there is a corresponding allegation. Proof without allegation is as ineffective as allegation without proof. The record, either as originally framed or as made by amendment, must set out the case as well on the part of the defendant as on the part of the plaintiff.'"

6. Lea *v.* Harris, 84 Ga. 137, 10 S. E. 599; Hatten *v.* Robinson, 4 Blackf. (Ind.) 479; Colt *v.* Miller, 10 Cush. (Mass.) 49; Macumber *v.* White River L. & B. Co., 52 Mich. 195, 17 N. W. 806; Piper *v.* Hoard, 107 N. Y. 67, 13 N. E. 632, 1 Am. St. Rep. 785.

7. Callen *v.* Rose, 47 Neb. 638, 66 N. W. 639; Christmas *v.* Haywood, 119 N. C. 130, 25 S. E. 861; Jackson *v.* Doherty, 17 Misc. 629, 40 N. Y. Supp. 655; Smythe *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670; Turnbull *v.* Home F. Ins. Co., 83 Md. 312, 34 Atl. 875; Malm *v.* Thelin, 47 Neb. 686, 66 N. W. 650; Smith *v.* Old Dominion Bldg. & L. Assn., 119 N. C. 257, 26 S. E. 40.

8. *United States.* — Wilson *v.* Haley Live Stock Co., 153 U. S. 39.

inal;[9] to suits in equity,[10] and special proceedings of a judicial na-

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38; New York, etc. R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1070.

Florida. — Wilkinson *v.* Pensacola & A. R. Co., 35 Fla. 83, 17 So. 71.

Georgia. — Sanderlin *v.* Willis, 98 Ga. 278, 25 S. E. 437.

Illinois. — Frazer *v.* Smith, 60 Ill. 145; Jeffrey *v.* Robbins, 167 Ill. 375, 47 N. E. 725.

Iowa. — Smith *v.* Runnels, 97 Iowa 55, 65 N. W. 1002; Humpton *v.* Unterkircker, 97 Iowa 509, 66 N. W. 776.

Missouri. — De Bolt *v.* Kansas City, etc. R. Co., 123 Mo. 496, 27 S. W. 575.

Nebraska. — Robinson *v.* Kilpatrick-Koch D. G. Co., 50 Neb. 795, 70 N. W. 378; Wilson *v.* City Nat. Bank, 51 Neb. 87, 70 N. W. 501; Cockrell *v.* Wood, 51 Neb. 269, 70 N. W. 944.

Oklahoma. — Noble *v.* Atchison, etc. R. Co., 4 Okla. 534, 46 Pac. 483, 5 Am. & Eng. R. Cas. (N. S.) 309.

Oregon. — Miller *v.* Hirschberg, 27 Or. 522, 40 Pac. 506.

Pennsylvania. — Ryder *v.* Jacobs, 182 Pa. St. 624, 38 Atl. 471; Campbell *v.* Brown, 183 Pa. St. 112, 38 Atl. 516.

Rhode Island. — Potts *v.* Allen, 19 R. I. 489, 34 Atl. 993.

Utah. — Peay *v.* Salt Lake City, 11 Utah 331, 40 Pac. 206.

Illustrations. — On Plea on Non Est Factum. — A variance between a declaration on a lease and the instrument produced in support of such allegation is fatal to the plaintiff's right of recovery. Corning Steel Co. *v.* Western Union Tel. Co., 60 Ill. App. 426.

Failure of City To Place Hydrants. Where the evidence shows that a city has failed to furnish or direct the placing of hydrants provided for in a contract with a water company, the averments of a declaration for the rent of such hydrants is not supported by such testimony. Ellensburgh Water Supply Co. *v.* Ellensburgh, 13 Wash. 554, 43 Pac. 531.

9. *Alabama.* — Agee *v.* State, 113 Ala. 52, 21 So. 207; Stone *v.* State, 115 Ala. 121, 22 So. 275.

Arizona. — Martinez *v.* Territory, 5 Ariz. 55, 44 Pac. 1089.

Arkansas. — Adams *v.* State, 64 Ark. 188, 41 S. W. 423; Keonn *v.* State, 64 Ark. 231, 41 S. W. 808.

California. — People *v.* Cummings, 117 Cal. 497, 49 Pac. 576.

Kentucky. — Dallas *v.* Com., 19 Ky. L. Rep. 289, 40 S. W. 456.

Michigan. — Maynard *v.* Eaton Circuit Judge, 108 Mich. 201, 65 N. W. 760.

Nebraska. — Williams *v.* State, 51 Neb. 630, 71 N. W. 313.

Texas. — Booth *v.* State, 36 Tex. Crim. 600, 38 S. W. 196; Barnett *v.* State, 35 Tex. Crim. 280, 33 S. W. 340.

10. *Alabama.* — Brown *v.* Weaver, 113 Ala. 228, 20 So. 964; Graham *v.* Tankersley, 15 Ala. 634; Hooper *v.* Strahan, 71 Ala. 75.

Colorado. — Francis *v.* Wells, 2 Colo. 660.

Georgia. — Keaton *v.* McGwier, 24 Ga. 217.

Illinois. — Fitzpatrick *v.* Beatty, 6 Ill. 454; Chaffin *v.* Kimball, 23 Ill. 33.

Indiana. — Peelman *v.* Peelman, 4 Ind. 612.

Michigan. — Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Rudd *v.* Rudd, 33 Mich. 101.

Missouri. — Lenox *v.* Harrison, 88 Mo. 491.

New Jersey. — Smith *v.* Axtell, 1 N. J. Eq. 494; Parsons *v.* Heston, 11 N. J. Eq. 155; Lehigh Val. R. Co. *v.* McFarlan, 30 N. J. Eq. 180.

New York. — Green *v.* Storm, 3 Sandf. Ch. 305.

North Carolina. — Mallory *v.* Mallory, 45 N. C. 80.

Tennessee. — Shaw *v.* Patterson, 2 Tenn. Ch. 171.

Vermont. — Barrett *v.* Sargeant, 18 Vt. 365.

Virginia. — Pigg *v.* Corder, 12 Leigh 69.

West Virginia. — Baugher *v.* Eichelberg, 11 W. Va. 217; Floyd *v.* Jones, 19 W. Va. 359.

Wisconsin. — Williams *v.* Starr, 5 Wis. 534.

Fraud Charged. — If fraud is charged in a bill in equity as the ground of relief, a decree on an-

other ground, on the failure of the proof of fraud, will not be justified. Dashiell *v.* Grosvenor, 66 Fed. 334, 13 C. C. A. 593, 25 U. S. App. 227, 27 L. R. A. 67.

In an action brought for the recovery on a contract relating to the construction of a railroad, evidence as to false representations cannot be received unless averred in the pleadings. McCracken *v.* Robison, 57 Fed. 375, 6 C. C. A. 400, 14 U. S. App. 602.

In a pleading which alleges that plaintiff relied altogether and exclusively on representations made by the defendant, evidence that he relied mainly and substantially on such allegations does not amount to a variance. Cook *v.* Gill, 83 Md. 177, 34 Atl. 248.

General Doctrine. — In Adams *v.* Gill, 158 Ill. 190, 41 N. E. 738, the court in the course of its opinion says: "When complainants had introduced all their evidence and rested their cause, the defendant moved the court to dismiss the bill for want of evidence to sustain it. That was a proper motion, and should have been heard and sustained by the court. Its refusal to do so, and permitting the hearing to proceed, is assigned for error. The bill set forth that a deed had been made, by which it was intended to convey a life estate in certain lands to Harriet Adams, but by mistake of the scrivener who prepared the deed she was granted an estate in fee simple; 'that the failure of the scrivener to insert the limitation was purely and wholly an act of oversight and omission on his part.' This was denied by defendant in her answer, and an issue thus regularly formed. None of the testimony introduced by complainants tended to prove that a mistake had been made by the scrivener, but, instead, that Harriet Adams and Josiah H. Adams, two of the parties to the deed, by deception induced complainants to sign it. In other words, the complainants set forth one case in their bill, and attempted to prove another on the hearing, placing their right to relief on entirely new ground. In McKay *v.* Bissett, 5 Gilman 505, it was said: 'A complainant must recover on the case made by his bill. He is not permitted to state one case in the bill and make out a different one in proof. The allegations and proof must correspond, the latter must support, and not be inconsistent with, the former. Although a good case may appear in the evidence, yet, if it be variant from the one stated in the bill, the bill will be dismissed. The defendant has the right to answer and contest the case on which the complainant claims relief' — *citing* Harrison *v.* Nixon, 9 Pet. 483; Boon *v.* Chiles, 10 Pet. 177; 1 Smith, Ch. Prac. 346; Doyle *v.* Teas, 4 Scam. 202. The rule is elementary, and has been strictly enforced by this court whenever invoked. Fish *v.* Cleland, 33 Ill. 244; Bush *v.* Connelly, Id. 452; Heath *v.* Hall, 60 Ill. 344; Lloyd *v.* Karnes, 45 Ill. 70; Carmichael *v.* Reed, Id. 112; Marvin *v.* Collins, 98 Ill. 517; Brockhausen *v.* Bochland, 137 Ill. 552, 27 N. E. 458. If the evidence makes a case variant from the one made in the bill, no decree should pass other than to dismiss the bill. Ohling *v.* Luitjens, 32 Ill. 29."

Specific Performance. — McDonald *v.* Walker, 95 Ala. 172, 10 So. 225, lays down the doctrine that the general principle that the allegations of a bill in equity and the evidence adduced at the hearing must correspond is applied with the greatest strictness to bills for the specific performance of contracts, to the extent, indeed, of requiring absolute correspondence, not only between every essential averment and the proof, but also between every redundant and superfluous averment with respect to a material fact, or descriptive of a matter or thing necessary to be alleged, citing the following authorities: Daniell's Ch. Pr. 860; Goodwin *v.* Lyon, 4 Port. (Ala.) 297; Ellis *v.* Burden, 1 Ala. 458; Ellerbe *v.* Ellerbe, 42 Ala. 643; Winston *v.* Mitchell, 87 Ala. 395, 5 So. 741; Webb *v.* Crawford, 77 Ala. 440. Thus where the bill alleged that the payments under a contract sought to be enforced were to be made in five equal annual instalments, and the proof was that they were to be made in four or five such instalments, it was held that the variance was fatal, and that a de-

ture;[11] and whether the trial be by the court[12] or jury,[13] and whether the pleadings be those of the plaintiff[14] or defendant.[15]

cree for specific performance of the contract was properly refused. Aday *v.* Echols, 18 Ala. 353. And where the bill averred that the contract was made on September 30, 1885, while the proof showed that it was made September 30, 1886, the variance was held to be fatal to relief; and this, notwithstanding the abstract rights of the parties were the same whether the contract bore the one or the other of these dates. The court said: "There is no class of cases in which correspondence between the allegations of the bill and the proof is more rigidly exacted than in suits for the specific performance of contracts. The allegation of the time when the contract is made is descriptive of that which is material, and the variance between the allegation and proof is fatal." Johnston *v.* Jones, 85 Ala. 286, 4 So. 748. See also Hamaker *v.* Hamaker, 85 Ala. 231, 3 So. 611.

11. Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182; Hall *v.* People, 21 Mich. 456; Pritchard *v.* McKinstry, 12 La. 224; State *v.* Thompson, 10 Tex. Civ. App. 272, 30 S. W. 728.

Removal of Public Officer. — "In proceedings under the statute to remove a public officer upon charges, evidence of acts performed by the accused as "Moderator of School District No. One," is not admissible to prove a charge against him as "Moderator of School District No. Two;" and when on the trial of an information for falsely assuming to act as Moderator of School District No. One, evidence had been produced of the proceedings before the Township Board to remove him upon charges recorded against him as Moderator of School District No. Two, it is not admissible to show that the record was a mistake, and that the charges were actually preferred against him as Moderator of No. One." Hall *v.* People, 21 Mich. 456.

12. Boardman *v.* Griffin, 52 Ind. 101; Dibrell *v.* Miller, 8 Yerg. (Tenn.) 476, 29 Am. Dec. 126; Wilcox & W. Organ Co. *v.* Lasley, 40 Kan. 521, 20 Pac. 228.

Trial by the Court. — "Parties to an action must recover, if at all, upon the allegations of the pleadings therein; and when the trial is by the court, it cannot, any more than a jury, go outside of the case made by the pleadings and find for a party upon facts different in their general scope and meaning from the facts pleaded." Boardman *v.* Griffin, 52 Ind. 101.

13. *United States.* — Brown *v.* United States, 1 Ct. Cl. 377.

Alabama. — Wharton *v.* Cunningham, 46 Ala. 590.

California. — Putnam *v.* Lamphier, 36 Cal. 151; Bachman *v.* Sepulveda, 39 Cal. 688.

Indiana. — Boardman *v.* Griffin, 52 Ind. 101; Wilkerson v. Rust, 57 Ind. 172; Oolitic-Stone Co. *v.* Crofton, 4 Ind. App. 571, 31 N. E. 375.

Minnesota. — Erickson *v.* Fisher, 51 Minn. 300, 53 N. W. 638.

Nebraska. — Lincoln Nat. Bank *v.* Virgin, 36 Neb. 735, 55 N. W. 218.

Texas. — Lazarus *v.* Barrett, 5 Tex. Civ. App. 5, 23 S. W. 822.

Washington. — Davis *v.* Hinchcliffe, 7 Wash. 199, 34 Pac. 915.

14. *United States.* — McKenzie *v.* Poorman Silv. Mines, 88 Fed. 111, 31 C. C. A. 409, 80 U. S. App. 1; Rogers *v.* Louisville & N. R. Co., 88 Fed. 462.

Connecticut. — Whiting *v.* Koepke, 71 Conn. 77, 40 Atl. 1053.

Georgia. — Small *v.* Cohen, 102 Ga. 248, 29 S. E. 430.

Illinois. — Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592; Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643.

Nebraska. — Hayes *v.* Slobodny, 54 Neb. 511, 74 N. W. 961; McCormick Harv. Mach. Co. *v.* Gustafson, 54 Neb. 276, 74 N. W. 576; Elliott *v.* Carter White Lead Co., 53 Neb. 458, 73 N. W. 948.

Tennessee. — Dunaway *v.* Dougherty (Tenn. Ch. App.), 46 S. W. 1025.

Texas. — Texas & P. R. Co. *v.* Purcell, 91 Tex. 585, 44 S. W. 1058.

15. Louisville & N. R. Co. *v.*

B. Actions at Law. — a. *General Rule.* — It is a primary rule

Johnston, 79 Ala. 436; Columbus Safe-Deposit Co. *v.* Burke, 88 Fed. 630, 32 C. C. A. 67, 60 U. S. App. 253; J. I. Case Plow Works *v.* Morris, 17 Tex. Civ. App. 6, 42 S. W. 652; Consolidated Fruit Jar Co. *v.* Navra, 33 La. Ann. 995; Murray *v.* Heinze, 17 Mont. 353, 42 Pac. 1057; *s. c.*, 43 Pac. 714; Remington *v.* Walker, 21 Hun (N. Y.) 322; Donavan *v.* Ladner, 3 Tex. Civ. App. 203, 22 S. W. 61.

In Kellogg *v.* Moore, 97 Ill. 282, the court in its opinion says: "There is no principle connected with the administration of the law more elementary in its character, or of more constant and universal application, than the well recognized doctrine that the allegations and proofs must agree. The rule is applicable to all pleadings, and is as fully recognized and as rigidly enforced in courts of equity as in courts of law. If parties were permitted to recover by proof of a state of facts varient from that set forth in their pleadings, all pleadings, so far from subserving any wise or good purpose, would be but a snare and delusion; they would be constantly subverted to the worst of purposes in order to gain an unrighteous advantage."

Illustrations of the Rule. — Accident Cases. — "Under a complaint in an action against a railroad company, which complains of damages on account of the conductor's refusal to stop his train and put the plaintiff off at the proper station, alleging that he 'wilfully refused' to stop, and carried her several hundred yards beyond, 'without her consent, and against her protest;' if the evidence shows that the conductor only neglected to stop, and that the plaintiff not only submitted, but consented to alight at the further place, without objection or protest, there is a fatal variance between the averments and proof." Louisville & N. R. Co. *v.* Johnston, 79 Ala. 436.

"Where a train was proved to have been improperly made up and it was alleged that the cause of the derailment and there was proof that the cause of the derailment was a snowslide and the make up of the train had nothing to do with it, an instruction that if the train was derailed because of negligence in making it up plaintiff could recover for the injuries, was error." Denver & R. G. R. Co. *v.* Pilgrim, 9 Colo. App. 86, 47 Pac. 657, 1 Am. Neg. Rep. 10.

In Haner *v.* Northern Pac. R. Co., 7 Idaho 305, 62 Pac. 1028, 9 Am. Neg. Rep. 12, the suit was brought to recover the value of a cow alleged to have been killed by the defendant because of the negligent and careless running of a locomotive and train of cars. Over the objection of the defendant, the court admitted evidence tending to prove that the defendant had not fenced its track at the point where the cow was killed, as required by statute of Idaho, and also evidence that a highway crossed the railroad track near where such cow was killed. Upon writ of error the supreme court held that the admission of this testimony was not justified by the pleadings, and that no recovery could be had upon this state of the pleadings without an amendment of the complaint.

Specific Cause of Accident. — While it is not necessary to allege the specific ground of the defendant's negligence causing the accident (Clark *v.* Chicago, B. & Q. R. Co., 4 McCrary 360, 15 Fed. 588; Andrew *v.* Chicago & N. W. R. Co., 45 Ill. App. 269; St. Louis & S. E. R. Co. *v.* Mathias, 50 Ind. 65, 8 Am. R. Rep. 381; Pittsburgh, C. & St. L. R. Co. *v.* Nelson, 51 Ind. 150; Louisville, etc. R. Co. *v.* Jones, 28 Am. & Eng. R. Cas. 170, 108 Ind. 551, 9 N. E. 476; Ohio & M. R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 32 Am. & Eng. R. Cas. 121, 12 West Rep. 731; Louisville & N. R. Co. *v.* Wolfe, 80 Ky. 82; Otto *v.* St. Louis, etc. R. Co., 12 Mo. App. 168; Eldridge *v.* Long Island R. Co., 1 Sandf. (N. Y.) 89. But see Devino *v.* Central Vt. R. Co., 63 Vt. 98, 20 Atl. 953), yet having made such specific allegation it must be proved in the manner averred. Ravenscraft *v.* Missouri Pac. R. Co., 27 Mo. App.

that the evidence adduced must correspond to the material allega-

617; Schneider *v.* Missouri Pac. R. Co., 75 Mo. 295; Atchison *v.* Chicago, etc. R. Co., 80 Mo. 213.

Allegations as to Medical Bills in Accident Cases. — In McLaughlin *v.* San Francisco & S. M. R. Co., 113 Cal. 590, 45 Pac. 839, which was an action for injuries sustained by plaintiff as a passenger upon an electric railroad line, a single question was raised on the appeal. Plaintiff, after averring the nature and the extent of his injuries, averred "that in attempting to be cured he has necessarily expended, in doctor's bills, the sum of $750 (seven hundred and fifty dollars)." The court in its opinion says: "Under this allegation the plaintiff was permitted to prove, against the objection of defendant, not that he had expended $750, or any part thereof, but that he had incurred an indebtedness therefor, which was not paid. Counsel for defendant afterwards moved to strike out the evidence, which was refused. The court also instructed the jury, in substance, that if, through the negligence of the defendant, plaintiff sustained injuries whereby medical services became necessary, he was entitled to the reasonable expense incurred therefor, and that the fact that plaintiff had not paid the bill would not preclude his recovery of the expenses so incurred. In all this, we think, the court below erred. In cases of personal injury of a plaintiff through the negligence of a defendant, there is no doubt but that, under a proper pleading, the injured party may recover for such necessary medical expenses as he may have become liable to pay, though not in fact paid before suit brought. Donnelly *v.* Hufschmidt, 79 Cal. 74, 21 Pac. 546. It will be observed here, however, that the allegation of the complaint is that he (the plaintiff) 'necessarily expended in doctor's bills the sum of,' etc. To expend is to pay out, to disburse, etc., and implies an act performed, a thing accomplished. To incur a liability to do the same thing is quite different. As was said by McFarland, J., in his concurring opinion in Donnelly *v.* Hufschmidt, *supra*, 'The law is, I think, that a plaintiff, in such a case cannot prove that he has incurred a physician's bill, under an allegation that he has paid it;' *citing* Ward *v.* Haws, 5 Minn. 440 (Gil. 359); Pritchet *v.* Boevey, 1 Cromp. & M. 775; Jones *v.* Lewis, 9 Dowl. 143; Sedg. Dam. (7th Ed.) 197, note a. See, also, Murphy *v.* Mulgrew, 102 Cal. 547, 36 Pac. 857. We are of opinion the evidence that plaintiff had incurred a liability to pay $750 was not admissible, under the allegation of his complaint that he had expended such sum."

Cases of Contract. — A contract under seal is not admissible to support a declaration in assumpsit averring the execution of a simple contract. Magruder *v.* Belt, 7 App. Cas. (D. C.) 303.

Contract Partly Written and Partly Oral. — Evidence that the contract sued on was partly written and partly oral is not a material variance from an allegation that the contract was oral. Kansas L. & T. Co. *v.* Love, 4 Kan. App. 188, 45 Pac. 953.

Agreement To Make Provisions in Will. — There can be no recovery on proof of an implied contract to pay a reasonable amount for services rendered, under an amended petition alleging an express agreement to make provision in a will for compensation for such services. Newton's Exr. *v.* Field, 98 Ky. 186, 32 S. W. 623.

Performance of Labor at Special Request. — In Daly *v.* Larsen, 29 Or. 535, 46 Pac. 143, the court in its opinion said: "There is but one question in the case, and that is, do the findings support the judgment? We think not. The several causes of action are for work and labor done and performed at the instance and request of the defendant, and the statement of each contains all the allegations necessary to a recovery upon an implied contract. These were all controverted by the answer, and the findings of fact should have been as broad as the material issues made by the pleadings. Drainage Dist. No. 4 *v.* Crow, 20 Or. 535,

tions embodying the statement of the plaintiff's cause of action[16] or the defendant's ground of defense,[17] and if it does not a variance arises.[18]

26 Pac. 845; Pengra *v.* Wheeler, 24 Or. 539, 34 Pac. 354; Jameson *v.* Coldwell, 25 Or. 205, 35 Pac. 245; and Moody *v.* Richards (just decided, 45 Pac. 777. The court below seems to have treated the action as based upon the so-called 'time checks,' and finds that they were duly issued, etc., but the plaintiff does not count upon these checks. They are evidence of indebtedness, and no doubt arose out of the transactions which plaintiff sets up; yet it is not deducible from the fact of their issuance that the alleged work and labor was done and performed, or that it was so performed at the instance of defendant, all of which plaintiff was called upon to prove in establishing the implied contract to pay the reasonable worth of such services, as well as to produce evidence from which its value might be determined. These are facts to be established in invitum, and it was therefore incumbent upon the court below to make its findings respecting them so that the law may be applied and judgment entered accordingly."

Logs Described as Round. — "Evidence showing that a contract under which the services sued for were performed was for logs, without prescribing that they should be round and crude, is not a fatal variance from a bill of particulars describing the logs as round and crude. Bucki *v.* McKinnon, 37 Fla. 391, 20 So. 540.

Oral Extension of Written Agreement. — Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588.

16. *Florida.* — Wilkinson *v.* Pensacola & A. R. Co., 35 Fla. 82, 17 So. 71.

Indiana. — Cleveland, etc. R. Co. *v.* Wynant, 100 Ind. 160; Brown *v.* Will, 103 Ind. 71, 2 N. E. 283.

Montana. — Winchester *v.* Joslyn, 72 Pac. 1079.

New Jersey. — Mulford *v.* Bowen, 9 N. J. L. 315.

New York. — Muller *v.* Schumann, 19 N. Y. Supp. 213; Hecla Powder Co. *v.* Hudson River, etc. Co., 23 Civ. Proc. 341, 7 Misc. 630, 28 N. Y. Supp. 34.

Ohio. — Hough *v.* Young, 1 Ohio 504.

South Carolina. — Simkins *v.* Montgomery, 1 Nott & McC. 589; Fitzsimons *v.* Guanahani Co., 16 S. C. 192.

Vermont. — Gates *v.* Bowker, 18 Vt. 23.

17. *Alabama.* — Smith *v.* Elrod, 122 Ala. 269, 24 So. 994.

Indiana. — Perkins Windmill & A. Co. *v.* Yeoman, 23 Ind. App. 483, 55 N. E. 782.

Kansas. — Campbell *v.* Reese, 8 Kan. App. 518, 56 Pac. 543.

Massachusetts. — Emerson *v.* Wiley, 7 Pick. 68; Leach *v.* Fobes, 11 Gray 506, 71 Am. Dec. 732.

Montana. — Winchester *v.* Joslyn, 72 Pac. 1079.

New Jersey. — Richards *v.* Weingarten, 58 N. J. Eq. 206, 42 Atl. 739; Gaskill *v.* Sine, 2 Beas. Ch. 400, 78 Am. Dec. 105.

New York. — Gasper *v.* Adams, 28 Barb. 441.

Tennessee. — Dibrell *v.* Miller, 8 Yerg. 476, 29 Am. Dec. 126.

18. *Connecticut.* — Prince *v.* Takash, 75 Conn. 616, 54 Atl. 1003; McNerney *v.* Barnes, 77 Conn. 155, 58 Atl. 714.

Indiana. — Farmers' Mut. Fire Ins. Co. *v.* Jackman, 35 Ind. App. 1, 73 N. E. 730.

Kansas. — Bailey *v.* Gatewood, 68 Kan. 231, 74 Pac. 1117.

Kentucky. — Chicago, etc. R Co. *v.* Wilson, 25 Ky. L. Rep. 525, 76 S. W. 138; City of Covington *v.* Miles, 26 Ky. L. Rep. 609, 82 S. W. 281.

Nebraska. — Chicago House Wreck. Co. *v.* Stewart Lumb. Co., 66 Neb. 835, 92 N. W. 1009.

Oregon. — Kitchen *v.* Holmes, 42 Or. 252, 70 Pac. 830.

Virginia. — Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

Illustrations. — In Tate *v.* Pensacola, G. L. & D. Co., 37 Fla. 439, 20 So. 542, the suit was brought to enforce specific performance of a

b. *Immaterial and Impertinent Allegations.* — (1.) **In General.** It is not necessary, as a rule, to prove immaterial or impertinent allegations in a pleading;[19] and, if objection is taken thereto, evi-

written agreement for the sale of a tract of land. On the question of the admissibility of evidence as to the increase in the value of the land as a ground of defense to the action, the court in its opinion says: "For aught that appears in the record, this remarkable increase of value may have all occurred between the time of the witness' first acquaintance with the property and the contract of purchase by Bonifay, or it might have occurred between the bringing of the suit and the time of taking the testimony. But the greatest — the vital — objection to this testimony is that it is not relevant to any issue in the case, no defense being made upon an increase in value of the property. It is an established rule of chancery practice and of pleading and practice generally, that the allegata and probata must correspond. However full and convincing may be the proof as to any essential fact, unless the fact is averred, proof alone is insufficient. Perdue *v.* Brooks, 95 Ala. 611, 11 So. 282. All evidence offered in a case should correspond with the allegations, and be confined to the issues. 1 Greenl. Ev. § 51. 'The requirement . . . that the cause of action or the affirmative defense must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading.' 2 Rice Ev. § 292, *citing* Pom. Rem. & Rem. Rights § 554. A litigant has a right to rely upon his adversary's pleading as indicating the case he is to meet; otherwise pleadings would serve no useful purpose, except to entrap and mislead the adversary. Southwick *v.* Bank, 61 How. Prac. 164; Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698."

19. *California.* — Patterson *v.* Keystone M. Co., 30 Cal. 360.

Connecticut. — Adams *v.* Way, 32 Conn. 160; Pratt *v.* Humphrey, 22 Conn. 317.

Georgia. — Simmons *v.* State, 4 Ga. 465.

Illinois. — Chicago West Div. R. Co. *v.* Mills, 105 Ill. 63; Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Nowlin *v.* Bloom, 1 Ill. 138; Chicago & A. R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500.

Indiana. — Overton *v.* Rogers, 99 Ind. 595.

Maine. — Maxwell *v.* Maxwell, 31 Me. 184.

Massachusetts. — Little *v.* Blunt, 16 Pick. 359.

Michigan. — Angell *v.* Loomis, 97 Mich. 5, 55 N. W. 1008.

Missouri. — Hutchison *v.* Patrick, 3 Mo. 65; McQueen *v.* Farrow, 4 Mo. 212; Martin *v.* Miller, 3 Mo. 135.

Nevada. — James *v.* Goodenough, 7 Nev. 970; Frevert *v.* Swift, 19 Nev. 400, 13 Pac. 6.

New York. — Lyons *v.* Miller, 10 Misc. 653, 31 N. Y. Supp. 795.

Ohio. — Gaines *v.* Union Transp. & Ins. Co., 28 Ohio St. 418.

Pennsylvania. — Gibbs *v.* Cannon, 9 Serg. & R. 198.

South Carolina. — Walker *v.* Briggs, 8 Rich. L. 440.

Texas. — First Nat. Bank *v.* Brown, 85 Tex. 80, 23 S. W. 862.

Vermont. — Henry *v.* Tilson, 17 Vt. 479.

What Variances Are Material. On the trial of an issue upon the assumpsit of the testator, evidence is not admissible showing a promise or engagement on behalf of the executor. Quarles' Admx. *v.* Littlepage, 2 Hen. & M. (Va.) 401, 3 Am. Dec. 637.

In an action on a contract, the one set forth in the record and the one proved must agree in substance and effect. And in the case of mutual executory promises, a trivial variation in setting out the contract is fatal. Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140.

An allegation of a total neglect and refusal to perform an engagement is not sustained by proof of a negligent and imperfect performance. Pennsylvania, etc. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

On a plea of *nul tiel record,* a

dence offered in proof of such allegations will be excluded as immaterial.[20]

variance between the decree relied on and that offered in evidence, as to the name of one of the parties in whose favor the decree was entered, is fatal, and can not be helped by an averment that the name was inserted by mistake. Dibrell *v.* Miller, 8 Yerg. (Tenn.) 476, 29 Am. Dec. 126.

A difference of half a cent between the note declared on and the one offered in evidence is a fatal variance. Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77. Names, sums, magnitudes, dates, durations, and terms are matters of essential description, and must, in general, be precisely proved. In declaring on contract it need not be recited *in haec verba;* but if it be so recited, the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated; and if there be a failure in either mode, an exception may be taken for the variance, and the instrument cannot be given in evidence. Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77.

Variance is fatal, whether an action is in case *ex contractu* or *ex delicto,* where the declaration alleges a special contract for unusual dispatch in transporting merchandise, and the evidence does not tend to prove that there was any agreement for unusual dispatch. Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398. Or where plaintiff declares upon a parol promise, and the proof shows a sealed instrument. Dougherty *v.* Matthews, 35 Mo. 520, 88 Am. Dec. 126. And where several sue for an injury to property alleged to belong to them jointly, they can recover only for damage to such property as they prove belonged to them in a joint capacity. St. Louis, etc. R. Co. *v.* Linder, 39 Ill. 433, 89 Am. Dec. 319.

What Variances Are Immaterial. A variance between the date of the bond declared on and that recited in the award is not fatal, if in other respects they agree; thus if the bond declared on have the month blank, and the award recites the month, it will not be fatal. Ross *v.* Overton, 3 Call (Va.) 309, 2 Am. Dec. 552.

A variance in mere matter of form between the record of acquittal offered and that pleaded is not sufficient to warrant its exclusion as evidence, especially when the prosecution out of which the acquittal arose was for a misdemeanor only. Adams *v.* Lisher, 3 Blackf. (Ind.) 241, 25 Am. Dec. 102.

Averments of matters of substance in a declaration need only be proved substantially, but matters of description must be proved exactly. And where assumpsit is brought to recover money alleged to be due from the defendant to the plaintiff, and by mistake omitted in a settlement between them, the averments of the time of such settlement, and of the particular sum due, and not embraced therein, are averments of matters of substance, not of description. Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128.

Immaterial allegations are not required to be proved as laid, unless they are of such a character as to be important in ascertaining the identity of the thing which is the cause of action. Holt *v.* Inhabitants of Penobscot, 56 Me. 15, 96 Am. Dec. 429.

Where a declaration sets out a warrant which charges that property had been stolen from a person's premises, and the warrant produced in evidence charges that it was stolen from his possession, the variance is not material. Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693.

20. *United States.* — Ferguson *v.* Harwood, 7 Cranch 408.

Alabama. — Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728; Mobile etc. R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

Arkansas. — Dudney *v.* State, 22 Ark. 251.

California. — Brown *v.* Rouse, 93 Cal. 237, 28 Pac. 1044.

Connecticut. — Adams *v.* Way, 32 Conn. 160.

Georgia. — Berrien *v.* State, 83 Ga. 381, 9 S. E. 609.

Illinois. — Gridley *v.* Bloomington, 68 Ill. 47

(2.) When Containing Matter of Essential Description. — If an allegation be made in a pleading which embodies matter of essential description of that which is material to the cause of action[21] or

Indiana. — Dickensheets *v.* Kaufman, 28 Ind. 251; Higman *v.* Hood, 3 Ind. App. 456, 29 N. E. 1141.

North Carolina. — Browning *v.* Berry, 107 N. C. 231, 12 S. E. 195.

Texas. — Hill *v.* State, 41 Tex. 253.

Utah. — Holman *v.* Pleasant Grove, 8 Utah 78, 30 Pac. 72; Ternes *v.* Dunn, 7 Utah 497, 27 Pac. 692.

Vermont. — Gates *v.* Bowker, 18 Vt. 23.

21. *Alabama.* — Gilmer *v.* Wallace, 75 Ala. 220; McDonald *v.* Walker, 95 Ala. 172, 10 So. 225.

Connecticut. — House *v.* Metcalf, 27 Conn. 631.

Illinois. — Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407.

Indiana. — Wilkinson *v.* State, 10 Ind. 372; Morgan *v.* State, 61 Ind. 447.

Maine. — State *v.* Jackson, 30 Me. 29.

Maryland. — Hoke *v.* Wood, 26 Md. 453.

Minnesota. — Downs *v.* Finnegan, 58 Min. 112, 59 N. W. 981, 49 Am. St. Rep. 488.

New Hampshire. — State *v.* Copp, 15 N. H. 212; State *v.* Bailey, 31 N. H. 521.

Tennessee. — Dibrell *v.* Miller, 8 Yerg. 476, 29 Am. Dec. 126; Turner *v.* State, 3 Heisk. (Tenn.) 452.

Virginia. — Olinger *v.* M'Chesney, 7 Leigh 660.

Illustrations. — While it is not necessary, in an indictment for the theft of an animal, to describe it by ear marks, yet if this be done, the description must be proved as laid, as this becomes essential to the proper identity of the property stolen. Robertson *v.* State, 97 Ga. 206, 22 S. E. 974.

In Branch *v.* Branch, 6 Fla. 314, the court, discussing the principle announced in the text, says: "Allegations fixing the identity of that which is legally essential to the claim, can never be rejected. 1 Greenleaf Ev. 126; Purcell *v.* Macnamara, 9 East 160. This case in East furnishes an example of matters of substance, and the proof required for them. The defendant was sued in an action on the case for malicious prosecution. The plaintiff alleged in his declaration that he was acquitted at a certain term of the court, when it appeared from the record that he was acquitted at another term. The variance was held to be immaterial, because the time when the judgment was rendered was not laid in the declaration as part of the description of the record of acquittal. A similar case is that of Stoddard *v.* Palmer, 3 Barn. and Cres. 2, where a sheriff was sued for a false return to a fieri facias. The declaration stated that the judgment on which the writ issued was rendered at one term, when the record showed a different term, and this was held no variance. In these cases, it was regarded as immaterial whether the judgment passed at the term mentioned in the declaration or not, because the suit was not brought upon the judgment. The reference to the judgment was only inducement to the principal matter, which in the one case was the acquittal of the plaintiff before he commenced his action, and in the other the false return. Therefore the statement of the term of which it was rendered was superfluous, and no proof was necessary. But if the judgment had been the subject matter of the suit, it would have become the principal matter, and must have been proved precisely as laid in the declaration. The statement of the time of its rendition would then have been descriptive of the identity of that which it was essential for the plaintiff to prove, and if it had not been proved exactly as set out in the declaration, the variance would have been fatal. Another case illustrating the rule as to matters of substance is that of Bowles *v.* Miller, 3 Taunt. 137, where an action was brought for an injury to the plaintiff's residuary interest in land, and he alleged that the close, when in-

ground of defense,[22] or operates as a limitation[23] of that which is

jured was and 'continually from thence hitherto hath been and still is' in the possession of a third person. This latter part of the averment was held superfluous and not necessary to be proved. It might as well have been stricken out, for it did not affect the claim either by adding matter of substance or description. Other cases in the books show the degree of proof required in averments of descriptions. Cudlip *v.* Rundle, Carth. 202, was an action by a lessor against his tenant for negligence, etc. A demise of seventy years was alleged, when the proof was of a tenancy at will. The variance was held to be fatal. It was requisite to have alleged some tenancy, and one generally was sufficient, yet the plaintiff having unnecessarily identified it by describing the precise term, he was bound to prove it as laid. Another case is that of justification in taking cattle damage feasant, Dyer 365, where the allegation of a general freehold title was sufficient, but the defendant without any necessity for it alleged a seisin in fee, he was held to the proof of a seisin in fee because it was descriptive and limiting that which it was necessary for him to aver and prove, to-wit: a freehold title. In Savage *v.* Smith, 2 W. B. 1101, an officer was sued for extorting illegal fees on a fieri facias. Here it was required to allege only the issue of the writ, but the judgment on which it was founded was also set out. The plaintiff was required to prove judgment as he had stated it, because it particularized the principal thing, the fieri facias. The rule extracted from these and other cases in the authorities, upon the subject of variance, is that all averments in a declaration, which need not be made or proved, when made, in order to entitle the plaintiff to recover, may be stricken out or disregarded in the proofs except when they touch the identity of that which is necessary to be proved. When they go to fix the identity, they become matters of description and must be proved precisely as laid. The object for which the rule is established is to effect the same purpose as a declaration, that is, to warn the defendant of the claim or charge which is sought to be made out against him, and to enable him to plead the judgment in bar of a second suit, for the same thing. We think the rule is sound and well calculated to effect the ends of justice."

22. City Bank *v.* Press Co., 56 Fed. 260; Eichholtz *v.* Taylor, 88 Ind. 38; Gilmer *v.* Wallace, 75 Ala. 220; Dill *v.* Rather, 30 Ala. 57; Good *v.* Mylin, 8 Pa. St. 51, 49 Am. Dec. 493; Dibrell *v.* Miller, 9 Yerg. (Tenn.) 476, 29 Am. Dec. 126.

In Dibrell *v.* Miller, 8 Yerg. (Tenn.) 476, 29 Am. Dec. 126, the syllabus is as follows: "On a plea of *nul tiel record*, a variance between the decree relied on and that offered in evidence, as to the name of one of the parties in whose favor the decree was entered, is fatal, and cannot be helped by an averment that the name was inserted by mistake."

Unnecessary Averments in the Plea. — In Lincoln *v.* Thrall, 34 Vt. 110, the declaration in the second suit counted upon a judgment for the sum of five hundred and seventy-three dollars and forty-seven cents. It was held "that although it was unnecessary to describe the judgments in the plea, yet having done so, the general allegation contained in the plea, that the two suits were for the same cause of action, which would otherwise have been alone sufficient, would not aid the plea when it appeared by comparison of it with the declaration, that the judgments were for different amounts."

23. *United States.* — Lewis *v.* Hitchcock, 10 Fed. 4.

Alabama. — Floyd *v.* Ritter's Admr., 56 Ala. 356; Alexander *v.* Taylor, 56 Ala. 60; Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523; Smith *v.* Causey, 28 Ala. 655, 65 Am. Dec. 372; McDonald *v.* Walker, 95 Ala. 172, 10 So. 225.

Arkansas. — Johnson *v.* Killian, 6 Ark. 172.

material, the evidence must correspond to such allegation,[24] else

Connecticut. — Arnold *v.* Smith, 5 Day 150; Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128.

Illinois. — Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77; Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 118; Streeter *v.* Streeter, 43 Ill. 155.

Missouri. — Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342.

New York. — Vail *v.* Lewis, 4 Johns. 449, 4 Am. Dec. 300.

Illustrations. — In McDonald *v.* Walker, 95 Ala. 172, 10 So. 225, the court, in the course of its opinion, as applicable to the principle announced in the text, says: "If redundant allegations are introduced into pleading, and they are descriptive of that which is material, a variance between the allegations and proof is fatal, — of the same consequences as the variance between the allegation of an essential fact, of that which is material, and the evidence or proof of the fact. 1 Greenl. Ev. § 67. The same measure of relief may be obtainable upon the facts proved as could have been obtained if the particular facts averred had been proved, but the court cannot permit the opposite party to be misled and taken by surprise by the proof of a case differing from that set up in the pleadings, and which, it is presumed, he came prepared to meet, as it is the case he had notice to resist. Floyd *v.* Ritter, *supra;* Meadors *v.* Askew, 56 Ala. 584; Bellows *v.* Stone, 14 N. H. 175; Gilmer *v.* Wallace, 75 Ala. 220. The application of the doctrine of the foregoing authorities to the case at bar leads us to the same result attained by the city court. The contract sought to be enforced is evidenced by a bond for title upon payment of purchase money. The bill alleges that this bond was executed jointly and severally by Alberto Martin and Marion A. May. If the evidence establishes the execution of any bond, it is not that of Martin and May, but that of Martin alone. Even if it be conceded that, had the averment been that the bond was executed by Martin alone, the complainants — other considerations being pretermitted — would be entitled to the relief prayed on the evidence we find in this record, even conceding that, although the sale was made by Martin and May, and the land at the time belonged to them as tenants in common, the complainants, in view of Martin's subsequent acquisition of May's interest, would be entitled to the relief prayed on averment and proof of a bond executed by Martin alone. Conceding, for the argument, in short, that the averment that May also executed the bond was not material to complainants' case, but redundant and superfluous, yet it is descriptive of the bond, and the bond is absolutely and essentially material. And this material thing thus laid and described became material as laid and described, and had to be proved with all the particularity, so far as May's relations to it are concerned, that confessedly would have been necessary had complainants' rights in point of fact depended upon the execution of the bond by May."

24. *United States.* — Geer *v.* Board of Comrs., 97 Fed. 435.

Alabama. — Gilmer *v.* Wallace, 75 Ala. 220; McDonald *v.* Walker, 95 Ala. 172, 10 So. 225.

Connecticut. — Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Florida. — Burrett *v.* Doggett, 6 Fla. 332.

Indiana. — Dickensheets *v.* Kaufman, 28 Ind. 251.

Kentucky. — Phoenix Ins. Co. *v.* Lawrence, 4 Met. 9.

Massachusetts. — Earle *v.* Kingsbury, 3 Cush. 206, 210; Buddington *v.* Shearer, 20 Pick. 477.

Michigan. — Harrington *v.* Worden, 1 Mich. 487.

Mississippi. — Tyler *v.* State, 69 Miss. 395, 11 So. 25.

Ohio. — Conn's Admrs. *v.* Gano, 1 Ohio 484.

Pennsylvania. — Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302.

Tennessee. — Exchange & Deposit Bank *v.* Swepson, 1 Lea 355.

Vermont. — Allen *v.* Goff, 13 Vt. 148; Robinson *v.* Hurlburt, 34 Vt. 115.

a variance will be created,[25] and the action cannot be maintained without an amendment of the pleadings.[26]

(3.) What Constitutes Impertinence or Immateriality. — Surplusage, impertinence and immateriality in a pleading are one and the same thing,[27] and may be defined to be any allegation of fact not necessary to the sufficient statement of the plaintiff's cause of action[28] or the defendant's ground of defense,[29] and which may be stricken

When Matter May Be Stricken Out, and Therefore Disregarded as Being Impertinent. — In its opinion, in Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302, the court says: "Immaterial matter, which must be proved, is that which enters into the foundation of the action though the plaintiff might have succeeded without stating it. As, for instance, where occupancy is sufficient to sustain the action and the plaintiff falsely avers a particular estate or interest in the land; or where he needlessly undertakes to recite part of a deed on which the action is founded, and misrecites it; and, again, if he set forth a judgment on which a *fi. fa.* is founded, although it would have been sufficient to set forth the *fi. fa.* alone, he shall be held to prove the judgment: Bristow *v.* Wright, Doug. 667; Waun *v.* White, 2 Bl. Rep. 842; Savage *qui tam v.* Smith, Id. 1101. But if the matter introduced have no necessary connection with the action, and would be stricken out on motion, it is deemed impertinent and need not be proved. It is sometimes difficult to distinguish between what is immaterial and that which is merely impertinent. Yet, as the modern inclination of courts is not to insist stringently upon rules which are not founded in some reason or some overruling policy, I think it may be safely assumed that where there is doubt of the character of an averment, it is best to class it with those subject to rejection as surplusage."

25. *United States.* — Union Stock Yds. Bank *v.* Gillespie, 137 U. S. 411.
Alabama. — Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728.
California. — Brown *v.* Rouse, 93 Cal. 237, 28 Pac. 1044.
Florida. — Walker *v.* Parry, 51 Fla. 344, 40 So. 69.
Georgia. — Berrien *v.* State, 83 Ga. 381, 9 S. E. 609.
Illinois. — Chicago & A. R. Co. *v.* Heinrich, 157 Ill. 388, 41 N. E. 860; Gridley *v.* City of Bloomington, 68 Ill. 47.
Indiana. — Higman *v.* Hood, 3 Ind. App. 456, 29 N. E. 1141; Johnson *v.* Murray, 112 Ind. 154, 13 N. E. 273.
Michigan. — Lull *v.* Davis, 1 Mich. 77.
New York. — Elting *v.* Dayton, 63 Hun 629, 17 N. Y. Supp. 849.
North Carolina. — Browning *v.* Berry, 107 N. C. 231, 12 S. E. 195.
Texas. — Galveston, etc. R. Co. *v.* Becht, (Tex. Civ. App.), 21 S. W. 971.
Utah. — Ternes *v.* Dunn, 7 Utah 497, 27 Pac. 692.
Vermont. — Gates *v.* Bowker, 18 Vt. 23.
Washington. — Tacoma Mill Co. *v.* Perry, 40 Wash. 44, 82 Pac. 140.

26. Bradley *v.* Reynolds, 61 Conn. 271, 278, 23 Atl. 928; Adams *v.* Capital State Bank, 74 Miss. 307, 20 So. 881; State *v.* Whitehouse, 95 Me. 179, 49 Atl. 869; State *v.* Watson, 141 Mo. 338, 42 S. W. 726; Bragaw *v.* Bolles, 51 N. J. Eq. 84, 25 Atl. 947; Harrison *v.* Perea, 168 U. S. 311.

27. Pharr *v.* Bachelor, 3 Ala. 237, 245; Whitewell *v.* Thomas, 9 Cal. 499; Green *v.* Palmer, 15 Cal. 411, 416, 76 Am. Dec. 492; Johns *v.* Pattee, 55 Iowa 665, 8 N. W. 663; Harrison *v.* Perea, 168 U. S. 311; Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302.

28. Harrison *v.* Perea, 168 U. S. 311; Hood *v.* Inman, 4 Johns. Ch. (N. Y.) 437, 438; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; Wilkinson *v.* Dodd, 42 N. J. Eq. 234, 7 Atl. 327; Bromberg *v.* Bates, 98 Ala. 621, 13 So. 557.

29. *United States.* — Wood *v.* Mann, 1 Sumn. 578, 30 Fed. Cas.

out without affecting either the right of action or the defense.[30]

C. Suits in Equity. — a. *General Principle.* — It is settled by an unbroken line of decisions that the evidence in a suit in equity

No. 17,952; Harrison *v.* Perea, 168 U. S. 311; Stokes *v.* Farnsworth, 99 Fed. 836; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14.

Alabama. — Bromberg *v.* Bates, 98 Ala. 621, 13 So. 557, 560.

Iowa. — Johns *v.* Pattee, 55 Iowa 665, 8 N. W. 663.

New Jersey. — Hutchinson *v.* Van Voorhis, 54 N. J. Eq. 439, 35 Atl. 371.

New York. — Hood *v.* Inman, 4 Johns. Ch. 437; Woods *v.* Morrell, 1 Johns. Ch. 103.

30. *United States.* — Wood *v.* Mann, 1 Sumn. 578, 30 Fed. Cas. No. 17,952; Harrison *v.* Perea, 168 U. S. 311.

Connecticut. — Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Indiana. — State *v.* Sarlls, 135 Ind. 195, 34 N. E. 1129, 1130.

Maine. — State *v.* Whitehouse, 95 Me. 179, 49 Atl. 869, 871.

Mississippi. — Adams *v.* Capital State Bank, 74 Miss. 307, 20 So. 881.

New Jersey. — Hutchinson *v.* Van Voorhis, 54 N. J. Eq. 439, 35 Atl. 371, 373.

New York. — Woods *v.* Morrell, 1 Johns. Ch. 103, 106.

West Virginia. — Doonan *v.* Glynn, 26 W. Va. 225; Lamb *v.* Cecil, 25 W. Va. 288; Floyd *v.* Jones, 19 W. Va. 359.

Alteration of Contract. — A variance which does not change the nature of the contract is not material. Ferguson *v.* Harwood, 7 Cranch (U. S.) 408; Cannell *v.* Milburn, 3 Cr. (C. C.) 424, 5 Fed. Cas. No. 2,384.

Test Determining Impertinence or Immateriality. — "There are cases where unnecessary particularity of averment will require a corresponding exactness in proof to avoid a variance. This is so whenever the unnecessary matter cannot be stricken out without destroying the right of action, or where it identifies the contract or fact averred. In the case before us, the contract sued on is pleaded as one made by the defendants as partners, thus distinguishing it from any joint contract of theirs, not made as partners. If the plaintiffs might support the averment by proof of a joint liability, not as partners, it is clear that the form of pleading might be used to mislead. It seems to be settled, that in such a case the allegation and the proof must correspond." Dickensheets *v.* Kaufman, 28 Ind. 251.

In Tyler *v.* State, 69 Miss. 395, 11 So. 25, the court in its opinion, discussing the principle stated in the text, said: "In the case of John (a slave) *v.* State, 24 Miss. 569, the indictment charged that the accused was the property of John D. Cook, and it was held that, although the averment was unnecessary, and need not have been made, yet, being inserted in the indictment, it became essential as descriptive of the person of the accused, and must be proved. In speaking of the rule that immaterial averments may be rejected as surplusage, the court said: 'But this rule has never been held to apply to allegations which, however unnecessary, are nevertheless connected with and descriptive of that which is material; or, in other words, to averments which might with propriety have been dispensed with, but, being inserted in the indictment, are descriptive of the identity of that which is legally essential to the charge. As, for example, an indictment for stealing a black horse will not be supported by proof that the horse was of some other color, for the allegation of color is descriptive of that which is legally essential to the offense and cannot be rejected.' In Dick (a slave) *v.* State, the indictment unnecessarily charged that the defendant was a negro. The evidence showed him to be a mulatto. The variance was held to be fatal. 30 Miss. 631. Where the entire averment, of which the descriptive matter is a part, is surplusage, it may be rejected, and the descriptive averment need not be proved. 1

must harmonize with the case alleged in the bill,[31] or a variance will be created[32] and the suit cannot be maintained.[33] The plaintiff cannot allege one case and prove another,[34] although the evidence

Bish. Crim. Proc. 488. But it must be proved as charged wherever, if the person, thing, act, place, or time to which it refers was struck from the indictment, no offense would be charged."

31. *United States.* — Surget *v.* Byers, Hempst. 715, 23 Fed. Cas. No. 13, 629; Brooks *v.* Stolley, 4 McLean 275, 4 Fed. Cas. No. 1,963.

Alabama. — Hooper *v.* Strahan, 71 Ala. 75; Evans *v.* Battle, 19 Ala. 398; Helmetag *v.* Frank, 61 Ala. 67.

Colorado. — Francis *v.* Wells, 2 Colo. 660.

Georgia. — Keaton *v.* McGwier, 24 Ga. 217.

Illinois. — Morris *v.* Tillson, 81 Ill. 607; Comr. of Highways *v.* Deboe, 43 Ill. App. 25.

Indiana. — Peelman *v.* Peelman, 4 Ind. 612.

Kentucky. — Lemaster *v.* Burckhart, 2 Bibb 25.

Maryland. — Small *v.* Owings, 1 Md. Ch. 363.

Michigan. — Harwood *v.* Underwood, 28 Mich. 427; Rudd *v.* Rudd, 33 Mich. 101.

Missouri. — Lenox *v.* Harrison, 88 Mo. 491.

New Jersey. — Midmer *v.* Midmer, 26 N. J. Eq. 299; Lehigh Val. R. Co. *v.* McFarlan, 30 N. J. Eq. 180.

New York. — Kelsey *v.* Western, 2 N. Y. 500.

North Carolina. — Mallory *v.* Mallory, 45 N. C. (Busb. Eq.) 80.

Ohio. — Dille *v.* Woods, 14 Ohio 122.

Pennsylvania. — Edwards *v.* Brightly, 44 Leg. Int. 132.

Tennessee. — Shaw *v.* Patterson, 2 Tenn. Ch. 171.

Vermont. — Barrett *v.* Sargeant, 18 Vt. 365.

Virginia. — Pigg *v.* Corder, 12 Leigh 69.

West Virginia. — Floyd *v.* Jones, 19 W. Va. 359.

Wisconsin. — Williams *v.* Starr, 5 Wis. 534.

32. *Alabama.* — Helmetag *v.* Frank, 61 Ala. 67.

Georgia. — McCallam *v.* Carswell, 75 Ga. 25.

Indiana. — Judy *v.* Gilbert, 77 Ind. 96, 40 Am. Rep. 289.

Iowa. — Singleton *v.* Scott, 11 Iowa 589.

Mississippi. — Kidd *v.* Manley, 6 Cushm. 156.

New Hampshire. — Tilton *v.* Tilton, 9 N. H. 385; Farrar *v.* Crosby, 27 N. H. 9.

New Jersey. — Andrews *v.* Farnham, 10 N. J. Eq. 91.

Wisconsin. — Flint *v.* Jones, 5 Wis. 424.

33. *Alabama.* — Morgan *v.* Crabb, 3 Port. 470; Burns *v.* Hudson, 37 Ala. 62; Helmetag *v.* Frank, 61 Ala. 67; Pollard *v.* Murrell, 6 Ala. 661.

Georgia. — McCallam *v.* Carswell, 75 Ga. 25.

Iowa. — Singleton *v.* Scott, 11 Iowa 589.

Mississippi. — Pinson *v.* Williams, 1 Cushm. 64; Kidd *v.* Manley, 6 Cushm. 156.

New Hampshire. — Tilton *v.* Tilton, 9 N. H. 385; Farrar *v.* Crosby, 27 N. H. 9.

New Jersey. — Andrews *v.* Farnham, 10 N. J. Eq. 91; Pasman *v.* Montague, 30 N. J. Eq. 385.

Wisconsin. — Flint *v.* Jones, 5 Wis. 424.

34. *United States.* — Piatt *v.* Vattier, 9 Pet. 405.

Alabama. — Helmetag *v.* Frank, 61 Ala. 67; Evans *v.* Battle, 19 Ala. 398.

Georgia. — McCallam *v.* Carswell, 75 Ga. 25.

Illinois. — Ewing *v.* Sandoval C. & M. Co., 110 Ill. 290.

Indiana. — Judy *v.* Gilbert, 77 Ind. 96, 40 Am. Rep. 289.

Iowa. — Singleton *v.* Scott, 11 Iowa 589.

Michigan. — Peckham *v.* Buffam, 11 Mich. 529.

Mississippi. — Pinson *v.* Williams, 1 Cushm. 64; Kidd *v.* Manley, 6 Cushm. 156.

New Jersey. — Andrews *v.* Farnham, 10 N. J. Eq. 91.

adduced may show a right to relief under proper allegations in the bill.[35].

b. *Substance of Bill Only Need Be Proved.* — It is only necessary that the evidence substantially support the allegations of the bill;[36] and relief will not be denied because the evidence fails to support the bill in some unimportant particular.[37] Illustrations of this principle are found in the notes.[38]

35. *United States.* — Henry *v.* Suttle, 42 Fed. 91.

Alabama. — Evans *v.* Battle, 19 Ala. 398; Helmetag *v.* Frank, 61 Ala. 67; Meadors *v.* Askew, 56 Ala. 584.

Illinois. — Ewing *v.* Sandoval C. & M. Co., 110 Ill. 290.

Indiana. — Judy *v.* Gilbert, 77 Ind. 96, 40 Am. Rep. 289.

Michigan. — Peckham *v.* Buffam, 11 Mich. 529.

Mississippi. — Pinson *v.* Williams, 1 Cushm. 64.

New Hampshire. — Bellows *v.* Stone, 14 N. H. 175.

New Jersey. — Andrews *v.* Farnham, 10 N. J. Eq. 91; Hoyt *v.* Hoyt, 27 N. J. Eq. 399.

36. *United States.* — Moore *v.* Crawford, 130 U. S. 122.

Alabama. — Eldridge *v.* Turner, 11 Ala. 1049.

Connecticut. — Sacket *v.* Hillhouse, 5 Day 551.

Florida. — Lee *v.* Patten, 34 Fla. 149, 15 So. 775.

Iowa. — Saum *v.* Stingley, 3 Iowa 514.

Kentucky. — Hart's Devisees *v.* Hawkin's Heirs, 3 Bibb 502.

New Jersey. — Hooper *v.* Holmes, 11 N. J. Eq. 122.

New York. — Sears *v.* Barnum, 1 Clarke Ch. 139; Ontario Bank *v.* Schermerhorn, 10 Paige Ch. 109.

Pennsylvania. — Woods *v.* McMillan, 32 Pittsb. Leg. 363.

37. *United States.* — Boone *v.* Chiles, 10 Pet. 177; Smith *v.* City of Portland, 30 Fed. 734; American Cable R. Co. *v.* Mayor of New York, 68 Fed. 227.

Alabama. — Eldridge *v.* Turner, 11 Ala. 1049; Gilchrist *v.* Gilmer, 9 Ala. 985; Helmetag *v.* Frank, 61 Ala. 67; Crabb's Admr. 4 Thomas, 25 Ala. 212; Skinner *v.* Barney, 19 Ala. 698; Morrow *v.* Turney's Admr., 35 Ala. 131.

Connecticut. — Sacket *v.* Hillhouse, 5 Day 551.

Florida. — Lee *v.* Patten, 34 Fla. 149, 15 So. 775.

Georgia. — McCallam *v.* Carsewell, 75 Ga. 25.

Illinois. — Adams *v.* Gill, 158 Ill. 190, 41 N. E. 738; Brockhausen *v.* Bochland, 137 Ill. 547, 27 N. E. 458; Marvin *v.* Collins, 98 Ill. 510.

Iowa. — Hood *v.* Smith, 79 Iowa 621, 44 N. W. 903.

Michigan. — Webster *v.* Peet, 97 Mich. 326, 56 N. W. 558.

Mississippi. — Keaton *v.* Miller, 38 Miss. 630.

New Hampshire. — Bellows *v.* Stone, 14 N. H. 175.

Tennessee. — Crow *v.* Blythe, 3 Hayw. 236.

Vermont. — Weston *v.* Cushing, 45 Vt. 531.

Virginia. — Zane's Devisees *v.* Zane, 6 Munf. 406; Campbell *v.* Bowles' Admr., 30 Gratt. 652.

38. Eldridge *v.* Turner, 11 Ala. 1049; Gilchrist *v.* Gilmer, 9 Ala. 985; Zane's Devisees *v.* Zane, 6 Munf. (Va.) 406; Booth *v.* Wiley, 102 Ill. 84, 104-113; Ewing *v.* Sandoval C. & M. Co., 110 Ill. 290.

Unimportant Particulars. — Johnston *v.* Glancy, 4 Blackf. (Ind.) 94. "Where there is enough in the bill to warrant the relief, and the defendant could not have been taken by surprise, the decree should not be reversed on the ground that the allegata and the probata do not sufficiently agree to justify it." Moore *v.* Crawford, 130 U. S. 122.

Eldridge *v.* Turner, 11 Ala. 1049, related to a certain note to be held for the use of the plaintiff to the suit, and the allegation as to this matter was that the payee "was to keep the note for the use and benefit of the complainant, until he attained his majority, and then it should be delivered to him; while

D. Criminal Cases. — a. *General Rule.* — The rule that the evidence must substantially correspond to the pleadings applies to

the witness merely proves that the money as indicated by the note was to be paid for the use and benefit of the complainant. This discrepancy between the allegation and proof is in our judgment unimportant."

Bill To Set Aside Fraudulent Conveyance. — If a suit be brought to set aside a fraudulent conveyance of land, the complainant will not be required to prove the worth of the property precisely as alleged in the bill. Lloyd *v.* Higbee, 25 Ill. 494. The court in its opinion in this case says, at page 497: "It is likewise urged that the evidence fails to show that the land is worth one thousand dollars, as alleged in the bill, and that as the proof fails to support this allegation, the decree should be reversed. We do not understand the practice to require that this allegation should be proved precisely as made, but if substantially proved it will suffice. The principal object in making and proving this allegation is to afford evidence that the person defrauded did not design to enter into the agreement, as the fact that property is not usually sold for a small fraction of its value."

Variance Not Material. — It is held that a variance between the allegations in a bill in chancery and the proofs, when not material to the rights of the parties, or upon a point not affecting the merits, is not fatal to the relief sought, when it can be maintained upon other grounds; and that allegations which are of such character that the defendant cannot properly inquire whether they have been proven, are not to be regarded as material. Booth *v.* Wiley, 102 Ill. 84.

Substantial Correspondence. — In Hart's Devisees *v.* Hawkins' Heirs, 3 Bibb (Ky.) 502, it was argued that the bill of the complainants did not set out a case corresponding to the proof, and that therefore a decree ought not to be pronounced in their favor upon evidence differing from the allegations in the bill. As to this point, the court in the course of its opinion says: "The bill sets forth a right upon the articles of copartnership, the application of the funds in the purchase of the lands, and the letter of 1784, as relating back to the purchase and recognizing the right from its origin. The evidence of Barton has relation to the same purchase, and would, was the matter contained in it most specially charged, claim the same decree as that set forth in the bill. It is not necessary to set forth the facts in the minutiae of the evidence — a substantial correspondence is sufficient."

Mode of Fraud Charged. — It is said in Merrill *v.* Allen, 38 Mich. 487, that "where fraud is alleged as the foundation of the relief sought, it will be but seldom indeed that the complainant will be able to set forth fully the correct theory of the case in his bill. And this will be especially true where the party defrauded has died and the proceedings are commenced by his representatives. Where parties contemplate the commission of a fraud, they usually intend to conduct and carry out the entire matter not only in secret, but to so cover up their tracks that the entire negotiations will, upon their face, appear fair, reasonable and honest, the result alone indicating the successful accomplishment of a gross fraud. Under such circumstances, to require the complainant, or in case of her death, her representatives, to set forth clearly and correctly the true theory of the fraudulent intent and purpose and the means adopted to accomplish it, would, in many cases, be equivalent to a denial of all relief. The complainant is but required to set forth the substance of the transaction and the result, and although the evidence when all in, may show that the fraud charged was successfully accomplished, but in some respects in a manner different from that charged, yet the complainant will not thereby be denied relief. Tong *v.* Marvin, 15 Mich. 60; Wilson *v.* Eggleston, 27 Mich. 261."

Concerning Deed. — Caton *v.* Raber, 56 W. Va. 244, 49 S. E. 147.

Liability Established Within Scope

criminal prosecutions, as in civil cases.[39] The offense charged must be proved as laid in the pleading.[40] A variance is fatal to the prosecution,[41] unless it is of such a nature that it may be relieved from

of Subject Stated. — It is held in Harrington *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, 915, that "a person cannot sue upon one cause of action and recover upon another; but that does not apply where the cause of action is not proved as alleged, yet a liability is established within the scope of the subject stated, and everything in respect thereto is fully litigated so that an amendment might properly be granted conforming the pleadings thereto; nor militate against the rule that a court of equity having taken jurisdiction of the subject-matter for one purpose, which is not fully established on the trial, a liability notwithstanding being established on a full hearing, within the scope of such subject, the court will retain the case and grant such relief as is within its jurisdiction to afford."

39. *United States.* — United States *v.* Keen, 1 McLean 429, 26 Fed. Cas. No. 15,510.

Alabama. — Thomas *v.* State, 111 Ala. 51, 20 So. 617.

Arkansas. — Hany *v.* State, 9 Ark. 193.

Illinois. — Davis *v.* People, 19 Ill. 74; Rice *v.* People, 38 Ill. 435.

Indiana. — Morgan *v.* State, 61 Ind. 447.

Iowa. — State *v.* Crogan, 8 Iowa 523.

Kentucky. — Com. *v.* Magowan, 1 Met. 368, 71 Am. Dec. 480.

Maine. — State *v.* Jackson, 30 Me. 29.

Missouri. — State *v.* Smith, 31 Mo. 120.

New York. — People *v.* Slater, 5 Hill 401.

Tennessee. — Turner *v.* State, 3 Heisk. 452.

Texas. — Collier *v.* State, 4 Tex. App. 12; Coffelt *v.* State, 27 Tex. App. 608, 11 S. W. 639, 11 Am. St. Rep. 205.

Virginia. — Morgan *v.* Com., 90 Va. 80, 21 S. E. 826.

40. Fisher *v.* State, 46 Ala. 717; Watson *v.* State, 29 Ark. 299; Durham *v.* State, 1 Blackf. (Ind.) 33; Farris *v.* Com., 90 Ky. 637, 14 S. W. 681; State *v.* Hunter, 43 La. Ann. 157, 8 So. 624; State *v.* Ryan, 15 Or. 572, 16 Pac. 417; State *v.* Johnson, 45 S. C. 483, 23 S. E. 619.

41. *Alabama.* — Page *v.* State, 61 Ala. 16; Crawford *v.* State, 112 Ala. 1, 21 So. 214; Parker *v.* State, 111 Ala. 72, 20 So. 641.

California. — People *v.* Strassman, 112 Cal. 683, 45 Pac. 3.

Georgia. — Garlington *v.* State, 97 Ga. 629, 25 S. E. 398.

Illinois. — Liomouze *v.* People, 58 Ill. App. 314.

Missouri. — State *v.* Wells, 134 Mo. 238, 35 S. W. 615.

Nebraska. — Casey *v.* State, 49 Neb. 403, 68 N. W. 643.

Charge of Perjury. — Where the accusation is that defendant committed perjury in qualifying as surety on the bail bond of a person held to answer for the crime of grand larceny, and the evidence shows that such person was in fact arrested, examined, and held on a charge of robbery, the variance is fatal. People *v.* Strassman, 112 Cal. 683, 45 Pac. 3.

Sale of Intoxicating Liquors. — An indictment charging that the defendant gave away liquors in a specified building is not sustained by proof of a sale and gift in some other place. Bryant *v.* State, 62 Ark. 459, 36 S. W. 188.

Larceny. — Evidence of embezzlement is a fatal variance from an indictment which charges larceny only. Parker *v.* State, 111 Ala. 72, 20 So. 641.

Receiving Deposit by Insolvent Bank. — An allegation in an indictment that defendant received a deposit in a bank, knowing it to be insolvent, is not supported by evidence that he assented to its receipt by another person. State *v.* Wells, 134 Mo. 238, 35 S. W. 615.

Indicted as Principal Not To Be Convicted as Accessory. — In those jurisdictions where the common law rule has not been modified by statute, a person charged as principal cannot

by amendment where such an amendment is authorized by virtue of statute.[42]

b. *Where Variance Is Not Material.* — Notwithstanding the strictness required in criminal procedure, if the variation of the evidence from the allegations of the accusation is only as to matters not material,[43] the evidence is sufficient and there is no variance.[44]

be convicted by evidence showing him to be an accessory, either before or after the fact. Casey *v.* State, 49 Neb. 403, 68 N. W. 643; Wagner *v.* State, 43 Neb. 1, 61 N. W. 85; Noland *v.* State, 19 Ohio 131; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484; Thornton *v.* Com., 24 Gratt. (Va.) 657; Hatchet *v.* Com., 75 Va. 925.

42. *Alabama.* — Page *v.* State, 61 Ala. 16; Crawford *v.* State, 112 Ala. 1, 21 So. 214.

Florida. — Burroughs *v.* State, 17 Fla. 643.

Louisiana. — State *v.* Holmes, 23 La. Ann. 604; State *v.* Buchanan, 35 La. Ann. 89; State *v.* Morgan, 35 La. Ann. 1139; State *v.* Hanks, 39 La. Ann. 234, 1 So. 458; State *v.* Ware, 44 La. Ann. 954, 11 So. 579; State *v.* Peterson, 41 La. Ann. 85, 6 So. 527; State *v.* Christian, 30 La. Ann. 367.

Mississippi. — Rocco *v.* State, 37 Miss. 357; Haywood *v.* State, 47 Miss. 1; Miller *v.* State, 68 Miss. 221, 8 So. 273; Murrah *v.* State, 51 Miss. 675; Garvin *v.* State, 52 Miss. 207; Miller *v.* State, 53 Miss. 403.

New York. — People *v.* Richards, 44 Hun 278.

Pennsylvania. — Rough *v.* Com., 78 Pa. St. 495; Rosenberger *v.* Com., 118 Pa. St. 77, 11 Atl. 782.

Vermont. — State *v.* Arnold, 50 Vt. 731; State *v.* Casavant, 64 Vt. 405, 23 Atl. 636.

Date of Offense. — An indictment charging that the offense was committed on a designated day in the year "one thousand eight hundred and ninety" may be amended by inserting the word "five" after the word "ninety," whether or not the omission was a mere clerical error. State *v.* May, 45 S. C. 509, 23 S. E. 513. See in this connection, Huff *v.* State, 23 Tex. App. 291, 4 S. W. 890; People *v.* Hamilton, 76 Mich. 212, 42 N. W. 1131; State *v.* Pierre, 39 La. Ann. 915, 3 So. 60; Myers *v.* Com., 79 Pa. St. 308.

Robbery. — A complete variance between the name of the person from whose possession the money is alleged to have been taken in an indictment for robbery and the name as shown by the evidence is within the scope of Mont. Pen. Code, § 1859, providing that upon the trial of an indictment, when a variance between the allegation therein and the proof in the name or description of any place, person or thing shall appear the court may in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended according to the proof on such terms as to postponement of the trial as the court may deem reasonable. State *v.* Oliver, 20 Mont. 318, 50 Pac. 1018.

43. *United States.* — United States *v.* Stevens, 4 Wash. C. C. 547, 27 Fed. Cas. No. 16,394.

Alabama. — Pharr *v.* Bachelor, 3 Ala. 237.

Arkansas. — State Bank *v.* Peel, 11 Ark. 750.

Indiana. — Carlisle *v.* State, 32 Ind. 55; Luck *v.* State, 96 Ind. 16; Johnson *v.* State, 13 Ind. App. 299, 41 N. E. 550.

Iowa. — State *v.* Verden, 24 Iowa 126.

Kansas. — State *v.* Bain, 43 Kan. 638, 23 Pac. 1070; State *v.* Nugent, 51 Kan. 297, 32 Pac. 1123.

Massachusetts. — Com. *v.* Riggs, 14 Gray 376, 77 Am. Dec. 333; Com. *v.* Intoxicating Liquors, 113 Mass. 208.

North Carolina. — State *v.* Patterson, 98 N. C. 666, 4 S. E. 540.

Pennsylvania. — Heikes *v.* Com., 26 Pa. St. 513.

44. Illustrations. — Perjury. Where an indictment charging perjury avers that the oath was administered by the court, evidence that it was administered by the presiding judge or by the clerk is not a fatal variance. State *v.* Caywood, 96 Iowa 367, 65 N. W. 385.

Burglary. — Evidence in a trial for

E. Special Proceedings of a Judicial Nature. — If proceedings of a judicial nature are instituted, though not amounting to a civil or criminal action,[45] the evidence must agree substantially with the matters alleged in such proceedings.[46]

II. PRINCIPLES GOVERNING IN MATTERS OF VARIANCE.

1. At Common Law. — A. In General. — Under the rules of the common law, technical accuracy was required to avoid a variance between the pleadings and proof.[47] It is believed that this

burglary, that the building broken into was a three-story building, is not a fatal variance from an averment in the indictment that it was a two-story building. State *v.* Porter, 97 Iowa 450, 66 N. W. 745.

Name of Deceased on Charge of Murder. — An allegation charging defendant with the murder of "Robert Thomas" is sustained by evidence that he murdered "Bob Thomas." Alsup *v.* State, 36 Tex. Crim. 535, 38 S. W. 174.

False Pretenses. — The full amount of money alleged to have been obtained by defendant in an indictment for obtaining money by false pretenses need not be proved to have been obtained. Com. *v.* Sessions, 169 Mass. 329, 47 N. E. 1034.

Ownership in Larceny. — An allegation in an information for larceny, that a specified person was the owner of the stolen property, is sustained by evidence that such person was in possession of the property as the agent of the real owner with full power to sell or otherwise dispose of the same. State *v.* Farris, 5 Idaho 666, 51 Pac. 772.

Instrument as Subject of Forgery. Evidence that the abbreviation "Nos." was used in alleged forged instrument is not a fatal variance from an allegation that the word "numbers" was used therein. Shope *v.* State, 106 Ga. 226, 32 S. E. 140.

Unlawfully Influencing a Juror. An indictment charged accused with attempting to improperly influence a juror by requesting him to "see that right was done, that it would not be to his loss," and by the use of language of like import. The evidence showed that accused said to the juror: "You are the only friend I have on the jury, and I want you to look after my rights. How will it go? I will make it all right. It will not be to your loss when we meet again." *Held,* not to be a variance. State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495.

45. Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182; Hall *v.* People, 21 Mich. 456; Pritchard *v.* McKinstry, 12 La. (O. S.) 224.

Removal of Officer. — Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182, was a case involving the removal of member of the municipal council.

46. Pritchard *v.* McKinstry, 12 La. (O. S.) 224; Hall *v.* People, 21 Mich. 456; Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182; Hamilton *v.* People, 46 Mich. 186, 9 N. W. 247; City of San Jose *v.* Reed, 65 Cal. 241, 3 Pac. 806; Ball *v.* Keokuk & N. W. R. Co., 71 Iowa 306, 32 N. W. 354; City of Syracuse *v.* Benedict, 86 Hun 343, 33 N. Y. Supp. 944.

47. *Alabama.* — Milton *v.* Hayden, 32 Ala. 30, 70 Am. Dec. 523; Smith *v.* Causey, 28 Ala. 655, 65 Am. Dec. 372.

Illinois. — Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77.

Maryland. — Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302.

New York. — Sears *v.* Barnum, Clarke Ch. 139.

Pennsylvania. — Ben Franklin Fire Ins. Co. *v.* Flynn, 98 Pa. St. 627, 636; Repsher *v.* Shane, 3 Yeates 575; Grubb *v.* The Mahoning Nav. Co., 14 Pa. St. 302; Emerick *v.* Kroh, 14 Pa. St. 315; Filson *v.* Dunbar, 26 Pa. St. 475.

South Dakota. — North Star Boot & Shoe Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

rule no longer obtains in any of the state[48] or the federal courts.[49]

Texas. — McClelland *v.* Smith, 3 Tex. 210.

As applicable to the doctrine stated in the text, the supreme court of Pennsylvania, in Ben Franklin Fire Ins. Co. *v.* Flynn, 98 Pa. St. 627, 636, in the course of the opinion in that case, said: "Then we have an objection to the proofs offered to establish the waiver, for that the declaration alleges that waiver to have occurred in a manner different from that set forth in the offer of proof. But as the narr. without the special clause, the subject of controversy, would have sustained the offer, we may treat this part of it as surplusage. We understand, indeed, that by the strict rules of pleading, if an allegation is made in the declaration which may be material in the trial, though immaterial in the pleadings, it must be proved as laid. But in our times the severe rules of pleading find but little encouragement, and even so far back as the case of Repsher *v.* Shane, 3 Yeates 575, this doctrine of variance was not very strictly applied. In this case the suit was on a promise of indemnity against the recovery of damages from the plaintiff by a third person; in the declaration the amount of damages was laid at a certain sum, and on the trial the proof offered was of a different sum; yet the variance was held not to be fatal, though certainly in a case of this kind, accurate proof of the damages sustained by the plaintiff was material. Following in the track of this case of Repsher *v.* Shane, many later cases have, like it, very much relaxed the strictness of the old doctrine of variance. Among these are Grubb *v.* The Mahoning Nav. Co., 2 Har. 302; Emerick *v.* Kroh, Id. 315, and Filson *v.* Dunbar, 2 Ga. 475".

48. *Colorado.* — Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063.

Florida. — Louisville & N. R. Co. *v.* Guyton, 47 Fla. 188, 36 So. 84.

Idaho. — Lewis *v.* Utah Const. Co., 10 Idaho 214, 77 Pac. 336.

Illinois. — Comer *v.* McDonnell, 117 Ill. App. 450; Peoria Star Co. *v.* Floyd Special Agency, 115 Ill. App. 491; National E. & S. Co. *v.* Vogel, 115 Ill. App. 607; Heyman *v.* Heyman, 110 Ill. App. 87; *s. c.*, 210 Ill. 524, 71 N. E. 591; Illinois Cent. R. Co. *v.* Behrens, 106 Ill. App. 471; *s. c.*, 208 Ill. 20, 69 N. E. 796.

Kansas. — Bailey *v.* Gatewood, 68 Kan. 231, 74 Pac. 1117.

Massachusetts. — Elliott *v.* Worcester Tr. Co., 189 Mass. 542, 75 N. E. 944.

Michigan. — O'Neil *v.* Newman, 132 Mich. 489, 93 N. W. 1064.

Minnesota. — Wilcox Lumb. Co. *v.* Ritteman, 88 Minn. 18, 92 N. W. 472.

Mississippi. — New Orleans, etc. R. Co. *v.* Echols, 54 Miss. 264.

Missouri. — White *v.* Farmers' Mut. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707.

New Jersey. — Rollins *v.* Atlantic City R. Co., 73 N. J. L. 64, 62 Atl. 929.

New York. — Catlin *v.* Gunter, 11 N. Y. 368, 62 Am. Dec. 113.

North Dakota. — Halloran *v.* Holmes, 13 N. D. 411, 101 N. W. 310.

South Carolina. — Hayes *v.* Walker, 70 S. C. 41, 48 S. E. 989.

South Dakota. — Woodford *v.* Kelley, 18 S. D. 615, 101 N. W. 1069.

Texas. — Echols *v.* Jacobs Merc. Co., 38 Tex. Civ. App. 65, 84 S. W. 1082.

Virginia. — Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

Washington. — Griffith *v.* Ridpath, 38 Wash. 540, 80 Pac. 820; Sterrett *v.* Northport M. & S. Co., 30 Wash. 164, 70 Pac. 266; Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68.

49. *United States.* — Nash *v.* Towne, 5 Wall. 689; Moses *v.* United States, 166 U. S. 571; Grayson *v.* Lynch, 163 U. S. 468; Robbins *v.* Chicago, 4 Wall. 657; Washington & G. R. Co. *v.* Hickey, 166 U. S. 521; Baltimore & P. R. Co. *v.* Cumberland, 176 U. S. 232; Derham *v.* Donohue, 155 Fed. 385, 83 C. C. A. 657.

District of Columbia. — Howgate *v.* United States, 3 App. Cas. 277; Washington & G. R. Co. *v.* Hickey, 5 App. Cas. 436.

In Allen *v.* Jarvis, 20 Conn. 37, the court, having before it a question of variance, said: "We do not per-

B. Modern Rule. — The modern rule relating to variance is more liberal than the one formerly prevailing;[50] and under the present practice of the courts, which is largely regulated by statute,[51] mere technical differences between the allegations and the proof are ignored.[52] The variance, to be a material one, must

ceive any such substantial difference between an agreement to make and one to finish them, that, on a question of variance, they should be distinguished. There has been, for some time past, a disposition on the part of the courts, and one which we are not disposed to check, to abolish the refinements which once prevailed on the subject of variances; and much less strictness of proof is now tolerated than formerly. We feel no inclination to retrograde, in this respect, as we should, if we allowed an objection bordering so much on subtilty as the one here made."

"In relation to variances, courts at the present day are not confined to the rigid rule of *idem sonans*, but adopting a more liberal and reasonable one, inquire whether the variance be material or immaterial. If there be a material and substantial variance, it is fatal; otherwise it is not." Stevens *v.* Stebbins, 4 Ill. 25.

50. *Connecticut.* — Allen *v.* Jarvis, 20 Conn. 38.

Georgia. — Phillips *v.* Dodge, 8 Ga. 51; White *v.* Molyneux, 2 Ga. 124.

Illinois. — McAllister *v.* Clark, 86 Ill. 236.

Kansas. — First Nat. Bank *v.* Montgomery Bank, 64 Kan. 134, 67 Pac. 458.

Maryland. — Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302.

Massachusetts. — Com. *v.* Warner, 173 Mass. 541, 54 N. E. 353.

New Hampshire. — Silver *v.* Kendrick, 2 N. H. 160.

Vermont. — Allen *v.* Lyman, 27 Vt. 20.

51. *United States.* — Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637.

California. — Lyles *v.* Perrin, 134 Cal. 417, 66 Pac. 472; Foster *v.* Carr, 135 Cal. 83, 67 Pac. 43; Moore *v.* Douglas, 132 Cal. 399, 64 Pac. 705; Duke *v.* Huntington, 130 Cal. 272, 62 Pac. 510.

Kansas. — People's Nat. Bank *v.* Myers, 65 Kan. 122, 69 Pac. 164.

Massachusetts. — Com. *v.* Soper, 133 Mass. 393; Com. *v.* Warner, 173 Mass. 541, 54 N. E. 353; Meaney *v.* Kehoe, 181 Mass. 424, 63 N. E. 925.

Missouri. — Rumbolz *v.* Bennett, 86 Mo. App. 174.

Nebraska. — Toy *v.* McHugh, 62 Neb. 820, 87 N. W. 1059.

Oregon. — West *v.* Eley, 39 Or. 461, 65 Pac. 798.

South Dakota. — Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863.

Vermont. — Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14.

Washington. — Ernst *v.* Fox, 26 Wash. 526, 67 Pac. 258.

In Oates, Williams & Co. *v.* Kendall, 67 N. C. 241, the following is from the syllabus: "The distinction between forms of action having been abolished by the Constitution, it would defeat the purpose of that provision if a party were allowed to avail himself of an objection, founded upon such distinctions. Therefore, when a plaintiff, in his complaint, alleged and set out a case in trover, and the proof showed that it should have been in the nature of assumpsit for money had and received, it was held that the plaintiff was entitled to recover, notwithstanding the variance."

52. *Alabama.* — Andrews *v.* State, 123 Ala. 42, 26 So. 522; Manchester F. Ins. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

California. — Clark *v.* Allen, 125 Cal. 276, 57 Pac. 985.

Colorado. — Bottom *v.* Barton, 12 Colo. App. 53, 54 Pac. 1031.

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38.

Indiana. — Consolidated Stone Co. *v.* Williams, 26 Ind. App. 131, 57 N. E. 558.

Michigan. — Hasse *v.* Freud, 119 Mich. 358, 78 N. W. 131.

Minnesota. — St. Louis County *v.* American L. & T. Co., 75 Minn. 489,

be as to a matter of substance going to the very right of the cause.[53]

2. Under the Code System. — A. In General. — In the various states in which the Code system, as contradistinguished from the common-law system, prevails,[54] the rule as to variance is that it

78 N. W. 113; Anderson *v.* Johnson, 74 Minn. 171, 77 N. W. 26.

Mississippi. — Georgia Pac. R. Co. *v.* Baird, 76 Miss. 521, 24 So. 195.

Nebraska. — Vix *v.* Whyman, 58 Neb. 190, 78 N. W. 497; Hoffmann *v.* Tucker, 58 Neb. 457, 78 N. W. 941.

Nevada. — Burgess *v.* Helm, 51 Pac. 1025.

Oregon. — Denn *v.* Peters, 36 Or. 486, 59 Pac. 1109.

South Dakota. — Hermiston *v.* Green, 11 S. D. 81, 75 N. W. 819.

Texas. — Slayden *v.* Stone, 19 Tex. Civ. App. 618, 47 S. W. 747; Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63.

Utah. — Hecla Gold Min. Co. *v.* Gisborn, 21 Utah 68, 59 Pac. 518.

Virginia. — Cohen *v.* Bellenot, 32 S. E. 455.

53. *United States.* — Brown & H. Co. *v.* Ligon, 92 Fed. 851.

Alabama. — Highland Ave. & B. R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955; Ford *v.* State, 123 Ala. 81, 26 So. 503; Clemmons *v.* Cox, 116 Ala. 567, 23 So. 79.

California. — Eastlick *v.* Wright, 121 Cal. 309, 53 Pac. 654.

Georgia. — Shope *v.* State, 106 Ga. 226, 32 S. E. 140.

Illinois. — Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498.

Indiana. — McFarlan Carriage Co. *v.* Potter, 153 Ind. 107, 53 N. E. 465.

Kentucky. — Fox *v.* Pearcy, 20 Ky. L. Rep. 2031, 50 S. W. 983.

Louisiana. — Young *v.* Texas & P. R. Co., 51 La. Ann. 295, 25 So. 69.

Massachusetts. — United States Nat. Bank *v.* Venner, 172 Mass. 449, 52 N. E. 543, 9 Am. & Eng. Corp. Cas. (N. S.) 457.

Michigan. — Hewitt *v.* Morley, 111 Mich. 187, 69 N. W. 245; Whitaker *v.* Engle, 111 Mich. 205, 69 N. W. 493.

Mississippi. — A. B. Smith Co. *v.* Jones, 75 Miss. 325, 22 So. 802.

Missouri. — Gannon *v.* Laclede G. Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907.

Texas. — International & G. N. R. Co. *v.* Williams, 20 Tex. Civ. App. 587, 50 S. W. 732.

Wisconsin. — McNally *v.* McAndrews, 98 Wis. 62, 73 N. W. 315.

54. *Arkansas.* — Molen *v.* Orr, 44 Ark. 486.

California. — Began *v.* O'Reilly, 32 Cal. 11.

Colorado. — Colorado Fuel, etc. Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875.

Iowa. — Hoben *v.* Burlington, etc. R. Co., 20 Iowa 562.

Missouri. — Leslie *v.* Wabash, etc. R. Co., 88 Mo. 50.

New York. — Catlin *v.* Gunter, 11 N. Y. 368, 62 Am. Dec. 113.

North Carolina. — Abernathy *v.* Seagle, 98 N. C. 553, 4 S. E. 542; Carpenter *v.* Huffsteller, 87 N. C. 273.

Oregon. — Stokes *v.* Brown, 20 Or. 530, 26 Pac. 561.

South Dakota. — North Star Boot etc. Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

Rule Under Code System. — In Molen *v.* Orr, 44 Ark. 486, as to the principle announced in the text, the court, in the course of its opinion, says: "That there was a variance between the proof and the allegations of the complaint there is no question; but the materiality of the variance is not to be determined as at common law by the incoherence of the two statements on their face. It must be shown by the party alleging the variance that he has been misled to his prejudice. Mans. Rev. St. 5075; Newman on Pl. & Pr. 720 et seq.; Green Ib. 467. There was no pretense of surprise or of being misled in this case. Indeed the only fact in the proof that is not found in the pleadings is the dissolution of the copartnership, and the release by one copartner to the other of his interest in the matter in controversy. This evidence was admitted without objection, and we must take it that the parties deemed the variance immaterial, or that they treated the

must be such as to mislead the adverse party to his prejudice,[55] in maintaining the action or defense on the merits.[56]

complaint as amended to admit such evidence. Burke *v.* Snell, 42 Ark. 57; Green Pl. and Pr. sec. 468; Munice *v.* Brady, 15 Abb. Pr. (O. S.) 173; Speer *v.* Bishop, 24 Ohio St. 598."

The technical rules of the common law respecting a variance between the allegations and the proof — especially upon the plea of *nul tiel record* — do not in their strictness apply under Ohio Rev. Stat. §§ 5294, 5295. Brady *v.* Palmer, 19 Ohio C. C. 687.

When Party Misled to His Prejudice. — "A variance between the pleadings and the proofs is not material, unless the adverse party is thereby misled to his prejudice in maintaining his action or defense on the merits. That he is so misled he must prove to the satisfaction of the court, and then the court may order the pleading to be amended on such terms as may be just." Short *v.* McRea, 4 Minn. 119.

55. *Arkansas.* — Molen *v.* Orr, 44 Ark. 486.

California. — Herman *v.* Hecht, 116 Cal. 553, 48 Pac. 611; Cockins *v.* Cook, 41 Pac. 406; Peters *v.* Foss, 20 Cal. 586; Hitchcock *v.* McElrath, 72 Cal. 565, 14 Pac. 305.

Colorado. — Rio Grande W. R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Michigan. — Mason *v.* School District No. 1, 34 Mich. 228.

Missouri. — Fischer *v.* Max, 49 Mo. 404; State *v.* Harl, 137 Mo. 252, 38 S. W. 919.

New Jersey. — Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268.

New York. — State *v.* Lamb, 141 Mo. 298, 42 S. W. 827; Baily *v.* Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645; Cotheal *v.* Talmadge, 1 E. D. Smith 573; Barrick *v.* Austin, 21 Barb. 241; McNair *v.* Gilbert, 3 Wend. 344; Smith *v.* Hicks, 5 Wend. 48; Willis *v.* Orser, 6 Duer (N. Y. Super.) 322; Milbank & Co. *v.* Dennistoun, 1 Bosw. (N. Y. Super.) 246; Seaman *v.* Low, 4 Bosw. (N. Y. Super.) 337; Craig *v.* Ward, 36 Barb. 377; Dunn *v.* Durant, 9 Daly 389.

North Carolina. — Lawrence *v.* Hester, 93 N. C. 79; Mode *v.* Penland, 93 N. C. 292.

Utah. — Culmer *v.* Clift, 14 Utah 286, 47 Pac. 85; Bullion etc. Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

Wisconsin. — Herrick *v.* Graves, 16 Wis. 157.

56. *California.* — Herman *v.* Hecht, 116 Cal. 553, 48 Pac. 611.

Indiana. — Jenney Elec. Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 36 L. R. A. 395; Consolidated Stone Co. *v.* Williams, 26 Ind. App. 131, 57 N. E. 558.

Kentucky. — Dorsey *v.* Swann, 19 Ky. L. Rep. 1387, 43 S. W. 692.

Missouri. — State *v.* Lamb, 141 Mo. 298, 42 S. W. 827; State *v.* Harl, 137 Mo. 252, 38 S. W. 919.

North Carolina. — Mode *v.* Penland, 93 N. C. 292.

Ohio. — Ralston *v.* Kohl's Admr., 30 Ohio St. 92.

South Dakota. — North Star Boot & Shoe Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

Texas. — McClelland *v.* Smith, 3 Tex. 210; Hays *v.* Samuels, 55 Tex. 560; Wiebusch *v.* Taylor, 64 Tex. 53; Mast *v.* Nacogdoches County, 71 Tex. 380, 9 S. W. 267; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Gunter *v.* Lillard, 1 Tex. Civ. App. 325, 21 S. W. 118.

Utah. — Holman *v.* Pleasant Grove City, 8 Utah 78, 30 Pac. 72.

Illustrations. — In Hoben *v.* Burlington & M. River R. Co., 20 Iowa 562, at page 565, the court says: "Of course, mere verbal, technical or other variances, not affecting the merits, will be disregarded."

The variance between a petition averring that defendant entered upon plaintiff's premises without her consent and against her will and placed beams or braces against her house, and the evidence which is merely to the effect that the plaintiff consented to an entry upon her lot by defendants to place jack screws, does not require a reversal, in view of Ky. Civ. Code Prac. § 129, providing that no variance between pleading and proof is material, which does not

B. Showing That the Party Has Been Misled. — If upon the introduction of the evidence it is claimed that the adverse party has been misled by the variance, it must be made to appear to the satisfaction of the court that he has been so misled,[57] and in some states in what respect.[58] If the variance be of such a character as

mislead a party to his prejudice in maintaining his action or defense upon the merits. Fox *v.* Pearcy, 20 Ky. L. Rep. 2031, 50 S. W. 983.

Evidence that defendant sought to be held liable on a contract signed by him, signed the same as a surety, is not a fatal variance from an allegation that he signed it as principal obligor, in the absence of anything to exonerate him from liability, or that he had been misled by such allegation. Hermiston *v.* Green, 11 S. D. 81, 75 N. W. 819.

Purchase Price of Land. — Where the complaint in an action to recover a part of the purchase price of land alleged that defendant agreed to pay $200 in one year, which was alleged to be due, and that the balance should be paid in annual instalments, and the evidence disclosed an agreement to pay only $100 the first year, the variance was not material, under Hill's Ann. Laws, § 96, declaring that no variance between the pleadings and proof shall be deemed material unless it actually misled the adverse party to his prejudice. Denn *v.* Peters, 36 Or. 486, 59 Pac. 1109.

See in connection with the doctrine stated in the text the following cases: Hecla Gold Min. Co. *v.* Gisborn, 21 Utah 68, 59 Pac. 518; Hofmann *v.* Tucker, 58 Neb. 457, 78 N. W. 941; Bottom *v.* Barton, 12 Colo. App. 53, 54 Pac. 1031; Georgia Pac. R. Co. *v.* Baird, 76 Miss. 521, 24 So. 195; Slayden *v.* Stone, 19 Tex. Civ. App. 618, 47 S. W. 747.

57. *Arkansas.* — Molen *v.* Orr, 44 Ark. 486.

California. — Plate *v.* Vega, 31 Cal. 383; Began *v.* O'Reilly, 32 Cal. 11; Stout *v.* Coffin, 28 Cal. 65.

Colorado. — Colorado Fuel etc. Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875; Rio Grande W. R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Michigan. — Barnhard *v.* White Cloud, 108 Mich. 508, 66 N. W. 387.

Minnesota. — Nichols & Shepard Co. *v.* Dedrick, 61 Minn. 513, 63 N. W. 1110.

Missouri. — James *v.* Hicks, 58 Mo. App. 521.

New Jersey. — Bunting *v.* Allen, 18 N. J. L. 299.

New York. — Willis *v.* Orser, 6 Duer (N. Y. Super.) 322; Craig *v.* Ward, 36 Barb. 377; Dunn *v.* Durant, 9 Daly 389; Spring *v.* Bowne, 89 Hun 10, 35 N. Y. Supp. 46; Wolcott *v.* Meech, 22 Barb. 321.

North Carolina. — Mode *v.* Penland, 93 N. C. 292.

Oregon. — Hill *v.* Mellon, 3 Or. 542.

South Dakota. — North Star Boot & S. Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

Texas. — Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288.

How Determined That Party Was Misled. — In Bunting *v.* Allen, 18 N. J. L. 299, 302, the court, in stating how it may be made to appear that a party has been misled, said: "If the variance between the particular and the evidence offered, is such, as upon its very face to mislead the party, such as the court, and every intelligent reader of the particular, must have understood as meaning something else, than that which is offered in evidence, the evidence ought to be rejected. But a trifling variance in date, or different in amount, or stating it as *cash* lent, when it was funds borrowed and to be returned in a certain way, ought not to exclude the evidence, unless the party objecting will satisfy the court he has been misled by it. If, for instance, the defendant had put in an affidavit to that effect, stating, that he had not understood the particular as referring to the funds mentioned in that writing, and that, if he had done so, he could have explained the transaction in some other way, it ought to have been rejected. This was not done, nor offered to be done."

58. Bunting *v.* Allen, 18 N. J. L.

to mislead no one, it will be regarded as an immaterial variance.[59]

299; Willis *v.* Orser, 6 Duer (N. Y. Super.) 322; Dunn *v.* Durant, 9 Daly (N. Y.) 389; Spring *v.* Bowne, 89 Hun 10, 35 N. Y. Supp. 46; Hill *v.* Mellon, 3 Or. 542; Carson *v.* Quinn, 127 Mo. App. 525, 105 S. W. 1088.

In What Respect Party Misled. In Hill *v.* Mellon, 3 Or. 542, the court, stating the rule in that jurisdiction, as laid down in the text, said: "There may, however, have been a variance between the allegations and the proofs, though whether that variance can be considered fatal, or even material, is questionable. The first clause of section 94 of the Code, provides, that 'no variance between the allegations in a pleading, and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits'. And the same section further provides that 'whenever it shall be alleged that the party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon, the court may order the pleadings to be amended upon such terms as shall be just.' A party failing to take advantage of the law in these particulars at the proper time and in the proper place in the court below, is himself at fault." And in Carson *v.* Quinn, 127 Mo. App. 525, 105 S. W. 1088, the court held: "Under Rev. St. 1899, § 655, a variance between pleadings and proof is material only when it has misled the adverse party to his prejudice, and can be taken advantage of only by allegation to that effect and an affidavit showing wherein he was misled."

59. *Arkansas.* — Molen *v.* Orr, 44 Ark. 486.

California. — Hitchcock *v.* McElrath, 72 Cal. 565, 14 Pac. 305; Cockins *v.* Cook, 41 Pac. 406; Moore *v.* Douglas, 132 Cal. 399, 64 Pac. 705.

Colorado. — Rio Grande W. R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Indiana. — Lucas *v.* Smith, 42 Ind. 103.

Iowa. — Robbins *v.* Diggins, 78 Iowa 521, 43 N. W. 306.

Kansas. — Crane *v.* Ring, 48 Kan. 61, 29 Pac. 696.

Michigan. — Mason *v.* School Dist. No. 1, 34 Mich. 228; Barnhard *v.* White Cloud, 108 Mich. 508, 66 N. W. 387.

Missouri. — James *v.* Hicks, 58 Mo. App. 521; Fischer *v.* Max, 49 Mo. 404.

Nebraska. — Kopplekom *v.* Huffman, 12 Neb. 95, 10 N. W. 577.

New Jersey. — Hallack *v.* Commercial Ins. Co., 26 N. J. L. 268; Bunting *v.* Allen, 18 N. J. L. 299.

New York. — Cotheal *v.* Talmadge, 1 E. D. Smith 573; Barrick *v.* Austin, 21 Barb. 241; Place *v.* Minster, 65 N. Y. 89; Chapman *v.* Carolin, 3 Bosw. (N. Y. Super.) 456; Dunn *v.* Durant, 9 Daly 389.

North Carolina. — Lawrence *v.* Hester, 93 N. C. 79; Mode *v.* Penland, 93 N. C. 292.

Ohio. — Ralston *v.* Kohl's Admr., 30 Ohio St. 92.

Oregon. — Hill *v.* Mellon, 3 Or. 542.

Texas. — McClelland *v.* Smith, 3 Tex. 210; Wiebusch *v.* Taylor, 64 Tex. 53; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288.

Utah. — Bullion Beck & C. Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

Wisconsin. — Herrick *v.* Graves, 16 Wis. 157; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Gifert *v.* West, 33 Wis. 617.

Party Not Misled. — Under Code Civ. Proc. § 469, providing that no variance between allegation and proof is material, unless misleading, where a complaint alleges that the debt was contracted on June 1st, proof that it was contracted on August 20th is not fatal. Cockins *v.* Cook (Cal.), 41 Pac. 406.

Plaintiff alleged that on October 15, 1854, he was owner, as mortgagee, of certain articles of merchandise, and that on the 14th of December, in that year, they were in a store occupied by the mortgagor, and that the sum secured by the mortgage was payable on demand, and that on December 14th payment was demanded and refused. On the trial plaintiff offered to prove that the possession of the merchandise

C. Where Evidence Would Bar Another Suit. — Where the evidence sustains the case made by the pleadings so that another action could not be maintained on the same evidence offered in support of the pleadings therein,[60] there is no material variance.[61]

D. Failure of Proof To Sustain Action. — Where the evidence entirely fails to make out a case, it is of no consequence whether the party was misled or not;[62] it is not a case of variance,[63] and the party must fail for want of proof.[64]

was in fact changed on the 15th of November by delivery to him. *Held*, variance immaterial and not misleading. Willis *v.* Orser, 6 Duer (N. Y. Super.) 322.

"Under Com. Laws, § 4934, providing that no variance between pleading and proof shall be deemed material unless it shall actually have misled the adverse party to his prejudice, the fact that a complaint is based on the balance of an account for merchandise, and the proof shows that the balance sued for consists of interest on the account only, does not constitute a variance." North Star Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

"In an action for personal injuries, it is immaterial that it was alleged in the petition that the injury was received at Provencal, La., while the proof showed that it was received at Robeline, La.; the defendant not having been misled thereby." Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288.

60. Reed *v.* State, 16 Ark. 499; Frazer *v.* Smith, 60 Ill. 145; Faris *v.* Lewis, 2 B. Mon. (Ky.) 375; Brewster *v.* Dana, 1 Root (Conn.) 266; United States *v.* Murphy, 3 Day 283, 27 Fed. Cas. No. 16,074.

61. Faris *v.* Lewis, 2 B. Mon. (Ky.) 375; Brewster *v.* Dana, 1 Root (Conn.) 266.

In Brewster *v.* Dana, 1 Root (Conn.) 266, the action was a case in which the declaration was for West India goods generally, while the note produced in evidence was for West India rum and sugar particularly, and the court held that a recovery for one would be no bar to an action for the other and the variance was fatal.

In Shepard *v.* New Haven & Northampton Co., 45 Conn. 54, the court in its opinion, says: "Every allegation essential to the issue must be proved in the form stated; the fact proven must be legally identical with the claim put forth; and this for the defendant's protection; first, that he may know the charge which he is to meet; secondly, if he is unable to disprove it that the judgment and verdict may protect him from another action based upon the same wrong; of course, therefore, where the evidence disproves the substance of the charge the case falls."

62. Iowa County *v.* Huston, 39 Iowa 323; Hartford County Comrs. *v.* Wise, 75 Md. 38, 23 Atl. 65; Dennis *v.* Spencer, 45 Minn. 250, 47 N. W. 795; Wesby *v.* Bowers, 58 Mo. App. 419; Clark *v.* Clark, 59 Mo. App. 532; Rich *v.* Rich, 16 Wend. (N. Y.) 663; Trowbridge *v.* Didier, 4 Duer (N. Y. Super.) 448.

63. Rosenfeld *v.* Central Vermont R. Co., 111 App. Div. 371, 97 N. Y. Supp. 905; Beck *v.* Ferrara, 19 Mo. 30; Haughey Livery & U. Co. *v.* Joyce, 41 Mo. App. 564; Chapman *v.* Carolin, 3 Bosw. (N. Y. Super.) 456; Butler *v.* Livermore, 52 Barb. (N. Y.) 570.

64. Illustrations. — Failure of Proof. — In Wesby *v.* Bowers, 58 Mo. App. 419, 422, the court says: "Their petition, as a petition for an accounting, states no cause of action, as it neither states nor prays for an account. As a bill for a dissolution of partnership it is bad, because it prays for no dissolution. The entire proof negatives the existence of a partnership. If, therefore, the petition had stated a cause of action properly, the plaintiffs could not recover, since their proof does not substantiate any cause of action either stated or attempted to be stated in their petition. This is not a mere variance, but an entire failure of proof. Cape Girardeau

E. Proof of Cause Different From That Alleged. — In most jurisdictions, if the evidence makes out an entirely different cause of action from that alleged a variance is created,[65] which cannot be

Railroad *v.* Kimmel, 58 Mo. 83; Reed *v.* Bott, 100 Mo. 62."

So, in Reed *v.* Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089, it was held that, "where a petition alleges that one of the defendants bought certain real estate, and had the same conveyed to his wife for the purpose of defrauding his creditors, and the evidence shows that the land was purchased by such defendant's father, who conveyed it to the wife, the plaintiff, who had purchased the land under a judgment against such defendant, is not entitled to a decree avoiding the conveyance, though the money paid for the land may have been the proceeds of defendant's labor, and the petition concluded with an allegation that the land in fact belonged to him."

Failure To Prove Amount of Loss. Waldrop *v.* Greenville, L. & S. R. Co., 28 S. C. 157, 5 S. E. 471.

Failure To Prove Negligence. Hale *v.* Columbia & G. R. Co., 34 S. C. 292, 13 S. E. 537.

In Matter of Contract. — The court in the course of its opinion in Dennis *v.* Spencer, 45 Minn. 250, 47 N. W. 795, says: "The complaint, in legal effect, alleged the contract upon which a recovery was sought to have been made between the plaintiff and the defendant. If no such contract be shown, but only a contract between the defendant and a third person, which the latter had assigned to the plaintiff, that would not be such a variance as, under our statute, should be disregarded. It falls rather within the terms of section 122, c. 66, Gen. St. 1878, which reads: 'When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particulars only, but in its entire scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.' Benson *v.* Dean, 40 Minn. 445, 42 N. W. 207; Southwick *v.* Bank, 84 N. Y. 420, 428; Deickman *v.* McCormick, 24 Mo. 506. If the recovery is sought to be sustained upon the evidence, to which we have referred, of a direct request by the defendant that the plaintiff should secure and deliver the cattle, it is to be said that the facts, as presented in the case of the plaintiff, are denied by the evidence on the part of the defendant, and the court should not have directed a verdict for the plaintiff."

Contract of Shipment. — Rosenfeld *v.* Central Vermont R. Co., 111 App. Div. 371, 97 N. Y. Supp. 905.

Destruction of Mill Dam. — County Comrs. *v.* Wise, 75 Md. 38, 23 Atl. 65.

Contract of Shipment. — "Where, in an action against a common carrier to recover damages arising from delay in the transportation and delivery of live-stock, the complaint is based upon a special contract, the plaintiff cannot sustain his action by proof of a breach of an implied contract, or of the legal duty of the defendant as a common carrier, to transport the stock in a reasonable time. In such case, there would be, not a variance, but a failure of proof." Jeffersonville, M. & I. R. Co. *v.* Worland, 50 Ind. 339.

65. *California.* — Gibson *v.* Wheeler, 110 Cal. 243, 42 Pac. 810.

Florida. — Louisville & N. R. Co. *v.* Guyton, 47 Fla. 188, 36 So. 84.

Georgia. — Lowry Nat. Bank *v.* Fickett, 122 Ga. 489, 50 S. E. 396; Loyd *v.* Anderson, 119 Ga. 875, 47 S. E. 208; Commercial Bank *v.* Tucker, 94 Ga. 289, 21 S. E. 507; Richmond & D. R. Co. *v.* Buice, 88 Ga. 180, 14 S. E. 205; Mackey *v.* Mutual Aid Co., 94 Ga. 104, 20 S. E. 643.

Illinois. — Lake St. Elev. R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374.

Iowa. — Proctor *v.* Reif, 52 Iowa 592, 3 N. W. 618.

Missouri. — York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968.

New York. — Child *v.* New York El. R. Co., 89 App. Div. 598, 85 N. Y. Supp. 604.

North Carolina. — Hunt *v.* Vanderbilt, 115 N. C. 559, 20 S. E. 168.

Oklahoma. — Noble *v.* Atchison,

cured by amendment.[66] Thus, if the allegation be of a cause of action founded upon contract and the evidence disclose one based on tort,[67] or *vice versa*,[68] the variance is fatal,[69] unless there be a statute

etc. R. Co., 4 Okla. 534, 46 Pac. 483, 5 Am. & Eng. R. Cas. (N. S.) 309.

Illustrations. — "Where an action is brought against a common carrier to recover damages for an alleged delay in the transportation and delivery of live-stock, and the complaint counts upon a breach of the common law duty of such carrier, if the evidence show a special contract, which was not declared upon for the transportation of such stock, the variance is fatal and the plaintiff cannot recover." Lake Shore & M. S. R. Co. *v.* Bennett, 89 Ind. 457.

In Thompson *v.* Rathbun, 18 Or. 202, 22 Pac. 837, the court said: "Ordinarily, immaterial and non-essential allegations need not be proven, but may be entirely disregarded, or treated as surplusage; but it is still true that a party must prevail upon substantially the case made in his pleadings. He could not, under the former practice, allege one cause of action and recover on an entirely separate and distinct cause of action; nor can he do it under the Code. In this case the plaintiff described a note as his cause of action, which was executed and delivered to the Portland Savings Bank. By this allegation is meant a note that was made payable to the Portland Savings Bank by name, or to bearer, or by some other equivalent expression by which the Portland Savings Bank could be clearly identified as the payee. This the note offered in evidence failed to do; and this was such a departure from the plaintiff's allegations that I think the court erred in receiving the paper in evidence."

66. St. Louis, I. M. & S. R. Co. *v.* State, 59 Ark. 165, 26 S. W. 824; Patterson *v.* Patterson, 1 Robt. (N. Y. Super.) 184; White *v.* Culver, 10 Minn. 192.

"Failure to prove a strictly joint liability is fatal upon a motion for a nonsuit, in an action in which the declaration charges a joint contract by the master and owner of a vessel, and alleges a loss through negligence." Patton *v.* Magrath, Rice L. (S. C.) 162, 33 Am. Dec. 98.

67. *California.* — Farmer *v.* Cram, 7 Cal. 135.

Iowa. — Straus *v.* Shaw, 84 Iowa 300, 50 N. W. 1060.

Maryland. — Lucke *v.* Clothing C. & T. Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408.

New York. — Degraw *v.* Elmore, 50 N. Y. 1; Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562; Walter *v.* Bennett, 16 N. Y. 250; Belknap *v.* Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Bernhard *v.* Seligman, 54 N. Y. 661; Barnes *v.* Quigley, 59 N. Y. 265.

"An action of deceit cannot be supported by proof of damages resulting from the breach of a warranty, either express or implied. This is so for the reason that the action is one *ex delicto*, and such proof relates to a cause of action arising *ex contractu*." Brooke *v.* Cole, 108 Ga. 251, 33 S. E. 849.

68. Noble *v.* Atchison, etc. R. Co., 4 Okla. 534, 46 Pac. 483, 5 Am. & Eng. R. Cas. (N. S.) 309; Wilson *v.* Live Stock Co., 153 U. S. 39; DeBolt *v.* Railroad Co., 123 Mo. 496, 27 S. W. 575; Miller *v.* Hirschberg, 27 Or. 522, 40 Pac. 506; Wilkinson *v.* Railroad Co., 35 Fla. 82, 17 So. 71; Peay *v.* Salt Lake City, 11 Utah 331, 40 Pac. 206.

69. *United States.* — Wilson *v.* Live Stock Co., 153 U. S. 39.

California. — Farmer *v.* Cram, 7 Cal. 135.

Florida. — Wilkinson *v.* Railroad Co., 35 Fla. 82, 17 So. 71.

Maryland. — Lucke *v.* Clothing C. & T. Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408.

Missouri. — DeBolt *v.* Railroad Co., 123 Mo. 496, 27 S. W. 575.

New York. — DeGraw *v.* Elmore, 50 N. Y. 1; Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562; Walter *v.* Bennett, 16 N. Y. 250; Belknap *v.* Sealey, 14 N. Y. 143, 67 Am. Dec. 120.

Oklahoma. — Noble *v.* Atchison, etc. R. Co., 4 Okla. 534, 46 Pac. 483, 5 Am. & Eng. R. Cas. (N. S.) 309.

permitting an amendment to be made in such class of cases.[70]

F. Partial Inconsistency in the Evidence. — If there be disclosed only an inconsistency in the evidence not amounting to a total failure of the proof, whether the matter be material or immaterial,[71] the variance may be cured by amendment.[72]

3. When the Case Is in Equity. — If the suit be in equity, the rule as to the consequences of a variance between the pleadings and proof is more liberal than that which obtains at law;[73] and while mere technical discrepancies will not be considered as sufficient to constitute a variance,[74] nevertheless there must be a substantial cor-

Oregon. — Miller *v.* Hirschberg, 27 Or. 522, 40 Pac. 506.

Utah. — Peay *v.* Salt Lake City, 11 Utah 331, 40 Pac. 206.

70. Lucke *v.* Clothing C. & T. Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408.

71. *Indiana.* — Brownlee *v.* Kennedy, 41 Ind. 216; Cincinnati, etc. R. Co. *v.* Revalee, 17 Ind. App. 657, 46 N. E. 352.

Kansas. — Missouri Pac. R. Co. *v.* McCally, 41 Kan. 639, 655, 21 Pac. 574.

Massachusetts. — Soule *v.* Russell, 13 Met. 436.

Minnesota. — Short *v.* McRea, 4 Minn. 119.

Missouri. — Leslie *v.* Wabash, etc. R. Co., 88 Mo. 50; Casey *v.* Donovan, 65 Mo. App. 521.

Nebraska. — Bush *v.* Bank of Commerce, 38 Neb. 403, 56 N. W. 989.

New York. — Pixley *v.* Clark, 32 Barb. 268; Dunn *v.* Durant, 9 Daly 389; Griswold *v.* Sedgwick, 1 Wend. 126.

Ohio. — Lake Shore, etc. R. Co. *v.* Lavalley, 36 Ohio St. 221.

Wisconsin. — Phillips *v.* Jarvis, 19 Wis. 205.

72. Bamberger *v.* Terry, 103 U. S. 40; Manners *v.* Fraser, 6 Colo. App. 21, 39 Pac. 889; Correll *v.* Glasscock, 26 Iowa 83; Wilcox & White Organ Co. *v.* Lasley, 40 Kan. 521, 20 Pac. 228.

In Brownlee *v.* Kennedy, 41 Ind. 216, the following point was decided: "In a suit upon a promissory note, where it appeared by the copy of the note filed with the complaint that it was due 'one day after date', and the note introduced in evidence without objection commenced 'one —— after date; *Held,* that it was not a failure of proof, as contemplated by section 96 of the code, but an immaterial variance, fully provided for by sections 94, 95, 101 and 580 of the code."

73. *United States.* — Moore *v.* Crawford, 130 U. S. 122; Tufts *v.* Tufts, 3 Woodb. & M. 456, 24 Fed. Cas. No. 14,233; Crawford *v.* Moore, 28 Fed. 824.

Alabama. — Gilchrist *v.* Gilmer, 9 Ala. 985; Offutt *v.* Scott, 47 Ala. 104; Eldridge *v.* Turner, 11 Ala. 1049.

Illinois. — Morgan *v.* Smith, 11 Ill. 194; Lloyd *v.* Higbee, 25 Ill. 603; Booth *v.* Wiley, 102 Ill. 84.

Kentucky. — Hart's Devisees *v.* Hawkins' Heirs, 3 Bibb. 502, 6 Am. Dec. 666.

Tennessee. — Bedford *v.* Williams, 5 Coldw. 202.

74. Merrill *v.* Allen, 38 Mich. 487; Bass *v.* Taylor, 34 Miss. 342; Hooper *v.* Holmes, 11 N. J. Eq. 122; Sears *v.* Barnum, 1 Clarke Ch. (N. Y.) 139; Ontario Bank *v.* Schermerhorn, 10 Paige Ch. (N. Y.) 109; Zane *v.* Zane, 6 Munf. (Va.) 406.

In Campbell *v.* Bowles, 30 Gratt. (Va.) 652, the court, discussing a variance in a court of equity, says: "The rule in equity practice, that the allegations and proofs in a cause must correspond, is too familiar to need the citation of authority for its support. Relief will not be granted on a case proved, which is materially different from the case stated in the bill. Whatever the prayer, the relief granted must be consistent, or at least not inconsistent, with the case made by the bill. A different rule would be attended oftentimes with surprise and prejudice. If, therefore, a complainant finds, in the progress of the cause, as sometimes

respondence between the pleadings and proof;[75] so that a party can not state one case in his bill and make out another by his evidence.[76]

happens, that there is a discrepancy between the facts proved and those stated in the bill, he may, in some cases, obviate the difficulty by amendment, which is liberally allowed. While, however, the rule is as has been stated, under the liberal spirit which inclines courts of equity to get over form in favor of substance, relief will not be denied unless the case stated and the case proven are so materially variant as to prevent a decree in favor of the plaintiff."

75. Baugher *v.* Eichelberger, 11 W. Va. 217; Mayo *v.* Murchie, 3 Munf. (Va.) 384.

76. *United States.* — South Park Comrs. *v.* Kerr, 13 Fed. 502.

Alabama. — Machem *v.* Machem, 28 Ala. 374; Winter *v.* Merrick & Sons, 69 Ala. 86; Hooper *v.* Strahan, 71 Ala. 75.

Colorado. — Francis *v.* Wells, 2 Colo. 660.

Georgia. — Keaton *v.* McGwier, 24 Ga. 217.

Illinois. — Chaffin *v.* Kimball, 23 Ill. 33; Tuck *v.* Downing, 76 Ill. 71; Morris *v.* Tillson, 81 Ill. 607; Slocum *v.* Slocum, 9 Ill. App. 142; Waugh *v.* Schlenk, 23 Ill. App. 433; Fountain *v.* Fountain, 23 Ill. App. 529; Commissioners *v.* Deboe, 43 Ill. App. 25.

Indiana. — Peelman *v.* Peelman, 4 Ind. 612.

Kentucky. — Lemaster *v.* Burckhart, 2 Bibb. 25.

Maryland. — Small *v.* Owings, 1 Md. Ch. 363.

Michigan. — Warner *v.* Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Harwood *v.* Underwood, 28 Mich. 427; Rudd *v.* Rudd, 33 Mich. 101; Ford *v.* Loomis, 33 Mich. 121.

Missouri. — Lenox *v.* Harrison, 88 Mo. 491.

New Jersey. — Midmer *v.* Midmer's Exrs., 26 N. J. Eq. 299; Lehigh Val. R. Co. *v.* McFarlan, 30 N. J. Eq. 180.

New York. — Tripp *v.* Vincent, 3 Barb. Ch. 613; Green *v.* Storm, 3 Sandf. Ch. 305; Kelsey *v.* Western, 2 N. Y. 500.

North Carolina. — Mallory *v.* Mallory, 45 N. C. (Busb. Eq.) 80.

Ohio. — Dille *v.* Woods, 14 Ohio 122.

Pennsylvania. — Edwards *v.* Brightly, 19 Phila. 251.

Tennessee. — Shaw *v.* Patterson, 2 Tenn. Ch. 171.

Vermont. — Barrett *v.* Sergeant, 18 Vt. 365.

Virginia. — Pigg *v.* Corder, 12 Leigh 69.

West Virginia. — Baugher *v.* Eichelberger, 11 W. Va. 217; Floyd *v.* Jones, 19 W. Va. 359.

Wisconsin. — Williams *v.* Starr, 5 Wis. 534.

To illustrate the principle stated in the text, we take from the case of Smith *v.* Nicholas, 8 Leigh (Va.) 330, at page 354, the following: "There are no principles more firmly established than those which require the allegata and probata to correspond, and the distinct announcement of the grounds of demand or defense, by the respective parties to a cause. They are principles as applicable to courts of equity as to courts of law; and it would be truly mischievous were it otherwise. To permit a defendant, in answer to a bill of foreclosure, to set forth generally that the claim was usurious, without disclosing the facts upon which the allegation rests, would be unfair, and calculated to take the plaintiff by surprise. The allegations, whether of bill or answer, ought to be so distinct and precise, as to give the adverse party notice of what he is to contest; and when so stated, they must be proved satisfactorily to the court, to entitle the party to its decree. It would lead me too far, were I to extract the various cases which go to these points. I must content myself therefore with a general reference to them. They will be found to establish the positions, that the demand or defense must be distinctly set forth; that evidence applicable to a matter not in issue will not be regarded; and, by consequence, that a

4. Criminal Cases. — The general rule in criminal cases is that the disagreement between the allegations and evidence must be in some matter legally essential to the charge averred,[77] or such as to prejudice the accused in his defense.[78] An examination of the cases will show that the rule in criminal cases as to variance is not essentially different from that which applies in civil cases.[79]

party is not to be permitted to allege one thing and prove another. See 6 Johns. Rep. 564; 1 Cowen 734; 4 Johns. Ch. Rep. 281; 1 Brown's C. C. 94; 11 Ves. 240; 6 Munf. 42, 416; 5 Munf. 314; 3 Rand. 263, 504; 5 Rand. 543; 5 Johns. Ch. Rep. 82; 1 Rand. 249. I do not mean to say that the same technicality will be required in a defense by way of answer in equity, though much strictness, it would seem, prevails where the defense is by way of plea. Wortley *v.* Pit, 1 Ves. 164; Beames's Pleas in Eq. 188."

77. *United States.* — United States *v.* Brown, 3 McLean 233, 24 Fed. Cas. No. 14,666.

Connecticut. — State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Illinois. — Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407; Sutton *v.* People, 145 Ill. 279, 34 N. E. 420.

Indiana. — Allen *v.* State, 52 Ind. 486.

Iowa. — State *v.* Ean, 90 Iowa 534, 58 N. W. 898.

Massachusetts. — Com. *v.* Lewis, 1 Met. 151.

Nebraska. — Tracey *v.* State, 46 Neb. 361, 64 N. W. 1069.

New Hampshire. — State *v.* Lord, 16 N. H. 357; State *v.* Langley, 34 N. H. 529.

Tennessee. — Cornell *v.* State, 7 Baxt. 520; State *v.* Brown, 8 Humph. 89.

Texas. — Prior *v.* State, 4 Tex. 383; Wilson *v.* State, 5 Tex. 21; Sublett *v.* State, 9 Tex. 53; Smith *v.* State, 7 Tex. App. 382.

Utah. — United States *v.* Kershaw, 5 Utah 618, 19 Pac. 194.

Vermont. — State *v.* Burt, 25 Vt. 373.

Illustrations. — Burglary. Where the indictment is for breaking and entering a dwelling with intent to steal, the defendant cannot be convicted of larceny. Fisher *v.* State, 46 Ala. 717.

Venue. — The allegation that the offense was committed in the county in which the indictment was found is material and must be proved as laid. Ferkel *v.* People, 16 Ill. App. 310.

Time. — Unless time is of the essence of the offense, it need not be proved as laid. United States *v.* Blaisdell, 3 Ben. 132, 24 Fed. Cas. No. 14,608.

Material Allegations. — The rule in criminal pleading requires that material allegations must be proved, and that an allegation not material need not be proved. State *v.* Porter, 38 Ark. 637.

78. *Alabama.* — Fisher *v.* State, 46 Ala. 717; Robinson *v.* State, 84 Ala. 434, 4 So. 774.

Arkansas. — Baker *v.* State, 4 Ark. 56; Watson *v.* State, 29 Ark. 299.

Florida. — Winburn *v.* State, 28 Fla. 339, 9 So. 694.

Georgia. — Malone *v.* State, 77 Ga. 767; Yarborough *v.* State, 86 Ga. 396, 12 S. E. 650.

Indiana. — Durham *v.* State, 1 Blackf. 33.

Kansas. — State *v.* Brandon, 7 Kan. 106.

Maine. — State *v.* Burgess, 40 Me. 592.

Massachusetts. — Com. *v.* Hope, 22 Pick. 1.

Mississippi. — Brantley *v.* State, 13 Smed. & M. 468.

Ohio. — Stewart *v.* State, 5 Ohio 241.

Tennessee. — State *v.* Bowling, 10 Humph. 52.

79. **Illustrations — Special Plea.** In State *v.* Evans, 33 W. Va. 417, 10 S. E. 792, there was offered by the prisoner a second special plea, setting out that there was a conspiracy between the deceased and one Hoke, in pursuance of which they were assailing the prisoner when he killed the deceased in self-defense. The court in rejecting this plea said: "This plea was embraced in and equivalent to the gen-

5. Admissions or Evidence of Adverse Party. — A variance cannot be founded upon the admissions[80] or evidence of an adverse party.[81] Thus, where the defendant, resisting the demand of the plaintiff, gives evidence which supports the plaintiff's cause, he can not claim a variance on this ground,[82] although there is nothing in the pleadings of the plaintiff to authorize the introduction of such evidence;[83] so a plaintiff is not precluded from recovering on a cause of action admitted by the defendant, though matters are admitted not embraced in the plaintiff's specifications.[84]

6. Bills of Particulars and Special Notices Accompanying Pleas. The same strict rules regarding variance do not apply either to bills of particulars,[85] or to special notices which sometimes accompany

eral issue of 'not guilty,' and hence there was no error in rejecting it. A special plea in a civil case which amounts only to the general issue, this court has held, ought to be rejected, and there is no material difference in the general rules of pleading in civil and criminal cases. See Van Winkle *v.* Blackford, 28 W. Va. 670; Fant *v.* Miller, 17 Gratt. 47."

80. Chatfield *v.* Frost, 3 Thomp. & C. (N. Y.) 357; Greenwood *v.* Smith, 45 Vt. 37; Williams *v.* Allen, 7 Cow. (N. Y.) 316.

In Greenwood *v.* Smith, 45 Vt. 37, the court, in its opinion, says: "It is the office of the specification to define the ground of recovery which the plaintiff proposes to maintain by evidence to be offered on his part. But we do not understand that such specification precludes his right of recovery upon a cause of action set forth in the declaration, and which would be proper matter for a specification, and growing out of the subject-matter of the specification actually filed, if, as in this case, the defendant confesses in open court, and on trial, such cause of action. The purpose of making the specification is to prevent surprise to the defendant, and to enable him to prepare to meet by evidence or otherwise the specified cause of action. The defendant does not need to be protected in this manner, in respect to a ground of recovery which he is ready to confess and does confess voluntarily on the trial."

81. Curtis *v.* Burdick, 48 Vt. 166; Norcross *v.* Welton, 59 Vt. 50, 7 Atl. 714.

In Williams *v.* Allen, 7 Cow. (N. Y.) 316, the action was assumpsit, with a bill of particulars filed, in which the defendant, in showing usury in the note given by him individually, produced evidence by which it appeared that the plaintiff was entitled to recover for items not included in his bill of particulars. The court, in sustaining the plaintiff's right to recover for such items, said: "The rule is correctly laid down in 1 Campb. 68, and 2 Archb. 199, that although the plaintiff, after delivering a particular of his demand, cannot, himself, at the trial, give evidence out of it; yet if the defendant's evidence shows that there are other items, which the plaintiff might have included in his demand, he is entitled to recover all that appears to be due to him. The objection, then, arising from the bill of particulars cannot be supported."

82. Williams *v.* Allen, 7 Cow. (N. Y.) 316.

83. Williams *v.* Allen, 7 Cow. (N. Y.) 316.

84. Greenwood *v.* Smith, 45 Vt. 37.

85. *Florida.* — Bucki *v.* McKinnon, 37 Fla. 391, 20 So. 540.

Illinois. — Moline Water Power & Mfg. Co. *v.* Nichols, 26 Ill. 90.

Indiana. — Vannoy *v.* Klein, 122 Ind. 416, 23 N. E. 526; Wellington *v.* Howard, 5 Ind. App. 539, 31 N. E. 852.

Maryland. — Jones *v.* Barnett, 35 Md. 258.

Massachusetts. — Taylor *v.* Dexter Engine Co., 146 Mass. 613, 16 N. E. 462.

Michigan. — Collins *v.* Beecher, 45 Mich. 436, 8 N. W. 97.

pleas,[86] that apply to special pleas filed in a case;[87] but there must be a substantial agreement between a set-off[88] or counter-claim pleaded to the action.[89]

7. More Proved Than Matters Alleged. — Where a party, in proving his cause, introduces evidence in support of the case made by the pleadings, and then introduces further testimony not required by the case made by his pleadings, no variance is thus created[90] unless such excess of evidence contravenes some essential averment in the pleadings.[91]

8. Evidence Explanatory of Matters Averred. — It not infrequently happens that matters offered in evidence do not correspond literally to an averment in relation thereto, and which, remaining unexplained, might constitute a variance.[92] In such case, evidence is admissible to show a correspondence between the matter alleged and that proved, and thus avoid a variance.[93] Illustrations are given in the notes.[94]

Mississippi. — Ware *v.* McQuillan, 54 Miss. 703.

New York. — Hoag *v.* Weston, 10 N. Y. Civ. Proc. 92.

South Carolina. — Vidal *v.* Clarke, 2 Rich. L. 359.

Wisconsin. — Cudworth *v.* Gaynor, 76 Wis. 296, 44 N. W. 1103.

86. Manion *v.* Creigh, 37 Conn. 462.

87. Manion *v.* Creigh, 37 Conn. 462.

88. Rotan *v.* Nichols, 22 Ark. 244; Bevens *v.* Barnett (Ark.), 22 S. W. 160; Johnson *v.* Collins, 1 Blackf. (Ind.) 166.

89. Downs *v.* Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Lawrence *v.* Vilas, 20 Wis. 382.

90. *Alabama.* — Sublett *v.* Hodges, 88 Ala. 491, 7 So. 296.

California. — Mulliken *v.* Hull, 5 Cal. 245.

Illinois. — Toledo, W. & W. R. Co. *v.* Thompson, 71 Ill. 434; Pennsylvania R. Co. *v.* Conlan, 101 Ill. 93.

Iowa. — Jones *v.* Smith, 6 Iowa 229.

Massachusetts. — Alvord *v.* Smith, 5 Pick. (Mass.) 232.

Michigan. — Detroit, H. & I. R. Co. *v.* Forbes, 30 Mich. 165.

New Hampshire. — Morrill *v.* Richey, 18 N. H. 295; Smith *v.* Webster, 48 N. H. 142.

Texas. — Rankin *v.* Bell, 85 Tex. 28, 19 S. W. 874.

Vermont. — Allen *v.* Goff, 13 Vt. 148; Ammel *v.* Noonar, 50 Vt. 402.

More Proved Than Alleged. — Toledo, W. & W. R. Co. *v.* Thompson, 71 Ill. 434.

91. Exchange & Dep. Bank *v.* Swepson, 1 Lea (Tenn.) 355; Crawford *v.* Morrell, 8 Johns. (N. Y.) 253.

92. Sheey *v.* Mandaville, 7 Cranch (U. S.) 208; Andrews *v.* Williams, 11 Conn. 326; Berber *v.* Kerzinger, 23 Ill. 346; Williams *v.* Baltimore & O. R. Co., 9 W. Va. 33.

93. Atchison, T. & F. R. Co. *v.* Goetz & Brada Mfg. Co., 51 Ill. App. 151; Hovey *v.* Smith, 22 Mich. 170; Hibler *v.* Servoss, 6 Mo. 24; Youngs *v.* Sunderland, 15 N. J. L. 32; Williams *v.* Baltimore & O. R. Co., 9 W. Va. 33.

94. Illustrations. — In Andress *v.* Williams, 11 Conn. 326, the court decided that "where the declaration averred that the defendant promised to deliver certain articles to the plaintiff, at the public sign-post in *W. Old Society;* and the proof was a writing by which the defendant promised to deliver those articles, at the public sign-post in *W. Centre,* accompanied by parol proof that *W. Old Society* and *W. Centre* were the same place, it was held, that there was no variance." The court in the opinion said, with reference to the conclusion just announced: "Nor are we without authorities upon this subject. Where a plaintiff declared upon a contract to deliver stock upon the 27th of *February*, and the

9. Statements Made Under a Videlicet. — It is common to state the time[95] or place of a contract, or other matters,[96] under a videlicet, and thus avoid an apparent variance;[97] but whenever a

proof was that it was to be delivered upon *settling day*, it was held good, proof being given that settling day was fixed for, and understood by the parties to mean, the 27th of February. Wickes *v.* Gordon, 2 Barn. & Adl. 335; S. C. 1 Chitt. Rep. 60. So, where the contract alleged in the declaration was for sound merchantable gum senegal, similar to a sample, and the contract exhibited was for rough gum senegal, which had not been garbled, it was claimed that this was a fatal variance. But it being shown in evidence that all gum senegal, when it arrives in England, is called *rough*, it was held that there was no variance. Silver *v.* Heseltine, 1 Chitt. Rep. 39, 18 Serg. & Lowb. 23."

"A declaration by F. C., on an account stated, may be supported by evidence of an account rendered by the defendants to C. & Co., and evidence that F. C. did business under the name of C. & Co." Charman *v.* Henshaw, 15 Gray (Mass.) 293.

In Grayson *v.* Lynch, 163 U. S. 468, the court holds: "A variance between an allegation in a declaration that cattle communicated 'Texas cattle fever,' and a finding of the court that the disease was 'Texas fever,' is immaterial where it appears that the same disease was known by these names and others."

95. *Alabama.* — Pharr *v.* Bachelor, 3 Ala. 237; McDade *v.* State, 20 Ala. 81.

Florida. — Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540.

Illinois. — Long *v.* Conklin, 75 Ill. 32.

Michigan. — Lothrop *v.* Southworth, 5 Mich. 436.

Minnesota. — State *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

North Carolina. — State *v.* Haney, 8 N. C. (1 Hawks) 460.

Virginia. — Taylor's Admr. *v.* Bank of Alexandria, 5 Leigh 471.

96. State *v.* Grimes, 50 Minn. 123, 52 N. W. 275; Brown *v.* Berry, 47 Ill. 175; Foster *v.* Pennington, 32 Me. 178; Thompson *v.* Crocker, 9 Pick. (Mass.) 59.

97. *Alabama.* — Pharr *v.* Bachelor, 3 Ala. 237.

Illinois. — Brown *v.* Berry, 47 Ill. 175; Prescott *v.* Guyler, 32 Ill. 312.

Massachusetts. — Thompson *v.* Crocker, 9 Pick. 59.

Michigan. — Lothrop *v.* Southworth, 5 Mich. 436.

Minnesota. — State *v.* Heck, 23 Minn. 549.

Mississippi. — Sullivan *v.* State, 67 Miss. 346, 7 So. 275.

New Hampshire. — Deming *v.* Grand Trunk R. Co., 48 N. H. 455; Glidden *v.* Town of Unity, 33 N. H. 571.

Virginia. — Taylor's Admr. *v.* Bank of Alexandria, 5 Leigh 471; Shaver *v.* White, 6 Munf. 110, 8 Am. Dec. 730.

Place Where Contract Arose. Generally "it is not necessary to state, in the declaration, where the contract arose, or the injury was committed; — but this is sometimes necessary; and then, for the sake of obviating the objection of a variance, or the like, the plaintiff is permitted to state, by a fiction, under a videlicet, that the place is within the jurisdiction of the court in which the suit is brought; which fiction, being in furtherance of justice, cannot be traversed."

Amount of Bond Sued On. — In Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670, the action was on a bond. In this case the court said: "It is also objected that there is a variance between the amount of the collector's warrant, set out in the declaration, and the warrant produced in evidence. In the declaration, the sum is alleged under a videlicet, and is stated at $5,935.59; the warrant produced is for $4,530.15. It is well settled, that an averment is material, the addition of a videlicet, does not render it immaterial, but it is as much traversable as if the videlicet had not been inserted. Greenwood *v.* Barrett, 6 T. R. 460; 1 Chit. 308. But the want of a videlicet will, in some cases, make an averment ma-

matter material to the case is so alleged, it must be proved.[98]

10. Allegations of Place and Time. — A. Of Place. — It is held that the allegation of place need not be proved with precision.[99]

terial, that would not otherwise be so; therefore, where a party does not mean to be concluded by a precise sum, or day stated, he ought to plead it under a videlicet; if he does not, he will be bound to prove the exact sum or day laid, it being a settled distinction that where anything which is not material is laid under a videlicet the party is not concluded by it; but he is, where there is no videlicet. Symonds *v.* Knox, 3 T. R. 68; 2 Saund. 291, n. 1. In the case before us, it was not material to state the amount of the warrant; had that been omitted, there was enough to apprise the defendants of the ground upon which a recovery was sought. But having stated the sum, the videlicet is added, to guard against the effect of a variance. If it were otherwise, this court would not suffer a formal objection to defeat the action, but would allow the party to amend."

98. Dawkins *v.* Smithwick, 4 Fla. 158 (time); Foster *v.* Pennington, 32 Me. 178 (quantity of article specified in contract); Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300 (time); Ladue *v.* Ladue, 16 Vt. 189 (death of person one year after whose death note declared on was payable); Derragon *v.* Village of Rutland, 58 Vt. 128, 3 Atl. 332 (where the declaration for negligence alleging damage from overflow of a sewer built in 1872, evidence of damage from another sewer near by built in 1882 was held to create a fatal variance).

99. **In Civil Cases.** — Grayson *v.* Lynch, 163 U. S. 468; Ross *v.* Ionia Tp., 104 Mich. 320, 62 N. W. 401; City of Hillsboro *v.* Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012.

In Criminal Cases. — *United States.* — United States *v.* Stevens, 4 Wash. C. C. 547, 27 Fed. Cas. No. 16,394.

Indiana. — Carlisle *v.* State, 32 Ind. 55; Luck *v.* State, 96 Ind. 16; Johnson *v.* State, 13 Ind. App. 299, 41 N. E. 550.

Kansas. — State *v.* Bain, 43 Kan. 638, 23 Pac. 1070; State *v.* Nugent, 51 Kan. 297, 32 Pac. 1123.

Massachusetts. — Com. *v.* Riggs, 14 Gray 376, 77 Am. Dec. 333; Com. *v.* Intoxicating Liquors, 113 Mass. 208.

Missouri. — State *v.* Fitzporter, 16 Mo. App. 282.

North Carolina. — State *v.* Patterson, 98 N. C. 666, 4 S. E. 540.

Ohio. — Bossert *v.* State, Wright 113.

Pennsylvania. — Heikes *v.* Com., 26 Pa. St. 513.

South Carolina. — State *v.* Colclough, 31 S. C. 156, 9 S. E. 811.

Place Not Material. — Grayson *v.* Lynch, 163 U. S. 468, was an action to recover for the loss and damage to a herd of cattle by a contagious disease. In the trial of the cause the question arose whether the cattle contracted the disease on the road, or on their own range or on Grayson's range. The Court in discussing the question of variance with reference to place, in the course of its opinion, says: "It certainly would not be claimed that the fact that plaintiffs could not prove whether the disease was communicated to their cattle while upon their own lands or elsewhere would prevent their recovery, if the disease were communicated either in one place or the other. In such case, if the description be wholly immaterial, it may be averred to have happened either in one place or the other, and the fact that it was impossible to tell exactly where the tort took place would not constitute a variance. It is said by Chitty (Pleading, 410) that 'where the place of doing an act is precisely alleged, if the description be wholly immaterial, the ground of charge or of complaint not being local, the description may perhaps be rejected as surplusage;' as if in trespass for taking goods, the declaration were to allege that they were taken 'in a house' it would seem to be sufficient to prove that they were taken elsewhere, unless indeed a local trespass as to the house be laid in the same court. In United States *v.* Le Baron,

But if the place alleged is material it must be substantially proved.[1]

71 U. S., 4 Wall. 642, (18:309, 310), it is said that allegations of time, quantity, value, etc., need not be proved with precision, but that a large departure from the same is allowable. The same rule also applies to allegations of place. See also Pope *v.* Allis, 115 U. S. 363 (29:393), where proof of the delivery of iron at a different place from that alleged in the complaint was held to have been properly admitted, defendants having failed to prove that they were misled by the variance between the averment and the proof. Peck *v.* Waters, 104 Mass. 345, 351."

1. Wright *v.* Chicago & N. W. R. Co., 27 Ill. App. 200; Wabash Western R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; Fields *v.* Hunter, 8 Mo. 128; State *v.* Verden, 24 Iowa 126; People *v.* Slater, 5 Hill (N. Y.) 401; Fields *v.* Hunter, 8 Mo. 128; Johnson *v.* State, 13 Ind. App. 299, 41 N. E. 550.

Illustrations. — Keeping House of Prostitution. — Johnson *v.* State, 13 Ind. App. 299, 41 N. E. 550, was for keeping a house of prostitution situate on a certain designated lot. The question was whether or not the proof should correspond to the allegation as to place. The court, in holding that the evidence as to place need not agree with the averment in this regard, said: "It is difficult to bring the case at bar within the rule of some of the decided cases. It has been held that an indictment similar to the affidavit under consideration was sufficient which did not contain a description of the lot or parcel of ground. Betts *v.* State, 93 Ind. 375. Neither do the established forms for this offense require a description of the realty on which the lot is situate. Bish. Directions & Forms § 782; Gillett, Cr. Law § 709. In view of these authorities, we have reached the conclusion that it was not necessary to give any description of the real estate on which the house was situated, and that such description in the affidavit before us is surplusage, and need not have been proved as alleged, or at all."

Place of Sale of Intoxicating Liquors. — In Hardison *v.* State, 95 Ga. 337, 22 S. E. 681, it was held: "Under the act of December 24, 1890, 'to regulate the sale of spirituous, vinous and malt liquors in this state, to fix a penalty for the violation of the same, and for other purposes,' it is a misdemeanor to sell such liquors, in any quantity, anywhere in this state, without a license. If the selling is done in an incorporated city, town or village, the municipal authorities of which have authority to grant liquor licenses, the license must be obtained from those authorities; if elsewhere, it must be obtained from the county authorities. In view of the provisions of this act, an indictment alleging that a sale of such liquors was made 'without first obtaining a license therefor from the authorities authorized by law to grant license for the sale of such liquors' is sufficient as to the matter of negativing the possession of license by the accused; and, although the indictment may further allege that the sale was made 'outside of an incorporated town,' a failure to prove that the sale was in fact made outside of the limits of such a town is of no consequence, and this latter allegation may be treated as mere surplusage."

Escape of Convict. — In Jenks *v.* State, 63 Ark. 312, 39 S. W. 361, "The indictment alleged that defendant escaped from the penitentiary, while the evidence showed that when he fled he was outside of the walls and stockade, doing duty as a 'trusty.'" *Held,* that the variance was immaterial, as such allegation might be treated as surplusage. It was further held: "It is not necessary to show that the offense of escape was committed at the place where alleged, if it is shown to have been committed in the same county."

Injury by Defective Culvert. — In Platz *v.* McKean, 178 Pa. St. 601, 36 Atl. 136, the court decided: "It was not error to refuse to instruct that the verdict must be for defendant, where the declaration alleged that plaintiff's wife was injured by reason of a defective culvert on a road

B. Of Time. — When a particular time is averred in a pleading, it need not be proved as alleged,[2] unless time is material as to the

'leading from E. to M., in said township,' and the evidence showed that the injury occurred half a mile the other side of M, but that the defendant was not misled by the declarations."

Illegal Sale of Liquor. — In Com. *v.* Matthews, 167 Mass. 173, 45 N. E. 92, the defendant was indicted in Plymouth County for keeping and maintaining at Brockton, in that county, a common nuisance, namely, a tenement used for the illegal sale, and illegal keeping for sale, of intoxicating liquors. At the trial there was no evidence tending to show the keeping of any tenement by the defendant in Brockton, but there was evidence tending to show the keeping of a tenement by him, for the illegal purposes alleged, in Easton, in the county of Bristol, but within 100 rods of the boundary line between said counties. The defendant excepted to the admission of the evidence, and also the refusal of the court to instruct the jury to return a verdict of not guilty because of a variance. The court, in passing on these exceptions and overruling them, said: "Must the place of the offense be alleged to be on the boundary line of the two counties and of the two towns, and within 100 rods of the dividing line between them? Such a description was held to be unnecessary, as has been already stated, in Com. *v.* Gillon, ubi supra, so far as county lines are concerned, and we see no good reason for adopting this form where the offense is local. It seems to us that the better rule is to say that the statute under consideration has the effect, in a case like the one before us, of extending, not only the county line, but also the town line, 'for the purpose of allegation, prosecution, and punishment,' into the county and town adjoining."

Place of Death on Charge of Murder. — In Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465, it is held that a variance between the place of the death of the deceased, as alleged in an indictment for murder and as shown by the evidence, is not material where it appears that the act which caused the death was done in the county charged in the indictment, as the averment as to the place of death is unnecessary and need not be proved.

Death of Deceased on Murder Charge. — Where the evidence showed that the deceased for whose murder the defendant is on trial, died seventy hours after he was shot by the defendant, a fatal variance is not created from an allegation that the homicide was committed on the day the shot was fired. State *v.* Pate, 121 N. C. 659, 28 S. E. 354.

Obtaining Money Under False Pretenses. — An allegation in an indictment for obtaining money by false pretenses on a specified day is sustained by evidence that the false pretenses were made on the day before the money was paid, and that such false pretenses induced the payment of the money. Com. *v.* Sessions, 169 Mass. 329, 47 N. E. 1034.

On Charge of Burglary. — The exact date on which the commission of a burglary is laid in an indictment need not be proved, but it is sufficient if it is shown that the crime was committed within the period limited by statute for the prosecution of the offense. Ferguson *v.* State, 52 Neb. 432, 72 N. W. 590.

Carnal Knowledge of Female Under Age of Consent. — A variance between the date of the act of intercourse charged in an indictment of defendant for having sexual intercourse with a female under the age of consent, and the date as shown by the evidence, is not fatal if both were within four months before she attained the age of consent. People *v.* Flaherty, 27 App. Div. 535, 50 N. Y. Supp. 574.

2. Russell *v.* Bradley, 47 Kan. 438, 28 Pac. 176; Shields *v.* Miller, 4 Har. & J. (Md.) 1; Sabin *v.* Wood, 10 Johns. (N. Y.) 218; Hobbs *v.* Memphis & C. R. Co., 9 Heisk. (Tenn.) 873; Gulf, C. & S. F. R. Co. *v.* Witte, 68 Tex. 295, 4 S. W. 490; Hans *v.* State, 50 Neb. 150, 69 N.

matter in controversy.[3] But where time is material, it must be proved as alleged.[4]

W. 838; State *v.* Holmes, 65 Minn. 230, 68 N. W. 11.

3. In Civil Cases. — *Georgia.* Strawn *v.* Kersey, 22 Ga. 586.

Louisiana. — Pigeau *v.* Commeau, 4 Mart. (N. S.) 190.

Massachusetts. — Carter *v.* Franklin Tel. Co., 109 Mass. 161.

Missouri. — Reeves *v.* Larkin, 19 Mo. 192.

New York. — Zorkowski *v.* Zorkowski, 3 Robt. (N. Y. Super.) 613; Hall *v.* Roberts, 63 Hun 473, 18 N. Y. Supp. 480; Devlin *v.* Boyd, 69 Hun 328, 23 N. Y. Supp. 523; James *v.* Work, 70 Hun 296, 24 N. Y. Supp. 149; Hoes *v.* Third Ave. R. Co., 5 App. Div. 151, 39 N. Y. Supp. 40.

Texas. — St. Louis, I. M. & S. R. Co. *v.* Edwards, 3 Wills. Civ. Cas. § 342; Kennard *v.* Withrow (Tex. Civ. App.), 28 S. W. 226.

In Criminal Cases. — *United States.* Johnson *v.* United States, 3 McLean 89, 13 Fed. Cas. No. 7,418; Dixon *v.* Washington, 4 Cranch C. C. 114, 7 Fed. Cas. No. 3,935; United States *v.* Graff, 14 Blatchf. 381, 26 Fed. Cas. No. 15,244.

Arkansas. — Medlock *v.* State, 18 Ark. 363; Scoggins *v.* State, 32 Ark. 205; Cohen *v.* State, 32 Ark. 226.

Connecticut. — State *v.* Munson, 40 Conn. 475; State *v.* Ransell, 41 Conn. 433.

Florida. — Chandler *v.* State, 25 Fla. 728, 6 So. 768.

Georgia. — Wingard *v.* State, 13 Ga. 396; McBryde *v.* State, 34 Ga. 202; Clarke *v.* State, 90 Ga. 448, 16 S. E. 96; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410; Fisher *v.* State, 73 Ga. 595.

Iowa. — State *v.* Bell, 49 Iowa 440; State *v.* Fry, 67 Iowa 475, 25 N. W. 738.

Louisiana. — State *v.* Agudo, 5 La. Ann. 185; State *v.* Walters, 16 La. Ann. 400; State *v.* Polite, 33 La. Ann. 1016.

Massachusetts. — Com. *v.* Braynard, Thacher Cr. Cas. 146; Com. *v.* Dacey, 107 Mass. 206; Com. *v.* Irwin, 107 Mass. 401; Com. *v.* Burk, 15 Gray 404.

Michigan. — Turner *v.* People, 33 Mich. 363.

Mississippi. — Oliver *v.* State, 5 How. 14; McCarty *v.* State, 37 Miss. 411.

Missouri. — State *v.* Hughes, 82 Mo. 86.

New York. — People *v.* Emerson, 53 Hun 437, 6 N. Y. Supp. 274.

North Carolina. — State *v.* Newsome, 47 N. C. (2 Jones' L.) 173.

South Carolina. — State *v.* Branham, 13 S. C. 389; State *v.* Howard, 32 S. C. 91, 10 S. E. 831.

Utah. — People *v.* Wright, 11 Utah 41, 39 Pac. 477.

But in order to support a conviction it must clearly appear from the evidence that the offense charged was committed anterior to the presentment of the indictment. Kincaid *v.* State, 8 Tex. App. 465; Arcia *v.* State, 28 Tex. App. 198, 12 S. W. 599.

4. In Civil Cases. — *United States.* Eastman *v.* Bodfish, 1 Story 528, 8 Fed. Cas. No. 4,255.

Indiana. — Ellis *v.* Ford, 5 Blackf. 554.

Kentucky. — Bannister *v.* Weatherford, 7 B. Mon. 271.

Louisiana. — Carter *v.* Hodge, 7 Rob. 433; Riley *v.* Wilcox, 12 Rob. 648.

New York. — Stewart *v.* Eden, 2 Caines 121, 2 Am. Dec. 222; Quin *v.* Astor, 2 Wend. 577 (*holding* that time, in a bill of particulars, is material); Duncan *v* Ray, 19 Wend. 530; Lyons *v.* Miller, 10 Misc. 43, 30 N. Y. Supp. 832.

South Carolina. — Beck *v.* Pearse, 1 Bailey 154.

Texas. — Walker *v.* Simkins, 2 Wills. Civ. Cas. § 69.

Wisconsin. — Paine *v.* Trumbull, 33 Wis. 164.

Every Variance in Point of Time Between the Allegations and Evidence Is Not Fatal. — *California.* Thomas *v.* Jamieson, 77 Cal. 91, 19 Pac. 177.

Georgia. — Augusta & S. R. Co. *v.* McElmurry, 24 Ga. 75.

Illinois. — St. Louis, etc. R. Co. *v.* Winkelmann, 47 Ill. App. 276.

11. Allegations as to Parties and Other Persons. — Allegations as to parties,[5] or other persons connected with the transaction set

Indiana. — Phoenix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1.

Kentucky. — Gentry *v.* Doolin, 1 Bush 1.

Louisiana. — Buquoi *v.* Hampton, 6 Mart. (N. S.) 8.

Minnesota. — Erickson *v.* Schuster, 44 Minn. 441, 46 N. W. 914.

New York. — Williams *v.* Freel, 99 N. Y. 666, 2 N. E. 54; Schuler *v.* Third Ave. R. Co., 1 Misc. 351, 20 N. Y. Supp. 683; Lyons *v.* Miller, 10 Misc. 653, 31 N. Y. Supp. 795.

Pennsylvania. — Stout *v.* Rassel, 2 Yeates 334.

South Carolina. — Degraffinreid *v.* Mitchell, Harp. L. 437.

Texas. — Texas & P. R. Co. *v.* Virginia R., L. & C. Co., 7 S. W. 341; East Line & R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; First Nat. Bank *v.* Stephenson, 82 Tex. 435, 18 S. W. 583; St. Louis, A. & T. R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798.

Utah. — Brown *v.* Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

In Criminal Cases. — Lehritter *v.* State, 42 Ind. 383; Com. *v.* Maloney, 112 Mass. 283; State *v.* Wilson, 39 Mo. App. 184; State *v.* Ray, 92 N. C. 810; Fisher *v.* State, 33 Tex. 792.

When Single Offense Charged in One Count. — In Thomas *v.* State, 111 Ala. 51, 20 So. 617, it is held, under the criminal code of Alabama, § 4385, providing that offenses of the same character and subject to the same punishment may be charged in the same county in the alternative, that if the indictment charges in the conjunctive the malicious killing of an ox and a cow, and the evidence shows that each was killed at a separate time, defendant cannot be convicted.

Time of Commission of Felony. In Shipp *v.* Com., 101 Ky. 518, 41 S. W. 856, it is held that "it is not necessary to prove that a felony was committed on the day charged in the indictment."

5. *United States.* — Schimmelpennick *v.* Turner, 6 Pet. 1.

California. — Christian College *v.* Hendley, 49 Cal. 347.

Georgia. — Rome R. Co. *v.* Sullivan, Cabot & Co., 25 Ga. 228; Commercial Bank *v.* Tucker, 94 Ga. 289, 21 S. E. 507.

Iowa. — Proctor *v.* Reif, 52 Iowa 592, 3 N. W. 618.

Michigan. — Hudson *v.* Emmons, 107 Mich. 549, 65 N. W. 542; Mace *v.* Page, 33 Mich. 38.

Nebraska. — Thompson *v.* Stetson, 15 Neb. 112, 17 N. W. 368.

New York. — Wyckoff *v.* Union L. & T. Co., 11 N. Y. Supp. 423.

South Carolina. — Huggins *v.* Watford, 38 S. C. 504, 17 S. E. 363.

South Dakota. — Anderson *v.* Alseth, 6 S. D. 566, 62 N. W. 435.

Texas. — Bowdon *v.* Robinson, 4 Tex. Civ. App. 626, 23 S. W. 816.

Where a pleading alleges attachments in suits in which A., B. & Co., D., C. & Co., E., F. & Co., creditors of the defendant, were plaintiffs without designating the plaintiff in each action, no material variance arises by showing at the trial who were the respective plaintiffs. Blackman *v.* Wheaton, 13 Minn. 326.

A complaint by an assignee for creditors was for goods, wares and merchandise sold and delivered to various persons who were employed by defendant in her boat and dry dock. Was held sufficiently broad to allow evidence tending to show that defendant was the real party contracting with plaintiff's assignor. McMahon *v.* Sherman, 14 N. Y. St. 637.

In a suit on a bond to indemnify the surety in another bond, which is not fully described in the pleadings, the fact that the bond indemnified against contains the name of a surety not mentioned in the indemnifying bond is not a material variance. Lee *v.* Wisner, 38 Mich. 82.

An allegation that plaintiff loaned defendant money may be supported by proof that the money was obtained by defendant from plaintiff's wife, and that it was plaintiff's money. Pilling *v.* Morse, 5 Wash. 797, 32 Pac. 748.

forth in the pleadings,[6] must be proved as alleged, else a variance will be created.[7]

12. Proof of Names as Alleged. — It is sufficient to prove the name in substance,[8] literal accuracy in this respect not being re-

6. *United States.* — United States *v.* Stafford, 2 Paine 525, 27 Fed. Cas. No. 16,372.

Alabama. — Smith *v.* Causey, 28 Ala. 655, 65 Am. Dec. 372.

Georgia. — Bennett *v.* Walker, 64 Ga. 326.

Illinois. — Snell *v.* DeLand, 43 Ill. 323; O'Neal *v.* Boone, 82 Ill. 589.

Indiana. — Warden *v.* Dundas, 1 Ind. 396.

Maryland. — Wright *v.* Gilbert, 51 Md. 146.

Massachusetts. — Bangs *v.* Snow, 1 Mass. 181; Dyer *v.* Stevens, 6 Mass. 389; Lincoln *v.* Shaw, 17 Mass. 410.

Nebraska. — Merchants' Bank *v.* McConiga, 8 Neb. 245.

New York. — Curtiss *v.* Marshall, 8 Bosw. (N. Y. Super.) 22.

South Carolina. — Simkins *v.* Montgomery, 1 Nott. & McC. 589.

Where, in an action against a common carrier for not complying with a contract to carry and deliver a draft, the complaint alleged that it was signed "John J. Jackson," and the proof showed that it was signed "John J. Jackson, Agent," the variance was immaterial. Zeigler *v.* Wells, Fargo & Co., 28 Cal. 263.

In an action on an appeal bond the complainant alleged that the judgment was recovered by J., while the evidence showed that it was recovered by C. for the use of J. *Held,* that the variance was immaterial. Lux *v.* McLeod, 19 Colo. 465, 36 Pac. 246.

7. *United States.* — United States *v.* Stafford, 2 Paine 525, 27 Fed. Cas. No. 16,372.

Alabama. — Garrison *v.* Hawkins Lumb. Co., 111 Ala. 308, 20 So. 427; Johnson *v.* State, 111 Ala. 66, 20 So. 590; Agee *v.* State, 113 Ala. 52, 21 So. 207.

California. — Christian College *v.* Hendley, 49 Cal. 347.

Colorado. — Sullivan *v.* People, 6 Colo. App. 458, 41 Pac. 840.

Georgia. — Rome R. Co. *v.* Sullivan, Cabot & Co., 25 Ga. 228.

Iowa. — Burns *v.* Iowa Homestead Co., 48 Iowa 279.

Louisiana. — State *v.* Taylor, 49 La. Ann. 319, 21 So. 516.

Michigan. — Mace *v.* Page, 33 Mich. 38; Hudson *v.* Emmons, 107 Mich. 549, 65 N. W. 542.

Nebraska. — Thompson *v.* Stetson, 15 Neb. 112, 17 N. W. 368; Williams *v.* State, 51 Neb. 630, 71 N. W. 313.

Vermont. — Murdock *v.* Hicks, 49 Vt. 408.

Promise Made to Corporation. Where the complaint alleges a promise to pay money to a corporation, and the promise proved was made to a committee of a church, there is a fatal variance between the complaint and proof. Christian College *v.* Hendley, 49 Cal. 347.

Delivery of Goods to Consignee. If a declaration allege that the defendants received forty bales of cotton, to be delivered to R. & C. at Charleston, South Carolina, the averment is not supported by evidence that it was to be delivered to the agent of the South Carolina Railroad at Augusta. Rome R. Co. *v.* Sullivan, Cabot & Co., 25 Ga. 228.

Agreement to Deliver Note. — "In an action on a note, a defense setting up an agreement for the delivery of the note to defendant by the payee and plaintiff's indorser is not sustained by proof of such an agreement on the part of the plaintiff's indorser alone." Hudson *v.* Emmons, 107 Mich. 549, 65 N. W. 542.

Sale of Liquor to Specified Person. An indictment charging a sale of liquor to "Henry Hall," a minor, is not sustained by evidence of a sale to "Henry Wall." Henderson *v.* State (Tex.), 38 S. W. 618.

8. Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829; Dodge *v.* Barnes, 31 Me. 290; Charman *v.* Henshaw, 15 Gray (Mass.) 293; M'Cool *v.* McCluny, Harp. L. (S. C.) 486;

quired.[9] An allegation of the Christian name is sustained, by evidence of initials;[10] and it is not necessary to prove the initial letter of a middle name, and a failure to do so does not constitute a variance.[11]

Post-Intelligencer Pub. Co. *v.* Harris, 11 Wash. 500, 39 Pac. 965.

Under Code 1886, § 3405, providing that appeals from justices shall be tried *de novo*, and according to equity and justice, regardless of any defects in the proceedings before the justice, though a cause of action is stated to be for the price of goods purchased by a defendant corporation in the corporate name by which it is sued, and it appears that they were purchased by said corporation before a change of its name, the variance is not fatal. Chewacla Lime Wks. *v.* Dismukes, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100.

In an action for damages for breach of a covenant of warranty, the plaintiff alleged that he subsequently acquired title from the paramount owner, the Des Moines Valley Railroad Company. *Held*, that he could not be permitted to prove that he acquired title from the Des Moines & Ft. Dodge Railroad Company. Burns *v.* Iowa Homestead Co., 48 Iowa 279.

A declaration in debt on a recognizance, which alleges that "D under the name of J," etc., became bound, is not sustained by proof that D entered into the recognizance in his own proper person but that the magistrate taking it by mistake entered the name as J. Murdock *v.* Hicks, 49 Vt. 408.

But evidence of a bond to "Sarah Eliza R." does not support the averment of a bond to "Eliza R." State *v.* Terre-Tenants of Reading, 1 Har. (Del.) 23.

9. Bell *v.* Norwood, 7 La. (O. S.) 95; Whitwork *v.* Alston, 65 Tex. 528; Bosley *v.* Pease (Tex. Civ. App.), 22 S. W. 516; Bosley *v.* Pease, 86 Tex. 292, 24 S. W. 279 (*holding* that where a petition alleges that the instrument sued on was executed by a person named "Ankerman," while the instrument itself is signed "Ankenman," the variance is immaterial); Mahon *v.* Blake, 125 Mass. 477; Cullers *v.* May, 81 Tex. 110, 16 S. W. 813.

Distinguishing Persons Having Same Name. — In De Kentland *v.* Somers, 2 Root (Conn.) 437, it was held that a declaration upon a judgment against A. Somers and David Goodrich is not supported by proof of a judgment against A. Somers and David Goodrich, Jr. But in Weber *v.* Fickey, 52 Md. 500, the judgment sued upon was recovered by F., Jr., while the narr. named the plaintiff as F., and it was not alleged that there were two persons bearing the name of F.; *held*, that there was no variance.

10. Webb *v.* Jones, 2 Ark. 330; Dudley *v.* Smith, 2 Ark. 365; Chumasero *v.* Gilbert, 26 Ill. 39; Peddie *v.* Donnelly, 1 Colo. 421. A plea alleging an assignment by "Elizabeth James" may be sustained by proof of a writing signed by "Mrs. A. P. James," where it appears that Elizabeth James is the wife of A. P. James. Cullers *v.* May, 81 Tex. 110, 16 S. W. 813.

11. Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372 (*holding* that in a suit against E. H., alias E. B. H., a judgment against E. H. is not objectionable as evidence, on the ground of variance); Mahon *v.* Blake, 125 Mass. 477 (*holding* that an allegation that a carrier agreed to deliver goods to "E. T. Learned" is sustained by proof that he clearly understood "Dr. E. T. Learned" to be the intended consignee, although the name marked on the cases of goods was "Dr. E. D. Leonard"); McDonough *v.* Heyman, 38 Mich. 334 (*holding* that an unprejudicial variance in the middle initial of the drawer of a draft will be disregarded); Franklin *v.* Talmadge, 5 Johns. (N. Y.) 84 (*holding* that where the plaintiff declared by the name of William T. Robinson, and gave in evidence a deed to William Robinson, the omission of the middle letter was an immaterial variance, "for the law knows of but one Christian name").

But in Com. *v.* Shearman, 11 Cush. (Mass.) 546, it was held that an allegation of a sale to George E. Allen is not sustained by proof

13. Description of Subject-Matter of Litigation. — A. In General. — It is a general rule that the description of property,[12] or other subject-matter involved in the action,[13] must be substantially

of a sale to George Allen, without any evidence that it is the same person, and in Massillon *v.* Holdridge, 68 Minn. 393, 71 N. W. 399, that a written instrument signed "S. Holdridge" does not "purport" to be signed or executed by "C. S. Holdridge," so as to be admissible in evidence against the latter, under Gen. St. 1894, § 5751, without proof of its execution by him, and that the parol evidence in that case was insufficient to identify the defendant as the person who executed the instrument under the name of "S. Holdridge."

In Davis *v.* State, 37 Tex. Crim. 218, 39 S. W. 296, the court in its opinion says: "The indictment charges that the alleged forgery purported to be of the name of 'L. V. Truelove,' and the tenor clause sets out the instrument, which also contains the name 'L. V. Truelove.' The instrument as introduced in evidence corresponded with that set out in the indictment. On the trial the state introduced as a witness L. B. Truelove, who testified he lived in the vicinity of Alvarado, and that he knew of no L. V. Truelove in that community. The fact that the state introduced testimony tending to show that no person bearing the name of L. V. Truelove lived in that neighborhood did not constitute a variance. If it be considered that L. B. Truelove was the person whose name was intended to be forged, and it be conceded that the difference in the middle initial would be a variance, still it does not occur to us that appellant can complain. The defendant could forge the name of a fictitious person, and the indictment need not allege that such person was fictitious; and, the proof showing that such a person as L. V. Truelove did not exist in that community and was a fictitious person, forgery of such fictitious name would constitute the offense charged. See Johnson *v.* State (Tex. Cr. App.), 33 S. W. 231, and Chapman *v.* State (Tex. Cr. App.), 34 S. W. 621."

12. Murat *v.* Micand (Tex. Civ. App.) 25 S. W. 312; Thompson *v.* Dunn, 44 Tex. 88; Halbert *v.* Carroll (Tex. Civ. App.) 25 S. W. 1102; Wilcox *v.* Jackson, 57 Iowa 278, 10 N. W. 661; Ross *v.* Thompson, 78 Ind. 90; Goodbub *v.* Scheller, 3 Ind. App. 318, 29 N. E. 610; Ellis *v.* Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687.

But where, in an action for rent, the premises were described in the declaration as a "certain messuage in the town of Jackson, known on the plan of said town as 'lot number six in square number one,'" and no evidence was given as to the number of the lot and the square, it was held that these were matters of description and that the failure to prove them was fatal. Burrett *v.* Doggett, 6 Fla. 332.

And where a party claims under a grant to B., and a devise from B. in the following words: "I will and bequeath . . . all the tract of land that J. S. now lives on, which land I bought of John Barnard" — and proves that J. S. was living on the land in controversy at the time of his death, the evidence does not identify the land devised as the land granted, since testator purported to hold that land, not by grant, but by purchase, from John Barnard. Morelock *v.* Barnard (Tenn.), 2 S. W. 32.

13. *Georgia.* — Snowden *v.* Waterman, 100 Ga. 588, 28 S. E. 121.

Indiana. — Ross *v.* Thompson, 78 Ind. 90; Goodbub *v.* Scheller, 3 Ind. App. 318, 29 N. E. 610.

Kentucky. — Lewis *v.* Com., 19 Ky. L. Rep. 1139, 42 S. W. 1127.

Texas. — Thompson *v.* Dunn, 44 Tex. 88; Murat *v.* Micand (Tex. Civ. App.), 25 S. W. 312; Halbert *v.* Carroll (Tex. Civ. App.), 25 S. W. 1102; Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

Description of Way. — Where the action is for damages for the disturbance of an easement, and to enjoin the appellent from interfering with its free use, a paragraph in the complaint for obstructing a pri-

proved as alleged in the pleadings, otherwise there is a variance.[14]

B. Title to Property. — It may be laid down as a general principle that title to property must be proved as alleged,[15] and a

vate way may be joined with one for obstructing a public highway in which the plaintiff has a special interest. In such case an instruction declaring that the plaintiff cannot recover unless he has proved a prescriptive right to the way claimed, but a slight variance in any particular would be of no consequence, such as a violation in the course of the way for a few feet at a given point, or in the terminus of the way, was held to be correct. Ross *v.* Thompson, 78 Ind. 90.

14. *Alabama* — Gilmer *v.* Wallace, 75 Ala. 220.

Delaware. — Randel *v.* Wright, 1 Har. 34.

Georgia. — Central R. etc. Co., *v.* Tucker, 79 Ga. 128, 4 S. E. 5.

Illinois. — City of Bloomington *v.* Goodrich, 88 Ill. 558; Reading *v.* Linington, 12 Ill. App. 491.

Indiana. — Buchanan *v.* Whitham, 36 Ind. 257.

Iowa. — Hurlbut *v.* Bagley, 99 Iowa 127, 68 N. W. 585.

Louisiana. — Hereford *v.* Lake, 15 La. Ann. 693.

Maryland. — McNamee *v.* Minke, 49 Md. 122.

Massachusetts. — Chapin *v.* White, 102 Mass. 139.

Michigan. — Harrington *v.* Worden, 1 Mich. 487.

Mississippi. — Carter *v.* Preston, 51 Miss. 423.

Missouri. — Erfort *v.* Consalus, 47 Mo. 208.

New Jersey. — Addis *v.* Van Buskirk, 24 N. J. L. 218.

New York. — Saxton *v.* Johnson, 10 Johns. 418.

North Carolina. — Abernathy *v.* Seagle, 98 N. C. 553, 4 S. E. 542.

Ohio. — Gaines *v.* Union Transp. & Ins. Co., 28 Ohio St. 418.

West Virginia. — Damarin *v.* Young, 27 W. Va. 436.

15. *Alabama.* — Crabb's Admr. *v.* Thomas, 25 Ala. 212; Winter *v.* Merrick & Sons, 69 Ala. 86; Munchus *v.* Harris, 69 Ala. 506; Lewis *v.* Montgomery Mut. B. & L. Assn., 70 Ala. 276.

California. — Hayes *v.* Fine, 91 Cal. 391, 27 Pac. 772.

Colorado. — Union Coal Co. *v.* Edman, 16 Colo. 438, 27 Pac. 1060.

Illinois. — Lyon *v.* Kain, 36 Ill. 362; Gridley *v.* City of Bloomington, 68 Ill. 47; Coal Run Coal Co. *v.* Giles, 49 Ill. App. 585.

Indiana. — Timmons *v.* Wiggins, 78 Ind. 297.

Iowa. — Ogilvie *v.* Hallam, 58 Iowa 714, 12 N. W. 730.

Louisiana. — Shaw *v.* Noble, 15 La. Ann. 305; Drew *v.* Attakapas Mail Transp. Co., 26 La. Ann. 306; Alford *v.* Hancock, McGloin 280.

Massachusetts. — Hill *v.* Haskins, 8 Pick. 83.

Michigan. — Emerson *v.* Atwater, 7 Mich. 12.

Missouri. — Deickman *v.* McCormick, 24 Mo. 596.

North Carolina. — Southerland *v.* Jones, 51 N. C. (6 Jones L.) 321; Abernathy *v.* Seagle, 98 N. C. 553, 4 S. E. 542.

Ohio. — Satchell *v.* Doram, 4 Ohio St. 542.

Pennsylvania. — Campbell *v.* Wasserman & Bros., 9 Pa. Co. Ct. 381.

Texas. — Texas & N. O. R. Co. *v.* Oates, 2 Wills. Civ. Cas. § 618; Missouri Pac. R. Co. *v.* Teague, 2 Wills. Civ. Cas. § 780; Galveston, etc. R. Co. *v.* Becht (Tex. Civ. App.), 21 S. W. 971.

Vermont. — Higgins *v.* Farnsworth, 48 Vt. 512.

Where the Variance Is Immaterial it Will Be Disregarded. — *Colorado.* Walsh *v.* Hastings, 20 Colo. 243, 38 Pac. 324.

Illinois. — Russell *v.* Whitside's Admrs., 5 Ill. 7.

Minnesota. — Caldwell *v.* Bruggerman, 4 Minn. 270.

North Carolina. — Thigpen *v.* Staton, 104 N. C. 40, 10 S. E. 89.

South Carolina. — Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305.

Texas. — Michon *v.* Ayalla, 84 Tex. 685, 19 S. W. 878; Whitworth *v.* Alston, 65 Tex. 528; Watts *v.* Johnson, 4 Tex. 311.

Wisconsin. — Thayer *v.* Jarvis, 44 Wis. 388.

failure to do so will create a variance between allegation and proof.[16]

Title to Personal Property. — In Crabb's Admr. *v.* Thomas, 25 Ala. 212, the bill alleged a gift of slaves to complainant "to her separate use for life, with remainder to her children," while the evidence showed a gift "to her and the heirs of her body, free from the control of her husband." The court held that the variance between the allegata and probata was fatal.

Allegation of Full Title. — In Winter *v.* Merrick & Sons, 69 Ala. 86, the complainant, a married woman, filed a bill seeking an equitable attachment, alleging that the whole of the money sought to be recovered was her property, constituting a portion of her statutory separate estate, and the proof showed that she had only a life interest in the money, with remainder to her children. The court held that the variance between the allegation and the proof was fatal. The court in the course of its opinion, disposing of the question of variance, says: "This precise point has been twice ruled on by this court, and in both instances it was held to be a variance, and, under the old practice, not amendable. Crabb's Admr. *v.* Thomas, 25 Ala. 212; Larkins *v.* Biddle, 21 Ala. 252. We hold to the authority of these cases, so far as concerns the doctrine of variance, but incline to the opinion that the defect would be amendable under our present statute. Code, 1876, § 3790; Hinton *v.* Ins. Co., 63 Ala. 488; Jones *v.* Reese, 65 Ala. 134. However this may be, the right of amendment should have been claimed before final decree in the lower court. Brock *v.* S. & N. Ala. R. R. Co., 65 Ala. 79. It may be that, had the chancellor granted the complainant relief and the case had been reversed here for this defect, we might have remanded the cause so as to afford an opportunity of amendment. But the rule is different where the bill is dismissed by the lower court, except, perhaps, where the bill has equity, and the dismissal is for want of proper parties, in the absence of a demurrer on this ground. Stone *v.* Hale, 17 Ala. 557 (52 Am. Dec. 185). This is not, however, a question of parties, but a matter of variance in the title as alleged in the bill and that disclosed in the proof, which are essentially different."

Ejectment. — If a plaintiff declare in ejectment for an estate in fee he cannot recover a less interest or different estate. Lyon *v.* Kain, 36 Ill. 362. A declaration in ejectment which counts upon the title being in M. R. alone is not supported by a patent to "M. R. and the other heirs at law of J. R., deceased," without proof that M. R. is the sole heir at law of J. R. Cook *v.* Sinnamon, 47 Ill. 214.

Legal Title Alleged in Ejectment. Where a party bases his claim to property or its possession in an action of ejectment upon the legal title, he cannot recover upon proof of an equitable title. Seaton *v.* Son, 32 Cal. 481; Sutton *v.* Aiken, 57 Ga. 416; Groves *v.* Marks, 32 Ind. 319; Stout *v.* McPheeters, 84 Ind. 585; Merrill *v.* Dearing, 47 Minn. 137, 49 N. W. 693; Tarpey *v.* Salt Co., 5 Utah 205, 14 Pac. 338.

Allegation of Title in Fee. — If ejectment be brought upon a claim of the premises under title in fee, such allegation is established by evidence of title by adverse possession only. Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597; City of Cincinnati *v.* White's Lessee, 6 Pet. (U. S.) 431; Day *v.* Alverson, 9 Wend. (N. Y.) 223; Lessee of Devacht *v.* Newsam, 3 Ohio 57.

16. *Alabama.* — Crabb's Admr. *v.* Thomas, 25 Ala. 212; Winter *v.* Merrick & Sons, 69 Ala. 86; Munchus *v.* Harris, 69 Ala. 506; Lewis *v.* Montgomery Mut. B. & L. Assn., 70 Ala. 276.

California. — Hayes *v.* Fine, 91 Cal. 391, 27 Pac. 772.

Illinois. — Lyon *v.* Kain, 36 Ill. 362; Gridley *v.* City of Bloomington, 68 Ill. 47; Coal Run Coal Co. *v.* Giles, 49 Ill. App. 585.

Indiana. — Timmons *v.* Wiggins, 78 Ind. 297.

Iowa. — Ogilvie *v.* Hallam, 58 Iowa 714, 12 N. W. 730.

Louisiana. — Shaw *v.* Noble, 15

C. Value and Amount. — Ordinarily the allegations as to value[17] or amount need not be strictly proved.[18]

D. Medium of Payment. — When there is an allegation in a pleading as to the medium of payment, as where the allegation is of money[19] or an article of merchandise,[20] the evidence must correspond to such allegation.[21]

La. Ann. 305; Drew *v.* Attakapas Mail Transp. Co., 26 La. Ann. 306; Alford *v.* Hancock, McGloin 280.

Massachusetts. — Hill *v.* Haskins, 8 Pick. 83.

Mississippi. — Emerson *v.* Atwater, 7 Mich. 12.

Missouri. — Deickman *v.* McCormick, 24 Mo. 596.

North Carolina. — Southerland *v.* Jones, 51 N. C. (6 Jones L.) 321; Abernathy *v.* Seagle, 98 N. C. 553, 4 S. E. 542.

Ohio. — Satchell *v.* Doram, 4 Ohio St. 542.

South Carolina. — Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305.

Texas. — Whitworth *v.* Alston, 65 Tex. 528.

Vermont. — Higgins *v.* Farnsworth, 48 Vt. 512.

17. Reilly *v.* Ringland, 39 Iowa 106.

The allegation, in an answer to a complaint, that the subject of the suit "was very poor and of very little value," will not be supported by proof that it was worth nothing. Deifendorff *v.* Gage, 7 Barb. (N. Y.) 18.

Value of Property Burned. — It is not incumbent upon the prosecution, in a trial for arson, to prove the value of the burned property as charged in the indictment, but only to prove that it was worth the amount necessary to bring the crime within the degree charged. Cunningham *v.* State, 117 Ala. 59, 23 So. 693.

Indictment for Robbery. — A defendant charged in an indictment for robbery with taking ten dollars in silver may be convicted upon evidence that he took one dollar. Jones *v.* State (Tex. Crim.), 44 S. W. 162.

18. Williams *v.* Harper, 1 Ala. 502; Smith *v.* Hicks, 5 Wend. (N. Y.) 48; Lass *v.* Wetmore, 2 Sweeney (N. Y. Super.) 209; Ammel *v.* Noonar, 50 Vt. 402.

In an action by a county to recover $1,000 which had been entrusted to H., as the agent of the county, to be expended in repairing a bridge, the petition alleged that the amount remained in the hands of H. unexpended and unaccounted for. The evidence showed that $800 had been paid to the contractor for work on the bridge. *Held,* that the plaintiff was not entitled to recover. Iowa County *v.* Huston, 39 Iowa 323.

19. Scott *v.* Com., 5 J. J. Marsh. (Ky.) 643; Baylies *v.* Fettyplace, 7 Mass. 325; Sisney *v.* Arnold, 28 Mo. App. 568; Swanton *v.* Lynch, 58 Me. 294.

In an action based on an exchange of goods and an agreement to pay the difference in value, plaintiffs declared, setting forth the exchange and an agreement by defendants to pay a certain sum in money, and the proof showed that the agreement was to pay in notes at four, six and eight months; the suit being brought after the notes fell due. *Held,* that there was no variance. Porter *v.* Talcott, 1 Cow. (N. Y.) 359.

20. Canfield *v.* Miller, 13 Gray (Mass.) 274; Tuskaloosa Cotton Seed O. Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Mann *v.* Morewood, 5 Sandf. (N. Y. Super.) 557; Wagener & Co. *v.* Mars, 20 S. C. 533; Bonney *v.* Seely, 2 Wend. (N. Y.) 481; Judd *v.* Burton, 51 Mich. 74, 16 N. W. 237.

21. In Forester *v.* Forester, 10 Ind. App. 680, 38 N. E. 426, an action by son against father for wages for services rendered on the latter's farm, the complaint alleged that said services were rendered at defendant's instance and request, and upon his promise to pay therefor, and the evidence showed an express promise by the father that the son should at the father's death take the farm in payment, and that this was the expectation of both during the

III. CLASSES OF CASES WHERE DOCTRINE MAY APPLY.

1. Civil Actions. — A. In General. — The doctrine of variance, as applied in the trial of causes, may be invoked in actions *ex contractu,* as where a contract in writing[22] or any other writing,[23] as a record[24] or judicial proceeding of any kind,[25] or a contract not in writing,[26] is the subject of controversy and alleged in the pleadings; and in actions *ex delicto,* as for instance in a case charging negligence[27] or other wrong.[28]

time the services were rendered; *held,* there was no variance.

22. *United States.* — Dixon *v.* United States, 1 Brock. 177, 7 Fed. Cas. No. 3,934; Clark *v.* Phillips, Hempst. 294, 5 Fed. Cas. No. 2,831*a*.

Alabama. — Phillips *v.* Americus Guano Co., 110 Ala. 521, 18 So. 104.

Connecticut. — Stoddard *v.* Gates, 2 Root 157.

Georgia. — Blue *v.* Ford, 12 Ga. 45.

Illinois. — Higgins *v.* Lee, 16 Ill. 495.

Kentucky. — Adams *v.* Brown, 3 Litt. 7.

Pennsylvania. — Cunningham *v.* Shaw, 7 Pa. St. 401.

South Carolina. — Morris *v.* Fort, 2 McCord 397.

Texas. — Hunt *v.* Wright, 13 Tex. 549.

23. *Alabama.* — Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476.

Connecticut. — Stoddard *v.* Gates, 2 Root 157.

Georgia. — Blue *v.* Ford, 12 Ga. 45.

Illinois. — Prather *v.* Vineyard, 9 Ill. 40; Corning Steel Co. *v.* Western U. Tel. Co., 60 Ill. App. 426.

Maryland. — Neale *v.* Fowler, 31 Md. 155.

Michigan. — Emerson *v.* Atwater, 7 Mich. 12.

New Hampshire. — Hall *v.* Spaulding, 42 N. H. 259.

North Carolina. — Southerland *v.* Jones, 51 N. C. (6 Jones' L.) 321.

Texas. — Whitworth *v.* Alston, 65 Tex. 528.

24. Whitaker *v.* Bramson, 2 Paine 209, 29 Fed. Cas. No. 17,526; Lynch *v.* Wilson, 4 Blackf. (Ind.) 288; State *v.* Lewis, 93 N. C. 581.

25. Forrester *v.* Vason, 71 Ga. 49; Giles *v.* Shaw, 1 Ill. 125; Ferguson *v.* Frizel, 1 Mo. 441; Blakey *v.* Saunders, 9 Mo. 742; Lackland *v.* Prichett, 12 Mo. 484; Gulick *v.* Loder, 14 N. J. L. 572.

26. Dougherty *v.* Matthews, 35 Mo. 520, 88 Am. Dec. 126.

27. *United States.* — Rogers *v.* Louisville & N. R. Co., 88 Fed. 462.

Colorado. — Denver & R. G. R. Co. *v.* Iles, 25 Colo. 19, 53 Pac. 222.

Connecticut. — Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88.

Illinois. — McCormick Harv. Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402; Chicago & E. I. R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921; Wabash R. Co. *v.* Kingsley, 177 Ill. 558, 52 N. E. 931, 5 Am. Neg. Rep. 554, 13 Am. & Eng. R. Cas. (N. S.) 835; Toledo W. & W. R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613.

Indiana. — Cincinnati, etc. R. Co. *v.* McLain, 148 Ind. 188, 44 N. E. 306.

Kansas. — Atchison, etc. R. Co. *v.* Owens, 6 Kan. App. 515, 50 Pac. 962; Brown *v.* Chicago, etc. R. Co., 59 Kan. 70, 52 Pac. 65.

Minnesota. — Olson *v.* Great Northern R. Co., 68 Minn. 155, 71 N. W. 5, 7 Am. & Eng. R. Cas. (N. S.) 241.

Missouri. — Gannon *v.* Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907.

Nebraska. — Elliott *v.* Carter White Lead Co., 53 Neb. 458, 73 N. W. 948.

Tennessee. — East Tennessee Coal Co. *v.* Daniel, 100 Tenn. 65, 42 S. W. 1062.

Wisconsin. — Flaherty *v.* Harrison, 98 Wis. 559, 74 N. W. 360, 10 Am. & Eng. R. Cas. (N. S.) 176.

28. Assault and Battery. — Meader *v.* Stone, 7 Metc. (Mass.) 147; Ward *v.* Haws, 5 Minn. 440; Peyton *v.* Rogers, 4 Mo. 254.

B. ACTIONS EX CONTRACTU. — a. *Contracts in General.*— **(1.) General Rule.** — It is well settled that when a contract declared on is the gist of the action it must be proved as alleged.[29]

Death by Wrongful Act. — Flanagan's Admr. *v.* City of Wilmington, 4 Houst. (Del.) 548; Georgia R. & B. Co. *v.* Oaks, 52 Ga. 410; Savannah, F. & W. R. Co. *v* Stewart, 71 Ga. 427; Quincy Coal Co. *v.* Hood, 77 Ill. 68.

False Imprisonment. — United States *v.* McNeily, 72 Fed. 972, 19 C. C. A. 318, 41 U. S. App. 1.

Libel and Slander. — Estes *v.* Estes, 75 Me. 478; Winter *v.* Donavon, 8 Gill (Md.) 370.

Malicious Prosecution. — Bennett *v.* Black, 1 Stew. (Ala.) 494; Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728. Cole *v.* Hanks, 3 T. B. Mon. (Ky.) 208.

29. *United States.* — Smith *v.* Barker, 3 Day 280, 22 Fed. Cas. No. 13,013; Dorsey *v.* Chenault, 2 Cranch C. C. 316, 7 Fed. Cas. No. 4,013.

Alabama. — Brantley *v.* West, 27 Ala. 542.

California. — Johnson *v.* Moss, 45 Cal. 515; Cox *v.* McLaughlin, 63 Cal. 196.

Connecticut. — Bunnel *v.* Taintor's Admr., 4 Conn. 568; Shepard *v.* Palmer, 6 Conn. 95; Smith *v.* Barker, 3 Day 312.

Georgia. — Whelan *v.* City of Milledgeville, 92 Ga. 374, 17 S. E. 339.

Illinois. — Iroquois Furnace Co. *v.* Bignall Hdw. Co., 201 Ill. 297, 66 N. E. 237.

Indiana. — Jacobs *v.* Finkel, 7 Blackf. 432; Lindley *v.* Downing, 2 Ind. 418.

Louisiana. — Shaw *v.* Noble, 15 La. Ann. 305.

Mississippi. — Drake *v.* Surget, 36 Miss. 458.

Missouri. — Laclede Const. Co. *v.* Tudor Iron Wks., 169 Mo. 137, 69 S. W. 384.

Texas. — Mason *v.* Kleberg, 4 Tex. 85.

Vermont. — Mann *v.* Birchard, 40 Vt. 326.

Virginia. — Harris *v.* Harris, 2 Rand. 431.

West Virginia. — Davisson *v.* Ford, 23 W. Va. 617.

But where an instrument is not the gist of the action, a slight variance between that alleged and proved is not material. Baldwin *v.* Hazzleton, 3 Mart. N. S. (La.) 61.

Mechanic's Lien. — An allegation in a bill to enforce a mechanic's lien, that the work was to be paid for when fully completed, will not be supported by proof that it was to be paid for by a certain day named. Bush *v.* Connelly, 33 Ill. 447.

In Curley *v.* Dean, 4 Conn. 259, the court decides as follows: "In an action on a contract, the contract given in evidence must agree in substance and effect with the one stated in the declaration; and a trivial variation is fatal, because it destroys the identity of the contract. Therefore, where the plaintiff declared upon a contract, by which he was to have the use and occupation of a clothier's shop for a period, *commencing in October,* 1818 *and ending, at the expiration of the season for dressing cloth, to wit, on the 1st of May,* 1819; and the period proved was *during the season for dressing cloth;* it was held, that the variance was fatal. So, where the plaintiff declared upon a contract by which *the defendant was to receive all the accounts, contracted by the plaintiff, in a certain business, during a certain period,* to reimburse certain expenses incurred by the defendant in such business, and the proof was that *the defendant was to receive the first moneys accruing from the business, and resort to the accounts for the balance only;* it was held, that the variance was fatal."

Where the declaration alleged an undertaking in consideration of a contract entered into by the plaintiff to build a ship, and the evidence was of a contract to finish a ship partly built, the variance was fatal. Smith *v.* Barker, 3 Day (Conn.) 312.

A declaration in an action for work and materials, alleging a contract therefor with defendant, is not sustained by proof that the con-

(2.) Joint Contract. — When the contract is alleged to be joint, the evidence must show a joint one;[30] and if the evidence in such case shows a several[31] the variance is fatal,[32] although by virtue of statute a party may recover against a part of those liable on a joint contract.[33]

(3.) Contract in Writing. — Where the contract is set out specially

tract was with a third party, and that defendant promised to see plaintiff paid. Hogan *v.* Coleman, 119 Mass. 96.

Where a declaration alleges a promise by defendant to pay plaintiff a sum of money, and the proof shows a promise to do certain other things and to pay the money, and all that remains to be done is the payment of money, there is no variance. Holbrook *v.* Dow, 1 Allen (Mass.) 397.

Where a contract was stated to be that the defendant promised to sell cattle for the plaintiff, for a reasonable reward, and account for and pay over the proceeds, and the proof was that the defendant was to sell for cash, the variance was fatal. Leland *v.* Douglass, 1 Wend. (N. Y.) 490.

Where a contract sued on is described in the declaration as executed in a county in one state, no recovery can be had upon the proof of a contract executed in another county in a different state. Carter *v.* Preston, 51 Miss. 423.

Plaintiff declared on a contract whereby defendant agreed to pay him a certain sum for half the land taken for a certain road, and the contract proved was that defendant was to pay for all the land. *Held*, that the variance was fatal. Crawford *v.* Morrell, 8 Johns. (N. Y.) 253.

30. Gossom *v.* Badgett, 6 Bush (Ky.) 97, 99 Am. Dec. 658; Whittemore *v.* Merrill, 87 Me. 456, 32 Atl. 1008; Slaughter *v.* Davenport, 82 Mo. App. 652.

31. Whittemore *v.* Merrill, 87 Me. 456, 32 Atl. 1008; Gossom *v.* Badgett, 6 Bush (Ky.) 97, 99 Am. Dec. 658.

32. Whittemore *v.* Merrill, 87 Me. 456, 32 Atl. 1008; Gossom *v.* Badgett, 6 Bush (Ky.) 97, 99 Am. Dec. 658; Slaughter *v.* Davenport, 82 Mo. App. 652.

In Whittemore *v.* Merrill, 87 Me. 456, 32 Atl. 1008, the court said: "Another fundamental rule of law is that in an action upon a contract, if any part of the contract proved varies materially from that stated in the plaintiff's declaration it will be fatal, for a contract is an entire thing, and must be proved as it is alleged. If a joint contract with two plaintiffs is alleged, proof of a several contract with each plaintiff will not support the action, and the plaintiff may be nonsuited. 1 Greenl. Ev. § 66; 2 Greenl. Ev. § 110."

33. Gossom *v.* Badgett, 6 Bush (Ky.) 97, 99 Am. Dec. 658. In this case, it was said: "It may be premised that although, before the adoption of the civil code, several actions could not be maintained upon a joint contract, by the thirty-ninth section of the civil code the rule of the common law is so changed that 'when two or more persons are jointly bound by contract the action thereon may be brought against all or any of them, at the plaintiff's option.' Therefore now, upon proper allegation and proof, a recovery may be had against part of several joint obligors without suing the others. But there is no provision of the code abrogating the well-established principle that the plaintiff in an action can only recover upon proof of the cause of action alleged in his pleading; Kearney *v.* City of Covington, 1 Met. (Ky.) 339. And although, according to section 156 of the code, 'no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits,' yet it is provided by section 158 of the code that where 'the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is

as one in writing, and the evidence shows a verbal one, there can be no recovery;[34] and the converse of this rule is also true.[35]

(4.) Absolute Contract. — Where the allegation is of an absolute contract, evidence of a contract in the alternative will constitute a variance;[36] and the converse of this proposition is true.[37]

(5.) Nature and Effect of Contract. — If the nature and effect of the contract is proved as alleged, this will be sufficient.[38]

not to be deemed a case of variance, but a failure of proof.' . . . In this case, if the contract was a separate undertaking, the plaintiff could not recover on the allegation of a joint liability."

But in Kirchner *v.* Laughlin, 4 N. M. 218, 17 Pac. 132, it was held that, "under Comp. Laws N. M. §§ 1845, 1846, 1889, providing that all contracts which by the statute law are joint only, shall be construed to be joint and several, and that suit may be brought and prosecuted against any one or more of the parties liable thereon, it is not essential to recovery in assumpsit, on a contract laid in the declaration as joint, to prove a joint contract by all defendants. Proof of a several contract with one is sufficient to warrant a recovery as against him."

34. Tilghman *v.* Tilghman, 1 Baldw. 464, 23 Fed. Cas. No. 14,045; Crawford *v.* Tyng, 10 Misc. 143, 30 N. Y. Supp. 907; Fleetwood *v.* Dorsey Mach. Co., 95 Ind. 491; Cohn *v.* Levy, 14 La. Ann. 355; Newby *v.* Rogers, 40 Ind. 9; Mutual L. Ins. Co. *v.* Robinson, 24 App. Div. 570, 49 N. Y. Supp. 887; Saatoff *v.* Scott, 103 Iowa 201, 72 N. W. 492.

Nor can there be a recovery where the proof shows a contract partly oral. King *v.* Faist, 161 Mass. 449, 37 N. E. 456; Philips *v.* Rose, 8 Johns. (N. Y.) 392; Steiner *v.* Hellman, 7 App. Div. 248, 40 N. Y. Supp. 36; *Contra,* Sanders Pressed Brick Co. *v.* Columbia Real Estate Co., 86 Mo. App. 169.

Where plaintiff, in an action on a contract under seal, does not allege in his pleadings a special parol contract or agreement, he cannot recover upon it. Irwin *v.* Shultz, 46 Pa. St. 74.

35. McMahan *v.* Canadian Pac. R. Co., 40 Or. 148, 66 Pac. 708; Johnson Harvester Co. *v.* Bartley, 81 Ind. 406; Colton *v.* Vandervolgen, 87 Ind. 361; Durflinger *v.* Baker, 149 Ind. 375, 49 N. E. 276; Altman & Taylor Co. *v.* Joplin, 5 Ky. L. Rep. 184.

Contra. — Nelson *v.* Dubois, 13 Johns. (N. Y.) 175; Kleinschmidt *v.* Kleinschmidt, 13 Mont. 64, 32 Pac. 1.

36. Williams *v.* Kinnard, Minor (Ala.) 196; Strong *v.* Slicer, 33 Vt. 466.

37. Russell *v.* South Britain Soc., 9 Conn. 508; Stone *v.* Knowlton, 3 Wend. (N. Y.) 374.

38. *Alabama.* — Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476; Jones *v.* Jones, 8 Ala. 262.

Arkansas. — Bailey *v.* Gatton, 14 Ark. 180.

Colorado. — Bishop *v.* Griffith, 4 Colo. 68; Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063.

Connecticut. — Alling *v.* Forbes, 68 Conn. 575, 37 Atl. 390; Fish *v.* Brown, 17 Conn. 341; Marion *v.* Faxon, 20 Conn. 486.

Illinois. — Iroquois Furnace Co. *v.* Elphicke, 200 Ill. 411, 65 N. E. 784; Hough *v.* Rawson, 17 Ill. 588.

Indiana. — Clifford *v.* Meyer, 33 N. E. 127.

Kentucky. — Steadman *v.* Guthrie, 4 Metc. 147.

Louisiana. — LeJeune *v.* Hebert, 2 La. Ann. 145.

Maryland. — Frank *v.* Morrison, 58 Md. 423.

Massachusetts. — Cleaves *v.* Lord, 3 Gray 66; Holbrook *v.* Dow, 1 Allen 397.

Michigan. — Engle *v.* Campbell, 42 Mich. 565, 4 N. W. 301; Fuller *v.* Rice, 52 Mich. 435, 18 N. W. 204.

Minnesota. — Short *v.* McRea, 4 Minn. 119.

Missouri. — Boone *v.* Stover, 66 Mo. 430; Chapman *v.* Currie, 51 Mo. App. 40; McDearmott *v.* Sedgwick, 140 Mo. 172, 39 S. W. 776; Sedalia Board of Trade *v.* Brady, 78 Mo. App. 585.

(6.) Contract Set Out According to Legal Effect. — Where a contract is stated in the pleading according to its *legal effect,* illustrations of which are given in the notes,[39] literal proof of such contract is

New Hampshire. — Moore *v.* Lake Co., 58 N. H. 254.

New York. — Newstadt *v.* Adams, 5 Duer (N. Y. Super.) 43; Marsh *v.* Dodge, 5 Lans. 541; Logan *v.* Berkshire Apt. Assn., 3 Misc. 296, 22 N. Y. Supp. 776.

Ohio. — Gaines *v.* Union Transp. & Ins. Co., 28 Ohio St. 418.

Pennsylvania. — Emerson *v.* Kroh, 14 Pa. St. 315.

Tennessee. — Deaton *v.* Tennessee Coal & R. Co., 12 Heisk. 650.

Texas. — Jefferson & N. W. R. Co. *v.* Dreeson, 43 Tex. Civ. App. 282, 96 S. W. 63; Buckler *v.* Kneezell (Tex. Civ. App.), 91 S. W. 367; Sublett *v.* Kerr, 12 Tex. 366.

Vermont. — Dix *v.* School Dist. No. 2, 22 Vt. 309; Bruce *v.* Greenbanks, 33 Vt. 226; Drown *v.* Forrest, 63 Vt. 557, 22 Atl. 612, 14 L. R. A. 80.

Washington. — Irby *v.* Phillips, 40 Wash. 618, 82 Pac. 931.

But Substantial Variance Is Fatal. Davis *v.* Campbell, 3 Stew. (Ala.) 319.

Variance Held Material and Therefore Fatal. — *Alabama.* — Prestwood *v.* Eldridge, 119 Ala. 72, 24 So. 729; Wellman *v.* Jones, 124 Ala. 580, 27 So. 416; Griffin *v.* Bass Foundry & Mach. Co., 135 Ala. 490, 33 So. 177.

Colorado. — Calhoun *v.* Girardine, 13 Colo. 103, 21 Pac. 1017.

Connecticut. — Smith *v.* Barker, 3 Day 312.

Georgia. — Central R. & Bkg. Co. *v.* Tucker, 79 Ga. 128, 4 S. E. 5; Morrison *v.* Dickey, 122 Ga. 417, 50 S. E. 178.

Illinois. — Stickney *v.* Cassell, 6 Ill. 418; Minifee *v.* Higgins, 57 Ill. 50; Brooks *v.* Gates, 8 Ill. App. 428.

Indiana. — Buckley *v.* Stanley, 5 Blackf. 162; Riley *v.* Walker, 6 Ind. App. 622, 34 N. E. 100.

Iowa. — York *v.* Wallace, 48 Iowa 305.

Kansas. — Ingraham *v.* Morris, 35 Kan. 290, 10 Pac. 825.

Kentucky. — Bull *v.* McRea, 8 B. Mon. 422; Anderson *v.* Waller, 3 T. B. Mon. 234; Union Boiler & Tube C. Co. *v.* Louisville R. Co., 25 Ky. L. Rep. 122, 74 S. W. 1056.

Maryland. — Hoke *v.* Wood, 26 Md. 453.

Massachusetts. — Irvine *v.* Stone, 6 Cush. 508; Sheafe *v.* Locke, 1 Allen 369; Hogan *v.* Coleman, 119 Mass. 96; Whelton *v.* Tompson, 121 Mass. 346; Turner *v.* Patterson, 160 Mass. 20, 34 N. E. 1083; Bowker *v.* Childs, 3 Allen 434.

Michigan. — Patter *v.* Brown, 35 Mich. 274; Bilsborrow *v.* Warner, 117 Mich. 506, 76 N. W. 7.

Missouri. — Green *v.* Cole, 127 Mo. 587, 30 S. W. 135.

New York. — Crawford *v.* Morrell, 8 Johns. 253; Leland *v.* Douglass, 1 Wend. 490; Gallaudet *v.* Kellogg, 133 N. Y. 671, 31 N. E. 337, *affirming* 61 Hun 626, 16 N. Y. Supp. 79; Hirsch *v.* Am. Dist. Tel. Co., 90 N. Y. Supp. 464.

North Carolina. — Walker *v.* Baxter, 23 N. C. (1 Ired. L.) 213; Starnes *v.* Erwin, 32 N. C. (10 Ired L.) 226; Dickens *v.* Perkins, 134 N. C. 220, 46 S. E. 490.

Oregon. — MacMahon *v.* Duffy, 36 Or. 150, 59 Pac. 184.

Texas. — Shipman *v.* Fulcrod, 42 Tex. 248; Kildow *v.* Irick (Tex. Civ. App.), 33 S. W. 315; Loudon *v.* Robertson (Tex. Civ. App.), 54 S. W. 783; Letat *v.* Edens (Tex. Civ. App.), 49 S. W. 109.

Virginia. — M'Alexander *v.* Montgomery, 4 Leigh 61.

West Virginia. — James *v.* Adams, 8 W. Va. 568; Baltimore & O. R. Co. *v.* Skeels, 3 W. Va. 556.

39. Illustrations. — In Short *v.* *v.* McRea, 4 Minn. 119, in the course of its opinion the court says: "This action, in respect to the contract under consideration, is simply to recover for work and labor done and performed by the plaintiff at the request of the defendant. The proof is, that one of the defendants directed the plaintiff to go on and perform the labor until his partner returned, and then if the arrangement was not satisfactory to the partner, he might fix it to suit himself. We are unable to perceive any difference in principle or legal effect, between the allegation and the proofs. If A

not required, but only such evidence as will establish it according to its legal effect.[40]

direct B to work for him until further advised, it will hardly be maintained that B cannot recover for the value of such labor as he may have performed before A notifies him to desist. Yet the claim of the defendants involves a direct denial of this proposition."

Nature of Contract Not Changed. In Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, the action was assumpsit, in which the declaration averred "that the said Walter as one of the administrators of William E. Berry, deceased, on etc. at, etc., delivered unto the said Enos, in part of his claim against the estate of the said William, three hogshead of crop tobacco, etc., he, the said Enos, to be allowed per cent therefor, the highest six months' credit price at the place aforesaid during that time, after rescinding the embargo." The contract produced in evidence was without the words "he, the said Enos." The court said as to this matter, "there is therefore a literal variance, but its effect depends upon the consideration whether it materially changes the contract." It was held in this case that this was not a fatal variance, as the court expressed itself as satisfied that the plaintiff had declared according to the true intent of the parties as apparent on the contract.

Action on Writing Obligatory. In Fish *v.* Brown, 17 Conn. 341, the plaintiff brought an action of debt, describing the subject of the action as a writing obligatory under the hand and seal of the defendant; and the instrument produced in evidence appeared to be not otherwise executed than by the signature of the defendant with a scrawl annexed. It was held, "1, that by the common law, a scrawl does not constitute a seal; but, 2, that it is sufficient to prove an allegation of a fact according to its legal effect; 3, that the statute of 1838, confirming deeds and bonds, gives the same legal effect to the instrument produced, as it would have, if actually sealed; 4, that it is to have this effect, not only as to the obligation created by it, but as to the description of it in pleading; consequently, that there was no variance between the declaration and the proof."

In the course of the opinion in this case, the court says: "It is a familiar rule of evidence, that it is sufficient to prove an allegation of a fact according to its legal effect. Stark Ev. pt. 4, p. 1565. Literal proof is not required. Hence an allegation that a party did a particular act, is satisfied by proof that the act, in legal effect, is his. Thus, an averment that the defendants accepted a bill of exchange, is proved by evidence of an acceptance by their authorized agent. So, in an action by the husband alone, on a bond alleged to be given to him, evidence of a bond to himself and his wife was held to support the allegation, for he had a right to reject the obligation to his wife, and in legal import, it was a bond to himself. Heys *v.* Heseltine, 2 Campb. 604. Coare *v.* Giblet, 4 Esp. Ca. 231; Ankerstein *v.* Clarke, 4 Term. R. 616. Stark Ev. pt. 4, tit. Variance. Phelps *v.* Riley, 3 Conn. R. 266. This principle, in our opinion, applies to the present case, and justifies the admission of the instrument in question in support of the declaration."

Action on Insurance Policy. — In Insurance Co. *v.* McDowell, 50 Ill. 120, the decision of the court on the subject of variance was in the following language: "Where the declaration avers the contract to have been made with the Insurance Company of North America, and the proof shows it to have been made with the President and Directors of the company, it was held that the averment stated the obligation under the contract according to its legal effect."

40. *England.* — Rex *v.* May, 1 Dougl. 193; Morgan *v.* Edwards, 6 Taunt. 394, 1 E. C. L. 423; Byne *v.* Moore, 5 Taunt. 187, 1 E. C. L. 69; Ankerstein *v.* Clark, 4 T. R. 616; Wilson *v.* Bramhall, 1 Y. & J. 2.

United States. — Ferguson *v.* Harwood, 7 Cranch 408.

Alabama. — Clark *v.* Moses, 50

(7.) Allegation of Contract in Haec Verba. — Where the pleadings set out the contract *in haec verba,* literal proof of the contract must be shown.[41]

Ala. 326; Davis & Co. *v.* Campbell, 3 Stew. 319.

Arkansas. — State Bank *v.* Magness, 11 Ark. 343; Dickens *v.* Howell, 24 Ark. 230.

Colorado. — Bishop *v.* Griffith, 4 Colo. 68.

Connecticut — Fish *v.* Brown, 17 Conn. 341; Comstock *v.* Savage, 27 Conn. 184; Waldo *v.* Spencer, 4 Conn. 71.

Georgia. — Kimbell *v.* Moreland, 55 Ga. 164.

Illinois. — Meers *v.* Stevens, 106 Ill. 549; Phelan *v.* Andrews, 52 Ill. 486.

Indiana. — St. James Church *v.* Moore, 1 Ind. 289; Chapman *v.* Ellison, 7 Blackf. 46; Leaphardt *v.* Sloan, 5 Blackf. 278; Lynch *v.* Wilson, 4 Blackf. 288; Adams *v.* Lisher, 3 Blackf. 241; Lambert *v.* Blackman, 1 Blackf. 59; Crenshaw *v.* Bullitt, 1 Blackf. 41.

Iowa. — Wilson *v.* King, 1 Morris 106.

Kentucky. — Anderson *v.* Waller, 3 T. B. Mon. 234.

Massachusetts. — Luce *v.* Dexter, 135 Mass. 23; Peck *v.* Waters, 104 Mass. 345; Clary *v.* Thomas, 103 Mass. 44; Cleaves *v.* Lord, 3 Gray 66; Commercial Bank *v.* French, 21 Pick. 486.

Minnesota. — Chapman *v.* Dodd, 10 Minn. 350.

Missouri. — Bank of State *v.* Vaughan, 36 Mo. 90; Montgomery *v.* Farley, 5 Mo. 233; Bell *v.* Scott, 3 Mo. 212.

New York. — Sears *v.* Barnum, Clarke Ch. 139; Wood *v.* Bulkley, 13 Johns. 486; Rodman *v.* Forman. 8 Johns. 26; Bissell *v.* Kip, 5 Johns. 89; Mills *v.* McCoy, 4 Cow. 406; Cotheal *v.* Talmadge, 1 E. D. Smith 573; Field *v.* Field, 9 Wend. 394.

Tennessee. — Deaton *v.* Tennessee Coal & R. Co., 12 Heisk. 650.

Vermont. — Maxfield *v.* Scott, 17 Vt. 634; Wead *v.* Marsh, 14 Vt. 80; Henry *v.* Henry, 1 D. Chip. 265.

Virginia. — Dickinson *v.* Smith, 5 Gratt. 135.

West Virginia. — State *v.* Berkeley, 41 W. Va. 455, 23 S. E. 608.

41. *England.* — Bowditch *v.* Mawley, 1 Campb. 195.

United States. — Ferguson *v.* Harwood, 7 Cranch 408.

Alabama. — Harrison *v.* Weaver, 2 Port. 542.

Arkansas. — Dickens *v.* Howell, 24 Ark. 230; State Bank *v.* Hubbard, 4 Ark. 419; Hanly *v.* Real Estate Bank, 4 Ark. 598.

Illinois. — Franklin Ins. Co. *v.* Smith, 82 Ill. 131; Taylor *v.* Kennedy, 1 Ill. 91.

Indiana. — Lynch *v.* Wilson, 4 Blackf. 288.

Massachusetts. — Dyer *v.* Stevens, 6 Mass. 389; Irvine *v.* Stone, 6 Cush. 508.

Missouri. — State *v.* Owen, 73 Mo. 440; State *v.* Smith, 31 Mo. 120; Lackland *v.* Pritchett, 12 Mo. 484; Blakey *v.* Saunders, 9 Mo. 742; Wash *v.* Foster, 3 Mo. 205; State *v.* Humble, 34 Mo. App. 343.

New Jersey. — Mulford *v.* Bowen, 9 N. J. L. 315.

New York. — Mills *v.* McCoy, 4 Cow. 406; Vail *v.* Smith, 4 Cow. 71.

Pennsylvania. — Com. *v.* Gillespie, 7 Serg. & R. 469; Dunbar *v.* Jumper, 2 Yeates 74.

South Carolina. — Beck *v.* Pearse, 1 Bailey L. 154; Butler *v.* State, 3 McCord L. 383.

Texas. — *Ex parte* Rogers, 10 Tex. App. 655.

Vermont. — McDaniels *v.* Bucklin, 13 Vt. 279; Sherwin *v.* Bliss, 4 Vt. 96; Harris *v.* Lawrence, 1 Tyler 156.

West Virginia. — State *v.* Berkeley, 41 W. Va. 455, 23 S. E. 608.

Wisconsin. — Eastman *v.* Bennett, 6 Wis. 232.

Where a party professes to give the legal effect and operation of the instrument, and its legal effect is different from that which appears by his statement, a variance will occur, and the instrument will be excluded at the trial, though he adopts the exact expressions contained in it; but when he does not profess to give the substance and legal effect of it only, but states the very words of the instrument, the court will con-

(8.) Partnership Contract. — An allegation of a partnership contract is not sustained by evidence of an individual contract.[42]

(9.) Allegation of an Original Contract. — If the allegation is of an original contract, proof of a contract subsequently modified does not sustain the case made by the pleadings.[43]

(10.) Allegation of Express or Implied Contract or Quantum Meruit. (A.) Express Contract. — If an express contract be alleged in the pleadings, evidence of an implied contract,[44] or of a *quantum meruit*,[45] is not admissible, unless allowed by special statute;[46] but

strue it for him. Fairbanks *v.* Isham, 16 Wis. 123.

42. Black *v.* Struthers, 11 Iowa 459; Ulrick *v.* Ragan, 11 Ala. 529. E converso, proof of a partnership contract cannot sustain allegations of an individual contract. McCord *v.* Seale, 56 Cal. 262; Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564; Smith *v.* James, 72 Iowa 515, 34 N. W. 309.

43. *Arkansas.* — Nesbitt *v.* McGehee, 26 Ala. 748; Jordan *v.* Fenno, 13 Ark. 593.

Iowa. — Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

Kansas. — Pioneer Sav. & Loan Co. *v.* Kaspar, 7 Kan. App. 813, 52 Pac. 623.

Maryland. — Kribs *v.* Jones, 44 Md. 396.

Missouri. — Harrison *v.* Kansas City, etc. R. Co., 50 Mo. App. 332.

New Hampshire. — Miles *v.* Roberts, 34 N. H. 245.

New York. — Tumbridge *v.* Read, 51 Hun 644, 3 N. Y. Supp. 908; McEntyre *v.* Tucker, 36 App. Div. 53, 55 N. Y. Supp. 153; Alexander *v.* O'Hare, 63 N. Y. Supp. 179, 48 App. Div. 401.

North Carolina. — Hassard-Short *v.* Hardison, 117 N. C. 60, 23 S. E. 96.

Wisconsin. — Ninman *v.* Suhr, 91 Wis. 392, 64 N. W. 1035; Computing Scales Co. *v.* Churchill, 109 Wis. 303, 85 N. W. 337; Duval *v.* Am. Tel. & Tel. Co., 113 Wis. 504, 89 N. W. 482.

44. *Florida.* — Smoot *v.* Strauss, 21 Fla. 611.

Kentucky. — Newton *v.* Field, 98 Ky. 186, 32 S. W. 623.

Michigan. — Swarthout *v.* Lucas, 101 Mich. 609, 60 N. W. 306.

Minnesota. — Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; Ecker *v.* Isaacs, 98 Minn. 146, 107 N. W. 1053.

Missouri. — Huston *v.* Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795.

Texas. — Nunn *v.* Townes (Tex. Civ. App.), 23 S. W. 1117.

Wisconsin. — White *v.* Lueps, 55 Wis. 222, 12 N. W. 376.

45. *Indiana.* — Davis *v.* Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294.

Iowa. — Formholz *v.* Taylor, 13 Iowa 500; Boyce *v.* Timpe, 89 N. W. 83; Hunt *v.* Tuttle, 125 Iowa 676, 101 N. W. 509.

Kansas. — Modell Tp. *v.* King Iron-Bridge Mfg. Co., 2 Kan. App. 237, 41 Pac. 1059.

Kentucky. — Morford *v.* Mastin, 6 T. B. Mon. 609, 17 Am. Dec. 168.

Louisiana. — Mazureau *v.* Morgan, 25 La. Ann. 281; Condran *v.* New Orleans, 43 La. Ann. 1202, 9 So. 31.

Missouri. — Traders' Bank *v.* Payne, 31 Mo. App. 512; Warson *v.* McElroy, 33 Mo. App. 553; Hayes *v.* Bunch, 91 Mo. App. 467; Wade *v.* Nelson, 119 Mo. App. 278, 95 S. W. 956.

Nebraska. — Powder River Live-S. Co. *v.* Lamb, 38 Neb. 339, 56 N. W. 1019; Mayer *v.* VerBryck, 46 Neb. 221, 64 N. W. 691; Dorrington *v.* Powell, 52 Neb. 440, 72 N. W. 587.

New York. — Lydecker *v.* Village of Nyack, 6 App. Div. 90, 39 N. Y. Supp. 509.

Pennsylvania. — Alexander *v.* Hoffman, 5 Watts & S. 382.

South Dakota. — Morrow *v.* Board of Education, 7 S. D. 553, 64 N. W. 1126.

Texas. — International & G. N. R. Co. *v.* Masterson, 51 S. W. 644.

Wisconsin. — Manning *v.* School Dist., 124 Wis. 84, 102 N. W. 356. *Contra*, see Palmer *v.* Miller, 19 Ind. App. 624, 49 N. E. 975.

46. Wittkowski *v.* Harris, 64 Fed. 712.

it is often otherwise when the pleading contains the common counts.[47]

(B.) Implied Contract or Quantum Meruit. — An allegation of a contract implied by law,[48] or one founded upon a *quantum meruit*, cannot be supported by evidence of an express contract.[49]

(11.) Different Parts of Contract. — (A.) Consideration. — As no contract can be valid without a consideration to support it,[50] when it is not under seal there must be a consideration alleged,[51] and the

47. Speer *v.* McLaughlin, 11 Ark. 732; Burke *v.* Claughton, 12 App. Cas. (D. C.) 182; Brewer & Hofmann Brew. Co. *v.* Hermann, 187 Ill. 40, 58 N. E. 397; Rubens *v.* Hill, 115 Ill. App. 565; Wilson *v.* St. Johns Hospital, 92 Ill. App. 413; McGraw *v.* Sturgeon, 29 Mich. 426.

In Van Fleet *v.* Van Fleet, 50 Mich. 1, 14 N. W. 671, it is decided: "Although one alleging an implied contract to pay for labor cannot recover upon proof of an express contract, yet, where he relies upon an express contract, and alleges that if it shall not be shown the facts will imply a contract, upon which he will rely, he may recover upon proof of either an express or implied contract.

"While one cannot recover as upon an implied contract where the evidence shows an express contract, a recovery may be had by one relying upon an express agreement, or, in case such agreement is not established, upon an agreement to the same effect implied from the facts shown." See in this connection, Fuller *v.* Rice, 52 Mich. 435, 18 N. W. 204.

48. Van Fleet *v.* Van Fleet, 50 Mich. 1, 14 N. W. 671; Farrell *v.* Knapp, 1 Cranch C. C. 131, 8 Fed. Cas. No. 4,684; Bean *v.* Elton, 44 Ill. App. 442; Wisbey *v.* Boyce (Tex. Civ. App.), 27 S. W. 590; Hogan *v.* Gibson, 12 La. 457.

Contra. — See Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98; Shilling *v.* Templeton, 66 Ind. 585.

Under a declaration claiming a certain sum for certain services, the plaintiff may recover by proving that the services were performed and were reasonably worth the sum claimed, although his counsel, in opening the case to the jury, has relied on a special contract to pay that sum, and evidence of such a contract has also been introduced. Harrington *v.* Baker, 15 Gray (Mass.) 538.

49. Willis *v.* Melville, 19 La. Ann. 13; Imhoff *v.* House, 36 Neb. 28, 53 N. W. 1032.

Though the complaint, in an action for the use of a device owned by the plaintiff, is on a quantum meruit, evidence offered by plaintiff to show a specific contract to pay a fixed price is competent, and if the contract is sufficiently established the stipulated price becomes the quantum meruit. Lamson Con. Store-Service Co. *v.* Weil, 15 Daly 498, 8 N. Y. Supp. 336.

50. *United States.* — Watson *v.* Dunlap, 2 Cranch C. C. 214, 29 Fed. Cas. No. 17,282.

Alabama. — Brown *v.* Adams, 1 Stew. 51, 18 Am. Dec. 36.

California. — Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223.

Connecticut. — Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79.

Massachusetts. — Thacher *v.* Dinsmore, 5 Mass. 299.

New York. — Burnet *v.* Bisco, 4 Johns. 235; People *v.* Shall, 9 Cow. 778.

Tennessee. — Roper *v.* Stone, 3 Tenn. 497; Clark *v.* Small, 6 Yerg. 418.

Virginia. — Beverleys *v.* Holmes, 4 Munf. 95.

51. *California.* — Acheson *v.* Western U. Tel. Co., 96 Cal. 641, 31 Pac. 583; Shafer *v.* Bear River & A. W. & M. Co., 4 Cal. 294.

Connecticut. — Russell *v.* South Britain Soc., 9 Conn. 508.

Indiana. — Poundstone *v.* Lewark, 4 Blackf. 173; Robinson *v.* Barbour, 5 Blackf. 468; Leach *v.* Rhodes, 49 Ind. 291; Doran *v.* Shaw, 26 Ind. 284.

Iowa. — Tomlinson *v.* Smith, 2 Iowa 39.

proof of consideration must be such as to support the one alleged.[52]

(B.) DATE. — When it is alleged that a contract was made on a certain date, evidence that it was made on some other date will not constitute a variance,[53] unless the contract is in writing and the date is made a matter of essential description,[54] in which case the

Massachusetts. — Harris *v.* Rayner, 8 Pick. 541.

Michigan. — Kean *v.* Mitchell, 13 Mich. 207.

South Carolina. — Rye *v.* Stubbs, 1 Hill 384.

Tennessee. — Shelton *v.* Bruce, 9 Yerg. 24.

Utah. — Felt *v.* Judd, 3 Utah 414, 4 Pac. 243.

Virginia. — Southern R. Co. *v.* Willcox, 98 Va. 222, 35 S. E. 355.

But not when contract is under seal. Wills *v.* Kempt, 17 Cal. 98; Moore *v.* Waddle, 34 Cal. 145.

52. *United States.* — Watson *v.* Dunlap, 2 Cranch C. C. 14, 29 Fed. Cas. No. 17,282.

Arkansas. — Speer *v.* McLaughlin, 11 Ark. 733.

Connecticut. — Bulkley *v.* Landon, 3 Conn. 76.

Illinois. — Indianapolis, etc. R. Co. *v.* Rhodes, 76 Ill. 285.

Indiana. — Lucas *v.* Smith, 42 Ind. 103.

Iowa. — Beebe *v.* Brown, 4 G. Gr. 406; Walker *v.* Irwin, 94 Iowa 448, 62 N. W. 785.

Kentucky. — Rogers *v.* Estis, Litt. Sel. Cas. 2.

Massachusetts. — Cleaves *v.* Lord, 3 Gray 66; Stone *v.* White, 8 Gray 589; Woodruff *v.* Wentworth, 133 Mass. 309.

Michigan. — Tillman *v.* Fuller, 13 Mich. 113.

Mississippi. — Drake *v.* Surget, 36 Miss. 458.

Missouri. — Marcum *v.* Smith, 26 Mo. App. 460.

New Hampshire. — Colburn *v.* Pomeroy, 44 N. H. 19; Hart *v.* Chesley, 18 N. H. 373; New Hampshire Mut. Ins. Co. *v.* Hunt, 30 N. H. 219.

New York. — Robertson *v.* Lynch, 18 Johns. 451.

Ohio. — Mulford *v.* Young, 6 Ohio 294.

Pennsylvania. — Umbehocker *v.* Rassel, 2 Yeates 339.

South Carolina. — Brooks *v.* Lourie, 1 Nott & McC. 342.

West Virginia. — Davisson *v.* Ford, 23 W. Va. 617.

Variance Held Immaterial. — Ives *v.* McHard, 103 Ill. 97; Miller *v.* Kendig, 55 Iowa 174, 7 N. W. 500; Borden Min. Co. *v.* Barry, 17 Md. 419; Legg *v.* Gerardi, 22 Mo. App. 149; Chapman *v.* Currie, 51 Mo. App. 40; Meyer *v.* Koehring, 129 Mo. 15, 31 S. W. 449; Salter *v.* Kirkbride, 4 N. J. L. 254.

Where "one dollar" was alleged as the consideration, proof that the consideration was different is not a material variance. Redfield *v.* Haight, 27 Conn. 31.

53. Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349; Frazer *v.* Smith, 60 Ill. 145; Long *v.* Conklin, 75 Ill. 32 (where date laid under videlicet); Reynolds Card-Mfg. Co. *v.* New York B.-N. Co., 91 Hun 463, 36 N. Y. Supp. 756; Stout *v.* Rassel, 2 Yeates (Pa.) 334; Trench *v.* Hardin County C. Co., 67 Ill. App. 269, 168 Ill. 135, 48 N. E. 64; Singer *v.* Hutchinson, 83 Ill. App. 675.

54. *United States.* — Cooke *v.* Graham's Admr., 3 Cranch 229.

Arkansas. — Field *v.* Pope, 5 Ark. 66; Hanly *v.* Real Estate Bank, 4 Ark. 498.

Connecticut. — Sage *v.* Hawley, 16 Conn. 106; Curley *v.* Dean, 4 Conn. 259.

Georgia. — Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349.

Illinois. — Frazer *v.* Smith, 60 Ill. 145; Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117; Streeter *v.* Streeter, 43 Ill. 155; Spangler *v.* Pugh, 21 Ill. 85.

Indiana. — Comparet *v.* State, 7 Blackf. 553.

New Jersey. — Gulick *v.* Loder, 14 N. J. L. 572.

Vermont. — Bank of Manchester *v.* Allen, 11 Vt. 302; Gates *v.* Bowker, 18 Vt. 22.

Virginia. — Bennett's Exr. *v.* Giles, 6 Leigh 316.

date must be proved as alleged or there is a material variance.[55]

(C.) Parties. — The parties to the contract should be shown by

West Virginia. — Damarin *v.* Young, 27 W. Va. 436.

55. Date Matter of Essential Description. — In Streeter *v.* Streeter, 43 Ill. 155, the note was described in the declaration as bearing date April 6, 1864, and the one offered in evidence and admitted against the objection of the defendant, bore date September 6, 1864. The court held that the allegation of the date of the note was made matter of essential description and that such date must be precisely proved as alleged, following the ruling made in Spangler *v.* Pugh, 21 Ill. 85. In Savage *v.* Aills, 2 T. B. Mon. (Ky.) 93, the note declared on was alleged to bear date on the 10th of April, 1821, and the court in its opinion said that as the date of the note as stated in the declaration became a material part of its description it was evident that the variance between the date of the note stated in the declaration and the date of that of which oyer was given was a substantial one, and not a mere formal one, *citing* Banks *v.* Coyle, 2 A. K. Marsh. (Ky.) 565, 1 Chitty 622-3. The court, therefore, said that because there was a substantial variance between the writing declared on and that of which oyer was given the decision of the court below was correct and the judgment was accordingly affirmed.

In Grant *v.* Winn, 7 Mo. 188, the court in its opinion said: "The appellee sued Grant in assumpsit, upon a promissory note for $62.50. The declaration averred, that on the 25th day of August, 1840, at, etc., defendant made his certain agreement in writing, dated the day and year aforesaid, and thereby then and there promised to pay, etc. Upon the trial, the plaintiff offered in evidence a note, answering to the description of the declaration, except that it bore no date at all. The defendant below objected to the note, but the court allowed it to go to the jury. There was a verdict and judgment for plaintiff, motion for a new trial by defendant, and exceptions duly saved. In stating the date of a promissory note, it must be truly stated; and if the note bears no date, it may be alleged to have been made at any day; and in that case, the words 'bearing date,' or 'dated,' being descriptive words, must be omitted. 1 Chitty's Pl. 258. It is the opinion of this court that it was error to allow this note to go to the jury. Judgment reversed and cause remanded."

When Date Not Matter of Description. — In First Nat. Bank *v.* Stephenson, 82 Tex. 435, 18 S. W. 583, the petition was on a note, in which it was alleged "that on or about the 11th day of October, 1888, defendant made, executed and delivered his certain promissory note in writing" etc., and the note offered in evidence bore date October 12, 1888. It was held that there was no material variance between the note described in the petition and the one offered in evidence. The court in the course of its opinion said that the allegation "that on or about the 11th of October, 1888, the defendant made, executed and delivered," etc. was not an averment that the note was dated on that day. The court furthermore relative to this variance says: "A variance between the allegation and proof which ought not to have misled the adverse party to his prejudice is not material. It must be such as to mislead or surprise the opposite party. A rule is adopted in McClelland *v.* Smith, 3 Tex. 213, which should apply to this case: 'That, if the misdescription will tend to mislead and surprise the adverse party, it should be noticed by the court; if not, it may be disregarded.' May *v.* Pollard, 28 Tex. 677; Smith *v.* Shinn, 58 Tex. 3; Wiebusch *v.* Taylor, 64 Tex. 56; Lasater *v.* Van Hook, 77 Tex. 655, 14 S. W. Rep. 270; 2 Greenl. Ev. § 12; Chitty, Bills, 563."

If the date of a note is correctly stated in the declaration, no variance is created, by proof that the note was made on a day different from its date. Marshall *v.* Russell, 44 N. H. 509.

the evidence to be those whom the pleadings allege to be the parties.[56]

(D.) Subject-Matter. — Where the matter to which the contract relates is alleged, there must be substantial proof as to such matter, else a variance will be created.[57]

(E.) Performance. — When there is an allegation relating to the matter of performance of a contract, such allegation must be substantially proved, else a variance will arise;[58] and the same rule

56. *United States.* — Craig *v.* Brown, Pet. C. C. 139, 6 Fed. Cas. No. 3,326.

Alabama. — Cobb *v.* Keith, 110 Ala. 614, 18 So. 325; Mason *v.* Hall, 30 Ala. 599.

Colorado. — Sherman *v.* Jones, 19 Colo. App. 281, 74 Pac. 799.

Georgia. — Thompson *v.* Fenn, 100 Ga. 234, 28 S. E. 39.

Indiana. — Graham *v.* Henderson, 35 Ind. 195.

Iowa. — Black *v.* Struthers, 11 Iowa 459; Saatoff *v.* Scott, 103 Iowa 201, 72 N. W. 492.

Kentucky. — Houngan *v.* Phillips, 7 Ky. L. Rep. 150.

Mississippi. — Spann *v.* Grant, 83 Miss. 19, 35 So. 217.

Missouri. — American Bank *v.* Campbell, 34 Mo. App. 45.

New York. — Buckley *v.* Zimmerman, 32 Misc. 704, 65 N. Y. Supp. 512; Brigger *v.* Mutual R. F. Life Assn., 75 App. Div. 149, 77 N. Y. Supp. 362; Riggs *v.* Chapin, 7 N. Y. Supp. 765.

North Carolina. — Murray *v.* Davis, 51 N. C. (6 Jones' L.) 341.

Texas. — Stewart *v.* Gordon, 65 Tex. 344.

Virginia. — Rohr *v.* Davis, 9 Leigh 30.

Washington. — Haynes *v.* Tacoma, etc. R. Co., 7 Wash. 211, 34 Pac. 922.

Variance Held Immaterial.

United States. — Ferguson *v.* Harwood, 7 Cranch 408.

Idaho. — Hewitt *v.* Maize, 5 Idaho 633, 51 Pac. 607.

Illinois. — Insurance Co. *v.* McDowell, 50 Ill. 120.

Missouri. — Anstee *v.* Ober, 26 Mo. App. 665.

South Dakota. — Hermiston *v.* Green, 11 S. D. 81, 75 N. W. 819.

Texas. — Slayden *v.* Stone, 19 Tex. Civ. App. 618, 47 S. W. 747.

Vermont. — Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

Virginia. — Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. W. 879.

An allegation of a contract by defendant will be sustained by proof of a contract by him through an agent. Blotcky *v.* Miller, 3 Neb. (Unof.) 344, 91 N. W. 523; Root *v.* Fay, 5 Ariz. 19, 43 Pac. 527.

57. *United States.* — Smith *v.* Barker, 3 Day 280, 22 Fed. Cas. No. 13,013.

Alabama. — Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335.

California. — Owen *v.* Meade, 104 Cal. 179, 37 Pac. 923.

Connecticut. — Smith *v.* Barker, 3 Day 312; Bunnel *v.* Taintor's Admr., 4 Conn. 568; Shepard *v.* Palmer, 6 Conn. 94.

Georgia. — Lea *v.* Harris, 84 Ga. 137, 10 S. E. 599.

Illinois. — Lane *v.* Sharpe, 4 Ill. 566; Iroquois Furnace Co. *v.* Elphicke, 200 Ill. 411, 65 N. E. 784.

Indiana. — Hatten *v.* Robinson, 4 Blackf. 479.

Kentucky. — Anderson *v.* Waller, 3 T. B. Mon. 234.

Maryland. — Norris *v.* Graham, 33 Md. 56.

Massachusetts. — Bridge *v.* Austin, 4 Mass. 115.

Missouri. — Gray *v.* Race, 51 Mo. App. 553.

New York. — Griggs *v.* Howe, 31 Barb. 100, *affirmed*, 2 Abb. Dec. 291.

Texas. — Letot *v.* Edens (Tex. Civ. App.), 49 S. W. 109.

Vermont. — Gowry *v.* Ward, 25 Vt. 217.

58. *Kentucky.* — Thompson *v.* Jewell, 1 A. K. Marsh. 195; Cole *v.* Hollister, 12 B. Mon. 83.

Massachusetts. — Colt *v.* Miller, 10 Cush. 49; Palmer *v.* Sawyer, 114 Mass. 1.

Michigan. — Thomas *v.* Corey, 74 Mich. 216, 41 N. W. 901; Haldeman *v.* Berry, 74 Mich. 424, 42 N. W. 57.

Missouri. — Sharp *v.* Colgan, 4

obtains as to the time of performance,[59] unless it appears that time is not of the essence of the contract.[60]

b. *Particular Contracts* — (1.) **Bills and Notes.** — (A.) GENERAL RULE. It is well settled, by a long line of decisions, that the allegations as to a bill or note must be proved as made in the pleadings.[61] What is said of promissory notes under this subdivision applies as well

Mo. 20; Taussig *v.* Wind, 98 Mo. App. 129, 71 S. W. 1095; Sundmacher *v.* Lloyd, 114 Mo. App. 317, 89 S. W. 368.

New Jersey. — Shinn *v.* Haines, 21 N. J. L. 340.

New York. — Newton *v.* Galbraith, 5 Johns. 119; Cobb *v.* Williams, 7 Johns. 24; Crandall *v.* Clark, 7 Barb. 169; Fox *v.* Davidson, 36 App. Div. 159, 55 N. Y. Supp. 524; Stern *v.* McKee, 70 App. Div. 142, 75 N. Y. Supp. 157; Scheurer *v.* Monash, 37 Misc. 803, 76 N. Y. Supp. 917; Dwyer *v.* City of New York, 77 App. Div. 224, 79 N. Y. Supp. 17; Richard *v.* Clark, 43 Misc. 622, 88 N. Y. Supp. 242.

Ohio. — Nugen *v.* Rogers, Tapp. 55.

Oregon. — Young *v.* Stickney, 46 Or. 101, 79 Pac. 345.

South Carolina. — Marks *v.* Robinson, 1 Bailey 89.

Vermont. — Fairman *v.* Ford, 70 Vt. 111, 39 Atl. 748.

Variance Held Immaterial. — Allen *v.* Thrall, 36 Vt. 711; Huntington & Broad Top R. Co. *v.* McGovern, 29 Pa. St. 78; Logan *v.* Berkshire Apt. Assn., 18 N. Y. Supp. 164; Morril *v.* Chadwick, 9 N. H. 84; Rowe *v.* Gerry, 112 App. Div. 358, 98 N. Y. Supp. 380, *affirmed* 188 N. Y. 625, 81 N. E. 1175.

59. Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208; Goree *v.* Clements, 94 Ala. 337, 10 So. 906; Koch & Co. *v.* Merk, 48 Ill. App. 26; Sturgeon *v.* Hock, 43 Ia. 155; Query *v.* Brindlinger, Litt. Sel. Cas. (Ky.) 85; Victoire *v.* Moulon, 8 Mart. (O. S.) (La.) 400; Cowles *v.* Warner, 22 Minn. 449.

Variance Held Immaterial. — Frazer *v.* Smith, 60 Ill. 145; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802.

60. Perry *v.* Botsford, 5 Pick. (Mass.) 189.

61. *United States.* — Page's Admrs. *v.* Bank of Alexandria, 7 Wheat. 35.

Alabama. — Sellers *v.* Sellers, 39 So. 990.

Georgia. — Northwestern F. Co. *v.* Atlanta Nat. Bank, 80 Ga. 629, 5 S. E. 793.

Illinois. — Yeomans *v.* Lane, 101 Ill. App. 228.

Indiana. — Gordon *v.* Cowger, 4 Blackf. 231; Fraser *v.* Spofford, 5 Blackf. 207; Stockton *v.* Creager, 51 Ind. 262; Smelser *v.* Wayne & U. S. Line Tpk. Co., 82 Ind. 417; Shindler *v.* The Wayne & U. S. L. Tpk. Co., 82 Ind. 601.

Iowa. — Hurlbut *v.* Bagley, 99 Iowa 127, 68 N. W. 585; Winburn *v.* Fidelity L. & B. Assn., 110 Iowa 374, 81 N. W. 682.

Kentucky. — Boyd's Admr. *v.* Farmers' Nat. Bank, 24 Ky. L. Rep. 756, 69 S. W. 964; Ditto *v.* Slaughter, 28 Ky. L. Rep. 1164, 92 S. W. 2; Carrico *v.* Scott, 11 Ky. L. Rep. 905.

Missouri. — Perry *v.* Barret, 18 Mo. 140; Bremen Bank *v.* Umrath, 42 Mo. App. 525.

Nebraska. — Grant *v.* Clarke, 58 Neb. 72, 78 N. W. 364.

New Jersey. — Stroud *v.* Shimer, 8 N. J. L. 134.

Pennsylvania. — Cunningham *v.* Shaw, 7 Pa. St. 401.

Texas. — Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395.

Instances Where Variance Held Immaterial. — Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Dec. 174; Hoyt *v.* Seeley, 18 Conn. 353 (*holding* that "the legal effect of the facts alleged and of the facts proved was the same; and proof of the latter, without proof of the former, was sufficient to support a recovery"); Bennett *v.* McCanse, 65 Mo. 194; Sigony *v.* Richards, 1 Root (Conn.) 119; Fitzgerald *v.* Lorenz, 181 Ill. 411, 54 N. E. 1029; Reed *v.* Fleming, 209 Ill. 390, 70 N. E. 667; Long *v.* Long, 2 Blackf. (Ind.) 293; Wooster *v.* Lyons, 5 Blackf. (Ind.) 60; Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716.

to bills of exchange.[62] When a note is described in the pleadings, the evidence must correspond to the description alleged.[63]

(B.) Omission of Words "or Order," "or Bearer." — When a note is declared on according to its legal effect, the omission of the words "or order," "or bearer" in the pleading does not constitute a variance, though the note offered in evidence contain such words.[64]

62. Winn *v.* Sloan, 1 White & W. (Tex.) § 1103; Walsh *v.* Blatchley, 6 Wis. 413, 70 Am. Dec. 469; Irwin *v.* Brown, 2 Cranch C. C. 314, 13 Fed. Cas. No. 7,080; Heaverin *v.* Donnell, 7 Smed. & M. (Miss.) 244, 45 Am. Dec. 302.

63. May & Bell *v.* Miller & Co., 27 Ala. 515; Connolly *v.* Cottle, 1 Ill. 364; Louden *v.* Walpole, 1 Ind. 319; Mattison *v.* Marks, 31 Mich. 421, 18 Am. Rep. 197; Reed *v.* Scott, 30 Ala. 640; McCrummen *v.* Campbell, 82 Ala. 566, 2 So. 482; January *v.* Goodman, 1 Dall. (U. S.) 208; Addis *v.* Van Buskirk, 24 N. J. L. 218.

Instances Where Variance Held Immaterial. — *United States.* — Conant *v.* Wills, 1 McLean 427, 6 Fed. Cas. No. 3,087.

Alabama. — Dew *v.* Garner, 7 Port. 503; Leigh & Co. *v.* Lightfoot, 11 Ala. 935.

California. — Corcoran *v.* Doll, 32 Cal. 82.

Connecticut. — Walbridge *v.* Arnold, 21 Conn. 423.

Illinois. — Williams *v.* German Mut. F. Ins. Co., 68 Ill. 387 (where declaration did not state language of note, and note was in German language); Teeter *v.* Poe, 48 Ill. App. 158.

Indiana. — Patterson *v.* Graves, 5 Blackf. 593; Glasgow *v.* Hobbs, 52 Ind. 239; Lambert *v.* Blackman, 1 Blackf. 59 (where note was declared on as if it were in the English language, and the note offered in evidence was in the French language).

Louisiana. — Blanchard *v.* Maurin, 8 La. 200.

Maryland. — Rich *v.* Boyce, 39 Md. 314.

Massachusetts. — Clary *v.* Thomas, 103 Mass. 44; State Tr. Co. *v.* Owen Paper Co., 162 Mass. 156, 38 N. E. 438; Clary *v.* Thomas, 103 Mass. 44.

Missouri. — Blackstone Nat. Bank *v.* Lane, 80 Mo. 165, 13 Atl. 683; Dent *v.* Miles, 4 Mo. 419; Brooks *v.* Ancell, 51 Mo. 178.

Where the pleadings describe a promissory note, and the instrument offered in evidence is under seal, the variance is fatal. Reed *v.* Scott, 30 Ala. 640; McCrummen *v.* Campbell, 82 Ala. 566, 2 So. 482; January *v.* Goodman, 1 Dall. (U. S.) 208; Benoist *v.* Inhab. of Carondelet, 8 Mo. 250. And the converse of this rule is also true. Scott *v.* Horn, 9 Pa. St. 407; Stull *v.* Wilcox, 2 Ohio St. 569; *Contra,* Emerick *v.* Kroh, 14 Pa. St. 315.

There can be no variance between a note and the note described in the petition or complaint, where the note is attached to the petition or complaint, since the note controls the averments.

Indiana. — Carper *v.* Gaar, Scott & Co., 70 Ind. 212; Cassady *v.* American Ins. Co., 72 Ind. 95.

Louisiana. — Krumbhaar *v.* Ludeling, 3 Mart. (O. S.) 640; Ditto *v.* Barton, 6 Mart. (N. S.) 127; Weyman *v.* Cater, 13 La. 492; Rio *v.* Gordon, 14 La. 418; Tenny *v.* Russell, 1 Rob. 449.

Texas. — Morrison *v.* Keese & Son, 25 Tex. Supp. 154; Pyron *v.* Grinder, 25 Tex. Supp. 159; Kennon *v.* Bailey, 15 Tex. Civ. App. 28, 38 S. W. 377.

64. *United States.* — Carrington *v.* Ford, 4 Cranch C. C. 231, 5 Fed. Cas. No. 2,449.

Arkansas. — Matlock *v.* Purefoy, 18 Ark. 492.

Colorado. — Thackaray *v.* Hanson, 1 Colo. 365.

Illinois. — Crittenden *v.* French, 21 Ill. 598; Sappington *v.* Pulliam, 4 Ill. 385.

Massachusetts. — Whitney *v.* Whitney, Quincy 117; Fay *v.* Goulding, 10 Pick. 122.

Missouri. — Bank of Pleasant Hill *v.* Wills, 79 Mo. 275; Barrows *v.* Million, 43 Mo. App. 79.

If the allegations are descriptive of the note the rule is otherwise.[65]

(C.) Date and Place of Execution. — If it is alleged that a note was *made* on a certain date,[66] or at a certain place,[67] introducing a note of a different date,[68] or one made at another place, does not constitute a variance;[69] but if the allegation is of a note *bearing* a certain date, the proof as to the date of the note must correspond to such allegation,[70] as such an allegation is essentially descriptive of the instrument.[71]

(D.) Allegations as to Maker. — (a.) *In General.* — The allegation

Texas. — Mason *v.* Kleberg, 4 Tex. 85.

A fortiori, where statute makes promissory notes negotiable, though containing no words of negotiability. Thackaray *v.* Hanson, 1 Colo. 365; Sappington *v.* Pulliam, 4 Ill. 385.

But recovery cannot be had on a non-negotiable note, though the complaint alleges that it was negotiable. Bank of Pleasant Hill *v.* Wills, 79 Mo. 275.

65. A note payable to plaintiff will not support an allegation of note payable to plaintiff, or order. Carrington *v.* Ford, 4 Cranch C. C. 231, 5 Fed. Cas. No. 2,449. *Contra,* Harrison *v.* Weaver, 2 Port. (Ala.) 542.

66. Lawson *v.* Townes, 2 Ala. 373; Sheppard *v.* Graves, 14 How. (U. S.) 505; First Nat. Bank *v.* Stephenson, 82 Tex. 435, 18 S. W. 583.

67. Anderson *v.* Hamilton, 6 Blackf. (Ind.) 94; Fairfield *v.* Adams, 16 Pick. (Mass.) 381; Sheppard *v.* Graves, 14 How. (U. S.) 505; Crowley *v.* Barry, 4 Gill (Md.) 194.

68. Lawson *v.* Townes, 2 Ala. 373; Estep *v.* Estep, 23 Ind. 114.

69. Crowley *v.* Barry, 4 Gill (Md.) 194.

70. *Arkansas.* — Hanley *v.* Real Estate Bank, 4 Ark. 598.

Delaware. — Bank of Wilmington & Brandywine *v.* Simmons, 1 Har. 331.

Illinois. — Streeter *v.* Streeter, 43 Ill. 155.

Indiana. — Reid *v.* Cox, 5 Blackf. 312.

Kentucky. — Savage *v.* Aills, 2 T. B. Mon. 93.

Missouri. — Grant *v.* Winn, 7 Mo. 188.

New Hampshire. — Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

New Jersey. — Kirk *v.* Rickerson, 46 N. J. L. 13.

Ohio. — Fallis *v.* Howarth, Wright 303.

Pennsylvania. — Stephens *v.* Graham, 7 Serg. & R. 505, 10 Am. Dec. 485; Church *v.* Feterow, 2 Pen. & W. 301.

Vermont. — Bank of Manchester *v.* Allen, 11 Vt. 302.

Contra. — Dresser *v.* Smith, 1 How. Pr. (N. Y.) 172; Salisbury *v.* Wilson, Tapp. (Ohio) 198.

But proof that the note was *made* on a different date will not be material. Marshall *v.* Russell, 44 N. H. 509; Rife *v.* Pierson, 2 G. Gr. (Iowa) 129.

71. *Arkansas.* — Hanley *v.* Real Estate Bank, 4 Ark. 598.

Delaware. — Bank of Wilmington & Brandywine *v.* Simmons, 1 Har. 331.

Illinois. — Streeter *v.* Streeter, 43 Ill. 155.

Indiana. — Reid *v.* Cox, 5 Blackf. 312.

Kentucky. — Savage *v.* Aills, 2 T. B. Mon. 93.

Mississippi. — Heaverin *v.* Donnell, 7 Smed. & M. 244, 45 Am. Dec. 302.

Missouri. — Grant *v.* Winn, 7 Mo. 188.

New Hampshire. — Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

New Jersey. — Kirk *v.* Rickerson, 46 N. J. L. 13.

Ohio. — Fallis *v.* Howarth, Wright 303.

Pennsylvania. — Church *v.* Feterow, 2 Pen. & W. 301; Stephens *v.* Graham, 7 Serg. & R. 505, 10 Am. Dec. 485.

Vermont. — Bank of Manchester *v.* Allen, 11 Vt. 302.

as to the maker or promisor of a note must be proved as laid.[72] But evidence may be received to show that the promisor alleged and the person proved are one and the same person where otherwise there would be an apparent variance.[73] Illustrations of this principle are given in the notes.[74]

72. *United States.* — Craig *v.* Brown, Pet. C. C. 139, 6 Fed. Cas. No. 3,326.

Arkansas. — Bank of State *v.* Hubbard, 4 Ark. 419; Boren *v.* State Bank, 8 Ark. 500.

California. — Cotes *v.* Campbell, 3 Cal. 191.

Connecticut. — Rossiter *v.* Marsh, 4 Conn. 196.

Illinois. — Becker *v.* German Mut. F. Ins. Co., 68 Ill. 412; Desmond *v.* St. Louis, etc. R. Co., 77 Ill. 631.

Indiana. — Loudon *v.* Walpole, 1 Smith 121.

Iowa. — Hall *v.* Bennett, 2 G. Gr. 466.

Missouri. — King *v.* Clark, 7 Mo. 269.

"In an action where the declaration stated that E. Brown was attached to answer, and proceeded to allege in his declaration, the drawing of a bill of exchange by Elisha Brown, evidence of a bill of exchange signed by Elijah Brown, cannot be given in evidence." Craig *v.* Brown, Pet. C. C. 139, 6 Fed. Cas. No. 3,326.

73. *Alabama.* — Madison College *v.* Burke, 6 Ala. 494.

Arkansas. — Jester *v.* Hopper, 13 Ark. 43.

Illinois. — Desmond *v.* St. Louis, etc. R. Co., 77 Ill. 631; Graham *v.* Eiszner, 28 Ill. App. 269; Peyton *v.* Tappan, 2 Ill. 388.

Indiana. — Gaskin *v.* Wells, 15 Ind. 253; Lasselle *v.* Hewson, 5 Blackf. 161; Leaphardt *v.* Sloan, 5 Blackf. 278; Farley *v.* Harvey, 14 Ind. 377.

74. **Evidence To Show Promissor and Defendant Same Person. — Due Bill.** — In Desmond *v.* St. Louis, A. & T. H. R. Co., 77 Ill. 631, the action was brought on the following instrument: "St. Louis, January 20, 1859. Due from the Terre Haute, Alton & St. Louis Railroad Company to the bearer, for value received, five dollars, payable at the company's office in St. Louis, on and after the 20th day of October, 1859, (and receivable after that date, at any agency of the company, in payment for transportation of freight or passengers,) with interest at the rate of six per cent. per annum until paid. The Terre Haute and St. Louis Railroad Co. By C. Murdock, Treasurer. Not valid until countersigned by James A. Rayman, Vice-President." There were fourteen of these instruments. An action was brought upon them resulting in a judgment in favor of the defendants, and against the plaintiff for costs. On the trial the plaintiff offered in evidence the note sued on, to which the defendant objected, and the objection was sustained. In passing upon this question the court in its opinion said: "Did the court below err in objecting to this evidence? The instruments purported to have been made by the Terre Haute, Alton & St. Louis Railroad Company, whilst the suit is against the St. Louis, Alston and Terre Haute Railroad Company. They seem to be wholly different organizations. There is nothing in the record to show that they are the same company, known by different names, or that the company sued is in any manner liable to pay the indebtedness for which suit is brought, nor did appellant offer to follow up this evidence by showing that appellee had become liable for its payment. This being the case, it was the same as if suit were brought against one person, and the note of another were offered in evidence in support of the action, which all know could not be done. Appellant should have offered to follow up this proof with evidence showing the liability of appellee."

Promissory Note. — In Lasselle *v.* Hewson, 5 Blackf. (Ind.) 161, the action was upon a promissory note, and invoking the doctrine stated in the text, the court decided as follows: "A promissory note was de-

(b.) *Name of Maker.* — If the allegation of the promisor is of his full christian name, it has generally been held that if the note introduced in evidence is signed by his initials,[75] or by an abbreviated

clared on as made by the defendant, Stanislaus Lasselle. Plea, the general issue without oath. The note produced being signed S. Lasselle, was objected to as evidence on the ground of variance. *Held,* that the note, with evidence that the defendant usually signed his name S. Lasselle, was admissible."

In Jester *v.* Hopper, 13 Ark. 43, the action was brought on a note alleged to be payable to John Hopper. Upon the introduction of the note in evidence it appeared that it was payable to John Harper. The court held that the plaintiff might prove that the note was executed to him by a wrong name, and then read it in evidence.

75. *Alabama.* — Cantley *v.* Hopkins, 5 Stew. & P. 58; Chandler *v.* Hudson, 8 Ala. 366.

Arkansas. — State Bank *v.* Peel, 11 Ark. 750.

Connecticut. — Chestnut-Hill R. Co. *v.* Chase, 14 Conn. 123.

Illinois. — Linn *v.* Buckingham, 2 Ill. 451; Pickering *v.* Pulsifer, 9 Ill. 79; Hunter *v.* Bryden, 21 Ill. 591; Wilson *v.* Turner, 81 Ill. 402.

Indiana. — Lasselle *v.* Hewson, 5 Blackf. 161; Muirhead *v.* Snyder, 4 Ind. 486; Hunt *v.* Raymond, 11 Ind. 215; Rightsell *v.* Kellum, 48 Ind. 252; West *v.* Hays, 104 Ind. 30, 3 N. E. 610.

Missouri. — Weaver *v.* McElhenon, 13 Mo. 89.

New York. — Wood *v.* Bulkley, 13 Johns. 486; Claflin *v.* Griffin, 21 N. Y. 689.

Vermont. — Mellendy *v.* New England Protective Union, 36 Vt. 31.

In Weaver *v.* McElhenon, 13 Mo. 89, it is held that "courts may take judicial notice of the abbreviation of a man's Christian name"; and in the opinion it is said: "It is, in our opinion, simply an abbreviation, and according to the decisions of this court heretofore made in the cases of Birch *v.* Rogers, 3 Mo. 227, and Fenton *v.* Perkins, 3 Mo. 144, 'the abbreviations of a man's given name are so common that, without any violence to the laws of our land, the courts may take judicial notice of them.'"

Illustrations. — In Pickering *v.* Pulsifer, 9 Ill. 79, an action of assumpsit on a promissory note against *Loring Pickering,* the note introduced in evidence was signed *"L. Pickering".* The court said: "The court is of opinion that there is no substantial variance. We may admit that strictly and technically the defendant 'Loring Pickering' and 'L. Pickering' may not necessarily be the same person. Yet, on the other hand, they may be the same; and if it shall in any manner appear, either by proof or by implication of law, that 'Loring Pickering' did make the note, then it cannot be denied that the allegation and the evidence correspond. 'Loring Pickering' is sued. He appears and pleads non-assumpsit. The note is produced, signed 'L. Pickering' and he does not, under our statute, verify his plea by affidavit; and consequently we think does not 'deny on the trial' the execution of the note by himself."

In Lasselle *v.* Hewson, 5 Blackf. (Ind.) 161, the syllabus is: "A promissory note was declared on as made by the defendant, *Stanislaus Lasselle.* Plea, the general issue without oath. The note produced, being signed *S. Lasselle,* was objected to as evidence on the ground of variance. *Held,* that the note, with evidence that the defendant usually signed his name *S. Lasselle,* was admissible."

In Chandler *v.* Hudson, 8 Ala. 366, the name alleged was *Frederick W. Chandler,* and the note offered in evidence was signed *F. W. Chandler;* and it was held the note was sufficiently described as to make it admissible.

In Hunt *v.* Raymond, 11 Ind. 215, the court said: "It is also objected that the complaint was against *Joshua P. Hunt,* and the note offered in evidence was signed *J. P. Hunt.* There is nothing in this objection. Muirhead *v.* Snyder, 4 Ind. 486. The note, or a copy of it, was filed

name,[76] there is no variance,[77] though there are a few decisions that seem to be against this rule.[78]

with the complaint as a part of the cause of action. This is equivalent to an averment that the defendant made the note by the name of *J. P. Hunt*. If he had intended to put in issue the making of the note by that name, he should have denied the same, under oath. Unthank *v.* The Henry County Turnpike Co., 6 Ind. 125."

In Muirhead *v.* Snyder, 4 Ind. 486, the second point of the syllabus is: "Assumpsit against the maker of a note. Plea, the general issue. The declaration described the name as made by *Ephraim S. Muirhead*, and the plaintiff offered in evidence a note signed E. S. Muirhead. *Held*, that the note was admissible as conducing to prove the issue on the part of the plaintiff." The court in its opinion said: "The defendant may always have inspection of the note on which he is sued before he pleads. This reasoning seems to us conclusive. If it is not his note, he may file the general issue under oath. If he goes to trial at random, without inspection, it is his own fault. It is not good policy to learn defendants to lean on the court to avert the consequences of their own neglect. When he goes to trial he may be presumed to have had inspection, and the objection to the signature comes too late."

In West *v.* Hays, 104 Ind. 30, 3 N. E. 610, the court held: "A note introduced in evidence signed 'W. West' is sufficient to sustain a finding thereon against Warren West."

76. State Bank *v.* Peel, 11 Ark. 750; Linn *v.* Buckingham, 2 Ill. 451; Wilson *v.* Turner, 81 Ill. 402; Weaver *v.* McElhenon, 13 Mo. 89; Wood *v.* Bulkley, 13 Johns. (N. Y.) 486.

In Weaver *v.* McElhenon, 13 Mo. 89, the name alleged was *Christopher McElhenon* and the signature appearing on the note *Christy* or *Christ. McElhenon*. *Held*, not a material variance.

In Bank *v.* Peel, 11 Ark. 750, the Christian name of the signer of a note was described as "John" in the petition, and in the note offered in evidence as "Jno." *Held*, it was not a material variance, and it was error to exclude the note therefor.

In Wilson *v.* Turner, 81 Ill. 402, it was decided: "Where the Christian name of the plaintiff is *Elizabeth*, and the averment in the declaration is that the defendant made the note sued on and thereby promised to pay to the plaintiff by the name of '*Lizia*,' etc., and the general issue and set-off are the only pleas, the note, if it corresponds with the averments in the declaration, is admissible in evidence without further proof."

77. *Alabama.* — Chandler *v.* Hudson, 8 Ala. 366; Cantley *v.* Hopkins, 5 Stew. & P. 58.

Arkansas. — State Bank *v.* Peel, 11 Ark. 750.

Connecticut. — Chestnut Hill R. Co. *v.* Chase, 14 Conn. 123.

Illinois. — Linn *v.* Buckingham, 2 Ill. 451; Wilson *v.* Turner, 81 Ill. 402; Pickering *v.* Pulsifer, 9 Ill. 79; Hunter *v.* Bryden, 21 Ill. 591.

Indiana. — Lasselle *v.* Hewson, 5 Blackf. 161; Muirhead *v.* Snyder, 4 Ind. 486; Hunt *v.* Raymond, 11 Ind. 215; Rightsell *v.* Kellum, 48 Ind. 252; West *v.* Hays, 104 Ind. 30, 3 N. E. 610.

Missouri. — Weaver *v.* McElhenon, 13 Mo. 89.

New York. — Wood *v.* Bulkley, 13 Johns. 486; Claflin *v.* Griffin, 21 N. Y. 689.

Vermont. — Mellendy *v.* New England Protective Union, 36 Vt. 31.

78. Loudon *v.* Walpole, 1 Smith (Ind.) 121; King *v.* Clark, 7 Mo. 269.

In King *v.* Clark, 7 Mo. 269, the court decided as follows, which appears in the syllabus of the case: "The declaration described the bill as being drawn by 'George A. Cook,' under the name of 'G. A. Cook.' On the trial the plaintiff offered in evidence a bill drawn by 'G. W. Cook.' *Held*, that the variance was material. It was, perhaps, unnecessary to set out the middle name, or initial letter of the middle name, but

(c.) *Note Executed by Agent.* — If the allegation is of the execution of the note by the defendant himself, evidence of the execution thereof by his agent does not constitute a variance, because if done by his agent it is his own act.[79] But if the allegation is of the exe-

having done so as a description of the instrument, it became necessary as a descriptive averment."

79. Baldwin *v.* Stebbins, Minor (Ala.) 180; Phelps *v.* Riley, 3 Conn. 266; McMartin *v.* Adams, 16 Mo. 268; Slevin *v.* Reppy, 46 Mo. 606; Meyer & Sons Co. *v.* Black, 4 N. M. 190, 16 Pac. 620.

In Phelps *v.* Riley, the holding was: "Where the declaration, in an action on a promissory note, stated that the defendants, by a note *under their hands*, promised to pay, and the note exhibited in evidence appeared to have been signed by procuration, this was no variance, the allegation being according to the operation of law." In the opinion of the court it is said: "The averment that Riley and Luddington, *under their hands*, promised, etc., is not such a declaration of fact that it requires proof of the act having been done by them *personally*. It is sufficient that facts took place which, in point of law, are equivalent. The case of Levy *v.* Wilson, 5 Esp. Rep. 180, is not parallel. The expression, 'his own proper handwriting' in that case, ties down the allegation to the fact as much as if it had been averred that the defendant did the act by his own natural hand.' But the words 'under their hands' are not so precise as to authorize the court in saying that the averment was on the literal fact, and not on the operation of law. 3 Chitt. Plead. 2; Bass *v.* Clive, 4 Campb. 78; Chitt. on Bills 358, 9; Tuberville *v.* Stampe, 1 Ld. Raym. 264; Brucker *v.* Fromont, 9 Term Rep. 659; Helslen *v.* Loader, 2 Campb. Rep. 450; Eliot *v.* Cooper, 2 Ld. Raym. 1376; Erskine *v.* Murray, 2 Ld. Raym. 1542; Sigony *v.* Richards, 1 Root 119."

In McMartin *v.* Adams, 16 Mo. 268, the court in its opinion said: "The petition of the plaintiff alleged that the defendant 'made his certain promissory note in writing, by the name and style of J. H. & W. R. Adams, by W. F. Adams, att'y, by him subscribed thereto, and thereby then and there promised,' etc. A demurrer was filed to this petition, and was sustained by the Circuit Court. It is insisted, in support of the demurrer, that by the note, as it is alleged to have been executed by the defendant, he did not bind himself as a principal, but that he is to be taken to have executed the note as an attorney, unless the fact is averred in the petition, either that he was a partner in the firm of J. H. & W. R. Adams, or that, professing to act as attorney, he acted without authority. It is a sufficient answer to this objection to the petition that it expressly charges that he 'made *his* promissory note,' and that *he* thereby promised.' The burden of showing that the note bound him as principal is upon the plaintiff, unless the defendant, when he comes to answer, is constrained to admit the fact. The charge is sufficiently clear to require him to answer. The demurrer was improperly sustained."

In Slevin *v.* Reppy, 46 Mo. 606, it was decided that "in a suit upon a promissory note, whether made by defendant himself or by his agent, the petition should charge that defendant made the note. This charge would be sustained by proof that the signature was by defendant personally, or by his duly authorized agent." And in the opinion, the court said: "The material fact set forth in the petition is that defendant made the note, not how he made it — whether by his own hand or by that of his agent. The mode of signing it need not have been averred. This material fact would be sustained by evidence either that the signature was in defendant's handwriting, or that it was made by another duly authorized by him."

In Meyer *v.* Black, 4 N. M. 190, 16 Pac. 620, the court, discussing such a question of variance with reference to a bill of exchange, says: "It is . . . contended that the

cution by an agent, evidence of a note not so executed creates a variance, as such an allegation becomes essentially descriptive of the instrument.[80]

(d.) *Joint or Joint and Several Note.* — Allegation of a joint note is not sustained by proof of a several one,[81] and *vice versa*;[82] but in an action against one of the makers of a note, in which the allegation

court should have sustained defendant's objection to the accepted bill of exchange offered in evidence by plaintiff, because, it is said, there was a variance between the one declared on and the one offered. This was the sole ground of objection. The declaration alleges that plaintiff made its bill of exchange directed to the defendant, which the defendant afterwards, upon sight, accepted, according to the usage and custom of merchants. The bill of exchange offered in evidence was in exact conformity to the one described in the declaration with the exception that it was indorsed 'Accepted.' Black & Co. per H. Fenton.' Chitty lays down the rule that a contract or other writing must be pleaded according to its legal effect, and says, if a bill of exchange be declared on as accepted by A, and the one offered in evidence is accepted by A, by his agent, it will sustain the averment, and there will be no variance. 1 Chit. Pl. 311. Mack *v.* Spencer, 4 Wend. 411. This is the general rule."

In Slack *v.* First Nat. Bank, 19 Ky. L. Rep. 1684, 44 S. W. 354, it was held: "A petition on a bill, which alleges that it was indorsed in writing by M., is good, though the bill filed shows that the name of M. was indorsed by C. as his agent, as it will be presumed, if necessary, that the authority of C. to sign was in writing."

80. Rossiter *v.* Marsh, 4 Conn. 196; Lawton *v.* Swihart, 10 Ind. 562; Atkins *v.* Brown, 59 Me. 90; Leach *v.* Blow, 16 Miss. 221.

If a note signed by A be declared on as the act and deed of B, the variance will be fatal. If a note signed by A, individually, be declared on as 'executed for and in behalf of B by his agent A,' the variance will be fatal. Rossiter *v.* Marsh, 4 Conn. 196.

A sued B upon three promissory notes, alleging in the complaint that B "made his promissory notes," etc. Upon the trial A offered in evidence three notes, signed, "C by B." Upon objection they were excluded because they did not tend to prove the averment. *Held*, that this was right. Lawton *v.* Swihart, 10 Ind. 562. In this case, the court, discussing this point, said: "We do not think he could, under the issues upon which he went to trial, be permitted to prove that the defendant had no authority to make the notes, as agent, and by that means attempt to fasten individual liability upon him. If he had desired to avail himself of that proof, he should have asked leave to amend his pleadings, and that would have presented the question whether he ought to have been permitted to make the amendment — a question we do not decide, as it is not before us."

81. Hopkins *v.* Farwell, 32 N. H. 425; Lincoln *v.* Hinzey, 51 Ill. 435.

A promissory note in which the words, "we or either of us promise to pay," are used, is both joint and several, and there will be no variance, if it is described as a joint note, or it is alleged that the makers promised to pay the money, this being its legal effect. Pogue *v.* Clark, 25 Ill. 333.

Where the complaint in an action against two indorsers of a note alleges that they indorsed it, the presumption is that they indorsed separately, and evidence that either promised to pay the note is good, as against him. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584.

Where the complaint in an action against two indorsers of a note alleges that they each promised to pay the note, the plaintiff may recover on proof of a separate promise by each, a joint promise not being necessary. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584.

82. Connolly *v.* Cottle, 1 Ill. 364.

is of a joint and several note, evidence of a joint and several note will sustain the action.[83]

(E.) Allegations as to Promisee. — The allegation in the pleadings as to the promisee in the note must be substantially proved as made,[84] otherwise a variance will be created.[85]

(F.) Amount of Note. — The allegation of the amount of the note must be proved as laid,[86] and any material difference between the evidence as to the amount of the note and that alleged in the pleadings will constitute a variance.[87] Indeed, the decisions seem to hold

83. Rock Val. Paper Co. *v.* Nixon, 84 Ill. 11; Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319.

And the rule is the same where there is no such allegation. Rock Val. Paper Co. *v.* Nixon, 84 Ill. 11; Anderson *v.* Hamilton, 6 Blackf. (Ind.) 94; Nichols *v.* Dedrick, 61 Minn. 513, 63 N. W. 1110.

An allegation in an action against a surviving maker of a joint note that it is joint and several is an immaterial variance, as the survivor is liable to suit thereon without the personal representatives of the other deceased maker being joined therein. Creecy *v.* Joy, 40 Or. 28, 66 Pac. 295.

In an action against two, upon a note which on the face of it is joint and several, and so declared upon, it is not a material variance that upon oyer it appears to be signed by one only for self and partner. Sigony *v.* Richards, 1 Root (Conn.) 119.

84. *Alabama.* — Bowie's Admx. *v.* Foster, Minor 264; Taylor *v.* Strickland, 37 Ala. 642.

Illinois. — Peyton *v.* Tappan, 2 Ill. 388; Stevens *v.* Stebbins, 4 Ill. 25; Ross *v.* Clawson, 47 Ill. 402; Greathouse *v.* Kipp, 4 Ill. 371.

Indiana. — Taylor *v.* Coquillard, 5 Blackf. 158; Leaphardt *v.* Sloan, 5 Blackf. 278; Ramsey *v.* Herndon, 5 Blackf. 345; Doron *v.* Cosby, 12 Ind. 634; Doran *v.* Crosby, 13 Ind. 497; Farley *v.* Harvey, 14 Ind. 377; Gose *v.* Porter, 4 Blackf. 187; St. James Church *v.* Moore, 1 Ind. 289.

Maryland. — Graham *v.* Fahnestock, 5 Gill 215.

New York. — Roberts *v.* Graves, 25 Wkly. Dig. 549.

South Carolina. — Harden *v.* Harden, 1 Strobh. 56.

Tennessee. — Wood *v.* Hancock, 4 Humph. 465; White *v.* Fassit & Co., 10 Humph. 191.

Texas. — Thomas *v.* Young, 5 Tex. 253; Dibrell *v.* Ireland, 1 White & W. § 300.

85. *Alabama.* — Madison College *v.* Burke, 6 Ala. 494.

Arkansas. — Murphree *v.* State Bank, 4 Ark. 448.

California. — Farmer *v.* Cram, 7 Cal. 135.

Georgia. — Gillis *v.* Gillis, 96 Ga. 1, 22 S. E. 702, 30 L. R. A. 143.

Illinois. — Rives *v.* Marrs, 25 Ill. 315; Curtis *v.* Marrs, 29 Ill. 508; Ingraham *v.* Luther, 65 Ill. 446; Connolly *v.* Cottle, 1 Ill. 364.

Indiana. — M'Kinney *v.* Harter, 6 Blackf. 320.

Louisiana. — Flogny *v.* Adams, 11 Mart. (O. S.) 547.

Missouri. — Faulkner *v.* Faulkner, 73 Mo. 327.

Oregon. — Thompson *v.* Rathbun, 18 Or. 202, 22 Pac. 837.

South Carolina. — Cherry *v.* Fergeson, 2 McMull. 15.

86. Rabaud *v.* DeWolf, 1 Paine 580, 20 Fed. Cas. No. 11, 519; Parker *v.* Morton, 29 Ind. 89; Glenn *v.* Porter, 72 Ind. 525; Shoop *v.* Clark, 4 Abb. Dec. (N. Y.) 235; Stevens *v.* Smith, 15 N. C. (4 Dev. L.) 292; Salisbury *v.* Wilson, Tapp. (Ohio) 198; White *v.* Fassitt, 10 Humph. (Tenn.) 191.

87. Fournier *v.* Black, 32 Ala. 41; Norwich Bank *v.* Hyde, 13 Conn. 279; Bissel *v.* Drake, 19 Johns. (N. Y.) 66.

In Fournier *v.* Black, 32 Ala. 41, it is held: "In an action on a promissory note by assignee against assignor, in the form given in the Code (p. 552), the amount of the note not being stated, the legal intendment is, that the amount is the sum which the plaintiff claims in the

with unanimity that such an allegation must be strictly proved.[88]

(G.) Interest. — If the allegation with reference to the note is silent as to interest, the introduction of evidence showing a note with interest constitutes a variance;[89] and the converse of the rule is true.[90]

(H.) Allegations as to Payment. — (a.) *Place of Payment.* — If the allegation of the pleadings is of payment generally, evidence of payment at a particular place is not admissible.[91] In some jurisdictions

commencement of his complaint; and a recovery cannot be had by the plaintiff on a note for a different amount."

In Norwich Bank *v.* Hyde, 13 Conn. 279, it is held: "Where a writing was given, in the form of a note, promising to pay —— dollars, in the margin of which was written $200, in an action against the indorser, alleging a promise to pay 200 dollars, such writing was not admissible in support of the declaration; the office of the memorandum in the margin being to remove an ambiguity in the body of the instrument, and not to supply a blank."

88. Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77; Pilie *v.* Mollere, 2 Mart. (N. S.) (La.) 666; White *v.* Noland, 3 Mart. (N. S.) (La.) 636; Fournier *v.* Black, 32 Ala. 41; Germania Ins. Co. *v.* Lieberman, 58 Ill. 117.

In Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77, it was decided: "Difference of half cent between note declared on and the one offered in evidence is a fatal variance. Names, sums, magnitudes, dates, durations and terms are matters of essential description, and must, in general, be precisely proved." The court, in its opinion, said: "The alleged variance in this case depends on the question whether the note given in evidence was the one described in the declaration. That offered in evidence was one-half cent greater in amount than the one declared on. It is a familiar rule of pleading that the contract must be stated correctly, and if the evidence differs from the statement, the whole foundation of the action fails, because the contract is entire, and must be proved as laid. A distinction is, however, made between matters of substance and matters of essential description. The former may be substantially proved, but the latter must be proved with a degree of strictness extending in some cases even to literal precision. No allegation descriptive of the identity of that which is legally essential to the claim can ever be rejected. And of this character are names, sums, magnitudes, dates, durations, and terms, which, being essential to the identity of the writing set forth, must, in general, be precisely proved."

89. Coyle *v.* Gozzler, 2 Cranch C. C. 625, 6 Fed. Cas. No. 3,312; Blue *v.* Russell, 3 Cranch C. C. 102, 3 Fed. Cas. No. 1,568; Gragg *v.* Frye, 32 Me. 283; Sawyer's Admr. *v.* Patterson, 11 Ala. 523; Hunt's Exr. *v.* Hall, 37 Ala. 702.

90. Cooper *v.* Guy, Tapp. (Ohio) 180.

91. *Alabama.* — Puckett *v.* King, 2 Ala. 570; Clancy *v.* Hilliard, 39 Ala. 713.

Arkansas. — Dickinson *v.* Tunstall, 4 Ark. 170; Caruthers *v.* Real Estate Bank, 4 Ark. 447; Walker *v.* Walker, 5 Ark. 643.

Connecticut. — Comstock *v.* Savage, 27 Conn. 184.

Delaware. — Thornton *v.* Herring, 5 Houst. 154.

Illinois. — Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742; Childs *v.* Laflin, 55 Ill. 156.

Indiana. — Alden *v.* Barbour, 3 Ind. 414.

Mississippi. — Walker *v.* Tunstall, 4 Miss. 259.

Missouri. — Bank of Missouri *v.* Vaughan, 36 Mo. 91; Faulkner *v.* Faulkner, 73 Mo. 327.

Texas. — Kreuger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087.

Contra. — *Alabama.* — Clark *v.* Moses, 50 Ala. 326; Morris *v.* Poillon, 50 Ala. 403.

the variance in this respect must mislead the defendant to his prejudice.[92]

(b.) *Time of Payment.* — The allegation as to the time of payment must be substantially proved as laid, to avoid a variance.[93]

(c.) *Mode of Payment.* — An allegation as to the mode of payment must be proved as made in the pleadings.[94]

(I.) CONSIDERATION. — (a.) *In General.* — As in other cases,[95] an allegation as to the consideration of a note must be proved as laid, in order to avoid a variance.[96]

(b.) *Want or Failure of Consideration.* — An allegation of a total failure of consideration is not supported by evidence of a partial failure thereof,[97] nor is an allegation of want of consideration sup-

Arkansas. — Walker *v.* Walker, 5 Ark. 643.

Connecticut. — Comstock *v.* Savage, 27 Conn. 184.

Mississippi. — Walker *v.* Tunstall, 4 Miss. 259.

Missouri. — Bank of Missouri *v.* Vaughan, 36 Mo. 91.

Pennsylvania. — Collins *v.* Naylor, 10 Phila. 437.

Texas. — Krueger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087.

92. Krueger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087.

93. *United States.* — Sheehy *v.* Mandeville, 7 Cranch 208; Page *v.* Bank of Alexandria, 7 Wheat. 35; Kikindal *v.* Mitchell, 2 McLean 402, 14 Fed. Cas. No. 7,763; *Ex parte* Kelty, 1 Low. 394, 14 Fed. Cas. No. 7,681.

Alabama. — Caller's Exrx. *v.* Boykin, Minor 206; White *v.* Word, 22 Ala. 442.

District of Columbia. — Johnston *v.* Randall, 2 Mackey 81.

Illinois. — Morton *v.* Tenny, 16 Ill. 494; Tipton *v.* Utley, 59 Ill. 25; Roberts *v.* Corby, 86 Ill. 182; Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617.

Indiana. — Vandevender *v.* Pittsford, 6 Blackf. 197; Hoover *v.* Johnson, 6 Blackf. 473; Hamilton *v.* Pumphrey, 20 Ind. 396.

Maine. — Hilt *v.* Campbell, 6 Me. 109.

Massachusetts. — Stanwood *v.* Scovel, 21 Mass. 422.

Mississippi. — Conner *v.* Routh, 8 Miss. 176, 40 Am. Dec. 59.

New York. — Chapman *v.* Carolin, 16 N. Y. Super. 456.

South Carolina. — Morris *v.* Fort, 2 McCord 397.

Tennessee. — Blackmore *v.* Wood, 3 Sneed 470.

Vermont. — Woodstock Bank *v.* Downer, 27 Vt. 482, 65 Am. Dec. 210; Passumpsic Bank *v.* Goss, 31 Vt. 315; Bates *v.* Leclair, 49 Vt. 229.

West Virginia. — Scott *v.* Baker, 3 W. Va. 285.

94. Carlisle *v.* Davis, 7 Ala. 42; Phillips *v.* Dodge, 8 Ga. 51; Weaver *v.* Lapsley, 42 Ala. 601, 94 Am. Dec. 671; Owen *v.* Barnum, 7 Ill. 461; Chickering *v.* Greenleaf, 6 N. H. 51; Butler *v.* Rawson, 1 Denio (N. Y.) 105.

In Carlisle *v.* Davis, 7 Ala. 42, it was held: "As a writing in the form of a promissory note for the payment of a sum of money 'in the common currency of Alabama,' is not an undertaking to pay the sum expressed in coin, but in bank notes, it is inadmissible under a declaration describing it as a promissory note for the payment of a sum in numero."

A declaration alleged that the defendant was indebted to plaintiff in the sum of $100, besides interest, on two promissory notes, and the notes offered in evidence were for the delivery of specific articles. *Held,* that the notes were properly rejected because of variance between the allegations and proof. Phillips *v.* Dodge, 8 Ga. 51.

95. Matlock *v.* Purefoy, 18 Ark. 492; Hawkins *v.* Dean, 24 Ark. 189; Crenshaw *v.* Bullitt, 1 Blackf. (Ind.) 41; Rossiter *v.* Marsh, 4 Conn. 196; Treadway *v.* Nicks, 3 McCord (S. C.) 195.

96. Bingham *v.* Calvert, 13 Ark. 399; White *v.* Molyneux, 2 Ga. 124.

97. Burnap *v.* Cook, 32 Ill. 168;

ported by evidence of an illegal consideration;[98] and it is a rule that failure or want of consideration must be proved as alleged.[99]

(J.) Indorsements. — Allegations as to indorsements, relating to the manner[1] and time thereof[2] and the parties making the same[3]

Whitacre *v.* Culver, 9 Minn. 295; Packwood *v.* Clark, 2 Sawy. 546, 18 Fed. Cas. No. 10,656; Cheney *v.* Higginbotham, 10 Ark. 273; Campbell *v.* Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

In Burnap *v.* Cook, 32 Ill. 168, the court, in the course of its opinion, says: "There were several pleas of an entire failure of consideration of the note filed by the defendant below. To these pleas there were replications, and issue to the country. On the trial, it appeared that the note was given for the purchase of a growing crop, on the farm of plaintiff in error, and a house and shed, with their appurtenances, which had been erected by the payee or his father. The evidence also shows that the payee and his father appropriated to their own use the greater part, if not all, of the crops, without the consent of plaintiff in error. If these crops of grain had been the only consideration, the defense might have been complete; but the house, sheds and appurtenances entered into and formed a part of the consideration of the note. There is no evidence that plaintiff in error did not receive them, and if so, he received a consideration to that extent, that has not failed. As they were improvements of a permanent character, becoming a part of the real estate by their erection, and being on his land, the presumption is that the plaintiff in error has received them, and is in their enjoyment."

In Cheney *v.* Higginbotham, 10 Ark. 273, it is held that "a plea of *no consideration*, without stating the circumstances attending the execution of the contract sued on, is a good plea. But if, under such a plea, there appears to have been *any consideration whatever*, though insufficient or inadequate, the proof does not sustain the plea."

98. Coyle *v.* Fowler, 26 Ky. 472. In this case it was said: "If the consideration were illegal, either because it was *malum in se* or *malum prohibitum*, as for future illicit cohabitation, gaming, or usury, it was necessary to aver the facts, so that the plaintiff might be notified of the specific ground of defense, and the court might be able to determine, on the facts stated, whether the consideration was illegal or not, and consequently whether the matter relied on in the defense, could bar the action. In such a case, a defendant would not be allowed to plead generally, that the consideration was vicious or illegal, or that there was no consideration 'valid in law.' This would be pleading a deduction of law, and not the matter of fact from which the conclusion of law may be drawn by the court. Morton *v.* Fletcher, II Marshall 137."

99. Hall *v.* Marks, 56 Ill. 125; Wheat *v.* Summers, 13 Ill. App. 444; Mooklar *v.* Lewis, 40 Ind. 1; Davis *v.* Young, 19 Ky. 381; Coyle *v.* Fowler, 26 Ky. 472; Ball *v.* Ballenseifen, 28 Ill. App. 221.

1. *Alabama.* — Strader *v.* Alexander, 9 Port. 441; Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476.

Illinois. — Dunker *v.* Schlotfeldt, 49 Ill. App. 652; Rozet *v.* Harvey, 26 Ill. App. 558.

Indiana. — Bowers *v.* Trevor, 5 Blackf. 24; Moore *v.* Pendleton, 16 Ind. 481; Chapman *v.* Harper, 7 Blackf. 333; Stowe *v.* Weir, 15 Ind. 341.

Iowa. — Skinner *v.* Church, 36 Iowa 91; Snyder *v.* Reno, 38 Iowa 329.

Kentucky. — Dodge *v.* Bank of Kentucky, 2 A. K. Marsh. 610.

Louisiana. — Taylor *v.* Normand, 12 Rob. 240.

Massachusetts. — State Trust Co. *v.* Owen Paper Co., 162 Mass. 156, 38 N. E. 438.

New York. — Norris *v.* Badger, 6 Cow. 449.

2. Penn *v.* Flack, 3 Gill & J. (Md.) 369; Canfield *v.* McIlwaine, 32 Md. 94; Little *v.* Blunt, 16 Pick. (Mass.) 359; Davis *v.* Miller, 14 Gratt. (Va.) 1.

3. *United States.* — Hyer *v.* Smith,

are matters of substance must be substantially proved as made.[4]

(K.) Presentment, Protest and Notice. — (a.) *In General.* — As demand and notice[5] are necessary to fix the liability of an indorser

3 Cranch C. C. 437, 12 Fed. Cas. No. 6,979.

Arkansas. — Jordon *v.* Ford, 7 Ark. 416.

Illinois. — Speer *v.* Craig, 22 Ill. 433.

Indiana. — Smelser *v.* Wayne & Union S. L. T. Co., 82 Ind. 417; Carpenter *v.* Sheldon, 22 Ind. 259; Glenn *v.* Porter, 72 Ind. 525.

Pennsylvania. — Lautermilch *v.* Kneagy, 3 Serg. & R. 202.

4. *United States.* — Rey *v.* Simpson, 22 How. 341.

Alabama. — Davis *v.* Campbell, 3 Stew. 319; Clancy *v.* Hilliard, 39 Ala. 713.

Illinois. — Lee *v.* Mendel, 40 Ill. 359.

Mississippi. — Holmes *v.* Preston, 71 Miss. 541, 14 So. 455.

Pennsylvania. — Dilworth *v.* Hirst, 8 Leg. Int. 111.

Tennessee. — Newell *v.* Williams, 5 Sneed 208.

Texas. — Washington *v.* Denton First Nat. Bank, 64 Tex. 4.

5. *United States.* — Magruder *v.* Union Bank, 3 Pet. 90; Bank of Alexandria *v.* Deneale, 2 Cranch C. C. 488, 2 Fed. Cas. No. 846; January *v.* Duncan, 3 McLean 19, 13 Fed. Cas. No. 7,217.

Alabama. — Ward *v.* Gifford, Minor 5; Crenshaw *v.* M'Kiernan, Minor 295.

Arizona. — Johnson *v.* Zeckendorf, 12 Pac. 65.

Arkansas. — Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212; White *v.* Cannada, 25 Ark. 41; Winston *v.* Richardson, 27 Ark. 34.

California. — Goldman *v.* Davis, 23 Cal. 256; Eastman *v.* Turman, 24 Cal. 379.

District of Columbia. — Presby *v.* Thomas, 1 App. Cas. 171.

Florida. — Guild *v.* Goldsmith, 9 Fla. 212.

Idaho. — Ankeny *v.* Henry, 1 Idaho 229.

Illinois. — Edwards *v.* Shields, 7 Ill. App. 70; Belford *v.* Bangs, 15 Ill. App. 76.

Iowa. — Nollen *v.* Wisner, 11 Iowa 190; Pryor *v.* Bowman, 38 Iowa 92.

Kansas. — Couch *v.* Sherill, 17 Kan. 622; Selover *v.* Snively, 24 Kan. 672.

Kentucky. — McGowan *v.* Bank of Kentucky, 5 Litt. 272.

Louisiana. — Abat *v.* Rion, 7 Mart. (O. S.) 562; Cammack *v.* Gordon, 20 La. Ann. 213.

Maine. — Rea *v.* Dorrance, 18 Me. 137.

Maryland. — Day *v.* Lyon, 6 Har. & J. 140; Farmer's Bank *v.* Duvall, 7 Gill & J. 78; Howard Bank *v.* Carson, 50 Md. 18.

Massachusetts. — Shaw *v.* Griffith, 7 Mass. 494; Copp *v.* M'Dugall, 9 Mass. 1.

Missouri. — Plahto *v.* Patchin, 26 Mo. 389; Napper *v.* Blank, 54 Mo. 131.

New Hampshire. — Lawrence *v.* Langley, 14 N. H. 70; Piscataqua Exch. Bank *v.* Carter, 20 N. H. 246, 51 Am. Dec. 217.

New York. — Berry *v.* Robinson, 9 Johns. 121, 6 Am. Dec. 267; Storp *v.* Harbutt, 4 E. D. Smith 464; Pahquioque Bank *v.* Martin, 11 Abb. Pr. 291.

North Carolina. — Farrow *v.* Respass, 33 N. C. 170.

Ohio. — Frazier *v.* Johnston, Wright 131; Blackwell *v.* Montgomery, 1 Handy 40.

Pennsylvania. — Jackson *v.* Newton, 8 Watts 401; Arnold *v.* Neiss, 1 Walk. 115; Cassidy *v.* Kreamer, 13 Atl. 744.

South Carolina. — Scarborough *v.* Harris, 1 Bay 177, 1 Am. Dec. 609; Galpin *v.* Hard, 3 McCord 394; Bank of the State *v.* Croft, 3 McCord 522, 15 Am. Dec. 640.

Tennessee. — Stothart *v.* Lewis, 1 Overt. 255.

Texas. — Green *v.* Elson, 31 Tex. 159.

Vermont. — Nash *v.* Harrington, 1 Aik. 39.

Virginia. — Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

West Virginia. — Shields *v.* Farm-

upon negotiable paper,[6] an allegation of these facts must be made in the pleadings of an action against indorsers of such paper,[7] and the evidence must correspond with such allegation.[8]

(b.) *Sufficiency of Evidence.* — As to what evidence will support the general allegation that the note was presented and payment refused, the decisions are in conflict.[9] In some jurisdictions this allegation is supported by evidence showing an excuse for failure to present the note for payment,[10] while others hold that it is not;[11] so in some jurisdictions a waiver of demand and notice will support this allegation,[12] while in others such evidence is not sufficient for this pur-

ers' Bank, 5 W. Va. 254; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Wisconsin. — Catlin *v.* Jones, 1 Pin. 130.

6. *Arkansas.* — Ruddell *v.* Walker, 7 Ark. 457.

Louisiana. — Union Ins. Co. *v.* Rodd, 26 La. Ann. 715.

Maryland. — Staylor *v.* Ball, 24 Md. 183.

Michigan. — Stewart *v.* First Nat. Bank, 40 Mich. 348.

Mississippi. — Bowling *v.* Arthur, 34 Miss. 41.

New Jersey. — Perry *v.* Green, 19 N. J. L. 61, 38 Am. Dec. 536.

New York. — Schumaker *v.* Quaritius, 5 Redf. 350.

Ohio. — House *v.* Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813.

South Carolina. — Kidwell *v.* Ford, 2 Treadw. Const. 678; Lazarus *v.* Aubin, 2 McCord 134.

7. Saco Nat. Bank *v.* Sanborn, 63 Me. 340; Jones *v.* Fales, 4 Mass. 245; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; North Bank *v.* Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; State Bank *v.* Vaughan, 36 Mo. 91.

8. Bank at Decatur *v.* Hodges, 9 Ala. 631; Anderson *v.* Yell, 15 Ark. 9; Peters *v.* Hobbs, 25 Ark. 67, 91 Am. Dec. 526; Laferriere *v.* Bynum, 12 La. 587; Smedberg *v.* Whittlesey, 3 Sandf. Ch. (N. Y.) 320; Myers *v.* Standart, 11 Ohio St. 29. *Contra,* Quigley *v.* Primrose, 8 Port. (Ala.) 247; Crawford *v.* Camfield, 6 Ala. 153; Smith *v.* Robinson, 11 Ala. 270; Frank *v.* Townsend, 9 Humph. (Tenn.) 724; Jackson *v.* Henderson, 3 Leigh (Va.) 196.

9. See cases in next succeeding foot notes 7 and 11.

10. *Alabama.* — Taylor *v.* Branch, 1 Stew. & P. 249, 23 Am. Dec. 293; Kennon *v.* M'Rea, 7 Port. 175.

Connecticut. — Hinsdale *v.* Miles, 5 Conn. 331; Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397.

Mississippi. — Goodloe *v.* Godley, 13 Smed. & M. 233, 51 Am. Dec. 159.

Missouri. — Faulkner *v.* Faulkner, 73 Mo. 327; Pier *v.* Heinrichoffen, 52 Mo. 333.

New York. — Stewart *v.* Eden, 2 Caines 121, 2 Am. Dec. 222; Williams *v.* Matthews, 3 Cow. 252; Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Purchase *v.* Mattison, 13 N. Y. Super. 587.

Pennsylvania. — Baumgardner *v.* Reeves, 35 Pa. St. 250.

11. Child *v.* Moore, 6 N. H. 33; Garvey *v.* Fowler, 4 Sandf. (N. Y. Super.) 665.

12. Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397; Knight *v.* Fox, 1 Morris (Iowa) 305; Armstrong *v.* Chadwick, 127 Mass. 156; Faulkner *v.* Faulkner, 73 Mo. 327; Hilbard *v.* Russell, 16 N. H. 410, 41 Am. Dec. 733; Smith *v.* Poillon, 87 N. Y. 590; Farmers' Bank *v.* Day, 13 Vt. 36. Promise to pay after maturity of the note, and with full knowledge of laches on the part of the holder in giving notice of dishonor. Moore *v.* Ayres, 13 Miss. 310; Clark *v.* Tryon, 4 Misc. 63, 23 N. Y. Supp. 780 *reversing* 2 Misc. 457, 21 N. Y. Supp. 1075; People's Nat. Bank *v.* Dibrell, 91 Tenn. 301, 18 S. W. 626. *Contra,* Spang *v.* McGarry, 2 Ohio Dec. 116.

Proof of waiver of notice will support an allegation of actual notice.

pose;[13] and in not a few jurisdictions the general allegation of demand and notice must be proved as laid in the pleadings.[14]

(c.) *Date of Note Protested.* — The date of the note as to which proof of demand and notice is made must not deviate from that alleged in the pleading.[15]

(L.) Proof Under Common Counts. — When a declaration contains the common counts, and also a special count in which the note is described, and the note is not receivable under the special count because of a variance, it may be given in evidence under such common counts so as to avoid a variance.[16]

Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; Gilroy *v.* Brinkley 12 Heisk. (Tenn.) 392.

13. Hall *v.* Davis, 41 Ga. 614; Lumbert *v.* Palmer, 29 Iowa 104; Peck *v.* Schick, 50 Iowa 281.

14. *United States.* — Dennistoun *v.* Stewart, 17 How. 606; Coyle *v.* Gozzler, 2 Cranch C. C. 625, 6 Fed. Cas. No. 3,312.

Alabama. — Leigh *v.* Lightfoot, 11 Ala. 935; Bank at Decatur *v.* Hodges, 9 Ala. 631.

Indiana. — Curtis *v.* State Bank, 6 Blackf. 312, 38 Am. Dec. 143.

Louisiana. — Lafitte *v.* Perkins, 21 La. Ann. 171.

Maine. — Hill *v.* Varrell, 3 Me. 233.

Massachusetts. — Blakely *v.* Grant, 6 Mass. 386.

Minnesota. — Helfer *v.* Alden, 3 Minn. 332.

Ohio. — Hough *v.* Young, 1 Ohio 504.

Virginia. — Jackson *v.* Henderson, 3 Leigh 196.

15. Bank at Decatur *v.* Hodges, 9 Ala. 631. Time must be proved as alleged regarding demand. Hough *v.* Young, 1 Ohio 504.

"A protest describing a bill as dated the 26th January is not admissible as evidence to show the protest of a bill dated the 28th January." Bank at Decatur *v.* Hodges, 9 Ala. 631.

16. *United States.* — Stone *v.* Lawrence, 4 Cranch C. C. 11, 23 Fed. Cas. No. 13,484.

Alabama. — Talladega Ins. Co. *v.* Landers, 43 Ala. 115.

Arkansas. — Jordan *v.* Ford, 7 Ark. 416.

Connecticut. — Vila *v.* Weston, 33 Conn. 42.

Illinois. — Gilmore *v.* Nowland, 26 Ill. 201; Peoria & O. R. Co. *v.* Neill, 16 Ill. 269; Streeter *v.* Streeter, 43 Ill. 155; Williams *v.* Baker, 67 Ill. 238; Boxberger *v.* Scott, 88 Ill. 477.

Maryland. — Hopkins *v.* Kent, 17 Md. 113.

New Mexico. — Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181.

New York. — Williams *v.* Allen, 7 Cow. 316.

Pennsylvania. — Williams *v.* Hood, 8 Leg. Int. 111.

"In an action by N. S. Baker on a promissory note, proof of the defendant's execution and delivery to the plaintiff of a note payable to 'N. S. Bake' *held* to be sufficient to admit the note as evidence under the common counts." William *v.* Baker, 67 Ill. 238.

Though a note indorsed to Joseph B. Myers cannot be received in evidence under a count in a declaration describing it as indorsed to Joseph B. Mason, yet such note may be given in evidence under the money counts. Jordan *v.* Ford, 7 Ark. 416.

A note payable on its face at a certain place within a certain state cannot be given in evidence upon a count on the note not so describing it, but it may be given in evidence upon the count for money had and received. Stone *v.* Lawrence, 4 Cranch C. C. 11, 23 Fed. Cas. No. 13,484.

A note against the defendant and another is evidence under a money count against defendant alone. Williams *v.* Allen, 7 Cow. (N. Y.) 316.

Contra, Fant *v.* Gadberry, 5 S. C. 10. In this case, A executed a note signing it A & B, as partners. Plaintiff declares on it as the note of A, and proved there was no such firm as A & B. *Held,* that the vari-

(2.) Deeds. — When a deed is set forth in a pleading and proof in relation thereto is offered, such proof must correspond to the description contained in the pleadings.[17]

(3.) Policies of Insurance. — (A.) In General. — As a general rule, the evidence relating to a policy of insurance must substantially agree with the allegations touching the same.[18] But a general allegation that the defendants were authorized to effect insurance permits evidence of any kind of insurance.[19]

(B.) Denial of Liability on Specific Ground. — Where liability on a policy of insurance is denied by an allegation of a specific ground, evidence of non-liability on another ground cannot be received.[20]

(C.) Allegation of Total Loss. — Where the allegation is of a total loss under a policy of insurance, evidence of a partial loss is admissible.[21]

ance was fatal, and that the note could not be given in evidence under one of the money counts.

17. Cole *v.* Bean, 1 Ariz. 364, 25 Pac. 537; Bloomer *v.* Henderson, 8 Mich. 395, 77 Am. Dec. 453.

18. *United States.* — Graves *v.* Boston Marine Ins. Co., 2 Cranch 419; Catlett *v.* Pacific Ins. Co., 1 Paine 594, 5 Fed. Cas. No. 2,517.

Colorado. — Atlantic Ins. Co. *v.* Manning, 3 Colo. 224.

Connecticut. — Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686.

Indiana. — Michigan Mut. L. Ins. Co. *v.* Custer, 128 Ind. 25, 27 N. E. 124.

Kentucky. — Phoenix Ins. Co. *v.* Lawrence, 4 Met. 9, 81 Am. Dec. 521.

Michigan. — Bonefant *v.* American F. Ins. Co., 76 Mich. 653, 43 N. W. 682; Dailey *v.* Preferred Masonic Mut. Acc. Assn., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

New York. — Burgher *v.* Columbian Ins. Co., 17 Barb. 274.

Texas. — Citizens' Ins. Co. *v.* Shrader (Tex. Civ. App.), 33 S. W. 584.

Utah. — Hong Sling *v.* Scottish U. & N. Ins. Co., 7 Utah 441, 27 Pac. 170.

Wisconsin. — McFetridge *v.* American F. Ins. Co., 90 Wis. 138, 62 N. W. 938.

19. Western Mass. Ins. Co. *v.* Duffy, 2 Kan. 347.

20. Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray (Mass.) 432; Hong Sling *v.* Scottish Union & Nat. Ins. Co., 7 Utah 441, 27 Pac. 170.

21. Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 382; Barney *v.* Maryland Ins. Co., 5 Har. & J. (Md.) 139.

In Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 382, the court in its opinion says: "The rule is well settled that under an averment of a total loss on a marine policy, the plaintiff may recover for a partial loss. In Gardiner *v.* Crowdale, 2 Burrow 904, which was an action on the case, where the plaintiff declared upon a total loss of a ship, but proved only an average or partial loss, it was objected that the jury could not take a partial loss into consideration upon an express declaration for a total loss, and cases were cited bearing on the point. Lord Mansfield said 'he could not hear of any such determination as can support the objection made by the defendant's counsel. Therefore it stands singly upon principles; and upon principles it is extremely clear, that the plaintiff may, upon this declaration, recover damages as for a partial loss. This is an action upon the case which is a liberal action, and a plaintiff may recover less than the grounds of his declaration support, though not more. This is agreeable with justice, and consistent with his demand. As to its being a total loss, or a partial loss, that is a question more applicable to the quantity of damages than to the ground of the action. The ground of the action is the same whether the loss be partial or total; both are

(D.) Copy of Policy Attached to Pleadings. — In those jurisdictions where a copy of the policy may be attached to plaintiff's pleadings as a part thereof, the policy when introduced must correspond to such copy.[22]

(4.) Bonds. — (A.) In General. — An allegation descriptive of a bond which is the subject-matter of controversy must be substantially proved as laid.[23]

perils within the policy.' He knew of no difference in principle between a marine and a fire policy, nor can the objection prevail in this case because it is an action of debt. In debt, a party may recover less than he declares for, and so in ejectment for a quarter section of land, the plaintiff may recover a half quarter or less. This court decided in Case *v.* The Hartford Fire Ins. Co., 13 Ill. 676, that the plaintiff need not prove an actual destruction by fire, but can recover such damages as he may show were occasioned by the removal of the goods to get them out of the reach of the fire. The proof shows that the agent of the company was engaged with the plaintiff in ascertaining the damages and getting up proof of the losses by the fire, and that the articles insured were all damaged by the fire or smoke, and that the agent was satisfied with the appraisement."

22. Franklin Ins. Co. *v.* Smith, 82 Ill. 131; Burton *v.* Connecticut Mut. L. Ins. Co., 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405; Graham *v.* Firemen's Ins. Co., 3 Wkly. L. G. (Ohio) 170.

23. *United States.* — Cabot *v.* McMasters, 55 Fed. 722; United States *v.* LeBaron, 4 Wall. 642.

Arkansas. — Bank of State *v.* Clark, 2 Ark. 375; Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; Vandever *v.* Clark, 16 Ark. 331; Wiggins *v.* Fisher, 21 Ark. 521.

California. — Vilhac *v.* Stockton & I. R. Co., 53 Cal. 208.

Connecticut. — Fish *v.* Brown, 17 Conn. 341; Crosby *v.* New London, etc. R. Co., 26 Conn. 121.

Illinois. — Walker *v.* Welch, 14 Ill. 277.

Indiana. — Byers *v.* State, 20 Ind. 47; Doherty *v.* Chase, 64 Ind. 73; LaRose *v.* Logansport Nat. Bank, 102 Ind. 332; Equitable Acc. Ins. Co. *v.* Stout, 135 Ind. 444, 33 N. E. 623; Deming *v.* Bullitt, 1 Blackf. 241; Hughes *v.* Houlton, 5 Blackf. 180; M'Kay *v.* Craig, 6 Blackf. 168; Irish *v.* Irish, 6 Blackf. 438; M'Donnan *v.* Jellison, 7 Blackf. 304; Lovejoy *v.* Bright, 8 Blackf. 206; Hurlburt *v.* State, 71 Ind. 154; Lentz *v.* Martin, 75 Ind. 228; Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108.

Kentucky. — Payne *v.* Mattox, 1 Bibb 164.

Louisiana. — Duchamp *v.* Nicholson, 2 Mart. (N. S.) 672.

Maryland. — Neale *v.* Fowler, 31 Md. 155.

Massachusetts. — Witt *v.* Potter, 125 Mass. 360.

Michigan. — Truesdale *v.* Hazzard, 2 Mich. 345; Boyer *v.* Sowles, 109 Mich. 481, 67 N. W. 530.

Minnesota. — Sprague *v.* Wells, 47 Minn. 504, 50 N. W. 535.

Missouri. — Payne *v.* Snell, 4 Mo. 238; Powers *v.* Browder, 13 Mo. 154; State *v.* Pace, 34 Mo. App. 458.

Nebraska. — Barr *v.* Ward, 36 Neb. 905, 55 N. W. 282.

New Hampshire. — Rand *v.* Rand, 4 N. H. 267.

New York. — Gale *v.* O'Bryan, 12 Johns. 216, 13 Johns. 189; Shaw *v.* Tobias, 3 N. Y. 188; Henry *v.* Brown, 19 Johns. 49; Every *v.* Merwin, 6 Cow. 360.

North Carolina. — Adams *v.* Spear, 2 N. C. 245; Usry *v.* Suit, 91 N. C. 406; King *v.* Phillips, 94 N. C. 555.

South Carolina. — State *v.* Scheper, 33 S. C. 562, 11 S. E. 623, 12 S. E. 564, 816.

Texas. — Peveler *v.* Peveler, 54 Tex. 53; Kohlberg *v.* Fett (Tex. Civ. App.), 29 S. W. 944; McArthur *v.* Barnes, 10 Tex. Civ. App. 318, 31 S. W. 212.

Virginia. — Jenkins *v.* Hurt's Comrs., 2 Rand. 446.

Washington. — Larson *v.* Winder, 14 Wash. 647, 45 Pac. 315.

(B.) Date of Bond. — The date of the bond should be proved as alleged, in order to avoid a variance.[24]

(C.) Obligors and Obligees. — The allegations relating to the parties executing the bond,[25] and the obligees therein named,[26] must be substantially proved as laid.[27]

(D.) Instrument Referred to in Bond. — Where a bond refers to some contract[28] or other instrument,[29] concerning which the bond was executed, in an action on the bond involving such contract or instrument the evidence relating thereto must correspond materially to such contract or other instrument.[30]

Wisconsin. — Veeder *v.* Lima, 11 Wis. 438; Germania S. & B. V. *v.* Flynn, 92 Wis. 201, 66 N. W. 109.

24. Cooke *v.* Graham, 3 Cranch (U. S.) 229; Comparet *v.* State, 7 Blackf. (Ind.) 553; Gordan *v.* Browne, 3 Hen. & M. (Va.) 219; Bennett *v.* Loyd, 6 Leigh (Va.) 316; Cheadle *v.* Riddle, 6 Ark. 480; Howgate *v.* United States, 3 App. Cas. (D. C.) 277.

25. *United States.* — Huff *v.* Hutchinson, 14 How. 586; Postmaster General *v.* Ridgway, Gilp. 135, 19 Fed. Cas. No. 11,313.

Alabama. — Taylor *v.* Rogers, Minor 197; Robbins *v.* Governor, 6 Ala. 839.

Arkansas. — Irvin *v.* Sebastian, 6 Ark. 33; Semon *v.* Hill, 7 Ark. 70; Rector *v.* Taylor, 12 Ark. 128; Miller *v.* Bell, 12 Ark. 135.

California. — Kurtz *v.* Forquer, 94 Cal. 91, 29 Pac. 413.

Colorado. — Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779.

Indiana. — Grant *v.* Whiteman, 5 Blackf. 67; Sherry *v.* Foresman, 6 Blackf. 56; Legate v. Marr, 8 Blackf. 404; State *v.* Geddes, 1 Ind. 577.

Kentucky. — Wilhite *v.* Roberts, 4 Dana 172.

Maine. — Colton *v.* Stanwood, 67 Me. 25.

Maryland. — Hopkins *v.* State, 53 Md. 502.

Massachusetts. — Beau *v.* Parker, 17 Mass. 591; Herrick *v.* Johnson, 11 Met. 26.

South Carolina. — Lockhart *v.* Bell, 2 Hill L. 422.

Virginia. — Evans *v.* Smith, 1 Wash. 72; Dickinson *v.* Smith, 5 Gratt. 135; Henderson *v.* Stringer, 6 Gratt. 130.

26. *Alabama.* — Gayle *v.* Hudson, 10 Ala. 116; Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845.

Connecticut. — Brainard *v.* Fowler, 2 Root 318.

Illinois. — Phillips *v.* Singer Mfg. Co., 88 Ill. 305.

Indiana. — Ft. Wayne *v.* Jackson, 7 Blackf. 36.

Mississippi. — Kingkendall *v.* Perry, 25 Miss. 228.

Missouri. — International Ins. Co. *v.* Davenport, 57 Mo. 289.

Ohio. — Kemp *v.* McGuigin, Tapp. 50.

Virginia. — Beasley *v.* Robinson, 24 Gratt. 325.

27. See cases cited under foot notes 77 and 78, *supra.*

28. Forest *v.* Leonard, 112 Ala. 296, 20 So. 587; Brown *v.* Rounsavell, 78 Ill. 589; Serviss *v.* Stockstill, 30 Ohio St. 418.

29. Smith *v.* Frazer, 61 Ill. 164; Smith *v.* Eubanks, 9 Yerg. (Tenn.) 20; Everts *v.* Bostwick, 4 Vt. 349.

In Smith *v.* Frazer, 61 Ill. 164, it was held that "where a declaration averred, in a suit on an appeal bond, that the defendants had not paid the judgment recovered before the justice, nor the costs of the circuit court on the dismissal of the appeal, amounting to $11.45 — the fee bills showed $11.05 costs in the justice's court, and $7.45 in the circuit court — either of these sums being variant from the amount set out in the declaration — and as it was a matter of description of the judgment appealed from, it was error to admit it in evidence."

30. Dearmond *v.* Curtis, 1 La. 93; Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255; Legg *v.* Robinson, 7 Wend. (N. Y.) 194.

c. *Records and Judicial Proceedings.* — **(1.) In General.** — The word "record" as here used will be taken as referring to proceedings in courts, and the law of variance touching records and judicial proceedings will be treated in its application to recognizances and judgments.

(2.) Recognizances. — (A.) In General. — The allegations of the pleadings in a proceeding to enforce a forfeited recognizance must be substantially proved as laid;[31] and if the record of the recognizance produced in support of the allegations substantially varies therefrom, a variance is created.[32]

(B.) Joint and Several Recognizance. — If the allegation be of a joint and several recognizance, a variance will be created by the admission in evidence of a several recognizance,[33] although it be provided by statute that joint obligations shall be treated as joint and several.[34]

(3.) Judgments. — (A.) In General. — When a judgment is sued on, the allegations in the pleadings describing it must be substantially proved as made;[35] and this is the rule whether such allegations relate to a foreign[36] or domestic judgment.[37]

(B.) Date, Amount and Parties. — The allegations of the pleadings

31. *Connecticut.* — Waldo *v.* Spencer, 4 Conn. 71; Hawley *v.* Middlebrook, 28 Conn. 527.
Delaware. — Reading's Heirs *v.* State, 1 Har. 190.
Illinois. — O'Brien *v.* People, 41 Ill. 456; Lytle *v.* People, 47 Ill. 422; Compton *v.* People, 86 Ill. 176; Allen *v.* People, 29 Ill. App. 555.
Indiana. — Paine *v.* State, 7 Blackf. 206.
Massachusetts. — Com. v. M'Neill, 19 Pick. 127.
Missouri. — State *v.* Furguson, 50 Mo. 470; State *v.* McElhaney, 20 Mo. App. 584.
Ohio. — Swank *v.* State, 3 Ohio St. 429.
Pennsylvania. — Abbott *v.* Lyon, 4 Watts & S. 38.
Rhode Island. — State *v.* Miner, 14 R. I. 303; State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920.
South Carolina. — State *v.* Mayson, 2 Nott & McC. 425.
Vermont. — Blood *v.* Morrill, 17 Vt. 598.
32. *United States.* — Barnes *v.* Lee, 1 Cranch C. C. 430, 2 Fed. Cas. No. 1,017.
Illinois. — Farris *v.* People, 58 Ill. 26.
Kansas. — Madden *v.* State, 35 Kan. 146, 10 Pac. 469.
Kentucky. — Brown *v.* Com., 4 Met. 221.
Massachusetts. — Harrington *v.* Brown, 7 Pick. 232.
Mississippi. — Daingerfield *v.* State, 4 How. 658; Ditto *v.* State, 30 Miss. 126.
New York. — Mechanics' Bank *v.* Hazard, 13 Johns. 353; Robbins *v.* Noxon, 4 Wend. 207.
Texas. — Ellis *v.* State, 10 Tex. App. 324; Garrison *v.* State, 21 Tex. App. 342, 17 S. W. 351; Bailey *v.* State (Tex. Crim.), 22 S. W. 40; Avant *v.* State, 33 Tex. Crim. 312, 26 S. W. 411; Frost *v.* Frost, 33 Tex. Crim. 347, 26 S. W. 412.
Virginia. — Wood *v.* Com., 4 Rand. 329.
33. Farris *v.* People, 58 Ill. 26.
34. Farris *v.* People, 58 Ill. 26.
35. Dow *v.* Humbert, 91 U. S. 294; Quigley *v.* Campbell, 12 Ala. 58; Haas *v.* Taylor, 80 Ala. 459, 2 So. 633; Cavener *v.* Shinkle, 89 Ill. 161; Whitaker *v.* Bramson, 2 Paine 209, 29 Fed. Cas. No. 17,526.
36. Dow *v.* Humbert, 91 U. S. 294.
37. Sayre *v.* Edwards, 19 W. Va. 352; Miller *v.* McManis, 57 Ill. 126.

in actions on judgments must be proved as laid, with reference to date,[38] amount,[39] parties,[40] and other essentials.[41]

C. Actions Ex Delicto. — a. *In General.* — While the law of variance, as we have seen applies to actions of tort, it is not governed by that strictness that obtains in actions on contract.[42] In actions of tort it is not necessary that every allegation of matter of substance be proved in order to recover.[43] For instance, as torts are divisible in their nature, proof of a part of the tort is, in general, sufficient to sustain the declaration.[44] Illustrations are given in the notes.[45]

38. Sayre *v.* Edwards, 19 W. Va. 352; Miller *v.* McManis, 57 Ill. 126.

39. Collyer *v.* Collins, 17 Abb. Pr. (N. Y.) 467.

40. Mann *v.* Edwards, 138 Ill. 19, 27 N. E. 603; Lowry *v.* McMurtry, 2 Ky. 251; Cumberland Coal & Iron Co. *v.* Jeffries, 27 Md. 526; Block *v.* Peebles, 10 Ohio Dec. 3; Luce *v.* Dexter, 135 Mass. 23; Sadler *v.* Slabarry, 2 Watts (Pa.) 73.

41. Boteler *v.* State, 8 Gill & J. (Md.) 359; Ryan *v.* State Bank, 10 Neb. 524, 7 N. W. 276; Crosswell *v.* Byrnes, 9 Johns. (N. Y.) 287.

42. *Alabama.* — Alabama, etc. R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53.

Connecticut. — Twiss *v.* Baldwin, 9 Conn. 291.

Illinois. — Swift & Co. *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038.

Iowa. — Winey *v.* Chicago, etc. R. Co., 92 Iowa 622, 61 N. W. 218.

Massachusetts. — Porter *v.* Sullivan, 7 Gray 441.

Missouri. — Morrow *v.* Surber, 97 Mo. 155, 11 S. W. 48; Radcliff *v.* St. Louis, etc. R. Co., 90 Mo. 127.

New York. — Cheetham *v.* Tillotson, 5 Johns. 430.

South Carolina. — M'Cool *v.* M'Cluny, Harp. L. 486.

Vermont. — Bailey *v.* Moulthrop, 55 Vt. 13.

43. *England.* — Stoddart *v.* Palmer, 3 Barn. & C. 2, 10 E. C. L. 4; Williamson *v.* Allison, 2 East 446; Shears *v.* Wood, 7 Moo. 345, 17 E. C. L. 76.

United States. — Texas etc. R. Co. *v.* Williams, 62 Fed. 440, 10 C. C. A. 463; United States *v.* Peachy, 36 Fed. 160.

Connecticut. — Nichols *v.* Hayes, 13 Conn. 155.

Georgia. — Southern Bell Tel. Co. *v.* Lynch, 95 Ga. 529, 20 S. E. 500; Georgia R. etc. Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939.

Illinois. — Lake Shore, etc. R. Co. *v.* Hundt, 140 Ill. 525, 30 N. E. 458.

Indiana. — McCallister *v.* Mount, 73 Ind. 559.

Iowa. — Sedgwick *v.* Illinois C. R. Co., 73 Iowa 158, 34 N. W. 750.

Maryland. — Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302.

Michigan. — Ross *v.* Ionia Twp., 104 Mich. 320, 62 N. W. 401.

New York. — Lettman *v.* Ritz, 3 Sandf. 734; Lass *v.* Wetmore, 2 Sweeney 209.

Texas. — Houston *v.* Summers, (Tex. Civ. App.), 49 S. W. 1106.

Vermont. — Skinner *v.* Grant, 12 Vt. 456.

44. *England.* — Ricketts *v.* Salwey, 2 Barn. & Ald. 360, 1 Chit. 104, 18 E. C. L. 39.

Alabama. — Alabama G. S. R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53.

Connecticut. — Burdick *v.* Glasko, 18 Conn. 494.

Illinois. — Swift & Co. *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498.

Iowa. — Winey *v.* Chicago, etc. R. Co., 92 Iowa 622, 61 N. W. 218.

Massachusetts. — Porter *v.* Sullivan, 7 Gray 441.

Missouri. — Morrow *v.* Surber, 97 Mo. 155, 11 S. W. 48.

New York. — Wilbur *v.* Brown, 3 Denio 356; Cheetham *v.* Tillotson, 5 Johns. 430.

South Carolina. — M'Cool *v.* M'Cluny, Harp. L. 486.

Vermont. — Bailey *v.* Moulthrop, 55 Vt. 13.

45. Illustrations. — In Alabama G. S. R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53, the plaintiff sued for

b. *Principles Governing in Actions Ex Delicto.* — **(1.) In General.** If the evidence in actions *ex delicto* substantially agrees with the allegations of the pleadings,[46] so as not to operate a surprise to the adverse party,[47] or mislead him to his prejudice, this is sufficient.[48]

damages for his wrongful and forcible ejection from a train on which he had entered by misdirection of a station agent of the defendant. *Held,* that plaintiff could recover damages for the misdirection, although the proof did not sustain the allegation of forcible ejection.

In Burdick *v.* Glasko, 18 Conn. 494, the syllabus is as follows: "In an action founded upon a tort, if the plaintiff fails to prove an injury as great as he has stated, he may, nevertheless, recover to the extent proved.

"A and B being owners of lands and mills on opposite sides of a river, which mills were operated by the waters of such river, raised by a dam across it, A brought an action on the case against B, for unlawfully raising the dam on his side of the river in such a manner as to inundate A's wheel and mill. In his declaration, A alleged that he was entitled to the free course of the waters of such river, and to the use of them for his mill, by means of the dam, free and undisturbed. In support of this allegation, A gave in evidence an indenture, executed in 1750, from which both parties derived their titles, providing that when there should be water enough in the pond, all the mills might be improved without let or hindrance; but when there should be want of water, the party under whom B claimed should have the sole power of drawing the water out of the pond, for his mills, three whole days in four, and the party under whom A claimed should have the like power one day in four. *Held,* that there was no variance sufficient to defeat a recovery by A; for the indenture proved the right alleged, either for the whole time, or for one day in four, and in either case, A was entitled to recover to the extent of the injury proved."

In Rock Island *v.* Cuinely, 126 Ill. 408, 18 N. E. 753, the court holds as follows: "Where the declaration, in an action against a city for personal injuries sustained by reason of a defective sidewalk, alleges that the planks were broken, loose and unfastened to the stringers, evidence that they were loose and unfastened to the stringers is sufficient."

46. *England.* — Williamson *v.* Allison, 2 East 446; Stoddart *v.* Palmer, 3 B. & C. 2, 10 E. C. L. 4.

United States. — Texas, etc. R. Co. *v.* Williams, 62 Fed. 440, 10 C. C. A. 463.

Connecticut. — Nichols *v.* Hayes, 13 Conn. 155.

Georgia. — Georgia R. etc. Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939; Southern Bell Telephone Co. *v.* Lynch, 95 Ga. 529, 20 S. E. 500.

Illinois. — Lake Shore, etc. R. Co. *v.* Hundt, 140 Ill. 525, 30 N. E. 458; Illinois Central R. Co. *v.* McClelland, 42 Ill. 355.

Indiana. — McCallister *v.* Mount, 73 Ind. 559; Galloway *v.* Stewart, 49 Ind. 156; Tucker *v.* Call, 45 Ind. 31; Iseley *v.* Lovejoy, 8 Blackf. 462; Cincinnati, etc. R. Co. *v.* Revolee, 17 Ind. App. 657, 46 N. E. 352; Hindman *v.* Timme, 8 Ind. App. 416, 35 N. E. 1046.

Maryland. — Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302.

New York. — Lettman *v.* Ritz, 3 Sandf. 734; Lass *v.* Wetmore, 2 Sweeny 209.

Texas. — San Antonio, etc. R. Co. *v.* Gillum (Tex. Civ. App.), 30 S. W. 697.

Vermont. — Skinner *v.* Grant, 12 Vt. 456.

47. Zeigler *v.* Wells, 28 Cal. 263; Texas & P. R. Co. *v.* Wilson (Tex. Civ. App.), 21 S. W. 373; Leslie *v.* Wabash, St. L. & P. R. Co., 88 Mo. 50, 26 Am. Eng. R. Cas. 229; Ridenhour *v.* Kansas City Cable Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Batterson *v.* Chicago & G. T. R. Co., 49 Mich. 184, 13 N. W. 508, 8 Am. & Eng. R. Cas. 123; Zeigler *v.* Danbury & N. R. Co., 52 Conn. 543.

48. St. Louis, A. & T. R. Co. *v.*

Illustrations of this principle are given in the notes.[49] But it is well

Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008.

49. **Personal Injury Cases. — Sudden Starting of Train.** — Where an action is brought to recover damages for an alleged personal injuries, in which it is charged that the plaintiff was injured while alighting from a street car, by the negligent starting of the car while the plaintiff was in the act of getting off, it is of no consequence whether the car was stopped at the instance of the plaintiff or not, or whether the plaintiff asked or obtained permission to alight; and such matters, if alleged in the declaration, are surplusage, and need not be proved, the *gist* of the action being negligence in starting the car while the plaintiff was in the act of alighting. Chicago West Division R. Co. *v.* Mill, 105 Ill. 63.

Where the declaration alleged that the plaintiff was standing on the step of the car when the train started, and the proof was that she was standing near the door when it started, such variance is not material, the gist of the action being that the train started while she was in the act of alighting. McCaslin *v.* Lake Shore & M. S. R. Co., 93 Mich. 553, 53 N. W. 724.

Servant Committing Injury. — In an action for personal injuries, where the pleading alleges that the act was done by a particular employe, it is not necessary to prove such allegation, if the evidence discloses that it was done by the defendant or any of its employees, and a failure to prove such allegation will not create a variance. Toledo, W. & W. R. Co. *v.* Williams, 77 Ill. 354.

Libel and Slander. — Where the declaration in an action for libel contains the words "U. States," and in the paper offered in evidence it is written "United States," the variance is not fatal. Lewis *v.* Few, 5 Johns. (N. Y.) 1.

A count alleging the words, "You would steal, and you will steal" is not sustained by evidence of the words, "A man that would do that would steal." The variance is a fatal one. Stees *v.* Kemble, 27 Pa. St. 112.

Cause of Injury. — Where an employe sues for personal injuries, and alleges in his declaration that such injuries were caused by a defective pile driver, there can be no recovery on proof that the injuries were caused by an unmanageable team of horses used in operating such pile driver. Santa Fe, P. & P. R. Co. *v.* Hurley, 4 Ariz. 258, 36 Pac. 216.

When an action is brought against a railroad company, in which the declaration alleges that plaintiff's hand was crushed and injured by the falling of an eccentric upon it, proof that the eccentric, in falling, knocked his hand upward, and crushed it against other machinery, is not so inconsistent with the declaration as to constitute a substantial variance; though it is advisable to amend the pleadings so as to make it conform accurately to the evidence. Georgia R. & Bkg. Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939.

Where the plaintiff's pleading avers that he was run over, while coupling cars for defendant, through his foot being caught in a splinter on the side of the railroad track, he cannot recover for the negligence of the defendant in allowing freight to project over the end of one of the cars, as he was not injured thereby. Doyle *v.* St. Paul, M. & M. R. Co., 42 Minn. 79, 43 N. W. 787.

Where the declaration alleges that the injury occurred in a particular way, the evidence must substantially correspond to such allegation. Manuel *v.* Chicago, R. I. & P. R. Co., 56 Iowa 655, 10 N. W. 237; Greenwald *v.* Marquette, H. & O. R. Co., 49 Mich. 197, 13 N. W. 513; Carey *v.* Boston & M. R. Co., 158 Mass. 228, 33 N. E. 512.

Defective Machinery or Appliances. — In an action brought by a servant to recover for injuries caused by defective machinery, there can be no recovery on proof of other defects than those alleged in the complaint. Conrad *v.* Gray, 109 Ala. 130, 19 So. 398; Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417; Long *v.* Doxey, 50 Ind. 385. And the same

settled that there must be substantial proof of the tort as alleged in the pleadings.[50]

(2.) When Contract Is Foundation of Action. — When the action is one *ex delicto* for a breach of duty growing out of contract, the contract creating this duty must be alleged,[51] and the evidence must correspond to the allegation thus made.[52]

(3.) Where Entire Claim Alleged Is Not Proved. — The fact that the plaintiff fails to make out all of his alleged claim for damages in an action *ex delicto,* and only proves a part thereof sufficient to justify a recovery *pro tanto,*[53] will not amount to a fatal

rule is applicable to appliances. Buffington *v.* Atlantic & P. R. Co., 64 Mo. 246; Arcade File Works *v.* Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.

50. *Alabama.* — Conrad *v.* Gray, 109 Ala. 130, 19 So. 398; Dean *v.* East Tennessee, V. & G. R. Co., 98 Ala. 586, 13 So. 489.

Arizona. — Santa Fe, P. & P. R. Co. *v.* Hurley, 4 Ariz. 258, 36 Pac. 216.

Illinois. — Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417.

Indiana. — Long *v.* Doxey, 50 Ind. 385; Arcade Fire Works *v.* Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.

Maine. — Estes *v.* Estes, 75 Me. 478.

Maryland. — Stanfield *v.* Boyer, 6 Har. & J. 248; Winter *v.* Donovan, 8 Gill 370.

New York. — Coffey *v.* Chapel, 2 N. Y. Supp. 648, 19 N. Y. St. 61.

North Carolina. — Hunt *v.* Vanderbilt, 115 N. C. 559, 20 S. E. 168.

In Libel or Slander, the words alleged must be proved substantially. Mere equivalent or similar words are insufficient, and constitute a variance.

United States. — Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

Alabama. — Scott *v.* McKinnish, 15 Ala. 662; Mohr *v.* Lemle, 69 Ala. 180.

Illinois. — Wallace *v.* Dixon, 82 Ill. 202.

Indiana. — Tucker *v.* Call, 45 Ind. 31.

Kentucky. — Taylor *v.* Moran, 61 Ky. 127.

Missouri. — Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525.

New York. — Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123.

Vermont. — Smith *v.* Hollister, 32 Vt. 695.

51. *England.* — Symonds *v.* Carr, 1 Campb. 361; Carlisle *v.* Trears, 2 Cowp. 671; Bristow *v.* Wright, 2 Dougl. 665; Weall *v.* King, 12 East 452; Ditchburn *v.* Spracklin, 5 Esp. 31; Lopes *v.* DeTastet, 4 Moo. C. P. 424, 1 Brod. & B. 538, 5 E. C. L. 180.

Alabama. — Wilkinson *v.* Moseley, 18 Ala. 288.

Connecticut. — Bartholomew *v.* Bushnell, 20 Conn. 271; Maine *v.* Bailey, 15 Conn. 298; Bulkley *v.* Landon, 2 Conn. 404.

Delaware. — Randel *v.* Wright, 1 Har. 34.

Illinois. — Wabash W. R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111.

Maryland. — McNamee *v.* Minke, 49 Md. 122; Ferguson *v.* Tucker, 2 Har. & G. 182.

Mississippi. — Tutt *v.* M'Leod, 3 How. 223.

Vermont. — Vail *v.* Strong, 10 Vt. 457.

52. See cases cited in the last footnote.

53. Werner *v.* Citizens R. Co., 81 Mo. 368; Chicago, B. & Q. R. Co. *v.* Warner, 108 Ill. 538, 18 Am. & Eng. R. Cas. 100; Chicago, I. & L. R. Co. *v.* Barnes (Ind.), 68 N. E. 166; Swift & Co. *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; East St. Louis Connecting R. Co. *v.* Shannan, 52 Ill. App. 420; O'Connor *v.* Railroad Corp., 135 Mass. 352; San Antonio Street R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

Negligence. — Where the plaintiff uses words in his pleading imputing fraud in connection with others charging negligence, plaintiff need not prove the allegation of fraud in

variance.[54] Or the rule may be stated thus: it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action.[55]

order to recover for negligence. Smith *v.* Holmes, 54 Mich. 104, 19 N. W. 767.

Concurrent Acts of Negligence. Where the action is brought for the recovery of damages caused from a personal injury, in which the accident and resulting injury are alleged to have been caused by several concurring negligent acts and omissions of the defendant, it is necessary to prove each element of negligence averred, in order to recover. Wormsdorf *v.* Detroit City Railway Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453.

Two Grounds of Negligence Alleged. — If the complaint in an action for personal injuries alleges two grounds of negligence, either of which is sufficient to authorize a recovery, failure to prove one ground will not defeat a recovery if the other is proved. Hough *v.* Grants Pass Power Co., 41 Or. 531, 69 Pac. 655.

Where Proof of Negligence Is Not Necessary. — Forms of action are abolished by the Code, but the pleader is required to state the facts constituting the cause of action, and not the fact constituting a cause of action, differing from the one to be established by the evidence, and the plaintiff, after framing his complaint in language necessary for the form of action selected by him, cannot be allowed, after failing to prove the necessary allegations, to claim that they are immaterial and shift his right to cover another form of action where such allegations are immaterial. The distinctions of the common-law forms of action cannot be entirely lost sight of and the judgment must be *secundum allegata et probata;* consequently in action "for damages *caused by negligence of the defendant,* recovery cannot be had under a statute, which makes proof of negligence unnecessary. Davis *v.* Utah Southern R. Co., 3 Utah 218, 2 Pac. 521.

54. *Alabama.* — Alabama, etc. R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53.

Connecticut. — Burdick *v.* Glasko, 18 Conn. 494.

Illinois. — East St. Louis C. R. Co. *v.* Shannon, 52 Ill. App. 420; Swift & Co. *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498.

Iowa. — Winey *v.* Chicago, etc. R. Co., 92 Iowa 622, 61 N. W. 218.

Massachusetts. — Porter *v.* Sullivan, 7 Gray 441; O'Connon *v.* Boston & L. R. Corp., 135 Mass. 352.

Michigan. — Smith *v.* Holmes, 54 Mich. 104, 19 N. W. 104, 19 N. W. 767; Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453; Thompson *v.* Toledo, etc. R. Co., 91 Mich. 255, 51 N. W. 995.

Missouri. — Morrow *v.* Surber, 97 Mo. 155, 11 S. W. 48; Werner *v.* Citizens' St. R. Co., 81 Mo. 368.

Oregon. — Hough *v.* Grants Pass P. Co., 41 Or. 531, 69 Pac. 655.

Texas. — San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

Vermont. — Bailey *v.* Moulthrop, 55 Vt. 13; Patten *v.* Sowles, 51 Vt. 388; Vail *v.* Strong, 10 Vt. 457.

55. *Alabama.* — Alabama, etc. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722.

Georgia. — Savannah, etc. R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308.

Illinois. — Rock Island *v.* Cuinely, 126 Ill. 408, 18 N. E. 753.

Iowa. — Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360.

Michigan. — Smith *v.* Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, 43 Am. St. Rep. 440.

Missouri. — Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342.

South Carolina. — Hammond *v.* N. E. R. Co., 6 S. E. 130.

Texas. — San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

Vermont. — Hutchinson *v.* Granger, 13 Vt. 386.

In Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342, which was an action on the case to recover for loss of

(4.) Allegation of More Than Necessary. — (A.) The Rule Stated. If allegations are made in the pleadings in an action *ex delicto* that are not essential to maintain the cause of action, proof of such unnecessary allegations is not required,[56] and if they are not proved no variance will be created,[57] unless such matters unnecessarily alleged constitute essential description,[58] in which case they must be proved as laid.[59]

certain goods shipped on the steamer Rolla, the court in the course of its opinion, says: "But this is not a question arising on the proof of a contract; it grows out of a declaration in tort, and the general rule of pleading in such case is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided, that what is proved affords a ground for maintaining the action supposing it to have been correctly stated as proved. The only exception to this rule is when the allegation contains matter of description. If the variance be in respect to a matter not essential to maintain the action, it is of no importance. 1 Ph. Ev. 205. In an indictment for murder, if the death is alleged to have been caused by a blow with a sword, but if it proves to have arisen from a staff, an ax, or a hatchet, this difference is immaterial. So in an action against a sheriff where the plaintiff declared that he had J. S. and his wife in execution, and the defendant suffered them to escape, and a special verdict was found that that husband alone was taken in execution (the execution being for a debt due from the wife before coverture), and that he escaped, the court held that the substance of the issue was found, and gave judgment for the plaintiff: *Roberts and wife v. Herbert,* 1 Sid. 5. So in *Bromfield v. Jones,* 10 Eng. Com. L. 624; S. C., 4 Barn. & Cress. 380, in an action of escape, the declaration alleged that the debtor was committed under a judgment on a *scire facias,* and on the trial it turned out that the commitment was under the original judgment; it was held that the allegation of the judgment in *scire facias* was immaterial, and that it need not be proved. In the case under consideration enough was proved to maintain the action, a deviation, and a subsequent loss; whether the loss was caused by the deviation or not was wholly immaterial."

Charge of Negligence. — Where an action has been brought by a shipper of livestock against a common carrier by rail to recover the value of an animal lost, a declaration alleging both delay in the transportation and failure to furnish an opportunity for feeding and watering the stock justifies a recovery upon proof of omission on the part of the company to furnish an opportunity to the shipper to give the animals feed and water, although the company is not liable for the alleged delay. Smith *v.* Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, 43 Am. St. Rep. 440.

Where several acts of negligence are charged, all need not be proved, provided the injury resulted from the acts proved. San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752; Savannah, F. & W. R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308; Alabama, etc. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722; Rock Island *v.* Cuinely, 126 Ill. 408, 18 N. E. 753; Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360; Hammond *v.* N. E. R. Co., 6 S. C. 130.

56. Thompson *v.* Toledo, A. A. & N. M. R. Co., 91 Mich. 255, 51 N. W. 995; Dobbin *v.* Foyles, 2 Cranch C. C. 65, 7 Fed. Cas. No. 3,942.

57. Thayer *v.* Flint & P. M. R. Co., 93 Mich. 150, 53 N. W. 216; Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768.

58. Richmond R. & Elec. R. Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388, 10 Am. Neg. Cas. 376; Missouri Pac. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607, 11 Am. Neg. Cas. 554; Bartley *v.* Metropolitan St. R. Co., 148 Mo. 124, 49 S. W. 840, 5 Am. Neg. Rep. 635; Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453.

59. *United States.* — Atwood *v.*

(B.) Illustrations. — Thus under a general allegation of negligence, evidence of any degree of negligence is admissible;[60] but where a specific act of negligence is alleged as ground of recovery, the act as alleged must be proved.[61]

(5.) Damages. — (A.) General Rule. — In an action *ex delicto*, it is not necessary to prove the amount of damages alleged in the pleadings,[62] as there may be a recovery for such sum as may be proved without reference to the amount alleged,[63] except that it cannot exceed the amount laid in the declaration or complaint.[64]

Chicago, R. I. & P. R. Co., 72 Fed. 447.

Alabama. — Watkins *v.* Birmingham R. & E. Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; Bowie *v.* Birmingham R. & E. Co., 125 Ala. 397, 27 So. 1016, 50 L. R. A. 632; Birmingham Elec. R. Co. *v.* Clay, 108 Ala. 233, 19 So. 309.

California. — Gibson *v.* Wheeler, 110 Cal. 243, 42 Pac. 810.

Kentucky — Thomas *v.* Louisville & N. R. Co., 18 Ky. L. Rep. 164, 35 S. W. 910.

Missouri. — Graney *v.* St. Louis, I. M. & S. R. Co., 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153.

Wisconsin. — Legage *v.* Chicago & N. W. R. Co., 91 Wis. 507, 65 N. W. 165.

Illustration. — " Proof of ejection from a street car by the conductor only is not sufficient to sustain a cause of action under a complaint which alleged that ejection was made by the united efforts of the conductor and motorman." Bowie *v.* Birmingham R. & E. Co., 125 Ala. 397, 27 So. 1016, 50 L. R. A. 632.

60. *United States.* — Shumacher *v.* St. Louis, etc. R. Co., 39 Fed. 174.

Alabama. — Louisville & N. R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130.

District of Columbia. — Atchison *v.* Willie, 21 App. Cas. 548.

Illinois. — Rockford, etc. R. Co. *v.* Phillips, 66 Ill. 548; Chicago, etc. R. Co. *v.* Carter, 20 Ill. 390.

Indiana. — Pennsylvania Co. *v.* Krick, 47 Ind. 368; Ohio & M. R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; City of Ft. Wayne *v.* De Witt, 47 Ind. 391.

Kentucky. — Louisville & N. R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706.

Mississippi. — Southern Exp. Co. *v.* Brown, 67 Miss. 260, 7 So. 318, 8 So. 425, 19 Am. St. Rep. 306.

Wisconsin. — Lawson *v.* Chicago, etc. R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

61. *Georgia.* — Tucker *v.* Central of Georgia R. Co., 122 Ga. 387, 50 S. E. 128; Hudgins *v.* Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974.

Illinois. — Chicago City R. Co. *v.* Bruley, 215 Ill. 464, 74 N. E. 441.

Kansas. — Chicago, R. I. & P. R. Co. *v.* Wheeler, 70 Kan. 755, 79 Pac. 673.

Missouri. — Politowitz *v.* Citizens' Telephone Co., 115 Mo. App. 57, 90 S. W. 1031; Bragg *v.* Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527; VanHorn *v.* St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326.

Ohio. — Baltimore & O. R. Co. *v.* Lockwood, 72 Ohio St. 586, 74 N. E. 1071.

Pennsylvania. — Sturtzebeker *v.* Inland Traction Co., 211 Pa. St. 156, 60 Atl. 583.

Washington. — Albin *v.* Seattle Elec. Co., 40 Wash. 51, 82 Pac. 145.

62. Chicago & A. R. Co. *v.* O'Brien, 34 Ill. App. 155; Pledger *v.* Wade, 1 Bay (S. C.) 35; Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053; Mallory *v.* Leach, 35 Vt. 156.

63. Mallory *v.* Leach, 35 Vt. 156; Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053; Chicago & A. R. Co. *v.* O'Brien, 34 Ill. App. 155.

64. Frank *v.* Curtis, 58 Mo. App. 349; Texas & P. R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741; Gulf, C. & S. F. R. Co. *v.* Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285; Gregory *v.* Coleman, 3 Tex. Civ. App. 166, 22 S. W. 181; Abernethy *v.* Van Buren Tp., 52 Mich. 383, 18 N. W. 116; Horton *v.* St. Louis, I. M. & S. R. Co., 83 Mo. 541.

(B.) Character of Damages. — The proof should correspond to the character of damages alleged.[65]

(6.) Place of Injury. — In actions *ex delicto* the place where the injury occurred need not be proved as alleged,[66] except where the place has been made a matter of essential description,[67] in which cases the allegation of place must be substantially proved as alleged.[68]

c. *Specific Cases.* — **(1.) Libel and Slander.** — Failure to prove all the words alleged in libel or slander does not constitute a variance, if there be enough of the precise words proved to make out the

65. *Illinois.* — North Chicago St. R. Co. *v.* Cotton, 41 Ill. App. 311.

Iowa. — Homan *v.* Franklin County, 90 Iowa 185, 57 N. W. 703.

Louisiana. — Roberts *v.* Hyde, 15 La. Ann. 51.

Michigan. — Abernethy *v.* Van Buren Tp., 52 Mich. 383, 18 N. W. 116; Petrie *v.* Lane, 67 Mich. 454, 35 N. W. 70.

Minnesota. — Morrison *v.* Lovejoy, 6 Minn. 319.

Missouri. — Saunders *v.* Brosius, 52 Mo. 50; Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542.

New York. — Schmitt *v.* Dry Dock, E. B. & B. R. Co., 2 City C. R. 359.

South Carolina. — Cobb *v.* Columbia & G. R. Co., 37 S. C. 194, 15 S. E. 878.

Texas. — Carson *v.* Texas I. Co. (Tex. Civ. App.), 34 S. W. 762.

Vermont. — Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Graves *v.* Severens, 40 Vt. 636.

66. Johnson *v.* Canal & C. R. Co., 27 La. Ann. 53; Barber *v.* Essex, 27 Vt. 62; Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480.

67. *Illinois.* — Lake Shore, etc. R. Co. *v.* Ward, 135 Ill. 511, 26 N. E. 520; Wright *v.* Chicago, etc. R. Co., 27 Ill. App. 200; Wabash W. R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111.

Maryland. — Chapman *v.* Brawner, 2 Har. & J. 366; Carroll *v.* Smith, 4 Har. & J. 128.

Massachusetts. — Shaw *v.* Boston & W. R. Corp., 8 Gray 45.

Michigan. — Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275.

New Jersey. — Ellet *v.* Pullen, 12 N. J. L. 357.

New York. — Shank *v.* Cross, 9 Wend. 160.

Vermont. — Benton *v.* Beattie, 63 Vt. 186, 22 Atl. 422.

68. Illustrations. — Trespass. In an action of trespass in which the declaration described the timber as 7,500 spruce trees, which had been standing on certain designated lots, there can be no recovery for spruce trees taken from any other lots. Benton *v.* Beattie, 63 Vt. 186, 22 Atl. 422.

In an action of trespass the defendant may plead a special *liberum tenementum,* setting forth specifically the place in which he justifies, when, if the plaintiff takes issue, and does not new assign, he assumes upon himself to show a cause of action at the place set up in the plea. Shank *v.* Cross, 9 Wend. (N. Y.) 160.

Accident at Railroad Crossing. "In an action for damages resulting from a train striking a team at a railroad crossing, the judge, after charging the jury that there could be no recovery if the proper signals were given, left it to them to determine whether there were any unusual circumstances which made the speed unreasonable. There being nothing in the pleadings or proofs to show that the crossing was different from other crossings, or that there were any other unusual circumstances, this was held error. The charge was also held erroneous in permitting the jury to find negligence on the part of the company in allowing certain bushes to grow along the track, near the crossing, when there was nothing in the pleadings thereto, and no distinct evidence, that such bushes had any connection with the accident. Klanow-

charge as alleged and the meaning of the language proved be the same as that alleged.[69]

(2.) Negligence. — (A.) In General. — It is a general principle relating to actions for negligence that the allegations therein setting forth the negligence must be substantially proved as alleged;[70] but it is the gravamen of the charge that must be substantially proved,[71] and not the mere circumstances connected with the charge.[72]

(B.) Time of Act of Negligence. — If a certain time as to the act of negligence complained of is alleged, proof of any other time is sufficient,[73] as time is not material in the absence of a plea of the statute of limitation.[74]

ski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275.

69. *Alabama.* — Commons *v.* Walters, 1 Port. 377, 27 Am. Dec. 635; Chandler *v.* Holloway, 4 Port. 17; Scott *v.* McKinnish, 15 Ala. 662.

Connecticut. — Nichols *v.* Hayes, 13 Conn. 155.

Georgia. — Brown *v.* Hanson, 53 Ga. 632.

Illinois. — Wilborn *v.* Odell, 29 Ill. 456; Sanford *v.* Gaddis, 15 Ill. 228; Harbison *v.* Shook, 41 Ill. 141; Keefe *v.* Voight, 45 Ill. App. 620.

Indiana. — M'Coombs *v.* Tuttle, 5 Blackf. 431; Wheeler *v.* Robb, 1 Blackf. 330, 12 Am. Dec. 245; Iseley *v.* Lovejoy, 8 Blackf. 462.

Kentucky. — Barr *v.* Gaines, 3 Dana 258.

Massachusetts. — Whiting *v.* Smith, 13 Pick. 364.

Missouri. — Cooper *v.* Marlow, 3 Mo. 188; Noeninger *v.* Vogt, 88 Mo. 589; Schmidt *v.* Bauer, 60 Mo. App. 212; Coghill *v.* Chandler, 33 Mo. 115; Pennington *v.* Meeks, 46 Mo. 217; Lewis *v.* McDaniel, 82 Mo. 577; Mix *v.* McCoy, 22 Mo. App. 488; Casey *v.* Aubuchon, 25 Mo. App. 91; Unterberger *v.* Scharff, 51 Mo. App. 102.

New Hampshire. — Merrill *v.* Peaslee, 17 N. H. 540; Smart *v.* Blanchard, 42 N. H. 137.

New York. — Miller *v.* Miller, 8 Johns. 74; Loomis *v.* Swick, 3 Wend. 205; Purple *v.* Horton, 13 Wend. 9, 27 Am. Dec. 167; Nestle *v.* Van Slyck, 2 Hill 282.

Ohio. — Cheadle *v.* Buell, 6 Ohio 67.

Tennessee. — Hancock *v.* Stephens, 11 Humph. 507.

Vermont. — Smith *v.* Hollister, 32 Vt. 695.

70. *Alabama.* — Louisville & N. R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130.

Connecticut. — Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88.

Illinois. — Chicago, etc. R. Co. *v.* Dickson, 88 Ill. 431; Straight *v.* Odell, 13 Ill. App. 232.

Indiana. — Louisville, etc. R. Co. *v.* Schmidt, 106 Ind. 73, 5 N. E. 684; Indiana, etc. R. Co. *v.* Overton, 117 Ind. 253, 20 N. E. 147.

Michigan. — Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453; Montgomery *v.* Muskegon Boom. Co., 88 Mich. 633, 50 N. W. 729, 26 Am. St. Rep. 308.

71. Illinois Cent. R. Co. *v.* Behrens, 208 Ill. 20, 69 N. E. 796.

72. National E. & S. Co. *v.* Vogel, 115 Ill. App. 607; Springfield *v.* Purdey, 61 Ill. App. 114; Chicago & A. R. Co. *v.* Anderson, 67 Ill. App. 386; Washington & G. R. Co. *v.* Patterson, 9 App. Cas. (D. C.) 423; Prewitt *v.* Missouri, etc. R. Co., 134 Mo. 615, 36 S. W. 667; Coulter *v.* Great Northern R. Co., 5 N. D. 568, 67 N. W. 1046, 4 Am. & Eng. R. Cas. (N. S.) 336.

73. St. Louis, etc. R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798; Toledo, P. & W. R. Co. *v.* McClannon, 41 Ill. 238.

When Statute Requires Time To Be Specified. — When the statute requires the time of an act to be stated, it then becomes material and must be proved. East Tennessee, V. & G. R. Co. *v.* Carloss, 77 Ala. 443.

74. Toledo, P. & W. R. Co. *v.* McClannon, 41 Ill. 238; Texas & P. R. Co. *v.* Virginia, etc. Co. (Tex.),

(C.) Parties Defendant. — In actions for negligence in which there is an allegation of joint liability on the part of the defendants, the evidence need not show such joint liability,[75] as a recovery in all actions of tort may be had against those whom the evidence shows to be liable.[76]

2. Criminal Proceedings. — A. In General. — a. *Substantial Proof Required.* — It is a general rule that the offense as charged in the indictment must be substantially proved,[77] and a variance in this regard will be fatal to the prosecution.[78]

b. *Indictment Charging More Than One Offense.* — If an indictment alleges two offenses, and the evidence establishes but one of them, this constitutes no variance, as the defendant may be convicted of one of them and acquitted of the other;[79] or an offense

7 S. W. 341, 35 Am. & Eng. R. Cas. 201.

75. Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Keer *v.* Oliver, 61 N. J. L. 154, 38 Atl. 693; Allen *v.* Craig, 13 N. J. L. 294; Montfort *v.* Hughes, 3 E. D. Smith (N. Y.) 591; McMullin *v.* Church, 82 Va. 501; Richmond & D. R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

76. Murphy *v.* Wilson, 44 Mo. 313.

77. *United States.* — United States *v.* Howard, 3 Sumn. 12, 26 Fed. Cas. No. 15,403.

Alabama. — Fisher *v.* State, 46 Ala. 717; Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40.

Arkansas. — Watson *v.* State, 29 Ark. 299.

Illinois. — Davis *v.* People, 19 Ill. 74.

Kentucky. — Farris *v.* Com., 90 Ky. 637, 14 S. W. 681.

Louisiana. — State *v.* Hunter, 43 La. Ann. 157, 8 So. 624.

Maine. — Hinckley *v.* Inhab. of Penobscot, 42 Me. 89.

New Hampshire. — State *v.* Copp, 15 N. H. 212.

New York. — Cohen *v.* People, 5 Park. Crim. 330.

Oregon. — State *v.* Ryan, 15 Or. 572, 16 Pac. 417.

Pennsylvania. — Herman *v.* Com., 12 Serg. & R. 69.

South Carolina. — State *v.* Johnson, 45 S. C. 483, 23 S. E. 619.

Texas. — Miller *v.* State, 16 Tex. App. 417.

Vermont. — State *v.* Jones, 39 Vt. 370.

78. *Alabama.* — Elliott *v.* State, 26 Ala. 78; Hughes *v.* State, 12 Ala. 458.

California. — People *v.* Trim, 39 Cal. 75.

Kansas. — State *v.* Cassady, 12 Kan. 550.

Kentucky. — Kessler *v.* Com., 75 Ky. 18; Mulligan *v.* Com., 84 Ky. 229, 1 S. W. 417.

Massachusetts. — Com. *v.* Dean, 109 Mass. 349.

New Jersey. — State *v.* Wyckoff, 31 N. J. L. 65.

South Carolina. — State *v.* Rushing, 2 Nott & McC. 560.

Texas. — Dunham *v.* State, 9 Tex. App. 330.

Virginia. — Rhodes *v.* Com., 78 Va. 692; Thornton *v.* Com., 24 Gratt. 657.

79. *United States.* — United States *v.* Harding, 1 Wall. Jr. 127, 26 Fed. Cas. No. 15,301.

Alabama. — Robinson *v.* State, 84 Ala. 434, 4 So. 774; McClellan *v.* State, 53 Ala. 640; McElhaney *v.* State, 24 Ala. 71.

Indiana. — Durham *v.* State, 1 Blackf. 33.

Massachusetts. — Com. *v.* McLaughlin, 12 Cush. 612; Com. *v.* Brown, 12 Gray 135.

New York. — White *v.* People, 32 N. Y. 465.

Tennessee. — Cornell *v.* State, 66 Tenn. 520.

Where a count for robbery is joined with one for assault and battery, there may be a conviction for the lesser offense alone. Com. *v.* Stivers, 1 Pa. Co. Ct. 526.

may be charged in one degree, and the evidence establish an offense of the same character of a lower degree.[80]

c. *Fact Alleged as Unknown.* — When a fact relating to an offense,[81] or the name of the perpetrator thereof is alleged in the indictment to be unknown to the grand jury, such unknown fact or name must be proved to have been unknown, to avoid a variance.[82]

d. *Unnecessary Particularity Alleged.* — If an indictment or information use greater particularity than is necessary in describing an offense, such unnecessary statements must be proved as alleged,[83]

A person indicted for burglary, in breaking and entering, etc., with intent to steal, and then and there stealing, may be acquitted of the burglary and convicted on the same count for the simple larceny. See the following cases:

United States. — United States *v.* Read, 2 Cranch C. C. 198, 27 Fed. Cas. No. 16,126.

Alabama. — Borum *v.* State, 66 Ala. 468.

Delaware. — State *v.* Cocker, 3 Har. 554.

Georgia. — Polite *v.* State, 78 Ga. 347.

Kansas. — State *v.* Brandon, 7 Kan. 106.

Louisiana. — State *v.* Morgan, 39 La. Ann. 214, 1 So. 456.

Massachusetts. — Com. *v.* Lowery, 149 Mass. 67, 20 N. E. 697.

New York. — People *v.* Snyder, 2 Park. Crim. 23.

North Carolina. — State *v.* Grisham, 2 N. C. (1 Hayw.) 12.

Contra. — See State *v.* Robertson, 48 La. Ann. 1024, 20 So. 166.

80. Baker *v.* State, 4 Ark. 56; Com. *v.* Hall, 142 Mass. 454, 8 N. E. 324; People *v.* Lohman, 2 Barb. (N. Y.) 216.

81. *United States.* — United States *v.* Riley, 74 Fed. 210.

Alabama. — Cheek *v.* State, 38 Ala. 227; Duvall *v.* State, 63 Ala. 12.

Arkansas. — Reed *v.* State, 16 Ark. 499.

Colorado. — Sault *v.* People, 3 Colo. App. 502, 34 Pac. 263.

Indiana. — Blodget *v.* State, 3 Ind. 403; Moore *v.* State, 65 Ind. 213.

Kentucky. — Yost *v.* Com., 5 Ky. L. Rep. 935.

Minnesota. — State *v.* Taunt, 16 Minn. 109.

Missouri. — State *v.* Stowe, 132 Mo. 199, 33 S. W. 799.

Texas. — Swink *v.* State, 32 Tex. Crim. 530, 24 S. W. 893; Jorasco *v.* State, 6 Tex. App. 238; Presley *v.* State, 24 Tex. App. 494, 6 S. W. 463, 540.

82. *Alabama.* — Winter *v.* State, 90 Ala. 637, 8 So. 556.

Arkansas. — Reed *v.* State, 16 Ark. 499.

Indiana. — Moore *v.* State, 65 Ind. 213.

Kansas. — State *v.* Ready, 26 Pac. 58.

Massachusetts. — Com. *v.* Hendrie, 2 Gray 503; Com. *v.* Green, 122 Mass. 333; Com. *v.* Gallagher, 126 Mass. 54; Com. *v.* Noble, 165 Mass. 13, 42 N. E. 328.

Missouri. — Isbell *v.* State, 13 Mo. 86; Hays *v.* State, 13 Mo. 246; State *v.* Bryant, 14 Mo. 340; State *v.* Ladd, 15 Mo. 430.

New York. — People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122; People *v.* Noakes, 5 Park. Crim. 291; White *v.* People, 32 N. Y. 465.

Texas. — Williamson *v.* State, 13 Tex. App. 514; Sharp *v.* State, 29 Tex. App. 211, 15 S. W. 176; Swink *v.* State, 32 Tex. Crim. 530, 24 S. W. 893; Grant *v.* State (Tex. Crim.), 36 S. W. 264.

83. *United States.* — United States *v.* Keen, 1 McLean 429, 26 Fed. Cas. No. 15,510; United States *v.* Brown, 3 McLean 233, 24 Fed. Cas. No. 14,666.

Arkansas. — Blackwell *v.* State, 36 Ark. 178.

Indiana. — Wilkinson *v.* State, 10 Ind. 372.

Iowa. — State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444.

Kentucky. — Clark *v.* Com., 16 B. Mon. 206; Com. *v.* Magowan, 1 Met.

unless such statements may properly be treated as mere surplusage.[84]

e. *Proof of Part of Offense.* — Where a charge in an indictment may be divided into two or more offenses, it is not necessary to prove all to sustain a prosecution.[85] Illustrations are found in the notes.[86]

368, 71 Am. Dec. 480; Louisville & N. R. Co. *v.* Com., 13 Ky. L. Rep. 925.

Massachusetts. — Com. *v.* King, 9 Cush. 284.

Mississippi. — Dick *v.* State, 30 Miss. 631; Murphy *v.* State, 6 Cushm. 637.

New Hampshire. — State *v.* Bailey, 31 N. H. 521; State *v.* Langley, 34 N. H. 529.

New York. — People *v.* Slater, 5 Hill 401.

North Carolina. — State *v.* Ammons, 7 N. C. 123.

Ohio. — Pringle *v.* State, 7 West. L. J. 67, 1 Ohio Dec. 283.

Texas. — Massie *v.* State, 5 Tex. App. 81; Courtney *v.* State, 3 Tex. App. 257; Meuly *v.* State, 3 Tex. App. 382; McGee *v.* State, 4 Tex. App. 625; Lancaster *v.* State, 9 Tex. App. 393.

84. *Illinois.* — Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407.

Iowa. — State *v.* Ean, 90 Iowa 534, 58 N. W. 898.

New Hampshire. — State *v.* Copp, 15 N. H. 212; State *v.* Bailey, 31 N. H. 521.

Mississippi. — Dick *v.* State, 30 Miss. 631.

Tennessee. — State *v.* Brown, 27 Tenn. 89.

Texas. — Prior *v.* State, 4 Tex. 383; Wilson *v.* State, 5 Tex. 21; Sublett *v.* State, 9 Tex. 53.

Utah. — United States *v.* Kershaw, 5 Utah 618, 19 Pac. 194.

85. *United States.* — United States *v.* Hall, 3 Chi. Leg. News 260, 26 Fed. Cas. No. 15,282.

Alabama. — McElhaney *v.* State, 24 Ala. 71.

Georgia. — Lowe *v.* State, 57 Ga. 171.

Illinois. — Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Iowa. — State *v.* Myers, 10 Iowa 448; State *v.* Cooster, 10 Iowa 453; State *v.* Harris, 11 Iowa 414.

Kansas. — State *v.* Gluck, 49 Kan. 533, 31 Pac. 690; State *v.* Schweiter, 27 Kan. 499.

Maine. — State *v.* Burgess, 40 Me. 592.

Massachusetts. — Com. *v.* Brown, 14 Gray 419; Com. *v.* O'Connell, 12 Allen 451; Com. *v.* O'Brien, 107 Mass. 208; Com. *v.* Dolan, 121 Mass. 374.

Mississippi. — Swinney *v.* State, 8 Smed. & M. 576.

Missouri. — State *v.* Kelsoe, 76 Mo. 505.

New York. — Harris *v.* People, 64 N. Y. 148.

North Carolina. — State *v.* Locklear, 44 N. C. (Busb. L.) 205; State *v.* Martin, 82 N. C. 672.

South Carolina. — State *v.* Johnson, 3 Hill L. 1; State *v.* Evans, 23 S. C. 209.

Tennessee. — Haslip *v.* State, 4 Hayw. 273; Cornell *v.* State, 7 Baxt. 520.

Texas. — Alderson *v.* State, 2 Tex. App. 10.

Virginia. — Angel *v.* Com., 2 Va. Cas. 231.

86. Harboring and Concealing. On a charge of harboring and concealing slaves, proof of harboring alone will justify a conviction. McElhaney *v.* State, 24 Ala. 71.

On a Charge of Larceny. — Where an indictment charges the larceny of two hogs at the same time and place, but as the property of different persons, proof that the defendant stole one of the hogs is sufficient to authorize a conviction. Lowe *v.* State, 57 Ga. 171.

Act Done Maliciously and Wantonly. — An indictment under the Rev. Stat., c. 162, § 2 of the state of Maine, for "maliciously and wantonly" breaking down a dam, is supported by proof that the act was done either maliciously or wantonly. State *v.* Burgess, 40 Me. 592.

Assault. — A count in an indictment alleging an assault on two

f. *Joint Indictment.* — A joint indictment against two or more cannot be sustained unless the evidence shows the offense to be the result of a joint act,[87] or it be otherwise provided by statute.[88]

B. Place and Time of Offense. — a. *Place.* — The place of the commission of a crime is material; that is, the county;[89] and it must be proved as laid,[90] or the variance will be fatal.[91] But if the place

different persons at the same time is supported by proof of an assault on either of them. Com. *v.* O'Brien, 107 Mass. 208.

Burglary and Larceny. — In a prosecution for burglary and larceny, it is error to charge the jury that, if they convict the defendant of either, they must convict him of both, since the offenses are distinct. State *v.* Kelsoe, 76 Mo. 505.

Larceny of Different Kinds of Goods. — In State *v.* Martin, 82 N. C. 672, the court in its opinion said: "The first special instruction asked was that the articles charged to have been stolen were taken at different times, and therefore constituted different offenses and cannot be united into the same indictment; His Honor very properly refused this instruction, for it was a continuing transaction, and in such cases, though there may be several distinct asportations, the parties may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first and intermediate acts. State *v.* Trexler, 4 N. C. 188. And it is held 'if there be ten different species enumerated, and the prosecutor prove the larceny of any one or more of a sufficient value, it will be sufficient, although he fail in the proof of the rest.' Arch. Crim. Law 50."

87. *United States.* — United States *v.* McDonald, 8 Biss. 439, 26 Fed. Cas. No. 15,667.

Alabama. — Johnson *v.* State, 44 Ala. 414; McGhee *v.* State, 48 Ala. 360.

Illinois. — Baker *v.* People, 105 Ill. 452.

Iowa. — State *v.* McConkey, 20 Iowa 574.

New York. — People *v.* Green, 1 Wheel. Crim. Cas. 152; Chatterton *v.* People, 15 Abb. Pr. 147.

Ohio. — Stephens *v.* State, 14 Ohio 386.

88. State *v.* Rushing, 2 Nott & McC. (S. C.) 560. See State *v.* McClintock, 8 Iowa 203; Shouse *v.* Com., 5 Pa. St. 83; Ward *v.* State, 22 Ala. 16.

Where two or more persons are jointly indicted for the commission of one and the same act, to convict all, it must appear that the offense was one wholly arising from the joint act of all. Such an indictment is not sustained by proof merely that each of the defendants separately committed at different times a separate and distinct offense of the character charged, with which the other defendants were not connected, and in which they did not participate. United States *v.* McDonald, 8 Biss. 439, 26 Fed. Cas. No. 15,667.

Where two persons are tried together for an offense requiring their joint action or concurrence, such as an affray, an acquittal of one is an acquittal of both. Cruce *v.* State, 59 Ga. 83.

Where different persons are indicted together, in one and the same indictment, for an offense which may be committed by any one or more persons, one may be convicted and the others acquitted. Ward *v.* State, 22 Ala. 16.

89. Rice *v.* People, 38 Ill. 435; State *v.* Crogan, 8 Iowa 523; Searcy *v.* State, 4 Tex. 450; Vance *v.* State, 32 Tex. 396; Morgan *v.* Com., 90 Va. 80, 21 S. E. 826; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380.

90. Rice *v.* People, 38 Ill. 435; People *v.* Bevans, 52 Cal. 470; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; Ferkel *v.* People, 16 Ill. App. 310; Searcy *v.* State, 4 Tex. 450; Vance *v.* State, 32 Tex. 396.

91. Rice *v.* People, 38 Ill. 435; People *v.* Bevans, 52 Cal. 470; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380.

averred and the one proved be within the jurisdiction of the court, this is sufficient,[92] unless place is essentially descriptive of the offense.[93]

b. *Time.* — The allegation of the time when the offense charged was committed need not be proved as laid,[94] unless time be of the essence of the crime charged, when it must be then proved as alleged;[95] provided, too, that the evidence does not show a bar to the prosecution by reason of the statute of limitations.[96]

C. DESCRIPTION OF PERSONS. — a. *The Defendant.* — The allegation of words merely descriptive of the defendant need not be

92. People *v.* Bevans, 52 Cal. 470; Rice *v.* People, 38 Ill. 435; Searcy *v.* State, 4 Tex. 450; Vance *v.* State, 32 Tex. 396; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; Carlisle *v.* State, 32 Ind. 55; Com. *v.* Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333.

93. State *v.* Crogan, 8 Iowa 523; Morgan *v.* Com., 90 Va. 80, 21 S. E. 826; People *v.* Slater, 5 Hill (N. Y.) 401; State *v.* Verden, 24 Iowa 126; State *v.* Colclough, 31 S. C. 156, 9 S. E. 811; City of Philadelphia *v.* Mintzer, 2 Phila. 43, 13 Leg. Int. 21.

94. *United States.* — United States *v.* Blaisdell, 3 Ben. 132, 24 Fed. Cas. No. 14,608; Dixon *v.* Washington, 4 Cranch C. C. 114, 7 Fed. Cas. No. 3,935; United States *v.* Graff, 14 Blatchf. 381, 26 Fed. Cas. No. 15,244; Johnson *v.* United States, 3 McLean 89, 13 Fed. Cas. No. 7,418.

Alabama. — McDade *v.* State, 20 Ala. 81 (time laid under videlicet).

Arkansas. — Medlock *v.* State, 18 Ark. 363; Scoggins *v.* State, 32 Ark. 205; Cohen *v.* State, 32 Ark. 226.

Connecticut. — State *v.* Munson, 40 Conn. 475.

Florida. — Chandler *v.* State, 25 Fla. 728, 6 So. 768.

Georgia. — Dacy *v.* State, 17 Ga. 439; Wingard *v.* State, 13 Ga. 396; McBryde *v.* State, 34 Ga. 202; Clarke *v.* State, 90 Ga. 448, 16 S. E. 96; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410; Fisher *v.* State, 73 Ga. 595.

Indiana. — Hubbard *v.* State, 7 Ind. 160.

Iowa. — State *v.* Bell, 49 Iowa 440; State *v.* Fry, 67 Iowa 475, 25 N. W. 738.

Kentucky. — Com. *v.* Alfred, 4 Dana 496.

Louisiana. — State *v.* Agudo, 5 La. Ann. 185; State *v.* Walters, 16 La. Ann. 400; State *v.* Polite, 33 La. Ann. 1016.

Maine. — State *v.* Baker, 34 Me. 52.

Massachusetts. — Com. *v.* Braynard, Thacher Crim. Cas. 146; Com. *v.* Dacey, 107 Mass. 206; Com. *v.* Irwin, 107 Mass. 401.

Michigan. — Turner *v.* People, 33 Mich. 363.

Minnesota. — State *v.* New, 22 Minn. 76.

Mississippi. — Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351; Oliver *v.* State, 5 How. 14; McCarty *v.* State, 37 Miss. 411.

Missouri. — State *v.* Hughes, 82 Mo. 86.

New York. — People *v.* Emerson, 53 Hun 437, 6 N. Y. Supp. 274, 7 N. Y. Crim. 97.

North Carolina. — State *v.* Newsom, 47 N. C. (2 Jones' L.) 173.

South Carolina. — State *v.* Howard, 32 S. C. 91, 10 S. E. 831.

Texas. — Crass *v.* State, 30 Tex. App. 480, 17 S. W. 1096; Herchenbach *v.* State, 34 Tex. Crim. 122, 29 S. W. 470; Lucas *v.* State, 27 Tex. App. 322, 11 S. W. 443.

Utah. — People *v.* Wright, 11 Utah 41, 39 Pac. 477.

95. Greene *v.* State, 79 Ind. 537; Lehritter *v.* State, 42 Ind. 383; Com. *v.* Maloney, 112 Mass. 283; State *v.* Wilson, 39 Mo. App. 184; State *v.* Ray, 92 N. C. 810; Fisher *v.* State, 33 Tex. 792; State *v.* Howard, 32 S. C. 91, 10 S. E. 831.

96. *United States.* — Dixon *v.* Washington, 4 Cranch C. C. 114, 7 Fed. Cas. No. 3,935.

proved.[97] But the name of the defendant must be substantially proved as alleged.[98]

b. *Person Other Than Accused.* — Allegations descriptive of the person upon whom the offense was committed must be substantially proved as laid in the indictment.[99]

D. Description and Ownership of Property. — a. *In General.* Allegations essentially descriptive of the property to which the offense relates must be proved as laid,[1] and a failure to do so will be fatal to the prosecution.[2]

b. *Ownership.* — Allegations in an indictment descriptive of the ownership[3] and character of the property must be proved as charged.[4]

Alabama. — McDade *v.* State, 20 Ala. 81.

Arkansas. — Scoggins *v.* State, 32 Ark. 205; Cohen *v.* State, 32 Ark. 226.

Connecticut. — State *v.* Munson, 40 Conn. 475.

Florida. — Chandler *v.* State, 25 Fla. 728, 6 So. 768.

Georgia. — Wingard *v.* State, 13 Ga. 396; McBryde *v.* State, 34 Ga. 202; Clarke *v.* State, 90 Ga. 448, 16 S. E. 96; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Iowa. — State *v.* Bell, 49 Iowa 440.

Missouri. — State *v.* Hughes, 82 Mo. 86.

North Carolina. — State *v.* Newsom, 47 N. C. (2 Jones' L.) 173.

97. Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407; Com. *v.* Lewis, 1 Met. (Mass.) 151.

98. Johnson *v.* State, 2 Cushm. (Miss.) 569; Gerrish *v.* State, 53 Ala. 476; English *v.* State, 30 Tex. App. 470, 18 S. W. 94.

99. Com. *v.* Stone, 152 Mass. 498, 25 N. E. 967; State *v.* Sherburne, 59 N. H. 99; Davis *v.* People, 19 Ill. 74; Aaron *v.* State, 37 Ala. 106; People *v.* Hughes, 41 Cal. 234; Moynahan *v.* People, 3 Colo. 367.

Illustrations. — An indictment charging an assault and battery on Grimanda C. Saddler is not sustained by proof of an assault and battery on Grimalda C. Saddler. The names are not of the same sound. Hayney *v.* State, 5 Ark. 72, 39 Am. Dec. 363.

Where an indictment charges the forgery of an instrument purporting to be the act of M. R. L., and sets out the instrument, which is signed R. M. L., the variance is fatal, although it was unnecessary to set out the instrument under a statute so providing in cases of forgery. English *v.* State (Tex. App.), 18 S. W. 94.

The rule that a middle name is not recognized in law does not apply to the first initial of a name, and a variance therein is fatal to an indictment. English *v.* State (Tex. App.), 18 S. W. 94.

1. *Indiana.* — Morgan *v.* State, 61 Ind. 447; Parsons *v.* State, 2 Ind. 499; Lewis *v.* State, 113 Ind. 59, 14 N. E. 892.

Maine. — State *v.* Weeks, 30 Me. 182; State *v.* Jackson, 30 Me. 29.

Missouri. — State *v.* Smith, 31 Mo. 120.

Tennessee. — Turner *v.* State, 3 Heisk. 452.

Texas. — Rose *v.* State, 1 Tex. App. 400; Collier *v.* State, 4 Tex. App. 12.

2. See cases cited under last footnote.

3. People *v.* Reed, 70 Cal. 529, 11 Pac. 676; Johnson *v.* State, 111 Ala. 66, 20 So. 590.

Proof of Possession Sufficient. Com. *v.* Blanchette, 157 Mass. 486, 32 N. E. 658.

4. *Alabama.* — Carr *v.* State, 104 Ala. 43, 16 So. 155.

Indiana. — Taylor *v.* State, 130 Ind. 66, 29 N. E. 415.

Massachusetts. — Com. *v.* Howe, 132 Mass. 250.

New York. — People *v.* Jones, 5 Lans. 340.

Pennsylvania. — Com. *v.* McManiman, 15 Pa. Co. Ct. 495.

Texas. — Mathews *v.* State, 10

E. Knowledge and Intent. — When knowledge or intent is essential to the offense alleged, failure to prove such fact will constitute a variance;[5] it is otherwise when such fact is not an element of the crime.[6]

F. Principals and Accessories. — a. *Principals in First and Second Degree.* — If the allegation is of a principal in the first degree, evidence of acts showing the crime to be that of a principal in the second degree will not constitute a variance,[7] where the punishment is not different in the two cases.[8]

b. *Principal and Accessory.* — If the allegation is of the act of a principal in the commission of the offense, evidence that it was that of an accessory before the fact will constitute a variance.[9] And the same doctrine applies with reference to an accessory after the fact.[10]

Tex. App. 279; Harris *v.* State, (Tex. Crim.), 30 S. W. 221.

Virginia. — Com. *v.* Butcher, 4 Gratt. 544.

Wisconsin. — State *v.* Kube, 20 Wis. 217, 91 Am. Dec. 390.

5. McGuire *v.* State, 50 Ind. 284; Pence *v.* State, 110 Ind. 95, 10 N. E. 919; *In re* Veazie, 7 Me. 131; Morman *v.* State, 24 Miss. 54.

6. *Connecticut.* — Barnes *v.* State, 19 Conn. 398.

Illinois. — McCutcheon *v.* People, 69 Ill. 601; Farmer *v.* People, 77 Ill. 322.

Massachusetts. — Com. *v.* Mash, 7 Metc. 472; Com. *v.* Elwell, 2 Metc. 190; Com. *v.* Farren, 9 Allen 489; Com. *v.* Smith, 103 Mass. 444.

North Carolina. — State *v.* Hause, 71 N. C. 518.

Rhode Island. — State *v.* Smith, 10 R. I. 258.

West Virginia. — State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315; State *v.* Cain, 9 W. Va. 559, 572.

Wisconsin. — State *v.* Hartfiel, 24 Wis. 60.

See in this connection the note appended to Farrell *v.* State, 30 Am. Rep. 617-620.

7. *Alabama.* — Brister *v.* State, 26 Ala. 107.

Delaware. — State *v.* O'Neal, 1 Houst. Crim. Cas. 58.

Georgia. — Hill *v.* State, 28 Ga. 604.

Indiana. — Williams *v.* State, 47 Ind. 568.

Kentucky. — Young *v.* Com., 8 Bush. 366; Travis *v.* Com., 96 Ky. 77, 27 S. W. 863.

Michigan. — People *v.* Wright, 90 Mich. 362, 51 N. W. 517.

North Carolina. — State *v.* Cockman, 60 N. C. (1 Winst.) 484.

Oregon. — State *v.* Kirk, 10 Or. 505.

Rhode Island. — State *v.* Sprague, 4 R. I. 257.

Contra. — See Mulligan *v.* Com., 84 Ky. 229, 1 S. W. 417.

Vice Versa. — Brister *v.* State, 26 Ala. 107; State *v.* O'Neal, 1 Houst. Crim. Cas. (Del.) 58; Benge *v.* Com., 92 Ky. 1, 17 S. W. 146. *Contra,* see Kessler *v.* Com., 12 Bush. (Ky.) 18.

8. Albritton *v.* State, 32 Fla. 358, 13 So. 955; Leonard *v.* State, 77 Ga. 764; Collins *v.* State, 88 Ga. 347, 14 S. E. 474; Hanoff *v.* State, 37 Ohio St. 178, 41 Am. Rep. 496.

9. Williams *v.* State, 41 Ark. 173; Hughes *v.* State, 12 Ala. 458; People *v.* Trim, 39 Cal. 75; People *v.* Katz, 23 How. Pr. (N. Y.) 93; Thornton *v.* Com., 24 Gratt. (Va.) 657. *Contra,* under states: State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; People *v.* Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701; State *v.* Beebe, 17 Minn. 241; State *v.* Cassady, 12 Kan. 550; Dempsey *v.* People, 47 Ill. 323; Bonsall *v.* United States, 1 G. Gr. (Iowa) 111; Coates *v.* People, 72 Ill. 303.

10. *California.* — People *v.* Gassaway, 28 Cal. 404; People *v.* Keefer, 65 Cal. 232, 3 Pac. 818.

Georgia. — McCoy *v.* State, 52 Ga. 287; Tarpe *v.* State, 95 Ga. 457, 20 S. E. 217.

G. Specific Crimes. — a. *Abortion.* — In a prosecution for abortion, the means employed to effect it need not be proved as alleged.[11]

b. *Adulteration of Food.* — Upon a charge of violating the "pure food" law, the allegation descriptive of the character of the article adulterated must be substantially proved as laid;[12] but all the allegations relating to the adulteration need not be established to sustain the charge.[13]

c. *Adultery.* — An allegation in an indictment charging a married man with committing adultery with an unmarried woman is not sustained by evidence showing the woman to be married.[14] So an allegation charging adultery by parties without living together, is not sustained by evidence of the commission of the offense by living together.[15]

d. *Offenses Relating to Animals.* — In charging a statutory offense of altering a brand on a domestic animal, the specific mode of alteration as alleged must be proved.[16] If the wilful destruction of an animal is charged, the ownership as averred must be proved.[17]

e. *Arson.* — In an indictment charging arson, allegations descriptive of the property burned,[18] and the ownership thereof, must be proved as laid.[19] Under a common-law indictment for arson, an allegation charging the offense is not sustained by the burning of another's house at his request to enable him to obtain the insurance.[20]

f. *Assault and Battery.* — In many jurisdictions, a specific allegation of the means or instrument by which the assault and battery

Illinois. — Reynolds *v.* People, 83 Ill. 479, 25 Am. Rep. 410.

Indiana. — Wade *v.* State, 71 Ind. 535.

Louisiana. — State *v.* Allen, 37 La. Ann. 685.

Washington. — State *v.* Jones, 3 Wash. 175, 28 Pac. 254.

11. Dougherty *v.* People, 1 Colo. 514; Scott *v.* People, 141 Ill. 195, 30 N. E. 329; State *v.* Smith, 32 Me. 369; Com. *v.* Brown, 14 Gray (Mass.) 419; Com. *v.* Snow, 116 Mass. 47.

12. Com. *v.* Luscomb, 130 Mass. 42; People *v.* Fulle, 12 Abb. N. C. (N. Y.) 196.

13. Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217.

14. Williams *v.* State, 86 Ga. 548, 12 S. E. 743.

15. Mitten *v.* State, 24 Tex. App. 346, 6 S. W. 196.

16. Davis *v.* State, 13 Tex. App. 215.

17. Collier *v.* State, 4 Tex. App. 12; Darnell *v.* State, 6 Tex. App. 482; McLaurine *v.* State, 28 Tex. App. 530, 13 S. W. 992; Rose *v.* State, 1 Tex. App. 400.

18. Com. *v.* Hayden, 150 Mass. 332, 23 N. E. 51; Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677; State *v.* Downs, 59 N. H. 320; People *v.* Slater, 5 Hill. (N. Y.) 401; State *v.* Lauglin, 53 N. C. (8 Jones' L.) 354; State *v.* Roper, 88 N. C. 656.

19. *Alabama.* — Boles *v.* State, 46 Ala. 204; Martha *v.* State, 26 Ala. 72.

Connecticut. — State *v.* Lyon, 12 Conn. 487.

Delaware. — State *v.* Bradley, 1 Houst. Crim. Cas. 164.

Massachusetts. — Com. *v.* Wade, 17 Pick. 395.

Mississippi. — Morris *v.* State, 8 So. 295.

New Jersey. — State *v.* Fish, 27 N. J. L. 323.

New York. — People *v.* Gates, 15 Wend. 159; McGary *v.* People, 45 N. Y. 153.

Wisconsin. — Carter *v.* State, 20 Wis. 647.

20. Heard *v.* State, 81 Ala. 55, 1 So. 640; Com. *v.* Makely, 131 Mass. 421.

was committed must be proved as alleged,[21] while in others such proof is not necessary.[22] But the name of the person upon whom the offense was committed must be substantially proved as alleged in all jurisdictions.[23]

g. Burglary. — In an indictment for burglary, the breaking and entering,[24] that it was done in the night-time,[25] the property described,[26] the intent with which the act was done,[27] and the owner-

21. *Alabama.* — Johnson *v.* State, 35 Ala. 363; Walker *v.* State, 73 Ala. 17.

Iowa. — State *v.* McClintock, 1 G. Greene 392.

Louisiana. — State *v.* Braxton, 47 La. Ann. 158, 16 So. 745.

Texas. — Ferguson *v.* State, 4 Tex. App. 156; Parsons *v.* State, 9 Tex. App. 204; Hilliard *v.* State, 17 Tex. App. 210; McGrew *v.* State, 19 Tex. App. 302; Herald *v.* State, 37 Tex. Crim. 409, 35 S. W. 670; Jones *v.* State (Tex. Crim.), 62 S. W. 758.

West Virginia. — State *v.* Meadows, 18 W. Va. 658.

22. Ryan *v.* State, 52 Ind. 167; Com. *v.* Burke, 14 Gray (Mass.) 100; Com. *v.* White, 110 Mass. 407; State *v.* Bean, 36 N. H. 122; State *v.* Phillips, 104 N. C. 786, 10 S. E. 463.

23. *California.* — People *v.* Christian, 101 Cal. 471, 35 Pac. 1043.

Florida. — Jacobs *v.* State, 46 Fla. 157, 35 So. 65.

Indiana. — Swails *v.* State, 7 Blackf. 324; McLaughlin *v.* State, 52 Ind. 476.

Missouri. — State *v.* Moore, 178 Mo. 348, 77 S. W. 522.

Texas. — Gorman *v.* State, 42 Tex. 221; Burgamy *v.* State, 4 Tex. App. 572; Parsons *v.* State, 9 Tex. App. 204; Osborne *v.* State, 14 Tex. App. 225; Brown *v.* State, 16 Tex. App. 197.

West Virginia. — State *v.* Meadows, 18 W. Va. 658.

24. Daniels *v.* State, 78 Ga. 98; State *v.* Huntley, 25 Or. 349, 35 Pac. 1065; State *v.* Brower, 127 Iowa 687, 104 N. W. 284; State *v.* Peebles, 178 Mo. 475, 77 S. W. 518.

25. People *v.* Smith, 136 Cal. 207, 68 Pac. 702; Jones *v.* State, 63 Ga. 141; Bromley *v.* People, 150 Ill. 297, 37 N. E. 209; State *v.* Johnson, 35 La. Ann. 842; Com. *v.* Glover, 111 Mass. 395; Hollister *v.* Com., 60 Pa. St. 103.

26. *Alabama.* — Wait *v.* State, 99 Ala. 164, 13 So. 584.

Arkansas. — Green *v.* State, 56 Ark. 386, 19 S. W. 1055.

California. — People *v.* Scott, 74 Cal. 94, 15 Pac. 384; People *v.* Geiger, 116 Cal. 440, 48 Pac. 389.

Colorado. — Greenwood *v.* People, 35 Colo. 67, 83 Pac. 646.

Florida. — Givens *v.* State, 40 Fla. 200, 23 So. 850.

Iowa. — State *v.* Porter, 97 Iowa 450, 66 N. W. 745.

Massachusetts. — Com. *v.* Reynolds, 122 Mass. 454.

Michigan. — Moore *v.* People, 47 Mich. 639, 11 N. W. 415.

New Hampshire. — State *v.* Kelley, 66 N. H. 577, 29 Atl. 843.

Ohio. — Thalls *v.* State, 21 Ohio St. 233.

Tennessee. — Fletcher *v.* State, 10 Lea 338.

Material Variance. — An indictment which charges the defendant with breaking and entering a "building, to wit, a storehouse, the property of one Mrs. Pons," is not sustained by proof that defendant broke and entered Mrs. Pons' ginhouse, a building separate and distinct from her storehouse. Givens *v.* State, 40 Fla. 200, 23 So. 850.

Immaterial Variance. — There is no variance where the indictment describes the place of the burglary as a "storehouse" and the evidence shows that it was a "warehouse," the two terms being synonymous. State *v.* Sprague, 149 Mo. 425, 50 S. W. 1117.

27. Com. *v.* Moore, 130 Mass. 45; State *v.* Carroll, 13 Mont. 246, 33 Pac. 688; Allen *v.* State, 18 Tex. App. 120; Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 824; State *v.* Fisher, 1 Penne. (Del.) 303, 41 Atl. 208.

Where the allegation is of intent to commit larceny, proof of intent to commit robbery is sufficient. People

ship of the property burglarized must all be proved as alleged.[28]

h. *Conspiracy.* — In an indictment for conspiracy it is not necessary to prove as alleged the precise time that it was formed,[29] or all the means described in the use of which it was carried out,[30] but the object of the conspiracy as alleged must be substantially proved,[31] as well as the other essentials of the crime.[32]

v. Crowley, 100 Cal. 478, 35 Pac. 84; State *v.* Cody, 60 N. C. 197; State *v.* Halford, 104 N. C. 874, 10 S. E. 524.

28. *California.* — People *v.* Webber, 138 Cal. 145, 70 Pac. 1089.

Georgia. — Berry *v.* State, 92 Ga. 47, 17 S. E. 1006.

Mississippi. — James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527.

Rhode Island. — State *v.* McCarthy, 17 R. I. 370, 22 Atl. 282.

Texas. — Daggett *v.* State, 39 Tex. Crim. 5, 44 S. W. 148, 842; Williams *v.* State, 49 Tex. Crim. 105, 90 S. W. 876.

West Virginia. — State *v.* Hill, 48 W. Va. 132, 35 S. E. 831.

Wisconsin. — Jackson *v.* State, 55 Wis. 589, 13 N. W. 448.

29. United States *v.* Goldberg, 7 Biss. 175, 25 Fed. Cas. No. 15,223; United States *v.* Hutchins, 1 Cin. L. Bul. 371, 26 Fed. Cas. No. 15,430; Com. *v.* Kellogg, 7 Cush. (Mass.) 473.

In United States *v.* Goldberg, 7 Biss. 175, 25 Fed. Cas. No. 15,223, the court said in the course of its opinion: "It is not essential that the alleged conspiracy be shown to have been formed at the precise time or times stated in the several counts of this indictment. It is sufficient, so far as time is concerned, if it be shown that at about the time or times charged, there was a conspiracy between any two or more of the persons who are alleged to have conspired together to wilfully take and carry away, with intent to steal or destroy, any of the papers, documents or records mentioned in the indictment."

30. United States *v.* Smith, 2 Bond 323, 27 Fed. Cas. No. 16,322; United States *v.* Johnson, 26 Fed. 682; United States *v.* Cassidy, 67 Fed. 698; Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

Illustrations. — "Where an indictment charges conspiracy to obtain goods by various false pretenses, proof that there was a conspiracy to obtain them by any of the pretenses set out does not constitute a variance." Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

"Where the indictment charges a conspiracy to obtain goods by false pretenses, proof of any conspiracy to obtain goods and labor is no variance." Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

31. *United States.* — United States *v.* Gardner, 42 Fed. 829.

Iowa. — State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370.

Massachusetts. — Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997; Com. *v.* Harley, 7 Met. 506.

New Hampshire. — State *v.* Hadley, 54 N. H. 224.

New York. — *In re* Manetti, 3 City Hall Rec. 60.

North Carolina. — State *v.* Trammell, 24 N. C. (2 Ired. L.) 379.

Ohio. — Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

32. United States *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; State *v.* Straw, 42 N. H. 393; People *v.* Petheram, 64 Mich. 252, 31 N. W. 188.

Part of Defendants Guilty. Where an indictment charges a number of defendants with conspiracy to defraud the government out of certain public lands, alleged to have been illegally entered for the benefit of the defendants, it is not a fatal variance that the proof shows that some of them only shared in the benefit; the offense being complete if the conspiracy is established and an overt act committed in pursuance thereof. Olson *v.* United State, 133 Fed. 840, 67 C. C. A. 21. See also Looney *v.* People, 81 Ill. App. 370.

Date of Document as Element of Offense. — Where an indictment alleges a conspiracy to wreck a building and loan association, describing a report of the secretary as sworn

i. *Counterfeiting.* — In an indictment for counterfeiting, the description of the subject-matter,[33] and of the persons defrauded, must be proved as alleged.[34] To avoid a fatal variance the acts constituting the offense must be substantially proved as alleged;[35]

to January 12th, the charge is not sustained by evidence of a report sworn to January 13th. Towne *v.* People, 89 Ill. App. 258.

Description of Property. — Under an indictment charging a conspiracy by false pretenses to obtain property of a corporation, proof of a conspiracy by false pretenses to obtain a draft, bill of exchange, or check belonging to such corporation is sufficient. Regent *v.* People, 96 Ill. App. 189.

Object of Conspiracy. — Where one is indicted for a conspiracy to cheat by false pretenses, he can not be convicted of a conspiracy to commit larceny. State *v.* Loser, 132 Iowa 419, 104 N. W. 337.

33. *United States.* — United States *v.* Moses, 4 Wash. C. C. 726, 27 Fed. Cas. No. 15,825; United States *v.* Hall, 4 Cranch C. C. 229, 26 Fed. Cas. No. 15,283; United States *v.* Burns, 5 McLean 23, 24 Fed. Cas. No. 14,691; United States *v.* Mason, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736; United States *v.* Bennett, 17 Blatchf. 357, 24 Fed. Cas. No. 14,572; United States *v.* Albert, 45 Fed. 552; United States *v.* Marcus, 53 Fed. 784.

Arkansas. — Mathena *v.* State, 20 Ark. 70.

Georgia. — State *v.* Calvin, Charlt. 151; Rouse *v.* State, 4 Ga. 136.

Illinois. — Quigley *v.* People, 3 Ill. 301.

Indiana. — People *v.* State, 6 Blackf. 95.

Iowa. — State *v.* Pepper, 11 Iowa 347.

Kentucky. — Clark *v.* Com., 16 B. Mon. 206.

Massachusetts. — Brown *v.* Com., 8 Mass. 59; Com. *v.* Whitmarsh, 4 Pick. 233; Com. *v.* Stearns, 10 Met. 256; Com. *v.* Woods, 10 Gray 477; Com. *v.* Dole, 2 Allen 165; Com. *v.* Hall, 97 Mass. 570.

New Hampshire. — State *v.* Hayden, 15 N. H. 355.

New York. — *In re* Dorsett, 5 City Hall Rec. 77; *In re* Jones, 6 City Hall Rec. 178.

Ohio. — Ohio *v.* Ankrim, Tapp. 112; Ohio *v.* Kinny, Tapp. 169; Smith *v.* State, 8 Ohio 294; Leisure *v.* State, 1 Ohio Dec. 59; Griffin *v.* State, 14 Ohio St. 55.

South Carolina. — State *v.* Waters, 3 Brev. 507.

Vermont. — State *v.* Wheeler, 35 Vt. 261.

34. *Arkansas.* — Gabe *v.* State, 6 Ark. 519.

Georgia. — Rouse *v.* State, 4 Ga 136.

Iowa. — State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444.

Massachusetts. — Com. *v.* Woodbury, Thatcher Crim. Cas. 47; Com. *v.* Hall, 97 Mass. 570; Com. *v.* Starr, 4 Allen 301.

New York. — People *v.* Peabody, 25 Wend. 472.

Ohio. — Hutchins *v.* State, 13 Ohio 198.

Rhode Island. — State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

Tennessee. — Jones *v.* State, 5 Sneed 346.

35. United States *v.* Biebusch, 1 Fed. 213; Com. *v.* Griffin, 21 Pick. (Mass.) 523; People *v.* Stewart, 5 Mich. 243; Snow *v.* State, 1 Ohio Dec. 426; State *v.* Morton, 8 Wis. 352.

Illustrations. — In Com. *v.* Griffin, 21 Pick. (Mass.) 523, Shaw C. J., in delivering the opinion of the court, refusing to uphold the contention of the defendant that inasmuch as the indictment charged his guilty possession of one hundred pieces of counterfeit coin, the averment must be proved as laid, said: "The general rule is, that every material averment must be proved, yet it by no means follows, that it is necessary to prove the offense charged, to the whole extent laid. It is quite sufficient to prove so much of the charge as constitutes an offense punishable by law. 'It is invariable (says Lord Ellenborough in Rex *v.* Hunt, 2 Campb. 585) to prove so

but the specific intent charged need not necessarily be proved.[36]

j. *Embezzlement.* — As embezzlement is a statutory offense[37] and the elements constituting it must be set out in the indictment,[38] all these essential elements must be proved as alleged.[39] Thus, the character of the trust,[40] the kind of property embezzled,[41] and the

much of the indictment as shows that the defendant has committed a substantive crime therein specified. The substance of the crime in the case before us, is the possession of counterfeit coin, with the guilty knowledge and intent indicated, and this is a substantiate offence, whether the number of pieces be over or under ten."

36. Com. *v.* Stone, 4 Met. (Mass.) 43; Com. *v.* Price, 76 Mass. 472, 71 Am. Dec. 668; Com. *v.* Starr, 86 Mass. 301; Sasser *v.* State, 13 Ohio 453.

37. State *v.* Wolff, 34 La. Ann. 1153; Leonard *v.* State, 7 Tex. App. 417; State *v.* Kusnick, 45 Ohio St. 535, 4 Am. St. Rep. 564; Com. *v.* Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662; People *v.* Gallagher, 100 Cal. 466, 35 Pac. 80.

38. *California.* — City of San Francisco *v.* Randall, 54 Cal. 408.

Georgia. — Hoyt *v.* State, 50 Ga. 313.

Illinois. — Lycan *v.* People, 107 Ill. 423.

Indiana. — State *v.* Sarlis, 135 Ind. 195, 34 N. E. 1129.

Iowa. — State *v.* Jamison, 74 Iowa 602, 38 N. W. 508.

Maine. — State *v.* Walton, 62 Me. 106.

Minnesota. — State *v.* New, 22 Minn. 76.

North Carolina. — State *v.* Wilson, 101 N. C. 730, 7 S. E. 872.

Pennsylvania. — Com. *v.* Hottenstein, 2 Woodw. Dec. 477.

Texas. — Gibbs *v.* State, 41 Tex. 491.

39. *Alabama.* — Washington *v.* State, 72 Ala. 272.

Georgia. — Watson *v.* State, 64 Ga. 61; McCrary *v.* State, 81 Ga. 334, 6 S. E. 588.

Illinois. — Goodhue *v.* People, 94 Ill. 37; Ker *v.* People, 110 Ill. 627.

Maine. — State *v.* Hinckley, 38 Me. 21.

Massachusetts. — Com. *v.* O'Keefe, 121 Mass. 59; Com. *v.* Logue, 160 Mass. 551, 36 N. E. 475; Com. *v.* Wyman, 8 Met. 247; Com. *v* Shepard, 1 Allen 575.

Missouri. — State *v.* Dodson, 72 Mo. 283; State *v.* Hays, 78 Mo. 600; State *v.* Heath, 8 Mo. App. 99.

Ohio. — Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121.

Oregon. — State *v.* Morgan, 28 Or. 578, 42 Pac. 128.

Texas. — Block *v.* State, 44 Tex. 620.

Vermont. — State *v.* Hopkins, 56 Vt. 250.

40. *Georgia.* — Carter *v* State, 53 Ga. 326; Crofton *v.* State, 79 Ga. 584, 4 S. E. 333; Rucker *v.* State, 95 Ga. 465, 20 S. E. 269.

Iowa. — State *v.* Foley, 81 Iowa 36, 46 N. W. 746; State *v.* King, 81 Iowa 587, 47 N. W. 775.

Massachusetts. — Com. *v.* Wyman, 8 Met. 247; Com. *v.* Shepard, 1 Allen 575; Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65.

New York. — *In re* Milligan's Case, 6 City Hall Rec. 69.

Pennsylvania. — Com. *v.* Gerdeman, 32 Leg. Int. 180; Com. *v.* Hill, 4 Luz. Leg. Obs. 52.

Texas. — Smith *v.* State, 34 Tex. Crim. 265, 30 S. W. 236.

Wyoming. — Edelhoff *v.* State, 5 Wyo. 19, 36 Pac. 627.

41. *Alabama.* — Gady *v.* State, 83 Ala. 51, 3 So. 429.

Arkansas. — Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

Georgia. — Watson *v.* State, 64 Ga. 61.

Illinois. — Goodhue *v.* People, 94 Ill. 37.

Massachusetts. — Com. *v.* Merrifield, 4 Met. 468.

Missouri. — State *v.* Dodson, 72 Mo. 283.

New York. — People *v.* Hearne, 66 Hun 626, 20 N. Y. Supp. 806.

Texas. — Riley *v.* State, 32 Tex. 763; Block *v.* State, 44 Tex. 620.

ownership of such property, must be substantially proved as alleged.[42] But as a general rule the amount of the property embezzled,[43] except as it bears on the grade of the offense,[44] or time of the crime, need not be proved as alleged.[45] But under peculiar

Vermont. — State *v.* Hopkins, 56 Vt. 250.

42. *Alabama.* — Washington *v.* State, 72 Ala. 272; Gady *v.* State; 83 Ala. 51, 3 So. 429.

Arkansas. — Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

Georgia. — McCrary *v.* State, 81 Ga. 334, 6 S. E. 588; Rucker *v.* State, 95 Ga. 465, 20 S. E. 269; Carter *v.* State, 53 Ga. 326.

Illinois. — Ker *v.* People, 110 Ill. 627.

Maine. — State *v.* Hinckley, 38 Me. 21.

Massachusetts. — Com. *v.* O'Keefe, 121 Mass. 59; Com. *v.* Logue, 160 Mass. 551, 36 N. E. 475.

Minnesota. — State *v.* Brame, 61 Minn. 101, 63 N. W. 250.

Missouri. — State *v.* Heath, 8 Mo. App. 99; State *v.* Hays, 78 Mo. 600.

Ohio. — Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121.

Oregon. — State *v.* Morgan, 28 Or. 578, 42 Pac. 128.

Texas. — Riley *v.* State, 32 Tex. 763; Leonard *v.* State, 7 Tex. App. 417; Block *v.* State, 44 Tex. 620.

Illustrations. — By a certain act of the legislature of Georgia, that portion of the state school fund intended for the maintenance of the Rome public schools ceased to become payable to the county school commissioner of Floyd county, and therefore an indictment alleging that such officer had embezzled a certain sum of money averred to be the property of Floyd county is not sustained by evidence that it belonged to the public school fund of Rome, though if the funds came into his hands before the enactment of said act the ownership was well laid. Bridges *v.* State, 103 Ga. 21, 29 S. E. 859.

A conviction for embezzlement will not be upheld where the indictment charges the moneys converted as belonging to a wife, and the evidence shows that it is the joint property of husband and wife. Rauguth *v.* People, 186 Ill. 93, 57 N. E. 832.

43. *United States.* — United States *v.* Harper, 33 Fed. 471.

Alabama. — Britton *v.* State, 77 Ala. 202; Gady *v.* State, 83 Ala. 51, 3 So. 429; Walker *v.* State, 117 Ala. 42, 23 So. 149.

California. — People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Georgia. — Jackson *v.* State, 76 Ga. 551.

Illinois. — Weimer *v.* People, 186 Ill. 503, 58 N. E. 378.

Louisiana. — State *v.* Fourchy, 51 La. Ann. 228, 25 So. 109.

Massachusetts. — Com. *v.* Hussey, 111 Mass. 432.

Missouri. — State *v.* Pratt, 98 Mo. 482, 11 S. W. 977.

Nebraska. — Bolln *v.* State, 51 Neb. 581, 71 N. W. 444.

New York. — People *v.* Howe, 2 Thomp. & C. 383.

Rhode Island. — State *v.* Hunt, 25 R. I. 75, 54 Atl. 937.

Washington. — State *v.* Lewis, 31 Wash. 75, 71 Pac. 778.

West Virginia. — State *v.* Moyer, 58 W. Va. 146, 52 S. E. 30.

Wisconsin. — Secor *v.* State, 118 Wis. 621, 95 N. W. 942.

In a prosecution for embezzlement, it is not necessary for the state to prove a fraudulent conversion of all the property set forth in the indictment; a conversion of any of the articles so set out is sufficient. State *v.* Sienkiewiez, 4 Penne. (Del.) 59, 55 Atl. 346.

"Though an indictment for embezzlement charged the taking of a certain sum, a conviction may be had on proof of the embezzlement of a less sum." Morse *v.* Com., 33 Ky. L. Rep. 831, 896, 111 S. W. 714.

44. Gerard *v.* State, 10 Tex. App. 690.

45. Com. *v.* Wyman, 8 Met. (Mass.) 247; State *v.* New, 22 Minn. 76; State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51; State *v.* Holmes, 65 Minn. 230, 68 N. W. 11; State *v.* Reinhart, 26 Or. 466; 38 Pac. 822; State *v.* Cushing, 11 R. I. 313; Haupt *v.* State, 108 Ga. 60, 33 S. E. 829.

statutory provisions, time in certain aspects of the evidence sometimes becomes material, as shown in the notes.[46]

k. *False Pretenses.* — In an indictment for false pretenses, the facts constituting the false pretenses must be proved as alleged.[47] Illustrations of the application of this rule are given in the notes.[48] But in some states an indictment for simple larceny will be sup-

46. People *v.* Donald, 48 Mich. 491, 12 N. W. 669; Campbell *v.* State, 35 Ohio St. 70; State *v.* Cornhauser, 74 Wis. 42, 41 N. W. 959.

Illustrations. — In People *v.* Donald, 48 Mich. 491, 12 N. W. 669, the syllabus of the case is as follows: "There is no legal presumption, for the purposes of a criminal prosecution, that bank notes, checks, bills of exchange and other securities for money are worth the sums which they represent or any sum. Comp. Laws, § 7811, provides that in a prosecution for embezzlement evidence may be given of 'any such embezzlement committed within six months next *after* the time stated in the indictment.' *Held*, that under this statute an information for embezzlement cannot be sustained by evidence of acts committed before the time stated."

"Whether or not an offense punishable by law is charged in an indictment, must be determined by the state of the law at the time the offense is alleged to have been committed. For the purpose of determining this, the question of time, as laid in the indictment, is material." Campbell *v.* State, 35 Ohio St. 70.

47. *Alabama.* — O'Connor *v.* State, 30 Ala. 9; Dorsey *v.* State, 111 Ala. 40, 20 So. 629; Headley *v.* State, 106 Ala. 109, 17 So. 714.

Arkansas. — Kirtley *v.* State, 38 Ark. 543.

California. — People *v.* Garnett, 35 Cal. 470, 95 Am. Dec. 125.

Colorado. — Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188.

Indiana. — Todd *v.* State, 31 Ind. 514.

Kansas. — State *v.* Palmer, 40 Kan. 474, 20 Pac. 270.

Massachusetts. — Com. *v.* Pierce, 130 Mass. 31.

Missouri. — State *v.* Myers, 82 Mo. 558, 52 Am. Rep. 389.

New Jersey. — State *v.* Vanderbilt, 27 N. J. L. 328; Sharp *v.* State, 53 N. J. L. 511, 21 Atl. 1026; Harris *v.* State, 58 N. J. L. 436, 33 Atl. 844.

48. *Alabama.* — Mack *v.* State, 63 Ala. 138; Copeland *v.* State, 97 Ala. 30, 12 So. 181.

Colorado. — Schayer *v.* People, 5 Colo. App. 75, 37 Pac. 43.

Georgia. — Corbett *v.* State, 24 Ga. 287.

Illinois. — Watson *v.* People, 27 Ill. App. 493; Limouze *v.* People, 58 Ill. App. 314.

Massachusetts. — Com. *v.* Stone, 4 Met. 43; Com. *v.* Davidson, 1 Cush. 33; Com. *v.* Jeffries, 7 Allen 548, 83 Am. Dec. 712; Com. *v.* Coe, 115 Mass. 481; Com. *v.* Parmenter, 121 Mass. 354; Com. *v.* Ashton, 125 Mass. 384.

New York. — People *v.* Herrick, 13 Wend. 87; People *v.* Sully, 1 Sheld. 17; Webster *v.* People, 92 N. Y. 422.

Ohio. — Baker *v.* State, 31 Ohio St. 314.

Pennsylvania. — Com. *v.* Garver, 40 Leg. Int. 210; Com. *v.* Karpowski, 167 Pa. St. 225, 31 Atl. 572.

Tennessee. — Britt *v.* State, 9 Humph. 31.

Texas. — Warrington *v.* State, 1 Tex. App. 168; Marwilsky *v.* State, 9 Tex. App. 377; Moore *v.* State, 20 Tex. App. 233; Peckham *v.* State (Tex. Crim.), 28 S. W. 532.

Wyoming. — Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

Intent To Injure. — As an intent to injure or defraud is one of the elements of the crime of obtaining money or property by false pretenses, such intent must be proved as alleged. Mack *v.* State, 63 Ala. 138; Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712.

Means Employed. — The means employed to perpetrate the fraud upon a charge of obtaining money or property by false pretenses, must

ported by evidence showing that the property was obtained from the owner by false pretenses.[49]

1. *Forgery.* — The allegation of the instrument which is the subject of the forgery may be *in haec verba,*[50] or according to its legal effect.[51] When in the former mode there be a literal correspond-

be proved as alleged. Corbett *v.* State, 24 Ga. 287.

Where a party is tried on an indictment for obtaining property from A on false pretenses, and nothing is said of any other inducement operating with the false pretenses to induce A to part with the property, a variance is not created because it appears from the evidence of the prosecution that part of the price of the property was paid, and that such payment constituted part of the inducement leading A to part with it. Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

49. McQueen *v.* State, 89 Ala. 91, 8 So. 115; Com. *v.* Collins, 12 Allen (Mass.) 181; People *v.* Dean, 58 Hun 610, 12 N. Y. Supp. 749; Fay *v.* Com., 28 Gratt. (Va.) 912; Shinn *v.* Com., 32 Gratt. (Va.) 899; Leftwich *v.* Com., 20 Gratt. (Va.) 716; State *v.* Halida, 28 W. Va. 499.

In State *v.* Halida, 28 W. Va. 499, and especially at page 503, the court, in the course of its opinion, says: "The indictment is founded on the statute, which declares: 'If a person obtain by false pretense or token from any person, with intent to defraud, money or other property, which may be the subject of larceny, he shall be guilty of the larceny thereof.' § 23, ch. 145 Code. This statute has been considered by the supreme court of Virginia in a number of cases, and it has been there held to be the settled law, 'that upon an indictment simply charging larceny, the commonwealth may show either that the subject of larceny was received with a knowledge that it was stolen, or *that it was obtained by a false token or false pretence.*' Anable's Case, 24 Gratt. 563, 566; Leftwich's Case, 20 Id. 716; Dowdy's Case, 9 Id. 726. Both counts in the indictment here are good as counts for simple larceny. State *v.* Reece, 27 W. Va. 375. It is therefore not important whether or not the first count is also good as an indictment for obtaining the mule under false pretences, because under the decisions above cited all the evidence which could be introduced to sustain an indictment for obtaining the mule by false pretences can also be introduced in support of an indictment for simple larceny, the legal offense as well as the punishment in both cases being precisely the same. Dull's Case, 25 Gratt. 965; Fay's Case, 28 Id. 912."

50. *United States.* — United States *v.* Britton, 2 Mason 464, 24 Fed. Cas. No. 14,650.

California. — People *v.* Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276.

Indiana. — Rooker *v.* State, 65 Ind. 86.

Kentucky. — Greenwood *v.* Com., 11 Ky. L. Rep. 220, 11 S. W. 811.

Louisiana. — State *v.* Gryder, 44 La. Ann. 962, 11 So. 573, 32 Am. St. Rep. 358.

Massachusetts. — Com. *v.* Parmenter, 5 Pick. 279; Com. *v.* Woods, 10 Gray 477.

Missouri. — State *v.* Fay, 65 Mo. 490; State *v.* Bibb, 68 Mo. 286; State *v.* Chamberlain, 75 Mo. 382.

New York. — *In re* Gotobed, 6 City Hall Rec. 25.

North Carolina. — State *v.* Collins, 115 N. C. 716, 20 S. E. 452.

Ohio. — Turpin *v.* State, 19 Ohio St. 540.

Texas. — Lassiter *v.* State, 35 Tex. Crim. 540, 34 S. W. 751.

Virginia. — Perkins *v.* Com., 7 Gratt. 651, 56 Am. Dec. 123.

51. *Massachusetts.* — Com. *v.* Dole, 2 Allen 165.

New Hampshire. — State *v.* Hayden, 15 N. H. 355.

Ohio. — Burdge *v.* State, 53 Ohio St. 512, 42 N. E. 594.

Wyoming. — Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746.

Texas. — Labbaite *v.* State, 6 Tex. App. 257; Ham *v.* State, 4 Tex. App. 645; Murphy *v.* State, 6 Tex. App.

ence between the paper offered in evidence and the one alleged,[52] but when the latter mode is employed substantial proof is suffi-

554; Lassiter *v.* State, 35 Tex. Crim. 540, 34 S. W. 751.

Virginia. — Burress *v.* Com., 27 Gratt. 934.

52. *Arkansas.* — Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

Florida. — Smith *v.* State, 29 Fla. 408, 10 So. 894.

Illinois. — Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474; Brown *v.* People, 66 Ill. 344.

Indiana. — Sharley *v.* State, 54 Ind. 168; Zellers *v.* State, 7 Ind. 659; Porter *v.* State, 15 Ind. 433; State *v.* Pease, 74 Ind. 263.

Iowa. — State *v.* Thompson, 19 Iowa 299.

Massachusetts. — Com. *v.* McKean, 98 Mass. 9.

Nebraska. — Roush *v.* State, 34 Neb. 325, 51 N. W. 755.

New York. — People *v.* Clements, 26 N. Y. 193.

Ohio. — Hart *v.* State, 20 Ohio 49.

Oregon. — Shirley *v.* State, 1 Or. 269.

Texas. — *Ex parte* Rogers, 10 Tex. App. 655, 38 Am. Rep. 654; Alexander *v.* State, 28 Tex. App. 186, 12 S. W. 595; Simms *v.* State, 32 Tex. Crim. 277, 22 S. W. 876; Burks *v.* State, 24 Tex. App. 326, 6 S. W. 300; *s. c.*, 24 Tex. App. 332, 6 S. W. 303; Potter *v.* State, 9 Tex. App. 55.

Vermont. — State *v.* Bean, 19 Vt. 530.

West Virginia. — State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225; State *v.* Fleshman, 40 W. Va. 726, 22 S. E. 309.

Instrument Set In Haec Verba. In Bennett *v.* State, 62 Ark. 516, 36 S. W. 947, the principle stated in the text was applied, and in discussing it, the court in the course of its opinion says: "The second ground of the motion for a new trial is 'that there was a variance between the deed offered in evidence, and the deed set out in the indictment.' The deed admitted in evidence, in setting out the consideration, has it thus: 'The sum of five hundred and fifty dollars, $550.00 dollars, to us paid by J. N. Wadkins.' The deed set out in the indictment has it thus: 'Five hundred and fifty dollars (550.00) to us paid by J. N. Watkins.' In describing the lands, as to one piece, the deed offered in evidence has it, 'north half,' while the deed set out in the indictment has it, 'the north half,' adding the word 'the' before 'north half.' In the blank form for relinquishment of dower in the deed offered in evidence, in setting out the consideration the word 'sum' is crossed as indicated, while in the deed set out in the indictment it is not, but appears without the cross marks, thus, 'sum.' Again, the deed offered in evidence concludes, 'Witness my hands and seals this 22 day of August, 1892,' while the deed set out in the indictment concludes, 'Witness my hand and seal this 22nd day of August, 1892.' . . . It is the opinion of a majority of the court that, as the indictment professes to set out an exact copy of the deed charged to have been forged, the other numerous variances between it and the deed offered in evidence, taken altogether, are material, and that, in contemplation of law, the two deeds are not the same. The words and figures which are a part of the deed set out in the indictment are said to be descriptive of the deed charged to have been forged, and a defendant could not have been convicted on such a charge by producing in evidence a deed not having these words and figures in it. McDonnell *v.* State, 58 Ark. 242, 24 S. W. 105, and cases cited. If the deed had been set out according to its purport, it might have been proven by the one offered in evidence; but, as the indictment professes to set it out in words and figures, it was necessary to prove it by an exact copy. Com. *v.* Parmenter, 5 Pick. 279; State *v.* Morton, 27 Vt. 310; Rex *v.* Powell, 2 W. Bl. 787, 2 East, P. C. 976."

Modern Rule, as Announced in the Text. — In discussing the rule announced in the text, the supreme court of New Jersey, in State *v.* Jay, 34 N. J. L. 368, says: "The general rule of criminal pleading, when

cient.[53] And an allegation of forgery is supported by evidence of an alteration of the instrument.[54] So when it is alleged that sev-

the tenor of a writing is required to be set forth, as in forgery and in libel, is, that the indictment should contain an exact copy. From the older cases it appears that this requirement was originally enforced with great strictness. But in the more modern practice this severity has been, in several instances, somewhat moderated, so that now we find the law stated in the text-books, as extracted from the reports, to the effect that the variance of a letter between the instrument produced and the tenor of the record will not be fatal, provided the meaning be not altered by changing a word into another of a different signification. This rule appears to have originated in the remarks of Justice Powys, in Regina *v.* Drake, 2 Salk. 660, but was afterwards ratified by Lord Mansfield, in Rex *v.* Beach, 1 Cowp. 229. The same disposition to throw aside the extravagant nicety of the ancient decisions has been exhibited in other reported cases. 1 Leach 145; United States *v.* Hinman, Baldwin, 292; State *v.* Bean, 19 Vt. 530; People *v.* Warner, 5 Wend. 271; Douglass 193. The relaxation of the old doctrine to this extent appears to be founded in good sense, and has in its favor judicial opinions of much weight."

53. *Alabama.* — Butler *v.* State, 22 Ala. 43.

California. — People *v.* Munroe, 33 Pac. 776.

Georgia. — Morel *v.* State, 74 Ga. 17; McGarr *v.* State, 75 Ga. 155.

Illinois. — Trask *v.* People, 151 Ill. 523, 38 N. E. 248; Parker *v.* People, 97 Ill. 32.

Kansas. — State *v.* Woodrow, 56 Kan. 217, 42 Pac. 714.

Kentucky. — Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661.

Massachusetts. — Com. *v.* Thomas, 10 Gray 483; Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736.

Michigan. — People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.

Nebraska. — Haslip *v.* State, 10 Neb. 590, 7 N. W. 331.

New York. — Paige *v.* People, 3 Abb. Dec. 439, 6 Park. Crim. 683; People *v.* Gumaer, 9 Wend. 272.

North Carolina. — State *v.* Street, 1 Tayl. & C. 158, 1 Am. Dec. 589; State *v.* Ballard, 6 N. C. (2 Murph. L.) 186; State *v.* Lane, 80 N. C. 407.

Ohio. — May *v.* State, 14 Ohio 461, 15 Am. Dec. 548.

Texas. — Mee *v.* State, 23 Tex. App. 566, 5 S. W. 243; Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215.

Vermont. — State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

West Virginia. — State *v.* Poindexter, 23 W. Va. 805.

Legal Effect of Instrument Set Out in Indictment. — In State *v.* Poindexter, 23 W. Va. 805, the court, applying the principle stated in the text, said: "It is insisted by counsel for the prisoner that the check was improperly admitted in evidence as it was materially variant from the one described in the indictment. The check was misdescribed in the second count, and the court very properly instructed the jury that it could not be used to support the charge in that count and that it could only be used as evidence in support of the first count. This count of the indictment did not profess to set out the tenor, which imports a verbatim copy of the check, but only its purport and effect, which means the legal effect of the instrument as a whole. It is described as a certain order for the payment of money commonly called a check purporting to be the check of one Creed Collins for the sum of fifty dollars, which said forged check is of the purport and effect following, to-wit, etc. The check produced in evidence, was a verbatim copy of the one set out in the indictment, except that the letters 'ar' in the word 'bearer' are blurred or blotted, but an examination of the original paper, brought up by certiorari, satisfies us there is no variance between that described in the first count and that produced and read in evidence, and the circuit court did not err in permitting it to be read by the jury."

54. State *v.* Flye, 26 Me. 312;

eral names to the instrument are forged, proof of any of them is sufficient.[55] The allegation of intent is sufficiently proved to avoid a variance by showing the intent to relate to a different person than the one averred.[56] But all allegations essentially descriptive of the offense must be proved as laid in the indictment, illustrations of which are given in the notes.[57]

State *v.* Clark, 23 N. H. 429; State *v.* Rowley, Brayt. (Vt.) 76.

55. Com. *v.* Adams, 7 Met. (Mass.) 50; Com. *v.* Dallinger, 118 Mass. 439; State *v.* Gustin, 51 N. J. L. 749; People *v.* Rathbun, 21 Wend. (N. Y.) 509; State *v.* Flora, 109 Mo. 293, 19 S. W. 95.

56. *Georgia.* — Phillips *v.* State, 96 Ga. 293, 22 S. E. 574.

Indiana. — Colvin *v.* State, 11 Ind. 361.

Kentucky. — Johnson *v.* Com., 90 Ky. 488, 14 S. W. 492.

Maine. — *In re* Veazie, 7 Me. 131.

Nevada. — State *v.* Cleavland, 6 Nev. 181.

New Hampshire. — State *v.* Hastings, 53 N. H. 452.

North Carolina. — State *v.* Hall, 108 N. C. 776, 13 S. E. 189.

Ohio. — Stoughton *v.* State, 2 Ohio St. 562.

Texas. — Hocker *v.* State, 34 Tex. Crim. 359, 30 S. W. 783; Ellis *v.* State (Tex. Crim.), 22 S. W. 678.

Virginia. — Com. *v.* Ervin, 2 Va. Cas. 337.

Intent To Defraud. — In Phillips *v.* State, 96 Ga. 293, 22 S. E. 574, it appeared from the evidence that Burnes was the agent of the Western & Atlantic Railroad Company. The accused was convicted, and filed a motion for a new trial, containing the general grounds that the verdict was contrary to law and the evidence, and also alleging that the court erred in charging that if the jury believed from the evidence that the accused "did pass this order with intent to defraud either G. B. Everett & Co., or the Western & Atlantic Railroad," it would be their duty to find him guilty. On this point the court said: "We think this charge was erroneous. Not only does the indictment fail to allege an intent to defraud the railroad company, but it does not even mention or allude to the company, in the remotest terms. The charge complained of, therefore, presented to the jury for determination a question in no wise involved in the accusation against the prisoner. The judge very probably considered the agent of the railroad company and the company itself substantially the same person, and must have entertained the opinion that an intention to defraud the agent would be tantamount to an intention to defraud the company. This is, however, by no means true. The agent of a corporation, and the corporation itself, are entirely distinct persons, and an alleged intention to defraud one of them cannot be sustained by proof showing an intention to defraud the other. Judgment reversed."

Intent To Defraud Any One May Be Shown. — In State *v.* Hall, 108 N. C. 776, 13 S. E. 189, the charge was forgery. In applying the principle stated in the text the court said: "To constitute forgery it is essential that there is an intent to defraud. It is not essential that any one be actually defrauded, or that any act be done other than the fraudulent making or altering of the writing. The forgery of the order upon Miller, and its presentation to his partner, was evidence ample of the intent to defraud. State *v.* Lane, 80 N. C. 407; State *v.* Morgan, 2 Dev. & B. 348. It was immaterial whether Miller himself, or Basinger for him, as his partner, filled the order, or, indeed, whether the order was filled at all or not. This is not an indictment for obtaining goods under false pretenses. Indeed, upon an allegation of an intent to defraud A., it is not a variance to show an attempt to defraud A. and B. 1 Whart. Crim. Law, 713, 743a."

57. *United States.* — United States *v.* Hinman, Baldw. 292, 26 Fed. Cas. No. 15,370.

Arkansas. — McClellan *v.* State, 32 Ark. 609.

California. — People *v.* Smith, 103

m. *Homicide.* — The common-law rule in pleading the instrument or means of death is, that the instrument or means so employed must be proved to be of the same nature and character as alleged in the indictment.[58] But when, by statute, the instrument used to cause death is not required to be averred,[59] any instrument

Cal. 563, 37 Pac. 516; People *v.* Cummings, 57 Cal. 88; People *v.* Phillips, 70 Cal. 61, 11 Pac. 493.

Georgia. — Allgood *v.* State, 87 Ga. 668, 13 S. E. 569.

Illinois. — Loehr *v.* People, 132 Ill. 504, 24 N. E. 68.

Iowa. — State *v.* Blanchard, 74 Iowa 628, 38 N. W. 519.

Kentucky. — Com. *v.* Harrison, 17 Ky. L. Rep. 343, 30 S. W. 1009.

Maine. — State *v.* Handy, 20 Me. 81.

Massachusetts. — Com. *v.* Ray, 3 Gray 441; Com. *v.* Hearsey, 1 Mass. 143.

Mississippi. — Wilson *v.* State, 12 So. 332.

New York. — People *v.* Badgley, 16 Wend. 53; People *v.* DeKroyft, 49 Hun 71, 1 N. Y. Supp. 692.

North Carolina. — State *v.* Lytle, 64 N. C. 255.

Tennessee. — Luttrell *v.* State, 85 Tenn. 232, 1 S. W. 232.

Texas. — Huntley *v.* State (Tex. Crim.), 34 S. W. 923.

Vermont. — State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

Virginia. — Powell *v.* Com., 11 Gratt. 822; Huffman *v.* Com., 6 Rand. 685.

Illustrations. — "Where the indictment charged that the defendant forged the name of a party to a certain receipted account, and also raised the amount, and the evidence showed that the signature was genuine, the variance is fatal." Wilson *v.* State (Miss.), 12 So. 332.

In State *v.* Blanchard, 74 Iowa 628, 38 N. W. 519, the charge was forgery. On the question of a variance the court said: "The forged instrument purported to be dated at Osage, Iowa, January 7, 1885. The copy set out in the indictment showed it to be dated January 7, 1884. The district court instructed that the variance was not material. The instruction is correct. The defendant could not have been prejudiced by the variance between the allegation and the proof as to the date of the instrument."

A fatal variance does not exist between allegation in indictment for forgery, to the effect that an order was drawn upon the "president, directors, and company of the Bank of Vergennes," and proof that the order was drawn upon the "Bank of Vergennes," unless the instrument is described as importing the words of the allegation upon its face. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

58. *Alabama.* — Ezell *v.* State, 54 Ala. 165; Phillips *v.* State, 68 Ala. 469; Turner *v.* State, 97 Ala. 57, 12 So. 54.

Delaware. — State *v.* Townsend, 1 Houst. Crim. Cas. 337; State *v.* Taylor, 1 Houst. Crim. Cas. 436.

Georgia. — Johnson *v.* State, 88 Ga. 203, 14 S. E. 208.

Illinois. — Guedel *v.* People, 43 Ill. 226.

Indiana. — Beavers *v.* State, 58 Ind. 530.

Kentucky. — Thomas *v.* Com., 14 Ky. L. Rep. 288, 20 S. W. 226.

Maine. — State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

Massachusetts. — Com. *v.* Fenno, 125 Mass. 387; Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4.

Mississippi. — Goodwyn *v.* State, 4 Smed. & M. 520; Porter *v.* State, 57 Miss. 300.

New Hampshire. — State *v.* Dame, 11 N. H. 271, 35 Am. Dec. 495.

North Carolina. — State *v.* Preslar, 48 N. C. (3 Jones' L.) 421.

Tennessee. — Witt *v.* State, 6 Coldw. 5.

Texas. — Ferguson *v.* State, 4 Tex. App. 156; Lightfoot *v.* State, 20 Tex. App. 77; Douglass *v.* State, 26 Tex. App. 109, 9 S. W. 489, 8 Am. St. Rep. 459; Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087; Morris *v.* State, 35 Tex. Crim. 313, 33 S. W. 539.

59. State *v.* Hoyt, 13 Minn. 132;

or means may be proved to sustain the indictment.[60] In an indictment against several persons, evidence of the guilt of but one is admissible.[61] Evidence as to the time of the homicide as alleged is not necessary,[62] if it is shown that death occurred before the finding of the indictment;[63] nor is it necessary to prove an allegation as to the place thereof,[64] so it be shown to be within the jurisdiction of the court.[65] An allegation with reference to the civil[66] or social status of the deceased need not be proved as alleged,[67] unless such allegation amounts to matter of essential description.[68] It is necessary, however, to prove the christian name of the party killed as alleged,[69] or, at least, that he has known by the name proved;[70] but a variance in the initial of the middle name is not material.[71] An allegation of the purpose of the killing is not material and the proof need not conform thereto;[72] nor is it necessary to prove the wound or bruise on the body as alleged in the indictment.[73] The

Olive *v.* State, 11 Neb. 1, 7 N. W. 444; State *v.* Murph, 60 N. C. 129; Harris *v.* State, 37 Tex. Crim. 441, 36 S. W. 88; State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

60. *Minnesota.* — State *v.* Lautenschlager, 22 Minn. 514.

Nebraska. — Long *v.* State, 23 Neb. 33, 36 N. W. 310.

New Jersey. — State *v.* Fox, 25 N. J. L. 566.

New York. — People *v.* Goodwin, 1 Wheel. Crim. Cas. 253, 5 City Hall Rec. 11, 6 City Hall Rec. 9; People *v.* Colt, 3 Hill 432; Colt *v.* People, 1 Park. Crim. 611; LaBeau *v.* People, 33 How. Pr. 66; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846.

North Carolina. — State *v.* Gould, 90 N. C. 658; State *v.* Weddington, 103 N. C. 364, 9 S. E. 577.

South Carolina. — State *v.* Jenkins, 14 Rich. L. 215, 94 Am. Dec. 132.

Texas. — Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647; Hernandez *v.* State, 32 Tex. Crim. 271, 22 S. W. 972; Crenshaw *v.* State (Tex. Crim.), 29 S. W. 787.

61. Turbeville *v.* State, 40 Ala. 715; State *v.* Fisher, 37 Kan. 404, 15 Pac. 606; Von Gundy *v.* Com., 11 Ky. L. Rep. 552, 12 S. W. 386; State *v.* Ford, 37 La. Ann. 443; State *v.* Rambo, 95 Mo. 462, 8 S. W. 365; State *v.* Wood, 53 Vt. 560.

62. Chapman *v.* People, 39 Mich. 357; State *v.* Ward, 74 Mo. 253; State *v.* Baker, 46 N. C. (1 Jones' L.) 267; Livingston *v.* Com., 14 Gratt. (Va.) 592.

63. People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54, 6 N. Y. Crim. 393, 7 Am. St. Rep. 684, 2 L. R. A. 255; O'Connell *v.* State, 18 Tex. 343; Cudd *v.* State, 28 Tex. App. 124, 12 S. W. 1010.

64. State *v.* Baker, 46 N. C. (1 Jones' L.) 267; State *v.* Ward, 74 Mo. 253; Chapman *v.* People, 39 Mich. 357.

65. State *v.* Outerbridge, 82 N. C. 617; Felix *v.* State, 18 Ala. 720.

66. Chase *v.* People, 40 Ill. 352; North *v.* People, 139 Ill. 81, 28 N. E. 966; Alsop *v.* Com., 4 Ky. L. Rep. 547; Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651; State *v.* Green, 66 Mo. 631.

67. Hodges *v.* State, 6 Tex. App. 615.

68. Felix *v.* State, 18 Ala. 720; State *v.* Motley, 7 Rich. L. (S. C.) 327; Wallace *v.* State, 10 Tex. App. 255.

69. State *v.* Boylson, 3 Minn. 438; Barcus *v.* State, 49 Miss. 17, 19 Am. Rep. 1; State *v.* Lincoln, 17 Wis. 579.

70. People *v.* Leong Sing, 77 Cal. 117, 19 Pac. 254; State *v.* Lincoln, 17 Wis. 579.

71. People *v.* Lockwood, 6 Cal. 205; Stockton *v.* State, 25 Tex. 772.

72. State *v.* Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154; Barcus *v.* State, 49 Miss. 17, 19 Am. Rep. 1; Territory *v.* Rowand, 8 Mont. 432, 20 Pac. 688, 21 Pac. 19; Hollywood *v.* People, 2 Abb. Dec. (N. Y.) 376; People *v.* Osmond, 138 N. Y. 80, 33 N. E. 739.

73. *Florida.* — Bryan *v.* State, 19 Fla. 864.

grade of the homicide must be proved as alleged,[74] unless proof of a different grade is admissible by statute;[75] but under an indictment alleging a higher grade, evidence to convict of a lower grade of homicide is admissible.[76]

n. *Offenses Relating to Intoxicating Liquors.* — The statutory offense of the unlawful sale of intoxicating liquors must be substantially proved as alleged.[77] If the allegation is of one offense under the statute, proof of a different violation of the liquor law is not admissible.[78] But where different offenses are charged in

Georgia. — Rockmore *v.* State, 93 Ga. 123, 19 S. E. 32.

Indiana. — Dias *v.* State, 7 Blackf. 20, 39 Am. Dec. 448; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

Louisiana. — State *v.* McCoy, 8 Rob. 545, 41 Am. Dec. 305; State *v.* Munco, 12 La. Ann. 625.

Massachusetts. — Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4.

Minnesota. — State *v.* Hoyt, 13 Minn. 132.

Missouri. — State *v.* Sanders, 76 Mo. 35; State *v.* Waller, 88 Mo. 402.

New Jersey. — State *v.* Fox, 25 N. J. L. 566.

New York. — People *v.* Sanchez, 18 How. Pr. 72, 22 N. Y. 147; Real *v.* People, 42 N. Y. 270.

South Carolina. — State *v.* Crank, 2 Bail. L. 66, 23 Am. Dec. 117; State *v.* Chiles, 44 S. C. 338, 22 S. E. 339.

Texas. — Nelson *v.* State, 1 Tex. App. 41.

Virginia. — Curtis *v.* Com., 87 Va. 589, 13 S. E. 73.

74. *Indiana.* — Bruner *v.* State, 58 Ind. 159.

Iowa. — State *v.* Boyle, 28 Iowa 522; State *v.* Knouse, 29 Iowa 118.

Massachusetts. — Com. *v.* Hartwell, 128 Mass. 415, 35 Am. Rep. 391.

Mississippi. — Morman *v.* State, 2 Cushm. 54.

Nebraska. — Curry State, 4 Neb. 545.

New York. — People *v.* White, 24 Wend. 520.

Texas. — Mitchell *v.* State, 1 Tex. Crim. 98, 34 S. W. 286, 60 Am. St. Rep. 22.

75. *Connecticut.* — State *v.* Parmelee, 9 Conn. 259

Iowa. — State *v.* Johnson, 72 Iowa 393, 34 N. W. 177.

Missouri. — State *v.* Kilgore, 70 Mo. 546.

New Jersey. — State *v.* Powell, 7 N. J. L. 244.

Texas. — Mitchell *v.* State, 1 Tex. App. 194.

Virginia. — Robertson *v.* Com. (Va.), 20 S. E. 362.

76. *California.* — People *v.* Pool, 27 Cal. 572.

Iowa. — State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Louisiana. — State *v.* Jones, 46 La. Ann. 1395, 16 So. 369.

Michigan. — People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

Missouri. — State *v.* Gee, 85 Mo. 647.

Montana. — Territory *v.* Manton, 7 Mont. 162, 14 Pac. 637; State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

Nevada. — State *v.* St. Clair, 16 Nev. 207.

Pennsylvania. — Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404.

Tennessee. — Goaler *v.* State, (5 Baxt.) 678.

Texas. — Fuller *v.* State, 30 Tex. App. 559, 17 S. W. 1108.

77. *Alabama.* — Lemons *v.* State, 50 Ala. 130.

Colorado. — Miller *v.* City of Colo. Springs, 3 Colo. App. 309, 33 Pac. 74.

Indiana. — Dant *v.* State, 106 Ind. 79, 5 N. E. 870.

Iowa. — State *v.* Hesner, 55 Iowa 494, 8 N. W. 329.

Kansas. — State *v.* Brooks, 33 Kan. 708, 7 Pac. 591; State *v.* Hescher, 46 Kan. 534, 26 Pac. 1022; State *v.* Nulty, 47 Kan. 259, 27 Pac. 995; State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623.

Massachusetts. — Com. *v.* Livermore, 70 Mass. 18; Com. *v.* Hardiman, 75 Mass. 136; Com. *v.* Burns, 75 Mass. 287.

West Virginia. — State *v.* Berkeley, 41 W. Va. 455, 23 S. E. 608.

78. Robinson *v.* Com., 6 Dana

separate counts in the same indictment, proof applying to any one of such counts is admissible.[79] An allegation of an unlawful sale by the defendant is sustained by proof of the sale by the clerk or agent.[80] If the allegation is of an unlawful sale to a particular person, the evidence must correspond to such averment,[81] although the allegation of a sale to a particular person may not be necessary to the offense under the statute.[82] So if the allegation is of a sale to one of a class of persons to whom it is unlawful to make sale, the evidence must correspond to the allegation as to such person.[83] According to some decisions, the allegation of a joint sale is supported by evidence that the sale was made by one,[84] while other cases require proof of a joint sale,[85] or one in which both parties participated.[86] An allegation as to the time of the sale need not be proved as laid,[87] and the same rule applies to an allegation as to

(Ky.) 287; State *v.* Therrien, 86 Me. 425, 29 Atl. 1117; Com. *v.* Churchill, 136 Mass. 148; State *v.* Apperger, 80 Mo. 173.

79. State *v.* Freeman, 27 Vt. 520.

80. Com. *v.* Park, 67 Mass. 553; Parker *v.* State, 4 Ohio St. 563; State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315. *Contra,* Hall *v.* State, 87 Ga. 233, 13 S. E. 634.

81. *Connecticut.* — State *v.* Miller, 24 Conn. 522.

Georgia. — Moore *v.* State, 79 Ga. 498, 5 S. E. 51; Hall *v.* State, 87 Ga. 233, 13 S. E. 634.

Iowa. — State *v.* Finan, 10 Iowa 19.

Kentucky. — Yost *v.* Com., 6 Ky. L. Rep. 110.

Massachusetts. — Com. *v.* Dillane, 67 Mass. 483; Com. *v.* Hendrie, 68 Mass. 503; Com. *v.* Remby, 68 Mass. 508; Com. *v.* Gormley, 133 Mass. 580; Com. *v.* Woods, 165 Mass. 145, 42 N. E. 565.

Missouri. — Hays *v.* State, 13 Mo. 246; State *v.* Ladd, 15 Mo. 430; State *v.* Wolff, 46 Mo. 584.

Texas. — Drechsel *v.* State, 35 Tex. Crim. 580, 34 S. W. 934.

Virginia. — Hulstead *v.* Com., 5 Leigh 724; Com. *v.* Taggart, 8 Gratt. 697.

82. Tyler *v.* State, 69 Miss. 395, 11 So. 25; Hudson *v.* State, 73 Miss. 784, 19 So. 965.

Charging Sale to a Particular Person. — In Tyler *v.* State, 69 Miss. 395, 11 So. 25, the court decided as follows: "An indictment charged defendant with a sale of intoxicating liquors to R. and B. in violation of law, but the proof was of a sale to B. alone. *Held,* though the allegation of sale to any particular person was unnecessary, yet, having been made, it was descriptive of the particular offense charged, and that the variance was fatal."

83. Birr *v.* People, 113 Ill. 645; Kurz *v.* State, 79 Ind. 488; Dukes *v.* State, 79 Ga. 795, 4 S. E. 876; State *v.* Yockey, 49 Mo. App. 443; Morgenstern *v.* Com., 27 Gratt. (Va.) 1018; State *v.* Douglass, 48 Mo. App. 39.

84. State *v.* Wadsworth, 30 Conn. 55; State *v.* Sterns, 28 Kan. 154; State *v.* Simmons, 66 N. C. 622.

85. Farrell *v.* State, 3 Ind. 573; Ledford *v.* State, 32 Tex. Crim. 567, 25 S. W. 123.

86. Farrell *v.* State, 3 Ind. 573.

87. *Connecticut.* — State *v.* Moriarty, 50 Conn. 415.

Florida. — Dansey *v.* State, 23 Fla. 316, 2 So. 692.

Iowa. — State *v.* Wambold, 72 Iowa 468, 34 N. W. 413; State *v.* Arnold, 98 Iowa 253, 67 N. W. 252.

Kansas. — State *v.* Reno, 41 Kan. 674, 21 Pac. 803; State *v.* Elliott, 45 Kan. 525, 26 Pac. 55.

Massachusetts. — Com. *v.* Harrison, 11 Gray 310; Com. *v.* Briggs, 11 Met. 573; Com. *v.* Kelly, 10 Cush. 69; Com. *v.* Wood, 4 Gray 11; Com. *v.* Armstrong, 7 Gray 49; Com. *v.* Kerrissey, 141 Mass. 110, 4 N. E. 820.

Mississippi. — Miazza *v.* State, 36 Miss. 613.

the place,[88] unless the place is made an essential element of the offense.[89] If the allegation is of a sale on a day on which sales are prohibited, the proof must correspond to such allegation.[90] An allegation as to the quantity sold need not be proved as laid,[91] unless quantity constitutes an essential element of the crime.[92] Where the allegation is of a sale of "intoxicating liquors," proof of any kind of such liquors is admissible.[93] Where the offense consists of a "sale" of liquor, and such sale is alleged, proof of a mere gift of such liquors will not sustain the indictment.[94] In many jurisdictions, under an allegation of an unlawful sale of intoxicating liquors,

Missouri. — State *v.* Heinze, 45 Mo. App. 403.

New York. — City of New York *v.* Mason, 4 E. D. Smith 142; People *v.* Krank, 110 N. Y. 488, 18 N. E. 242.

Ohio. — Clinton *v.* State, 33 Ohio St. 27.

Texas. — Monford *v.* State, 35 Tex. Crim. 237, 33 S. W. 351.

Vermont. — State *v.* Munger, 15 Vt. 290; State *v.* Whipple, 57 Vt. 637.

Virginia. — Loftis *v.* Com., 3 Gratt. 601.

Wisconsin. — Boldt *v.* State, 35 N. W. 935.

88. *Connecticut.* — Lowrey *v.* Gridley, 30 Conn. 450.

Iowa. — State *v.* Gurlagh, 96 Iowa 141, 40 N. W. 141.

Kansas. — State *v.* Estlenbaum, 47 Kan. 291, 27 Pac. 996; State *v.* Rohrer, 34 Kan. 427, 8 Pac. 718.

Massachusetts. — Com. *v.* Godley, 11 Gray 454; Com. *v.* Shattuck, 14 Gray 23; Com. *v.* Welch, 2 Allen 510; Com. *v.* Crogan, 107 Mass. 212; Com. *v.* Hersey, 144 Mass. 297, 11 N. E. 116; Com. *v.* Kern, 147 Mass. 595, 18 N. E. 568.

North Carolina. — State *v.* Emery, 98 N. C. 668, 3 S. E. 636.

89. Bryant *v.* State, 62 Ark. 459, 36 S. W. 188; Compher *v.* State, 18 Ind. 447; Com. *v.* McCaughey, 9 Gray (Mass.) 296; Botto *v.* State, 4 Cushm. (Miss.) 108; State *v.* Mudgett, 85 N. C. 538; Moore *v.* State, 12 Ohio St. 387; Hood *v.* State, 35 Tex. Crim. 585, 34 S. W. 935.

90. *Kentucky.* — Megowan *v.* Com., 2 Met. 3.

Maine. — State *v.* Small, 80 Me. 452, 14 Atl. 942.

Massachusetts. — Com. *v.* Davis, 121 Mass. 352; Com. *v.* Barnes, 138 Mass. 511; Com. *v.* Elwell, 1 Gray 463; Com. *v.* Gardner, 7 Gray 494.

New York. — People *v.* Ball, 42 Barb. 324.

North Carolina. — State *v.* Bryson, 90 N. C. 747.

Texas. — Galloway *v.* State, 23 Tex. App. 398, 5 S. W. 246.

91. State *v.* Cooper, 16 Mo. 551; State *v.* Andrews, 28 Mo. 17; State *v.* Moore, 14 N. H. 451; State *v.* Connell, 38 N. H. 81; Brock *v.* Com., 6 Leigh (Va.) 634.

92. State *v.* Weiss, 21 Mo. 493; Com. *v.* Buck, 12 Metc. (Mass.) 524.

93. *Alabama.* — Olmstead *v.* State, 89 Ala. 16, 7 So. 775.

Dakota. — Brugnier *v.* United States, 1 Dak. 5, 46 N. W. 502.

Delaware. — State *v.* Bennet, 3 Har. 565.

Georgia. — Tharpe *v.* State, 89 Ga. 748, 5 N. E. 870.

Kansas. — State *v.* Wood, 49 Kan. 711, 31 Pac. 623.

Massachusetts. — Com. *v.* Thayer, 8 Metc. 523; Com. *v.* Giles, 1 Gray 466; Com. *v.* Peckham, 2 Gray 514.

Missouri. — State *v.* Heinze, 45 Mo. App. 403.

New Hampshire. — State *v.* Adams, 51 N. H. 568.

New York. — Prussia *v.* Guenther, 16 Abb. N. C. 230.

Rhode Island. — State *v.* Campbell, 12 R. I. 147.

Texas. — Prinzel *v.* State, 35 Tex. Crim. 274, 33 S. W. 350; Needham *v.* State, 19 Tex. 332.

94. Town of New Decatur *v.* Lande, 93 Ala. 84, 9 So. 382; Humpeler *v.* People, 92 Ill. 400; Stevenson *v.* State, 65 Ind. 409. *Contra,* Dahmer *v.* State, 56 Miss. 787.

proof of the sale is all that is necessary to make out the offense,[95] the validity of such sale being matter of defense.[96]

o. *Larceny.* — As a rule, an allegation descriptive of the property stolen must be proved as laid in the pleadings;[97] so that if the allegation extend to unnecessary descriptive matter, it must be strictly proved.[98] But if the descriptive allegation amounts to mere

95. Tinker *v.* State, 96 Ala. 115, 11 So. 383; State *v.* McGlynn, 34 N. H. 422.

96. State *v.* Cloughly 73 Iowa 626, 35 N. W. 652; Com. *v.* Ryan, 9 Gray (Mass.) 137.

Illustrations. — "After proof of the sale of intoxicating liquor in a store in Iowa, the burden rests upon defendant to show such sales were lawful. Proof that persons drank liquor in a pharmacy raises the presumption that such liquor had been unlawfully given or sold to them by the proprietor thereof, as directly provided by Acts 21st Gen. Assem. Iowa, c. 83." State *v.* Cloughly, 73 Iowa 626, 35 N. W. 652.

"On the trial of an indictment on St. 1855, c. 215, for unlawfully selling intoxicating liquors, the burden of proving any license, appointment or right to sell, is upon the defendant, by virtue of St. 1844, c. 102. Com. *v.* Ryan, 9 Gray (Mass.) 137.

97. *Alabama.* — Pfister *v.* State, 84 Ala. 432, 4 So. 395.

Arkansas. — State *v.* Gooch, 60 Ark. 218, 29 S. W. 640.

California. — People *v.* Pico, 62 Cal. 50.

Florida. — Glover *v.* State, 22 Fla. 493.

Georgia. — Berry *v.* State, 10 Ga. 511; Green *v.* State, 95 Ga. 463, 22 S. E. 289.

Louisiana. — State *v.* Bassett, 34 La. Ann. 1108.

Massachusetts. — Com. *v.* Lavery, 101 Mass. 207.

Montana. — State *v.* McDonald, 10 Mont. 21, 24 Pac. 628, 24 Am. St. Rep. 25.

North Carolina. — State *v.* Godet, 29 N. C. (7 Ired. L.) 210.

Texas. — Lancaster *v.* State, 9 Tex. App. 393; Otero *v.* State, 30 Tex. App. 450, 17 S. W. 1081.

98. *Arizona.* — Martinez *v.* Territory, 5 Ariz. 55, 44 Pac. 1089.

Delaware. — State *v.* Harris, 3 Har. 559.

Georgia. — Robertson *v.* State, 97 Ga. 206, 22 S. E. 974; Crenshaw *v.* State, 64 Ga. 449.

Indiana. — Morgan *v.* State, 61 Ind. 447.

Maine. — State *v.* Noble, 15 Me. 476.

New York. — People *v.* Case, 64 Hun 636, 19 N. Y. Supp. 625.

North Carolina. — State *v.* Hemphill, 20 N. C. 109.

Illustrations. — In Robertson *v.* State, 97 Ga. 206, 22 S. E. 974, applying the doctrine announced in the text, the court decided, that "while it is not essential, in an indictment for the larceny of an animal, to describe it by earmarks, yet, if this be done, the description must be proved as laid. Crenshaw *v.* State, 64 Ga. 449. Consequently, where an indictment for the larceny of a hog alleged that it had a crop off the left ear and a split in the right, and the prosecutor testified that the hog stolen from him had a crop off the right ear and a split in the left, there was a fatal variance; and this variance was not cured by the evidence of another witness who testified that the stolen hog had a crop off one ear and a split in the other, but did not state which ear had the split and which had the crop."

In Morgan *v.* State, 61 Ind. 447, which involved the charge of grand larceny, the court in discussing and applying the principle stated in the text said: "At the proper time the appellant asked the court to instruct the jury, that 'proof that a "Smith & Wesson" revolver was taken from the witness, August Mayer, will not support the allegation in the indictment that a "Smith & Weston" revolver had been taken from said Mayer,' but the court refused to so instruct the jury. It is a well established rule in criminal proceedings,

surplusage, its proof is not required;[99] or if the description is alleged in the alternative, proof of either is sufficient.[1] At common law the allegation of ownership must be strictly proved as laid;[2] but in some jurisdictions this doctrine has been modified by statute, which requires that a variance in this regard must be material.[3] An

that where, in an indictment, a particular description is given by way of identifying an article of property alleged to have been stolen, the state is bound by the description thus given, and that, to justify a conviction, the evidence must sustain the description contained in the indictment. Starkie Ev., 8th Am. Ed., 628; 1 Bishop Crim. Proced., sec. 579; 1 Wharton Crim. Law, sections 592, 610. Allegations of weight, magnitude, number and value are generally, but not always, exceptions to this rule, but none of these exceptions apply to the case at bar. Where a chattel has obtained a particular name of its own, it ought to be described by that name, so that the proof will certainly correspond with the description. 2 Russ. Crimes, p. 314; 2 Bishop Crim. Proced., *supra*, section 738. Where an indictment for larceny contains particulars descriptive of the property stolen, though unnecessarily inserted, such particulars must be proved on the trial. The State *v.* Jackson, 30 Me. 29. In the case before us the description of the pistol was unnecessarily particular, but, having been so inserted in the indictment, it had to be proved as inserted, to make out a case against the appellant. The state had its option as to the description it should give to the pistol, and, having adopted a particular description, it was bound by it on the trial. Wertz *v.* The State, 42 Ind. 161. We are of the opinion, that there is a material difference, as a matter of description, between the names of 'Weston' and 'Wesson,' and that, in consequence, there was a substantial variance between the description of the pistol in the indictment and the evidence on the trial. Black *v.* The State, 57 Ind. 109. We think the court erred in refusing to give the instruction asked for by the appellant."

99. Goodall *v.* State, 22 Ohio St. 203; Com. *v.* Garland, 3 Met. (Ky.) 478; Pomeroy *v.* Com., 2 Va. Cas. 342; Gettinger *v.* State, 13 Neb. 308, 14 N. W. 403; State *v.* Harris, 64 N. C. 127; State *v.* Campbell, 76 N. C. 261.

1. People *v.* Smith, 15 Cal. 408.

2. *Alabama.* — Parmer *v.* State, 41 Ala. 416.

Idaho. — People *v.* Frank, 1 Idaho 200.

Illinois. — Barnes *v.* People, 18 Ill. 52, 65 Am. Dec. 699.

Indiana. — King *v.* State, 44 Ind. 285; Stevens *v.* State, 44 Ind. 469; Hogg *v.* State, 3 Blackf. 326.

Kentucky. — Hensley *v.* Com., 64 Ky. 11, 89 Am. Dec. 604; McBride *v.* Com., 76 Ky. 337.

Louisiana. — State *v.* Robinson, 35 La. Ann. 964.

Massachusetts. — Com. *v.* Trimmer, 1 Mass. 476; Com. *v.* Morse, 14 Mass. 217.

Mississippi. — McDowell *v.* State, 68 Miss. 348, 8 So. 508.

New Hampshire. — State *v.* McCoy, 14 N. H. 364.

New York. — Norton *v.* People, 8 Cow. 137.

North Carolina. — State *v.* Burgess, 74 N. C. 272.

Oregon. — State *v.* Wilson, 6 Or. 428.

South Carolina. — State *v.* Washington, 15 Rich. L. 39; State *v.* Ryan, 4 McCord 16, 17 Am. Dec. 702; State *v.* Owens, 10 Rich. L. 169; State *v.* London, 3 S. C. 230.

Texas. — Brown *v.* State, 35 Tex. 692; Jorasco *v.* State, 6 Tex. App. 238; Ryan *v.* State, 22 Tex. App. 699, 3 S. W. 547; Clark *v.* State, 29 Tex. App. 437, 16 S. W. 171; Ganoway *v.* State, 21 S. W. 410; Wilson *v.* State, 3 Tex. App. 206.

Virginia. — Hughes *v.* Com., 17 Gratt. 565, 94 Am. Dec. 498.

3. *United States.* — United States *v.* Barlow, 1 Cranch C. C. 94, 24 Fed. Cas. No. 14,521.

allegation as to the quantity or number as applied to the property stolen need not be proved as laid.[4] Illustrations of this principle are given in the notes.[5]

Alabama. — Robinson *v.* State, 84 Ala. 434, 4 So. 774.

Delaware. — State *v.* Jackson, 1 Houst. Crim. Cas. 561.

Florida. — Kennedy *v.* State, 31 Fla. 428, 12 So. 858.

Georgia. — Bernhard *v.* State, 76 Ga. 613.

Indiana. — Marcus *v.* State, 26 Ind. 101.

Iowa. — State *v.* Cunningham, 21 Iowa 433.

Maine. — State *v.* Somerville, 21 Me. 14, 38 Am. Dec. 248; State *v.* Grant, 22 Me. 171; State *v.* Pettis, 63 Me. 124.

Massachusetts. — Com. *v.* McLaughlin, 103 Mass. 435; Com. *v.* Arrance, 5 Allen 517; Com. *v.* O'Brien, 12 Allen 183; Com. *v.* Butts, 124 Mass. 449.

Missouri. — State *v.* Riley, 100 Mo. 493, 13 S. W. 1063.

New York. — People *v.* Smitt, 1 Park. Crim. 329.

North Carolina. — State *v.* Bell, 65 N. C. 313; State *v.* Allen, 103 N. C. 433, 9 S. E. 626.

Oklahoma. — Martin *v.* Territory, 4 Okla. 105, 43 Pac. 1067.

South Carolina. — State *v.* White, 34 S. C. 59, 12 S. E. 661, 27 Am. St. Rep. 783.

Tennessee. — State *v.* Connor, 5 Coldw. 311; Yates *v.* State, 10 Yerg. 549.

Texas. — Mathews *v.* State, 9 Tex. App. 138; Bagley *v.* State, 3 Tex. App. 163; Clark *v.* State, 26 Tex. App. 486, 9 S. W. 767; Pitts *v.* State, 14 S. W. 1014; Skipworth *v.* State, 8 Tex. App. 135.

Vermont. — State *v.* Casavant, 64 Vt. 405, 23 Atl. 636.

4. *Indiana.* — McCorkle *v.* State, 14 Ind. 39.

Georgia. — Lowe *v.* State, 57 Ga. 171.

Massachusetts. — Com. *v.* Lavery, 101 Mass. 207; Com. *v.* O'Connell, 94 Mass. 451.

Mississippi. — Swinney *v.* State, 8 Smed. & M. 576.

North Carolina. — State *v.* Martin, 82 N. C. 672; State *v.* Harris, 64 N. C. 127; State *v.* Locklear, 44 N. C. (Busb. L.) 205; State *v.* Martin, 62 N. C. (Phill. Eq.) 672.

South Carolina. — State *v.* Johnson, 3 Hill L. 1; State *v.* Evans, 23 S. C. 209.

Texas. — Alderson *v.* State, 2 Tex. App. 10.

5. **Illustrations.** — In McCorkle *v.* The State, 14 Ind. 39, the court, in commenting on the doctrine stated in the text, and applying the rule there announced, said: "The indictment in this case was for grand larceny, and charged, with proper description, the stealing, at the date of the indictment, of 3,000 dollars of current bank notes, 2,000 dollars in gold coin, and 1,000 dollars of silver coin. The evidence tended to prove a succession of acts of larceny, whereby an aggregate of between 15,000 and 20,000 dollars was, in all, abstracted from the bank in which the thefts were perpetrated. The court charged the jury that if they believed, beyond a reasonable doubt, that the defendant, by any one act of theft, within, etc., feloniously stole, etc., an amount of the bills and coin charged, or of either singly, of the value of 5 dollars or upwards, they might find him guilty of grand larceny; if of less than the value of 5 dollars, of petit larceny. The jury found him guilty of grand larceny. It is contended that the state was bound to prove a larceny of the exact sums named in the indictment, or fail entirely in the prosecution. We do not think so, and have no doubt that the instruction expressed the law. See 2 Wat. Grah. on New Trials, 55."

In State *v.* Martin, 82 N. C. 672, the case was on a charge of larceny, in which it was alleged that ten yards of jeans had been stolen, while the proof showed that 30¼ yards were stolen. It was objected that this constituted a variance. The court in the course of its opinion overruling this objection, said: "The remaining instruction asked is that there was a variance between

p. *Perjury.* — The general rule is that a charge of perjury must be substantially proved as alleged;[6] but where the indictment con-

the proof and the allegation, because the indictment charged the larceny of ten yards of jeans, and the proof was thirty and a half yards. This is so absurd that it looks like trifling with the court, and to cite an authority against the fallacy of the position would be attaching too much importance to the exception."

In Love *v.* State, 57 Ga. 171, the following is the syllabus: "An indictment for simple larceny in stealing two hogs at the same time and place, though alleging that one is the property of one person, and the other of another, covers but one transaction, and charges but one offense, and judgment thereon will not be arrested. Proof that defendant stole one of the hogs is sufficient to convict under such an indictment."

Where it Is Necessary To Prove Value. — From the opinion in Com. *v.* Lavery, 101 Mass. 207, 208, we take the following: "The indictment alleged that the defendant stole 'sixty pieces of the fractional currency of the United States, each piece thereof being of the denomination and value of fifty cents; one bank bill of the denomination and value of five dollars; six towels of the value of one dollar; twelve handkerchiefs of the value of six dollars.' The fractional currency and the bank bill, as well as some of the towels and handkerchiefs, but a less number of each than the number stated in the indictment, were produced in court, identified by a witness, and submitted to and examined by the jury, who were instructed that 'if it was proved that the defendant stole the articles exhibited in court, and if on the evidence given, or on the inspection of the articles themselves, they found them to be of some value, it would be competent for them to find the defendant guilty;' and a general verdict of guilty of simple larceny was returned. Upon consideration, the court is unanimously of opinion that this instruction was not sufficiently guarded. By the statutes of the Commonwealth, goods and chattels must be of some value in order to be the subject of simple larceny. Gen. Sts. c. 161, sec. 18. Commonwealth *v.* McKenney, 9 Gray 114. No person therefore can be sentenced for stealing anything which is not both alleged in the accusation, and found by the verdict, to be of some value. This indictment does not allege that each of the towels or each of the handkerchiefs was of some value, but only that the six towels together were of some value, and the twelve handkerchiefs together were of some value. It is quite consistent with these allegations that the only towels or handkerchiefs which were deemed by the grand jury to be of any value were those which were not produced at the trial or proved to have been stolen. The traverse jury, under the instructions given them, may have found the defendant guilty, solely by reason of thinking that the towels and handkerchiefs produced were of some value. To restate the case more particularly, the indictment and verdict do not exclude the conclusion that the grand jury were of opinion that the fractional currency, the bank bill, and some of the towels and handkerchiefs, were valuable, but that the other towels and handkerchiefs, and the only ones which were proved at the trial to have been stolen, were of no value; and, on the other hand, that the traverse jury were of opinion that the only stolen articles of any value were the towels and handkerchiefs produced in court, which the grand jury, for aught that appears, may have thought to be of no value whatever. As the defendant may therefore have been convicted, without being found guilty of stealing anything which the grand jury and the traverse jury concurred in finding to be of any value, she is entitled to a new trial. O'Connel *v.* Commonwealth, 7 Met. 460. Hope *v.* Commonwealth, 9 Met. 134."

6. Gandy *v.* State, 23 Neb. 436, 36 N. W. 817; State *v.* Kalyton, 29 Or. 375, 45 Pac. 756.

tains several assignments proof of one is sufficient[7] and a failure to prove less than all the assignments will not constitute a variance.[8] The allegations descriptive of the proceedings in which the oath was administered,[9] the form of the oath administered,[10] the instrument containing the oath,[11] and the time, when matter of record,[12] must be proved as laid.[13]

q. *Receiving Stolen Goods.* — As larceny, and receiving stolen goods knowing them to have been stolen, are separate and distinct offenses,[14] under an indictment for larceny proof of receiving stolen goods constitutes a variance,[15] and *vice versa*.[16] If the indictment alleges the name of the party by whom the property was stolen, proof as alleged must be made,[17] though such allegation is not necessary.[18] And the allegation of ownership of property,[19] its descrip-

7. Marvin *v.* State, 53 Ark. 395, 14 S. W. 87; State *v.* Hascall, 6 N. H. 352; State *v.* Blaisdell, 59 N. H. 328.

8. Page *v.* State, 59 Miss. 474; Dodge *v.* State, 24 N. J. L. 455; Moore *v.* State, 32 Tex. Crim. 405, 24 S. W. 95.

9. Jacobs *v.* State, 61 Ala. 448; Walker *v.* State, 96 Ala. 53, 11 So. 401; People *v.* Strassman, 112 Cal. 683, 45 Pac. 3; Strong *v.* State, 1 Blackf. (Ind.) 193; Com. *v.* Farley, Thatcher Crim. Cas. (Mass.) 654; Com. *v.* Soper, 133 Mass. 393.

10. *Kentucky.* — Com. *v.* Jarboe, 89 Ky. 143, 12 S. W. 138.

New Hampshire. — State *v.* Norris, 9 N. H. 96; State *v.* Gates, 17 N. H. 373.

New York. — Smith *v.* People, 1 Park. Crim. 317.

North Carolina. — State *v.* Davis, 69 N. C. 383.

South Carolina. — State *v.* Porter, 2 Hill L. 611.

Tennessee. — Williams *v.* State, 7 Humph. 47.

Texas. — Beach *v.* State, 32 Tex. Crim. 240, 22 S. W. 976.

11. Dill *v.* People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254; Tardy *v.* State, 4 Blackf. (Ind.) 152; Com. *v.* Hughes, 5 Allen (Mass.) 499; Wohlgemuth *v.* United States, 6 N. M. 586, 30 Pac. 854; Case *v.* People, 14 Hun (N. Y.) 503, *reversed*, 76 N. Y. 242.

12. United States *v.* McNeal, 1 Gall. 387, 26 Fed. Cas. No. 15,700; United States *v.* Matthews, 68 Fed. 880; Matthews *v.* United States, 161 U. S. 500; State *v.* Lewis, 93 N. C. 581.

13. Smith *v.* People, 1 Park. Crim. (N. Y.) 317; State *v.* Alexander, 13 N. C. (2 Dev. F.) 470; State *v.* Collins, 85 N. C. 511; State *v.* Green, 100 N. C. 547, 6 S. E. 402; State *v.* Peters, 107 N. C. 876, 12 S. E. 74; State *v.* Hayes, 8 Ohio Dec. 454; Rhodes *v.* Com., 78 Va. 692.

14. State *v.* Moultrie, 33 La. Ann. 1146; Gaither *v.* State, 21 Tex. App. 527, 1 S. W. 456.

15. Johnson *v.* State, 13 Tex. App. 378; Brown *v.* State, 15 Tex. App. 581; Chandler *v.* State, 15 Tex. App. 587.

16. State *v.* Moultrie, 33 La. Ann. 1146; Gaither *v.* State, 21 Tex. App. 527, 1 S. W. 456.

In State *v.* Moultrie, 33 La. Ann. 1146, the court said: "The allegations as to larceny do not cover those necessary to constitute receiving stolen goods, and although the offenses are to some extent kindred or of the same class, yet they are as to punishment and to the essential ingredients constituting the crime distinct. Bishop on Crim. Pro., Waterman's Digest, and authorities cited by these authors."

17. United States *v.* DeBare, 6 Biss. 358, 25 Fed. Cas. No. 14,935; Com. *v.* King, 9 Cush. (Mass.) 284.

18. Hester *v.* State, 103 Ala. 83, 15 So. 857; Holford *v.* State, 2 Blackf. (Ind.) 103; Com. *v.* King, 9 Cush. (Mass.) 284.

19. People *v.* Ribolsi, 89 Cal. 492, 26 Pac. 1082; Butler *v.* State, 35 Fla. 246, 17 So. 551; O'Connell *v.* State,

tion,[20] as well as allegations that certain matters were unknown to

55 Ga. 296; Brooks *v.* State, 5 Baxt. (Tenn.) 607.

Proof of Special Property Is Sufficient. — Brooks *v.* State, 5 Baxt. (Tenn.) 607.

20. Com. *v.* Campbell, 103 Mass. 436; Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116; People *v.* Wiley, 3 Hill (N. Y.) 194; State *v.* Horan, 61 N. C. (Phill. L.) 571; Williams *v.* People, 101 Ill. 382; Sands *v.* State, 30 Tex. App. 578, 18 S. W. 86.

In State *v.* Horan, 61 N. C. (Phill. L.) 571, the court in its opinion said: "The following distinction may be taken between the descriptions of the same article in different forms of existence. When in its raw or unmanufactured state it may be described by its name, and as so much in quantity, weight or measure, but if it be worked up into a specific article, and remain so at the time when stolen, it must be described by the name by which such specific article is generally known. Two cases which have been decided may serve to illustrate this distinction. In the case of the State *v.* Moore, 11 Ire. 70, it was held that turpentine, which has run into boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny. But an indictment for stealing two barrels of turpentine cannot be supported by proving that the turpentine was stolen by having been dipped out of the boxes, from time to time in small quantities, and then put into barrels. In the other case, Rex *v.* Holloway, above, it was decided that a charge of stealing a brass furnace was not sustained by proof that the furnace was broken into pieces before it was stolen. In the case now before us the cast iron top of a box, separated from the box to which it belonged has not, so far as we are informed, any distinct name, and may therefore well be described as one pound of iron. Whether the top of the box weighed more or less than a pound, makes no difference. State *v.* Moore, *ubi supra.*"

And the court in Williams *v.* People, 101 Ill. 382, said: "Mr. Wharton, in discussing the sufficiency of an indictment for receiving stolen property, among other things says: 'The indictment should describe the goods with accuracy, and a variance in this particular will be fatal.' 2 Wharton on Crim. Law § 1901, 7th ed. Indeed, it is an elementary and fundamental principle that every material fact essential to the commission of a crime must be distinctly alleged and clearly proven on the trial, in order to warrant a conviction. The specific charge in this case is, that the accused 'for their own gain, knowingly and feloniously received *one gold* coin of the value of $10, one bill, purporting to be issued by the Monmouth National Bank, of the value of $10, and one bill, purporting to be issued by some National bank, of the value of $5,' knowing the same to have been stolen. It was clearly the duty of the pleader to give, as he did, a proper description of the stolen money alleged to have been received by the accused, otherwise they could not intelligently have prepared for trial; and as this was a material averment in the indictment, it follows the prosecutor was bound to prove it substantially as laid. This has not been done. The only evidence to be found in the record that can be regarded as having the slightest reference to this allegation in the indictment, is the statement of Ragsdale with reference to what he found on the defendants when he searched them at the straw-pile. He says: 'I found on Mose Williams $10, on Frank Lewis $15, and some small change, amounting to, I think, twenty-five cents.' There is no proof of their having received, or of having about them, a gold coin of any kind, or a national bank bill of any denomination or description. . . . It is clear that the accused might well have had the amount of money on their persons testified to by the witness, and not have had a gold coin or bank bill of any kind about them, much less the particular kinds mentioned in the indictment."

the grand jury,[21] must all be proved as laid in the indictment.[22]

IV. DECISION OF QUESTION OF VARIANCE.

1. In General. — As a disagreement between the allegations of the pleadings and the evidence offered in their support raises a question of admissibility of evidence,[23] as a rule such question must be decided by the court,[24] though under rare circumstances it is

21. Sault *v.* People, 3 Colo. App. 502, 34 Pac. 263. In this case, the court in its opinion said: "As it is required, in indictments, that the names of the persons injured, and of all others whose existence is legally essential to the charge, be set forth, if known, it is, of course, material that they be precisely proved as laid. Thus, the name of the legal owner, general or special, of the goods stolen or intended to be stolen, must be alleged and proved. And if the person be described as one whose name is to the jurors unknown, and it be proven that he was known, the variance is fatal, and the person will be acquitted. 3 Greenl. Ev. § 22. 'Where a third person can not be described by name, it is enough to charge him as a certain person to the jurors aforesaid unknown, which, as will presently be seen, is correct, if the party was at the time of the indictment unknown to the grand jury, though he became known afterwards. But if the third party's name be known to the grand jury, or could have been known by inquiry of witnesses at hand, the allegation will be improper, and the defendant must be acquitted on that indictment, though he may be afterward tried upon a new one, in which the mistake is corrected.' Whart. Crim. Pl. §§ 111, 112. 'When a third person is described as a person to the grand jurors unknown, and it turns out that he was known to the grand jurors, the variance is fatal.' Whart. Crim. Ev. § 97. Where the name of such third person, even if unknown, might have been ascertained by the use of reasonable diligence, the effect is the same as if the name was actually known. Jorasco *v.* State, 6 Tex. App. 238. The rule laid down by the authorities is not a mere arbitrary one. It is the right of a defendant in a criminal case to be informed of the charges against him as fully as it is in the power of the prosecution to inform him, so that he may be enabled intelligently to prepare his defense. Where he is charged with larceny, the name of the person from whom the property was stolen; where with murder, the name of the person killed; where with receiving stolen goods, the name of the owner of the goods, and of the person from whom they were received, — must be set out in the indictment or information, and only the inability to ascertain such names will excuse the failure to give them. See, also, State *v.* Perkins, 45 Tex. 10; State *v.* Beatty, Phil. (N. C.) 52."

22. O'Connell *v.* State, 55 Ga. 296; Holtz *v.* State, 30 Ohio St. 486; Sands *v.* State, 30 Tex. App. 578, 18 S. W. 86. See cases cited in notes 5-7.

23. Robinson *v.* Ferry, 11 Conn. 460; Winslow *v.* Bailey, 16 Me. 319; Funk's Lessee *v.* Kincaid, 5 Md. 404; Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Bogle *v.* Sullivant, 1 Call (Va.) 561; Claytor *v.* Anthony, 6 Rand. (Va.) 285; Dr. Harter Medicine Co. *v.* Hopkins, 83 Wis. 309, 53 N. W. 501.

24. Oxley *v.* Storer, 54 Ill. 159; Hendrick *v.* Kellogg, 3 G. Gr. (Iowa) 215; Birch *v.* Benton, 26 Mo. 153; Pharo *v.* Johnson, 15 Iowa 560; Becker *v.* Crow, 7 Bush. (Ky.) 198; People *v.* Ivey, 49 Cal. 56.

Whether a fact alleged in a petition is material to the issue, and whether it is denied in the answer, are both questions of law, which should be determined by the court. Becker *v.* Crow, 7 Bush (Ky.) 198.

sometimes a mixed question of law and fact to be determined by the jury under proper instructions from the court.[25]

2. When Facts Undisputed. — When the facts are not disputed, the rule is that the question is always for the court.[26]

3. When Facts Disputed. — When the facts are disputed with reference to a question of variance, the matter is referred to the jury with proper instructions from the court.[27]

V. WAIVER OF VARIANCE.

1. General Rule. — The rule is scarcely without exception that if advantage be not taken of a variance between the pleadings and proof at the trial, such variance will be treated as waived,[28] and

25. State *v.* Green, 100 N. C. 419, 5 S. E. 422; Morris *v.* Bridgeport Hydraulic Co., 47 Conn. 279; Laflin & Rand Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Jaccard *v.* Anderson, 37 Mo. 91.

The question of a variance between the allegation and the proof, where there is evidence to support the allegation, becomes a question of fact, for the determination of the jury. City of Chicago *v.* Seben, 62 Ill. App. 248.

The court should never direct a verdict, on the ground of a variance between the proof and the declaration, when there is any evidence in the case that has a tendency to prove the facts stated in the declaration that are essential to the right of recovery, and from which the jury might find the facts as alleged, since plaintiff has the right, in such case, to have the facts submitted to the jury. Lewis *v.* Pratt, 48 Vt. 358.

26. Oxley *v.* Storer, 54 Ill. 159; Hendrick *v.* Kellogg, 3 G. Gr. (Iowa) 215; Birch *v.* Benton, 26 Mo. 153; Pharo *v.* Johnson, 15 Iowa 560; Becker *v.* Crow, 7 Bush (Ky.) 198; People *v.* Ivey, 49 Cal. 56; Duelle *v.* Roath, 29 Ga. 733.

27. State *v.* Green, 100 N. C. 419, 5 S. E. 422; Morris *v.* Bridgeport Hydraulic Co., 47 Conn. 279; Laflin & Rand Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Jaccard *v.* Anderson, 37 Mo. 91.

28. *United States.* — Wasarch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293; Grayson *v.* Lynch, 163 U. S. 468.

California. — Marshall *v.* Ferguson, 23 Cal. 65; Dikeman *v.* Norrie, 36 Cal. 94; Bell *v.* Knowles, 45 Cal. 193.

Colorado. — Smith *v.* Roe, 7 Colo. App. 169, 1 Pac. 909; McCoy *v.* Wilson, 8 Colo. 335, 7 Pac. 298; Cunningham *v.* Bostwick, 7 Colo. App. 169, 43 Pac. 151; Percy Consol. Min. Co. *v.* Hallam, 22 Colo. 233, 44 Pac. 509.

Illinois. — Curry *v.* People, 54 Ill. 263; Grundeis *v.* Hartwell, 90 Ill. 324; City of Mattoon *v.* Fallin, 113 Ill. 249; Dolin *v.* Prince, 124 Ill. 76, 16 N. E. 242; Wight Fireproofing Co. *v.* Poczekai, 130 Ill. 139, 22 N. E. 543; City of Chicago *v.* Moore, 139 Ill. 201, 28 N. E. 1071; Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025; Betting *v.* Hobbett, 142 Ill. 72, 30 N. E. 1048; Libby, McNeill & Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; Harris *v.* Shebek, 151 Ill. 287, 37 N. E. 1015; Hess *v.* Rosenthal, 55 Ill. App. 324; Morier *v.* Moran, 58 Ill. App. 235; Chicago & A. R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698; City of Chicago *v.* Seben, 62 Ill. App. 248.

Indiana. — Hull *v.* Green, 26 Ind. 388; Woodward *v.* Wilcox, 27 Ind. 207; Krewson *v.* Cloud, 45 Ind. 273.

Louisiana. — Langlini *v.* Broussard, 12 Mart. (O. S.) 242.

Maine. — Conway Fire Ins. Co. *v.* Sewall, 54 Me. 352.

Maryland. — Strauss *v.* Young, 36 Md. 246.

Massachusetts. — Hutchinson *v.*

therefore no advantage can be taken thereof in an appellate court.[29]

2. By Pleadings, or Stipulations of Counsel. — There may be such admissions in the pleadings of a party[30] or the stipulations of counsel as to amount to a waiver.[31] Illustrations are given in the notes.[32]

3. When Variance Noticed in Appellate Court. — When the suit is in equity, under the English chancery system, wherein everything done in the case is necessarily a part of the record,[33] or where the variance appears of record and is of such a character that the affirmance of the judgment would not protect the parties as to the matter actually litigated,[34] the appellate court will consider the variance, though not brought to the attention of the lower court.[35]

Gurley, 8 Allen 23; Russell *v.* Barry, 115 Mass. 300.

Minnesota. — Washburn *v.* Winslow, 16 Minn. 33; Nelson *v.* Thompson, 23 Minn. 508; Cummins *v.* Petsch, 41 Minn. 115, 42 N. W. 789; Johnson *v.* Avery, 41 Minn. 485, 43 N. W. 340; O'Connor *v.* Delaney, 53 Minn. 247, 54 N. W. 1108, 39 Am. St. Rep. 601.

Mississippi. — Stier *v.* Surget, 10 Smed. & M. 154; Kimbrough *v.* Ragsdale, 69 Miss. 674, 13 So. 830.

Missouri. — Blair *v.* Corby, 29 Mo. 480; Waldon *v.* Bolton, 55 Mo. 405; Liddell *v.* Fisher, 48 Mo. App. 449.

Montana. — Frohner *v.* Rodgers, 2 Mont. 179.

Nevada. — Tognini *v.* Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442.

New Hampshire. — McConihe *v.* Sawyer, 12 N. H. 396; Hopkins *v.* Atlantic & St. L. R. Co., 36 N. H. 9.

New York. — Luckey *v.* Frantzkee, 1 E. D. Smith 47; Barnes *v.* Perine, 12 N. Y. 18; Cardell *v.* McNiel, 21 N. Y. 336; Niebuhr *v.* Scheyer, 135 N. Y. 614, 32 N. E. 13; Dey *v.* Prentice, 90 Hun 27, 35 N. Y. Supp. 563.

North Carolina. — Allen *v.* Sallinger, 108 N. C. 159, 12 S. E. 896.

Ohio. — Speer *v.* Bishop, 24 Ohio St. 598.

Pennsylvania. — Miller *v.* Miller, 4 Pa. St. 317.

29. *Illinois.* — Driver *v.* Ford, 90 Ill. 595; Stearns *v.* Reidy, 33 Ill. App. 246.

Indiana. — Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

Maryland. — Pennsylvania, D. & M. Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

Michigan. — Johnson *v.* Spear, 82 Mich. 453, 46 N. W. 733.

Missouri. — Bank of Springfield *v.* First Nat. Bank, 30 Mo. App. 271.

New York. — Fisdale *v.* Morgan, 7 Hun 583; Mensch *v.* Mensch, 2 Lans. 235.

Vermont. — Peck *v.* Thompson, 15 Vt. 637; Phelps *v.* Conant, 30 Vt. 277; Hills *v.* Town of Marlboro, 40 Vt. 648.

30. Rozet *v.* Harvey, 26 Ill. App. 558; Geheebe *v.* Stanby, 1 La. Ann. 17; Buzzell *v.* Snell, 25 N. H. 474; Handley *v.* Chicago, etc. R. Co., 55 Mo. App. 499.

31. Harbison *v.* Shook, 41 Ill. 141, 142; Pillsbury *v.* Browne, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94; Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275.

32. Buzzell *v.* Snell, 25 N. H. 474; Hoff *v.* Coumeight, 14 Misc. 314, 35 N. Y. Supp. 1052.

Where, in the statement of the answer, a case is made demanding the interposition of the court of equity to relieve the complainant, a decree may be entered, though the case stated in the bill is different, and is unsupported by the proof. Rose *v.* Mynatt, 7 Yerg. (Tenn.) 30.

33. White *v.* Morrison, 11 Ill. 361; Ward *v.* Owen, 12 Ill. 283; Mason *v.* Bair, 33 Ill. 194; Bennett *v.* Welch, 15 Ind. 332; Smith *v.* Newland, 40 Ill. 100.

34. Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756; Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580.

35. Kelly *v.* Kelly, 54 Mich. 30,

VI. MODE OF RAISING OBJECTION.

1. In General. — A. Time of Making Objection. — The general rule as to the mode of making objection to the introduction of evidence which does not correspond to the allegations of the pleadings, is to object at the time it is offered on the specific ground of a variance.[36]

B. Variance Must Be Material. — The evidence must materially vary from the pleadings to render an objection available.[37]

C. Variance Must Be Such as to Mislead. — a. *In General.* In several states, by virtue of statute the variance must be of such a character as to mislead the adverse party,[38] or it will be regarded as immaterial.[39]

b. *Affidavit That Party Has Been Misled.* — In some states, by virtue of statute it must be made to appear to the court by proof on affidavit that a party has been misled,[40] by the alleged variance,

19 N. W. 580; Dille *v.* Woods, 14 Ohio 122; Bedford *v.* Williams, 5 Coldw. (Tenn.) 202; Burley *v.* Weller, 14 W. Va. 264.

63. Straus *v.* Young, 36 Md. 246; McCormick Harv. Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588. See cases cited in note 28, this series.

37. *Louisiana.* — Hogan *v.* Gibson, 12 La. 457.

Massachusetts. — Ware *v.* Gay, 11 Pick. 106; Norton *v.* Huxley, 13 Gray 285.

Michigan. — Kroll *v.* Ten Eyck's Estate, 48 Mich. 230, 12 N. W. 164; Macumber *v.* White River L. & B. Co., 52 Mich. 195, 17 N. W. 806.

Missouri. — Ridenhour *v.* Kansas City C. R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

New Hampshire. — Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163.

New York. — Cottrell *v.* Conklin, 4 Duer (N. Y. Super.) 45.

38. *Arkansas.* — Molen *v.* Orr, 44 Ark. 486.

Missouri. — Fischer *v.* Max, 49 Mo. 404.

New Jersey. — Hallock *v.* Com. Ins. Co., 26 N. J. L. 268.

New York. — Cotheal *v.* Talmadge, 1 E. D. Smith 573; Barrick *v.* Austin, 21 Barb. 241.

North Carolina. — Lawrence *v.* Hester, 93 N. C. 79; Mode *v.* Penland, 93 N. C. 292; McClelland *v.* Smith, 3 Tex. 210.

39. *California.* — Peters *v.* Foss, 20 Cal. 586; Hitchcock *v.* McElrath, 72 Cal. 565, 14 Pac. 305.

Colorado. — Rio Grande W. R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

New York. — Willis *v.* Orser, 13 N. Y. Super. 322; Seaman *v.* Low, 4 Bosw. (N. Y. Super.) 337; Dunn *v.* Durant, 9 Daly 389.

North Carolina. — Mode *v.* Penland, 93 N. C. 292.

Washington. — Bullion Beck & C. Min. Co. *v.* Eureka Hill Min. Co., 5 Wash. 3, 11 Pac. 575.

Wisconsin. — Herrick *v.* Graves, 16 Wis. 157.

40. *Missouri.* — Hoyt *v.* Quinn, 20 Mo. App. 72; Cayuga County Nat. Bank *v.* Dunklin, 29 Mo. App. 442; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Olmstead *v.* Smith, 87 Mo. 602; Bank of Pleasant Hill *v.* Wills, 79 Mo. 275; Ferris *v.* Thaw, 72 Mo. 446; Waldhier *v.* Hannibal, etc. R. Co., 71 Mo. 514; Meyer *v.* Chambers, 68 Mo. 626; Ely *v.* Porter, 58 Mo. 158; Wells *v.* Sharp, 57 Mo. 56; Clements *v.* Maloney, 55 Mo. 352; Turner *v.* Chillicothe, etc. R. Co., 51 Mo. 501; Fischer *v.* Max, 49 Mo. 404; Wolf *v.* Lauman, 34 Mo. 575; La Belle Sav. Bank *v.* Taylor, 69 Mo. App. 99; James *v.* Hicks, 58 Mo. App. 521; Brown *v.* Hannibal, etc. R. Co., 31 Mo. App. 661; Clydesdale Horse Co. *v.* Bennett, 52 Mo. App. 333; Lalor *v.* Byrne, 51 Mo. App. 578; Brown *v.* Kansas City, etc. R. Co., 20 Mo. App. 427; Hollfield *v.*

and also in what respect he has been misled by the same.[41]

2. General Objection. — In most jurisdictions a general objection to evidence, without specifying the particular part of the evidence producing the variance, can not be made a ground of error in an appellate court,[42] while in other jurisdictions a general objection is

Black, 20 Mo. App. 328; Gaty *v.* Sack, 19 Mo. App. 470; Baker *v.* Raley, 18 Mo. App. 562.

New Jersey. — Bunting *v.* Allen, 18 N. J. L. 299.

New York. — Chapman *v.* Carolin, 3 Bosw. (N. Y. Super.) 456; Dunn *v.* Durant, 9 Daly 389; Place *v.* Minster, 65 N. Y. 89; Hauck *v.* Craighead, 4 Hun 561.

Oregon. — Hill *v.* Mellon, 3 Or. 542.

South Carolina. — Ahrens *v.* State Bank, 3 S. C. 401.

Texas. — St. Louis, etc. R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288.

Affidavit Required. — In Bunting *v.* Allen, 18 N. J. L. 299, the court in its opinion says: "If the variance between the particular and the evidence offered, is such as upon its very face to misled the party, such as the court and every intelligent reader of the particular must have understod as meaning something else than that which is offered in evidence ought to be rejected. But a trifling variance in date, or difference in amount, or stating it as *cash* lent, when it was funds borrowed and to be returned in a certain way, ought not to exclude the evidence, unless the party objecting will satisfy the court he has been misled by it. If, for instance, the defendant had put in an affidavit to that effect, stating that he had not understood the particular as referring to the funds mentioned in that writing, and that if he had done so he could have explained the transaction in some other way, it ought to have been rejected. This was not done, nor offered to be done."

41. See cases cited in preceding note.

42. *Alabama.* — Richards *v.* Bestor, 90 Ala. 352, 8 So. 30; Milton *v.* Haden, 32 Ala. 30; Sawyer's Admr. *v.* Patterson, 11 Ala. 523.

California. — Eversdon *v.* Haywhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Knox *v.* Higby, 76 Cal. 264, 18 Pac. 381.

Georgia. — Southern Mut. Ins. Co. *v.* Turnley, 100 Ga. 296, 27 S. E. 975.

Illinois. — Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498; Union Show Case Co. *v.* Blindauer, 175 Ill. 325, 51 N. E. 709; Chicago, etc. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; Crone *v.* Crone, 170 Ill. 494, 49 N. E. 217; Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763; Probst Constr. Co. *v.* Foley, 166 Ill. 31, 46 N. E. 750; Chicago *v.* Seben, 165 Ill. 371, 46 N. E. 244; Chicago, etc. R. Co. *v.* Dickson, 143 Ill. 368, 32 N. E. 380; Chicago, etc. R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Holman *v.* Gill, 107 Ill. 467; Thompson *v.* Hoagland, 65 Ill. 310; Chicago, etc. R. Co. *v.* Hull, 76 Ill. App. 408.

Michigan. — Detroit, etc. R. Co. *v.* Forbes, 30 Mich. 165.

Mississippi. — Greer *v.* Bush, 57 Miss. 575.

Missouri. — State *v.* Boogher, 8 Mo. App. 600.

Nebraska. — Catron *v.* Shepherd, 8 Neb. 308.

New York. — Belknap *v.* Sealey, 14 N. Y. 143; Doyle *v.* Mulren, 7 Abb. Pr. (N. S.) 258.

Vermont. — Holdridge *v.* Holdridge, 53 Vt. 546; Mann *v.* Birchard, 40 Vt. 326; Hills *v.* Marlboro, 40 Vt. 648.

Wisconsin. — Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

A general exception to the final decision of a judge "as well upon the facts as the law of the case that the plaintiff was entitled to recover" raises only the question whether, upon the facts as found, the law has been properly decided, and does not present for the consideration of the appellate court a special objection upon the ground of variance between the complaint or answer and the proof. Belknap *v.* Sealey, 14 N. Y. 143.

sufficient for this purpose without a more particular specification.[43]

3. Motion To Exclude Evidence. — When evidence has been introduced which does not materially correspond to the allegations of the pleadings, a motion to exclude the evidence from the jury is a proper method of objection,[44] or an instruction to the jury to disregard the evidence.[45]

4. On Craving Oyer and Demurring. — When a written instrument under seal is declared on, the question of variance may be

Where a general objection to evidence is made without assigning any reason, it can be regarded only as going to the competency of the evidence, and for the purpose of a variance must be treated as if no objection had been made at all. Holman *v.* Gill, 107 Ill. 467.

43. In Vermont, under the statute, Stat. Vt. 1894 § 1630, providing that no question of variance may be heard in a case brought by exceptions to the Supreme Court, except it appears that the question was raised and passed upon in the trial court, unless such variance is material, affecting the very right of the matter, it is not enough to except to the admission of evidence on the general ground of variance, unless it is material and substantial, but the exceptions must state the particular variance relied upon and the judgment of the trial court thereon. Morey *v.* King, 49 Vt. 304.

The right to object, on the trial, to evidence of a parol warranty, and raise the question of its admissibility on appeal, was not waived by plaintiff pleading over after a motion to strike out an allegation of the warranty in the answer was overruled. Mast *v.* Pearce, 58 Iowa 579, 8 N. W. 632, 12 N. W. 597, 43 Am. Rep. 125.

Under an indictment against a freedman for the larceny of a sale, alleged to be the property of J. L. Terrell, the prisoner's confession that he had taken "Mass' Lee's mule," is not competent evidence, without proof of the identity of J. L. Terrell as "Mass' Lee;" and the admission of such confession is an error which will work a reversal of the judgment, although the bill of exception states that the defendant was on trial for the larceny of a mule, "the property of Lee Terrell," and no specific objection was made to the evidence on the ground of variance. Gabriel *v.* State, 40 Ala. 357. In this case, the court said: "The evidence objected to, being illegal, should have been excluded by the court. It is evident that the prisoner had in view the objection to its admissibility on the ground that the confession was not voluntary. But the objection is general, and we do not feel authorized to limit the extent of the same. A general objection to the admissibility of evidence is sufficient, if the evidence is illegal upon its face, when applied to the pleadings in the cause. Cunningham *v.* Cochran, 18 Ala. 480, 52 Am. Dec. 230."

44. *Virginia.* — Richmond, etc. Co. *v.* West, 100 Va. 184, 40 S. E. 643; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 801, 22 S. E. 869; Knights of Pythias *v.* Weller, 93 Va. 605, 25 S. E. 891; Shenandoah Val. R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796; Drummond *v.* Crutcher, 2 Wash. 218; Davis *v.* Miller, 14 Gratt. 1.

Washington. — Guley *v.* Northwestern C. & Transp. Co., 7 Wash. 491, 35 Pac. 372.

West Virginia. — Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197; Davisson *v.* Ford, 23 W. Va. 617; Dresser *v.* Transp. Co., 8 W. Va. 553; Harris *v.* Lewis, 5 W. Va. 575; Scott *v.* Baker, 3 W. Va. 285; Baltimore, etc. R. Co. *v.* Rathbone, 1 W. Va. 87; James *v.* Adams, 8 W. Va. 568; Damarin *v.* Young, 27 W. Va. 436; Smith *v.* Lawson, 18 W. Va. 212; State *v.* Fleshman, 40 W. Va. 726, 22 S. E. 309.

45. Ogilvie *v.* Hallam, 58 Iowa 714, 12 N. W. 730; Davis *v.* Miller, 14 Gratt. (Va.) 1; Damarin *v.* Young, 27 W. Va. 436; Smith *v.* Lawson, 18 W. Va. 212.

raising by craving oyer of the instrument and demurring to the declaration.[46]

5. Motion for Non-suit. — If the evidence is so different from the pleadings as not to support the case made by them, a motion for a non-suit may be made,[47] and in such case a refusal to sustain such motion is ground for reversal of the judgment.[48]

6. Directing Verdict on Ground of Variance. — Where the evidence of a party upon whom rests the burden of proof in a case is materially variant from the case as stated in his pleadings, a

46. *England.* — Howell *v.* Richards, 11 East 633.
Canada. — Waugh *v.* Bussell, 5 Taunt. 707, 1 E. C. L. 241.
Arkansas. — Kelly *v.* Matthews, 5 Ark. 223; Cummins *v.* Woodruff, 5 Ark. 116; Watkins *v.* Weaver, 4 Ark. 556.
Illinois. — Taylor *v.* Kennedy, 1 Ill. 91.
Indiana. — Osborne *v.* Fulton, 1 Blackf. 233; Deming *v.* Bullitt, 1 Blackf. 241.
Kentucky. — Milroy *v.* Hensley, 2 Bibb 20; Salter *v.* Richardson, 3 T. B. Mon. 204.
Maine. — Colton *v.* Stanwood, 67 Me. 25.
Maryland. — Baltimore Cemetery Co. *v.* First Independent Church, 13 Md. 117; Anderson *v.* Critcher, 11 Gill & J. 450.
Massachusetts. — Dorr *v.* Fenno, 12 Pick. 521.
Mississippi. — Robertson *v.* Banks, 1 Smed. & M. 666.
Missouri. — Treat *v.* Brush, 11 Mo. 310.
New York. — Jansen *v.* Ostrander, 1 Cow. 670; Ehle *v.* Purdy, 6 Wend. 629.
Ohio. — Mulford *v.* Young, 6 Ohio 294.
Tennessee. — Steele *v.* M'Kinnie, 5 Yerg. 449.
Texas. — Pearce *v.* Bell, 21 Tex. 688; Hunt *v.* Wright, 13 Tex. 549; Greenwood *v.* Anderson, 8 Tex. 225; Peters *v.* Crittenden, 8 Tex. 131.
Vermont. — Denton *v.* Adams, 6 Vt. 40.
Virginia. — Browne *v.* Ross, 4 Call 221; Sterrett *v.* Teaford, 4 Gratt. 84; Craghill *v.* Page, 2 Hen. & M. 446.
West Virginia. — Thompson *v.* Boggs, 8 W. Va. 63.

47. *England.* — Bowditch *v.* Mawley, 1 Campb. 195; Scott *v.* Godwin, 1 Bos. & Pull. 67.
California. — Wagner *v.* Hansen, 103 Cal. 104, 37 Pac. 195.
Colorado. — Bottom *v.* Barton, 12 Colo. App. 53, 54 Pac. 1031.
Georgia. — Whelan *v.* Mayor of Milledgeville, 92 Ga. 374, 17 S. E. 339; Shomo *v.* Ransom, 92 Ga. 97, 18 S. E. 534.
Illinois. — Pearsons *v.* Lee, 2 Ill. 193.
Indiana. — City of Plymouth *v.* Milner, 117 Ind. 324, 20 N. E. 235.
Kentucky. — Bull *v.* McCrea, 8 B. Mon. 422; Faris *v.* Lewis, 2 B. Mon. 375.
Michigan. — Mead *v.* Raymond, 52 Mich. 14, 17 N. W. 221.
Minnesota. — Cowles *v.* Warner, 22 Minn. 449.
Missouri. — Reeves *v.* Larkin, 19 Mo. 192.
New Hampshire. — Pickering *v.* De Rochemont, 45 N. H. 67; Hall *v.* Spaulding, 42 N. H. 259; Smith *v.* Wheeler, 29 N. H. 334; Hart *v.* Chesley, 18 N. H. 373.
New York. — Chapman *v.* Carolin, 3 Bosw. 456; Dunn *v.* Durant, 9 Daly 389; Boorman *v.* Jenkins, 12 Wend. 566.
Pennsylvania. — Jenneson *v.* Camden, 5 Clark 409.
South Carolina. — Ahrens *v.* State Bank, 3 S. C. 401; Marks *v.* Robinson, 1 Bailey L. 89; Morris *v.* Fort, 2 McCord L. 397; Brooks *v.* Lowrie, 1 Nott & McC. 342.
Vermont. — Hilliker *v.* Loop, 5 Vt. 116.
Washington. — Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.
Wisconsin. — Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20; Hoeflinger *v.* Stafford, 38 Wis. 391.

48. See cases in next preceding note.

motion to direct a verdict for the adverse party will be sustained,[49] and to overrule such motion is reversible error.[50] But to sustain a motion there must be a clear case of variance.[51]

7. Demurrer to the Evidence. — There are several cases which hold that when there is such a variance that the evidence does not appreciably tend to sustain the allegations made in the pleadings, the question may be raised by a demurrer to the evidence.[52] But there are cases which hold that the question can not thus be raised.[53]

8. Motion in Arrest of Judgment. — Ordinarily a variance between the pleadings and proof can not be reached by motion in arrest of judgment.[54]

9. Motion for a New Trial. — A motion for a new trial can not be made available as an objection to evidence because of variance between it and the pleadings,[55] unless timely objection was made to

49. South & No. Alabama R. Co. *v.* Wilson, 78 Ala. 587; Alabama G. S. R. Co. *v.* Grabfelder, 83 Ala. 201, 3 So. 432; Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728; Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329; Hall *v.* Penn. Co., 90 Ind. 459.

50. South & No. Alabama R. Co. *v.* Wilson, 78 Ala. 587; Alabama G. S. R. Co. *v.* Grabfelder, 83 Ala. 201, 3 So. 432; Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728; Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329; Hall *v.* Penn. Co., 90 Ind. 459.

51. Swan *v.* Liverpool L. & G. Ins. Co., 52 Miss. 704; Callahan *v.* Warne, 40 Mo. 131; Knapp *v.* Winchester, 11 Vt. 351; Jacobs *v.* Case (Ky.), 1 S. W. 6.

52. *Connecticut.* — Brewster *v.* Dana, 1 Root 266.

Illinois. — Parsons *v.* Lee, 2 Ill. 193.

Missouri. — Hite *v.* Metropolitan St. R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33; Gurley *v.* Missouri Pac. R. Co., 93 Mo. 445, 6 S. W. 218; State *v.* Myers, 82 Mo. 558; Singleton *v.* Pacific R. Co., 41 Mo. 466; Gray *v.* Race, 51 Mo. App. 553; Wallich *v.* Morgan, 39 Mo. App. 469; Trimble *v.* Stewart, 35 Mo. App. 537; Sisney *v.* Arnold, 28 Mo. App. 568; Gaty *v.* Sack, 19 Mo. App. 470.

Pennsylvania. — Emerick *v.* Kroh, 14 Pa. St. 315.

Virginia. — Craghill *v.* Page, 2 Hen. & M. 446; M'Alexander *v.* Montgomery, 4 Leigh 61.

53. Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197; Lewis *v.* Few, 5 Johns. (N. Y.) 1.

54. *Arkansas.* — Strawn *v.* State, 14 Ark. 549; State *v.* Bledsoe, 47 Ark. 233, 1 S. W. 149.

Connecticut. — Wickham *v.* Waterman, Kirby 273.

Illinois. — Williamson *v.* Rexroat, 55 Ill. App. 116.

Iowa. — Kirk *v.* Litterst, 71 Iowa 71, 32 N. W. 106.

Maryland. — Coulter *v.* Western Theological Sem., 29 Md. 69; Baden *v.* State, 1 Gill 165.

Mississippi. — Covey *v.* State, 8 Smed. & M. 573.

Missouri. — Jones *v.* Louderman, 39 Mo. 287; Frost *v.* Pryor, 7 Mo. 314; Palmer *v.* Hunter, 8 Mo. 512; Shaler *v.* Van Wormer, 33 Mo. 386; Richardson *v.* Farmer, 36 Mo. 35; Roper *v.* Clay, 18 Mo. 383.

New Hampshire. — Lovell *v.* Sabin, 15 N. H. 29.

New York. — Jacobowsky *v.* People, 6 Hun 524.

South Carolina. — State *v.* Crank, 2 Bail. L. 66; State *v.* Cockfield, 15 Rich. L. 316.

Tennessee. — Allen *v.* Word, 6 Humph. 284.

Texas. — Foster *v.* State, 1 Tex. App. 531; Berliner *v.* State, 6 Tex. App. 181.

Wyoming. — Territory *v.* Pierce, 1 Wyo. 168.

55. *United States.* — Gravelle *v.* Minneapolis, etc. R. Co., 3 McCrary 359, 11 Fed. 569.

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38.

Georgia. — Haiman *v.* Moses, 39 Ga. 708.

its introduction before verdict and such objection was improperly overruled by the court.[56]

VII. AVOIDANCE OF VARIANCE AND ITS CONSEQUENCES.

1. Methods of Avoidance in General. — The consequences of a variance between the pleadings and proof may be avoided by a proper amendment of the pleadings,[57] or by appropriate averments in the original pleadings to meet the probable different phases of the evidence.[58]

2. Amendments To Conform to Proof. — A. Right To Make Amendments. — a. *In General.* — It is a general rule that pleadings may be amended to conform to the proof, provided that the adverse party is not thereby taken by surprise[59] and provided also that

Illinois. — Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276; Chicago, etc. R. Co. *v.* Hull, 76 Ill. App. 408.

New Jersey. — Powell *v.* Mayo, 26 N. J. Eq. 120.

New York. — Meyer *v.* M'Lean, 1 Johns. 509; Cole *v.* Goodwin, 19 Wend. 251, 32 Am. Dec. 470; Updike *v.* Abel, 60 Barb. 15.

56. *California.* — Christian College *v.* Hendley, 49 Cal. 347.

Connecticut. — Adams *v.* Way, 32 Conn. 160; Willoughby *v.* Raymond, 4 Conn. 130; Bulkley *v.* Landon, 2 Conn. 404.

Illinois. — Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276.

Kansas. — Atchison, etc. R. Co. *v.* Irwin, 35 Kan. 286, 10 Pac. 820.

Louisiana. — Boatner *v.* Walker, 4 La. 313.

West Virginia. — Hutchinson *v.* Parkersburg, 25 W. Va. 226.

57. *United States.* — Mack *v.* Porter, 72 Fed. 236, 18 C. C. A. 527.

Alabama. — Burkham *v.* Mastin, 54 Ala. 122.

California. — Stringer *v.* Davis, 30 Cal. 318.

Indiana. — Diltz *v.* Spahr, 42 N. E. 823.

Iowa. — Hoben *v.* Burlington & M. R. Co., 20 Iowa 562; Correll *v.* Glasscock, 26 Iowa 83.

Kentucky. — Taylor *v.* Arnold, 17 S. W. 361.

Massachusetts. — Nichols *v.* Prince, 8 Allen (Mass.) 404.

Missouri. — Stephens *v.* Frampton, 29 Mo. 263; Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

Montana. — First Nat. Bank *v.* How, 1 Mont. 604.

New Jersey. — Redstrake *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 294.

New York. — Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith 364; McLaughlin *v.* McGovern, 34 Barb. 208; Tannenbaum *v.* Armeny, 81 Hun 581, 31 N. Y. Supp. 55.

Where an answer is insufficient, from want of clearness, to admit evidence of payment and discharge of the note sued on, an amendment should be allowed. Phillips *v.* Jarvis, 19 Wis. 204.

Where a complaint fails to allege a demand, and the defendant answers on the merits, and at the trial objects to plaintiff's evidence on account of such defect, plaintiff will be allowed to show facts excusing such demand, and to amend his complaint to correspond, it not appearing that defendant will be prejudiced on account of surprise. Jenkinson *v.* City of Vermillion, 3 S. D. 238, 52 N. W. 1066.

58. James *v.* State, 115 Ala. 83, 22 So. 565; Johnson *v.* State, 111 Ala. 66, 20 So. 590; Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610.

59. *United States.* — Mack *v.* Porter, 72 Fed. 236.

Alabama. — Burkham *v.* Mastin, 54 Ala. 122.

Indiana. — Diltz *v.* Spahr, 42 N. E. 823.

Iowa. — Hoben *v.* Burlington & M.

such amendments do not set up a new cause of action[60] or defense.[61]

b. *Rule in Equity.* — Notwithstanding the repugnancy of equity to mere form, amendments will not be allowed in these courts so as to alter or vary the cause of action.[62]

R. Co., 20 Iowa 562; Correll *v.* Glasscock, 26 Iowa 83.

Kentucky. — Taylor *v.* Arnold, 13 Ky. L. Rep. 516, 17 S. W. 361.

Massachusetts. — Nichols *v.* Prince, 8 Allen 404.

Missouri. — Stephens *v.* Frampton, 29 Mo. 263; Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

Montana. — First Nat. Bank *v.* How, 1 Mont. 604.

New Jersey. — Redstrake *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 294.

New York. — Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith 364; McLaughlin *v.* McGovern, 34 Barb. 208; Ayrault *v.* Chamberlain, 33 Barb. 229.

60. Martin *v.* Philips, 4 Ga. 203; Missouri Pac. R. Co. *v.* McCally, 41 Kan. 639, 655, 21 Pac. 574; Soule *v.* Russell, 13 Metc. (Mass.) 436; Com. *v.* Meckling, 2 Watts (Pa.) 130; Jenkinson *v.* City of Vermillion, 3 S. D. 238, 52 N. W. 1066; Fox River Val. R. Co. *v.* Shoyer, 7 Wis. 365.

61. Stringer *v.* Davis, 30 Cal. 318; Manners *v.* Fraser, 6 Colo. App. 21, 39 Pac. 889; Wilcox & W. Organ Co. *v.* Lasley, 40 Kan. 521, 20 Pac. 228; Phillips *v.* Jarvis, 19 Wis. 204.

62. *United States.* — Tremaine *v.* Hitchcock, 23 Wall. 518; Hardin *v.* Boyd, 113 U. S. 756; Shields *v.* Barrow, 17 How. 130; Goodyear *v.* Bourn, 3 Blatchf. 266, 10 Fed. Cas. No. 5,561.

Alabama. — Winston *v.* Mitchell, 93 Ala. 554, 9 So. 551; Rumbly *v.* Stainton, 24 Ala. 712; Larkins *v.* Biddle, 21 Ala. 252; Crabb's Admr. *v.* Thomas, 25 Ala. 212.

Arkansas. — Cook *v.* Bronaugh, 13 Ark. 183.

Connecticut. — Minor *v.* Woodbridge, 2 Root 274.

Georgia. — Carey *v.* Smith, 11 Ga. 539; Rogers *v.* Atkinson, 14 Ga. 320.

Illinois. — Martin *v.* Eversal, 36 Ill. 222.

Mississippi. — Dickson *v.* Poindexter, 1 Freem. Ch. 721.

Vermont. — Hill *v.* Hill, 53 Vt. 578.

Virginia. — Lambert *v.* Jones, 2 Pat. & H. 144; Belton *v.* Apperson, 26 Gratt. 207; McComb *v.* Lobdell, 32 Gratt. 185; Shenandoah Val. R. Co. *v.* Griffith, 76 Va. 913; Pettyjohn *v.* Burson, 22 S. E. 508.

West Virginia. — Seborn *v.* Beckwith, 30 W. Va. 774, 5 S. E. 450; Christian *v.* Vance, 41 W. Va. 754, 24 S. E. 596; Bird *v.* Stout, 40 W. Va. 43, 20 S. E. 852.

What Constitutes New or Different Case. — To make an amendment improper, there must be inconsistency or repugnancy between the purpose of the bill as amended and the original bill, as contradistinguished from a modification in the relief asked. Cain *v.* Gimon, 36 Ala. 168.

The rule in equity in regard to amendments is that they may be made when the bill is defective in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself. Plaintiff will not be permitted to abandon the entire case made by his bill, and make a new and different case of way of amendment; but this rule has been much trenched on. Belton *v.* Apperson, 26 Gratt. (Va.) 207.

Illustrations. — An amendment to a creditor's bill to redeem land sold at sheriff's sale, so as to make it a bill to enforce a trust alleged to have arisen between complainant and another judgment creditor, is a departure. Ward *v.* Patton, 75 Ala. 207.

Where a suit is brought by an executor after distribution of an estate to construe the will, plaintiff cannot by amendment seek to quiet his title as trustee to the land devised, which has been conveyed to him as trustee by the devisee, since such amendment would change both the cause of action and the capacity in which plaintiff sues. Miles *v.* Strong, 60 Conn. 393, 22 Atl. 959.

The second mortgagee of land

c. *Rule Under the Code System.* — While the rule under the code system permitting amendments is quite liberal, it will not generally allow amendments which introduce a new cause of action;[63] yet in some of the states having this system amendments changing the cause of action are permissible.[64]

d. *Test Whether Amendment Introduces New Cause of Action.* In order to determine whether a proposed amendment is entirely foreign to the cause of action already set forth, the original pleadings will be liberally construed.[65] It may be stated as a general rule that so long as the plaintiff adheres to the original instrument or contract sued on[66] any alteration of the grounds of recovery

brought his bill against the first mortgagee to redeem the first mortgage, and the court postponed plaintiff's mortgage, on account of misrepresentations made by him, so as to let in and give priority to a subsequent mortgage of a part of the same land to defendant. *Held* that, plaintiff not having the right to proceed under the bill for the redemption of such subsequent mortgage, the bill could not be amended for that purpose. Platt *v.* Squire, 5 Cush. (Mass.) 551.

A bill to enforce the lien of a trust deed will not be allowed to be amended and made a bill to settle an estate and disburse the assets among the creditors. Piercy *v.* Beckett, 15 W. Va. 444.

A bill seeking reformation of an instrument cannot be amended so as to seek a cancellation instead. Kennerty *v.* Etiwan Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669.

An action brought to obtain an injunction cannot be changed by amendment into one for a mandamus. McNair *v.* Buncombe, 93 N. C. 364.

A bill for the specific performance of a contract for the sale of land may be amended so as to make it a bill for cancellation of the contract. Papin *v.* Goodrich, 103 Ill. 86.

An amendment to a bill for the specific performance of a contract of sale, setting up false and fraudulent representations, not discovered to be false until after the filing of the original bill, and praying for a rescission of the contract, was properly allowed. Jefferson *v.* Kennard, 77 Ill. 246.

A bill asking for reformation of a mortgage, and foreclosure thereof, may be amended so as to ask for reformation, and the removal of a cloud on complainant's title as mortgagee. Hawkins *v.* Pearson, 96 Ala. 369, 11 So. 304.

A bill to prevent a third party from removing trust property from the state may be amended by making new parties defendant, and showing the necessity for an accounting and for aid in administering the trust; and such amendments are not within the rule forbidding the introduction of such new matter as constitutes, in substance, a new bill. McCrum *v.* Lee, 38 W. Va. 583, 18 S. E. 757.

A bill for the sale of land, under the statute on that subject, may, by amendment, be changed into a bill for a partition. Watson *v.* Godwin, 4 Md. Ch. 25.

63. Ramirez *v.* Murray, 5 Cal. 222; Supervisors *v.* Decker, 34 Wis. 378; Johnson *v.* Filkington, 39 Wis. 62; Shinners *v.* Brill, 38 Wis. 648; Rutledge *v.* Vanmeter, 8 Bush. (Ky.) 354; McGrath *v.* Balser, 6 B. Mon. (Ky.) 141; 34 Am. Dec. 160.

64. *New York.* — Brown *v.* Leigh, 12 Abb. Pr. (N. S.) 193; Mason *v.* Whitely, 1 Abb. Pr. 85; Brown *v.* Babcock, 3 How. Pr. 305; MacQueen *v.* Babcock, 13 Abb. Pr. 268; Wyman *v.* Remond, 18 How. Pr. 272; Prindle *v.* Aldrich, 13 How Pr. 466; Watson *v.* Rushmore, 15 Abb. Pr. 51.

North Carolina. — Robinson *v.* Willoughby, 67 N. C. 84; Bullard *v.* Johnson, 65 N. C. 436.

Texas. — Williams *v.* Randon, 10 Tex. 74, 34 Am. Dec. 161.

65. Nevada County & S. Canal Co. *v.* Kidd, 28 Cal. 673.

66. *United States.* — Ferguson *v.* Harwood, 7 Cranch 408.

Alabama. — Conner *v.* Smith, 88

on such instrument or contract,[67] or of the modes in which it has been violated, is not an alteration of the cause of action.[68] In an action of tort any change in the allegations as to the circumstances of the injury,[69] setting out the facts relating thereto more fully,[70] adding additional grounds of negligence as the cause of injury,[71] stating more fully the result of the injury,[72] or increasing the amount of damages claimed, does not introduce a new cause of action.[73] If a recovery on the original pleading would be a bar to a recovery under the pleading as amended, the amendment does not change the cause of action, and is permissible.[74]

Ala. 300, 7 So. 150; Johnson *v.* Durner, 88 Ala. 580, 7 So. 245; Hawkins *v.* Pearson, 96 Ala. 369, 11 So. 304; Milner *v.* Stanford, 102 Ala. 277, 14 So. 644.

Connecticut. — Miles *v.* Strong, 60 Conn. 393, 22 Atl. 959.

Georgia. — Bennett *v.* Woolfolk, 15 Ga. 213; Lacy *v.* Hurst, 83 Ga. 223, 9 S. E. 1052; Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385; Pearson *v.* Reid, 10 Ga. 582.

Illinois. — Jefferson *v.* Kennard, 77 Ill. 246; Papin *v.* Goodrich, 103 Ill. 86.

Iowa. — Williamson *v.* Chicago, etc. R. Co., 84 Iowa 583, 51 N. W. 60.

Kansas. — Newell *v.* Newell, 14 Kan. 202.

Maine. — McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666.

Mississippi. — Brooks *v.* Span, 63 Miss. 198.

New Hampshire. — Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155; Little *v.* Morgan, 31 N. H. 499.

Pennsylvania. — Pittsburgh J. R. Co. *v.* McCutcheon, 7 Atl. 146.

Virginia. — Ewing *v.* Ferguson, 33 Gratt. 548.

West Virginia. — McCrum *v.* Lee, 38 W. Va. 583, 18 S. E. 757.

67. *California.* — Frost *v.* Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; Storch *v.* McCain, 85 Cal. 304, 24 Pac. 639.

Massachusetts. — Mixer *v.* Howarth, 21 Pick. 205, 32 Am. Dec. 256.

New Hampshire. — Stevenson *v.* Mudgett, 10 N. H. 338.

Pennsylvania. — Stewart *v.* Kelly, 16 Pa. St. 160, 55 Am. Dec. 487; Yost *v.* Eby, 23 Pa. St. 327.

Wisconsin. — Lackner *v.* Turnbull, 7 Wis. 105; Ball *v.* McGeoch, 78 Wis. 359, 47 N. W. 610.

68. See cases in next preceding note.

69. Georgia R. Co. *v.* Thomas, 68 Ga. 744; Gourley *v.* St. Louis & S. F. R. Co., 35 Mo. App. 87; Harris *v.* Central R. Co., 78 Ga. 525, 3 S. E. 355, 30 Am. & Eng. R. Cas. 581; Andrews *v.* Mason City & Ft. D. R. Co., 77 Iowa 669, 42 N. W. 513.

70. Georgia R. Co. *v.* Thomas, 68 Ga. 744; Pacific Exp. Co. *v.* Darneil (Tex.), 6 S. W. 765, 32 Am. & Eng. R. Cas. 543; Missouri Pac. R. Co. *v.* Speed, 3 Tex. Civ. App. 454, 22 S. W. 527; Alabama G. R. S. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337, 30 Am. & Eng. R. Cas. 546.

71. *United States.* — Smith *v.* Missouri Pac. R. Co., 56 Fed. 458.

Alabama. — Alabama G. S. R. Co. *v.* Chapman, 83 Ala. 453, 3 So. 813; Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666, 43 Am. & Eng. R. Cas. 309.

Georgia. — Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 228.

Iowa. — Kuhn *v.* Wisconsin I. & N. R. Co., 76 Iowa 67, 40 N. W. 92.

Missouri. — Moody *v.* Pacific R. Co., 68 Mo. 470.

New Hampshire. — McIntire *v.* Eastern R. Co., 58 N. H. 137.

New York. — Davis *v.* New York, etc. R. Co., 110 N. Y. 646, 17 N. E. 733.

72. International & G. R. Co. *v.* Irvine, 64 Tex. 529, 23 Am. & Eng. R. Cas. 518.

73. Galena & C. U. R. Co. *v.* Appleby, 28 Ill. 283; Tassey *v.* Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

74. Davis *v.* New York, etc. R. Co., 110 N. Y. 646, 17 N. E. 733. In this case, it was held: "Under Code

B. Who May Make Amendments. — The right to make amendments to the pleadings to avoid the effect of a variance is not confined to the plaintiff,[75] but is open to the defendant also.[76]

C. Time of Making Amendment. — In the absence of statute authorizing it to be done,[77] an amendment of the pleadings to conform to the evidence will not be permitted after verdict, [78] but is permissible at any time before rendition of the verdict.[79]

D. Amendments as to Specific Matters. — a. *Time and Place.* The pleadings may be amended as to the time and place alleged therein, so as to conform them to the evidence.[80]

Civil Proc. N. Y. § 723, providing that at any time on or before trial, or before or after judgment in an action, the court may, in furtherance of justice, and upon just terms, amend a pleading by inserting an allegation material to the case, a complaint by an engineer against his employer, a railroad company, alleging injuries arising from negligence in failing to furnish suitable and safe appliances, and in not furnishing a safe locomotive, whereby plaintiff was injured, may be amended at the special term, after a reversal and an order remanding the case, and before a second trial, by inserting an allegation that the injury was caused by improper and unsafe coal furnished for use in the engine; such allegation not amounting to a new cause of action."

75. See cases in next succeeding note.

76. McMurray *v.* Boyd, 58 Ark. 504, 25 S. W. 505; Curtis *v.* Harrison, 36 Ill. App. 287; Wright *v.* Johnson, 50 Ind. 454; Newman *v.* Kershaw, 10 Wis. 333; Rublee *v.* Tibbetts, 26 Wis. 399; Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707; Sharp *v.* Sharp, 13 Serg. & R. (Pa.) 444; Charlton *v.* Scoville, 68 Hun 348, 22 N. Y. Supp. 883.

77. *Massachusetts.* — Stanwood *v.* Scovel, 4 Pick. 422; Peck *v.* Waters, 104 Mass. 345.

Mississippi. — Miller *v.* Northern Bank of Miss., 34 Miss. 412.

New York. — Hoffnagle *v.* Leavitt, 7 Cow. 517.

North Carolina. — Bullard *v.* Johnson, 65 N. C. 436.

Pennsylvania. — Ashton *v.* Moyer, 14 Phila. 147.

West Virginia. — Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197.

Wisconsin. — Lenike *v.* Daegling, 52 Wis. 498, 9 N. W. 399.

78. Richard *v.* Hupp (Cal.), 37 Pac. 920; Neimick *v.* American Ins. Co., 16 Mont. 318, 40 Pac. 597; Egert *v.* Wicker, 10 How. Pr. (N. Y.) 193; Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163; Hudson *v.* Kansas Pac. R. Co., 9 Fed. 879.

79. Kamm *v.* Bank of Cal., 74 Cal. 191, 15 Pac. 765; Mather Elec. *v.* Matthews, 47 Ill. App. 557; Leib *v.* Butterick, 68 Ind. 199; Fitzgerald *v.* Hollan, 44 Kan. 497, 24 Pac. 957; Jeffries *v.* Jeffries, 66 Miss. 216, 5 So. 112.

80. *United States.* — Coates' Lessee *v.* Hamilton, 2 Dall. 256.

Colorado. — Cooper *v.* McKeen, 11 Colo. 41, 17 Pac. 97.

Indiana. — Numbers *v.* Bowser, 29 Ind. 491.

Iowa. — Ball *v.* Keokuk & N. W. R. Co., 71 Iowa 306, 32 N. W. 354.

Kansas. — Kansas Pac. R. Co. *v.* Kunkel, 17 Kan. 145.

Louisiana. — Bissell *v.* Erwin's Heirs, 13 La. 143.

Maine. — Hammat *v.* Russ, 16 Me. 171; Inhabitants of Ripley *v.* Inhab. of Hebron, 60 Me. 379; Duffy *v.* Patten, 74 Me. 396.

Massachusetts. — Bannon *v.* Angier, 2 Allen 128.

Michigan. — Niemarck *v.* Schwartz, 51 Mich. 466, 16 N. W. 815.

New Hampshire. — Harvey *v.* Town of Northwood, 68 N. H. 117, 9 Atl. 653.

New Jersey. — Manager of No. River, Meadow Co. *v.* Christ Church, 15 N. J. L. 52.

New York. — Lion *v.* Burtis, 18 Johns, 510.

b. *Parties and Other Persons.* — Subject to the rule against changing the cause of action by amendment,[81] the pleadings may be amended as to parties[82] and other persons mentioned in them, in order to promote the ends of justice.[83]

c. *Description of Subject-Matter of Litigation.* — Where a variance exists as to the description of the property,[84] or other subject-matter of litigation and the evidence introduced, it may be cured by amendment.[85]

d. *Written Instruments.* — Where an action is founded upon a written instrument, and the evidence varies from the one described

Oregon. — Beates *v.* Retallick, 23 Pac. 288.

Pennsylvania. — Bailey *v.* Musgrave, 2 Serg. & R. 219; Clymer *v.* Thomas, 7 Serg. & R. 178.

Rhode Island. — Wilson *v.* New York, N. H. & H. R. Co., 18 R. I. 598, 29 Atl. 300.

South Carolina. — Morrow *v.* Morrow, 2 Mill Const. 109.

Texas. — Longino *v.* Ward, 1 White & W. 521.

Washington. — Morgan *v.* Morgan, 10 Wash. 99, 38 Pac. 1054.

81. Wilson *v.* Spafford, 57 Hun 589, 10 N. Y. Supp. 649; Lampkin *v.* Chisom, 10 Ohio St. 450; Langhorne *v.* Richmond City R. Co., 91 Va. 364, 22 S. E. 357; Paine *v.* Waterloo Gas Co., 69 Iowa 211, 28 N. W. 560.

82. *Connecticut.* — Ritchie *v.* Waller, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 161, 27 L. R. A. 161.

Iowa. — Andrews *v.* Mason City & Ft. D. R. Co., 77 Iowa 669, 42 N. W. 513.

Kentucky. — Palmer *v.* Hamilton, 15 Ky. L. Rep. 677, 24 S. W. 613; Hume *v.* Langston, 6 J. J. Marsh. 254.

Massachusetts. — Kincaid *v.* Howe, 10 Mass. 203.

New York. — Union Bank *v.* Mott, 19 How. Pr. 114; Bennett *v.* Judson, 21 N. Y. 238.

Pennsylvania. — Felty *v.* Deaven, 166 Pa. St. 640, 31 Atl. 333; Kirkner *v.* Com., 6 Watts & S. 557.

83. *United States.* — New York, L. E. & W. R. Co. *v.* McHenry, 17 Fed. 414.

Alabama. — Mitchell *v.* Davis, 58 Ala. 615.

Connecticut. — Santo *v.* Maynard, 57 Conn. 157, 17 Atl. 700.

Georgia. — Water Lot Co. *v.* Leonard, 30 Ga. 560; Georgia R. & Bkg. Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235.

Michigan. — St. Joseph Co. Supervisors *v.* Coffenbury, 1 Mich. 354.

Missouri. — Bennett *v.* McCanse, 65 Mo. 194.

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

84. Sanford *v.* Willetts, 29 Kan. 647; Callaghan *v.* McMahan, 33 Mo. 111; Fremont, E. & M. V. R. Co. *v.* Crum, 30 Neb. 70, 46 N. W. 217; Truax *v.* Thorn, 2 Barb. (N. Y.) 156.

85. Smith *v.* Nash, 5 La. Ann. 575; Waverly Timber & Iron Co. *v.* St. Louis Cooperage Co., 112 Mo. 383, 20 S. W. 566; Rublee *v.* Tibbetts, 26 Wis. 399; Brown *v.* Haven, 37 Vt. 439.

In Smith *v.* Nash, 5 La. Ann. 575, by an error in his petition plaintiff alleged that he was to make and burn 300,000 bricks instead of 200,000. When the contract was offered in evidence, it was objected to by defendant and rejected by the court on the ground of variance. The existence of the contract was not disputed. *Held,* that the court should have allowed the correction of the error.

In Waverly Timber & Iron Co. *v.* St. Louis Cooperage Co., 112 Mo. 383, 20 S. W. 566, plaintiff brought action for the conversion of timber cut from its lands. The evidence showed that the greater part of the timber was taken from lands not described in the complaint. *Held,* that an amendment of the description to include this portion, which only had the effect of making more specific the general averment was improperly denied.

in the pleadings, an amendment will be permitted, so as to conform the pleadings to the proof.[86]

3. Avoidance of Variance by Averments in Pleadings. — A. Name of Person Signing Instrument. — If a person execute an instrument by a name which is not his true name, he may still be sued on the writing in his true name, alleging the execution of the same in the name appearing on the instrument, and thus avoid the apparent variance.[87] Otherwise, when sued in his proper name the writing would not be admissible.[88]

B. Different Counts in Same Pleading. — A variance may be avoided by alleging the cause of action in different counts under different phases of the case,[89] or with different attendant circumstances, so as to meet the varying aspects of the evidence.[90]

C. Attachment of Instrument to Pleading. — Where a writing is attached to a pleading as an exhibit so as to make such writing a part of the pleading, a variance between the instrument and the pleading is thus necessarily avoided.[91]

In Rublee *v.* Tibbetts, 26 Wis. 399, it was held that where an answer alleged a tender of a certain sum, but the evidence showed the tender to have been $1 less than was due, defendant, on offering proof that the whole amount due was in fact tendered, was entitled to amend so as to let in such proof and protect himself from a judgment for costs.

In Brown *v.* Haven, 37 Vt. 439, the declaration alleged that a guaranty sued on was of the payment of C's claim "of about $25." The proof showed that C's claim was about $70. *Held*, that if there was a variance it could be cured by amending the declaration.

86. *Illinois.* — Stratton *v.* Henderson, 26 Ill. 68; Miller *v.* Metzger, 16 Ill. 390.

Indiana. — Perdue *v.* Aldridge, 19 Ind. 290; Hobbs *v.* Cowden, 20 Ind. 310.

Maine. — Perrin *v.* Keene, 19 Me. 355, 36 Am. Dec. 759.

Massachusetts. — Keller *v.* Webb, 126 Mass. 393.

Missouri. — Boone *v.* Stover, 66 Mo. 430.

Nebraska. — Ward *v.* Parlin, 30 Neb. 376, 46 N. W. 529.

New Jersey. — Smith *v.* Axtell, 1 N. J. Eq. 494.

New York. — Rees *v.* Overbaugh, 4 Cow. 124; Morris *v.* Wadsworth, 17 Wend. 103; Jansen *v.* Ball. 6 Cow. 628.

North Carolina. — Allin *v.* Sallinger, 108 N. C. 159, 12 S. E. 896.

Ohio. — Chamberlain *v.* Sawyer, 19 Ohio 360.

Pennsylvania. — Republica *v.* Coates, 1 Yeates 2; Dunbar *v.* Jumper, 2 Yeates 74.

Texas. — Sweetzer *v.* Claflin, 82 Tex. 513, 17 S. W. 769.

Vermont. — Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153.

87. Becker *v.* German Mut. F. Ins. Co., 68 Ill. 412; O'Brien *v.* People, 41 Ill. 456; Curtis *v.* Marrs, 29 Ill. 508; Rives *v.* Marrs, 25 Ill. 315; Garrison *v.* People, 21 Ill. 535; Neteler *v.* Culies, 18 Ill. 188; State *v.* Griffie, 118 Mo. 188, 23 S. W. 878. See also State *v.* Weaver, 35 N. C. (13 Ired. L.) 491.

88. See cases cited in last preceding note.

89. James *v.* State, 115 Ala. 83, 22 So. 565; Johnson *v.* State, 111 Ala. 66, 20 So. 590.

90. Miner *v.* Downer, 20 Vt. 461; Smith *v.* Walker, 7 Ind. App. 614, 34 N. E. 843.

91. *Indiana.* — Carper *v.* Gaar, Scott & Co., 70 Ind. 212; Cassady *v.* American Ins. Co., 72 Ind. 95.

Louisiana. — Krumbhaar *v.* Ludeling, 3 Mart. (O. S.) 640; Ditto *v.* Barton, 6 Mart. (N. S.) 127; Weyman *v.* Cater, 13 La. 492; Rio *v.* Gordon, 14 La. 418; Tenny *v.* Russell, 1 Rob. 449.

VIII. ADMISSIBILITY OF EVIDENCE AS DEPENDENT UPON THE PLEADINGS.

1. In General. — All the evidence must relate to the issue or issues made by the pleadings.[92] The issue depends upon the character of the declaration[93] or complaint,[94] or, where the distinction

North Carolina. — Lee *v.* Foard, 1 Jones Eq. 125.

Texas. — Morrison *v.* Keese, 25 Tex. Supp. 154; Kennon *v.* Bailey, 15 Tex. Civ. App. 28, 38 S. W. 377.

92. *United States.* — Taylor *v.* Luther, 2 Sumn. 228, 23 Fed. Cas. No. 13,796.

Arkansas. — State Bank *v.* Arnold, 12 Ark. 180.

California. — Hicks *v.* Murray, 43 Cal. 515; Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299.

Illinois. — Mix *v.* White, 36 Ill. 484.

Indiana. — Marion & M. V. R. Co. *v.* Ward, 9 Ind. 123; Graydon *v.* Gaddis, 20 Ind. 515; State *v.* O'Haver, 8 Ind. 282.

Iowa. — Ransom *v.* Stanberry, 22 Iowa 334.

Kentucky. — Phoenix Ins. Co. *v.* Lawrence, 4 Metc. 9, 81 Am. Dec. 521; Bolling *v.* Doneghy, 1 Duv. 220.

Louisiana. — Williamson *v.* His Creditors, 5 Mart. (O. S.) 618; Trudeau *v.* Trudeau, 1 Mart. (N. S.) 128; Rodriguez *v.* Morse, 2 Mart. (N. S.) 358; Dumartrait *v.* Deblanc, 5 Mart. (N. S.) 38; Judice's Heirs *v.* Brent, 6 Mart. (N. S.) 226; Ponsony *v.* Debaillon, 6 Mart. (N. S.) 238; Benoit *v.* Hebert, 1 La. 212; Dixon *v.* Emerson, 9 La. 104; Colsson *v.* Consolidation Asso. Bank, 12 La. 105; Lyons *v.* Jackson, 4 Rob. 465; Lawler *v.* Cosgrove, 39 La. Ann. 488, 2 So. 34; Conrad *v.* Louisiana Bank, 10 Mart. (O. S.) 700.

Minnesota. — Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Payette *v.* Day, 37 Minn. 366, 34 N. W. 592.

Missouri. — Brooks *v.* Blackwell, 76 Mo. 309; Weil *v.* Posten, 77 Mo. 284.

Nebraska. — German Ins. Co. *v.* Fairbank, 32 Neb. 750, 29 N. W. 711, 29 Am. St. 459.

New York. — New York Cent. Ins. Co. *v.* National Proct. Ins. Co., 20 Barb. 468; Chu Pawn *v.* Irwin, 82 Hun 607, 31 N. Y. Supp. 724; Cowenhoven *v.* City of Brooklyn, 38 Barb. 9.

North Carolina. — Graves *v.* Trueblood, 96 N. C. 495, 1 S. E. 918; McLaurin *v.* Cronly, 90 N. C. 50.

Ohio. — Waller *v.* Robinson, 2 Ohio Dec. 16.

Texas. — Smith *v.* Sherwood, 2 Tex. 460; Rivers *v.* Foote, 11 Tex. 662; Denison *v.* League, 16 Tex. 399; Keeble *v.* Black, 4 Tex. 69; Guess *v.* Lubbock, 5 Tex. 535; Thompson *v.* Thompson, 12 Tex. 327.

Vermont. — Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

93. Allen *v.* Newberry, 8 Iowa 65; Jones *v.* Vanzandt, 2 McLean 596, 13 Fed. Cas. No. 7,501; Atchison, T. & S. F. R. Co. *v.* Bryan (Tex. Civ. App.), 28 S. W. 98.

94. *United States.* — Mexia *v.* Oliver, 148 U. S. 664.

Alabama. — Florence Cotton & Iron Co. *v.* Field, 104 Ala. 471, 16 So. 538.

California. — Burke *v.* Levy, 68 Cal. 32, 8 Pac. 527; Nordholt *v.* Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. 268.

Connecticut. — Rossiter *v.* Downs, 4 Conn. 292.

Illinois. — City of Chicago *v.* O'Brennan, 65 Ill. 160.

Indiana. — Hackler *v.* State, 81 Ind. 430; Sims *v.* Smith, 99 Ind. 469, 50 Am. Rep. 99; Louisville, etc. R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163; Evansville etc. R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. 865, 2 L. R. A. 450.

Kansas. — Kingman, P. & W. R. Co. *v.* Quinn, 45 Kan. 477, 25 Pac. 1068; Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686.

Kentucky. — Richardson *v.* Talbot, 2 Bibb 382; Howard *v.* Dietrick, 13 Ky. L. 539.

Louisiana. — Pritchard *v.* McKinstry, 12 La. 224.

Maryland. — McTavish *v.* Carroll, 17 Md. 1.

Michigan. — Green *v.* Green, 26

between law and equity exists, upon the character of the bill,[95] the pleadings thereto by the defendant,[96] and the further pleadings as made by the parties,[97] which do not usually extend beyond the plaintiff's replication.[98] If the fact alleged by the pleadings is not controverted, no proof of such an allegation is required.[99]

Mich. 437; Detroit, H. & I. R. Co. *v.* Forbes, 30 Mich. 165; Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

Minnesota. — State *v.* Segal, 60 Minn. 507, 62 N. W. 1134.

Mississippi. — Wells *v.* Alabama G. S. R. Co., 67 Miss. 24, 6 So. 737.

Missouri. — James *v.* Hicks, 58 Mo. App. 521.

New Hampshire. — Brewer *v.* Hyndman, 18 N. H. 9.

New York. — Bristol *v.* Rensselaer & S. R. Co., 9 Barb. 158; Garvey *v.* Fowler, 4 Sandf. (N. Y. Super.) 665; Brown *v.* McCune, 5 Sandf. (N. Y. Super.) 224; Riggs *v.* Chapin, 7 N. Y. Supp. 765.

Texas. — Thornton *v.* Stevenson (Tex. Civ.), 31 S. W. 232.

Washington. — Northern Pac. R. Co. *v.* O'Brien, 1 Wash. St. 599, 21 Pac. 32; Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124.

95. *United States.* — Blandy *v.* Griffith, 3 Fish. Pat. Cas. 600, 3 Fed. Cas. No. 1,529.

Alabama. — Grady *v.* Robinson, 28 Ala. 289.

Arkansas. — Trapnall *v.* Burton, 24 Ark. 371.

Delaware. — Cannon *v.* Collins, 3 Del. Ch. 132.

Illinois. — Maher *v.* Bull, 44 Ill. 97; Carmichael *v.* Reed, 45 Ill. 108; Hall *v.* Towne, 45 Ill. 493.

Indiana. — Peelman *v.* Peelman, 4 Ind. 612.

Iowa. — Shaw *v.* Livermore, 2 G. Gr. 338.

Kentucky. — Sprigg *v.* Albin, 6 J. J. Marsh. 158.

New Jersey. — Howell *v.* Sebring, 14 N. J. Eq. 84; Moores *v.* Moores, 16 N. J. Eq. 275.

New York. — James *v.* M'Kernon, 6 Johns. 543.

Ohio. — Shur *v.* Statler, 2 Ohio Dec. 70.

Wisconsin. — Brayton *v.* Sawin, 5 Wis. 117; Flint *v.* Jones, 5 Wis. 424.

96. *Alabama.* — Guthrie *v.* Quinn, 43 Ala. 561; Fenno *v.* Sayre, 3 Ala. 458.

Arkansas. — Fairhurst *v.* Lewis, 23 Ark. 435.

Florida. — Orman *v.* Barnard, 5 Fla. 528.

Mississippi. — Salmon *v.* Smith, 58 Miss. 399.

New York. — James *v.* M'Kernon, 6 Johns. 543.

Virginia. — Ronald *v.* Bank of Princeton, 90 Va. 813, 5 S. E. 842.

West Virginia. — Warren *v.* Syme, 7 W. Va. 474.

97. James *v.* M'Kernon, 6 Johns. (N. Y.) 543; Goodwin *v.* McGhee, 15 Ala. 232; Davis *v.* Cook, 65 Ala. 617; Cockrell *v.* Warner, 14 Ark. 345; Millsaps *v.* Pfeiffer, 44 Miss. 805; Miller *v.* Gregory, 16 N. J. Eq. 274; Carnochan *v.* Christie, 11 Wheat. (U. S.) 444.

98. Humes *v.* Scruggs, 94 U. S. 22; Shields *v.* Trammel, 19 Ark. 51; Enoch *v.* Mining & Petroleum Co., 23 W. Va. 314; Rogers *v.* Mitchell, 41 N. H. 154; Hale *v.* Plummer, 6 Ind. 121.

99. *United States.* — Rhodes *v.* Hadfield, 2 Cranch C. C. 566, 20 Fed. Cas. No. 11,748.

Arkansas. — Edwards *v.* State, 22 Ark. 303; Lazarus *v.* Freidheim, 51 Ark. 371, 11 S. W. 518.

California. — Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Himmelmann *v.* Spanagel, 39 Cal. 401.

Colorado. — Wilson *v.* Hawthorne, 14 Colo. 530, 24 Pac. 548, 20 Am. St. 290; Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947.

Indiana. — Lassiter *v.* Jackman, 88 Ind. 118.

Iowa. — Pegram *v.* McCormack, 14 Iowa 141; *In re* Ward's Estate, 58 Iowa 431, 10 N. W. 793; Walker *v.* Lathrop, 6 Iowa 516.

Kentucky. — Rogers *v.* Aulick, 63 Ky. 419; Parks *v.* Doty, 13 Bush 727.

Louisiana. — Akin *v.* Bedford, 4 Mart. (N. S.) 615; Hiesland *v.* City of New Orleans, 14 La. Ann. 137; Lea *v.* Terry, 20 La. Ann. 428; Kirkman *v.* Wyer, 10 Mart. (O. S.) 126;

2. As Dependent Upon Plaintiff's Pleadings. — A. In General. Any evidence which tends to prove any material fact alleged by the plaintiff in his pleadings, must be received;[1] but if it does not tend to prove such fact it must be rejected.[2]

B. Literal Proof Not Required. — If the evidence tends to prove in any appreciable manner the fact alleged, the evidence is admissible;[3] or if it substantially tends to prove such fact the evi-

Lopez *v.* Bergel, 7 La. 178; Featherstone *v.* Robinson, 7 La. 596; Police Jury of St. Helena *v.* Fluker, 1 Rob. 389.

Maryland. — Union Bank *v.* Ridgely, 1 Har. & G. 324.

Minnesota. — Dexter *v.* Moodey, 36 Minn. 205, 30 N. W. 667.

Nebraska. — Harden *v.* Atchison & N. R. Co., 4 Neb. 521; Gillen *v.* Riley, 27 Neb. 158, 42 N. W. 1054.

New York. — Fagen *v.* Davison, 2 Duer 153; Clark *v.* Dillon, 97 N. Y. 370, *affirming* 4 Civ. Proc. 245, and 15 Abb. (N. C.) 261; Finkelstein *v.* Barnett, 16 Misc. 488, 38 N. Y. Supp. 961; Harlow *v.* LaBrum, 82 Hun 292, 31 N. Y. Supp. 487.

North Carolina. — Jenkins *v.* No. Carolina Ore D. Co., 65 N. C. 563; Calkins *v.* Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797.

1. *United States.* — Jones *v.* Vauzandt, 2 McLean 596, 13 Fed. Cas. No. 7,501.

Arkansas. — Ward *v.* Young, 42 Ark. 542; Tucker *v.* West, 29 Ark. 386.

Georgia. — Sample *v.* Lipscomb, 18 Ga. 687; Walker *v.* Roberts, 20 Ga. 15.

Indiana. — Newell *v.* Downs, 8 Blackf. 523.

Kentucky. — Shannon *v.* Kinny, 1 A. K. Marsh. 3, 10 Am. Dec. 705; Mason *v.* Bruner's Admr., 3 A. K. Marsh. 155.

Maine. — Trull *v.* True, 33 Me. 367.

Michigan. — Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765; Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W. 881.

Missouri. — Gardner *v.* Crenshaw, 122 Mo. 79, 27 S. W. 612.

New York. — McLeod *v.* Johnston, Anth. N. P. 16.

South Carolina. — Gale *v.* Hayes, 3 Strob. 452.

Texas. — Atchison, T. & S. F. R. Co. *v.* Bryan (Tex. Civ.), 28 S. W. 98; Wells *v.* Fairbanks, 5 Tex. 582; Horton *v.* Reynolds, 8 Tex. 284.

2. *Alabama.* — State *v.* Campbell, 17 Ala. 566; Magee *v.* Billingsly, 3 Ala. 679.

Arkansas. — State *v.* Roper, 8 Ark. 491.

Georgia. — Claflin *v.* Briant, 58 Ga. 414.

Kentucky. — Winlock *v.* Hardy, 4 Litt. 272; Nesbit *v.* Gregory, 7 J. J. Marsh. 270.

Maryland. — Maslin *v.* Thomas, 8 Gill 18; Dorsey *v.* Whipps, 8 Gill 457.

Missouri. — Hartt *v.* McNeil, 47 Mo. 526.

Pennsylvania. — Foster *v.* Shaw, 7 Serg. & R. 156; Hart *v.* Evans, 8 Barr 13.

Tennessee. — Foster *v.* Jackson, 67 Tenn. 433.

Texas. — Leach *v.* Millard, 9 Tex. 551.

Vermont. — Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415.

3. *Arkansas.* — Tucker *v.* West, 29 Ark. 386; Ward *v.* Young, 42 Ark. 542.

Florida. — Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745.

Georgia. — Sample *v.* Lipscomb, 18 Ga. 687; Walker *v.* Roberts, 20 Ga. 15; Molyneaux *v.* Collier, 13 Ga. 406.

Indiana. — Newell *v.* Downs, 8 Blackf. 523; West *v.* Cavins, 74 Ind. 265.

Iowa. — High *v.* Kistner, 44 Iowa 79; Smyth *v.* Ward, 46 Iowa 339.

Kentucky. — Mason *v.* Bruner's Admr., 3 A. K. Marsh. 155.

Louisiana. — Hanson *v.* City Council of Lafayette, 18 La. 295.

Maine. — Trull *v.* True, 33 Me. 367.

Michigan. — Briscoe *v.* Eckley, 35 Mich. 112; Colwell *v.* Adams, 51 Mich. 491, 16 N. W. 870; Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W.

dence is receivable.[4] Illustrations of this principle are given in the notes.[5]

C. Material Fact Omitted. — If any material fact has been omitted from the plaintiff's declaration or complaint, evidence as to that fact can not be admitted,[6] for the reason that every fact essential to the plaintiff's case must be alleged in his complaint.[7]

881; Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765.

Missouri. — Gardner *v.* Crenshaw, 122 Mo. 79, 27 S. W. 612.

Nevada. — State *v.* Rhoades, 6 Nev. 352.

New Jersey. — Bigelow *v.* Rommelt, 24 N. J. Eq. 115.

New York. — McLeod *v.* Johnson, Anth. N. P. 16.

Pennsylvania. — Pennsylvania Tel. Co. *v.* Varnau, 5 Lanc. Law Rev. 401.

4. *Arkansas.* — Tucker *v.* West, 29 Ark. 386.

Georgia. — Walker *v.* Roberts, 20 Ga. 15.

Indiana. — Newell *v.* Downs, 8 Blackf. 523; West *v.* Cavins, 74 Ind. 265.

Louisiana. — Conrad *v.* Louisiana Bank, 10 Mart. (O. S.) 700.

Maine. — Trull *v.* True, 33 Me. 367.

Nevada. — State *v.* Rhodes, 6 Nev. 352.

Texas. — Wells *v.* Fairbanks, 5 Tex. 582; Horton *v.* Reynolds, 8 Tex. 284.

5. Illustrations. — Cardinal Principle. — The admission of evidence in any case depends upon the cardinal principle that the allegata and probata must correspond. Finley *v.* Quirk, 9 Minn. 194. If, in the examination of witnesses, facts are brought out which, had they been alleged, would furnish ground of relief or defense, such facts must be disregarded, unless they are authorized by the averments of the pleadings. Stuart *v.* Merchants' and Farmers' Bank, 19 Johns. (N. Y.) 496; Field *v.* Mayor of New York, 6 N. Y. 179, 57 Am. Dec. 435.

Breach of Warranty. — The complaint charged that the defendant in the sale of a horse to him warranted the horse to be sound, perfect in every respect, and true, gentle, and willing to work. The defendant denied the warranty, and averred the soundness of the horse. It came out in evidence that the sale was consummated on Sunday, and under the laws of the state, such a sale is void. At the close of the plaintiff's evidence the defendant moved for judgment on the ground that the sale was made on Sunday. The motion was overruled, and this was assigned as error. The question thus raised was whether the evidence showing the sale to have been made on Sunday could be considered by the court, and thus declare the sale a void one. The court held that such evidence could not be considered, because the invalidity of the sale should have been raised by the pleadings of the defendant, and as no such fact was averred in the pleadings, the evidence could not be considered, and was therefore inadmissible. Finley *v.* Quirk, 9 Minn. 194.

6. *United States.* — Mexia *v.* Oliver, 148 U. S. 664.

Alabama. — Florence Cotton & Iron Co. *v.* Field, 104 Ala. 471, 16 So. 538.

California. — Burke *v.* Levy, 68 Cal. 32, 8 Pac. 527; Nordholt *v.* Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268.

Connecticut. — Rossiter *v.* Downs, 4 Conn. 292.

Illinois. — City of Chicago *v.* O'Brennan, 65 Ill. 160.

Indiana. — Hackler *v.* State, 81 Ind. 430; Sims *v.* Smith, 99 Ind. 469, 50 Am. Rep. 99; Louisville, N. A. & C. R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163; Evansville & T. H. R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450.

7. *Kansas.* — Kingman, P. & W. R. Co. *v.* Quinn, 45 Kan. 477, 25 Pac. 1068; Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686.

Kentucky. — Richardson *v.* Talbot,

If evidence be received over the objection of the defendant of fact not averred, this will be regarded as error.[8]

D. Matters of Evidence Need Not Be Alleged. — As it is only the ultimate facts constituting the cause of action, and not mere evidence, that must be alleged,[9] all the evidence of the various circumstances[10] and probative facts should be received, though not alleged in the plaintiff's pleadings.[11]

E. Common Counts in Assumpsit. — When the plaintiff declares upon the common counts in assumpsit, no evidence is admissible on his part except as to the matters set out in the bill of particulars filed with the declaration.[12]

3. As Dependent Upon Defendant's Pleadings. — A. In General. The admissibility of the evidence of the defendant is governed by the character of his plea.[13]

2 Bibb 382; Howard *v.* Deitrick, 13 Ky. L. Rep. 539.

Louisiana. — Pritchard *v.* McKinstry, 12 La. 224.

Maryland. — McTavish *v.* Carroll, 17 Md. 1.

Michigan. — Green *v.* Green, 26 Mich. 437; Detroit, H. & I. R. Co. *v.* Forbes, 30 Mich. 165; Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

Minnesota. — State *v.* Segel, 60 Minn. 507, 62 N. W. 1134.

Mississippi. — Wells *v.* Alabama G. S. R. Co., 67 Miss. 24, 6 So. 737.

Missouri. — James *v.* Hicks, 58 Mo. App. 521.

New Hampshire. — Brewer *v.* Hyndman, 18 N. H. 9.

8. Bristol *v.* Rensselaer & S. R. Co., 9 Barb. (N. Y.) 158; Garvey *v.* Fowler, 4 Sandf. (N. Y. Super.) 665; Riggs *v.* Chapin, 7 N. Y. Supp. 765; Thornton *v.* Stevenson (Tex. Civ.), 31 S. W. 232; Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32; Gilmore *v.* Baker Co., 12 Wash. 468, 41 Pac. 124; Warner *v.* Warner's Estate, 37 Vt. 356.

9. Grewell *v.* Walden, 23 Cal. 165; Rocky Ford Canal, Reservoir, Land, Loan & Trust Co. *v.* Simpson, 5 Colo. App. 30, 36 Pac. 638; Tyler *v.* Gilmore, 3 Mackey (D. C.) 189; Siebert *v.* Leonard, 21 Minn. 442; Alcorn *v.* Chicago & A. R. Co., 108 Mo. 81, 18 S. W. 188; McCorkle *v.* Lawrence, 21 Tex. 731; Dillon *v.* Folsom, 5 Wash. 439, 32 Pac. 216.

10. Siebert *v.* Leonard, 21 Minn. 442; McCorkle *v.* Lawrence, 21 Tex. 731; Dillon *v.* Folsom, 5 Wash. 439, 32 Pac. 216.

11. *United States.* — Cavazos *v.* Trevino, 6 Wall. 773.

Arkansas. — Tucker *v.* West, 29 Ark. 386.

Kansas. — Ballou *v.* Humphrey, 8 Kan. App. 219; Holman *v.* Raynesford, 3 Kan. App. 676, 44 Pac. 910.

Michigan. — Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170; Steers *v.* Holmes, 79 Mich. 430, 44 N. W. 922; Dikeman *v.* Arnold, 83 Mich. 218, 47 N. W. 113.

Missouri. — De Arman *v.* Taggart, 65 Mo. App. 82.

Pennsylvania. — Douglass *v.* Mitchell, 35 Pa. St. 440.

12. Williams *v.* Sinclair, 3 McLean 289, 29 Fed. Cas. No. 17,737; Roberts *v.* Harris, 32 Ga. 542; Saunders *v.* Osgood, 46 N. H. 21; Davis *v.* Hunt, 2 Bailey (S. C.) 412; Lapham *v.* Briggs, 27 Vt. 26; Mann *v.* Perry, 3 W. Va. 580.

13. *United States.* — Taylor *v.* Luther, 2 Sumn. 228, 23 Fed. Cas. No. 13,796.

Arkansas. — State Bank *v.* Arnold, 12 Ark. 180.

California. — Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299.

Illinois. — Mix *v.* White, 36 Ill. 484.

Indiana. — Graydon *v.* Gaddis, 20 Ind. 515.

Iowa. — Ranson *v.* Stanberry, 22 Iowa 334.

Kentucky. — Bolling *v.* Doneghy, 62 Ky. 220.

B. Evidence Under General Issue or Denial. — a. *General Rule.* — When the only plea is that of the general issue or denial, the only evidence admissible, as a general rule, is that which bears on the allegations made by the plaintiff in the statement of his cause of action contained in his declaration or complaint.[14]

b. *Modification of General Rule.* — In some jurisdictions,[15] and ordinarily in the action of ejectment,[16] and in criminal prosecutions,[17] under the plea of the general issue or denial all evidence

Louisiana. — Lawler *v.* Cosgrove, 39 La. Ann. 488, 2 So. 34.

Missouri. — Weil *v.* Posten, 77 Mo. 284.

Nebraska. — German Ins. Co. *v.* Fairbanks, 31 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459.

New York. — Chu Pawn *v.* Irwin, 82 Hun 607, 31 N. Y. Supp. 724.

North Carolina. — Graves *v.* Trueblood, 96 N. C. 495, 1 S. E. 918.

Texas. — Thompson *v.* Thompson, 12 Tex. 327; Smith *v.* Sherwood, 2 Tex. 460; Rivers *v.* Foote, 11 Tex. 662; Dennison *v.* League, 16 Tex. 399.

14. *United States.* — Lonsdale *v.* Brown, 3 Wash. C. C. 404, 15 Fed. Cas. No. 8,493; Wilkinson *v.* Pomeroy, 9 Blatchf. 513, 29 Fed. Cas. No. 17,674.

Alabama. — McConnico *v.* Stallworth, 43 Ala. 389.

California. — McLaren *v.* Spalding, 2 Cal. 510; White *v.* Moses, 11 Cal. 69.

Indiana. — Leary *v.* Moran, 106 Ind. 560, 7 N. E. 236; Vail *v.* Halton, 14 Ind. 344; Butler *v.* Edgerton, 15 Ind. 15; Woodruff *v.* Garnor, 20 Ind. 174.

Iowa. — Johnson *v.* Pennell, 67 Iowa 669, 25 N. W. 874.

Louisiana. — Petit *v.* Laville, 5 Rob. 117; Bonnabel *v.* Bouligny, 1 Rob. 292.

Maryland. — Hannon *v.* State, 2 Gill 42.

Massachusetts. — Snow *v.* Lang, 84 Mass. 18.

Minnesota. —Caldwell *v.* Bruggerman, 4 Minn. 270.

Mississippi. — Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482.

Missouri. — Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Hoffman *v.* Parry, 23 Mo. App. 20.

Nebraska. — Broadwater *v.* Jacoby, 19 Neb. 77, 22 N. W. 629; Winkler *v.* Roeder, 23 Neb. 706, 37 N. W. 607, 8 Am. St. Rep. 155; Hassett *v.* Curtis, 20 Neb. 162, 29 N. W. 295.

New York. — Weaver *v.* Barden, 49 N. Y. 286; Wilmarth *v.* Babcock, 2 Hill 194; Bellinger *v.* Craigue, 31 Barb. 534.

Pennsylvania. — Machette *v.* Musgrave, 8 Leg. Int. 74.

Tennessee. — Beaty *v.* McCorkle, 11 Heisk. 593.

Texas. — Pitt *v.* Elser, 7 Tex. Civ. App. 47, 32 S. W. 146; Guess *v.* Lubbock, 5 Tex. 535; Tisdale *v.* Mitchell, 12 Tex. 68.

Vermont. — Thrall *v.* Wright, 38 Vt. 494; Austin *v.* Chittenden, 32 Vt. 168.

Washington. — Penter *v.* Straight, 1 Wash. St. 365, 25 Pac. 469.

West Virginia. — Seim *v.* O'Grady, 42 W. Va. 77, 24 S. E. 994.

15. See cases cited under notes 19 and 20, this series.

16. *United States.* — Roberts *v.* Pillow, Hempst. 624, 20 Fed. Cas. No. 11,909.

Indiana. — Dale *v.* Frisbie, 59 Ind. 530; Steeple *v.* Downing, 60 Ind. 478; Wood *v.* Eckhouse, 79 Ind. 354; Webster *v.* Babinger, 70 Ind. 9.

Kansas. — Wicks *v.* Smith, 18 Kan. 508.

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

Pennsylvania. — Zeigler *v.* Fisher, 3 Pa. St. 365.

17. *Alabama.* — Allbritton *v.* State, 94 Ala. 76, 10 So. 426.

Illinois. — Hankins *v.* People, 106 Ill. 628.

Indiana. — Jones *v.* State, 74 Ind. 249; Eggleston *v.* State, 6 Blackf. 436; Neaderhouser *v.* State, 28 Ind. 257.

Ohio. — Hirn *v.* State, 1 Ohio St. 15.

Tennessee. — Bennett *v.* State, 1 Swan 411.

Virginia. — Fitch *v.* Com., 92 Va.

may be received which will tend to defeat the action[18] or prosecution,[19] although it may be evidence of matters of confession and avoidance.[20]

c. *Evidence Contradictory of Special Plea.* — Where defendant has pleaded a general denial and set up matter of defense in a special plea, evidence seemingly contradictory of such special plea may be admissible under the general issue.[21] It can not be rejected because of its contradictory nature in this regard.[22]

C. Matters Arising After Commencement of Suit. — In some jurisdictions, matters arising after the suit has been instituted must be specially pleaded in order to allow the introduction of evidence relating to such matters,[23] while in other courts the rule is

824, 24 S. E. 272; Ryan *v.* Com., 80 Va. 385.

West Virginia. — State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

18. McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34; Beaty *v.* McCorkle, 11 Heisk. (Tenn.) 593; Bonnabel *v.* Bouligny, 1 Rob. (La.) 292; Tracy *v.* Kelley, 52 Ind. 535; Hoffman *v.* Parry, 23 Mo. App. 20; Watson *v.* Bayley, 2 Cranch C. C. 67, 29 Fed. Cas. No. 17,276.

19. *United States.* — United States *v.* Brown, 2 Lowell 267, 24 Fed. Cas. No. 14,665.

Arkansas. — State *v.* Gill, 33 Ark. 129.

California. — People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436.

Florida. — Nelson *v.* State, 17 Fla. 195.

Georgia. — Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480.

Indiana. — Hatwood *v.* State, 18 Ind. 492; Lee *v.* State, 42 Ind. 152; Bryant *v.* State, 72 Ind. 400; Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369; Ulmer *v.* State, 14 Ind. 52.

Kentucky. — Com. *v.* Washington, 1 Dana 446.

Louisiana. — State *v.* Reed, 41 La. Ann. 581, 7 So. 132.

Michigan. — Morrissey *v.* People, 11 Mich. 327.

Mississippi. — Thompson *v.* State, 54 Miss. 740.

North Carolina. — State *v.* Potts, 100 N. C. 457, 6 S. E. 657.

Pennsylvania. — Com. *v.* Grise, 23 Pittsb. Leg. J. 138; Com. *v.* Bunn, 1 Leg. Op. 114.

Texas. — Brill *v.* State, 1 Tex. App. 152.

Vermont. — State *v.* Conlin, 27 Vt. 318.

20. *United States.* — Watson *v.* Bayley, 2 Cranch C. C. 67, 29 Fed. Cas. No. 17,276.

California. — Gavin *v.* Annan, 2 Cal. 494; McLarren *v.* Spalding, 2 Cal. 510.

Indiana. — Sowle *v.* Holdridge, 17 Ind. 236; Woodruff *v.* Garnor, 20 Ind. 174; Tracy *v.* Kelley, 52 Ind. 535.

Iowa. — Johnson *v.* Pennell, 67 Iowa 669, 24 N. W. 874.

Massachusetts. — Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356; Bates *v.* Norcross, 17 Pick. 14, 28 Am. Dec. 271.

Minnesota. — McDermott *v.* Deither, 40 Minn. 86, 41 N. W. 544.

Missouri. — Hoffman *v.* Parry, 23 Mo. App. 20; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135.

Nebraska. — Broadwater *v.* Jacoby, 19 Neb. 77, 26 N. W. 629.

Tennessee. — McGavock *v.* Puryear, 6 Coldw. 34; Beaty *v.* McCorkle, 11 Heisk. 593.

Texas. — Tisdale *v.* Mitchell, 12 Tex. 68.

Wisconsin. — Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755.

21. McGrew *v.* Armstrong, 5 Kan. 284; Hawkins *v.* New Orleans Printing & Pub. Co., 29 La. Ann. 134; Joseph *v.* Miller, 1 N. M. 621; Prince *v.* Puckett, 12 Ala. 832; McCormick Harv. Mach. Co. *v.* Snell, 23 Ill. App. 79; Grash *v.* Sater, 6 Iowa 301.

22. See cases cited in next preceding note.

23. Mount *v.* Scholes, 120 Ill. 394,

otherwise and evidence of such matters may be received under the general issue or denial.[24]

D. Matters in Confession and Avoidance. — It is a general rule in most jurisdictions that evidence of matters in confession and voidance of the plaintiff's action can not be received under the general issue,[25] but only under a special plea or answer.[26]

4. Admissibility as to Special Matters. — A. Foreign Laws. — If it is sought to found an action or defense upon a foreign law, it is

11 N. E. 401; Feagin *v.* Pearson, 42 Ala. 332; Agnew *v.* Bank of Gettysburg, 2 Har. & G. (Md.) 478; Johnson *v.* Kibbee, 36 Mich. 269.

24. City of Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Indiana, B. & W. R. Co. *v.* Adams, 112 Ind. 302, 14 N. E. 80; Williams *v.* Tappan, 23 N. H. 385; Moore *v.* McNairy, 12 N. C. 319; Lyon *v.* Marclay, 1 Watts (Pa.) 271.

25. *United States.* — Wilkinson *v.* Pomeroy, 9 Blatchf. 513, 29 Fed. Cas. No. 17,674.

Alabama. — American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644.

California. — Pico *v.* Kalisher, 55 Cal. 153.

Georgia. — Jones *v.* Lavender, 55 Ga. 228; Ocean S. S. Co. *v.* Williams, 69 Ga. 251; Jacobus *v.* Wood, 84 Ga. 638, 10 S. E. 1099.

Illinois. — First Baptist Church *v.* Hyde, 40 Ill. 150; Culver *v.* Johnson, 90 Ill. 91; Yost *v.* Minneapolis Harv. Wks., 41 Ill. App. 556.

Indiana. — Millhollan *v.* Jones, 7 Ind. 715; Norris *v.* Amos, 15 Ind. 365; Louisville, etc. R. Co. *v.* Cauley, 119 Ind. 142, 21 N. E. 546.

Iowa. — Hargan *v.* Burch, 8 Iowa 309; Bartlett *v.* Gaines, 11 Iowa 95.

Kansas. — Fuller *v.* Jackson County Comrs., 2 Kan. 445.

Louisiana. — Sherman *v.* New Orleans, 18 La. Ann. 660.

Massachusetts. — Poor *v.* Robinson, 10 Mass. 131; Coombs *v.* Williams, 15 Mass. 243; Grinnell *v.* Spink, 128 Mass. 25; Fogel *v.* Dussault, 141 Mass. 154, 7 N. E. 17.

Minnesota. — Roberts *v.* Nelson, 65 Minn. 240, 68 N. W. 14.

Missouri. — Phister *v.* Gove, 48 Mo. App. 455; Hardwick *v.* Cox, 50 Mo. App. 509; Evers *v.* Shumaker, 57 Mo. App. 454; Cooke *v.* Kansas City, etc. R. Co., 57 Mo. App. 471.

Nebraska. — Atchison & N. R. Co. *v.* Washburn, 5 Neb. 117; Quick *v.* Sachsse, 31 Neb. 312, 47 N. W. 935; Walton Plow Co. *v.* Campbell, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468; Home F. Ins. Co. *v.* Berg, 46 Neb. 600, 65 N. W. 780.

Nevada. — Horton *v.* Ruhling, 3 Nev. 498.

New York. — Butterworth *v.* Soper, 13 Johns. 443; Drake *v.* Barrymore, 14 Johns. 166; Richmond *v.* Little, 2 Hill 134; Dillaye *v.* Parks, 31 Barb. 132; Harter *v.* Crill, 33 Barb. 283; Healy *v.* Clark, 12 N. Y. St. 685; Sawyer *v.* Thurber, 14 Civ. Proc. 204; Same *v.* Gates, 14 N. Y. St. 236.

Texas. — Marley *v.* McAnelly, 17 Tex. 658; Willis *v.* Hudson, 63 Tex. 678; Ft. Worth & D. R. Co. *v.* Lillard, 16 S. W. 654; Hoffman *v.* Cleburne Bldg. & L. Assn., 2 Tex. Civ. App. 688, 22 S. W. 155; Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284.

26. *United States.* — Walker *v.* Flint, 11 Fed. 31.

California. — Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Bridges *v.* Paige, 13 Cal. 640.

Louisiana. — Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606; White *v.* Moreno, 17 La. 371.

Massachusetts. — Snow *v.* Chatfield, 77 Mass. 12.

Nebraska. — Jones *v.* Seward Co., 10 Neb. 154, 4 N. W. 946; Phoenix Ins. Co. *v.* Bachelder, 39 Neb. 95, 57 N. W. 996; Keens *v.* Robertson, 46 Neb. 837, 6 N. W. 897.

Nevada. — Ferguson *v.* Rutherford, 7 Nev. 385.

New York. — Beaty *v.* Swarthout, 32 Barb. 293.

South Carolina. — Maverick *v.* Gibbs, 3 McCord 315.

Texas. — McCartney *v.* Martin, 1 Posey 143.

necessary that such law be pleaded by the party relying on it, else evidence of the existence of such law can not be received.[27]

B. Municipal Ordinances. — If a municipal ordinance is relied on, no evidence relating to such ordinance can be received unless it is set out in the pleadings.[28]

C. Matters Admitted in Pleading. — When a fact is admitted in the pleading of either party, no evidence is admissible to controvert it.[29]

D. Matter Inserted in Pleading by Party's Attorney. Where a matter is inserted in a pleading by the attorney of the party filing such pleading, the party will not afterwards be allowed to controvert such fact by the introduction of evidence for that purpose.[30] But if such allegation of fact has been so made by mistake, the party may have it corrected.[31]

E. Admissions in Pleadings in Former Suit. — Admissions in pleadings in a former suit do not preclude the party from show-

27. *United States.* — Noonan *v.* Delaware, L. & W. R. Co., 68 Fed. 1.

Alabama. — Forsyth *v.* Preer, 62 Ala. 443; Cubbedge *v.* Napier, 62 Ala. 518.

Connecticut. — Hempstead *v.* Reed, 6 Conn. 480.

Illinois. — Chumasero *v.* Gilbert, 24 Ill. 293; Pearce *v.* Rhawn, 13 Ill. App. 637.

Indiana. — Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303; Milligan *v.* State, 86 Ind. 553.

Iowa. — Carey *v.* Cincinnati & C. R. Co., 5 Iowa 357; Bean *v.* Briggs, 4 Iowa 464.

Kentucky. — Roots *v.* Merriweather, 8 Bush 397; Valz *v.* First Nat. Bank, 96 Ky. 543, 29 S. W. 329, 49 Am. St. Rep. 306.

Michigan. — Great Western R. Co. *v.* Miller, 19 Mich. 305.

Nebraska. — Sells *v.* Haggard, 21 Neb. 357, 32 N. W. 66; Smith *v.* Mason, 44 Neb. 610, 63 N. W. 41.

North Dakota. — National German Am. Bank *v.* Lang, 2 N. D. 66, 49 N. W. 414.

Oklahoma. — Dunham *v.* Halloway, 3 Okla. 244, 41 Pac. 140.

Texas. — Armendiaz *v.* De La Serna, 40 Tex. 291.

Vermont. — Herring *v.* Selding, 2 Aikens 12.

28. *Alabama.* — Case *v.* Mayor of Mobile, 30 Ala. 538.

California. — City of Los Angeles *v.* Waldron, 65 Cal. 283, 3 Pac. 890.

Illinois. — Rockford City *v.* Matthews, 50 Ill. App. 267.

Indiana. — Green *v.* City of Indianapolis, 22 Ind. 192.

Kansas. — City of Emporia *v.* Volmer, 12 Kan. 622.

Missouri. — Becker *v.* City of Washington, 94 Mo. 375, 7 S. W. 291.

New Jersey. — Kip *v.* City of Paterson, 26 N. J. L. 298.

North Carolina. — City of Greensboro *v.* Shields, 78 N. C. 417.

29. *United States.* — Winter *v.* United States, Hempst. 344, 30 Fed. Cas. No. 17,895; Central Railroad of New Jersey *v.* Stoermer, 51 Fed. 518, 2 C. C. A. 360.

California. — Blankman *v.* Vallejo, 15 Cal. 638; Turner *v.* White, 73 Cal. 299, 14 Pac. 794.

Colorado. — Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152.

Louisiana. — Betat *v.* Mougin, 17 La. Ann. 289.

Montana. — Wulf *v.* Manuel, 9 Mont. 276, 286, 23 Pac. 723.

New York. — Crosbie *v.* Leary, 6 Bosw. (N. Y. Super.) 312; Hunt *v.* Mitchell, 1 Hun 621.

North Carolina. — Bank of Statesville *v.* Pinkers, 83 N. C. 377.

Wisconsin. — Denton *v.* White, 26 Wis. 679; City of Seymour *v.* Town of Seymour, 56 Wis. 314, 14 N. W. 371.

30. See 1 Ency. of Ev., p. 428 *et seq.*, where the subject is considered.

31. Smith *v.* Fowler, 12 Lea

ing the fact to be contrary to such admissions,[32] and this is especially so when the fact admitted was not in issue in the former suit.[33]

F. Account Stated. — If an account stated is relied on in the pleadings, evidence to impeach it is not admissible unless the ground of impeachment is set forth in the pleadings of the party seeking to impeach such account.[34]

G. Impeaching Acknowledgment of Deed. — The certificate of an officer to the acknowledgment of a deed being in the nature of a judicial act,[35] evidence to impeach it is not to be received unless a proper ground for such impeachment is set out in the pleading of the party attacking such acknowledgment.[36]

H. Notice. — Where the right relied on depends upon notice to the adverse party, evidence in proof of the notice can not be received unless an averment of the fact of notice is made in the pleadings.[37]

I. Pendency of Another Action. — If it is desired to show the pendency of another action between the same parties for the same cause and thus abate the suit, such fact must be pleaded to admit evidence to establish it.[38]

(Tenn.) 163; Coats *v.* Elliott, 23 Tex. 606; Wanzer *v.* Howland, 10 Wis. 8.

32. *Georgia.* — Wilkinson *v.* Thigpen, 71 Ga. 497.

Illinois. — Mulvey *v.* Gibbons, 87 Ill. 367; Gillespie *v.* Gillespie, 159 Ill. 84, 42 N. E. 305.

Indiana. — Fowler *v.* Hobbs, 86 Ind. 131.

Iowa. — Iowa County *v.* Huston, 43 Iowa 485.

Kansas. — Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

Louisiana. — Lusk *v.* Benton, 30 La. Ann. 686.

Maine. — Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628.

Minnesota. — Rich *v.* City of Minneapolis, 40 Minn. 82, 41 N. W. 455.

Missouri. — Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614; Trask *v.* German Ins. Co., 58 Mo. App. 431.

Wisconsin. — Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

33. Blanks *v.* Klein, 53 Fed. 436, 3 C. C. A. 585, 2 U. S. App. 432.

34. Lyne *v.* Gilliat, 3 Call (Va.) 5; Warner *v.* Myrick, 16 Minn. 102.

35. Rollins *v.* Menager, 22 W. Va. 461.

36. Marsh *v.* Mitchell, 26 N. J. Eq. 497; Dolph *v.* Barney, 5 Or. 191; Moore *v.* Fuller, 6 Or. 272, 25 Am. Rep. 524.

37. Burck *v.* Taylor, 152 U. S. 634; Carlisle *v.* Cahawba & M. R. Co., 4 Ala. 70; Cole *v.* Jessup, 2 Barb. (N. Y.) 309; Mayfield *v.* Averitt's Admr., 11 Tex. 140; Wright *v.* Smith, 19 Vt. 110.

38. *United States.* — City of North Muskegon *v.* Clark, 62 Fed. 694; Cheongwo *v.* Jones, 3 Wash. C. C. 359, 5 Fed. Cas. No. 2,638.

Alabama. — *Ex parte* Brooks, 48 Ala. 423; Holley *v.* Younge, 27 Ala. 203.

California. — Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12.

Indiana. — Smock *v.* Graham, 1 Blackf. 314.

Kentucky. — Curd *v.* Lewis, 1 Dana 351; Frogg's Ex'rs. *v.* Long's Admr., 3 Dana 157, 28 Am. Dec. 69; Anderson *v.* Barry, 2 J. J. Marsh. 281.

Maine. — Fahy *v.* Brannagan, 56 Me. 42; Small *v.* Thurlow, 37 Me. 504.

Massachusetts. — Com. *v.* Churchill, 5 Mass. 174; Morton *v.* Sweetser, 94 Mass. 134.

Missouri. — Bernecker *v.* Miller, 44 Mo. 102.

New Hampshire. — Wallace *v.* Robinson, 52 N. H. 286; Parker *v.* Colcord, 2 N. H. 36.

New Jersey. — Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

New York. — Groshon *v.* Lyon, 16 Barb. 461; Gardner *v.* Clark, 21 N. Y. 399; White *v.* Talmage, 35 N. Y. Super. 223.

5. Evidence Under General Issue at Common Law. — A. Observations. — There are two systems of pleading obtaining in this country—one known as the common-law system,[39] and the other as the Code system.[40] Under the former the extent of the admissibility of evidence is dependent largely upon the form of action and the character of the plea,[41] while under the latter it depends upon the statement of the facts by the plaintiff and the extent and nature of the defendant's answer.[42] But there is great uniformity among the states under the latter system as to the statutes relating to this subject.[43] We shall treat these two systems separately, beginning with the former.

B. Evidence Under General Issue in Particular Actions. a. In *Assumpsit.* — **(1.) Matters Admissible.** — It is laid down as a general principle governing the admission of evidence under the general issue in assumpsit, that anything which shows that the plaintiff has no subsisting cause of action may be received in evi-

North Carolina. — Harris *v.* Johnson, 65 N. C. 478.

Oregon. — Crane *v.* Larson, 15 Or. 345, 15 Pac. 326.

Pennsylvania. — Streater *v.* Ricketts, 2 Kulp 529.

Tennessee. — Allen *v.* Allen, 3 Tenn. Ch. 145.

Wisconsin. — Rowley *v.* Williams, 5 Wis. 151; Witte *v.* Foote, 90 Wis. 235, 62 N. W. 1044.

Contra. — Gaines *v.* Park, 3 B. Mon. 223, 38 Am. Dec. 185; Peck *v.* Kirtz, 113 N. Y. 669, 21 N. E. 1116; Navigation Co. *v.* Navigation Co., 3 Phila. (Pa.) 214; Battell *v.* Malot, 58 Vt. 271, 5 Atl. 479.

39. The following states adhere to the common law practice to a greater or less extent and may be said to be the common law jurisdictions: Delaware, District of Columbia, Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, West Virginia.

40. While the statutes in the code states prescribing the practice differ in some of their minor details, all are modeled after the New York code. The following are the jurisdictions having a code practice: Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Washington, Wisconsin, Wyoming, Arizona Territory, Oklahoma and Utah.

41. This is apparent from an examination of the actions of assumpit and debt, and the evidence that may be offered under the general issue in each of these forms. See authorities under notes 44, 45, 62, 63, 67, 71 and 74, this series.

42. *United States.* — Mack *v.* Lancashire Ins. Co., 1 Fed. 193.

California. — McLauren *v.* Spalding, 2 Cal. 510; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692.

Georgia. — Longstreet *v.* Reeside, Ga. Dec. 39.

Indiana. — Moorman *v.* Barton, 16 Ind. 206; Pfaffenberger *v.* Platter, 98 Ind. 121.

Iowa. — Scott *v.* Morse, 54 Iowa 732, 6 N. W. 68, 7 N. W. 15.

Nebraska. — Bishop *v.* Stevens, 31 Neb. 786, 48 N. W. 827.

New York. — Clark *v.* Yale, 12 Wend. 470; Hubbel *v.* Ames, 15 Wend. 372; Schaus *v.* Manhattan Gas Co., 36 N. Y. Super. 262; Wemple *v.* McManus, 59 N. Y. Super. 418.

Oregon. — Buchtel *v.* Evans, 21 Or. 309, 28 Pac. 67.

South Carolina. — Lylies *v.* Bolles, 8 S. C. 258.

43. As shown by the authorities cited under notes 26 and 31, next series.

dence under such issue.[44] And so it has been held that evidence is admissible to prove fraud;[45] no consideration;[46] a different consideration from that stated in the declaration;[47] illegality of the contract sued on because of infancy[48] or usury;[49] a release of the contract sued on;[50] a general payment before suit brought;[51] accord and satisfaction;[52] the defendant's incapacity to contract, as that defendant at the time of its execution was a lunatic[53] or a feme covert;[54] invalidity of the contract because of duress,[55] the statute of frauds,[56] alteration of the contract,[57] or the non-performance of a condition precedent by the plaintiff;[58] a promissory note or other negotiable security, given for the debt and still outstanding in the hands of a third person;[59] the pendency of a foreign attachment.[60]

44. *United States.* — McRae *v.* Parsons, 112 Fed. 917; Young *v.* Black, 11 U. S. 565; Craig *v.* Missouri, 29 U. S. 410; Dawes *v.* Peebles, 6 Fed. 856.

Illinois. — Stephenson County Supervisors *v.* Manny, 56 Ill. 160; Wilson *v.* King, 83 Ill. 232; Huff *v.* Wolfe, 48 Ill. App. 589.

Kentucky. — Smart *v.* Baugh, 26 Ky. 363; Jones *v.* Pryor, 4 Ky. 614.

Maryland. — Herrick *v.* Swomley, 56 Md. 439.

New York. — Wilt *v.* Ogden, 13 Johns. 56; Niles *v.* Totman, 3 Barb. 594; Edson *v.* Weston, 7 Cow. 278.

Pennsylvania. — Dawson *v.* Tibbs, 4 Yeates 349; Falconer *v.* Smith, 18 Pa. St. 130, 55 Am. Dec. 611.

45. Block *v.* Elliott, 1 Mo. 275; Kelly *v.* Fahrney, 123 Fed. 280; Minor *v.* Baldridge, 123 Cal. 187, 55 Pac. 783.

46. Dawes *v.* Peebles, 6 Fed. 856; Block *v.* Elliott, 1 Mo. 275; Talbert *v.* Cason, 1 Brev. (S. C.) 298; Farrow *v.* Mays, 1 Nott & McC. (S. C.) 312; Keen *v.* Ranck, 14 Phila. (Pa.) 168; Blessing *v.* Miller, 102 Pa. St. 45; Jamison *v.* Buckner, 2 Blackf. (Ind.) 77.

47. 1 Bart. Law Prac. (2nd ed.) 501; Hogg's Plead. & Forms (3rd. ed.) 177.

48. Stansbury *v.* Marks, 4 Dall. (Pa.) 130.

49. Andrews *v.* Pond, 13 Pet. (U. S.) 65; Craig *v.* Missouri, 4 Pet. (U. S.) 410; M. & M. Bank *v.* Evans, 9 W. Va. 373; McCrea *v.* Parsons, 112 Fed. 917.

50. Brown *v.* Baltimore & O. R. Co., 6 App. Cas. (D. C.) 237; Chicago W. & V. Coal Co. *v.* Peterson, 45 Ill. App. 507; Shafer *v.* Stonebraker, 4 Gill & J. (Md.) 345; Barr *v.* Perry, 3 Gill (Md.) 313; Dawson *v.* Tibbs, 4 Yeates (Pa.) 349; Johnson *v.* Philadelphia & R. R., 163 Pa. 127, 29 Atl. 854, 35 Wkly. Notes Cases 375.

51. Coe *v.* Given, 1 Blackf. (Ind.) 367; Jeffrey *v.* Schlasinger, 13 Fed. Cas. No. 7,253*a*; Craig *v.* Whips, 31 Ky. 375; Dingee *v.* Letson, 15 N. J. Law 259; Drake *v.* Drake, 11 Johns. (N. Y.) 531; Worthen *v.* Dickey, 54 Vt. 277; Brennan *v.* Tietsort, 49 Mich. 397, 13 N. W. 790; Dawson *v.* Tibbs, 4 Yeates (Pa.) 349.

52. Baylies *v.* Fettyplace, 7 Mass. 325; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Burge *v.* Dishman, 5 Blackf. (Ind.) 272; Chappell *v.* Phillips, Wright (Ohio) 372; Stewart *v.* Saybrook, Wright (Ohio) 374; Phillips *v.* Kelly, 29 Ala. 628; Page *v.* Prentice, 7 Blackf. (Ind.) 322.

53. 1 Chitty on Plead. (11th Am. ed.) 476, 477.

54. Fuller *v.* Bartlett, 41 Me. 241.

55. 1 Chitty on Plead. (11th Am. ed.) 476, 477.

56. Gardens *v.* Webber, 17 Pick. (Mass.) 407; Hotchkiss *v.* Ladd, 36 Vt. 393, 86 Am. Dec. 679; Read *v.* Nash, 1 Wils. (Eng.) 305; Saunders *v.* Wakefield, 4 Barn. & Ald. (Eng.) 595.

57. Ward *v.* Athens Min. Co., 98 Ill. App. 227.

58. Manchester Iron Mfg. Co. *v.* Sweeting, 10 Wend. (N. Y.) 162.

59. 1 Chitty on Plead. (11th Am. ed.) 478.

60. 1 Chitty on Plead. (11th Am. ed.) 478.

Arbitrament,[61] or former recovery may be proved under the general issue.[62]

(2.) Matters Inadmissible.— About the only matters which are held not to be admissible in evidence under the general issue in assumpsit are the statute of limitations,[63] set-offs,[64] tender,[65] and

61. 1 Chitty on Plead. (11th Am. ed.) 478; Hogg's Pl. & Forms, (3rd. ed.) 177.

62. Mutual Life Ins. Co. *v.* Harris, 97 U. S. 331; Arnold *v.* Paxton, 29 Ky. 503; Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Cawill *v.* Garrigues, 5 Pa. St. 152; Bartels *v.* Schell, 16 Fed. 341; Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

63. *United States.*— Brown *v.* Jones, 2 Gall. 477, 4 Fed. Cas. No. 2,017; Neale *v.* Walker, 1 Cranch C. C. 57, 17 Fed. Cas. No. 10,072; Walker *v.* Flint, 11 Fed. 31.

Alabama.— Espy *v.* Comer, 76 Ala. 501; Brown *v.* Hemphill, 9 Port. 206; Ferguson *v.* Carter, 40 Ala. 607.

California.— People *v.* Broadway Wharf Co., 31 Cal. 33; Manning *v.* Dallas, 73 Cal. 420, 15 Pac. 34.

Georgia.— Parker *v.* Irvin, 47 Ga. 405.

Illinois.— Chenot *v.* Lefevre, 8 Ill. 637; Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702; Wilson *v.* King, 83 Ill. 232.

Indiana.— McCallam *v.* Pleasants, 67 Ind. 542; Wood *v.* Hughes, 138 Ind. 179, 37 N. E. 588; City of Lebanon *v.* Twiford, 13 Ind. App. 384, 41 N. E. 844; Bowman *v.* Mallory, 14 Ind. 424.

Iowa.— Sleeth *v.* Murphy, 1 Morris 321, 41 Am. Dec. 232.

Kentucky.— Jones *v.* Chiles, 27 Ky. 610; Hayden *v.* Stone, 62 Ky. 396; Stewart *v.* Durrett, 19 Ky. 113; Rankin *v.* Turney, 65 Ky. 555; Hieronymous *v.* Mayhall, 64 Ky. 508.

Louisiana.— Lejeune *v.* Hebert, 6 Rob. 419; Ashbey *v.* Ashbey, 41 La. Ann. 102, 5 So. 539; Mansfield *v.* Doherty, 21 La. Ann. 395.

Maine.— Ware *v.* Webb, 32 Me. 41; Longfellow *v.* Longfellow, 54 Me. 240.

Maryland.— Oliver *v.* Gray, 1 Har. & G. 204; *In re* Hepburn's Case, 3 Bland 95.

Minnesota.— Davenport *v.* Short, 17 Minn. 24.

Missouri.— Boyce *v.* Christy, 47 Mo. 70; Bell *v.* Clark, 30 Mo. App. 224; Orr *v.* Rode, 101 Mo. 387, 13 S. W. 1066.

Nebraska.— Atchison & N. R. Co. *v.* Miller, 16 Neb. 661, 21 N. W. 451.

New York.— Ainslie *v.* New York, 1 Barb. 168.

North Carolina.— Randolph *v.* Randolph, 107 N. C. 506, 12 S. E. 374; Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713.

Ohio.— Towsley *v.* Moore, 30 Ohio St. 184, 27 Am. Rep. 434.

Pennsylvania.— Heath *v.* Page, 48 Pa. St. 130; Witherupp *v.* Hill, 9 Serg. & R. 11.

Rhode Island.— White *v.* Eddy, 19 R. I. 108, 31 Atl. 823.

South Carolina.— Jones *v.* Massey, 9 S. C. 376.

Tennessee.— Maury *v.* Lewis, 18 Tenn. 115; Merriman *v.* Cannovan, 68 Tenn. 93.

Texas.— Petty *v.* Cleveland, 2 Tex. 404.

Virginia.— Hudson *v.* Hudson's Admr., 6 Munf. 352.

West Virginia.— Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410.

Wisconsin.— Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283; Lockhart *v.* Fessenich, 58 Wis. 588, 17 N. W. 302.

64. Judson *v.* Eslava, Minor (Ala.) 2; Kennard *v.* Secor, 57 Ill. App. 415; Sangster *v.* Maitland, 11 Gill & J. (Md.) 286; Alliston *v.* Lindsey, 20 Miss. 656; Bell *v.* Crawford, 8 Grat. (Va.) 110.

65. *United States.*— Boulton *v.* Moore, 14 Fed. 922.

California.— Hegler *v.* Eddy, 53 Cal. 597.

District of Columbia.— Hughes *v.* Eschback, 7 D. C. 66.

Iowa.— Barker *v.* Brink, 5 Iowa 481.

Massachusetts.— Carley *v.* Vance, 17 Mass. 389.

bankruptcy.[66] These matters must be made the subject of special pleas.[67]

(3.) Nonjoinder of Parties. — As to whether a nonjoinder of proper parties may be shown under the general issue, the authorities are in conflict, some holding such nonjoinder may be proved under the general issue,[68] others that it can only be shown under a special plea in abatement.[69] In some jurisdictions the right to prove this under the general issue is denied by statute.[70]

b. *In Action of Debt.* — The admissibility of evidence in an action of debt under the general issue depends upon the character of the instrument sued on.[71] If the declaration is upon simple contract, practically the same matters may be given in evidence under the general issue as may be shown under this issue in assumpsit.[72]

New York. — Hill *v.* Place, 36 How. Prac. 26.

Pennsylvania. — Siebert *v.* Kline, 1 Pa. 38; Wagenblast *v.* McKean, 2 Grant Cas. 393; Sharpless *v.* Dobbins, 1 Del. Co. R. 25.

Vermont. — Griffin *v.* Tyson, 17 Vt. 35.

Wisconsin. — McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200.

66. 1 Chitty on Plead. (11th Am. ed.) 478*a*, 479.

67. See cases and authorities cited under next preceding foot notes, 63, 64, 65 and 66.

68. *United States.* — Carne *v.* McLane, 1 Cranch C. C. 351, 5 Fed. Cas. No. 2,416; Coffee *v.* Eastland, 5 Fed. Cas. No. 2,945.

Alabama. — Findlay *v.* Stevenson, 3 Stew. 48; Kirkley *v.* Segar, 20 Ala. 226.

Illinois. — Henrichsen *v.* Mudd, 33 Ill. 476; Fairbanks *v.* Badger, 46 Ill. 644.

Maine. — Marshall *v.* Jones, 11 Me. 54, 25 Am. Dec. 260.

Maryland. — Mitchell *v.* Dall, 2 Har. & G. 159; Hoffar *v.* Dement, 5 Gill 132, 46 Am. Dec. 628.

Tennessee. — Coffee *v.* Eastland, 3 Tenn. 159.

69. Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338; Mellandy *v.* New England Protective Union, 36 Vt. 31; Ives *v.* Hulet, 12 Vt. 314.

70. Nash *v.* Skinner, 12 Vt. 219, *s. c.* 36 Am. Dec. 338; Mellandy *v.* New England Protective Union, 36 Vt. 31; Prunty *v.* Mitchell, 76 Va. 169; Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976; Rutter *v.* Sullivan, 25 W. Va. 427.

71. *United States.* — Welsh *v.* Linde, 1 Cranch C. C. 508, 29 Fed. Cas. No. 17,409.

Connecticut. — Anderson *v.* Henshaw, 2 Day 272.

Indiana. — Stipp *v.* Cole, 1 Ind. 146.

Kentucky. — Craig *v.* Whips, 31 Ky. 375.

New Hampshire. — Dartmouth College Trustees *v.* Clough, 8 N. H. 22.

New Jersey. — Armstrong *v.* Hall, 1 N. J. L. 178.

Pennsylvania. — Davis *v.* Shoemaker, 1 Rawle 135.

Tennessee. — Phoenix Ins. Co. *v.* Munday, 45 Tenn. 547; McGavock *v.* Puryear, 46 Tenn. 34; Gillespie *v.* Darwin, 53 Tenn. 21; Beaty *v.* McCorkle, 58 Tenn. 593.

Virginia. — Newton *v.* Wilson, 3 H. & M. 470; Fant *v.* Miller, 17 Gratt. 447; Keckley *v.* Union Bank of Winchester, 79 Va. 458.

General Issue on Simple Contract in an action of debt is *nil debet.* Hughes *v.* Kelly (Va.), 30 S. E. 387.

72. "Under the plea of *nil debet* (the general issue in debt) the defendant may prove at the trial, coverture, lunacy, duress, infancy, release, arbitrament, accord and satisfaction, payment, want of consideration, failure of consideration, fraud, and, in short, anything which proves that there is no existing debt due. The statute of limitations, bankruptcy and tender are believed to be the only defenses which may not be proved under this plea."

Ordinarily all defense in such an action upon a specialty must be shown under a special plea.[73] Illustrations are given in the notes.[74]

c. *In Action of Covenant.* — (1.) **In General.** — All evidence admissible in this action is that provable under a special plea.[75] The evidence receivable under the pleas of "covenants performed" and "covenants not broken" is given in the notes.[76]

Keckley *v.* Union Bank of Winchester, 79 Va. 458.

73. In debt on a specialty, where the specialty is only the inducement to the action, as where the action is on an indenture of lease for rent due, the general issue may be *nil debet*. 1 Chitty on Plead. (11th Am. ed.) 482. Where the action is on a specialty which is made the foundation of the action, *nil debet* is not a proper plea. Jansen *v.* Ostrander, 1 Cowen (N. Y.) 670. If, however, the plea of *nil debet* is filed to an action of debt on a specialty, and it is not objected to, and the plaintiff takes issue on it, the plaintiff will be required to prove all the material allegations of his declaration. Jansen *v.* Ostrander, 1 Cowen (N. Y.) 670.

That all defenses to an action of debt on specialty must be specially pleaded, see the following: 1 Chitty on Plead. (11th Am. ed.) §§ 482-484*a*; English *v.* City of Jersey City, 42 N. J. Law 275; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Dickson *v.* Burk, 6 Ark. 412, 44 Am. Dec. 521.

74. Illustrations. — Non Est Factum. — If the defendant desires to offer evidence to controvert the execution of the instrument sued on, he can only do so by the special plea of *non est factum*. English *v.* Mayor, etc. Jersey City, 42 N. J. L. 275.

75. *United States.* — Marine Ins. Co. *v.* Hodgson, 10 U. S. 206.

Illinois. — Longley *v.* Norvall, 2 Ill. 389.

Kentucky. — Champ *v.* Ardery, 9 Ky. 246; McCoy *v.* Hill, 12 Ky. 372.

Massachusetts. — Kellogg *v.* Ingersoll, 1 Mass. 5.

Missouri. — Colgan *v.* Sharp, 4 Mo. 263.

New York. — Provost *v.* Calder, 2 Wend. 517.

Ohio. — Granger's Admr. *v.* Granger, 6 Ohio 35.

Tennessee. — Jones *v.* Johnson, 29 Tenn. 184.

Vermont. — Freeman *v.* Henry, 48 Vt. 553.

Illustrations. — In Jones *v.* Johnson, 29 Tenn. 184, the court, in its opinion, says: "In the action of covenant there is, properly speaking, no general issue or plea, amounting to a traverse or denial of the whole declaration, so as to thereby put the plaintiff to the necessity of proving the whole. Even the plea of *non est factum* only puts the deed in issue, and not the breach of covenant, or any other matter of defense. The defendant must, therefore, plead specially every matter of defense, of which, under the circumstances of the case, he is at liberty to avail himself, and the evidence must be confined to the issue made by such special plea. The defendant must plead specially, the performance of the covenant, and likewise matter in excuse of performance. 1 Chitty Pl. 523, 524. Upon issue joined on the plea of performance, the defendant assumes the burden of proof, and, on the trial of such issue, evidence in excuse of performance, in whole or in part, is wholly irrelevant and inadmissible. So much of the declaration as is not put in issue by the pleadings of the defendant must be taken as true." Buel *v.* Briggs, 15 Vt. 34, cited with approval in Freeman *v.* Henry, 58 Vt. 553.

76. Illustrations. — Covenants Performed. — Where a defendant pleads "covenants performed," this plea can only be supported by the evidence which shows that the covenant has been performed; and evidence showing that non-performance has been excused by the act of the plaintiff, or any other, does not support the issue, as this might tend to surprise the plaintiff at the trial. Fairfax *v.* Lewis, 2 Rand. (Va.) 20; Wallace *v.* Shaffer, 12 Leigh (Va.)

(2.) Plea of Non Est Factum. — In most jurisdictions no evidence is admissible as to the execution of an instrument sued on in the absence of a plea of *non est factum* verified by affidavit,[77] or in the absence of an affidavit denying the execution of the instrument sued on.[78] Any evidence tending to show that the instrument sued

623; Long *v.* Colston, Gilmer (Va.) 98; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185; Chewning *v.* Wilkinson, 95 Va. 667, 29 S. E. 680.

In a contract between A, B and C by which A purchases from B part of a tract of land, the title to which was in B, and B covenanted to procure a conveyance for that part of the land to A, and C purchases the residue of the land of B and purchases also from A that part which A had purchased from B, for which A covenants with C to procure him a proper conveyance; and, in the same contract, B covenants with C to procure him a conveyance of the whole tract; upon the general plea of covenants performed by A, proof that B procured a conveyance of the whole land to C does not support the issue on the part of A. Fairfax *v.* Lewis, 2 Rand. (Va.) 20.

Title bond executed by S. to W. with condition that S. should convey good title to W., not to him and his assigns, in 200 acres of land; this bond is assigned by W. to M. and M. to B., and while the bond is held by M., the first assignee, S. and his wife make a conveyance of the title to M. who refuses to accept the same; in action by W. for benefit of B., the last assignee, and upon pleas of conditions performed, and of conveyance to M., it was held that the condition of the bond requires that the title shall be made to W. and if there was proof of a conveyance of title to M. that would not sustain the plea of conditions performed, and the second plea of a conveyance to M. is nought. Wallace *v.* Shaffer, 12 Leigh (Va.) 622.

In an action upon a bond, if the brief statement filed under the statute alleges performance of the condition only in defense, evidence to show excuse for non-performance is inadmissible. Washburn *v.* Moseley, 22 Me. 160.

In Grieve *v.* Annin, 6 N. J. L. 461, the action was debt on a bond. The defendants pleaded *non est factum* and performance. Under the latter plea they offered to prove that a tender was made, which the court says is a fact never admitted in evidence unless it is pleaded, and which the court held contradicted the plea in that case, because the fact of a tender admits a refusal and shows there was no actual performance.

77. *United States.* — Chambers County *v.* Clews, 88 U. S. 317.

Alabama. — Tindall *v.* Bright, Minor 103; Parks *v.* Greening, Minor 178; Bonner *v.* Young, 68 Ala. 35.

Georgia. — Justices of Irwin County *v.* Sloan, 7 Ga. 31.

Indiana. — Boden *v.* Dill, 58 Ind. 273.

Michigan. — Union Cent. Life Ins. Co. *v.* Howell, 101 Mich. 332, 59 N. W. 599.

Missouri. — Smith *v.* Hart, 1 Mo. 273; McGill *v.* Wallace, 22 Mo. App. 675.

Texas. — Yeary *v.* Cummins, 28 Tex. 91.

Virginia. — James River & K. Co. *v.* Littlejohn, 18 Gratt. 53.

78. *United States.* — Bradford *v.* Williams, 45 U. S. 576.

Alabama. — Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755; Garnet *v.* Roper, 10 Ala. 842.

Arkansas. — McFarland *v.* State Bank, 4 Ark. 44, 37 Am. Dec. 761.

Colorado. — Anderson *v.* Sloan, 1 Colo. 484.

Illinois. — Herrick *v.* Swartwout, 72 Ill. 340; Horner *v.* Boyden, 27 Ill. App. 573.

Indiana. — Wilson *v.* Markle, 6 Blackf. 118.

Ohio. — McMurtry *v.* Campbell, 1 Ohio 262; Carrington *v.* Davis, Wright 735.

Texas. — Burleson *v.* Burleson, 15 Tex. 423.

on was not executed by the defendant is admissible.[79] Illustrations of this principle are given in the notes.[80]

d. *In Action of Detinue.* — Under the general issue in detinue, any matter which shows title in the plaintiff,[81] or his right of possession,[82] or title in the defendant,[83] or his right to the possession of the property sued for,[84] or the possession of the defendant before or at the time of suit, may be given in evidence.[85]. So the statute of

79. *Illinois.* — Sugden *v.* Beasley, 9 Ill. App. 71; Freeman *v.* Morris, 9 Ill. App. 237.

Indiana. — Huston *v.* Williams, 3 Blackf. 170, 25 Am. Dec. 184; State *v.* Gregory, 132 Ind. 387, 31 N. E. 952.

Kentucky. — Hall *v.* Smith, 77 Ky. 604.

Maine — Webber *v.* Libby, 70 Me. 412.

Maryland. — Union Bank *v.* Ridgeley, 1 Har. & G. 324.

Missouri. — State *v.* Ferguson, 9 Mo. 288.

New York. — Dorr *v.* Mussell, 13 Johns. 430; Dale *v.* Roosevelt, 9 Cow. 307.

North Carolina. — Perry *v.* Fleming, 4 N. C. 344.

South Carolina. — State *v.* Mayson, 2 Nott & McC. 425; Adams *v.* Wylie, 1 Nott & McC. 78.

Vermont. — Downer *v.* Dana, 19 Vt. 338.

Virginia. — Taylor *v.* King, 6 Munf. 358, 8 Am. Dec. 746.

West Virginia. — Stuart *v.* Livesay, 4 W. Va. 45; American Buttonhole, O. & S. M. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

80. Illustrations. — Want of Delivery may be shown under a denial of the execution of the instrument sued on (Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469), as well, also, as that it had been altered since it was signed and delivered (Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Boomer *v.* Koon, 6 Hun (N. Y.) 645; Gist *v.* Gans, 30 Ark. 285); that the note or other instrument was delivered in escrow (Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324; Owings *v.* Grubbs, 29 Ky. 31); fraud in the execution (Woolson *v.* Shirley, 36 Ky. 308; Stacy *v.* Ross, 27 Tex. 3, 84 Am. Dec. 604; Kingman & Co. *v.* Shawley, 61 Mo. App. 54).

81. *Alabama.* — Cooper *v.* Watson, 73 Ala. 252; Seals *v.* Edmondson, 73 Ala. 295, 49 Am. Rep. 51; Graham *v.* Myers, 74 Ala. 432; Haynes *v.* Crutchfield, 7 Ala. 189; Traylor *v.* Marshall, 11 Ala. 458; Parsons *v.* Boyd, 20 Ala. 112; Bryan *v.* Smith, 22 Ala. 534; Reese *v.* Harris, 27 Ala. 301; Gafford *v.* Stearns, 51 Ala. 434; Moore *v.* Parks, 61 Ala. 409; Jones *v.* Pullen, 66 Ala. 306; Jackson *v.* Rutherford, 73 Ala. 155.

Illinois. — Robinson *v.* Peterson, 40 Ill. App. 132.

Kentucky. — Merriweather *v.* Booker, 15 Ky. 254.

Missouri. — Melton *v.* McDonald, 2 Mo. 45, 22 Am. Dec. 437.

Nebraska. — Grand Island Bkg. Co. *v.* First Nat. Bank, 34 Neb. 93, 51 N. W. 596.

North Carolina. — O'Neal *v.* Baker, 47 N. C. 168.

82. Phillips *v.* McGrew, 13 Ala. 255; Shomo *v.* Caldwell, 21 Ala. 448; Huddleston *v.* Huey, 73 Ala. 215; Berry *v.* Hale, 2 Miss. 315; Calvit *v.* Cloud, 14 Tex. 53.

83. Duckett *v.* Crider, 50 Ky. 188; Slaughter *v.* Cunningham, 24 Ala. 200, 60 Am. Dec. 463.

84. Snellgrove *v.* Evans, 145 Ala. 600, 40 So. 567.

85. Woodruff *v.* Bentley, 30 Fed. Cas. No. 17,986*a*; Pool *v.* Adkisson, 31 Ky. 110; Kershaw *v.* Boykin, 1 Brev. (S. C.) 301; Haley *v.* Rowan, 13 Tenn. 301, 26 Am. Dec. 268; O'Shea *v.* Twohig, 9 Tex. 336. *Contra*, Gilbreath *v.* Jones, 66 Ala. 129; Berlin Mach. Wks. *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418; Davis *v.* Herndon, 39 Miss. 484; Houghton *v.* Newberry, 69 N. C. 456.

limitations may be given in evidence under this issue.[86] As to all other matters, evidence thereof can only be given under a special plea.[87]

e. *In Action of Replevin.* — (1.) **In General.** — At common law the general issue in replevin puts in issue not only the taking of the property,[88] but also the place mentioned in the declaration.[89] Under this issue only evidence relating to the taking is admissible.[90]

(2.) Right of Property. — Evidence of right of property in the action of replevin cannot be received at common law under the general issue;[91] such evidence is only admissible under a special plea.[92] So evidence of property out of the plaintiff can not be shown under the general issue,[93] but only under a special plea.[94] And at com-

86. Traun *v.* Keiffer, 31 Ala. 144; Lag *v.* Lawson, 23 Ala. 377; Ducket *v.* Crider, 11 B. Mon. (Ky.) 195; Stanley *v.* Earl, 5 Litt. (Ky.) 281.

87. Determination of plaintiff's interest, Brown *v.* Brown, 13 Ala. 208, 48 Am. Dec. 52, where officer was sued in detinue for a chattel taken and held by him, evidence of his right to hold it is not admissible. Cromwell *v.* Clay, 31 Ky. 578, 25 Am. Dec. 165; in detinue for a slave who has died since the last continuance, to prevent surprise, evidence ought not to be received of the alleged death unless the matter be specially pleaded. Bethea *v.* McLennon, 23 N. C. 523.

88. Ingalls *v.* Bulkely, 15 Ill. 224; Van Namee *v.* Bradley, 69 Ill. 299; Smith *v.* Snyder, 15 Wend. (N. Y.) 325.

89. Smith *v.* Snyder, 15 Wend. (N. Y.) 325.

90. Smith *v.* Snyder, 15 Wend. (N. Y.) 325; People *v.* Niagara C. P., 4 Wend. (N. Y.) 217.

91. Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198; Harper *v.* Barker, 3 T. B. Mon. (Ky.) 422, 16 Am. Dec. 112; Mackinley *v.* McGregor, 3 Wharton (Pa.) 369, 31 Am. Dec. 522; Carroll *v.* Harris, 19 Ark. 237.

92. *United States.* — Dickson *v.* Mathers, Hemp. 65, 7 Fed. Cas. No. 3,898*a*.

Arkansas. — Carroll *v.* Harris, 19 Ark. 237.

Florida. — Stewart *v.* Mills, 18 Fla. 57.

Illinois. — Ingalls *v.* Bulkley, 15 Ill. 224; Van Namee *v.* Bradley, 69 Ill. 299; Bourk *v.* Riggs, 38 Ill. 320; Schermerhorn *v.* Mitchell, 15 Ill. App. 418.

Kentucky. — Harper *v.* Barker, 3 T. B. Mon. 422, 16 Am. Dec. 112.

New Hampshire. — Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198; Mitchell *v.* Roberts, 50 N. H. 486.

Pennsylvania. — Mackinley *v.* McGregor, 3 Whart. 369, 31 Am. Dec. 522.

Contra. — Under Statutes. — *Indiana.* — Ashby *v.* West, 3 Ind. 170; Simcoke *v.* Frederick, 1 Smith 64; Sparks *v.* Heritage, 45 Ind. 66; May *v.* Pavey, 63 Ind. 4; Shipman Coal Min. & Mfg. Co. *v.* Pfeiffer, 11 Ind. App. 445, 39 N. E. 291.

Missouri. — Gibson *v.* Mozier, 9 Mo. 256.

New York. — Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740; Siedenbach *v.* Riley, 111 N. Y. 740, 19 N. E. 275; Haas *v.* Altieri, 2 Misc. 252, 21 N. Y. Supp. 959.

Ohio. — Coverlee *v.* Warner, 19 Ohio 29.

Wisconsin. — Heeron *v.* Beckwith, 1 Wis. 17.

93. Wilson *v.* Royston, 2 Ark. 315; Galusha *v.* Butterfield, 3 Ill. 227; Trotter *v.* Taylor, 5 Blackf. (Ind.) 431; Vickery *v.* Sherburne, 20 Me. 34; Draper *v.* Richards, 20 La. Ann. 306; Ringo *v.* Fields, 6 Ark. 43; Harper *v.* Baker, 3 T. B. Mon. (Ky.) 421, 16 Am. Dec. 112. *Contra*, under statutes: Kennedy *v.* Shaw, 38 Ind. 374; Hall *v.* Henline, 9 Ind. 256; Timp *v.* Dockham, 32 Wis. 146; Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897.

94. See cases cited in next preceding note.

mon law no evidence is receivable under the general issue to show a justification on the part of the defendant in taking the property.[95]

(3.) Set-off or Counter-Claim. — In an action of replevin, evidence of a set-off or counter-claim is not admissible.[96]

f. *In Action of Trespass.* — **(1.) Matters Admissible.** — Under the general issue in trespass may be given in evidence any matter which tends to contradict any material allegation necessary to the plaintiff's recovery.[97]

(2.) Matters Inadmissible. — Evidence of justification[98] or excuse of the alleged trespass,[99] an easement,[1] a license,[2] that the *locus in*

95. Hopkins *v.* Burney, 2 Fla. 42; McFarland *v.* Barker, 1 Mass. 153; Ely *v.* Ehle, 3 N. Y. 506; Howard *v.* Black, 49 Vt. 9; Holmes *v.* Wood, 6 Mass. 1.

"St. 1783, c. 42, allowing, in actions before a justice of the peace, under the general issue, evidence of matters of excuse or justification, does not extend to actions of replevin." Holmes *v.* Wood, 6 Mass. 1.

96. Goslin *v.* Redden, 3 Har. (Del.) 21; Swing *v.* Sparks, 7 N. J. L. 59; Anderson *v.* Reynolds, 14 Serg. & R. (Pa.) 439.

97. Fuller *v.* Founceville, 29 N. M. 554; Bruch *v.* Carter, 32 N. J. L. 554; Sutherland *v.* Ingalls, 63 Mich. 620, 30 N. W. 342, 6 Am. St. 332; Rawson *v.* Morse, 21 Mass. 127; Perkins *v.* Towle, 43 N. H. 220, 80 Am. Dec. 149.

98. *United States.* — Goddard *v.* Davis, 1 Cranch C. C. 33, 70 Fed. Cas. No. 5,491.

California. — Razzo *v.* Varni, 21 Pac. 762.

Delaware. — Coe *v.* English, 6 Houst. 456.

Georgia. — Brooks *v.* Ashburn, 9 Ga. 297.

Indiana. — Johnson *v.* Cuddington, 35 Ind. 43.

Massachusetts. — Rawson *v.* Morse, 4 Pick. 127; Ward *v.* Bartlett, 12 Allen 419.

Michigan. — Osburn *v.* Lovell, 36 Mich. 246.

New Hampshire. — Fuller *v.* Rounceville, 29 N. H. 554.

New York. — Drake *v.* Barrymore, 14 Johns. 166; Van Buskirk *v.* Irving, 7 Cow. 35; Bradley *v.* Powers, 7 Cow. 330.

Tennessee. — Merritt *v.* City of Nashville, 5 Coldw. 95; Peck *v.* Goss, 6 Heisk. 108; Plowman *v.* Foster, 6 Coldw. 52.

Wisconsin. — Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478.

99. Root *v.* Chandler, 10 Wend. (N. Y.) 110; Demick *v.* Chapman, 11 Johns. (N. Y.) 132.

Distinction Between Trespass and Trespass on the Case. — What is stated in the text here must not be confounded with what may be given in evidence under the general issue in an action of trespass on the case. In Plowman *v.* Foster, 6 Coldw. (Tenn.) 52, and especially at pages 54, 55, the court says: "There is an essential difference between the actions of trespass and trespass on the case. The first is *stricti juris*, and matters in excuse or justification must be specially pleaded. The other is founded in the justice and equity of the case; for, whatever would in equity and conscience, according to existing circumstances, preclude the plaintiff from recovering, might, in an action on the case, be given in excuse, by the defendant, under the general issue; because the plaintiff must recover upon the justice and conscience of his case, and on that only. 1 Chitty's Pleadings, 491."

1. Strout *v.* Berry, 7 Mass. 385; Waters *v.* Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; Ferris *v.* Brown, 3 Barb. (N. Y.) 105; Whetstone *v.* Bowser, 29 Pa. St. 59; Harrison *v.* Davis, 2 Stew. (Ala.) 350. *Contra*, see Strout *v.* Berry, 7 Mass. 385; Saunders *v.* Wilson, 15 Wend. (N. Y.) 338.

2. *Alabama.* — Finch's Exrs. *v.* Alston, 2 Stew. & P. 83, 23 Am. Dec. 299.

Indiana. — Gronour *v.* Daniels, 7 Blackf. 108; Crabs *v.* Fetick, 7

quo was a public highway,[3] title in a stranger,[4] or that defendant acted under authority of law, can only be given in evidence under a special plea.[5]

(3.) Damages. — Only general damages may be proved under a general allegation of damages.[6] Evidence of special damage is not permissible unless such damages are averred in the declaration.[7]

Blackf. 373; Chase *v.* Long, 44 Ind. 427.

Massachusetts. — Ruggles *v.* Lesure, 24 Pick. 187; Hollenbeck *v.* Rowley, 8 Allen 473; Rawson *v.* Morse, 4 Pick. 127.

Michigan. — Seneeal *v.* Labadie, 42 Mich. 126, 3 N. W. 296.

New Jersey. — Hetfield *v.* Central R. Co., 29 N. J. L. 571.

New York. — Haight *v.* Badgeley, 15 Barb. 499.

Rhode Island. — Collier *v.* Jencks, 19 R. I. 493, 34 Atl. 998.

South Carolina. — Gabling *v.* Prince, 2 Nott & McC. 138; Hendrix *v.* Trapp, 2 Rich. L. 93.

Vermont. — Sawyer *v.* Newland, 9 Vt. 383; Child *v.* Allen, 33 Vt. 476; Hill *v.* Morey, 26 Vt. 178.

Wisconsin. — Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245; Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478.

But License From a Stranger Is Admissible, — Rawson *v.* Morse, 4 Pick. (Mass.) 127; Rasor *v.* Quolls, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658.

License is admissible in mitigation of damages. Hamilton *v.* Windolf, 36 Md. 301, 11 Am. Rep. 491.

3. Wood *v.* Mansell, 3 Blackf. (Ind.) 125; Babcock *v.* Lamb, 1 Cow. (N. Y.) 238; Aiken *v.* Stewart, 63 Pa. St. 30.

4. Beach *v.* Livergood, 15 Ind. 496.

Admissible in Mitigation of Damages, — Anthony *v.* Gilbert, 4 Blackf. (Ind.) 348.

5. *United States.* — Martin *v.* Clark, Hempst. 259, 16 Fed. Cas. No. 9,158a.

Alabama. — Womack *v.* Bird, 51 Ala. 504.

Michigan. — Rosenbury *v.* Angell, 6 Mich. 508.

New Jersey. — Carson *v.* Wilson, 11 N. J. L. 43, 19 Am. Dec. 368; Bruch *v.* Carter, 32 N. J. L. 554; Shreeves *v.* Liveson, 2 N. J. L. 247.

New York. — Demick *v.* Chapman, 11 Johns. 132; Butterworth *v.* Soper, 13 Johns. 443; Simpson *v.* Watrus, 3 Hill 619.

Ohio. — Parish *v.* Rigdon, 12 Ohio 191.

Tennessee. — Peck *v.* Goss, 6 Heisk. 108.

6. Samuels *v.* Richmond & D. R. Co., 35 S. C. 493, 14 S. E. 943, 52 Am. & Eng. R. Cas. 315; Sullivan *v.* Oregon R. & N. Co., 12 Or. 392, 7 Pac. 508, 21 Am. & Eng. R. Cas. 391; Houston & T. C. R. Co. *v.* Baker, 57 Tex. 419, 11 Am. & Eng. R. Cas. 667; Savannah, F. & W. R. Co. *v.* Holland, 82 Ga. 257, 10 S. E. 200, 41 Am. & Eng. R. Cas. 196.

7. *Alabama.* — Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

California. — Potter *v.* Froment, 47 Cal. 165.

Illinois. — Illinois Cent. R. Co. *v.* Siddons, 53 Ill. App. 607.

Indiana. — Ohio & M. R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

Maine. — Hunter *v.* Stewart, 47 Me. 419.

Massachusetts. — Adams *v.* Barry, 10 Gray 361.

Missouri. — Brown *v.* Chicago & A. R. Co., 80 Mo. 457.

Pennsylvania. — Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 533.

Texas. — Gulf, etc. R. Co. *v.* Maetze, 2 Wills. Civ. Cas. § 633.

Illustrations. — In an action against a city to recover damages to a lot caused by flowage of a sewer, plaintiff cannot show that, by reason of the flowage, his tenant left the premises, unless he alleges special damages. City of Union Springs *v.* Jones, 58 Ala. 654.

Expenses paid an attorney in getting rid of an illegal arrest, are not chargeable on the defendant in an action of false imprisonment, unless specially laid in the declaration; nor

g. *In Action on the Case.* — Under the general issue in case may be given in evidence at common law a former recovery,[8] release,[9] accord and satisfaction,[10] or any matter which, in equity and conscience, according to the existing circumstances, precludes a recovery by the plaintiff.[11] Thus, for illustration, anything which operates a discharge of the cause of action,[12] or any justification[13] or excuse, may be given in evidence under the general issue.[14]

h. *In Action of Trover and Conversion.* — Under the general issue in this action may be given in evidence all matters of defense,[15] except the statute of limitations[16] and release.[17] And this is the

is evidence of them admissible. Strang *v.* Whitehead, 12 Wend. (N. Y.) 64.

In an action for damages for the death of a mare, plaintiff will not be allowed to prove that the death of the mare was an injury to her sucking colt, if such damages be not alleged in the pleadings. Gamble *v.* Mullin, 74 Iowa 99, 36 N. W. 909.

An unmarried woman cannot recover damages on account of her prospects of marriage being lessened by injury which she has received, unless such special damage be alleged and proved. Hunter *v.* Stewart, 47 Me. 419.

In an action for a wrongful attachment, proof of special damages arising from loss of reputation, credit, or business cannot be made, unless such damages are pleaded. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

In an action to recover damages for injury to a horse, the hire of another horse to do the work of the injured horse is special damage, and must be specially pleaded. Hoffman *v.* Ruddiman, 5 Misc. 326, 25 N. Y. Supp. 508.

8. Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179; Greenwalt *v.* Horner, 6 Serg. & R. (Pa.) 71; Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Jones *v.* Weathersbee, 4 Strobh. L. (S. C.) 50, 51 Am. Dec. 653.

9. Greenwalt *v.* Horner, 6 Serg. & R. (Pa.) 71; Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Ridgeley *v.* Town of West Fairmont, 46 W. Va. 445, 33 S. E. 235.

10. See cases cited in next preceding note.

11. Plowman *v.* Foster, 6 Coldw. (Tenn.) 52; Jones *v.* Allen, 1 Head (Tenn.) 626; Jones *v.* Weathersbee, 4 Strobh. L. (S. C.) 50, 51 Am. Dec. 653; Ridgeley *v.* Town of West Fairmont, 46 W. Va. 445, 33 S. E. 235; Bird *v.* Randall, 3 Burr (Eng.) 1345 (Yelv. 174, b. note); Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179.

12. Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179; Ridgeley *v.* Town of West Fairmont, 46 W. Va. 445, 33 S. E. 235.

13. Fulton *v.* Merrill, 23 Ill. App. 599; Plowman *v.* Foster, 6 Coldw. (Tenn.) 52; Kidder *v.* Jennison, 21 Vt. 108; Rust *v.* Flowers, 1 Har. (Del.) 475; Callison *v.* Hedrick, 15 Gratt. (Va.) 244; Ridgeley *v.* Town of West Fairmont, 46 W. Va. 445, 33 S. E. 235.

14. See cases cited in next preceding note.

15. Kerwood *v.* Ayres, 59 Kan. 343, 53 Pac. 134; Nichols *v.* Minnesota, etc., Co., 70 Minn. 528, 73 N. W. 415; Pemberton *v.* Smith, 3 Head (Tenn.) 18; Vaden *v.* Ellis, 18 Ark. 355. *Contra,* as to justification under execution (Graham *v.* Harrower, 18 How. Pr. (N. Y.) 144; Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293; Wehle *v.* Butler, 43 How. Pr. (N. Y.) 5, 12 Abb. Pr. (N. S.) 139), or attachment (Crenshaw *v.* Smith, 57 Tex. 1); fraud (Keating Imp. & Mach. Co. *v.* Terre Haute C. & B. Co., 11 Tex. Civ. App. 216, 32 S. W. 556).

16. Yorke *v.* Grenaugh, 2 Ld. Raym. (Eng.) 866; Hawley *v.* Peacock, 2 Campb. (Eng.) 557; Pemberton *v.* Smith, 3 Head (Tenn.) 18; Vaden *v.* Ellis, 18 Ark. 355.

17. Yorke *v.* Grenaugh, 2 Ld.

rule now prevailing in nearly all the states of the Union.[18] Thus, under this issue the defendant may introduce evidence to show title in himself,[19] either as general or special owner;[20] that he took the property for rent in arrear;[21] title in a third party;[22] facts

Raym. (Eng.) 868; Pemberton *v.* Smith, 3 Head (Tenn.) 18; Vaden *v.* Ellis, 18 Ark. 355.

18. *Arkansas.* — Vaden *v.* Ellis, 18 Ark. 355.

Connecticut. — Morey *v.* Hoyt, 65 Conn. 516, 33 Atl. 496.

Indiana. — Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Kansas. — Kerwood *v.* Ayres, 59 Kan. 343, 53 Pac. 134.

Kentucky. — Graham *v.* Warner, 3 Dana 146, 28 Am. Dec. 65.

Michigan. — Eureka Iron Wks. *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834.

Minnesota. — Nichols *v.* Minnesota, etc. Co., 70 Minn. 528, 73 N. W. 415.

New Jersey. — Legrand *v.* Swayze, 4 N. J. L. 326.

North Carolina. — Boyce *v.* Williams, 84 N. C. 275, 37 Am. Rep. 618.

Oklahoma. — Robinson *v.* Peru Plow & W. Co., 1 Okla. 140, 31 Pac. 988.

Oregon. — Krewson *v.* Purdorn, 13 Or. 563, 11 Pac. 281.

Pennsylvania. — Pennsylvania R. Co. *v.* Hughes, 39 Pa. 521.

Tennessee. — Pemberton *v.* Smith, 3 Head 18.

West Virginia. — Smoot *v.* Cook, 3 W. Va. 172, 100 Am. Dec. 741.

19. McClelland *v.* Nichols, 24 Minn. 176; Skinner *v.* Upshaw, 2 Ld. Raym. (Eng.) 752; Eureka Iron Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834; Hart *v.* Hart, 48 Mich. 175, 12 N. W. 33. *Contra,* Dyson *v.* Ream, 9 Iowa 51.

20. See cases cited in next preceding note.

21. Wallace *v.* King, 1 H. Bl. (Eng.) 13; Kline *v.* Husted, 3 Caines (N. Y.) 275; Shipwick *v.* Blanchard, 6 Term R. (Eng.) 298.

22. *Connecticut.* — Morey *v.* Hoyt, 65 Conn. 516, 33 Atl. 496.

Indiana. — Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Kentucky. — Graham *v.* Warner, 3 Dana 146, 28 Am. Dec. 65.

Michigan. — Stephenson *v.* Little, 10 Mich. 433.

Minnesota. — Vanderburgh *v.* Bassett, 4 Minn. 242.

Mississippi. — Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375.

New Jersey. — Legrand *v.* Swayze, 4 N. J. L. 326.

New York. — McLaughlin *v.* Harriot, 14 Misc. 343, 35 N. Y. Supp. 684; Davis *v.* Hoppock, 6 Duer (N. Y. Super.) 254; Schryer *v.* Fenton, 15 App. Div. 158, 44 N. Y. Supp. 203; Schermerhorn *v.* Van Volkenburgh, 11 Johns. 529; Simar *v.* Shea, 85 N. Y. Supp. 457.

North Carolina. — Boyce *v.* Williams, 84 N. C. 275, 37 Am. Rep. 618.

Oklahoma. — Robinson *v.* Peru Plow & W. Co., 1 Okla. 140, 31 Pac. 988.

Oregon. — Krewson *v.* Purdorn, 13 Or. 563, 11 Pac. 281.

Pennsylvania. — Pennsylvania R. Co. *v.* Hughes, 39 Pa. St. 521.

West Virginia. — Smoot *v.* Cook, 3 W. Va. 172, 100 Am. Dec. 741.

Contra, (where defendant does not claim under third person).

Alabama. — Cook *v.* Patterson, 35 Ala. 102; Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 188.

Connecticut. — Haslem *v.* Lockwood, 37 Conn. 500, 9 Am. Rep. 350.

Florida. — Carter *v.* Bennett, 4 Fla. 283.

Illinois. — Montgomery *v.* Brush, 121 Ill. 513, 13 N. E. 230.

Maine. — Brown *v.* Ware, 25 Me. 411.

Maryland. — Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670.

Massachusetts. — Burke *v.* Savage, 13 Allen 408.

Michigan. — Kane *v.* Hutchisson, 93 Mich. 488, 53 N. W. 624.

Nebraska. — Miller *v.* Waite, 60 Neb. 431, 83 N. W. 355, 100 Am. Dec. 742.

showing a license;[23] or any other matter which tends to disprove the allegation of conversion.[24]

6. Admissibility Under the Code System. — A. In General. The admissibility of evidence under this system depends upon the scope of the complaint and the character of the answer.[25]

B. Admissibility as Dependent Upon Complaint. — Evidence on the part of the plaintiff is only admissible as to those essential matters of fact which have been stated in his complaint.[26] Thus,

New York. — Duncan *v.* Spear, 11 Wend. 54.

Wisconsin. — Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999.

23. Clarke *v.* Clarke, 6 Esp. (Eng.) 61; Bird *v.* Astock, 2 Bulstr. (Eng.) 280. *Contra,* see Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293.

24. For Specific Matters, see the following cases:

United States. — Coolidge *v.* Guthrie, 6 Fed. Cas. No. 3,185.

Indiana. — Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Iowa. — Thew *v.* Miller, 73 Iowa 742, 36 N. W. 771.

Kentucky. — Arthur *v.* Wilson, Litt. Sel. Cas. 76; Graham *v.* Warner, 3 Dana 146, 28 Am. Dec. 65 (fraud).

Michigan. — Eureka Iron & S. Wks. *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834 (fraud); Thomas *v.* Watt, 104 Mich. 201, 62 N. W. 345.

Missouri. — Thomas *v.* Ramsey, 47 Mo. App. 84 (fraud).

New Hampshire. — Drew *v.* Spaulding, 45 N. H. 472.

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

Wisconsin. — Willard *v.* Giles, 24 Wis. 319; Phoenix Mut L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151.

Under the general issue in trover, the plea is admissible in defense that the property was seized and converted by defendant while a military officer of the United States, in command of troops in an insurgent state. Coolidge *v.* Guthrie, 6 Fed. Cas. No. 3,185.

In an action for conversion, evidence is admissible under the general denial to prove that the title on which plaintiff's possession was based was void as against defendant, and that the disturbance of such possession was not wrongful. Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

In an action of trover, against A. in the state court, who seized and sold property as an excise officer of the United States, he may, under the general issue, give in evidence the act of Congress under which he proceeded. Arthur *v.* Wilson, Litt. Sel. Cas. (Ky.) 76.

The bar of an action for conversion by an election to sue in assumpsit can be shown under the general issue. Thomas *v.* Watt, 104 Mich. 201, 62 N. W. 345.

Under the general issue, in trover for a cow which had been impounded, the defendant may show a taking of the animal in question, damage feasant. Drew *v.* Spaulding, 45 N. H. 472.

Defendant may show that sale under which plaintiff claims title was fraudulent. Thomas *v.* Ramsey, 47 Mo. App. 84.

25. See cases in next note, also note 31, this series.

26. *United States.* — Mexia *v.* Oliver, 148 U. S. 664.

Alabama. — Florence Cotton & I. Co. *v.* Field, 104 Ala. 471, 16 So. 538.

Arizona. — Richards *v.* Green, 32 Pac. 266.

California. — Burke *v.* Levy, 68 Cal. 32, 8 Pac. 527; Nordholt *v.* Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; Owen *v.* Meade, 104 Cal. 179, 37 Pac. 923.

Colorado. — Levy *v.* Spencer, 18 Colorado, 532, 33 Pac. 415, 36 Am. St. Rep. 303.

Indiana. — Hackler *v.* State, 81 Ind. 430; Evansville & T. H. R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 410, 9 Am. St. Rep. 865, 2 L. R. A. 450.

Iowa. — Woolsey *v.* Williams, 34 Iowa 413.

to illustrate, under a complaint counting upon a written instrument, evidence of a parol agreement is not admissible.[27] So in an action by a passenger for carrying her beyond her destination, evidence in proof of a custom on the part of the defendant's conductors to lend special assistance to a lady when traveling alone, can not be received in the absence of a proper allegation of such fact.[28] So in an action for the wrongful seizure and conversion of goods, there can be no recovery of damages for special loss by reason of being deprived of the goods unless such loss is alleged in the complaint.[29]

Kansas. — Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686.

Louisiana. — Pritchard *v.* McKinstry, 12 La. 224.

Maryland. — McTavish *v.* Carroll, 17 Md. 1.

Michigan. — Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

Minnesota. — State *v.* Segel, 60 Minn. 507, 62 N. W. 1134; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Payette *v.* Day, 37 Minn. 366, 34 N. W. 592.

Mississippi. — Wells *v.* Alabama G. S. R. Co., 67 Miss. 24, 6 So. 737.

Missouri. — Kabrich *v.* State Ins. Co., 48 Mo. App. 393.

New Hampshire. — Brewer *v.* Hyndman, 18 N. H. 9.

New York. — Hunt *v.* Griffen, 64 Hun 634, 4 N. Y. Supp. 135; Riggs *v.* Chapin, 7 N. Y. Supp. 765; Cowenhoven *v.* Brooklyn, 38 Barb. 9.

North Carolina. — McLaurin *v.* Cronly, 90 N. C. 50.

Texas. — Thornton *v.* Stevenson (Tex. Civ. App.), 31 S. W. 232.

Washington. — Northern Pac. R. Co. *v.* O'Brien, 1 Wash. St. 599, 21 Pac. 32; Gilmore *v.* Baker Co., 12 Wash. 468, 41 Pac. 124.

Wisconsin. — Eilert *v.* City of Oshkosh, 14 Wis. 586; Dolph *v.* Rice, 18 Wis. 397.

27. "The difficulty all lies in the petition. It counts upon a written lease when there was no such lease, but only a contract to pay money for the consideration expressed. The suit should have been upon that contract, and if the defendants sought to avoid it by denying the consideration or by pleading a want of it, it would have been competent to show a parol lease to sustain the promise. But inasmuch as the plaintiff counted upon a written lease, and asked for damages for not complying with the terms of that lease — for the unusual manner of stating the breaches means that or nothing — it was incompetent to offer in support of that count either a parol lease or the written promise of defendants to pay money, and the court committed no error in ruling them out. It is true, the plaintiffs, under the statute of *jeofails*, might have amended their petition, but they did not ask the privilege of doing so, and must abide the result." Browning *v.* Walbrun, 45 Mo. 477.

28. "In view of the proof offered concerning the custom referred to, the jury may have reached the conclusion that, irrespective of the question whether or not the conductor made such a promise, he was bound to observe this custom, and give to the plaintiff the special consideration usually bestowed upon all ladies traveling without escorts. Furthermore, even if such a custom really existed, it should, in the absence of proof that the company's governing officials had knowledge thereof, and recognized it as entering into the contracts of carriage made with purchasers of tickets, be treated as amounting to no more than a practice on the part of obliging and chivalrous conductors to render to ladies courteous attention, which they were not, in their capacity as ordinary members of the traveling public, entitled to demand as matter of right, and which the conductors were under no duty, relatively to either the carrier or to female passengers, to bestow." Southern R. Co. *v.* Hobbs, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

29. "Under the issues in the case the plaintiff was entitled to recover

Further illustrations of this principle will be found in the notes.[30]

C. Admissibility as Dependent Upon Answer. — a. *In General.* — The admissibility of the evidence of the defendant under this system depends upon the character of his answer.[31]

b. *Allegations Not Denied by Answer.* — It is a well accepted doctrine under the Code system that all allegations of the com-

the actual value of the goods taken, and exemplary damages, within the reasonable discretion of the jury, if the evidence warranted exemplary damages. She was not entitled to recover anything for special loss by reason of being deprived of the goods, because such a recovery was neither warranted by allegation nor proof. The instruction, therefore, was erroneous. . . . As the verdict was largely made up from considerations aside from the value of the goods, and as we do not think that the jury were warranted from the evidence in finding that the defendant Harrison was liable for exemplary damages, we incline to think that the special loss referred to in the foregoing instruction had much to do with the amount of the verdict." Inman *v.* Ball, 65 Iowa 543, 22 N. W. 666.

30. For specific matters held inadmissible, see Owen *v.* Meade, 104 Cal. 179, 37 Pac. 923; Morris *v.* Hazlewood, 1 Bush (Ky.) 208; Barrett *v.* Zacharie, 2 La. Ann. 655; Abat *v.* Penny, 19 La. Ann. 289; Kabrich *v.* State Ins. Co., 48 Mo. App. 393; Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82; Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150.

Where in an action for attorney's services the complaint alleges that defendant agreed to pay a fixed sum for the services, evidence that such sum was a reasonable fee if its payment was made contingent on the result of the litigation is inadmissible. Owen *v.* Mead, 104 Cal. 179, 37 Pac. 923. "There was no issue in the case as to the reasonableness of such a fee, and the admission of this evidence was clearly prejudicial to the defendant. Upon this point, see Ellis *v.* Woodburn, 89 Cal. 129, 26 Pac. 963."

"Statements of a party claiming to have been robbed, though made immediately after the alleged misfortune, are not evidence in his behalf at the suit of another to recover money so alleged to have been lost. In such a case the issue is a fact and not character, and it is erroneous to admit defendant to prove former good character for the purpose of sustaining his defense." Morris *v.* Hazelwood, 1 Bush (Ky.) 208. Under the issues as made by the pleadings, the inquiry was as to the damages, if any, sustained by the defendant by reason of the taking of his land by the plaintiff railroad company for the right of way of the road; and where, upon the trial, plaintiff offered to prove an arbitration, *held*, that the offer was properly rejected, the arbitration being new matter in bar, and, as such, should have been set up by appropriate pleading.

31. *United States.* — Imperial Ref. Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503.

California. — Yosemite Val. & M. B. T. G. Comrs. *v.* Barnard, 98 Cal. 199, 32 Pac. 982.

Colorado. — Gomer *v.* Stockdale, 5 Colo. App. 489, 39 Pac. 355.

Iowa. — Benson *v.* Haywood, 86 Iowa 107, 53 N. W. 85, 23 L. R. A. 335.

Kentucky. — Denton *v.* Logan, 3 Met. 434.

Louisiana. — O'Donald *v.* Lobdell, 2 La. 299.

Maine. — Lincoln *v.* Fitch, 42 Me. 456.

Massachusetts. — Taylor *v.* Jaques, 106 Mass. 291.

Minnesota. — Anderson *v.* Rockwood, 62 Minn. 1, 63 N. W. 1023.

Missouri. — Currier *v.* Lowe, 32 Mo. 203.

New York. — Linton *v.* Unexcelled Fire Works Co., 124 N. Y. 533, 24 N. E. 406; Read *v.* Bank of Attica, 124 N. Y. 671, 27 N. E. 250.

Texas. — Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118.

plaint not denied by the answer are taken as true,[32] and proof in contradiction of such allegations is not to be received.[33]

c. *General Denial.* — (1.) **In General.** — Under the general denial the defendant will be permitted to introduce any evidence which tends directly to controvert any of the facts which the plaintiff must establish in order to maintain his cause of action.[34] Several

Wisconsin. — Kilbourn *v.* Pacific Bank, 11 Wis. 230.

32. *Arkansas.* — Edwards *v.* State, 22 Ark. 303; Lazarus *v.* Freidheim, 51 Ark. 371, 11 S. W. 518.

California. — Hansom *v.* Fricker, 79 Cal. 283, 21 Pac. 751; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Himmelman *v.* Spanagel, 39 Cal. 401.

Colorado. — Watson *v.* Lemon, 9 Colo. 200, 11 Pac. 88; Wilson *v.* Hawthorne, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290; Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947.

Georgia. — Hight *v.* Barrett, 94 Ga. 792, 21 S. E. 1008.

Indiana. — Lassiter *v.* Jackman, 88 Ind. 118; Warbritton *v.* Cameron, 10 Ind. 302.

Iowa. — Walker *v.* Lathrop, 6 Iowa 516; Fellows *v.* Webb, 43 Iowa 133.

Kentucky. — Hartley *v.* Hartley, 3 Met. 56; Rogers *v.* Aulick, 2 Duv. 419.

Louisiana. — Clapp *v.* Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Featherstone *v.* Robinson, 7 La. 596; Lopez *v.* Bergel, 7 La. 178; Lea *v.* Terry, 20 La. Ann. 428.

Minnesota. — Dexter *v.* Moody, 36 Minn. 205, 30 N. W. 667.

Missouri. — Wells *v.* Pike, 31 Mo. 590; Boatman's Sav. Inst. *v.* Holland, 38 Mo. 49.

Nebraska. — Harden *v.* Atchison & N. R. Co., 4 Neb. 521; Gillen *v.* Riley, 27 Neb. 158, 12 N. W. 1054.

New York. — Fagen *v.* Davison, 2 Duer (N. Y. Super.) 153; Clark *v.* Dillon, 97 N. Y. 370; Finkelstein *v.* Barrett, 16 Misc. 488, 38 N. Y. Supp. 961; Merritt *v.* Dyckman, 16 Wend. 405; Hauteman *v.* Gray, 5 Civ. Proc. 224; Harlow *v.* LaBrun, 82 Hun 292, 31 N. Y. Supp. 487.

North Carolina. — Jenkins *v.* North Carolina Ore D. Co., 65 N. C. 563.

South Dakota. — Calkins *v.* Seabury-Calkins Consol. M. Co., 5 S. D. 299, 58 N. W. 797.

Utah. — Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

Wisconsin. — Bonnell *v.* Jacobs, 36 Wis. 59.

33. *United States.* — Draper *v.* Town of Springport, 15 Fed. 328, 21 Blatchf. 240.

California. — Patterson *v.* Sharp, 41 Cal. 133.

Iowa. — Singer Mfg. Co. *v.* Billings, 39 Iowa 347; *In re* Edward's Estate, 58 Iowa 431, 10 N. W. 793.

New York. — Beard *v.* Tilghman, 66 Hun 12, 20 N. Y. Supp. 736; East River Elec. Light Co. *v.* Clark, 18 N. Y. Supp. 463.

Ohio. — Bryans *v.* Taylor, Wright 245.

Tennessee. — Cummings *v.* Wagstaff, 1 Baxt. 399.

Wisconsin. — Russell *v.* Andrea, 84 Wis. 374, 54 N. W. 792.

34. *California.* — Gavin *v.* Annan, 2 Cal. 494; McLarren *v.* Spalding, 2 Cal. 510.

District of Columbia. — Metropolitan R. Co. *v.* Snashall, 22 Wash. L. R. 377.

Indiana. — Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15; Blizzard *v.* Applegate, 61 Ind. 368; Leary *v.* Moran, 106 Ind. 560, 7 N. E. 236; Sowle *v.* Holdridge, 17 Ind. 236.

Iowa. — Johnson *v.* Pennell, 67 Iowa 669, 25 N. W. 874.

Massachusetts. — Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356; Howard *v.* Hayward, 16 Gray 354; Snow *v.* Lang, 84 Mass. 18.

Minnesota. — Caldwell *v.* Bruggerman, 4 Minn. 270.

Mississippi. — Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482.

Missouri. — Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Hoffman *v.* Parry, 23 Mo. App. 20.

Nebraska. — Broadwater *v.* Jacoby, 19 Neb. 77, 26 N. W. 629; Winkler *v.* Roeder, 23 Neb. 706, 37 N. W. 607, 8 Am. St. Rep. 155.

New York. — Wheeler *v.* Billings,

illustrations of this well settled fact are found in the notes.[35]

(2.) Right of Plaintiff To Sue. — Under a mere general denial, evidence of the plaintiff's incapacity to sue can not be introduced.[36] Thus when plaintiff sues as a corporation,[37] or there is an allegation

38 N. Y. 263; Weaver *v.* Barden, 49 N. Y. 286.

Tennessee. — McGavock *v.* Puryear, 6 Coldw. 34; Beaty *v.* McCorkle, 11 Heisk. 593.

Texas. — Altgelt *v.* Emilienburg, 64 Tex. 150; Galveston, etc. R. Co. *v.* Henry, 65 Tex. 585; Pitt *v.* Elser, 7 Tex. Civ. App. 47, 32 S. W. 146; Guess *v.* Lubbock, 5 Tex. 535.

Vermont. — Thrall *v.* Wright, 38 Vt. 494.

Washington. — Penter *v.* Straight, 1 Wash. St. 365, 25 Pac. 469.

35. See the following cases:

Louisiana. — Petit *v.* Laville, 5 Rob. 117; Bonnabel *v.* Bouligny, 1 Rob. 292.

Minnesota. — Caldwell *v.* Bruggerman, 4 Minn. 270; McDermott *v.* Deither, 40 Minn. 86, 41 N. W. 544.

Missouri. — Clemens *v.* Knox, 31 Mo. App. 185.

New York. — Wilmarth *v.* Babcock, 2 Hill 194.

Texas. — Tisdale *v.* Mitchell, 12 Tex. 68.

Wisconsin. — Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755.

"Under a general denial, the defendant may show anything that tends directly to disprove the allegations in the complaint. So where plaintiff's title to personal property, under an alleged transfer to him, was put in issue, defendant may show that the property never was delivered to plaintiff, such delivery being held necessary to the vesting of title in plaintiff." Caldwell *v.* Bruggerman, 4 Minn. 270.

Where it was alleged by plaintiff that defendant, for value, executed a contract in writing to pay a note previously made by a third party to plaintiff, and held by him, and the answer is a general denial, *held,* on a motion to strike out the answer as sham, upon which it appeared that such contract was not a specific agreement to pay the note, but the partnership and individual debts of the maker thereof, not exceeding a sum certain, that defendant might show upon the trial, under his general denial, that the agreement had already been otherwise satisfied, and did not include the plaintiff's claim, and hence that it did not indisputably appear that the answer was sham or interposed in bad faith. McDermott *v.* Deither, 40 Minn. 86, 41 N. W. 544.

The complaint alleged that a note and a deed were given by plaintiff to defendant as security for a loan. The answer denied this, and denied that the note was ever assigned to or received by defendant. *Held,* that, under the issue thus made, defendant could show that after plaintiff received the money the deed was kept off the record a short time, to allow plaintiff to raise the money if possible, and repay it to defendant, and that, as security for the money, while the deed was kept from the record, the note was left with a third person, together with the deed, and that after the latter was recorded the note was returned to plaintiff. Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755.

"That there was no special matter pleaded to the action was not reason for excluding evidence of a settlement, or of admissions by the plaintiff, adverse to his right to recover in whole or in part." Tisdale *v.* Mitchell, 12 Tex. 68.

36. *California.* — White *v.* Moses, 11 Cal. 70.

Indiana. — Downs *v.* McCombs, 16 Ind. 211; Harrison *v.* Martinsville, etc. Co., 16 Ind. 505, 79 Am. Dec. 447; Heaston *v.* Cincinnati, etc. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Jones *v.* Cincinnati Type F. Co., 14 Ind. 89.

Texas. — Cheatham *v.* Riddle, 12 Tex. 112; Clifton *v.* Lilley, 12 Tex. 130; Trammell *v.* Swan, 25 Tex. 473.

Wisconsin. — Sandford *v.* McCreedy, 28 Wis. 103; Ewen *v.* Chicago, etc. R. Co., 38 Wis. 613.

37. *Indiana.* — Indianapolis Fur-

of partnership, evidence is not admissible under the general denial to controvert the existence of the corporation or partnership.[38] To authorize the admission of evidence in such case, there must be an affirmative allegation in the answer with reference to such matters.[39]

(3.) Execution of Written Instrument. — In many of the states the effect of a general denial is limited by statute with reference to the execution of written instruments made the subject of suit.[40] So that a general denial of the execution of such instrument contained in the answer will not be sufficient to admit evidence controverting its execution unless the denial is under oath.[41]

(4.) Evidence in Specific Cases Under General Denial. — (A.) Actions Ex Contractu. — (a.) *In General.* — When the action is upon contract and the defense rests upon a general denial, evidence that

nace Co. *v.* Herkimer, 46 Ind. 142; Cicero H. Drain. Co. *v.* Craighead, 28 Ind. 274; Heaston *v.* Cincinnati, etc. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Dunning *v.* New Albany, etc. R. Co., 2 Ind. 437; Railsbach *v.* Liberty, etc. Tpk. Co., 2 Ind. 656; Hubbard *v.* Chappel, 14 Ind. 601; Price *v.* Grand Rapids, etc. R. Co., 18 Ind. 137.

Minnesota. — St. Anthony Falls W. P. Co. *v.* King Bridge Co., 23 Minn. 186, 23 Am. Rep. 632; Woodson *v.* Milwaukee, 21 Minn. 60.

Nebraska. — National L. Ins. Co. *v.* Robinson, 8 Neb. 452; Zunkle *v.* Cunningham, 10 Neb. 162, 4 N. W. 951; Dietrichs *v.* Lincoln, etc. R. Co., 13 Neb. 43, 13 N. W. 13; Herron *v.* Cole Brok., 25 Neb. 692, 41 N. W. 765.

New York. — Bank of Havana *v.* Wickham, 7 Abb. Pr. 134; Bank of Gennessee *v.* Patchin Bank, 13 N. Y. 312.

South Carolina. — Palmetto Lumb. Co. *v.* Risley, 25 S. C. 309; American Button Hole Co. *v.* Hill, 27 S. C. 164.

Wisconsin. — Williams Reaper Co. *v.* Smith, 33 Wis. 530; Central Bank *v.* Knowlton, 12 Wis. 624, 78 Am. Dec. 769; Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109; Farmers' Trust Co. *v.* Fisher, 12 Wis. 114.

38. *Texas.* — Lee *v.* Hamilton, 12 Tex. 413; Congdon *v.* Monroe, 51 Tex. 109; Drew *v.* Harrison, 12 Tex. 279; Persons *v.* Frost, 25 Tex. 129; Lewis *v.* Lowery, 31 Tex. 663; Cushing *v.* Smith, 43 Tex. 261.

Wisconsin. — Fisk *v.* Tank, 12 Wis. 306, 78 Am. Dec. 737; Whitman *v.* Wood, 6 Wis. 676; Martin *v.* American Express Co., 19 Wis. 336.

39. See cases in notes 36, 37, and 38, this series.

40. *Alabama.* — Campbell *v.* Larmore, 84 Ala. 499, 4 So. 593.

Maine. — Willis *v.* Cressy, 17 Me. 9.

Michigan. — Peoria Marine & F. Ins. Co. *v.* Perkins, 16 Mich. 380.

Missouri. — Simms *v.* Lawrence, 9 Mo. 665.

New Hampshire. — Hill *v.* Barney, 18 N. H. 607; Great Falls Bank *v.* Farmington, 41 N. H. 32.

New York. — Coffin *v.* Grand Rapids Hyd. Co., 18 N. Y. Supp. 782; Marx *v.* Cross, 2 Misc. 511, 22 N. Y. Supp. 393, *s. c.*, 142 N. Y. 678, 37 N. E. 824.

41. *Alabama.* — Tuscaloosa Cotton Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635.

Arkansas. — Trowbridge *v.* Pitcher, 4 Ark. 147.

California. — Hastings *v.* Dollarhide, 18 Cal. 390; Sloan *v.* Diggins, 49 Cal. 38; Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430.

Idaho. — United States *v.* Alexander, 2 Idaho 354, 17 Pac. 746.

Illinois. — Lockridge *v.* Nichols, 25 Ill. 178; Gaddy *v.* McCleave, 59 Ill. 182; Judd *v.* Cralle, 37 Ill. App. 149.

Indiana. — Lucas *v.* Smith, 42 Ind. 103; Belton *v.* Smith, 45 Ind. 291; Woolen *v.* Wise, 73 Ind. 212; Woolen *v.* Whiteacre, 73 Ind. 198; Coen *v.* Funk, 18 Ind. 345; Potter *v.* Earnest, 51 Ind. 384.

the contract is different from the one set out in the complaint,[42] or that no contract at all was made,[43] or the invalidity of the contract under the statute of frauds, is admissible.[44]

Kansas. — Payne *v.* National Bank, 16 Kan. 147.

Kentucky. — Gill *v.* Johnson, 1 Met. 649; Black *v.* Crouch, 3 Litt. 226; Barret *v.* Coburn, 3 Met. 510.

42. *California.* — Goddard *v.* Fulton, 21 Cal. 430.

Indiana. — Paris *v.* Strong, 51 Ind. 339; Chicago, etc. R. Co. *v.* West, 37 Ind. 215; Blizzard *v.* Applegate, 61 Ind. 368.

Missouri. — Wilkerson *v.* Farnham, 82 Mo. 672; Stewart *v.* Goodrich, 9 Mo. App. 125; Clemens *v.* Knox, 31 Mo. App. 135.

New York. — Wheeler *v.* Billings, 38 N. Y. 263; Schermerhorn *v.* Van Allen, 18 Barb. 29; Goodale *v.* Central Nat. Bank, 16 N. Y. Wkly. Dig. 364; Dietrich *v.* Oriental, 6 N. Y. St. 528; Healy *v.* Clark, 12 N. Y. St. 685; Marsh *v.* Dodge, 66 N. Y. 533.

Texas. — McGill *v.* Hall (Tex. Civ. App.), 26 S. W. 132.

It may be shown that the contract was conditional. Stewart *v.* Goodrich, 9 Mo. App. 125; Danebaum *v.* Person, 3 N. Y. Supp. 129, 25 N. Y. St. 849.

Or a custom or usage known to both parties may be proved, by way of showing that the contract made was not that alleged. Miller *v.* North America's Ins. Co., 1 Abb. N. Co. (N. Y.) 470.

43. See cases in next preceding note.

44. *United States.* — May *v.* Sloan, 101 U. S. 231.

Arkansas. — Wynn *v.* Garland, 19 Ark. 23; Trapnall *v.* Brown, 19 Ark. 39.

California. — Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984.

Illinois. — Ruggles *v.* Gatton, 50 Ill. 412.

Kansas. — Larkin *v.* Taylor, 5 Kan. 433.

Kentucky. — Hocker *v.* Gentry, 3 Met. 463.

Maryland. — Billingslea *v.* Ward, 33 Md. 48.

Massachusetts. — Reid *v.* Stevens, 120 Mass. 209.

Mississippi. — Metcalf *v.* Brandon, 58 Miss. 841.

Missouri. — Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171.

Nebraska. — Powder River Live Stock Co. *v.* Lamb, 38 Neb. 339.

New Jersey. — Busick *v.* Van Ness, 44 N. J. Eq. 82.

New York. — Clark *v.* Lichtenberg, 7 N. Y. Supp. 900, 26 N. Y. St. 935; Amburger *v.* Marvin, 4 E. D. Smith 393.

Texas. — Patton *v.* Rucker, 29 Tex. 402.

Vermont. — Hotchkiss *v.* Ladd, 36 Vt. 593.

Virginia. — Argenbright *v.* Campbell, 3 Hen. & M. 144.

Testimony showing illegality of the contract sued on is admissible under a general denial, since the effect of such answer is to deny that there was any legal contract in existence. Chapman *v.* Currie, 51 Mo. App. 40.

Proof that the contract was a wagering contract, prohibited by statute, is admissible under a general denial. Hentz *v.* Miner, 58 Hun 428, 12 N. Y. Supp. 474.

Want of consideration may be shown under a general denial. Evans *v.* Williams, 60 Barb. (N. Y.) 346.

Where the complaint in an action on a written contract sets out only part of the contract, the defendant, under a general denial that the agreement was as set forth, is entitled to put in evidence the part omitted. Marsh *v.* Dodge, 66 N. Y. 533.

Where the complaint avers due performance by plaintiff on his part, evidence of breaches by plaintiff is admissible under the general denial. Weinberg *v.* Blum, 13 Daly (N. Y.) 399.

Under a general denial of the allegations of a compiaint which sets out an absolute, unconditional agreement, continuing for a certain period, defendant may prove that the agreement was conditional, and, by force of the condition, had terminated. Danebaum *v.* Person, 3 N. Y. Supp. 129, 25 N. Y. St. 849.

(b.) *Want of Consideration.* — Where it is necessary for the plaintiff to show consideration of the contract in suit as a part of his case, evidence of the want of such consideration may be shown under the general denial,[45] and in some states this may be done in all cases under such denial.[46] Otherwise it must be affirmatively averred in the answer to admit evidence of want of consideration.[47]

(c.) *Failure To Perform Contract.* — It seems to be well settled that under a general denial evidence of failure on the part of the plaintiff to perform the contract sued on in whole,[48] or in part, is receivable.[49]

(d.) *Sales.* — In an action for the purchase price of chattels, evidence that the chattels were a gift is admissible,[50] or that after the alleged contract plaintiff agreed to purchase the goods on different terms from those alleged by him,[51] or, in order to lessen the damages, a breach of warranty.[52] So incapacity to make the contract

45. *Illinois.* — Hardy *v.* Ross, 4 Ill. App. 501; Wilson *v.* King, 83 Ill. 232.
Indiana. — Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Catlet *v.* McDowell, 4 Blackf. 556; Tucker *v.* Tipton, 4 Blackf. 529.
Michigan. — Colbath *v.* Jones, 28 Mich. 280; Hill *v.* Callaghan, 31 Mich. 424.
Mississippi. — Ferguson *v.* Oliver, 8 Smed. & M. 332.
Missouri. — Block *v.* Elliott. 1 Mo. 275.
New York. — Dubois *v.* Hermance, 56 N. Y. 673; Eldridge *v.* Mather, 2 N. Y. 157; Weaver *v.* Barden, 49 N. Y. 286; Meakim *v.* Anderson, 11 Barb. 215; Evans *v.* Williams, 60 Barb. 346.
South Carolina. — Talbert *v.* Cason, 1 Brev. 298; Carrier *v.* Hague, 9 S. C. 454.
Vermont. — Parrott *v.* Farnsworth, Brayt. 174.

46. Evans *v.* Williams, 60 Barb. (N. Y.) 346; Debois *v.* Hermace, 1 Thomp. & C. 293, 56 N. Y. 673; Eldridge *v.* Mather, 2 N. Y. 157; Weaver *v.* Barden, 49 N. Y. 286; Butler *v.* Edgerton, 15 Ind. 15; Bondurant *v.* Bladen, 19 Ind. 160; Bush *v.* Brown, 49 Ind. 573, 19 Am. Rep. 695.

47. *Indiana.* — Frybarger *v.* Cockefair, 17 Ind. 404; Crow *v.* Eichenger, 34 Ind. 65.
New Hampshire. — Jones *v.* Houghton, 61 N. H. 51.
New York. — Fay *v.* Richards, 21 Wend. 626; Mechanics Bank *v.* Foster, 44 Barb. 87; Loewer's Gambrinus Brew. Co. *v.* Bachman, 18 N. Y. Supp. 138.
Ohio. — Hauser *v.* Metzger, 1 Cin. 164.
Tennessee. — Simpson *v.* Moore, 6 Baxt. 371.
Vermont. — Williams *v.* Hicks, 2 Vt. 36, 19 Am. Dec. 693; Alden *v.* Parkhill, 18 Vt. 205.

48. *United States.* — Fabric F. & H. Co. *v.* Bilt Mfg. Co., 39 Fed. 98.
Minnesota. — Caldwell *v.* Bruggerman, 4 Minn. 270.
New York. — Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570; Weinberg *v.* Blum, 13 Daly 399; Chatfield *v.* Simonson, 92 N. Y. 209; Springer *v.* Dwyer, 50 N. Y. 19; Emery *v.* Pease, 20 N. Y. 62; Williams *v.* Slote, 70 N. Y. 601; Manning *v.* Winter, 7 Hun 482; Krom *v.* Levy, 1 Hun 171; Close *v.* Clark, 30 N. Y. St. 671; Reed *v.* Hayt, 51 N. Y. Super. 121.
Wisconsin. — Moritz *v.* Larsen, 70 Wis. 569, 36 N. W. 331.

49. See cases in next preceding note.

50. Blatz *v.* Lester, 54 Mo. App. 283; Munn *v.* Pope, 2 Stew. (Ala.) 498.

51. Gargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214; Hawkins *v.* Boreland, 14 Cal. 413; Daniels *v.* Osborn, 71 Ill. 169.

52. Keyes *v.* Western Vermont Slate Co., 34 Vt. 81; Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; Simmons *v.* Cutreer, 12 Smed. & M. (Miss.) 584.

from whatever cause arising may be shown under the general denial.[53]

(e.) *Bills and Notes.* — In an action against the maker by an indorsee after maturity, a contemporaneous written agreement by the payee, showing a contingency upon which the payment of the note is to depend, is admissible under the general issue.[54]

(f.) *Judgments.* — In some jurisdictions, in an action upon a judgment a general denial puts in issue only the fact of the rendition of the judgment,[55] and only evidence as to such fact is admissible[56] while in others the jurisdiction of the court to render the judgment may be given in evidence under such denial.[57] It is suggested that if anything other than the fact of the rendition of the judgment is to be controverted it be specially set forth in the answer.[58]

(B.) Actions Ex Delicto. — (a.) *Assault and Battery.* — Under the general denial, only evidence controverting the fact of the assault and battery,[59] or that which bears on the question of damages, is generally held to be admissible.[60] All other matters, to be received

53. Cavender *v.* Waddingham, 2 Mo. App. 551; Hawkins *v.* Borland, 14 Cal. 413.

54. Munro *v.* King, 3 Colo. 238; Heaton *v.* Myers, 4 Colo. 59; Culver *v.* Johnson, 90 Ill. 91.

55. Union Pac. R. Co. *v.* McCarty, 8 Kan. 91; Moore *v.* Gynn, 27 N. C. (5 Ired. L.) 187; Goodrich *v.* Jenkins, 6 Ohio 43; Bennett *v.* Morley, 10 Ohio 100.

56. See cases cited in next preceding note.

57. *Alabama.* — Foster *v.* Glazner, 27 Ala. 391.

Arkansas. — Kimball *v.* Merrick, 20 Ark. 12.

Iowa. — Hindman *v.* Mackall, 3 G. Gr. 170.

Massachusetts. — Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Hall *v.* Williams, 6 Pick. 332, 17 Am. Dec. 356.

Missouri. — Crone *v.* Dawson, 19 Mo. App. 214.

New Hampshire. — Judkins *v.* Union Mut. F. Ins. Co., 37 N. H. 470.

Tennessee. — Barrett *v.* Oppenheimer, 12 Heisk. 298.

58. *United States.* — Hill *v.* Mendenhall, 88 U. S. 453; Tunstall *v.* Robinson, Hempst. 229, 24 Fed. Cas. No. 14,238*a*.

Arkansas. — Buford *v.* Kirkpatrick, 13 Ark. 33.

Kentucky. — Pollard *v.* Rogers, 1 Bibb. 473.

Massachusetts. — M'Rae *v.* Mattoon, 15 Pick. 53.

Mississippi. — Stephens *v.* Roby, 27 Miss. 744.

New York. — Bron *v.* Balde, 3 Lans. 283; Carpenter *v.* Goodwin, 4 Daly 89; Hoffheimer *v.* Stiefel, 39 N. Y. Supp. 714.

Pennsylvania. — Fratz *v.* Fisher, 5 Clark 350; Palmer *v.* Palmer, 2 Miles 373.

South Carolina. — Gage *v.* Sartor, 2 Mill Const. 247.

Texas. — O'Conner *v.* Silver, 26 Tex. 606.

59. *Georgia.* — Brook *v.* Ashburn, 9 Ga. 297; Kerwick *v.* Steelman, 44 Ga. 197.

Indiana. — Lair *v.* Abrams, 5 Blackf. 191; Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

Massachusetts. — Cooper *v.* McKenna, 124 Mass. 284, 26 Am. Rep. 667; Hathaway *v.* Hatchard, 160 Mass. 296, 35 N. E. 857.

Missouri. — Thomas *v.* Werremeyer, 34 Mo. App. 665.

New Hampshire. — Wheeler *v.* Whitney, 59 N. H. 197.

North Carolina. — Meeds *v.* Carver, 29 N. C. (7 Ired. L.) 273.

Oregon. — Konigsberger *v.* Harvey, 12 Or. 286, 7 Pac. 114.

Wisconsin. — Atkinson *v.* Harran, 68 Wis. 405, 32 N. W. 756.

60. *Connecticut.* — Burke *v.* Melvin, 45 Conn. 243.

Georgia. — Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684.

in evidence, must be specially pleaded in the defendant's answer.[61]

(b.) *Replevin Under the Code System.* — The rule is quite generally established that under a general denial throughout the states where the Code system prevails, any evidence which tends to defeat the alleged right of the plaintiff to the possession of the property in controversy is admissible.[62] Thus, for illustration, under the general denial evidence is receivable to show that property in question belongs to some third person,[63] or that it belongs to the

Indiana. — Norris *v.* Casel, 90 Ind. 143.

Massachusetts. — Sampson *v.* Henry, 13 Pick. 36.

Mississippi. — Martin *v.* Minor, 50 Miss. 42.

New York. — Rosenthal *v.* Brush, 1 Code R. 228; Saltus *v.* Kipp, 12 How. Pr. 342, 12 N. Y. Super. 646; Hays *v.* Berryman, 6 Bosw. (N. Y. Super.) 679.

Virginia. — Davis *v.* Franke, 33 Gratt. 413.

61. *California.* — Bundy *v.* Magginess, 7 Cal. 532, 18 Pac. 668.

Connecticut. — Hanchett *v.* Bassett, 35 Conn. 27.

Indiana. — Kreger *v.* Osborn, 7 Blackf. 74; Isley *v.* Huber, 45 Ind. 421.

Kentucky. — Brubaker *v.* Paul, 7 Dana 428, 32 Am. Dec. 111.

Massachusetts. — Levi *v.* Brooks, 121 Mass. 501.

New Hampshire. — Jewett *v.* Goodall, 19 N. H. 562; Dole *v.* Erskine, 37 N. H. 316.

New York. — Coles *v.* Carter, 6 Cow. 691.

Vermont. — Hathaway *v.* Rice, 19 Vt. 102.

Evidence of Justification Is Not Admissible. — Mitchell *v.* Gambill, 140 Ala. 316, 37 So. 290; Barr *v.* Post, 56 Neb. 698, 77 N. W. 123; Mangold *v.* Oft, 63 Neb. 397, 88 N. W. 507; Harden *v.* Hodges, 33 Tex. Civ. App. 155, 76 S. W. 217; Blake *v.* Damon, 103 Mass. 199; Cooper *v.* McKenna, 124 Mass. 284, 26 Am. Rep. 667.

62. *Iowa.* — Jansen *v.* Effey, 10 Iowa 227.

Kansas. — Bailey *v.* Bayne, 20 Kan. 657; White *v.* Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 274.

Maine. — Vickery *v.* Sherburne, 20 Me. 34.

Michigan. — Loomis *v.* Foster, 1 Mich. 165.

Nebraska. — Aultman, Miller & Co. *v.* Stichler, 21 Neb. 72, 31 N. W. 241; Richardson *v.* Steele, 9 Neb. 483, 4 N. W. 83; Merrill *v.* Wedgwood, 25 Neb. 283, 41 N. W. 149.

New York. — Coon *v.* Congden, 12 Wend. 496; Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740.

Wisconsin. — Child *v.* Child, 13 Wis. 17.

63. *United States.* — Schulenberg *v.* Harriman, 21 Wall. 44.

California. — Woodworth *v.* Knowlton, 22 Cal. 164.

Indiana. — Lane *v.* Sparks, 75 Ind. 278; Williams *v.* Kressler, 82 Ind. 183; Porter *v.* Mitchell, 82 Ind. 414; Fruits *v.* Elmore, 8 Ind. App. 278, 34 N. E. 829, 100 Am. Dec. 743; Kennedy *v.* Shaw, 38 Ind. 474.

Iowa. — Neeb *v.* McMillan, 98 Iowa 718, 68 N. W. 438.

Michigan. — Snook *v.* Davis, 6 Mich. 156.

New York. — Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740.

Oklahoma. — Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101.

South Dakota. — Pitts Agr. Wks. *v.* Young, 6 S. D. 557, 62 N. W. 432.

Washington. — Chamberlain *v.* Winn, 1 Washington. St. 501, 20 Pac. 780.

Wisconsin. — Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897; Timp *v.* Dockham, 32 Wis. 146.

Plaintiff may show his wife is cotenant with plaintiff in respect to the property in suit, and that defendant at the time of the replevin held the title under her and for her use. Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229.

Contra. — *Florida.* — Hopkins *v.* Burney, 2 Fla. 42.

defendant himself,[64] or jointly to the plaintiff and a third person of whose interest the defendant has the right to possession,[65] or that the defendant holds the property by virtue of legal process.[66]

(c.) *Other Actions Ex Delicto.* — Under a general denial in actions to recover for false imprisonment,[67] libel and slander,[68] malicious

Iowa. — Reed *v.* Reed, 13 Iowa 5.
Kentucky. — Harper *v.* Baker, 3 T. B. Mon. 422, 16 Am. Dec. 112.
Maryland. — Puffer *v.* May, 78 Md. 74, 26 Atl. 1020.
Massachusetts. — Adams *v.* Wildes, 107 Mass. 123.
Minnesota. — McClung *v.* Bergfield, 4 Minn. 148.
Missouri. — Gottschalk, *v.* Klinger, 33 Mo. App. 410.
New York. — Shuter *v.* Page, 11 Johns. 196.

64. *California.* — Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106.
Indiana. — May *v.* Pavey, 63 Ind. 4; Aultman & Co. *v.* Forgey, 10 Ind. App. 397, 36 N. E. 939; Shipman Coal M. & M. *v.* Pfeiffer, 11 Ind. App. 445, 39 N. E. 291.
Rhode Island. — Halstead *v.* Cooper, 12 R. I. 500.
South Dakota. — Esshom *v.* Watertown Hotel Co., 7 S. D. 74, 63 N. W. 299; Pitts Agricultural Works *v.* Young, 6 S. D. 557, 62 N. W. 432.
Washington. — Harvey *v.* Ivory, 35 Wash. 397, 77 Pac. 725.
Wisconsin. — Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897; Timp *v.* Dockham, 32 Wis. 146.

In replevin by a mortgagee for the possession of the mortgaged property, defendant may, under a general denial, defeat a recovery by proof that, after the execution and delivery of the mortgage, she sold the property to the mortgagee, who refused to take it and pay the contract price. Deford *v.* Hutchinson, 45 Kan. 332, 26 Pac. 60; *s. c.*, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257.

65. Branch *v.* Wiseman, 51 Ind. 1; Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229.

66. *Indiana.* — Branch *v.* Wiseman, 51 Ind. 1.
Missouri. — Bosse *v.* Thomas, 3 Mo. App. 472.
Nebraska. — Richardson *v.* Steele, 9 Neb. 483, 4 N. W. 83.
Ohio. — Oaks *v.* Wyatt, 10 Ohio 344; Moravec *v.* Buckley, 9 Ohio Dec. 226; Bailey *v.* Swain, 45 Ohio St. 657, 16 N. E. 370.
South Dakota. — Connor *v.* Knott, 8 S. D. 304, 60 N. W. 461.

67. *Indiana.* — Boaz *v.* Tate, 43 Ind. 60.
Michigan. — White *v.* McQueen, 96 Mich. 249, 55 N. W. 843.
New Hampshire. — Fowler *v.* Watkins, 1 N. H. 251.
New York. — Strang *v.* Whitehead, 12 Wend. 64; Brown *v.* Chadsey, 39 Barb. 253; Willson *v.* Manhattan R. Co., 2 Misc. 127, 20 N. Y. Supp. 852.
Pennsylvania. — Russell *v.* Shuster, 8 Watts & S. 308.
South Carolina. — Isaacs *v.* Camplin, 1 Bailey 411.
Utah. — Yost *v.* Tracy, 13 Utah 431, 45 Pac. 346.
Wisconsin. — Scheer *v.* Keown, 34 Wis. 349.

68. *Alabama.* — Arrington *v.* Jones, 9 Port. 139; Douge *v.* Pearce, 13 Ala. 127.
Delaware. — Waggstaff *v.* Ashton, 1 Har. 503.
Indiana. — Burke *v.* Miller, 6 Blackf. 155.
Iowa. — Beardsley *v.* Bridgman, 17 Iowa 290.
Kentucky. — Samuel *v.* Bond, Litt. Sel. Cas. 158.
Maine. — Taylor *v.* Robinson, 29 Me. 323.
Maryland. — Hagan *v.* Hendry, 18 Md. 177.
Massachusetts. — Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114.
New Hampshire. — Smart *v.* Blanchard, 42 N. H. 137.
New York. — Fero *v.* Ruscoe, 4 N. Y. 162.
South Carolina. — Eagen *v.* Gantt, 1 McMul. 468.
Tennessee. — McCampbell *v.* Thornburgh, 3 Head 109.
Vermont. — Barns *v.* Webb, 1 Tyler 17.

prosecution,[69] negligence,[70] and other torts,[71] the rule is the same as in actions for assault and battery; that is, only evidence to controvert the allegations in the petition is admissible.[72] All other matters must be made the subject of affirmative allegations in the answer.[73]

Virginia. — Grant *v.* Hover, 6 Munf. 13.

Wisconsin. — Eaton *v.* White, 2 Pin. 42.

69. *Indiana.* — Rogers *v.* Lamb, 3 Blackf. 155.

Iowa. — Bruley *v.* Rose, 57 Iowa 651, 11 N. W. 629.

Kentucky. — Baker *v.* Hopkins, 1 A. K. Marsh. 587.

Louisiana. — Hitchcock *v.* North, 5 Rob. 328, 39 Am. Dec. 540.

Massachusetts. — Brigham *v.* Aldrich, 105 Mass. 212; Folger *v.* Washburn, 137 Mass. 60.

Missouri. — Sparling *v.* Conway, 6 Mo. App. 283, 75 Mo. 510.

Texas. — Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85; Sutor *v.* Wood, 70 Tex. 403, 13 S. W. 321.

Wisconsin. — Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

70. *Illinois.* — Coles *v.* Louisville, etc. R. Co., 41 Ill. App. 607.

Indiana. — Indianapolis & C. R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

Iowa. — Kendig *v.* Overhulser, 58 Iowa 195, 12 N. W. 264; Fernbach *v.* City of Waterloo, 34 N. W. 610.

Kansas. — Osborn *v.* Woodford Bros., 31 Kan. 290, 1 Pac. 548.

Louisiana. — Hart *v.* New Orleans & C. R. Co., 4 La. Ann. 261.

Missouri. — Cousins *v.* Hannibal & St. J. R. Co., 66 Mo. 572.

New York. — Schaus *v.* Manhattan Gaslight Co., 14 Abb. Pr. (N. S.) 371; Roemer *v.* Striker, 142 N. Y. 134, 36 N. E. 808.

Texas. — St. Louis, etc. R. Co. *v.* Fenlaw (Tex. Civ. App.), 36 S. W. 295.

71. Conversion. — Phoenix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151; Willard *v.* Giles, 24 Wis. 319; Terry *v.* Munger, 49 Hun 560, 2 N. Y. Supp. 348.

72. Sowers *v.* Sowers, 87 N. C. 303. See cases in next preceding note; also note 67, this series.

73. *United States.* — Barrows *v.* Carpenter, 1 Cliff. 204, 2 Fed. Cas. No. 1,058.

Connecticut. — Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. 397; Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Delaware. — Bailey *v.* Wiggins, 5 Har. 462, 60 Am. Dec. 650.

Illinois. — Sheaham *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Horn *v.* Sullivan, 83 Ill. 30; Toledo W. & W. R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613; Straight *v.* Odell, 13 Ill. App. 232.

Kansas. — Telle *v.* Leavenworth R. T. R. Co., 50 Kan. 455, 31 Pac. 1076.

Louisiana. — Miller *v.* Roy, 10 La. Ann. 231.

Maryland. — Padgett *v.* Sweeting, 68 Md. 404, 4 Atl. 887.

Massachusetts. — Brickett *v.* Davis, 21 Pick. 404.

Michigan. — Moyer *v.* Pine, 4 Mich. 409; McNaughton *v.* Quay, 102 Mich. 142, 60 N. W. 474; Marquette H. & O. R. Co. *v.* Marcott, 41 Mich. 433, 2 N. W. 795; McNally *v.* Colwell, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494.

Missouri. — Dagenhart *v.* Schmidt, 7 Mo. App. 117; Ellis *v.* Wabash, St. L. & P. R. Co., 17 Mo. App. 126.

New York. — Snyder *v.* Andrews, 6 Barb. 43; Sawyer *v.* Bennett, 66 Hun 626, 20 N. Y. Supp. 835.

Ohio. — Brooks *v.* Bryan, Wright 760; Mack *v.* McGary, 6 Ohio Dec. 1062.

Pennsylvania. — Kay *v.* Fredrigal, 3 Pa. St. 221; Fitzgerald *v.* Stewart, 53 Pa. St. 343.

South Carolina. — Easterwood *v.* Quin, 2 Brev. 64, 3 Am. Dec. 700; Watson *v.* Hamilton, 6 Rich. L. 75.

Texas. — Galveston H. & S. R. Co. *v.* Herring (Tex. Civ. App.), 36 S. W. 129.

Washington. — Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

West Virginia. — Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

Wisconsin. — Langton *v.* Hagerty, 35 Wis. 150.

(5.) New Matter.— Evidence of new matter[74] is not admissible

74. *Alabama.* — American Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644.

California. — Pico *v.* Kalisher, 55 Cal. 153; Piercey *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Bridges *v.* Paige, 13 Cal. 640.

Georgia. — Brunswick & W. R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84; Jacobus *v.* Wood, 84 Ga. 638, 10 S. E. 1099.

Illinois. — Yost *v.* Minneapolis Harv. Wks., 41 Ill. App. 556.

Indiana. — Glemm *v.* Dailey, 96 Ind. 472; Winstandley *v.* Rariden, 110 Ind. 140, 11 N. E. 15; Shauver *v.* Philips, 32 N. E. 1131; Louisville, etc. R. Co. *v.* Cauley, 119 Ind. 142, 21 N. E. 546.

Iowa. — Bartlett *v.* Gaines, 11 Iowa 95.

Kansas. — Fuller *v.* Jackson, 2 Kan. 445.

Louisiana. — Chase *v.* New Orleans Gaslight Co., 45 La. Ann. 300, 12 So. 308; Sherman *v.* City of New Orleans, 18 La. Ann. 660.

Massachusetts. — Fogel *v.* Dussault, 141 Mass. 154, 7 N. E. 17; Ward *v.* Bartlett, 12 Allen 419.

Minnesota. — Roberts *v.* Nelson, 65 Minn. 240, 68 N. W. 14.

Missouri. — Cooke *v.* Kansas City, etc. R. Co., 57 Mo. App. 471.

Nebraska. — Walton Plow Co. *v.* Campbell, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468; Home F. Ins. Co. *v.* Berg, 46 Neb. 600, 65 N. W. 780; Jones *v.* Seward County, 10 Neb. 154, 4 N. W. 946; Phenix Ins. Co. *v.* Bachelder, 39 Neb. 95, 57 N. W. 996; Keens *v.* Robertson, 46 Neb. 837, 65 N. W. 897.

Nevada. — Horton *v.* Rushling, 3 Nev. 498; Ferguson *v.* Rutherford, 7 Nev. 385.

New York. — Pattison *v.* Taylor, 8 Barb. 250; Arthur *v.* Brooks, 14 Barb. 533; Gihon *v.* Levy, 2 Duer (N. Y. Supp.) 176; Butterworth *v.* Soper, 13 Johns. 443.

South Carolina. — Maverick *v.* Gibbs, 3 McCord 315.

Texas. — Marley *v.* McAnelly, 17 Tex. 658; Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284.

What Is New Matter. — New matter is matter extrinsic to the matter set up in the complaint as the basis of the cause of action. Manning *v.* Winter, 7 Hun (N. Y.) 482.

New matter is the averment of facts different from those alleged in the complaint, and not embraced within the judicial inquiry into their truth. Lupo *v.* True, 16 S. C. 579; Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 14 S. W. 15; Northrup *v.* Mississippi Val. Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Bridges *v.* Paige, 13 Cal. 640.

Whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some fact not inconsistent with such allegations, are new matter. Mauldin *v.* Ball, 5 Mont. 96, 1 Pac. 409.

New matter is that which under the rules of evidence the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Glazer *v.* Clift, 10 Cal. 303; McCarty *v.* Roberts, 8 Ind. 150.

A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists involves new matter. Churchhill *v.* Baumann, 95 Cal. 541, 30 Pac. 770; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Greenway *v.* James, 34 Mo. 326; Evans *v.* Williams, 60 Barb. (N. Y.) 346.

New matter is matter of confession and avoidance. It cannot be introduced under an answer simply denying the allegations of the complaint. It is not proving new matter, however, in an action to recover a sum due on contract, for the defendant to show that there are other terms in the contract from which the plaintiff has deviated, either to defeat the action or to reduce the damages, accordingly as the case of the plaintiff is shaped. Ferguson *v.* Rutherford, 7 Nev. 385.

New matter is where the contract is admitted, and the matter set up *avoids* the contract — not where the matter set up *denies* the contract. Gilbert *v.* Cram, 12 How. Pr. (N. Y.) 455; Stoddard *v.* Onondaga

under a denial. This principle applies either to a full[75] or partial defense.[76]

d. *Specific Defenses.* — **(1.) Matters in Abatement.** — All matters in abatement of the action must be pleaded in the answer as new matter, in order to admit evidence in support of a ground of abate-

Annual Conference, 12 Barb. (N. Y.) 573; Radde *v.* Ruckgaber, 3 Duer (N. Y.) 684; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Brazill *v.* Isham, 12 N. Y. 9; Carter *v.* Koezley, 14 Abb. Pr. (N. Y.) 147.

A general denial is not equivalent to a general issue at common law. It only puts the plaintiff to proof of his substantial allegations. If the defendant has an affirmative defense in the nature of an avoidance, he should plead it. Walker *v.* Flint, 11 Fed. 31.

Illustrations. — In General. Every means of defense, such as payment, release, novation, etc., showing the extinction of an obligation admitted or proved to have once existed, must be pleaded specially, and cannot be urged under the general issue, which only denies the facts in the petition. Plaintiff might otherwise be taken by surprise. Mortimer *v.* Trappan's Estate, 9 La. 108; Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606; Davis *v.* Davis, 17 La. 259; White *v.* Moreno, 17 La. 371; McKown *v.* Mathes, 19 La. 542; New Orleans Gas Light & Bkg. Co. *v.* Hudson, 5 Rob. (La.) 486; Bludworth *v.* Hunter, 9 Rob. (La.) 256.

Facts in the Nature of a Confession and Avoidance cannot be proved under a general denial. Keens *v.* Robertson, 46 Neb. 837, 65 N. W. 897; Phenix Ins. Co. *v.* Bachelder, 39 Neb. 95, 57 N. W. 996; Beatty *v.* Swarthout, 32 Barb. (N. Y.) 293.

Action for Salary by Officer. Plaintiff's complaint alleged, in substance, that, in March, 1871, he was appointed by the then comptroller of the city of New York an attendant upon the court of common pleas; that he entered upon his duties and continued to perform them until June 1, 1872; and that he claimed to recover a balance of his salary unpaid. Defendants answer simply denied these allegations. *Held* that, under the pleadings, it was not competent for defendants to prove that the appointment of the plaintiff was in excess of the number of employes allowed by law, or that the funds for the payment of such employes were exhausted. Brennan *v.* City of New York, 62 N. Y. 365.

Justification. — Under the general denial defendant cannot justify. Beatty *v.* Swarthout, 32 Barb. (N. Y.) 293; Snow *v.* Chatfield, 11 Gray (Mass.) 12.

Set-off or Counter-claim. — Evidence of a set-off or counter-claim is not admissible under a general denial. Brown *v.* College Corner & R. G. Road Co., 56 Ind. 110; Marley *v.* Smith, 4 Kan. 183.

Want of Consideration cannot be proved under a general denial. Brooks *v.* Chilton, 6 Cal. 640; Smith *v.* Flack, 95 Ind. 116; Bingham *v.* Kimball, 17 Ind. 396.

75. *Louisiana.* — Bludworth *v.* Hunter, 9 Rob. 256; Mortimer *v.* Trappan, 9 La. 108; Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606; Davis *v.* Davis, 17 La. 259; White *v.* Moreno, 17 La. 371; McKown *v.* Mathes, 19 La. 542.

Nebraska. — Keens *v.* Robertson, 46 Neb. 837, 65 N. W. 897; Phenix Ins. *v.* Bachelder, 39 Neb. 95, 57 N. W. 996.

New York. — Beaty *v.* Swarthout, 32 Barb. 293; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696.

76. Marley *v.* Smith, 4 Kan. 183; Brown *v.* College Corner & R. G. R. Co., 56 Ind. 110; Ronan *v.* Williams, 41 Iowa 680; Bennett *v.* Matthews, 64 Barb. (N. Y.) 410; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Houghton *v.* Townsend, 8 How. Pr. (N. Y.) 441; Grosvenor *v.* Atlantic F. Ins. Co., 1 Bosw. (N. Y.) 469.

Contra. — A partial defense is bad, and admits the allegations of the complaint. Jones *v.* Frost, 51 Ind. 69; Conger *v.* Parker, 29 Ind. 380; Lockwood *v.* Woods, 3 Ind. App. 258, 29 N. E. 569; Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531; Smith *v.* Dick, 95 Ala. 311, 10 So. 845.

ment.[77] Proof of such matter is not receivable under a denial.[78]

(2.) Matters in Bar. — (A.) EQUITABLE DEFENSE. — All those matters which are considered as equitable defenses are treated as new matter,[79] and must be pleaded to admit evidence in support of them.[80]

77. *United States.* — Walker *v.* Flint, 7 Fed. 435; Hilliard *v.* Brevoort, 4 McLean 24, 12 Fed. Cas. No. 6,505; Smith *v.* Kernochen, 7 How. 198; Rateau *v.* Bernard, 3 Blatchf. 244, 20 Fed. Cas. No. 11,579; Boyreau *v.* Campbell, 1 McAll. 119, 3 Fed. Cas. No. 1,760; Wythe *v.* Myers, 3 Sawy. 595, 30 Fed. Cas. No. 18,119; Gause *v.* Clarksville, 1 Fed. 353; Williams *v.* Nottawa, 104 U. S. 209; Walker *v.* Flint, 7 Fed. 435; Dinsmore *v.* Central R. Co., 19 Fed. 153.

Arkansas. — Heilman *v.* Martin, 2 Ark. 158.

Colorado. — Cody *v.* Raynawd, 1 Colo. 272.

Illinois. — Kenney *v.* Greer, 13 Ill. 432; Waterman *v.* Tuttle, 18 Ill. 292; Callender *v.* Gates, 45 Ill. App. 374; Hardy *v.* Adams, 48 Ill. 532; Farmers' & M. Ins. Co. *v.* Buckles, 49 Ill. 482; Toledo, W. & W. R. Co. *v.* Williams, 77 Ill. 354; Drake *v.* Drake, 83 Ill. 526; Drainage Comrs. *v.* Griffin, 134 Ill. 330, 25 N. E. 995.

Indiana. — Baily *v.* Schrader, 34 Ind. 260.

Louisiana. — Crouse *v.* Duffield, 12 Mart. 539; Welman *v.* Connoly, 2 Mart. (O. S.) 245.

Maine. — Webb *v.* Goddard, 46 Me. 505; Upham *v.* Bradley, 17 Me. 423; Strang *v.* Hirst, 61 Me. 9; Blaisdell *v.* Pray, 68 Me. 269.

Maryland. — Wilms *v.* White, 26 Md. 380, 90 Am. Dec. 113.

Massachusetts. — Cleveland *v.* Welsh, 4 Mass. 591; Davis *v.* Marston, 5 Mass. 199; Ainslie *v.* Martin, 9 Mass. 454; Jaha *v.* Belleg, 105 Mass. 208; Crosby *v.* Harrison, 116 Mass. 114.

Minnesota. — McNair *v.* Toler, 21 Minn. 175.

Mississippi. — Lanier *v.* Trigg, 6 Smed. & M. 641, 45 Am. Dec. 293; Commercial Bank of Columbus *v.* Thompson, 7 Smed. & M. 443.

Missouri. — Kincaid *v.* Storz, 52 Mo. App. 564.

New Hampshire. — Bishop *v.* Silver Lake Co., 62 N. H. 455; Christian Educational Soc. *v.* Varney, 54 N. H. 376.

New York. — Daniels *v.* Patterson, 3 N. Y. 47.

North Carolina. — Whicker *v.* Roberts, 32 N. C. 485.

South Carolina. — Comstock *v.* Alexander, 2 Spear 274.

Tennessee. — O'Sullivan *v.* Larry, 2 Head 54.

Texas. — Piedmont & A. Life Ins. Co. *v.* Ray, 50 Tex. 511; Whittaker *v.* Wallace, 2 Wills. Civ. Cas. § 559; Lee *v.* Salinas, 15 Tex. 495.

Wisconsin. — Dutcher *v.* Dutcher, 39 Wis. 651.

78. Killian *v.* Fulbright, 25 N. C. (3 Ired. L.) 9.

79. *Indiana.* — Walter *v.* Hartwig, 106 Ind. 123, 6 N. E. 5; Winstandley *v.* Rariden, 110 Ind. 140, 11 N. E. 15; Shauver *v.* Phillips, 32 N. E. 1131.

Kentucky. — Owensboro F. R. & G. R. Co. *v.* Harrison, 94 Ky. 408, 22 S. W. 545.

New York. — Pattison *v.* Taylor, 8 Barb. 250; Arthur *v.* Brooks, 14 Barb. 533; Carter *v.* Koezley, 9 Bosw. (N. Y. Super.) 583; Petrakion *v.* Arbeely, 26 N. Y. Supp. 731.

North Carolina. — McKinnon *v.* McIntosh, 98 N. C. 89, 3 S. E. 840.

80. *California.* — Estrada *v.* Murphy, 19 Cal. 248; Lestrade *v.* Barth, 19 Cal. 660; Cadiz *v.* Majors, 33 Cal. 288; McCauley *v.* Fulton, 44 Cal. 355; Downer *v.* Smith, 24 Cal. 114; Blum *v.* Robertson, 24 Cal. 127; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Tormey *v.* True, 45 Cal. 105; Arguello *v.* Bonrs., 67 Cal. 447, 8 Pac. 49; Meeker *v.* Dalton, 75 Cal. 154, 16 Pac. 764.

Georgia. — Brunswick & W. R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84; Ward *v.* Winn, 42 Ga. 323.

Indiana. — Glenn *v.* Dailey, 96 Ind. 472.

Louisiana. — Chase *v.* New Orleans G. L. Co., 54 La. Ann. 300, 12 So. 308.

An equitable defense, by virtue of statute, is permitted in some common-law states by means of a special plea, under which evidence to sustain it is admissible.

(B.) Defenses Other Than Equitable. — (a.) *Payment.* — Evidence of payment can only be received when pleaded in the answer;[81] and only then, in many states, when issue has been made by a reply to such answer.[82]

(b.) *Former Judgment.* — When it is sought to show a former judgment as a defense to the action, evidence is not permissible unless such defense is pleaded in the answer.[83]

(c.) *Fraud.* — While at common law fraud could be given in evi-

Missouri. — Carman *v.* Johnson, 20 Mo. 108, 61 Am. Dec. 593.

New York. — Gihon *v.* Levy, 2 Duer (N. Y. Super.) 176; Ayrault *v.* Chamberlain, 33 Barb. 229; Hollister *v.* Kolb, 59 Hun 615, 12 N. Y. Supp. 613.

Texas. — Welborn *v.* Norwood, 1 Tex. Civ. App. 614, 20 S. W. 1129.

Wisconsin. — Dobbs *v.* Kellogg, 53 Wis. 448, 10 N. W. 623; Weld *v.* Johnson Mfg. Co., 86 Wis. 549, 57 N. W. 378.

81. *Colorado.* — Ebenson *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008.

Connecticut. — Buell *v.* Flower, 39 Conn. 462, 12 Am. Rep. 414.

Indiana. — Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Coe *v.* Givan, 1 Blackf. 367.

Iowa. — Junge *v.* Bowman, 72 Iowa 648, 34 N. W. 612.

Kentucky. — Tibbs' Heirs *v.* Clark, 5 T. B. Mon. 526.

Louisiana. — D'Arensbourg *v.* Chauvin, 6 La. Ann. 778; McKown *v.* Mathes, 19 La. 542; Ruhlman *v.* Smith, 15 La. Ann. 670; Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606.

Missouri. — Edwards *v.* Giboney, 51 Mo. 129.

New Jersey. — Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711; Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102.

New York. — Austin *v.* Tompkins, 3 Sandf. (N. Y. Super.) 22; Texier *v.* Gouin, 5 Duer (N. Y. Super.) 389; Miner *v.* Beekman, 14 Abb. Pr. (N. S.) 1.

Ohio. — Flowers *v.* Slater, 2 Ohio Dec. 336.

Tennessee. — Stanley *v.* McKinzer, 7 Lea 454.

82. Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Harris *v.* Merz Architectural Iron Wks., 82 Ky. 200.

83. *United States.* — Blandy *v.* Griffith, 2 Fed. Cas. No. 1,528.

California. — Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12.

Illinois. — Hahn *v.* Ritter, 12 Ill. 80.

Indiana. — Picquet *v.* M'Kay, 2 Blackf. 465.

Iowa. — Cooley *v.* Brayton, 16 Iowa 10; Van Orman *v.* Spafford, 16 Iowa 186.

Kentucky. — Galloway *v.* Hamilton, 1 Dana 576; Norton *v.* Norton, 15 Ky. L. Rep. 872, 25 S. W. 750, 27 S. W. 85.

Louisiana. — Williams *v.* Bethany, 1 La. 315; Mitchell *v.* Levi, 28 La. Ann. 946.

Michigan. — Briggs *v.* Milburn, 40 Mich. 512.

Montana. — Josephi *v.* Mady Clothing Co., 13 Mont. 195, 33 Pac. 1.

Nebraska. — Gregory *v.* Kenyon, 34 Neb. 640, 52 N. W. 685.

New York. — Lyon *v.* Tallmadge, 14 Johns. 501; Derby *v.* Yale, 13 Hun 273; Fowler *v.* Hait, 10 Johns. 111; Bryson *v.* St. Helen, 79 Hun 167, 29 N. Y. Supp. 524.

North Carolina. — Redmond *v.* Coffin, 17 N. C. (2 Dev. Eq.) 437.

Ohio. — White *v.* United States Bank, 6 Ohio 528; Meiss *v.* Gill, 44 Ohio St. 253, 6 N. E. 656.

Oregon. — Murray *v.* Murray, 6 Or. 26.

Tennessee. — Turley *v.* Turley, 85 Tenn. 251, 1 S. W. 891.

dence under the general issue,[84] under the Code system evidence to sustain a defense of fraud can only be received when the fraud is pleaded.[85]

(d.) *Illegality of Contract.* — Where the contract relied on does not appear to be illegal on its face, evidence to show its illegality can only be received under a pleading setting up such illegality.[86] The

West Virginia. — Beall *v.* Walker, 26 W. Va. 741.

84. Candy *v.* Twichel, 2 Root (Conn.) 123; Ragsdale *v.* Thorn, 1 McMull. (S. C.) 335.

85. *United States.* — McCracken *v.* Robison, 57 Fed. 375.

Illinois. — Dwertman *v.* Sipe, 62 Ill. App. 115; Anderson *v.* Jacobson, 66 Ill. 522.

Indiana. — Fankboner *v.* Fankboner, 20 Ind. 62; Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358.

Louisiana. — Brugnot *v.* Louisiana State M. & F. Ins. Co., 12 La. 326; Gay *v.* Nicol, 28 La. Ann. 227.

Michigan. — Jackson *v.* Collins, 39 Mich. 557; Dayton *v.* Munroe, 47 Mich. 193, 10 N. W. 196.

Minnesota. — Daly *v.* Proetz, 20 Minn. 411; Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

New York. — Chu Pawn *v.* Irwin, 82 Hun 607, 31 N. Y. Supp. 724.

Texas. — Gilliam *v.* Alford, 69 Tex. 267, 6 S. W. 757.

Virginia. — Welfley *v.* Shenandoah Iron, etc. Co., 83 Va. 768, 3 S. E. 376.

West Virginia. — Chalfant *v.* Martin, 25 W. Va. 394.

But in Greenway *v.* James, 34 Mo. 326, it was held that "in an action of trespass *de bonis asportatis*, in which the petition alleges and the answer denies the ownership of the plaintiff, the defense that the sale under which the plaintiff claims was made to defraud creditors, and was therefore void, need not be specially pleaded; and evidence supporting such defense is relevant to the issue made." The court said: "Where a cause of action which *once existed* has been determined by some matter which subsequently transpired, such new matter must, to comply with the statute, be specially pleaded; but where the cause of action alleged *never existed*, the appropriate defense under the law is a denial of the material allegations of the petition; and such facts as tend to disprove the controverted allegations are pertinent to the issue. In the cause at bar, the rejected testimony, if true, disproved the respondent's ownership of the property, and thereby showed the cause of action alleged had never existed."

86. *United States.* — Welford *v.* Gilham, 2 Cranch C. C. 556, 29 Fed. Cas. No. 17,376.

Alabama. — Angel *v.* Simpson, 85 Ala. 53, 3 So. 758; Jordan *v.* Locke, Minor 254.

Arkansas. — Dickson *v.* Burk, 6 Ark. 412, 44 Am. Dec. 521; Guynn *v.* McCauley, 32 Ark. 97.

California. — Osborne *v.* Endicott, 6 Cal. 149.

Colorado. — Benjamin *v.* Mattler, 3 Colo. App. 227, 32 Pac. 837.

Georgia. — Kimbro *v.* Bank of Fulton, 49 Ga. 419.

Illinois. — Irwin *v.* Dyke, 114 Ill. 302, 1 N. E. 913; Dyer *v.* Martin, 5 Ill. 140; Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193.

Indiana. — Ensley *v.* Patterson, 19 Ind. 95; Glass *v.* Murphy, 4 Ind. App. 530, 30 N. E. 1097; Crowder *v.* Reed, 80 Ind. 1; Kain *v.* Rinker, 1 Ind. App. 86, 27 N. E. 328.

Louisiana. — Harvey *v.* Fitzgerald, 6 Mart. (O. S.) 530.

Minnesota. — Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

Missouri. — Lowe *v.* Williams, 58 Mo. App. 138; Hackworth *v.* Zeitinger, 48 Mo. App. 32.

Nebraska. — Atchison & N. R. Co. *v.* Miller, 16 Neb. 661, 21 N. W. 451; Fitzgerald *v.* Fitzgerald Const. Co., 44 Neb. 463, 62 N. W. 899.

New York. — Cruse *v.* Findlay, 16 Misc. 576, 38 N. Y. Supp. 741; Nichols *v.* Lumpkin, 51 N. Y. Super. 88; Schreyer *v.* City of New York,

illegality of a contract can not be proved under a general denial.[87]

(e.) *Statute of Limitations.* — Evidence to establish a bar to the action by reason of the statute of limitations can not be received, unless such statute is affirmatively relied on in the answer.[88] It is an invariable rule that such statute must be specially pleaded.[89]

7 Jones & S. (N. Y. Super.) 1; Drake *v.* Siebold, 81 Hun 178, 30 N. Y. Supp. 697.

North Carolina. — Boyt *v.* Cooper, 6 N. C. (2 Murph.) 286.

Texas. — Nunn *v.* Lackey, 1 White & W. § 1331.

87. Sheldon *v.* Pruessner, 52 Kan. 579, 35 Pac. 201; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

88. *United States.* — Norton *v.* Meader, 4 Sawy. 603, 18 Fed. Cas. No. 10,351.

Alabama. — Brown *v.* Hemphill, 9 Port. 206; Ferguson *v.* Carter, 40 Ala. 607.

Illinois. — Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702.

Kentucky. — Rankin *v.* Turney, 2 Bush 555.

Maryland. — Chambers *v.* Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572; Smith *v.* Williamson, 1 Har. & J. 147; Maddox *v.* State, 4 Har. & J. 539; Bannon *v.* Lloyd, 64 Md. 48, 20 Atl. 1023; Brendel *v.* Strobel, 25 Md. 395.

Minnesota. — Hoyt *v.* McNeil, 13 Minn. 390.

Missouri. — Tramell *v.* Adams, 2 Mo. 155.

New Jersey. — Brand *v.* Longstreet, 4 N. J. L. 325.

New York. — Van Hook *v.* Whitlock, 2 Edw. Ch. 304; Fairchild *v.* Case, 24 Wend. 381.

North Carolina. — Pegram *v.* Stoltz, 67 N. C. 144.

Ohio. — Lockwood *v.* Wildman, 13 Ohio 430.

Texas. — Petty *v.* Cleveland, 2 Tex. 404.

Virginia. — Hickman *v.* Stout, 2 Leigh 6.

Wisconsin. — Ward *v.* Walters, 63 Wis. 39, 22 N. W. 844.

89. *United States.* — Brown *v.* Jones, 2 Gall. 477, 4 Fed. Cas. No. 2,017.

Alabama. — Espy *v.* Comer, 76 Ala. 501; Sands *v.* Hammell, 108 Ala. 624, 18 So. 489.

California. — People *v.* Broadway Wharf Co., 31 Cal. 33.

Colorado. — Jennings *v.* Rickard, 10 Colo. 395, 15 Pac. 677.

Georgia. — Parker *v.* Irvin, 47 Ga. 405.

Illinois. — Kennedy *v.* Stout, 26 Ill. App. 133.

Indiana. — City of Lebanon *v.* Twiford, 13 Ind. App. 384, 41 N. E. 844.

Iowa. — Sleeth *v.* Murphy, 1 Morris 321, 41 Am. Dec. 232.

Kansas. — Greer *v.* Adams, 6 Kan. 203.

Kentucky. — Hayden *v.* Stone, 1 Duv. 396.

Louisiana. — Ashley *v.* Ashley, 41 La. Ann. 102, 5 So. 539.

Maine. — Ware *v.* Webb, 32 Me. 41.

Maryland. — Oliver *v.* Gray, 1 Har. & G. 204.

Minnesota. — Davenport *v.* Short, 17 Minn. 24.

Missouri. — Boyce *v.* Christy, 47 Mo. 70; Wynn *v.* Cory, 48 Mo. 346.

Nebraska. — Atchison & N. R. Co. *v.* Miller, 16 Neb. 661, 21 N. W. 451.

New York. — Ainslie *v.* New York, 1 Barb. 168; Stewart *v.* Smith, 14 Abb. Pr. 75.

North Carolina. — Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713.

Ohio. — Towsley *v.* Moore, 30 Ohio St. 184, 27 Am. Rep. 434.

Oregon. — The Senorita *v.* Simonds, 1 Or. 274.

Pennsylvania. — Heath *v.* Page, 48 Pa. St. 130.

Rhode Island. — White *v.* Eddy, 19 R. I. 108, 31 Atl. 823.

South Carolina. — Jones *v.* Massey, 9 S. C. 376.

Tennessee. — Merriman *v.* Cannovan, 9 Baxt. 93.

Texas. — McClenney *v.* McClenney, 3 Tex. 192, 49 Am. Dec. 738.

West Virginia. — Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410; Seborn *v.* Beckwith, 30 W. Va. 774, 5 S. E. 450.

(f.) *Statute of Frauds.* — In some jurisdictions it is held that evidence to sustain a defense of the statute of frauds may be received under a general denial;[90] but the great weight of authority holds that this defense can not be availed of unless relied on by plea[91] or answer [92].

(g.) *Contributory Negligence.* — The decisions are not in accord as to whether evidence of contributory negligence may be received under a general denial,[93] or under the general issue at common

Wisconsin. — Lockhart *v.* Fessenich, 58 Wis. 588, 17 N. W. 302.

90. *United States.* — May *v.* Sloan, 101 U. S. 231.

California. — Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162.

Indiana. — Suman *v.* Springate, 67 Ind. 115.

Kentucky. — Grant's Heirs *v.* Craigmiles, 1 Bibb 203; Smith *v.* Fah, 15 B. Mon. 443; Hocker *v.* Gentry, 3 Met. 463.

Maryland. — Billingslea *v.* Ward, 33 Md. 48.

Massachusetts. — Boston Duck Co. *v.* Dewey, 6 Gray 446.

Minnesota. — Fontaine *v.* Bush, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722.

Missouri. — Wildbahn *v.* Robidoux, 11 Mo. 659; Dunn *v.* McClintock, 64 Mo. App. 193.

Montana. — Ryan *v.* Dunphy, 4 Mont. 342, 1 Pac. 710.

New Jersey. — Van Duyne *v.* Vreeland, 12 N. J. Eq. 142.

New York. — Berrien *v.* Southack, 7 N. Y. Supp. 324; Bailie *v.* Plaut, 10 Misc. 30, 31 N. Y. Supp. 1015; Schultz *v.* Cohen, 13 Misc. 638, 34 N. Y. Supp. 927.

Pennsylvania. — Parrish *v.* Koons, 1 Pars. Eq. Cas. 78.

Texas. — Johnson *v.* Flint, 75 Tex. 379, 12 S. W. 1120.

Vermont. — Hotchkiss *v.* Ladd, 36 Vt. 593, 86 Am. Dec. 679.

91. *Alabama.* — Harper *v.* Campbell, 102 Ala. 342, 14 So. 650; Lagerfelt *v.* McKie, 100 Ala. 430, 14 So. 281.

Colorado. — Hamill *v.* Hall, 4 Colo. App. 290, 35 Pac. 927.

Illinois. — Thornton *v.* Henry, 3 Ill. 218.

Kentucky. — Hocker *v.* Gentry, 3 Met. 463.

Maine. — Lawrence *v.* Chase, 54 Me. 196; Douglass *v.* Snow, 77 Me. 91.

Maryland. — Lingan *v.* Henderson, 1 Bland 236.

Missouri. — Randolph *v.* Frick, 50 Mo. App. 275.

New York. — Cheever *v.* Schall, 87 Hun 32, 33 N. Y. Supp. 751; Wells *v.* Monihan, 129 N. Y. 161, 29 N. E. 232; Schwann *v.* Clark, 7 Misc. 242, 27 N. Y. Supp. 262.

North Carolina. — Lyon *v.* Crissman, 22 N. C. (2 Dev. & B. Eq.) 268.

92. *Alabama.* — Espalla *v.* Wilson, 86 Ala. 487, 5 So. 867; Martin *v.* Blanchett, 77 Ala. 288; Smith *v.* Pritchett, 98 Ala. 649, 13 So. 569.

Illinois. — Lear *v.* Chouteau, 23 Ill. 39; Yourt *v.* Hopkins, 24 Ill. 326.

Kentucky. — Brown *v.* East, 5 T. B. Mon. 405; Hocker *v.* Gentry, 3 Met. 463.

Massachusetts. — Middlesex Co. *v.* Osgood, 4 Gray 447.

Missouri. — Sherwood *v.* Saxton, 63 Mo. 78; Graff *v.* Foster, 67 Mo. 512.

New York. — Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43; Honsinger *v.* Mulford, 90 Hun 589, 35 N. Y. Supp. 986.

North Carolina. — Bonham *v.* Craig, 80 N. C. 224.

Tennessee. — Chitty *v.* Southern Queen Mfg. Co., 93 Tenn. 276, 24 S. W. 121.

93. Not Admissible. — *United States.* — Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

Alabama. — Kansas City, M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262; Montgomery, etc. R. Co. *v.* Chambers, 79 Ala. 342; Richmond, etc. R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

law,[94] or only under a special plea of contributory negligence.[95] The rule requiring contributory negligence to be specially pleaded before proof of the fact can be received seems to rest upon sound principles.[96]

It is held that where the contributory negligence of the plaintiff appears from his pleading,[97] or his own evidence,[98] such defense is available under a general denial.[99]

Indiana. — Jeffersonville, M. & I. R. Co. *v.* Dunlap, 29 Ind. 426.

Missouri. — Stone *v.* Hunt, 94 Mo. 475, 7 S. W. 431; Neier *v.* Missouri Pac. R. Co., 1 S. W. 387.

New York. — Brown *v.* Elliott, 45 How. Prac. 182; Roemer *v.* Stryker, 142 N. Y. 134, 36 N. E. 808; Wall *v.* Buffalo Water Works Co., 18 N. Y. 119.

Texas. — Western Union Tel. Co. *v.* Apple, 28 S. W. 1022; Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731; Missouri, K. & T. R Co. *v.* Jamison, 12 Tex. Civ. App. 689, 34 S. W. 674; Western Union Tel. Co. *v.* Wisdom, 85 Tex. 261, 20 S. W. 56; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288.

Admissible. — *Indiana.* — Evansville & C. R. Co. *v.* Hiatt, 17 Ind. 102; Indianapolis & C. R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Jonesboro & F. Tpk. Co. *v.* Baldwin, 57 Ind. 86.

Iowa. — Fernbach *v.* City of Waterloo, 34 N. W. 610; Fernbach *v.* City of Waterloo, 76 Iowa 598, 41 N. W. 570.

Minnesota. — St. Anthony Falls W. P. Co. *v.* Eastman, 20 Minn. 277.

Texas. — Rogers *v.* Watson, 1 White & W. Civ. Cas., § 382; Texas & P. R. Co. *v.* Pollard, 2 Wills. Civ. Cas., § 481; St. Louis S. W. R. Co. *v.* Fenlaw, 36 S. W. 295.

94. Not Admissible. — Clark *v.* Canadian Pac. R. Co., 69 Fed. 543.

Admissible. — Wooddell *v.* West Virginia Imp. Co., 38 W. Va. 23, 17 S. E. 386.

95. Under Code, must be pleaded specially. See cases cited in note 93, this series.

At Common Law, must be pleaded specially. See cases cited in next preceding note.

In Clark *v.* Canadian Pac. R. Co., 69 Fed. 543, it is held that "in an action in a federal court, brought in a state where the common law system of pleading prevails, contributory negligence, being in those courts a matter of affirmative defense, must be pleaded."

96. As it is elementary law that the burden of proof is on the defendant to establish contributory negligence (Chicago, etc. R. Co. *v.* Price, 97 Fed. 423; Galveston, H. & S. A. R. Co. *v.* Dehnisch (Tex.), 57 S. W. 615; Linden *v.* Anchor Min. Co., 20 Utah 134, 58 Pac. 355; Conrad *v.* Town of Ellington, 104 Wis 367, 80 N. W. 456; Platte & D. Canal & Mill. Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68), unless such negligence appears in the proofs offered by the plaintiff (Platte & D. Canal & Mill. Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68; Baltimore & O. R. Co. *v.* Whitacre, 35 Ohio St. 627; Overby *v.* Chesapeake & O. R. Co., 37 W. Va. 524, 16 S. E. 813; Missouri Pac. R. Co. *v.* Foreman, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785; Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886), it logically follows that where defendant relies on this defense he ought to be required to plead it.

97. Murray *v.* Gulf, etc. R. Co., 73 Tex. 2, 11 S. W. 125; Alcorn *v.* Chicago & A. R. Co. (Mo.), 16 S. W. 229; Alcorn *v.* Chicago & A. R. Co., 108 Mo. 81, 18 S. W. 188.

98. McMurtry *v.* Louisville, etc. R. Co., 67 Miss. 601, 7 So. 401; Warmington *v.* Atchison, etc. R. Co., 46 Mo. App. 159; Gulf, C. & S. F. R. Co. *v.* Allbright, 7 Tex. Civ. App. 21, 26 S. W. 250; Bunnell *v.* Rio Grande W. R. Co., 13 Utah 314, 44 Pac. 927; Evans & Howard Fire Brick Co. *v.* St. Louis & S. F. R. Co., 21 Mo. App. 648.

99. *Mississippi.* — McMurtry *v.*

(h.) *License or Release.* — Evidence of a license,[1] or release can only be received under an answer specially pleading such matter.[2]

(i.) *Tender, Accord and Satisfaction, and Bankruptcy.* — Unless specially alleged in the answer, evidence can not be admitted to show a tender,[3] accord and satisfaction,[4] or a discharge in bankruptcy.[5]

Louisville, etc. R. Co., 67 Miss. 601, 7 So. 401.

Missouri. — Alcorn *v.* Chicago & A. R. Co., 16 S. W. 229; *s. c.*, 108 Mo. 81, 18 S. W. 188; Warmington *v.* Atchison, etc. R. Co., 46 Mo. App. 159; Evans & Howard Fire Brick Co. *v.* St. Louis, etc. R. Co., 21 Mo. App. 648.

Texas. — Murray *v.* Gulf, etc. R. Co., 73 Tex. 2, 11 S. W. 125; Gulf, etc. R. Co. *v.* Allbright, 7 Tex. Civ. App. 21, 26 S. W. 250.

Utah. — Bunnell *v.* Rio Grande W. R. Co., 13 Utah 314, 44 Pac. 927.

1. Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370; Chase *v.* Long, 44 Ind. 427; Alford *v.* Barnum, 45 Cal. 482; Tell *v.* Beyer, 38 N. Y. 161; Clifford *v.* Dam, 81 N. Y. 52.

2. *California.* — Coles *v.* Soulsby, 21 Cal. 47; Grunwald *v.* Freese, 34 Pac. 73.

Indiana. — Wall *v.* Galvin, 80 Ind. 447; Cameron *v.* Warbritton, 9 Ind. 351.

Maryland. — Barr *v.* Perry, 3 Gill 313.

Massachusetts. — Parker *v.* City of Lowell, 11 Gray 353; Emerson *v.* Knower, 8 Pick. 63.

Montana. — Collier *v.* Field, 2 Mont. 320.

New York. — Hitchcock *v.* Carpenter, 9 Johns. 344; Horton *v.* Horton, 83 Hun 213, 31 N. Y. Supp. 588.

Pennsylvania. — Johnson *v.* Kerr, 1 Serg. & R. 25.

Tennessee. — Harvey *v.* Sweasy, 4 Humph. 449.

Texas. — Marley *v.* McAnelly, 17 Tex. 658.

3. *United States.* — Boulton *v.* Moore, 14 Fed. 922.

California. — Hegler *v.* Eddy, 53 Cal. 597; Duff *v.* Fisher, 15 Cal. 375.

Massachusetts. — Carley *v.* Vance, 17 Mass. 389.

New York. — Hill *v.* Place, 36 How. Pr. 26; Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163.

Pennsylvania. — Seibert *v.* Kline, 1 Pa. St. 38; Wagenblast *v.* M'Kean, 2 Grant Cas. 393; Vosburg *v.* Reynolds, 8 Luz. Leg. Reg. 283; Sharpless *v.* Dobbins, 1 Del. Co. R. 25.

Vermont. — Griffin *v.* Tyson, 17 Vt. 35.

Wisconsin. — McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200.

4. *California.* — Coles *v.* Soulsby, 21 Cal. 47; Sweet *v.* Burdett, 40 Cal. 97.

Connecticut. — Atchison *v.* Atchison, 67 Conn. 36, 34 Atl. 761.

Illinois. — Kenyon *v.* Sutherland, 8 Ill. 99.

Iowa. — Taylor *v.* Frink, 2 Iowa 84.

New Jersey. — Longstreet *v.* Ketcham, 1 N. J. L. 170.

New York. — Jacobs *v.* Day, 5 Misc. 410, 25 N. Y. Supp. 763; Niggli *v.* Foehry, 83 Hun 269, 31 N. Y. Supp. 931.

Contra. — Looby *v.* West Troy, 24 Hun (N. Y.) 78.

5. *United States.* — Goodrich *v.* Hunton, 2 Woods 137, 10 Fed. Cas. No. 5,544, *reversed*, 99 U. S. 80; Fellows *v.* Hall, 2 McLean 281, 8 Fed. Cas. No. 4,722; Fowle *v.* Park, 48 Fed. 789.

Alabama. — Collins *v.* Hammock, 59 Ala. 448; Ivey *v.* Gamble, 7 Port. 545; Cogburn *v.* Spence, 15 Ala. 549, 50 Am. Rep. 140.

Connecticut. — Brown *v.* Stevens Co., 52 Conn. 110.

Georgia. — Smith *v.* Cook, 71 Ga. 705.

Illinois. — Horner *v.* Spelman, 78 Ill. 206.

Indiana. — Jenks *v.* Opp, 43 Ind. 108.

Louisiana. — Palmer *v.* Moore, 3 La. Ann. 208; Ludeling *v.* Felton, 29 La. Ann. 719.

Mississippi. — Jones *v.* Coker, 53 Miss. 195.

Missouri. — Bank of Missouri *v.* Franciscus, 15 Mo. 303.

(j.) *Champerty and Usury.* — Evidence of champerty or usury can not be received except when such defenses are specially pleaded, as they are regarded as new matter.[6]

(k.) *Award.* — Evidence to show that the subject-matter of the suit was submitted to arbitration and an award made thereon is not receivable, unless such award is pleaded in the answer.[7]

(l.) *Bona Fide Purchaser.* — That the defendant is a *bona fide* purchaser can not be shown in evidence in the absence of an affirmative pleading of such fact.[8] It can not be shown under a general denial.[9]

(m.) *Release of Surety.* — In an action involving the relationship of surety, the release of the surety can not be shown in evidence in the absence of a proper affirmative pleading relying upon the fact of such release.[10]

New York. — Cornell *v.* Dakin, 38 N. Y. 253.

North Carolina. — Parker *v.* Grant, 91 N. C. 338.

Ohio. — Gardner *v.* Hengehold, 6 Ohio Dec. 997.

Texas. — Park *v.* Casey, 35 Tex. 536; Manwarring *v.* Kouns, 35 Tex. 171.

6. *United States.* — Paddock *v.* Fish, 10 Fed. 125.

Arkansas. — Pilsbury *v.* McNally, 22 Ark. 409; Laird *v.* Hodges, 26 Ark. 356.

Idaho. — Brumback *v.* Oldham, 1 Idaho 709.

Illinois. — Smith *v.* Whitaker, 23 Ill. 367; Hadden *v.* Innes, 24 Ill. 381; Schoonhoven *v.* Pratt, 25 Ill. 457; Murry *v.* Crocker, 2 Ill. 212.

Kentucky. — Bush's Admx. *v.* Bush, 7 T. B. Mon. 53.

Maryland. — Bandel *v.* Isaacs, 13 Md. 202; Chambers *v.* Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572.

Missouri. — Moore *v.* Ringo, 82 Mo. 468; Bond *v.* Worley, 26 Mo. 253.

New York. — Fay *v.* Grimsteed, 10 Barb. 321.

Ohio. — Franklin Bank *v.* Commercial Bank, 5 Ohio Dec. 339.

Pennsylvania. — Keim *v.* Bank of Penn Twp., 1 Pa. St. 36.

Tennessee. — Riggs *v.* Shirley, 9 Humph. 71.

Texas. — McMullen *v.* Guest, 6 Tex. 275; Harrison *v.* State Cent. Bank, 1 White & W. § 375.

Vermont. — Dyer *v.* Lincoln, 11 Vt. 300.

Washington. — Brundage *v.* Burke, 11 Wash. 679, 40 Pac. 343.

Wisconsin. — Barker *v.* Barker, 14 Wis. 131.

7. *Indiana.* — Brown *v.* Perry, 14 Ind. 32.

Iowa. — Dougherty *v.* Stewart, 43 Iowa 648.

Louisiana. — Buquoi *v.* Hampton, 6 Mart. (N. S.) 8.

Maryland. — Yingling *v.* Kohlhass, 18 Md. 148.

Minnesota. — Lautenschlager *v.* Hunter, 22 Minn. 267.

New York. — Lobdell *v.* Stowell, 37 How. Pr. 88; Brazill *v.* Isham, 12 N. Y. 9.

North Carolina. — Moore *v.* Austin, 85 N. C. 179.

Virginia. — Harrison *v.* Brock, 1 Munf. 22.

West Virginia. — Martin *v.* Rexroad, 15 W. Va. 512.

Contra. — Newell *v.* Newell, 34 Miss. 385; Winne *v.* Elderkin, 2 Pin. (Wis.) 248, 52 Am. Dec. 159.

8. Holdsworth *v.* Shannon, 113 Mo. 508, 21 S. W. 85; Weaver *v.* Barden, 49 N. Y. 286.

9. Holdsworth *v.* Shannon, 113 Mo. 508, 21 S. W. 85; Weaver *v.* Barden, 49 N. Y. 286, 2 Pom. Eq. (3rd Ed.) § 784.

10. *Alabama.* — Hill *v.* Fitzpatrick, 6 Ala. 314.

Arkansas. — Dawson *v.* Real Estate Bank, 5 Ark. 283.

California. — Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Eppinger *v.* Kendrick, 44 Pac. 234, Mulford *v.* Estudillo, 23 Cal. 94;

(n.) *Invalidity of Statute or Ordinance.* — If the action rests upon a statute or ordinance, its invalidity can not be shown unless the facts constituting the invalidity are averred in the answer.[11]

(o.) *Title to Real Estate.* —In an ordinary action for trespass to real estate, it has been held in some jurisdictions that the plaintiff's title can not be called in question by evidence introduced for that purpose, unless the want of title has been specially pleaded,[12] while in other jurisdictions this fact may be shown under a general denial.[13]

People *v.* Ah Luck, 62 Cal. 503.

Georgia. — Stewart *v.* Barrow, 55 Ga. 664; Bonner *v.* Nelson, 57 Ga. 433.

Illinois. — Lyle *v.* Morse, 24 Ill. 95.

Louisiana. — Barnes *v.* Crandell, 11 La. Ann. 119; Hoffman *v.* Atkins, 11 La. Ann. 172.

Massachusetts. — Horne *v.* Bodwell, 5 Gray 457.

Michigan. — Rawlings *v.* Cole, 67 Mich. 431, 35 N. W. 66.

Minnesota. — Farrell *v.* Fabel, 47 Minn. 11, 49 N. W. 303.

Missouri. — Taylor *v.* Jeter, 23 Mo. 244; Missouri Bank *v.* Matson, 24 Mo. 333; Hempstead *v.* Hempstead, 27 Mo. 187; Smith *v.* Rice, 27 Mo. 505, 72 Am. Dec. 281; Ferguson *v.* Turner, 7 Mo. 497; Rucker *v.* Robinson, 38 Mo. 154, 90 Am. Dec. 412; Pitts *v.* Fugate, 41 Mo. 405; Headles *v.* Jones, 43 Mo. 235; Rice *v.* Morton, 19 Mo. 263.

Nebraska. — Hayden *v.* Cook, 34 Neb. 670, 52 N. W. 165.

Nevada. — Horton *v.* Ruhling, 3 Nev. 498.

Rhode Island. — Shelton *v.* Hurd, 7 R. I. 403, 84 Am. Dec. 564.

South Carolina. — Davant *v.* Webb, 2 Rich. L. 379; Lainhart *v.* Reilly's Admr., 3 Desaus. 590.

Texas. — Petty *v.* Cleveland, 2 Tex. 404.

11. Darlington *v.* Mayor, 2 Robt. (N. Y.) 274; Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; Bluedorn *v.* Missouri Pac. R. Co. (Mo.), 24 S. W. 57.

12. *California.* — Razzo *v.* Varni, 21 Pac. 762.

Indiana. — Wood *v.* Mansell, 3 Blackf. 125; Rasor *v.* Qualls, 4 Blackf. 286, 30 Am. Dec. 658; Beach *v.* Livergood, 15 Ind. 496.

Iowa. — Dyson *v.* Ream, 9 Iowa 51.

Maryland. — Manning *v.* Brown, 47 Md. 506.

Massachusetts. — Stone *v.* Hubbard, 17 Pick. 217; Rawson *v.* Morse, 4 Pick. 127; Ward *v.* Bartlett, 12 Allen 419; Jewett *v.* Foster, 14 Gray 495; Walker *v.* Swasey, 2 Allen 312.

Michigan. — Ostrom *v.* Potter, 104 Mich. 115, 62 N. W. 170.

New Jersey. — Shreeves *v.* Liveson, 2 N. J. L. 247; Carson *v.* Wilson, 11 N. J. L. 43, 19 Am. Dec. 368.

New York. — Althause *v.* Rice, 4 E. D. Smith 347; Babcock *v.* Lamb, 1 Cow. 238; Van Buskirk *v.* Irving, 7 Cow. 35; Coan *v.* Osgood, 15 Barb. 583.

Pennsylvania. — Stambaugh *v.* Hollabaugh, 10 Serg. & R. 357.

Tennessee. — Carson *v.* Prater, 6 Coldw. 565.

Texas. — Carter *v.* Wallace, 2 Tex. 206.

Wisconsin. — Lockhart *v.* Gier, 54 Wis. 133, 11 N. W. 245; Williams *v.* Holmes, 2 Wis. 129; Lyon *v.* Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732.

13. *United States.* — Reynolds *v.* Baker, 4 Cranch C. C. 104, 20 Fed. Cas. No. 11,727.

Connecticut. — Munson *v.* Mallory, 36 Conn. 165, 4 Am. Rep. 52.

Indiana. — Rasor *v.* Qualls, 4 Blackf. 286, 30 Am. Dec. 658.

Louisiana. — Louisiana Land & F. Co. *v.* Gasquet, 45 La. Ann. 759, 13 So. 171.

Maryland. — Baker *v.* Pierce, 4 Har. & McH. 502.

Massachusetts. — Bennett *v.* Clemence, 6 Allen 10; Hastings *v.* Hastings, 110 Mass. 280; Rawson *v.* Morse, 4 Pick. 127.

Michigan. — Vandoozer *v.* Dayton,

(p.) *Mistake in Written Instrument.* — Evidence of mistake in a written instrument will not be received in the absence of a special pleading properly averring such mistake.[14]

(q.) *Custom and Rules Among Miners.* — No evidence of the customs and rules among miners will be received unless they are relied upon in the answer.[15]

(r.) *Set-off or Counter-Claim.* — Evidence of a set-off or counter-claim will not be received unless specially pleaded.[16]

(s.) *Withdrawal of Suit.* — Evidence to show that plaintiff made an offer to withdraw his suit is not admissible unless the matter is specially pleaded.[17]

(t.) *Discharge of Employe for Certain Term.* — In an action for damages for discharging the plaintiff, who it is alleged was employed for a definite term, evidence that the discharge was made because of the inefficiency of the plaintiff is not admissible unless such matter is specially pleaded in the answer.[18]

45 Mich. 247, 7 N. W. 814; Esty *v.* Smith, 45 Mich. 402, 8 N. W. 83.

New Hampshire. — Fuller *v.* Rounceville, 29 N. H. 554.

New Jersey. — Central R. Co. *v.* Hatfield, 29 N. J. L. 206, 571.

14. *Delaware.* — Templeman *v.* Biddle, 1 Har. 522.

Iowa. — Lindley *v.* First Nat. Bank, 76 Iowa 629, 41 N. W. 381.

Mississippi. — Turner *v.* Fish, 28 Miss. 306.

Missouri. — Hayden *v.* Grillo's Admr., 42 Mo. App. 1.

Pennsylvania. — Girard L. Ins. Co. *v.* Mutual L. Ins. Co., 13 Phila. 90; Stultz *v.* Dickey, 5 Bin. 285, 6 Am. Dec. 411.

Texas. — Anderson *v.* Rogge, 28 S. W. 106; Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

15. *Alabama.* — Kannady *v.* Lambert, 37 Ala. 57.

California. — *In re* Couts' Estate, 100 Cal. 400, 34 Pac. 865.

Illinois. — Jockisch *v.* Hardtke, 50 Ill. App. 202.

Massachusetts. — Clark *v.* Leach, 10 Mass. 51; Sargent *v.* Southgate, 5 Pick. 312, 16 Am. Dec. 409; Braynard *v.* Fisher, 6 Pick. 355; Grew *v.* Burditt, 9 Pick. 265.

Michigan. — Mead *v.* Harris, 101 Mich. 585, 60 N. W. 284.

New Jersey. — Freeman *v.* Marsh, 3 N. J. L. 473; Robbins *v.* Aikins, 3 N. J. L. 745.

New York. — Nelson *v.* Wellington, 5 Bosw. (N. Y. Super.) 178; Beers *v.* Waterbury, 8 Bosw. (N. Y. Super.) 396; Montanye *v.* Montgomery, 19 N. Y. Supp. 655, 47 N. Y. St. 114.

16. Mullenbrinck *v.* Pooler, 4 N. Y. St. 127; Mead *v.* Harris, 101 Mich. 585, 60 N. W. 284; Calvin *v.* McClure, 17 Serg. & R. (Pa.) 385; Humbert *v.* Brisbane, 25 S. C. 506.

17. *Alabama.* — Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320.

California. — Pope *v.* Dalton, 31 Cal. 218.

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

Indiana. — Voltz *v.* Newbert, 17 Ind. 187; Hill *v.* Forkner, 76 Ind. 115; Weigold *v.* Pross, 132 Ind. 87, 31 N. E. 472.

Kansas. — Kansas Pac. R. Co. *v.* McBrantney, 10 Kan. 415.

Maine. — Weyman *v.* Brown, 50 Me. 139; Clark *v.* Hilton, 75 Me. 426.

Maryland. — Wallis *v.* Wilkinson, 73 Md. 128, 20 Atl. 787.

Mississippi. — Davis *v.* Davis, 68 Miss. 478, 10 So. 70.

Missouri. — Schuster *v.* Schuster, 93 Mo. 438, 6 S. W. 259.

Montana. — Meyendorf *v.* Frohner, 3 Mont. 282.

New York. — Wilkins *v.* Williams, 49 Hun 605, 3 N. Y. Supp. 897.

18. Jacobus *v.* Wood, 84 Ga. 638, 10 S. E. 1099.

7. In Action of Ejectment. — A. Admissibility of Evidence for Plaintiff. — Evidence of plaintiff's title[19] and possession of defendant, as alleged in the pleading, is always admissible.[20] But where the general issue has been pleaded, no evidence of the defendant's possession is necessary on the part of the plaintiff,[21] as such plea admits that the defendant is in possession of the land claimed by the plaintiff in his pleading.[22] But the evidence of the plaintiff must be confined to the case made by his complaint or declaration, as shown by the illustrations given in the notes.[23]

19. McDowell *v.* Love, 30 N. C. (8 Ired. L.) 502; Rhodes *v.* Gunn, 35 Ohio St. 387; Tripp *v.* Ide, 3 R. I. 51; Bowers *v.* School Comrs., 7 Yerg. (Tenn.) 117; Wilson *v.* Palmer, 18 Tex. 592.

20. Cumming *v.* Butler, 6 Ga. 88; Stevens *v.* Griffith, 3 Vt. 448; Jones *v.* Jackson, 38 Mo. 444; Black *v.* Tricker, 52 Pa. St. 436; Evarts *v.* Dunston, Brayt. (Vt.) 70.

21. *Alabama.* — Newton *v.* Louisville & N. R. Co., 110 Ala. 474, 19 So. 19; King *v.* Kent's Heirs, 29 Ala. 542; Philpot *v.* Bingham, 55 Ala. 435; Swann *v.* Kidd, 78 Ala. 173.

California. — Burke *v.* Table Mountain W. Co., 12 Cal. 403; Schenk *v.* Evoy, 24 Cal. 104; Hawkins *v.* Reichert, 28 Cal. 534.

Florida. — Buesing *v.* Forbes, 33 Fla. 495, 15 So. 209.

Illinois. — Weiland *v.* Kobick, 110 Ill. 16, 51 Am. Rep. 576.

Indiana. — Holman *v.* Elliott, 86 Ind. 231.

Maine. — Coffin *v.* Freeman, 82 Me. 577, 20 Atl. 238.

Maryland. — Wallis *v.* Wilkerson, 73 Md. 128, 20 Atl. 787.

Missouri. — Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002.

North Carolina. — Gilchrist *v.* Middleton, 107 N. C. 663, 12 S. E. 85.

Pennsylvania. — Ulsh *v.* Strode, 13 Pa. St. 432.

Tennessee. — James *v.* Brooks, 6 Heisk. 150.

West Virginia. — Beckwith *v.* Thompson, 18 W. Va. 103.

22. See cases cited in next preceding note.

23. *California.* — Seaton *v.* Son, 32 Cal. 481.

District of Columbia. — Todd *v.* Kauffman, 19 D. C. 304.

Georgia. — Boatright *v.* Porter's Heirs, 32 Ga. 130; Sutton *v.* Aiken, 57 Ga. 416; Bohanon *v.* Bonn, 32 Ga. 390.

Illinois. — Cook *v.* Sinnamon, 47 Ill. 214; Winstanly *v.* Meacham, 58 Ill. 97; Speer *v.* Hadduck, 31 Ill. 439.

Indiana. — Hunt *v.* Campbell, 83 Ind. 48; Stout *v.* McPheeters, 84 Ind. 585.

Maryland. — Dockery *v.* Maynard, 1 Har. & McH. 209; Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321; Kelso *v.* Stiger, 75 Md. 376, 24 Atl. 18.

Michigan. — Willson *v.* Hoffman, 54 Mich. 246, 20 N. W. 37; DeMill *v.* Moffat, 49 Mich. 125, 13 N. W. 387.

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

Mississippi. — Kane *v.* Mackin, 9 Smed. & M. 387.

Missouri. — Whitmore *v.* Crawford, 106 Mo. 435, 17 S. W. 640.

New York. — Enders *v.* Sternberg, 52 Barb. 222.

North Carolina. — Young *v.* Drew, 1 Tayl. 119; Brittain *v.* Daniels, 94 N. C. 781.

Vermont. — Park *v.* Moore, 13 Vt. 183; Norton *v.* Spooner, Chip. 74.

Location of Land. — Plaintiff must prove the bounds and location of the lands he has made title to, although no defense is taken for any land within the bounds claimed by him. Dockery *v.* Maynard, 1 Har. & McH. (Md.) 209.

Plaintiff declared for a tract of land called "Nonesuch," and professed to locate it according to its patent. *Held*, that he could not offer evidence of the boundaries of certain other tracts; and that they were comprised under the reputed name of "Nonesuch," there being no location of it as a parcel of land by

B. Admissibility of Evidence for Defendant. — a. *Matters Admissible Under General Issue or Denial.* — The general issue or denial pleaded by the defendant puts in issue the title and right of possession of the plaintiff,[24] and under it all evidence may be re-

that name. Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321.

When the declaration alleged that the land was situated in the southeast quarter of a certain section, and patent and deeds showed that it should be so situated, but it was proved that the land lay west of the quarter section post, the variance was fatal. Willson *v.* Hoffman, 54 Mich. 246, 20 N. W. 37.

Identity of Land. — Where defendant pleads in bar a former recovery, by his landlord, of the same lands, of the plaintiff, and this is traversed, the plaintiff's testimony must be confined to what disproves the issue, the identity of the land. He is not permitted to go into proof which would have constituted a defense for him in the former action. Parks *v.* Moore, 13 Vt. 183.

Possession. — Where plaintiff in an action of ejectment, on the execution of a warrant of resurvey, located on the plots for his claim and pretensions all that part of a certain tract of land "which was in the possession of M," making no reference as to the time to which such possession related, it is incompetent for him to prove by witnesses that M. was in possession thereof for several years prior to his death. Mitchell *v.* Mitchell, 8 Gill (Md.) 98.

Source of Title. — Where plaintiff offers in evidence a chain of title, but fails to show by what means he acquired any title from the person last named in said chain, it is not sufficient to justify a jury in giving him a verdict. Whitmore *v.* Crawford, 106 Mo. 435, 17 S. W. 640.

Recovery Limited to Interest Claimed. — Recovery is limited to the interest claimed in the declaration, and cannot cover any interest acquired by plaintiff after the dates set forth therein as those on which he had possession and defendant entered. De Mill *v.* Moffat, 49 Mich. 125, 13 N. W. 387.

Heirship. — Plaintiff, when suing as heir at law, must prove his descent from the ancestor from whom he claims, and must show that all the intermediate heirs are dead, without issue. Kelso *v.* Steiger, 75 Md. 376, 24 Atl. 18.

Patent. — A declaration which counted upon the title being in Martha Reason alone, is not supported by a patent to "Martha Reason and the other heirs at law of James Reason, deceased," without evidence that Martha Reason is the sole heir at law of James Reason. Cook *v.* Sinnamon, 47 Ill. 214.

Character of Title. — An assignee of a mortgage cannot recover the premises in ejectment, where he claims to be the owner in fee simple. Speer *v.* Hadduck, 31 Ill. 439.

Under a complaint distinctly alleging a strictly legal title as owner in fee, plaintiff will not be permitted to prove and recover upon an equitable title. Merrill *v.* Dearing, 47 Minn. 137, 49 N. W. 693; Stout *v.* McPheeters, 84 Ind. 585; Sutton *v.* Aiken, 57 Ga. 416; Seaton *v.* Son, 32 Cal. 481.

Estate. — Where in his complaint plaintiff alleged that he was seized of certain lands in fee, and the evidence showed that he was only entitled to a life estate, he is not entitled to recover in this state of the pleadings. Brittain *v.* Daniels, 94 N. C. 781.

Where he claims one undivided interest, he cannot recover another and different interest. Winstanley *v.* Meacham, 58 Ill. 97.

Plaintiff cannot demand on a lease and recover in fee. Norton *v.* Douglass, N. Chip. (Vt.) 74.

Where plaintiff alleges that he is the owner in fee simple, an answer, which avers that he has only an estate for years, is sufficient, as proof of the latter will not support an averment of the former. Hunt *v.* Campbell, 83 Ind. 48.

24. Cumming *v.* Butler, 6 Ga. 88; Stevens *v.* Griffith, 3 Vt. 448; Jones

ceived tending to show want of title in the plaintiff[25] or his right of possession to the land in controversy.[26] Adverse possession by the defendant for the period required by the statute of limitations applying to actions of ejectment, may be shown under the general issue,[27] and a special plea thereof will not be received.[28] Under the general issue or denial, the defendant, if not a mere trespasser, may show title out of the plaintiff at the commencement of the action, without connecting himself with such outstanding title.[29] So he may show a homestead right,[30] or that the defendant is the owner of the land in controversy,[31] or matter in confirmation of the title, as an infant's

v. Jackson, 38 Mo. 444; Wicks *v.* Smith, 18 Kan. 508; Zeigler *v.* Fisher's Heirs, 3 Pa. St. 365.

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

California. — Morton *v.* Folger, 15 Cal. 275; Stark *v.* Barrett, 15 Cal. 361; Bell *v.* Brown, 22 Cal. 671; Roberts *v.* Chan Tin Pen, 23 Cal. 259; Dyson *v.* Bradshaw, 23 Cal. 528; Sparrow *v.* Rhoades, 76 Cal. 208, 18 Pac. 245, 9 Am. St. Rep. 197.

Illinois. — Johnson *v.* Adleman, 35 Ill. 265.

Indiana. — Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813.

Kansas. — Hall's Heirs *v.* Dodge, 18 Kan. 277; Clayton *v.* School Dist. No. 1, 20 Kan. 256; Armstrong *v.* Brownfield, 32 Kan. 116, 4 Pac. 185; Smith *v.* Hobbs, 49 Kan. 800, 31 Pac. 687.

Minnesota. — Kipp *v.* Bullard, 30 Minn. 84, 14 N. W. 364.

Missouri. — Collins *v.* Brannin, 1 Mo. 540; Davis *v.* Peveler, 65 Mo. 189; Estes *v.* Long, 71 Mo. 605; Goff *v.* Roberts, 72 Mo. 570; Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

New Hampshire. — Mowry *v.* Blandin, 64 N. H. 3, 4 Atl. 882.

New Jersey. — Stewart *v.* Camden & A. R. Co., 33 N. J. L. 115.

New York. — Jackson *v.* Ramsey, 3 Cow. 75, 15 Am. Dec. 242; Raynor *v.* Timerson, 46 Barb. 518.

North Carolina. — Morrison *v.* Watson, 95 N. C. 479.

Tennessee. — Walker *v.* Fox, 85 Tenn. 154, 2 S. W. 98; Bleindom *v.* Pilot Mountain Coal & M. Co., 89 Tenn. 166, 204, 15 S. W. 737.

Vermont. — Orleans County Grammar School *v.* Parker, 25 Vt. 696; Cheney *v.* Cheney, 26 Vt. 606.

Wisconsin. — Lain *v.* Shepardson, 23 Wis. 224; Mather *v.* Hutchinson, 25 Wis. 27.

26. Stout *v.* Hyatt, 13 Kan. 232; Coryell *v.* Cain, 16 Cal. 567.

27. *California.* — Gillespie *v.* Jones, 47 Cal. 259; Hagely *v.* Hagely, 68 Cal. 348, 9 Pac. 305.

Florida. — Neal *v.* Spooner, 20 Fla. 38; Weiskoph *v.* Dibble, 18 Fla. 24.

Illinois. — Emery *v.* Keighan, 88 Ill. 482; Stubblefield *v.* Borders, 92 Ill. 279.

Michigan. — Miller *v.* Beck, 68 Mich. 76, 35 N. W. 899.

Mississippi. — Wilson *v.* Williams' Heirs, 52 Miss. 487.

Missouri. — Holmes *v.* Kring, 93 Mo. 452, 6 S. W. 347; Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Fairbanks *v.* Long, 91 Mo. 628, 4 S. W. 499; Bird *v.* Sellers, 113 Mo. 580, 21 S. W. 91.

North Carolina. — Freeman *v.* Sprague, 82 N. C. 366.

28. Fraser *v.* Weller, 6 McLean 11, 9 Fed. Cas. No. 5,064; Wade *v.* Doyle, 17 Fla. 522; Weiskoph *v.* Dibble, 18 Fla. 24; Cumming *v.* Butler, 6 Ga. 88; Hutto *v.* Thornton, 44 Miss. 166; Dean *v.* Tucker, 58 Miss. 487; Johnson *v.* Griswold, 8 W. Va. 240.

29. Matkin *v.* Marx, 96 Ala. 501, 11 So. 633; Bell *v.* Brown, 22 Cal. 671; Dyson *v.* Bradshaw, 23 Cal. 528; Ested *v.* Long, 71 Mo. 605; Raynor *v.* Timerson, 46 Barb. (N. Y.) 518; Walker *v.* Fox, 85 Tenn. 154, 2 S. W. 98; Bleidorn *v.* Pilot Mountain Coal & Min. Co., 89 Tenn. 166, 204, 15 S. W. 737.

30. Johnson *v.* Adleman, 35 Ill. 265; Kipp *v.* Bullard, 30 Minn. 84, 14 N. W. 364; Morrison *v.* Watson, 95 N. C. 479; Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142.

31. Halls' Heirs *v.* Dodge, 18

deed,[32] incapacity of grantor to make the deed relied on in the action,[33] or the invalidity of a deed for any cause relied on by either of the parties,[34] or any other matter tending to defeat the plaintiff's action.[35]

b. *Equitable Defenses.* — Equitable defenses are not available in ejectment under the general issue or denial.[36] Evidence to support an equitable defense to an action of ejectment can only be received under a special pleading setting up the facts constituting the defendant's equities.[37]

8. In Suits in Equity. — A. Evidence Admissible Under the Bill. — a. *In General.* —It is a well settled principle that evidence will not be considered as to matters not alleged in the bill.[38]

Kan. 277; Armstrong *v.* Brownfield, 32 Kan. 116, 4 Pac. 185; Smith *v.* Hobbs, 49 Kan. 800, 31 Pac. 687; Davis *v.* Peveler, 65 Mo. 189.

32. McCormic *v.* Leggett, 53 N. C. (8 Jones' L.) 425.

33. Fitzgerald *v.* Shelton, 95 N. C. 519.

34. Franklin *v.* Kelley, 2 Neb. 79; Staley *v.* Housel, 35 Neb. 160, 52 N. W. 888; Helmes *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893; Sparrow *v.* Rhoades, 76 Cal. 208, 18 Pac. 245, 9 Am. St. Rep. 197; Lyman *v.* Humphrey, 28 Conn. 322; Gould *v.* Sullivan, 84 Wis. 659, 54 N. W. 1013, 36 Am. St. Rep. 955, 20 L. R. A. 487.

35. *Connecticut.* — Holton *v.* Button, 4 Conn. 436.

Indiana. — Dale *v.* Frisbie, 59 Ind. 530; Steeple *v.* Downing, 60 Ind. 478; Woodruff *v.* Garnor, 20 Ind. 174; Webster *v.* Bebbinger, 70 Ind. 9; Wood *v.* Eckhouse, 79 Ind. 354.

Kansas. — Wicks *v.* Smith, 18 Kan. 508.

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

Pennsylvania. — Zeigler *v.* Fisher, 3 Pa. St. 365.

36. *California.* — Estrada *v.* Murphy, 19 Cal. 248; McCauley *v.* Fulton, 44 Cal. 355; Downer *v.* Smith, 24 Cal. 114; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Torney *v.* True, 45 Cal. 105; Arguello *v.* Bonrs, 67 Cal. 447, 8 Pac. 49; Manly *v.* Howlett, 55 Cal. 94; Kenyon *v.* Quinn, 41 Cal. 325.

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

Missouri. — Carman *v.* Johnson, 20 Mo. 108, 61 Am. Dec. 593; Kennedy *v.* Daniels, 20 Mo. 104; LeBeau *v.* Armitage, 47 Mo. 138.

Montana. — Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298.

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

New York. — Carpenter *v.* Ottley, 2 Lans. 451.

North Carolina. — Talbert *v.* Becton, 111 N. C. 543, 16 S. E. 322.

Ohio. — Powers *v.* Armstrong, 36 Ohio St. 357.

Wisconsin. — Dobbs *v.* Kellogg, 53 Wis. 448, 10 N. W. 623; Weld *v.* Johnson Mfg. Co., 86 Wis. 549, 57 N. W. 378.

37. *California.* — Lestrade *v.* Barth, 19 Cal. 660; Cadiz *v.* Majors, 33 Cal. 288; Forney *v.* True, 45 Cal. 105; Arguello *v.* Bonrs, 67 Cal. 447, 8 Pac. 49.

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

Missouri. — Carman *v.* Johnson, 20 Mo. 108, 61 Am. Dec. 593; Kennedy *v.* Daniels, 20 Mo. 104.

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

New York. — Carpenter *v.* Ottley, 2 Lans. 451.

North Carolina. — Talbert *v.* Becton, 111 N. C. 543, 16 S. E. 322.

Ohio. — Powers *v.* Armstrong, 36 Ohio St. 357.

Wisconsin. — Weld *v.* Johnson Mfg. Co., 86 Wis. 549, 57 N. W. 378.

38. *United States.* — The Chusan, 2 Story 455, 5 Fed. Cas. No. 2,717.

Arkansas. — Trapnall *v.* Burton, 24 Ark. 371.

California. — Green *v.* Covillaud, 10 Cal. 317.

Florida. — Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

b. *Specific Matters To Be Alleged.* — If fraud is to be relied on the facts constituting it must be alleged;[39] so laches can not be avoided by evidence to show an excuse, unless the grounds of such excuse are set out in the bill;[40] so where it is sought to show an act done with intent to defraud, such intent must be alleged;[41] so where estoppel is relied on to defeat a legal right, the facts constituting such estoppel must be alleged to admit evidence respecting such matter.[42]

c. *Meeting Case Made by Defendant.* — It not infrequently occurs that the *prima facie* right to relief as made out by the plaintiff in his bill is destroyed by some matter affirmatively relied on by the

Illinois. — Maher *v.* Bull, 44 Ill. 97; Carmichael *v.* Reed, 45 Ill. 108; Hall *v.* Towne, 45 Ill. 493.

Indiana. — Peelman *v.* Peelman, 4 Ind. 612.

Iowa. — Shaw *v.* Livermore, 2 G. Gr. 338.

Kentucky. — Sprigg *v.* Albin, 6 J. J. Marsh. 168; Hunt *v.* Daniel, 6 J. J. Marsh. 398.

Michigan. — Moran *v.* Palmer, 13 Mich. 367.

New Jersey. — Mann *v.* Bruce, 5 N. J. Eq. 413; Moores *v.* Moores, 16 N. J. Eq. 275.

New York. — DePeyster *v.* Colden, 1 Edw. Ch. 63; James *v.* McKernon, 6 Johns. 543.

North Carolina. — Bailey *v.* Wilson, 21 N. C. (1 Dev. & B. Eq.) 182.

Ohio. — Shur *v.* Statler, 2 Ohio Dec. 70.

Virginia. — Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513; Nash *v.* Nash, 28 Gratt. 686.

39. James *v.* McKernon, 6 Johns. (N. Y.) 543; Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442; Booth *v.* Booth, 3 Litt. (Ky.) 57; Knibb *v.* Dixon, 1 Rand. (Va.) 249; Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Rawnsley *v.* Trenton Mut. Fire Ins. Co., 9 N. J. Eq. 95.

40. Badger *v.* Badger, 69 U. S. 87; Harwood *v.* Cincinnati & C. Air-Line R. Co., 84 U. S. 78; Stearns *v.* Page, 1 Story 204, 22 Fed. Cas. No. 13,339; Marsh *v.* Whitmore, 88 U. S. 178; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46; Bertine *v.* Varian, 1 Edw. Ch. (N. Y.) 343; Kirksey *v.* Keith, 1 Posey Unrep. Cas. (Tex.) 511.

41. Bentley *v.* Dunkle, 57 Ind. 374; National State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. 330; Lockwood *v.* Harding, 79 Ind. 129; Willis *v.* Thompson, 93 Ind. 62; Booth *v.* Booth, 3 Litt. (Ky.) 57; Hogen *v.* Burnett, 37 Miss. 617; Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553.

42. *Arkansas.* — Gaines *v.* Bank of Mississippi, 12 Ark. 769.

California. — Hostler *v.* Hays, 3 Cal. 302; Blood *v.* Marcuse, 38 Cal. 590, 99 Am. Dec. 590; Clark *v.* Huber, 25 Cal. 593.

Colorado. — Prewitt *v.* Lambert, 19 Colo. 7, 34 Pac. 684.

Indiana. — Bowles *v.* Trapp, 139 Ind. 55, 38 N. E. 406.

Iowa. — Golden *v.* Hardesty, 93 Iowa 622, 61 N. W. 913.

Kentucky. — Faris *v.* Dunn, 7 Bush 276; Ray *v.* Longshaw, 4 Ky. L. Rep. 904.

Massachusetts. — Guild *v.* Richardson, 6 Pick. 364.

Michigan. — Dean *v.* Crall, 98 Mich. 591, 57 N. W. 813, 39 Am. St. Rep. 571; Moran *v.* Palmer, 13 Mich. 367.

Missouri. — Cockrill *v.* Hutchinson, 135 Mo. 67, 36 S. W. 375.

Nebraska. — Nebraska Mtg. Loan Co. *v.* Van Kloster, 42 Neb. 746, 60 N. W. 1016; Scroggin *v.* Johnston, 45 Neb. 714, 64 N. W. 236.

Nevada. — Hanson *v.* Chiatovich, 13 Nev. 395.

Oregon. — Rugh *v.* Ottenheimer, 6 Or. 231, 25 Am. Rep. 513; Remillard *v.* Prescott, 8 Or. 37.

Texas. — Anderson *v.* Nuckles (Tex. Civ. App.), 34 S. W. 184.

defendant in his answer.[43] If the plaintiff would introduce evidence to avoid the effect of such affirmative matter of defense, other than that in denial of the truth of such matter, the grounds of avoidance must be brought into the bill by proper allegations by way of amendment to the bill;[44] unless such defense has already been anticipated by the plaintiff and the matters of avoidance alleged in the charging part of the bill.[45] Thus, for illustration, if the defendant in his answer relies upon the statute of limitations, and the plaintiff can prove that his case, by reason of some matter connected with the transaction, has been taken out of the operation of the statute, such matter, if not already contained in the charging part of the bill, must be alleged therein by way of amendment, in order to enable the plaintiff to introduce evidence in support of such matter.[46]

B. Evidence Admissible Under Answer. — It is a well settled

Vermont. — Brinsmaid *v.* Mayo, 9 Vt. 31.

Washington. — Walker *v.* Baxter, 6 Wash. 244, 33 Pac. 426.

Wisconsin. — Warder *v.* Baldwin, 51 Wis. 450, 8 N. W. 257.

43. Carrow *v.* Adams, 65 N. C. 32; Blaisdell *v.* Stevens, 16 Vt. 179; Connerton *v.* Oakman, 41 Mich. 608, 2 N. W. 932; Delaware & R. Canal Co. *v.* Raritan & D. B. R. Co., 14 N. J. Eq. 445; Chalfants *v.* Martin, 25 W. Va. 394.

44. Johnson *v.* Johnson, 5 Ala. 90; Commissioners of Highways *v.* Deboe, 43 Ill. App. 25; Connerton *v.* Oakman, 41 Mich. 608, 2 N. W. 932; Harris *v.* Knickerbocker, 5 Wend. (N. Y.) 638; Chalfants *v.* Martin, 25 W. Va. 394.

45. Bruen *v.* Bruen, 4 Edw. Ch. (N. Y.) 640; Summer *v.* Caldwell, 2 Strobh. Eq. (S. C.) Beech *v.* Haynes, 1 Tenn. Ch. 569.

Under the modern code system a complaint must not contain the allegation of pretense and charge which prevailed in the English system of chancery pleading. Clarke *v.* Harwood, 8 How. Pr. (N. Y.) 470.

46. Johnson *v.* Johnson, 5 Ala. 90; South Sea Comp. *v.* Wymondsell, 3 P. Wms. (Eng.) 145; Bertine *v.* Varian, 1 Edwards Ch. (N. Y.) 343; Maury's Admr. *v.* Mason's Admr., 8 Port. (Ala.) 211; Hatfield *v.* Montgomery, 2 Port. (Ala.) 58; Ragland *v.* Morton, 41 Ala. 344, 345.

In applying the principle stated in the text in Fretwell *v.* McLemore, 52 Ala. 124, and especially at 137, the court in the course of its opinion says: "The remaining cause of demurrer is that assigned by the administrator of Hannon alone,— that it is shown by the bill that more than eighteen months have elapsed from the grant of administration to him, and a presentment of the claim or demand was not averred. The failure to present a claim or demand, within the period prescribed by the statute of non-claim, as a bar, like the statute of limitations, must in a court of law be specially pleaded, or it is not available as a defense. Mardis' Admrs. *v.* Smith, 2 Ala. 382. The rule is different in a court of equity; the defense may then be made by plea, answer, or demurrer, and when it is interposed in the one mode or the other, if there are any special circumstances, or any reason for excepting the case out of the statute, it must be introduced by an amendment to the bill. Maury's Admr. *v.* Mason's Admr., 8 Port. (Ala.) 211; Nimmo *v.* Stewart, 21 Ala. 692; Ragland's Exrs. *v.* Morton, 41 Ala. 344, 91 Am. Dec. 516."

In Ragland *v.* Morton, 41 Ala. 344, the court decides: "The lapse of time, or the statute of limitations, is available as a defense in equity on demurrer; and if there are any special circumstances, which bring the case within any exception to the general rule, they must be averred in the bill, or by way of special replication to a plea." Holding the

doctrine of equity practice that no evidence will be received in support of matters of defense except those alleged in the answer.[47]

C. Affirmative Matters of Defense. — Every affirmative matter of defense must be alleged in an answer[48] or plea, else evidence of such defense can not be considered on the hearing.[49] Thus, for illustration, if fraud,[50] estoppel[51] or the statute of limitations is relied on as a defense, no evidence in support of such defense is admissible unless such ground of defense is made the subject of a plea[52] or an answer.[53]

same principle, Parker *v.* Jones, 67 Ala. 234.

47. *United States.* — Blandy *v.* Griffith, 3 Fish. Pat. Cas. 609, 3 Fed. Cas. No. 1,529.

Alabama. — Grady *v.* Robinson, 28 Ala. 289.

Arkansas. — Trapnall *v.* Burton, 24 Ark. 371.

Illinois. — Millard *v.* Millard, 221 Ill. 86, 77 N. E. 595; Maher *v.* Bull, 44 Ill. 97; Carmichael *v.* Reed, 45 Ill. 108; Hall *v.* Towne, 45 Ill. 493.

Indiana. — Peelman *v.* Peelman, 4 Ind. 612.

Iowa. — Shaw *v.* Livermore, 2 G. Gr. 338.

New Jersey. — Moores *v.* Moores, 16 N. J. Eq. 275; Mann *v.* Bruce, 5 N. J. Eq. 413.

New York. — James *v.* M'Kernon, 6 Johns. 543; DePeyster *v.* Colden, 1 Edw. Ch. 63.

Ohio. — Shur *v.* Statler, 2 Ohio Dec. 70.

Virginia. — Nash *v.* Nash, 28 Gratt. 686.

48. Mann *v.* Bruce, 5 N. J. Eq. 413; Bailey *v.* Wilson, 21 N. C. (1 Dev. & B. Eq.) 182.

49. Mann *v.* Bruce, 5 N. J. Eq. 413; Bailey *v.* Wilson, 21 N. C. (1 Dev. & B. Eq.) 182.

50. James *v.* M'Kernon, 6 Johns. (N. Y.) 543; Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442; Knibb's Exr. *v.* Dixon's Exr., 1 Rand. (Va.) 249; Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721.

51. Equitable estoppel is available as a defense either at law or in equity. Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Barnard *v.* German-American Seminary, 49 Mich. 444, 13 N. W. 811.

That Estoppel Must Be Pleaded, see the following cases:

United States. — Mabury *v.* Louisville & J. Ferry Co., 60 Fed. 645, 9 C. C. A. 174, 18 U. S. App. 542.

Indiana. — Wood *v.* Ostram, 29 Ind. 177.

Kentucky. — Burdit's Exrs. *v.* Burdit, 2 A. K. Marsh. 143; Keel *v.* Ogden, 3 Dana 103.

Michigan. — Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483; Gooding *v.* Underwood, 89 Mich. 187, 50 N. W. 818.

Missouri. — Stones *v.* Richmond, 21 Mo. App. 17; Central Nat. Bank *v.* Doran, 109 Mo. 40, 18 S. W. 836.

Nevada. — Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459.

Pennsylvania. — Knight *v.* Mut. L. Ins. Co., 14 Phila. 187.

Vermont. — Sawyer *v.* Hoyt, 2 Tyler 288.

52. Illustrations. — Where a defect in posting notices of a tax sale would be cured by the statute of limitations, this will not aid a defendant in an action of ejectment, who has not set up the statute as a defense. Ward *v.* Walters, 63 Wis. 39, 22 N. W. 844.

The statute of limitation being a defense personal to defendant, where the bill shows on its face that the cause of action is barred, the defense will be deemed waived, if not raised by defendant. Rich *v* Bray, 37 Fed. 273, 2 L. R. A. 225.

53. Wilson *v.* Anthony, 19 Ark. 16; Humphreys *v.* Butler, 51 Ark. 351, 11 S. W. 479; Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Borders *v.* Murphy, 78 Ill. 81; Dixon *v.* Dixon, Md. Ch. 271; Ruckman *v.* Decker, 23 N. J. Eq. 283.

Contra, Haskell *v.* Bailey, 22 Conn. 569. See Syester *v.* Brewer, 27 Md. 288.

D. Equitable Action Under Code System. — a. *Plaintiff's Pleading.* — No evidence is admissible on the part of the plaintiff as to matters not set out in the complaint.[54]

b. *Defendant's Pleading.* — It is also a settled principle under this system that no evidence can be introduced by the defendant except as to such matters as are made the subject of his answer.[55]

9. In Criminal Cases. — A. Evidence of State. — a. *In General.* It is a general rule which obtains in criminal cases, except applying perhaps with greater strictness than in civil cases,[56] that all evidence introduced by the state must be relevant to the charge made against the defendant,[57] and in order to convict, be sufficient to establish the guilt of the accused, as charged, beyond a reasonable doubt.[58]

See Also as to Limitations. Norton *v.* Meader, Fed. Cas. No. 10,351; Chalmers *v.* Chalmers, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572; Van Hook *v.* Whitlock, 2 Edw. Ch. (N. Y.) 304; Hickman *v.* Stout, 2 Leigh (Va.) 6. But see *contra,* Riley *v.* Norman, 39 Ark. 158.

But in some jurisdictions where it appears affirmatively on the face of the bill that the action is barred by the statute of limitations it may be taken advantage of on demurrer. Cameron *v.* City and County of San Francisco, 68 Cal. 390, 9 Pac. 430; Worthy *v.* Johnson, 8 Ga. 236; Devor *v.* Rerick, 87 Ind. 337; Chellis *v.* Coble, 37 Kan. 558, 15 Pac. 505.

54. *United States.* — Blandy *v.* Griffith, 3 Fish Pat. Cas. 609, 3 Fed. Cas. No. 1,529.

Arkansas. — Trapnall *v.* Burton, 24 Ark. 371.

California. — Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725.

Florida. — Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Illinois. — Carmichael *v.* Reed, 45 Ill. 108; Maher *v.* Bull, 44 Ill. 97.

Indiana. — Peelman *v.* Peelman, 4 Ind. 612.

Iowa. — Shaw *v.* Livermore, 2 G. Gr. 338.

Kentucky. — Booth *v.* Booth, 3 Litt. 57; Hunt *v.* Daniel, 6 J. J. Marsh. 158.

New Jersey. — Moores *v.* Moores, 16 N. J. Eq. 275.

New York. — James *v.* M'Kernon, 6 Johns. 543.

Ohio. — Shur *v.* Statler, 2 Ohio Dec. 70.

Virginia. — Nash *v.* Nash, 28 Gratt. 686.

55. Grady *v.* Robinson, 28 Ala. 289; Mann *v.* Bruce, 5 N. J. Eq. 413; Bailey *v.* Wilson, 21 N. C. (1 Dev. & B. Eq.) 182; Tibb's Heir's *v.* Clark, 5 T. B. Mon. (Ky.) 526. See also authorities cited under note 54 this series.

56. Dyson *v.* State, 4 Cushm. (Miss.) 362; Hudson *v.* State, 3 Caldw. (Tenn.) 355.

57. Austin *v.* State, 14 Ark. 555; Rye *v.* State, 8 Tex. 153; People *v.* Kennedy, 32 N. Y. 141; Simms *v.* State, 10 Tex. App. 131; State *v.* Dart, 29 Conn. 153, 76 Am. Dec. 596.

58. *United States.* — United States *v.* Keller, 19 Fed. 633; United States *v.* Searcey, 26 Fed. 435; United States *v.* Jackson, 29 Fed. 503.

Alabama. — State *v.* Murphy, 6 Ala. 845.

Arkansas. — State *v.* King, 20 Ark. 166.

California. — People *v.* Kerrick, 52 Cal. 446.

Illinois. — Miller *v.* People, 39 Ill. 457; Marlatt *v.* People, 104 Ill. 364.

Indiana. — Hipp *v.* State, 5 Blackf. 149, 33 Am. Dec. 463; Stewart *v.* State, 44 Ind. 237.

Iowa. — State *v.* Tweedy, 5 Iowa 433; State *v.* Porter, 64 Iowa 237, 20 N. W. 168.

Kentucky. — Payne *v.* Com., 1 Met. 370.

Nebraska. — Morrison *v.* State, 13 Neb. 527, 14 N. W. 475; Vandeventer *v.* State, 38 Neb. 592, 57 N. W. 397.

New York. — *In re* Blake, 1 City Hall Rec. 99.

b. *Under Plea of Not Guilty.* — All evidence is admissible on the part of the state, under this plea, that in any appreciable degree tends to establish the truth of the charge.[59] For illustration, under this plea there may be shown in evidence the flight of the prisoner;[60] his escape,[61] or attempted escape,[62] from arrest or confinement;

Ohio. — State *v.* Gardiner, Wright 392.

Oregon. — State *v.* Ah Lee, 7 Or. 237.

Pennsylvania. — Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Tack, 1 Brewst. 511; Com. *v.* Hanlon, 8 Phila. 401; Com. *v.* Irving, 1 Leg. Chron. 69.

Texas. — Dorsey *v.* State, 34 Tex. 651; Conner *v.* State, 34 Tex. 659; Zazley *v.* State, 17 Tex. App. 267.

West Virginia. — State *v.* Abbott, 8 W. Va. 741.

59. State *v.* McAllister, 24 Me. 139; Austin *v.* State, 14 Ark. 55; State *v.* King, 84 N. C. 737.

60. *United States.* — United States *v.* Jackson, 29 Fed. 503.

Alabama. — Sylvester *v.* State, 71 Ala. 17; *s. c.*, 72 Ala. 201; Bowles *v.* State, 58 Ala. 335; Carder *v.* State, 84 Ala. 417, 4 So. 823.

Arkansas. — Burris *v.* State, 38 Ark. 221.

California. — People *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401; People *v.* Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; People *v.* Welsh, 63 Cal. 167; People *v.* Lock Wing, 61 Cal. 380.

Georgia. — Sewell *v.* State, 76 Ga. 836.

Indiana. — Porter *v.* State, 2 Ind. 435; Batten *v.* State, 80 Ind. 394.

Kentucky. — Baker *v.* Com., 13 Ky. L. Rep. 571, 17 S. W. 625.

Louisiana. — State *v.* Harris, 48 La. Ann. 1189, 20 So. 729.

Maine. — State *v.* Frederic, 69 Me. 400.

Mississippi. — Smith *v.* State, 58 Miss. 867.

Missouri. — State *v.* Griffin, 87 Mo. 608; State *v.* Moore, 101 Mo. 316, 14 S. W. 182.

New York. — People *v.* Ogle, 104 N. Y. 511, 11 N. E. 53, 4 N. Y. Crim. 349.

Ohio. — Grillo *v.* State, 9 Ohio C. C. 394.

Pennsylvania. — Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971.

Texas. — Aiken *v.* State, 10 Tex. App. 610; Hardin *v.* State, 4 Tex. App. 355; Watts *v.* State, 13 Tex. App. 169; Mathews *v.* State, 9 Tex. App. 138; Blake *v.* State, 3 Tex. App. 581; Williams *v.* State, 43 Tex. 182, 23 Am. Rep. 590; Hart *v.* State, 22 Tex. App. 563, 3 S. W. 741.

61. *Alabama.* — Elmore *v.* State, 98 Ala. 12, 13 So. 427; Murrell *v.* State, 46 Ala. 89, 7 Am. Rep. 592.

Arkansas. — Burris *v.* State, 38 Ark. 221.

Indiana. — Hittner *v.* State, 19 Ind. 48.

Iowa. — State *v.* Rodman, 62 Iowa 456, 17 N. W. 663; State *v.* Stevens, 67 Iowa 557, 25 N. W. 777; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202.

Kentucky. — Ryan *v.* Com., 5 Ky. L. Rep. 177; Clark *v.* Com., 17 Ky. L. Rep. 540, 32 S. W. 131.

Louisiana. — State *v.* Dufour, 31 La. Ann. 804; State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406.

Massachusetts. — Com. *v.* Brigham, 147 Mass. 414, 18 N. E. 167.

Michigan. — People *v.* Cleveland, 107 Mich. 367, 65 N. W. 216.

Missouri. — Fanning *v.* State, 14 Mo. 386.

New York. — People *v.* Myers, 2 Hun 6; People *v.* McKeon, 64 Hun 504, 19 N. Y. Supp. 486.

Texas. — Blake *v.* State, 3 Tex. App. 581.

Wisconsin. — Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

62. *Arkansas.* — Burris *v.* State, 38 Ark. 221.

California. — People *v.* Sheldon, 68 Cal. 434, 9 Pac. 457.

Georgia. — McRae *v.* State, 71 Ga. 96; Whaley *v.* State, 11 Ga. 123.

Indiana. — Hittner *v.* State, 19 Ind. 48; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

Iowa. — State *v.* Rodman, 62 Iowa 456, 17 N. W. 663; State *v.* Stevens, 67 Iowa 557, 25 N. W. 777.

Kentucky. — Ryan *v.* Com., 5 Ky.

his concealment;[63] or his subornation of witnesses[64] or jurors.[65]

B. Evidence of Defendant. — a. *Invalidity of Indictment.* Evidence to show the invalidity of an indictment can only be admitted under a plea in abatement specifically and clearly setting forth the grounds of its invalidity.[66] Thus, for instance, if it is desired to show an irregularity relating to the impaneling of the grand jury which found the indictment,[67] the disqualification of a grand juror,[68] or any irregularity in the proceedings of the grand

L. Rep. 177; Clark *v.* Com., 17 Ky. L. Rep. 540, 32 S. W. 131.

Louisiana. — State *v.* Dufour, 31 La. Ann. 804; State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406.

Missouri. — Fanning *v.* State, 14 Mo. 386; State *v.* Jackson, 95 Mo. 623, 8 S. W. 749; State *v.* Howell, 117 Mo. 307, 23 S. W. 263.

New Hampshire. — State *v.* Palmer, 65 N. H. 216, 20 Atl. 6.

New York. — People *v.* Myers, 2 Hun 6; People *v.* McKeon, 64 Hun 504, 19 N. Y. Supp. 486; People *v.* Petmecky, 2 N. Y. Crim. 450.

Texas. — Blake *v.* State, 3 Tex. App. 581.

Virginia. — Dean *v.* Com., 4 Gratt. 541.

West Virginia. — State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328.

Wisconsin. — Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

63. *Illinois.* — Jamison *v.* People, 145 Ill. 357, 34 N. E. 486.

Louisiana. — State *v.* Wingfield, 34 La. Ann. 1200.

Michigan. — People *v.* Pitcher, 15 Mich. 397; Hall *v.* People, 39 Mich. 717.

Missouri. — State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086.

New York. — Ryan *v.* People, 79 N. Y. 593.

Virginia. — Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

64. *Georgia.* — Reid *v.* State, 20 Ga. 681.

Indiana. — Conway *v.* State, 118 Ind. 482, 21 N. E. 285.

Iowa. — State *v.* Rorabacher, 19 Iowa 154.

Massachusetts. — Com. *v.* Cooper, 5 Allen 495, 81 Am. Dec. 762; Com. *v.* Smith, 162 Mass. 508, 39 N. E. 111.

Michigan. — People *v.* Marion, 29 Mich. 31.

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

New York. — Adams *v.* People, 9 Hun 89.

Texas. — Williams *v.* State, 22 Tex. App. 497, 4 S. W. 64; Love *v.* State, 35 Tex. Crim. 27, 29 S. W. 790.

Vermont. — State *v.* Barron, 37 Vt. 57.

65. People *v.* Marion, 29 Mich. 31; State *v.* Case, 93 N. C. 545, 53 Am. Rep. 471.

66. Eggleston *v.* State, 6 Blackf. (Ind.) 436; Uterburgh *v.* State, 8 Blackf. (Ind.) 202; Whitener *v.* State, 46 Neb. 144, 64 N. W. 704.

67. *Alabama.* — State *v.* Williams, 5 Port. 130; State *v.* Greenwood, 5 Port. 474; Nugent *v.* State, 19 Ala. 540.

Arkansas. — Shropshire *v.* State, 12 Ark. 190; Brown *v.* State, 13 Ark. 96; Wilburn *v.* State, 21 Ark. 198.

Florida. — Tervin *v.* State, 37 Fla. 396, 20 So. 551.

Indiana. — Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 55 Am. Rep. 756.

Mississippi. — McQuillen *v.* State, 16 Miss. 587; Rawls *v.* State, 16 Miss. 599.

North Carolina. — State *v.* Haywood, 73 N. C. 437.

68. *Alabama.* — State *v.* Middleton, 5 Port. 484.

Florida. — Kitrol *v.* State, 9 Fla. 9; Burroughs *v.* State, 17 Fla. 643; Potsdamer *v.* State, 17 Fla. 895.

Indiana. — Hardin *v.* State, 22 Ind. 347.

Maine. — State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275.

Rhode Island. — State *v.* Davis, 12 R. I. 492, 34 Am. Rep. 704.

Tennessee. — State *v.* Duncan, 7 Yerg. 271.

Texas. — Vanhook *v.* State, 12 Tex. 252.

jury in finding the indictment, evidence for such purpose is only admissible under a plea in abatement raising an issue as to such matter.[69]

b. *Under Plea of Not Guilty.* — Under a plea of not guilty, the defendant may give in evidence the statute of limitations,[70] his insanity, [71] an alibi,[72] the court's lack of jurisdiction,[73] or, as a general rule, any other matter constituting a bar to the prosecution.[74]

c. *Matters Admissible Only Under Special Plea.* — If it is sought to introduce evidence of a pardon,[75] or to show former jeopardy, acquittal or conviction, for the same offense, as a rule such evidence can only be received under a special plea specifying such grounds of defense.[76] In some jurisdictions the rule as to former jeopardy, conviction or acquittal is otherwise, and evidence thereof may be given under the plea of not guilty.[77]

10. Replication. — A. Replication Under Code System.

69. *In re* Low, 4 Me. 439, 16 Am. Dec. 271. See Donald *v.* State, 31 Fla. 255, 12 So. 695.

70. *United States.* — United States *v.* Cook, 17 Wall. 168; United States *v.* White, 5 Cranch C. C. 73, 28 Fed. Cas. No. 16,676.

Arkansas. — State *v.* Gill, 33 Ark. 129.

Florida. — Nelson *v.* State, 17 Fla. 195.

Indiana. — Hatwood *v.* State, 18 Ind. 492; Ulmer *v.* State, 14 Ind. 52.

Kentucky. — Com. *v.* Washington, 1 Dana 446.

Mississippi. — Thompson *v.* State, 54 Miss. 740.

Pennsylvania. — Com. *v.* Grise, 23 Pittsb. Leg. J. 138; Com. *v.* Bunn, 1 Leg. Op. 114.

Contra. — Johnson *v.* United States, 3 McLean 89, 13 Fed. Cas. No. 7,418; State *v.* Hussey, 7 Iowa 409; State *v.* McIntire, 58 Iowa 572, 12 N. W. 593; Com. *v.* Ruffner, 28 Pa. St. 259; Com. *v.* Hutchison, 7 Leg. Int. (Pa.) 118.

71. People *v.* Olwell, 28 Cal. 456; Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480; State *v.* Potts, 100 N. C. 457, 6 S. E. 657. *Contra,* Walker *v.* State, 91 Ala. 76, 9 So. 87.

72. Allbritton *v.* State, 94 Ala. 76, 10 So. 426; Caffey *v.* State, 94 Ala. 76, 10 So. 426.

73. Bennett *v.* State, 1 Swan (Tenn.) 411; Fitch *v.* Com., 92 Va. 824, 24 S. E. 272; Field *v.* State, 34 Tex. 39; Ryan *v.* Com., 80 Va. 385; Jones *v.* State, 74 Ind. 249.

74. Hankins *v.* People, 106 Ill. 628; Eggleston *v.* State, 6 Blackf. (Ind.) 436; Neaderhouser *v.* State, 28 Ind. 257.

75. Michael *v.* State, 40 Ala. 361; State *v.* Blalock, 61 N. C. 242; *In re* Fries, 1 Whart. St. Tr. (Pa.) 587; United States *v.* Wilson, 7 Pet. 150.

76. *United States.* — United States *v.* Wilson, 7 Pet. 150.

Alabama. — Michael *v.* State, 40 Ala. 361; DeArman *v.* State, 77 Ala. 10; Baysinger *v.* State, 77 Ala. 60; Jordan *v.* State, 81 Ala. 20, 1 So. 577.

Colorado. — *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790; Guenther *v.* People, 22 Colo. 121, 43 Pac. 999.

Kentucky. — Com. *v.* Olds, 5 Litt. 137.

Maine. — State *v.* Barnes, 32 Me. 530.

Massachusetts. — Com. *v.* O'Neil, 29 N. E. 1146.

New York. — People *v.* Benjamin, 2 Park. Crim. 201.

North Carolina. — State *v.* Blalock, 61 N. C. 242; State *v.* Morgan, 95 N. C. 641.

Pennsylvania. — *In re* Fries, 1 Whart. St. Tr. 587.

Tennessee. — Zachary *v.* State, 7 Baxt. 1.

77. People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436; Bryant *v.* State, 72 Ind. 400; State *v.* Conlin, 27 Vt.

When the reply of the plaintiff consists of a general denial of the matters set up as a defense to the action, any evidence tending to overthrow the defense is admissible;[78] but if new matter is relied on by the plaintiff to establish an affirmative defense to the answer,[79] or matter in avoidance of the defense made by the answer,[80] such matter must be specially set up in the reply or evidence in support of such matter will not be admitted.[81]

B. Replication in Equity. — If a cause in equity is heard on bill and answer, without any replication to the latter, all the matters alleged in the answer are regarded as true,[82] and no evidence is admissible to controvert such matters,[83] unless permitted by statute.[84] So a replication to a plea in equity is necessary if the

318; Clem *v.* State, 42 Ind. 430, 13 Am. Rep. 369.

78. Johnson *v.* White, 6 Hun 587; Haley *v.* Manning, 2 Tex. Civ. App. 17, 21 S. W. 711; Fagan *v.* McWhirter, 71 Tex. 567, 9 S. W. 677.

79. Rogers *v.* Mutual Reserve Fund L. Assoc., 1 How. Pr. N. S. (N. Y.) 194; McGin *v.* Sorrens, 4 N. Y. Law Bul. 29; Watson *v.* Phyfe, 20 N. Y. Wkly. Dig. 372. But see note 81, this series.

80. Rivers *v.* Foote, 11 Tex. 662.

81. *United States.* — Newman *v.* Newton, 14 Fed. 634.

Alabama. — Roland *v.* Logan, 18 Ala. 307.

California. — Frisch *v.* Caler, 21 Cal. 71.

Florida. — Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

Illinois. — Lindsay *v.* Stout, 59 Ill. 491; South Park Comrs. *v.* Gavin, 139 Ill. 280, 28 N. E. 826.

Indiana. — Huston *v.* M'Pherson, 8 Blackf. 562.

Iowa. — Ford *v.* Westcott, 3 Iowa 286.

Kentucky. — Brown *v.* Ready, 14 Ky. L. Rep. 583, 20 S. W. 1036.

Nebraska. — Williams *v.* Evans, 6 Neb. 216; Western Horse & C. Ins. Co. *v.* Timm, 23 Neb. 526, 37 N. W. 308.

New York. — Bancker *v.* Ash, 9 Johns. 250; Walrod *v.* Bennett, 6 Barb. 144; Steinway *v.* Steinway, 68 Hun 430, 22 N. Y. Supp. 945.

North Carolina. — Hardin *v.* Ray, 94 N. C. 456.

Ohio. — Knauber *v.* Wunder, 5 Ohio Dec. 516.

Oregon. — Benicia Agr. Wks. *v.* Creighton, 21 Or. 495, 28 Pac. 775.

The principle announced in the text does not, of course, apply in those states in which the statute regulating the practice provides that no reply is required, as shown in Flood *v.* Shamburgh, 3 Mart. N. S. (La.) 622; Planters' Bank *v.* Allard, 8 Mart. N. S. (La.) 136; Holliday *v.* Marionneaux, 9 Rob. (La.) 504; Riley *v.* Wilcox, 12 Rob. (La.) 648.

82. *Alabama.* — Lucas *v.* Bank of Darien, 2 Stew. 280.

Alabama. — Hannah *v.* Carrington, 18 Ark. 85.

Illinois. — Paine *v.* Frazier, 5 Ill. 55; Stone *v.* Moore, 26 Ill. 165; Farrell *v.* McKee, 36 Ill. 225.

Indiana. — Hale *v.* Plummer, 6 Ind. 121.

Iowa. — Compton *v.* Comer, 4 Iowa 577.

New York. — Dale *v.* M'Evers, 2 Cow. 118.

Pennsylvania. — Sigle *v.* Bird in Hand Tpk. Co., 3 Lanc. L. Rev. 258.

Virginia. — Pickett *v.* Chilton, 5 Munf. 467.

West Virginia. — Coal River Nav. Co. *v.* Webbs, 3 W. Va. 438.

83. Stone *v.* Moore, 26 Ill. 165; Byers *v.* Sexton, 22 Ark. 533; Mills *v.* Pittman, 1 Paige (N. Y.) 490.

84. In Virginia it is provided by statute that no decree shall be reversed for want of replication to the answer, where the defendant has taken depositions as if there had been a replication; and when it appears that there was a full and fair hearing on the merits, and that substantial justice has been done, a decree shall not be reversed for want

plaintiff would controvert the truth of its averments.[85] If he fails to reply to such plea he can introduce no evidence to disprove the facts therein alleged.[86]

C. Waiver of Replication. — There may be a waiver of a replication at law[87] or in equity,[88] and in such case the evidence will

of a replication, although the defendant may not have taken depositions; nor shall it be reversed for any informality in the proceedings, at the instance of a party who has taken depositions. Va. Code, 1904, § 3450. Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549; Jones *v.* Degge, 84 Va. 685, 5 S. E. 799; Jones *v.* Janes, 6 Leigh (Va.) 167; Simmons *v.* Simmons' Admr., 33 Gratt. (Va.) 451; Harris *v.* Harris, 31 Gratt. (Va.) 13.

In West Virginia the statute provides that no decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication; nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits and that substantial justice has been done. W. Va. Code, 1898, ch. 134, sec. 4; Chalfants *v.* Martin, 25 W. Va. 394; Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765; Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863; Moore *v.* Wheeler, 10 W. Va. 35; Richardson *v.* Donehoo, 16 W. Va. 685; Coal River, etc. Co. *v.* Webb, 3 W. Va. 438; Martin *v.* Rellehan, 3 W. Va. 480; Forqueran *v.* Donnally, 7 W. Va. 114; Cunningham *v.* Hedrick, 23 W. Va. 579; Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804; Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611; Snyder *v.* Martin, 17 W. Va. 276.

85. Gallagher *v.* Roberts, 1 Wash. C. C. 320, 9 Fed. Cas. No. 5,194; Leberman *v.* Leberman, 43 Leg. Int. (Pa.) 128; Burrell *v.* Hackley, 35 Fed. 833; Burrell *v.* Pratt, 35 Fed. 834.

86. *United States.* — United States *v.* Military Road Co., 140 U. S. 599; Burrell *v.* Hackley, 35 Fed. 833; Rhode Island *v.* Massachusetts, 14 Pet. 210; Birdseye *v.* Heilner, 26 Fed. 147; Myers *v.* Dorr, 13 Blatchf. 22; Korn *v.* Wiebusch, 33 Fed. 50.

Massachusetts. — Newton *v.* Thayer, 17 Pick. 129.

New Jersey. — Flagg *v.* Bonnel, 10 N. J. Eq. 82.

Tennessee. — Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

Virginia. — Northwestern Bank *v.* Nelson, 1 Gratt. 108.

87. *Colorado.* — Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462.

Florida. — Judge *v.* Moore, 9 Fla. 269.

Illinois. — Ross *v.* Reddick, 2 Ill. 73; Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626.

Indiana. — Ringle *v.* Bicknell, 32 Ind. 369; Sutherland *v.* Venard, 32 Ind. 483; Irvinson *v.* Van Riper, 34 Ind. 148.

Kansas. — Kepley *v.* Carter, 49 Kan. 72, 30 Pac. 182.

88. *United States.* — National Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54; Clements *v.* Moore, 6 Wall. 299; Fretz *v.* Stover, 22 Wall. 198.

Illinois. — Webb *v.* Alton M. & F. Ins. Co., 10 Ill. 223; Stark *v.* Hillibert, 19 Ill. 344; Jones *v.* Neely, 72 Ill. 449; Marple *v.* Scott, 41 Ill. 50; Corbus *v.* Teed, 69 Ill. 205; Kaegebein *v.* Higgle, 51 Ill. App. 538.

Indiana. — Demaree *v.* Driskill, 3 Blackf. 115; Bunts *v.* Cole, 7 Blackf. 265, 41 Am. Dec. 226.

Maryland. — Glenn *v.* Hebb, 12 Gill & J. 271; Hall *v.* Clagett, 48 Md. 223.

Massachusetts. — Holt *v.* Weld, 140 Mass. 578, 5 N. E. 506.

Montana. — Fabian *v.* Collins, 3 Mont. 215.

North Carolina. — Fleming *v.* Murph, 59 N. C. 59.

West Virginia. — Martin *v.* Rellehan, 3 W. Va. 480; Moore *v.* Wheeler, 10 W. Va. 35.

be received and considered as if a replication had been duly filed.[89] In many jurisdictions going to trial on the merits of the case is a waiver of the replication.[90]

11. Waiver and Cure of Inadmissibility of Evidence. — A. WAIVER. If evidence is offered upon the trial of an action which is not properly admissible under the pleadings, it should be objected to on that ground.[91] The theory of the rule is that admission of the evidence

89. At Law. — *United States.* Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478.

Alabama. — Hubbert *v.* Collier, 6 Ala. 269; Bond *v.* Hills, 3 Stew. 283.

Colorado. — Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462; Taylor *v.* McLaughlin, 2 Colo. 12.

Florida. — Judge *v.* Moore, 9 Fla. 269.

Illinois. — Ross *v.* Reddick, 2 Ill. 73; Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Robinson *v.* Brown, 82 Ill. 279; Imperial F. Ins. Co. *v.* Shimer, 96 Ill. 580.

Indiana. — Ringle *v.* Bicknell, 32 Ind. 369; Sutherland *v.* Venard, 32 Ind. 483; Irvinson *v.* Van Riper, 34 Ind. 148; Preston *v.* Sandford's Admr., 21 Ind. 156; Pattison *v.* Vaughan, 40 Ind. 253; Wilcox *v.* Majors, 88 Ind. 203; Evey *v.* Smith, 18 Ind. 461; Helton *v.* Wells, 12 Ind. App. 605, 40 N. E. 930.

Kansas. — Kepley *v.* Carter, 49 Kan. 72, 30 Pac. 182.

Kentucky. — Reading *v.* Ford, 1 Bibb 338; Porter *v.* Martin, 1 Litt. 158.

Missouri. — Gray *v.* Worst, 129 Mo. 122, 31 S. W. 585.

Montana. — Russell *v.* Hoyt, 4 Mont. 412, 2 Pac. 25.

Ohio. — Woodward *v.* Sloan, 27 Ohio St. 592.

Pennsylvania. — Thompson *v.* Cross, 16 Serg. & R. 350; Glenn *v.* Copeland, 2 Watts & S. 261; Jenkins *v.* Cutchens, 2 Miles 65; Franklin *v.* Mackey, 9 Lanc. Bar 197.

Vermont. — Wood *v.* Town of Springfield, 43 Vt. 617.

In Equity. — *United States.* — Central Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54; Fretz *v.* Stover, 89 U. S. 198; Clements *v.* Moore, 73 U. S. 299.

Illinois. — Webb *v.* Alton M. & F. Ins. Co., 10 Ill. 223; Stark *v.* Hillibert, 19 Ill. 344; Jones *v.* Neely, 72 Ill. 449; Marple *v.* Scott, 41 Ill. 50; Corbus *v.* Teed, 69 Ill. 205; Kaegebein *v.* Higgie, 51 Ill. App. 538.

Indiana. — Demaree *v.* Driskill, 3 Blackf. 115; Bunts *v.* Cole, 7 Blackf. 265, 41 Am. Dec. 226.

Maryland. — Glenn *v.* Hebb, 12 Gill & J. 271; Hall *v.* Clagett, 48 Md. 223.

Massachusetts. — Holt *v.* Weld, 140 Mass. 578, 5 N. E. 506.

Montana. — Fabian *v.* Collins, 3 Mont. 215.

West Virginia. — Moore *v.* Wheeler, 10 W. Va. 35.

90. *United States.* — Clements *v.* Moore, 6 Wall. 299; Fretz *v.* Stover, 22 Wall. 198.

Alabama. — Bond *v.* Hills, 3 Stew. 283.

Colorado. — Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462; Taylor *v.* McLaughlin, 2 Colo. 12.

Connecticut. — Lord *v.* Sill, 23 Conn. 319.

Florida. — Judge *v.* Moore, 9 Fla. 269.

Illinois. — Corbus *v.* Teed, 69 Ill. 205; Ross *v.* Reddick, 2 Ill. 73; Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626.

Indiana. — Ringle *v.* Bicknell, 32 Ind. 369; Sutherland *v.* Venard, 32 Ind. 483.

Kansas. — Kepley *v.* Carter, 49 Kan. 72, 30 Pac. 182.

West Virginia. — Martin *v.* Rellehan, 3 W. Va. 480.

"If there is no replication to an answer in chancery, everything stated in it is admitted to be true. But if the party answering proceeds to take depositions to sustain his allegations and statements, he waives this advantage." Martin *v.* Rellehan, 3 W. Va. 480.

91. *California.* — Hutchings *v.* Castle, 48 Cal. 152; Hess *v.* Bolinger,

without objection amounts to waiver of its inadmissibility.[92]

B. CURE. — a. *By Motion or by Instructions to Jury.* — If evidence has gone to the jury which is not admissible under the pleadings, it may be reached and relieved from by a motion to exclude it from the jury on that ground,[93] or by instructions from the court directing the jury not to consider such evidence.[94]

48 Cal. 349; O'Connell *v.* Main & Tenth St. Hotel Co., 90 Cal. 515, 27 Pac. 373.

Illinois. — Stark *v.* Brown, 101 Ill. 395.

Iowa. — Wilson Sew. Mach. Co. *v.* Bull, 52 Iowa. 554, 3 N. W. 564.

Louisiana. — McMicken *v.* Brown, 6 Mart. (N. S.) 85; Leggett *v.* Peet, 1 La. 288; Powell *v.* Aiken, 18 La. 321.

Massachusetts. — Lawler *v.* Earle, 87 Mass. 22.

Minnesota. — Village of Wayzata *v.* Great Northern R. Co., 50 Minn. 438, 52 N. W. 913.

Mississippi. — Dufolt *v.* Gorman, 1 Miss. 301.

Missouri. — Hatch *v.* Hansom, 46 Mo. App. 323; Hardwick *v.* Cox, 50 Mo. App. 509.

New York. — Fowler *v.* Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 479, 4 L. R. A. 145; Niebuhr *v.* Schreyer, 135 N. Y. 614, 32 N. E. 13; Miller *v.* Reynolds, 72 Hun 482, 25 N. Y. Supp. 642; Anderson *v.* Steitz, 75 Hun 347, 27 N. Y. Supp. 65; Smith *v.* O'Donnell, 15 Misc. 98, 36 N. Y. Supp. 480; Hubbard *v.* Russell, 24 Barb. 404; Domschke *v.* Metropolitan El. R. Co., 74 Hun 442, 26 N. Y. Supp. 840; Jackson *v.* Demont, 9 Johns. 55, 6 Am. Dec. 259; Williams *v.* People's F. Ins. Co., 57 N. Y. 274; Peck *v.* Goodberlett, 109 N. Y. 180, 16 N. E. 350.

South Carolina. — Hatcher *v.* Hatcher, 1 McMull. 311.

Virginia. — Wells *v.* Com., 2 Va. Cas. 333; Com. *v.* Chalmers, 2 Va. Cas. 76.

Washington. — Guley *v.* Northwestern C. & T. Co., 7 Wash. 491, 35 Pac. 372.

92. See cases cited in next preceding note.

93. Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801; Puget Sound Iron Co. *v.* Worthington, 2 Wash. Ter. 472, 7 Pac. 882.

94. *United States.* — Texas & P. R. Co. *v.* Volk, 151 U. S. 73.

Illinois. — Petefish *v.* Watkins, 124 Ill. 384, 16 N. E. 248.

Indiana. — Louisville, etc. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200.

Iowa. — Ham *v.* Wisconsin, etc. R. Co., 61 Iowa 716, 17 N. W. 157; Mitchell *v.* Joyce, 69 Iowa 121, 28 N. W. 473; Dorr *v.* Simerson, 73 Iowa 89, 34 N. W. 752; Rea *v.* Scully, 76 Iowa 343, 41 N. W. 36; Shepard *v.* Chicago, etc. R. Co., 77 Iowa 54, 41 N. W. 564.

Massachusetts. — Whitney *v.* Bayley, 4 Allen 173.

Michigan. — Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788; Dykes *v.* Wyman, 67 Mich. 236, 34 N. W. 561; Schneider *v.* Detroit, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54; Tolbert *v.* Burke, 89 Mich. 132, 50 N. W. 803.

Missouri. — Whitmore *v.* Supreme Lodge, 100 Mo. 36, 13 S. W. 495; Knox *v.* Hunt, 18 Mo. 174.

New York. — Holmes *v.* Moffat, 120 N. Y. 159, 24 N. E. 275; Ganiard *v.* Rochester, 121 N. Y. 661, 24 N. E. 1092, 2 N. Y. Supp. 470.

Wisconsin. — Beck *v.* Cole, 16 Wis. 95; Pireaux *v.* Simon, 79 Wis. 392, 48 N. W. 674.

Contra. — See the following cases:

Illinois. — Dickerson *v.* Evans, 84 Ill. 451.

Michigan. — Feiertag *v.* Feiertag, 73 Mich. 297, 41 N. W. 414; Sinker, Davis & Co. *v.* Diggins, 76 Mich. 557, 43 N. W. 674; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921; People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360.

b. *By Verdict or Judgment.* — The inadmissibility of evidence can not ordinarily be objected to after verdict[95] or judgment.[96] If the cause of action be defectively stated, and inadmissible evidence is received without objection, such evidence can not be objected to after verdict[97] or judgment.[98] But if the pleading states no cause of action, evidence to support a cause of action can not be received,[99]

Minnesota. — Juergens *v.* Thom, 39 Minn. 458, 40 N. W. 559.

New York. — Garafola *v.* Errico, 7 N. Y. 425; Newman *v.* Goddard, 3 Hun 70.

Texas. — Gulf, etc. R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269.

95. *United States.* — Hudson *v.* Kansas Pac. R. Co., 9 Fed. 879.

Georgia. — Howard *v.* Barrett, 52 Ga. 15.

Maryland. — Merrick *v.* Bank of Metropolis, 8 Gill 59.

Missouri. — Warne *v.* Anderson, 7 Mo. 46; Bassett *v.* City of St. Joseph, 53 Mo. 290, 14 Am. Rep. 446.

New Hampshire. — Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 369; Smith *v.* Eastern R. Co., 35 N. H. 356.

Pennsylvania. — Ashton *v.* Moyer, 14 Phila. 147.

96. Archer *v.* Claflin, 31 Ill. 306; Ketucemunguah *v.* McClure, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782; Perry County Comrs. *v.* Lomax, 5 Ind. App. 567, 32 N. E. 800; Lenike *v.* Daegling, 52 Wis. 498, 9 N. W. 399.

97. Howard *v.* Barrett, 52 Ga. 15; Railroad Co. *v.* Attaway, 90 Ga. 659, 16 S. E. 956; Railway *v.* Barber, 71 Ga. 648; Haiman & Brothers *v.* Moses & Berrard, 39 Ga. 708.

98. *California.* — Baxter *v.* Hart, 104 Cal. 344, 37 Pac. 941; Hutchings *v.* Castle, 48 Cal. 349; O'Connell *v.* Main & Tenth St. Hotel Co., 90 Cal. 515, 27 Pac. 373.

Iowa. — Supple *v.* Iowa State Ins. Co., 58 Iowa 29, 11 N. W. 716; Wilson Sew. Mach. Co. *v.* Bull, 52 Iowa 554, 3 N. W. 564; Delaney *v.* Reade, 4 Iowa 292.

Louisiana. — England *v.* Grippin, 15 La. Ann. 304; Powell *v.* Aiken, 18 La. 321.

Massachusetts. — Lawler *v.* Earl, 87 Mass. 22.

Minnesota. — Dufolt *v.* Gorman, 1 Minn. 234; Village of Wayzata *v.* Great Northern R. Co., 50 Minn. 438, 52 N. W. 913.

Missouri. — Hardwick *v.* Cox, 50 Mo. App. 509.

Nevada. — Lee *v.* McLeod, 12 Nev. 280.

New York. — Fowler *v.* Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 479, 4 L. R. A. 145; Tifft *v.* Moore, 59 Barb. 619.

Washington. — Guley *v.* Northwestern G. & T. Co., 7 Wash. 491, 35 Pac. C. 372.

99. *Arkansas.* — Knight *v.* Sharp, 24 Ark. 602.

California. — Barron *v.* Frink, 30 Cal. 486; Richards *v.* Travelers' Ins. Co., 80 Cal. 505, 22 Pac. 939.

Illinois. — McLean County Coal Co. *v.* Long, 91 Ill. 617, 33 Am. Rep. 64; Funk *v.* Piper, 50 Ill. App. 163.

Indiana. — Dickerson *v.* Hays, 4 Blackf. 44; Indianapolis C. R. Co. *v.* Davis, 10 Ind. 398.

Massachusetts. — Williams *v.* Hingham Bridge & Tpk. Corp., 4 Pick. 341.

Minnesota. — Lee *v.* Emery, 10 Minn. 187; Loomis *v.* Youle, 1 Minn. 175.

Mississippi. — Poindexter *v.* Turner, 1 Miss. 349.

Missouri. — Clark *v.* Whittaker Iron Co., 9 Mo. App. 446; Inhab. of Clinton *v.* Williams, 53 Mo. 141; Clark *v.* Fairley, 24 Mo. App. 429.

New Jersey. — Farwell *v.* Smith, 16 N. J. L. 133.

North Carolina. — Pearce *v.* Mason, 78 N. C. 37.

Pennsylvania. — Dewart *v.* Masser, 40 Pa. St. 302.

Texas. — McClellan *v.* State, 22 Tex. 405; Texas & P. R. Co. *v.* McCoy, 3 Tex. Civ. App. 276, 22 S. W. 926.

Vermont. — Needham *v.* McAuley, 13 Vt. 68.

Virginia. — Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646; Chichester *v.* Vass, 1 Call 83, 1 Am. Dec. 509.

and such inadmissible evidence may be objected to after judgment;[1] because there must be sufficient pleadings to support the judgment[2] or decree.[3]

1. Cathcart *v.* Peck, 11 Minn. 45; Holmes *v.* Campbell, 12 Minn. 221; Shaw *v.* Lobitz (Tex. Civ. App.), 35 S. W. 877.
2. Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332; Kiskaddon *v.* Jones, 63 Mo. 190.
3. Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580; Land *v.* Cowan, 19 Ala. 297; Chandler *v.* Herrish, 11 N. J. Eq. 497; Brown *v.* Heard, 3 A. K. Marsh. (Ky.) 390.

VENDOR AND PURCHASER.

By John Abbott Powell.

CROSS-REFERENCES:

Abandonment,
Assent,
Consideration,
Contracts,
Deeds,
Fraud,
Parol Evidence,
Payment,
Rescission,
Statute of Frauds,
Tender.

I. THE CONTRACT.

1. In General. — The contract arising between the vendor and purchaser of land varies in no material respects from other contracts and is subject to the general rules of evidence for proof of its execution and for its interpretation and enforcement.[1]

2. Elements. — A. THE RELATIONSHIP. — To establish the rela-

1. See article "CONTRACTS."

Burden of Proof. — Plaintiff must prove the contract substantially as alleged by him — and its breach, by a preponderance of the evidence. McEvoy *v.* Swayze, 34 Neb. 315, 51 N. W. 824.

Existing Custom — Part of the Contract. — Where land on the Mississippi was sold, it was held that it would be presumed that the customary depth of forty arpents was sold in the absence of evidence to the contrary. Carraby *v.* Desmarre, 7 Mart. N. S. (La.) 661.

Presumption From Execution of a Deed. — A deed absolute on its face is *prima facie* evidence of a sale of the property described, but its true character may be shown; an accompanying co-temporaneous agreement is to be considered in this connection. Gwin *v.* Waggoner, 98 Mo. 315, 11 S. W. 227. And see article "DEEDS."

Lapse of Time will supply the want of distinctness and directness of proof, and will corroborate defective evidence of the existence of the contract, but will not create such evidence. But when the alleged vendee has been a long time out of possession the presumptions are the other way. Willey *v.* Day, 51 Pa. St. 51, 88 Am. Dec. 562.

Certified Check, by which the vendor returned to the vendee purchase-money paid down, is admissible to show that the contract was never completed, although the vendee refused to accept it, claiming the land, and although it was not a legal tender. Slator *v.* Trostel (Tex. Civ. App.), 21 S. W. 285.

In Louisiana. — "It is hornbook law in our jurisprudence that the verity and reality of authentic sales can be assailed by the parties thereto only in two ways, viz.: first, by means of the counter-letter; second, by the answers of the other party to interrogatories on facts and articles." Godwin *v.* Neustadl, 42 La. Ann. 735, 7 So. 744, *cited* and *approved* in Thompson *v.* Herring, 45 La. Ann. 991, 13 So. 398.

Attempted Conveyance of Public Lands; relation of vendor and vendee is not thereby created. "But do such rules have any application to an attempted conveyance of a portion of the public domain? The vendor cannot lawfully place the vendee in possession. The possession of the vendee cannot ripen into a right, nor will it give him any advantage in dealing with the state. His wrongful possession will not even preclude an actual settler from moving onto the land under contract with the government, for it can confer upon him no right of action or defense. The making of such deeds by private parties would tend to embarrass the state in the disposition of its public lands, would encumber the homes of the purchasers with liens not only to the state for the real purchase money, but also in favor of a stranger to the title for such sum as he might charge the settler for his pretended right, thereby rendering the settler less able to perform his contract with the state, and is therefore contrary to public policy. The public lands are not a lawful subject-matter of private contract, and an attempted conveyance thereof by one private person to another passes no interest whatever in the land, and does not create the relation of vendor and vendee, and therefore cannot be held to furnish a consideration for the payment, the promise of payment, or the securing of the supposed consideration of such conveyance." Lamb *v.* James, 87 Tex. 485, 29 S. W. 647.

tionship of vendor and purchaser it must appear that the parties mutually intended to enter into this particular relationship.[2]

B. ASSENT. — a. *Burden of Proof.* — The burden is upon the party relying upon the contract to prove an actual meeting of the minds of the parties, resulting in an absolute and unconditional acceptance by one party of the terms offered by the other party, and a communication of such acceptance to the offerer.[3]

b. *Conduct of Parties.* — The acceptance of an offer for the purchase or sale of lands may be evidenced by the conduct of the parties, where no particular method of acceptance is specified in the offer.[4]

c. *Unconditional Acceptance.* — The acceptance of an offer to purchase or sell lands must, of course, be shown to have been unconditional and not to have varied the terms of the offer in any degree.[5]

2. Bemiss *v.* Hawkins, 2 La. Ann. 500.

Inducement Paid by Stranger to obtain the acceptance of an offer to buy does not constitute him a purchaser. Cox *v.* Cox, 59 Ala. 591.

Ignorance. — The relationship cannot arise where either party is ignorant of the transaction. Weare *v.* Linnell, 29 Mich. 224.

Document Executed Without an Intention to create a sale will not be effective as a sale. Ware *v.* Morris, 23 La. Ann. 665.

3. Keel *v.* Schaupp (Colo.), 93 Pac. 1094; Crane *v.* Gritton, 54 Iowa 738, 6 N. W. 79, 7 N. W. 138; Ford v. Gebhardt, 114 Mo. 298, 21 S. W. 818; Frahm *v.* Metcalf, 75 Neb. 241, 106 N. W. 227; Cammeyer *v.* United German L. Churches, 2 Sandf. Ch. (N. Y.) 186; Foster *v.* New York & T. Land Co., 2 Tex. Civ. App. 505, 22 S. W. 260; Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

4. Gough *v.* Loomis, 123 Iowa 642, 99 N. W. 295; Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247; Mix *v.* Balduc, 78 Ill. 215; Atkinson *v.* Whitney, 67 Miss. 655, 7 So. 644.

Correspondence and Long Continued Possession by vendee, and improvements made, may establish an acceptance. Garvey *v.* Parkhurst, 127 Mich. 368, 86 N. W. 802.

Improvements Made May Evidence an Acceptance. — Perkins *v.* Hadsell, 50 Ill. 216. But see Boucher *v.* Vanbuskirk, 2 A. K. Marsh. (Ky.) 345.

Payment or Tender is not essential to an acceptance of an offer to sell land, and need not be proved, unless payment is expressly made an act of acceptance. Watson *v.* Coast, 35 W. Va. 463, 14 S. E. 249. See Maynard *v.* Tabor, 53 Me. 511 (acceptance of offer to sell for cash must be accompanied by the money); Sands & M. Lumb. Co. *v.* Crosby, 74 Mich. 313, 41 N. W. 899.

5. Middaugh *v.* Stough, 161 Ill. 312, 43 N. E. 1061; Bowman *v.* Patrick, 36 Fed. 138; Ford *v.* Gebhardt, 114 Mo. 298, 21 S. W. 818.

Specifying a Place for Delivery of the deed other than that implied in the offer, makes an acceptance conditional.

United States. — National Bank *v.* Hall, 101 U. S. 43.

California. — Wristen *v.* Bowles, 82 Cal. 84, 22 Pac. 1136.

Iowa. — Gilbert *v.* Baxter, 71 Iowa 327, 32 N. W. 364; Batie *v.* Allison, 77 Iowa 313, 42 N. W. 306.

Kansas. — Greenawalt *v.* Este, 40 Kan. 418, 19 Pac. 803; Heiland *v.* Ertel, 4 Kan. App. 516, 44 Pac. 1005.

Michigan. — DeJonge *v.* Hunt, 103 Mich. 94, 61 N. W. 341; Wilkin Mfg. Co. *v.* Loud, 94 Mich. 158, 53 N. W. 1045.

Minnesota. — Langellier *v.* Schaefer, 36 Minn. 361, 31 N. W. 690.

Missouri. — Egger *v.* Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596.

North Dakota. — Harris Bros. *v.* Reynolds, 114 N. W. 369.

South Dakota. — Stearns *v.* Clapp, 16 S. D. 558, 94 N. W. 430.

d. *Time.* — The acceptance of an offer must be shown to have been made within the time specified therein;[6] or if no time is specified, within a reasonable time after the offer is made;[7] and in every case it must have been made before the withdrawal of the offer.[8]

Wisconsin. — Russell *v.* Falls Mfg. Co., 106 Wis. 329, 82 N. W. 134; Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557; Baker *v.* Holt, 56 Wis. 100, 14 N. W. 8.

Request for Assignment of Insurance Policy in an acceptance will serve to render it conditional. Beiseker *v.* Amberson (N. D.), 116 N. W. 94.

"**Let Me Know** your further wishes in the premises" following an acceptance, held to render it conditional. Somerville *v.* Coppage, 101 Md. 519, 61 Atl. 318.

"**It is an Elementary Principle** in the law of contracts that an unqualified acceptance by letter in answer to an offer submitted by letter creates a binding contract in writing. It is also equally well established that any counter proposition, or any deviation from the terms of the offer contained in the acceptance is deemed to be in effect a rejection, and not binding as an acceptance on the person making the offer, and no contract is made by such qualified acceptance alone. In other words, the minds of the parties must meet as to all the terms of the offer and of the acceptance before a valid contract is entered into. It is not enough that there is a concurrence of minds of the price of the real estate offered to be sold. If the purchaser adds anything in his acceptance not contained in the offer, then there is no contract." Beiseker *v.* Amberson (N. D.), 116 N. W. 94; Bowman *v.* Patrick, 36 Fed. 138.

"**A Conditional Acceptance** is a new offer, which in its turn requires acceptance to close the bargain." Millard *v.* Martin (R. I.), 68 Atl. 420; Baker *v.* Johnson County, 37 Iowa 186; Cartmel *v.* Newton, 79 Ind. 1; National Bank *v.* Hall, 101 U. S. 43.

Where the Offer is to sell for $850 net, there is not an unconditional acceptance if in addition to the acceptance this clause is added: "Send warranty deed for collection to First National Bank with abstract showing clear." Richards Tr. Co. *v.* Beach, 17 S. D. 432, 97 N. W. 358.

Condition Implied by Law. — Acceptance, "provided the title is good" is unconditional, since the proviso is merely one that the law would imply. Ryder *v.* Johnston (Ala.), 45 So. 181.

Mere Suggestion. — Where it appears from evidence aliunde the correspondence that the variation was submitted merely as a suggestion, the acceptance will be considered as unconditional. Kreutzer *v.* Lynch, 122 Wis. 474, 100 N. W. 887.

Ambiguity. — Acceptance of an offer to convey land must be plain and unambiguous in order to create a contract. Goodenow *v.* Barnes, 40 Iowa 561; Seymour *v.* Canfield, 122 Mich. 212, 80 N. W. 1096.

6. *Illinois.* — Harding *v.* Gibbs, 125 Ill. 85, 17 N. E. 60.

Kansas. — Blanchard *v.* Jackson, 55 Kan. 239, 37 Pac. 986.

Kentucky. — Stembridge *v.* Stembridge's Admr., 87 Ky. 91, 7 S. W. 611.

Minnesota. — Cannon River Mfg. Assn. *v.* Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497.

Nebraska. — Veith *v.* McMurtry, 26 Neb. 341, 42 N. W. 6.

New Jersey. — Potts *v.* Whitehead, 20 N. J. Eq. 55.

New York. — Britton *v.* Phillips, 24 How. Pr. 111.

Ohio. — Longworth *v.* Mitchell, 26 Ohio St. 334.

West Virginia. — Dyer *v.* Duffy, 39 W. Va. 148, 19 S. E. 540.

7. Kempner *v.* Cohn, 47 Ark. 519, 1 S. W. 869; Stone *v.* Harmon, 31 Minn. 512, 19 N. W. 88; Hamilton *v.* Patrick, 62 Hun 74, 16 N. Y. Supp. 578, *affirmed*, 149 N. Y. 580, 43 N. E. 987.

Acceptance After Many Years, Unreasonable. — Marr *v.* Shaw, 51 Fed. 860 (20 years); Cooper *v.* Carlisle, 17 N. J. Eq. 525.

8. Larmon *v.* Jordan, 56 Ill. 204; Moore *v.* Pierson, 6 Iowa 279.

C. PARTIES. — a. *In General.* — Proof as to the identity of the grantor will not always prove who was the vendor; any relevant evidence is admissible[9] to establish the parties to a sale of real property.[10]

b. *Capacity.* — The capacity of parties to enter into the contract is an issue of fact,[11] and contracts made by persons who are insane,[12] intoxicated,[13] or under duress,[14] are voidable and not void.

D. CONSIDERATION. — The rules governing the proof of a consideration are treated elsewhere in this work.[15]

Withdrawal. — Parol evidence is admissible to prove that upon the verbal acceptance of an offer it was at once verbally withdrawn. Levy *v.* Levy, 114 La. 239, 38 So. 155.

9. Distinction Between Vendor and Grantor. — The vendor is not always and necessarily the grantor; title may come from a person other than he who negotiates the sale and receives the consideration. Rutland *v.* Brister, 53 Miss. 683.

Where the defendant accepted a conveyance of land from a third person as a compliance with an agreement of the plaintiff to convey the land, proof of a prior agreement of the third person to convey the land to the plaintiff is admissible as tending to show that the conveyance to the defendant was made at the instance of the plaintiff. Hamilton *v.* Hulett, 51 Minn. 208, 53 N. W. 364.

10. Ascertainment of Vendee. Where father and son have the same name and the question is which was the vendee in a certain transaction, the fact that the father devised the property, subsequently, and the devise was paid without objection, is presumptive evidence that the father was the vendee. Lockwood *v.* Stockholm, 11 Paige (N. Y.) 87.

11. Thompson *v.* Gossitt, 23 Ark. 175; Jones' Admr. *v.* Perkins, 5 B. Mon. (Ky.) 222; Fehr *v.* Edwards, 129 Iowa 61, 105 N. W. 349.

12. "'The mere fact that one of the parties to a contract was insane, (he not having been so adjudged by judicial proceedings) does not render the contract void, but at most only voidable, and constitutes no ground for setting it aside, where the other party had no notice of the insanity, and derived no inadequate advantage from it, and where the parties cannot be placed *in statu quo.*' Schaps *v.* Lehner, 54 Minn. 208, 55 N. W. 911." Scott *v.* Hay, 90 Minn. 304, 97 N. W. 106; Logan *v.* Vanarsdall, 27 Ky. L. Rep. 822, 86 S. W. 981.

"**A Higher Degree** of intellect is necessary to sustain a contract, than a will." Turner *v.* Houpt, 53 N. J. Eq. 526, 33 Atl. 28.

Specific Performance refused where the vendor was eighty years old, infirm in mind and body, had recently done no business and the price was very inadequate. Ratterman *v.* Campbell, 26 Ky. L. Rep. 173, 80 S. W. 1155.

13. Schramm *v.* O'Connor, 98 Ill. 539; Hotchkiss *v.* Fortson, 7 Yerg. (Tenn.) 67; Morris *v.* Nixon, 7 Humph. (Tenn.) 579.

For a Vendor to be relieved from his contract on the ground of intoxication, he must be shown to have been so completely under the influence of intoxicants as not to have been able to understand the effect and consequences of the business transaction. Kuhlman *v.* Wieben, 129 Iowa 188, 105 N. W. 445; Moetzel *v.* Koch, 122 Iowa 196, 97 N. W. 1079.

Habits of Intoxication proved are insufficient to rescind a sale in the absence of proof that the vendor was drunk at the time it was executed. Girault *v.* Feucht, 120 La. 1070, 46 So. 26.

14. Duress. — A contract of sale executed under duress is merely voidable, and where the vendor accepts a lease, a ratification is shown. Harvin *v.* Blackman, 121 La. 431, 46 So. 525.

15. See articles "CONSIDERATION;" "DEEDS."

E. Legality. — The legality of a contract involving the purchase and sale of land will be presumed.[16]

3. Form. — A. In General. — A contract for the purchase and sale of lands need not be evidenced by any particular forms, except such as are required by the statute of frauds.[17]

Res Gestae. — Where the consideration for a conveyance of land is in issue and the contract is in parol and the grantor dead, the conversation of the parties relative to the consideration, while conducting the negotiations resulting in the contract, is admissible as part of the *res gestae*. Porter *v.* Waltz, 108 Ind. 40, 8 N. E. 705.

Value as Evidence of the Agreed Consideration. — On the issue as to what the price was which was orally agreed to be paid for the land, evidence as to the value of the land was held admissible, "as the inference might be drawn that the parties probably were guided, in fixing the consideration to be paid, by its value." Paddleford *v.* Cook, 74 Iowa 433, 38 N. W. 137; Johnson *v.* Harder, 45 Iowa 677.

Bond for Conveyance — Consideration Presumed. — Calmes *v.* Buck, 4 Bibb (Ky.) 453.

True Consideration of a warranty deed can be shown by extrinsic evidence. Tucker *v.* Dolan, 109 Mo. App. 442, 84 S. W. 1126.

16. Purchase by Corporation. In the absence of any evidence it will be presumed that the purchase of land by a corporation was for an authorized purpose. Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

17. Evans *v.* Prothero, 2 Mac. & G. 319, 322, 42 Eng. Reprint 123; Barry *v.* Coombe, 1 Pet. (U. S.) 640; Hurley *v.* Brown, 98 Mass. 545.

"The only formality that the law requires between the parties is, that a sale of immovable property should be made in writing; (Civ. Code, art. 2415;) but the contract is perfect when three circumstances concur, to wit, the thing sold, the price, and the consent. Civ. Code, art. 2414. So, in 3 Mart. N. S. 337, the court held, that *a receipt of a vendor, acknowledging payment by vendee* of a lot of ground, *is a good and valid sale*. In 1 La. 314, we said, that *evidence of the receipt of a sum of money for* a slave, and the promise to warrant the title, is sufficient evidence of a sale, and that *the document which contains evidence of these two facts, is a bill of sale*. In 2 La. 460, we declared, that *a written promise to sell* or convey real property is valid, notwithstanding there be no signing or written assent by the promisee. In 3 La. 397, we held, that a contract by which *one joint proprietor conveys all his interest* in common property to another, for a given sum, *is a sale*. And in the case of Long *v.* French, 13 La. 231, we recognized the doctrine that *an agreement to sell a lot of ground, in which it is designated, and the price* and terms of payment *specified, is a specimen according to* art. 2431 of the Civ. Code, *and the seller is bound to execute a title accordingly*." Barrett *v.* His Creditors, 12 Rob. (La.) 474.

Note for Purchase Money, although recorded, does not evidence a sale. Morgan *v.* Locke, 28 La. Ann. 806.

A note containing an indorsement that it was not payable until a deed to certain land was executed, is not proof of an agreement to convey the land. Enlow Cattle Co. *v.* Gannow (Neb.), 94 N. W. 978.

Following Instrument held to be more than a mere receipt and to evidence a sale: "Port Edwards, Wis., January 1878. 'Received of *Jacob Schweitzer* $25. This amount is paid to secure that portion of the S.W. ¼ of section (21) twenty-one, town (25) twenty-five, range (4) four, that lies south of the W.C.R.R., at $9 per acre, upon condition that on March 15th the one-third of the whole amount, being the first payment, shall then be made. John Edwards & Co.' On the back of this instrument is this memorandum:

B. Statute of Frauds. — a. *In General.* — **(1.) The Rule.** — The universal rule under the statute of frauds is that all contracts for the purchase or sale of lands must be evidenced by a writing.[18]

(2.) Burden of Proof. — While the burden of proving the existence of the writing is upon the party relying upon the contract,[19] there is a presumption that the contract was in writing in the absence of all other evidence upon the question.[20]

(3.) Contract Partly Executed. — If some of the stipulations in the contract are within the statute and others are not, and those which are within it have been performed, an action will tie upon the other stipulations, if they are separate.[21]

'March 15, 1878, first payment to be made, $317. March 15, 1879, second payment to be made, with interest from the first. March 15, 1880, third payment to be made, with interest from the first.'" Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922. See Eppich *v.* Clifford, 6 Colo. 493; Phillips *v.* Swank, 120 Pa. St. 76, 13 Atl. 712.

Defective Deed may be enforced as a valid contract to convey. Edson *v.* Knox, 8 Wash. 642, 36 Pac. 698; Howard *v.* Zimpelman (Tex.), 14 S. W. 59.

18. *England.* — Bartlett *v.* Pickersgill, 4 East (Eng.) 577, note.

Alabama. — Hughes *v.* Hatchett, 55 Ala. 539; Williams *v.* Gibson, 84 Ala. 228, 4 So. 350.

California. — Wristen *v.* Bowles, 82 Cal. 84, 22 Pac. 1136.

Indiana. — Thompson *v.* Elliott, 28 Ind. 55.

Louisiana. — Labauve *v.* Declouet, 19 La. 376.

Maine. — Brackett *v.* Brewer, 71 Me. 478.

Massachusetts. — Clifford *v.* Heald, 141 Mass. 322, 6 N. E. 227.

Mississippi. — Hairston *v.* Jaudon, 42 Miss. 380.

North Carolina. — Young *v.* Young, 81 N. C. 91.

Oregon. — Banks *v.* Crow, 3 Or. 477.

Vermont. — Hibbard *v.* Whitney, 13 Vt. 21.

Wisconsin. — Brandeis *v.* Neustadl, 13 Wis. 142.

19. Niles *v.* Hancock, 140 Cal. 157, 73 Pac. 840. See article "Statute of Frauds."

20. Britton *v.* Erickson, 80 Wis. 466, 50 N. W. 342; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220; Sowards *v.* Moss, 58 Neb. 119, 78 N. W. 373; Schmid *v.* Schmid, 37 Neb. 629, 56 N. W. 207.

Demurrer to the Complaint will not lie because of a failure to allege that the contract was in writing. Richerson *v.* Moody, 17 Tex. Civ. App. 67, 42 S. W. 317.

Allegation of Writing. — When Necessary. — "It is not pretended in this cross-complaint that any part of the agreement upon which it was based was in writing, but on the contrary, it is expressly stated that the part of it which is claimed to have been made after the examination of the abstract was verbal. While ordinarily it may be true that when it is alleged that two parties entered into an agreement for the sale of lands, if nothing else appears, it will be assumed that the agreement was in writing; it can hardly be so in this case, where the plaintiff in his pleading refers to another agreement made between the same parties at the same time, which was confessedly in writing, and then proceeds to set out a different agreement, which he declares was made in reference to the same property, and containing stipulations as a part thereof, which, by his answer in the same cause, he declares did rest in parol." Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217.

21. Niland *v.* Murphy, 73 Wis. 326, 41 N. W. 335; Brandeis *v.* Neustadl, 13 Wis. 142; Browne, Stat. of Frauds, § 116.

Parol Evidence is admissible to show the entire contract only where

(4.) Authority of Agent. — While under some statutes the authority of an agent to execute a contract in behalf of his principal in relation to lands must be evidenced by a writing,[22] under others this is not required.[23]

b. *Sufficiency of Memorandum.* — **(1.) Description of Subject-Matter.** — (A.) In General. — It is not essential that the land which is the subject-matter of the contract be described with exactness, and it is sufficient if the description can be applied with certainty to the land in question.[24]

the part sought to be established is not itself directly forbidden by law to be proved by parol. Westmoreland *v.* Carson, 76 Tex. 619, 13 S. W. 559.

22. Bissell *v.* Terry, 69 Ill. 184; Albertson *v.* Ashton, 102 Ill. 50; Watson *v.* Sherman, 84 Ill. 263; Meux *v.* Hogue, 91 Cal. 442, 27 Pac. 744; Baum *v.* Dubois, 43 Pa. St. 260; Wallace *v.* McCollough, 1 Rich. Eq. (S. C.) 426; Morrow *v.* Jones, 41 Neb. 867, 60 N. W. 369.

Authority of Agent Must Be in Writing. — O'Shea *v.* Rice, 49 Neb. 893, 69 N. W. 308. And a party dealing with him must take notice of that fact and is bound by any limitation in his authority. Frahm *v.* Metcalf, 75 Neb. 241, 106 N. W. 227; Morgan *v.* Bergen, 3 Neb. 209.

23. *England.* — Mortlock *v.* Buller, 10 Ves. Jr. 292, 311, 32 Eng. Reprint 857; Heard *v.* Pilley, 38 L. J. Ch. 718, L. R. 4 Ch. 548, 21 L. T. 68, 17 W. R. 750.

Alabama. — Ledbetter *v.* Walker, 31 Ala. 175.

Kansas. — Rottman *v.* Wasson, 5 Kan. 552.

Kentucky. — Irvine *v.* Thompson, 4 Bibb 295; Whitworth *v.* Pool, 29 Ky. L. Rep. 1104, 96 S. W. 880.

Maine. — Inhab. of Alna *v.* Plummer, 4 Greenl. 258.

Massachusetts. — Shaw *v.* Nudd, 8 Pick. 9.

Minnesota. — Brown *v.* Eaton, 21 Minn. 409; Dickerman *v.* Ashton, 21 Minn. 538.

Mississippi. — Curtis *v.* Blair, 26 Miss. 309.

Missouri. — Johnson *v.* McGruder, 15 Mo. 365; Smith *v.* Allen, 86 Mo. 178.

New Jersey. — Brown *v.* Honiss, 74 N. J. L. 501, 68 Atl. 150; Long *v.* Hartwell, 34 N. J. L. 116.

New York. — Moody *v.* Smith, 70 N. Y. 598; Lawrence *v.* Taylor, 5 Hill 107.

North Carolina. — Blacknall *v.* Parish, 59 N. C. (6 Jones Eq.) 70.

Tennessee. — Johnson *v.* Somers, 1 Humph. 268.

Virginia. — Yerby *v.* Grigsby, 9 Leigh 387.

Wisconsin. — Dodge *v.* Hopkins, 14 Wis. 630; Smith *v.* Armstrong, 24 Wis. 446.

24. Government Description Not Necessary. — "It is urged that the contract, if any existed, between Charles and Harry, is void, under the statute of frauds, because it does not contain a sufficient description of the property. This contention cannot prevail. A governmental description or a description by metes and bounds is not required, to the validity of a contract for the sale of lands. It is sufficient if the land be described by name so as to be identified by extrinsic evidence not contradictory of the contract. Thus, a description 'The Schoolcraft Store,' held sufficient. Francis *v.* Barry, 69 Mich. 311, 37 N. W. 353. So, land described as, 'My title and interest in the lands, etc., belonging to a certain business,' held sufficient. Eggleston *v.* Wagner, 46 Mich. 610, 10 N. W. 37. So, in this case, a letter referring to the land as 'my place,' meaning the place situated in the township of Mooreland, sufficiently describes the land. It is evident that it was the only place he owned in that township. The identification can be supplied by extrinsic evidence without conflicting with the contract." Garvey *v.* Parkhurst, 127 Mich. 368, 86 N. W. 802.

(B.) Parol Evidence. — Parol and extrinsic evidence is admissible to identify the land referred to in the description, and to explain latent ambiguities; but it is not admissible where the ambiguity is patent.[25]

Where Location Could Be Made by Surveyor. — If sufficiently described to enable a surveyor to locate it, then the instrument is good and binding; and this is a question for the jury to be determined from the evidence, unless it is manifest from the instrument that it cannot be located." White *v.* Hermann, 51 Ill. 243, 79 Am. Dec. 543.

Contract Which in Itself declares and sets forth a method of making certain and applying the description is sufficiently definite. Schuyler *v.* Wheelon (N. D.), 115 N. W. 259.

Receipt. — "I have received of T. Hendricks on his land where he now lives," etc., held a sufficient memorandum if the land be sufficiently identified by extrinsic evidence. Manufacturing Co. *v.* Hendricks, 106 N. C. 485, 11 S. E. 568.

Exact Location Unspecified. — "It has been held in Ruzicka *v.* Hotovy, 72 Neb. 589, 101 N. W. 328, that a memorandum of a contract of sale which fails to specify which quarter of a named section of land is intended, and states the number of the range without specifying whether it is east or west, it is not void under the statute of frauds for uncertainty in description, if the description is otherwise specific and the land intended to be conveyed can be identified from the description with the aid of parol testimony." Heenan v. Parmele (Neb.), 114 N. W. 639. And see Brotherton *v.* Livingston, 3 Watts & S. (Pa.) 334; Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647; Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118.

Contract To Sell "that tract of land adjoining section nine, and known as the Phil Allen place, containing eighty acres more or less," contains a sufficient description and extrinsic evidence is admissible to apply it. Raines *v.* Baird, 84 Miss. 807, 37 So. 458.

Description of Land as "the Triangle or Cut Off Pasture, now leased and occupied by F. D. Booth," held sufficient.. Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227.

An Offer to a person of $5000 for "his house and lot," accepted, is too indefinite to be specifically enforced. Ray *v.* Talbott, 23 Ky. L. Rep. 572, 64 S. W. 834.

25. Howison *v.* Bartlett, 147 Ala. 408, 40 So. 757; Hyden *v.* Perkins, 119 Ky. 188, 83 S. W. 128.

The Rule often recognized in this state is that where the description given is consistent but incomplete, and its completion does not require the contradiction or alteration of that given, or that a new description be introduced, parol evidence may be received to complete the description." Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355.

"Such Memorandum, whether it consists of a single writing or several, must express the substance of the contract and its terms with reasonable certainty. While parol evidence is admissible to apply its terms or to identify its subject-matter, it is not admissible to add to the terms of the sale, or supply the subject-matter thereof; for the memorandum must contain sufficient particulars to point out the land and the terms of its sale. It is not, however, essential that the land should be described with precision, if the writing is on its face an adequate guide to find it. George *v.* Conhaim, 38 Minn. 338, 37 N. W. 791; Nippolt *v.* Kammon, 39 Minn. 372, 40 N. W. 266; Burgon *v.* Cabanne, 42 Minn. 267, 44 N. W. 118." Swallow *v.* Strong, 83 Minn. 87, 85 N. W. 942.

"A Complete Contract, binding under the statute of frauds, may be executed by means of letters passing between the parties, but such a contract, or memorandum thereof, to be valid and convey land, must either describe the land or refer to it in such a manner that, by the aid of the contract or memorandum, one not a party to it can, by resorting to parol testimony, definitely ascertain

(2.) Specification of Price. — The consideration need not be expressed, as it may be shown by parol evidence.[26]

(3.) Signature and Description of Parties. — The memorandum must disclose the parties to the contract,[27] but it need only be signed

the land intended to be conveyed. It is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless. The terms may be abstract and of a general nature, but they must be sufficient to fix and comprehend the property which is the subject of the transaction, so that with the assistance of external evidence the description, without being contradicted or added to, can be connected with and applied to the very property intended to be conveyed and to the exclusion of all other property. Ryan *v.* U. S., 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447. Where sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given, or where there is no description, such evidence is inadmissible." Heenan *v.* Parmele (Neb.), 114 N. W. 639.

Identification by Parol Evidence Proper. — "The appeal presents the question of the sufficiency of the pleading and proof to sustain the decree; one of the principal contentions being that the contract is not sufficiently definite and certain to permit of its being enforced, because parol evidence was necessary to identify it, and even though it were informal in that respect, the correct rule is that, if the land intended can be identified from the description with the aid of parol evidence, the contract is not void for uncertainty." Hiskett *v.* Bozarth, 75 Neb. 70, 105 N. W. 990; Cammack *v.* Prather (Tex. Civ. App.), 74 S. W. 354.

Parol Evidence is inadmissible to both describe the land and then apply the description. Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89.

While Parol Evidence is admissible to supply the particular description of lands when the contract relied on describes the subject-matter of the grant with sufficient definiteness to fix its location (Ferguson *v.* Staver, 33 Pa. St. 411; Smith & Fleck's Appeal, 69 Pa. St. 474), yet "a contract for the sale of the land, in which the description lacks the certainty necessary to locate it, is void. Words intended to be descriptive, but which do not in fact describe so that the parties themselves or the courts can certainly determine from the instrument itself the tract of land to be conveyed, or its location, are not sufficient to base a decree for specific performance. Descriptive language applicable to any one of several tracts of land cannot be supplemented by parol evidence as to what tract was intended. Mellon *v.* Davidson, 123 Pa. 298, 16 Atl. 431; Soles *v.* Hickman, 20 Pa. 180; Peart *v.* Brice, 152 Pa. 277, 25 Atl. 537." Barnes *v.* Hustead (Pa.) 68 Atl. 839.

26. Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227.

The Consideration Need Not Be Expressed in the writing; it is sufficient if it can be collected from the circumstances. Tingley *v.* Cutler, 7 Conn. 291. *Compare* Monahan *v.* Colgin, 4 Watts (Pa.) 436; Stafford *v.* Lick, 10 Cal. 12.

Contract Under Seal need not specify a consideration, since one is implied. Mansfield *v.* Watson, 2 Iowa 111; Northern Kansas Town Co. *v.* Oswald, 18 Kan. 336.

27. Cavanaugh *v.* Casselman, 38 Cal. 543, 26 Pac. 515; Barton *v.* Patrick, 20 Neb. 654, 31 N. W. 370; Cusenbary *v.* Latimer, 28 Tex. Civ. App. 217, 67 S. W. 187.

"**While the Law** does not require technical exactness and precision in such cases, there are some things which it does require. One of these is, that the note or memorandum should show the parties to the contract either by naming them, or so describing them that they may be identified." Frahm *v.* Metcalf, 75 Neb. 241, 106 N. W. 227.

Place of Signing. — "Provided the name be inserted in such manner as

by the party against whom the contract is sought to be enforced.[28]

(4.) **Connected Writings.** — The memorandum may be evidenced by several writings provided that the signed paper contains a clear reference to others which are at the time in existence, but parol evidence is inadmissible to establish the connection.[29]

C. WRITTEN CONTRACTS. — Where the existence and execution of the papers in question are not denied, the question of whether they constitute a contract is for the determination of the court;[30] any relevant evidence is admissible to prove the execution of the papers.[31]

to have the effect of authenticating the instrument, the provision of the act is complied with, and it does not much signify in what part of the instrument the name is to be found." Olgilvie *v.* Foljambe, 3 Mer. 53, 36 Eng. Reprint 21.

28. Cavanaugh *v.* Casselman, 88 Cal. 543, 26 Pac. 515; Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227.

29. *Colorado.* — Beckwith *v.* Talbot, 2 Colo. 639.

Kentucky. — Ratterman *v.* Campbell, 26 Ky. L. Rep. 173, 80 S. W. 1155.

Mississippi. — Fisher *v.* Kuhn, 54 Miss. 480.

New York. — Tallman *v.* Franklin, 14 N. Y. 584.

North Carolina. — Gordon *v.* Collett, 102 N. C. 532, 9 S. E. 486.

South Carolina. — Cathcart *v.* Keirnaghan, 5 Strobh. 129.

Tennessee. — Blair *v.* Snodgrass, 1 Sneed 1.

Virginia. — Darling *v.* Cummings' Exr., 92 Va. 521, 23 S. E. 880.

Wisconsin. — Washburn *v.* Fletcher, 42 Wis. 152.

Browne "Statute of Frauds," § 346.

"**A Valid Contract**, within the statute of frauds, 'may be of one or many pieces of paper, provided the several pieces are so connected, physically or by internal reference, that there can be no uncertainty as to their meaning and effect when taken together. But this connection cannot be shown by extrinsic evidence.'" Manufacturing Co. *v.* Hendricks, 106 N. C. 485, 11 S. E. 568.

"**The Memorandum** of a contract for the sale of land, or an interest therein, to satisfy the statute of frauds, may consist wholly of letters, if they are connected by reference, expressed or implied, so as to show that they all relate to the same subject-matter. This relation cannot be shown by parol, but it must appear upon the face of the letters, from the nature of their contents, or by express reference. Sanborn *v.* Nockin, 20 Minn. 178 (Gil. 163); Tice *v.* Freeman, 30 Minn. 389, 15 N. W. 674." Swallow *v.* Strong, 83 Minn. 87, 85 N. W. 942.

30. Niles *v.* Hancock, 140 Cal. 157, 73 Pac. 840.

31. Presumption From Refusal To Produce. — Where defendant stated to plaintiffs that he would sign a certain contract on his receiving it from his agent, and has acted under it, but on the trial refuses to produce the original, the inference is warranted that he did actually sign it. Ferguson *v.* Blood, 152 Fed. 98, 82 C. C. A. 482.

Statement Under Oath by the alleged vendor, in his petition in bankruptcy, that he did not own any real estate, is evidence of the execution of a prior deed of his real estate, where he denies the execution of such deed. Dent *v.* Ferguson, 132 U. S. 50.

Possession by Assignee of the contract is strong evidence of its due execution. "Here was a contract, apparently fairly entered into, agreeing to convey the undivided half of a lot, the consideration of the sale acknowledged to have been paid in full, and an obligation to convey on demand and reasonable notice, found in the hands of an assignee. The existence of such an instrument, although not conclusive, is strong evidence that it was fairly and legally executed, and must be held binding on the person executing it, until it is shown by clear and satisfactory evi-

D. Oral Contracts. — a. *In General.* — While a parol contract for the sale or purchase of land is regarded as void at law,[32] in equity it will be protected and enforced where payment has been made and possession taken.[33]

b. *Existence.* — The making of the oral contract may be proved by evidence of the surrounding circumstances, such as possession taken and improvements made,[34] or the payment of taxes.[35] It must be established by clear proof.[36]

dence to be invalid. Loose and unsatisfactory evidence is not sufficient. If the binding force of such instruments may be destroyed by such unsatisfactory evidence, then the effect of written agreements, solemnly entered into, would, as evidence, be well-nigh destroyed. Such instruments must have controlling effect, as evidence, until convincing proof establishes their invalidity." Stampofski *v.* Hooper, 86 Ill. 321.

Parol Negotiations With an Agent inadmissible to prove the making of a written contract with the principal. Niles *v.* Hancock, 140 Cal. 157, 73 Pac. 840.

Papers Constituting the Contract. "The memorandum, the notes, mortgage and deed, executed at the same time and as parts of one transaction, and the other papers referred to therein, constituted the contract between the parties." Ditchey *v.* Lee, 167 Ind. 267, 78 N. E. 972.

32. Flinn *v.* Barber, 64 Ala. 193; Brown *v.* Pollard, 89 Va. 696, 17 S. E. 6 ("We cannot conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else").

Verbal Sale. — Person relying upon a verbal sale must show that it was made at a time when such a transfer was authorized by law. Badon *v.* Bahan, 4 La. Ann. 467.

33. Parol Contract for purchase of lands may be proven where payment is made or possession taken thereunder. Heddleston *v.* Stoner, 128 Iowa 525, 105 N. W. 56; Chamberlin *v.* Robertson, 31 Iowa 408.

Equitable Title under a parol contract can be established only by proof of possession taken and payment of the purchase money. Johnson *v.* Pontious, 118 Ind. 270, 20 N. E. 792.

Under § 2152 of Alabama Code 1896, the only parol purchase of land which is not void is one where "the purchase money, or a portion thereof, be paid and the purchaser be put into the possession of the land by the seller." Both of these acts must concur but they need not be contemporaneous. City Loan & Bkg. Co. *v.* Poole (Ala.), 43 So. 13.

34. *Indiana.* — O'Brien *v.* Knotts, 165 Ind. 308, 75 N. E. 594.

Pennsylvania. — Brownfield's Exrs. *v.* Brownfield, 151 Pa. St. 565, 25 Atl. 92.

Texas. — Ponce *v.* McWhorter, 50 Tex. 562; Garner *v.* Stubblefield, 5 Tex. 552; Dugan's Heirs *v.* Colville's Heirs, 8 Tex. 126; Willis *v.* Matthews, 46 Tex. 478; Taylor *v.* Rowland, 26 Tex. 293; Wright *v.* Isaacks (Tex. Civ. App.), 95 S. W. 55.

Deed Conclusive Evidence of the Contract. — In an executed parol contract, a warranty deed is conclusive evidence of the contract between the parties, except as to the consideration. Tucker *v.* Dolan, 109 Mo. App. 442, 84 S. W. 1126.

Irrelevant Facts. — The fact that plaintiff, after obtaining a patent, had purchased from defendant in possession, some trees and shrubs growing upon the land, is irrelevant to the issue of the existence of an alleged oral agreement by plaintiff to convey the land upon the issuance of a patent to him. Treadway *v.* Wilder, 16 Nev. 354.

35. McClure *v.* Jones, 121 Pa. St. 550, 15 Atl. 659.

Fact That Taxes were assessed against the defendant is not conclusive evidence that the alleged contract was not made, while the fact that the plaintiffs paid the taxes is a strong circumstance in his favor. Fairfield *v.* Barbour, 51 Mich. 57, 16 N. W. 230.

36. Clear Proof Necessary. — "In

E. Contracts by Correspondence. — a. *In General.* — The contract may be expressed in the letters and correspondence of the parties.[37]

b. *Assent.* — Authority to accept an offer by mailing an acceptance is implied where the offer was itself made by mail,[38] and in such case the contract is complete upon the posting of the letter of acceptance.[39]

c. *Sufficiency of Evidence.* — Where a contract by correspondence

Standard *v.* Standard, 223 Ill. 255, it was held that to justify enforcing an oral promise to convey land where the statute of frauds is pleaded, the complainant must establish by clear proof that he took possession under the terms of the promise and made lasting and valuable improvements on the lands with his own means, relying upon the promise, with the knowledge of the promisor." Watson *v.* Watson, 225 Ill. 412, 80 N. E. 332.

"There was no written memorandum to take the case out of the operation of the statute of frauds. It requires no citation of authorities to support the proposition that the proof of a parol agreement in such case should be so clear and persuasive as to leave no reasonable doubt in the mind of the chancellor as to its precise terms." McManness *v.* Paxson, 37 Fed. 296.

Loose and Conflicting Declarations of the father that he had given the property to his daughter in consideration of her life maintenance of him, insufficient to establish an executed oral contract. Truman *v.* Raybuck, 207 Pa. St. 357, 56 Atl. 944.

37. Barrett *v.* His Creditors, 12 Rob. (La.) 474; Beiseker *v.* Amberson (N. D.), 116 N. W. 94.

"**The Form of a Memorandum** in writing, necessary to take a case out of the operation of the statute of frauds, is immaterial. A letter properly signed, and containing the necessary particulars of the contract, is sufficient. But it must be such a letter as shows an existing and binding contract, as contradistinguished from a pending negotiation, a concluded agreement, and not an open treaty, in order to bind the party from whom it proceeds. So a correspondence consisting of a number of letters between the parties may be taken together, and construed and considered with reference to each other, and the substantial meaning of the whole arrived at; and if, when thus blended, as it were, into one, and the result is ascertained, it is clear that the parties understood each other, and that the terms proposed by one were acceded to by the other, it is a valid and binding contract, and may be enforced. If the substantial terms are sufficiently expressed, collateral circumstances, not contradicting but consistent with them, may be supplied, as virtually comprehended in the agreement expressed." Patton *v.* Rucker, 29 Tex. 402.

Whole Correspondence To Be Considered. — Lucas *v.* Patton (Tex. Civ. App.), 107 S. W. 1143; Hobart *v.* Frederiksen, 20 S. D. 248, 105 N. W. 168.

38. Scottish-Am. Mtg. Co. *v.* Davis, 96 Tex. 504, 74 S. W. 17.

39. Posting of Letter of Acceptance completes the contract if it is shown to be properly addressed and prepaid.

England. — Dunlop *v.* Higgins, 1 H. L. Cas. 381, 12 Jur. 295; Adams *v.* Lindsell, 1 B. & Ald. 681, 19 R. R. 415.

United States. — Patrick *v.* Bowman, 149 U. S. 411.

Iowa. — Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Kentucky. — Chiles *v.* Nelson, 7 Dana 281.

Maryland. — Wheat *v.* Cross, 31 Md. 99.

New Jersey. — Potts *v.* Whitehead, 20 N. J. Eq. 55.

New York. — Britton *v.* Phillips, 24 How. Pr. 111; Vassar *v.* Camp, 14 Barb. 341, Mactier's Admrs. *v.* Frith, 6 Wend. 103.

West Virginia. — Campbell *v.*

is relied upon, it must be made to appear by clear proof that the letters were more than mere negotiations.[40]

4. Options. — A. In General. — Whether a transaction results in a sale or in an option to buy or sell, depends upon the intention of the parties and is to be determined by construction of the agreement as expressed in the writings containing the contract.[41]

B. Acceptance. — a. *Burden of Proof.* — The party claiming under an option must prove an acceptance of the option within the time specified by its terms.[42]

b. *Conditional Acceptance.* — The acceptance of an option must be shown to be absolute and unconditional.[43]

Beard, 57 W. Va. 501, 50 S. E. 747.

40. See Sault Ste. Marie Land & I. Co. *v.* Simons, 41 Fed. 835; Wristen *v.* Bowles, 82 Cal. 84, 22 Pac. 1136; Allen *v.* Roberts, 2 Bibb (Ky.) 98; Lyman *v.* Robinson, 14 Allen (Mass.) 242.

"**A Valid Contract** undoubtedly can be made by correspondence; but, as was said in Lyman *v.* Robinson, 14 Allen (Mass.) 242, care should be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations." Scott *v.* Fowler, 227 Ill. 104, 81 N. E. 34.

Where the alleged contract is claimed to have been made by certain letters between the parties, it is a very suspicious circumstance that none of the letters were produced. Leyde *v.* Silvis, 47 Minn. 412, 50 N. W. 361.

41. "'**The True Question** in all cases is as to the intention of the parties. If from the writing it is clear and plain beyond doubt that a unilateral contract was intended to be made, then it will be so held. If, on the other hand, it is not clear and beyond doubt, that such was the intention of the parties, . . . it will be presumed that in making their contract they intended it to be mutually obligatory.'" Cross *v.* Snakenberg, 126 Iowa 636, 102 N. W. 508; McHenry *v.* Mitchell, 219 Pa. St. 297, 68 Atl. 729.

See the following cases defining and illustrating the nature of contracts of option:

Arkansas. — Bonanza Min. & S. Co. *v.* Ware, 78 Ark. 306, 95 S. W. 765; Indiana & A. Lumb. Co. *v.* Pharr, 82 Ark. 573, 102 S. W. 686.

Iowa. — Flanders *v.* Merrill, 38 Iowa 583; Dows *v.* Morse, 62 Iowa 231, 17 N. W. 495; Hopwood *v.* McCausland, 120 Iowa 218, 94 N. W. 469.

Kentucky. — Litz *v.* Goosling, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 128.

Montana. — Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695.

Pennsylvania. — McMillan *v.* Philadelphia Co., 159 Pa. St. 142, 28 Atl. 220.

West Virginia. — Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536; John *v.* Elkins, 59 S. E. 961.

42. Longworth *v.* Mitchell, 26 Ohio St. 334; Killough *v.* Lee, 2 Tex. Civ. App. 260, 21 S. W. 970; Cummings *v.* Town of Lake Realty Co., 86 Wis. 382, 57 N. W. 43; Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Option "being, however, only a continuing offer to sell, limited to a certain time, and not being a contract of sale, it is essential that it should be accepted within the time specified by the optionee or his assignee, if assignable, complying with its terms, and if not so accepted within that time, the right to do so is lost." Fulton *v.* Messenger, 61 W. Va. 477, 56 S. E. 830.

Reasonable Time. — Where no time is specified in an option contract, it must be acted upon within a reasonable time. Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536.

43. Larned *v.* Wentworth, 114 Ga. 208, 39 S. E. 855; Elmer *v.* Hart, 121 La. 537, 46 So. 619.

"**An Acceptance of an Option,** to be good, must be such as amounts to an agreement or contract between the parties. Such an acceptance can be only an unconditional one. The rule upon this subject is thus stated

C. CONSIDERATION. — A valuable consideration must be shown to have been paid for the option contract.[44]

D. EXTENSION. — An extension of an option can be proved only by showing the execution of a new contract.[45]

5. Fraud and Misrepresentation. — A. BURDEN OF PROOF. — a. *In General.* — The same rule applies to actions between vendor and purchaser in which fraud is alleged as in other actions, that fraud is never presumed but it must be alleged and proved by the party relying upon it.[46]

b. *In Particular Cases.* — In those cases where confidential relations exist between the parties, or where equity imposes the duty of exercising the utmost good faith upon a party, the burden is upon him to show that the transaction was free from fraud.[47]

c. *Reliance.* — There is a presumption that false representations were relied upon, and the burden of proof is upon the other party to show that they did not influence the action of the party alleging the fraud.[48]

in Potts *v.* Whitehead, 23 N. J. Eq. 512: 'An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this, it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand." Henry *v.* Black, 213 Pa. St. 620, 63 Atl. 250.

44. Payment. — Recital of $1 "to me paid," with the testimony of the holder of the option that it was actually paid, make a preponderance of evidence over the testimony of the other party that it was not paid. Jones *v.* Barnes, 105 App. Div. 287, 94 N. Y. Supp. 695.

Value. — In an option contract the consideration was $1; *held* to be merely nominal, inadequate, and not "valuable." Murphy, Thompson & Co. *v.* Addington, 31 Ky. L. Rep. 176, 101 S. W. 964.

45. Parol Evidence. — An option cannot be extended by parol and without consideration. Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891.

Burden of Proof. — Where an option was extended upon the condition that the contemplated purchasers should satisfy the vendors of their ability to perform within a specified time, the burden of proving such satisfaction was upon the purchaser. Direct testimony of officers of the defendant corporation that they were not satisfied is admissible, in the absence of formal action of the board of directors that they were not satisfied. Washington *v.* Rosario Co., 28 Tex. Civ. App. 430, 67 S. W. 459.

46. Scott *v.* Walton, 32 Or. 460, 52 Pac. 180; Noe *v.* Taylor, 13 La. 249; Bischof *v.* Coffelt, 6 Ind. 23; Cork *v.* Cook, 56 W. Va. 51, 48 S. E. 757; McShane *v.* Hazlehurst, 50 Md. 107; Crebs *v.* Jones, 79 Va. 381. See article "FRAUD."

Bond Given to Execute and give a good title necessarily embraces all upon the land, and when the plaintiffs attack it for fraud or mistake in not excepting timber, the burden of proof is on them. Begley *v.* Combs, 27 Ky. L. Rep. 1115, 87 S. W. 1081.

47. Lee *v.* Pearce, 68 N. C. 76.

Vendee Intoxicated. — Burden of showing good faith is upon the vendor where the purchase-price was exorbitant and the purchaser was intoxicated at the time of the transaction. Fagan *v.* Wiley, 49 Or. 480, 90 Pac. 910.

Conveyance by One in a Situation of Distress and Necessity burden on grantee to show that it was made voluntarily. Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326.

48. Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Turner *v.* Houpt, 53 N. J. Eq. 526, 33 Atl. 28.

Exception. — Personal examination

B. Admissibility and Relevancy. — a. *In General.* — Evidence to prove fraud is admitted with great liberality, and, as direct evidence is seldom attainable, all of the surrounding circumstances bearing upon the transaction may be shown.[49]

of land—vendee presumed to rely upon his own judgment and not upon the representations of vendor. "'If the party to whom the representations were made,' remarked Lord Lanfdale, in Clapham *v.* Shillito, 7 Beavan 146, 149, 'himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.'" Farrar *v.* Churchill, 135 U. S. 609.

But where the vendor acts in such a manner as to prevent the examination of the vendee to be as full and free as it otherwise would be, the presumption of reliance upon his own judgment does not obtain. Wamscott *v.* Occidental Assn., 98 Cal. 253, 33 Pac. 88; Southern Develop. Co. *v.* Silva, 125 U. S. 247; Hall *v.* Thompson, 1 Smed. & M. (Miss.) 443.

49. Nature of the Transaction. "We will next consider the character of this contract for fraud 'may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and such as no honest and fair man would accept on the other.'" King *v.* Cohorn, 6 Yerg. (Tenn.) 75, 27 Am. Dec. 455.

Mental, Physical and Pecuniary condition of the parties is to be considered. King *v.* Cohorn, 6 Yerg. (Tenn.) 75, 27 Am. Dec. 455.

Illegal Character of Enterprise Which Induced Investment. — Evidence to show that two corporations were fraudulently organized is admissible to rescind a sale where the fraud alleged consists in representations that the said corporations would build certain buildings upon the land. Troxler *v.* New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58.

Statement as to Cost. — Statement by vendor as to the price he paid for the land held a statement of fact and not a mere expression of opinion. Dorr *v.* Cory, 108 Iowa 725, 78 N. W. 682.

Value a Matter of Opinion. — In an action for rescission for false representations, the admission of evidence as to the value of the land is prejudicial error, since a representation of value as here is a mere matter of opinion. Nostrum *v.* Halliday, 39 Neb. 828, 58 N. W. 429.

Presumption of Knowledge of Boundaries by Vendor. — "It will be presumed that the owner of land knows the boundaries thereof, and, in the absence of something to put him on inquiry, a purchaser from the owner is entitled to rely upon positive statements made by the owner as of his own knowledge concerning the boundary. If, however, he does not pretend to point out the boundary, but merely gives his opinion or states the distance from a known, to an unknown, corner, the purchaser is not at liberty to rest upon such representations as matters of fact, but must ascertain for himself the true boundary line." Odell *v.* Story (Neb.), 116 N. W. 269.

Correspondence. — Vendor, alleging fraud in that his agent misrepresented to him the value of the land sold and was in collusion with the vendee, may introduce all his correspondence with the alleged agent to prove both the agency and the fraud. Roy *v.* Haviland, 12 Ind. 364.

Misreading Contract. — Contract of sale will be set aside on evidence that the vendee and his agent misread the terms of the contract as to consideration, to the vendor, who relied

b. *Inadequacy of Consideration.* — Inadequacy of consideration, while not of itself sufficient to prove the fraud, is a circumstance of considerable weight.[50]

c. *Silence.* — It is not always necessary to prove a positive and affirmative representation, for where the facts establish a duty to speak and disclose matters, fraud will be inferred from the mere silence of the party.[51]

d. *Position of the Parties.* — The position of the parties in regard

upon their reading. Heitsman *v.* Windahl, 125 Iowa 207, 100 N. W. 1118.

Purchase by Agents for Themselves. — Agents who buy subsequent to the termination of the agency need not disclose their purchase to their former principal, and failure to do so is not a badge of fraud. Walker *v.* Derby, 5 Biss. 134, 29 Fed. Cas. No. 17,068.

Knowledge of Falsity by Vendor. "No presumption of knowledge of falsity from the single fact, per se, that the representation was false." Southern Develop. Co. *v.* Silva, 125 U. S. 247, *citing* Barnett *v.* Stanton 2 Ala. 181; McDonald *v.* Trafton, 15 Me. 225.

Parol Representations cannot be shown where the vendee insisted upon and obtained a written statement as to the land. Porter *v.* McElhiney, 56 Iowa 93, 8 N. W. 802.

Representations Made to Third Person in the presence of the vendee may be shown. Alexander *v.* Beresford, 27 Miss. 747, 61 Am. Dec. 538.

Oral Testimony to prove representations made by the vendor before the written contract, admissible to prove fraud, since they were not merged in the writing. Holbrook *v.* Burt, 22 Pick. (Mass.) 546.

Declarations by Real Party in Interest May Be Shown. — Letters signed "Straus, per Sullivan" held admissible as evidence of the representations made by Straus to the plaintiff vendee, where Sullivan held title merely for the accommodation of Straus or the person whom he represented as agent. Northrup *v.* Sullivan, 47 La. Ann. 715, 17 So. 259.

Declaration of Vendee "that he intended to, or should have" a deed of the land in question does not indicate that he intended to obtain one by fraud or undue influence. Ten Eyck *v.* Whitbeck, 69 Hun 450, 23 N. Y. Supp. 463.

Incumbrance on Land. — Mere fact of the existence of a mortgage on land at the time the contract to sell was made is not evidence of fraud where the vendor was not to convey title by the terms of the contract until a date subsequent to the date when the mortgage would become due. Greenby *v.* Cheevers, 9 Johns. (N. Y.) 125.

Express Representations stated in the bill of complaint need not be proved precisely if words of equivalent import are shown. Taylor *v.* Fleet, 1 Barb. (N. Y.) 471.

Understanding of witness obtained from the language used by the defendant, as to a boundary line, was held immaterial. Odell *v.* Story (Neb.), 116 N. W. 269.

In Louisiana, between the parties, the verity of authentic sales can be attacked only by counter letter or by answers to interrogatories. Thompson *v.* Herring, 45 La. Ann. 991, 13 So. 398.

50. McElya *v.* Hill, 105 Tenn. 319, 59 S. W. 1025; Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661; Burch *v.* Smith, 15 Tex. 219, 65 Am. Dec. 154; Walker *v.* Derby, 5 Biss. 134, 29 Fed. Cas. No. 17,068.

51. Stewart *v.* Wyoming Ranche Co., 128 U. S. 383. See Attwood *v.* Small, 6 Cl. & F. 232, 7 Eng. Reprint 684, 2 Jur. 200, 8 L. J. Ch. 145; Jennings *v.* Broughton, 5 De G., M. & G. 126, 43 Eng. Reprint 818, 17 Beav. 234, 23 L. J. Ch. 999; Tuck *v.* Downing, 76 Ill. 71.

Fraudulent Concealment. — On the issue of whether the existence of a mortgage was fraudulently concealed by the vendor, the fact that he had bought the land shortly before for much less than its market value was irrelevant; though it might have been

to their acquaintance with the property may be shown,[52] and also their relations with each other.[53]

e. *Subsequent Representations.* — A statement or representation made subsequently to the completion of the contract is inadmissible, unless used merely to corroborate the testimony of a witness.[54]

f. *Similar Representations.* — Evidence of similar representations made to others is irrelevant.[55]

g. *Ignorance of Vendor.* — Mere ignorance of the vendor concerning the value or quality of the property is not conclusive evidence of fraud upon the part of the vendee.[56]

h. *Rebuttal.* — The same rule of liberality applies to evidence offered in rebuttal of the allegation of fraud.[57]

relevant had the issue been whether he knew of the mortgage or not. Everling *v.* Holcomb, 74 Iowa 722, 39 N. W. 117.

52. Where either of the parties is personally acquainted with the property and the other is not, this is a strong circumstance to be considered upon the question of whether fraud was practiced. "In Morgan *v.* Dinges, 23 Neb. 273, it is said by Judge Maxwell, in writing the opinion: 'Where parties stand on an equal footing, expressions of opinion as to the value of certain property will not usually be considered so material that misstatements will constitute fraud. But where the purchaser resides near the property in this state and has full knowledge of its situation and approximate value, and the owner resides in another state without any knowledge on that subject, expressions of opinion as to value by such purchaser which he knows to be much beneath the true value of the property, and statements made by him that the owner's title had been abrogated by reason of a sale of the property for taxes, will be sufficient, where the property was purchased for a grossly inadequate consideration, to set aside the deed.'" Cressler *v.* Rees, 27 Neb. 515, 43 N. W. 363, 20 Am. St. Rep. 691.

53. King *v.* Cohorn, 6 Yerg. (Tenn.) 75, 27 Am. Dec. 455.

54. The Acts and Declarations, occurring after the sale, are not evidence of fraud in obtaining it. Childress *v.* Holland, 3 Hayw. (Tenn.) 274.

Representation by Agent of vendor after the sale is consummated is properly excluded, as it could not have operated as an inducement. Everling *v.* Holcomb, 74 Iowa 722, 39 N. W. 117.

Statements Made by the Vendor subsequent to the sale, as to the quantity of the land, are admissible to corroborate the vendee's statement as to her representations made before the sale. Lewis *v.* Hoeldtke (Tex. Civ. App.), 76 S. W. 309.

55. Bischof *v.* Coffelt, 6 Ind. 23.

Circulation of Report by the vendee as to the worthlessness of land he was trying to buy is inadmissible where it is not shown that the vendor heard it. Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661.

56. Harris *v.* Tyson, 24 Pa. St. 347, 61 Am. Dec. 661 (knowledge by vendee of the existence of a mine of which the vendor was ignorant).

57. Evidence that the certificate of sale of school lands made by the auditor, embracing the lands in question, had been lost, and the proceedings taken by the grantor of the vendor to obtain a new one, was held admissible to rebut the allegation of fraudulent misrepresentation of title. Hinkle *v.* Margerum, 50 Ind. 240.

Defendant having affirmed that the tract of land in question contained 100 acres when it actually contained only 84, a written memorandum purporting to have been made by the direction of the defendant's vendor and given to him at the time of the transaction, the deed to such property not having been executed at the time of the resale of the property to the plaintiff, was admissible to rebut

C. Reliance. — a. *Direct Testimony.* — A party may testify directly to the fact of his reliance upon the alleged misrepresentation.[58]

b. *Circumstantial Evidence.* — Upon the issue of whether a representation was or was not relied upon, the conduct of the parties and the surrounding circumstances may be shown.[59]

c. *Admissions.* — The admissions of a party may be shown upon the issue of reliance upon fraudulent representations.[60]

D. Weight and Sufficiency. — The evidence of fraud must be clear and satisfactory.[61]

the allegation of fraud. Messinger *v.* Hagenbuch, 2 Whart. (Pa.) 410.

58. Slingluff *v.* Dugan, 98 Md. 518, 56 Atl. 837.

"**It Is Now Insisted** that the court erred in permitting defendant in error to testify that the representations made by Cressler induced him to make the trade; that this was testifying to a conclusion which it was the province of the jury to determine, the witness stating the facts. We cannot agree to this conclusion; it was entirely competent for the witness to state whether he believed the representations, alleged to have been made, and whether or not they were the moving cause of the transfer." Cressler *v.* Rees, 27 Neb. 515, 43 N. W. 363, 20 Am. St. Rep. 691.

59. High *v.* Kistner, 44 Iowa 79. Where plaintiff claims she relied upon oral representations which were false, in addition to a written statement, the fact that she required and accepted the written statement warrants the inference that she did not rely upon the oral statements. Porter *v.* McElhiney, 56 Iowa 93, 8 N. W. 802.

The Habitual Custom of plaintiff as to his trading and dealing in lands in the state is immaterial where it is conceded that he knew nothing of the particular land in controversy. Cressler *v.* Rees, 27 Neb. 515, 43 N. W. 363, 20 Am. St. Rep. 691.

60. Subsequent Admission of defrauded vendee that he had knowledge of the character of the land is admissible without reference to the time when made. High *v.* Kistner, 44 Iowa 79.

61. Rupart *v.* Dunn, 1 Rich. L. (S. C.) 101; Marksbury *v.* Taylor, 10 Bush (Ky.) 519; Straight *v.* Wilson, 176 Pa. St. 520, 35 Atl. 230; Lee *v.* Pearce, 68 N. C. 76. And see "Fraud," Vol. VI, p. 50 *et seq.*

Rule Stated. — "In civil cases the jury determine facts according to the weight of evidence, and not by its sufficiency to produce conviction of the absolute certainty of the conclusion arrived at. In most cases of conflicting evidence such a degree or amount of proof would not be attainable, and to require it would be tantamount to a denial of justice. If the evidence is sufficient to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest, 1 Stark. Evid. 514, it is all that the law requires, though such conviction may come short of absolute certainty. There is nothing peculiar in the determination of a question of fraud that makes it an exception to the general rule. Where there is evidence of fraud, its existence must be determined like any other fact. But in this case the jury were told in effect that, in determining the question, they must not be governed by the weight of evidence; that the evidence tending to show the alleged fraud must lead to a satisfactory and certain conclusion, otherwise, such is the plain implication, the evidence must be disregarded. What else could the jury have understood from this instruction, than that the evidence of the fraud must be so clear and convincing as to leave no doubt resting on their minds? If this were the rule, it would be difficult to establish fraud in any case. But the law does not require so high a degree of proof. If the evidence satisfies an unprejudiced

E. Question of Fact. —Whether the alleged fraud exists is a question of fact for the determination of the jury.[62]

6. Construction. — A. In General. — The written contract is to be construed by the court,[63] and parol evidence is inadmissible to add to, vary or contradict the meaning of the writings as it appears upon their face.[64]

B. Ambiguous Contract. — a. *In General.* — A contract which contains a latent ambiguity may be aided and explained by extrinsic evidence in order to render it intelligible, or to apply the written description to the proper land.[65]

mind, beyond reasonable doubt, it is sufficient." Young *v.* Edwards, 72 Pa. St. 257.

Parol Evidence of Fraud in Sale of Land. — Unsupported testimony of one witness is competent, but should be received with caution and should be supported by other evidence. Rich *v.* Ferguson, 45 Tex. 396.

Evidence of Equal Weight. "Fraud cannot be presumed, but must be established by a preponderance of the evidence; and where two witnesses affirm and two others, no more interested in the subject-matter, and for all that appears, fully as creditable, deny the fraud, it is not proved." Allison *v.* Ward, 63 Mich. 128, 29 N. W. 528.

62. Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621; Burr *v.* Todd, 41 Pa. St. 206; Griffith *v.* Eby, 12 Mo. 517; M'Kerall *v.* Cheek, 9 N. C. 343; Lancaster *v.* Richardson, 13 Tex. Civ. App. 682, 35 S. W. 749.

63. Construction by Jury Not Error, where the jury has placed the correct construction upon it. Cosper *v.* Nesbit, 45 Kan. 457, 25 Pac. 866.

"It is claimed that the court erred in submitting to the jury the question of what the parties understood and meant by the expression. In general, it is the province of the court to construe written contracts, but where peculiar expressions are used, it may be left to the jury to determine by the aid of extrinsic circumstances and facts what sense was intended by the parties. Where the language of a contract contains an expression which is ambiguous, or one used in a peculiar sense, evidence may be properly received to show what the parties understood and intended by it. The practical interpretation of such an expression by the parties is entitled to great, if not controlling, influence." Cosper *v.* Nesbit, 45 Kan. 457, 25 Pac. 866.

64. *Georgia.* — Burton *v.* O'Neill Mfg. Co., 126 Ga. 805, 55 S. E. 933.

Michigan. — Dikeman *v.* Arnold, 71 Mich. 656, 40 N. W. 42.

Nebraska. — Waters *v.* Phelps, 116 N. W. 783.

New York. — Schoen *v.* Wagner, 1 App. Div. 298, 37 N. Y. Supp. 367.

Pennsylvania. — Seitzinger *v.* Ridgway, 4 Watts. & S. 472.

South Dakota. — Chambers *v.* Roseland, 112 N. W. 148.

Wisconsin. — Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922; Gilbert *v.* Stockman, 76 Wis. 62, 44 N. W. 845, 20 Am. St. Rep. 23. See article "Parol Evidence."

Previous Negotiations inadmissible to control a writing, under the argument that to fail to give effect to them would work a fraud on the vendee. Faucett *v.* Currier, 115 Mass. 20.

In the Absence of an allegation of fraud or mistake, a deed is presumed to contain the final contract of the parties and to measure defendant's liabilities. Corrough *v.* Hamill, 110 Mo. App. 53, 84 S. W. 96.

Reservation of Right of Possession cannot be shown by parol (Jones *v.* Timmons 21 Ohio St. 596), nor of a right to timber. Schweitzer *v.* Connor, 57 Wis. 177, 14 N. W. 922.

Strangers to the Contract. — Parol evidence is admissible to explain or vary a contract where the issue is raised against a stranger. *In re* Shields Bros., 134 Iowa 559, 111 N. W. 963, 10 L. R. A. (N. S.) 1061; Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551.

65. Tingue *v.* Patch, 93 Minn.

b. *Practical Construction.* — The practical construction placed by

437, 101 N. W. 792; McClure *v.* Jones, 121 Pa. St. 550, 15 Atl. 659.

Rule Stated. — "It is quite obvious that the issue thus made between the parties cannot be determined by reference solely to the terms of the written contract. These are sufficiently intelligible, and by themselves present no patent ambiguity. If any doubt exists in respect to them, it arises from extrinsic facts, and creates a case of latent ambiguity which renders parol evidence admissible to aid in its construction. The rule of law applicable to cases of this kind is very familiar. Whenever, in a contract or conveyance, an estate is specifically and fully described by monuments, bounds and admeasurements, no evidence dehors the writing can be admitted to show the intention of the parties in making the contract or conveyance, or to prove what estate is comprehended by the written description. But where general terms only are used to designate the subject-matter of the agreement or conveyance, or the description is of a nature to call for evidence to ascertain the relative situation, nature and qualities of the estate, then parol evidence is not only admissible, but is absolutely essential to ascertain the true meaning of the instrument, and to determine its proper application with reference to extrinsic circumstances and objects. In such cases parol evidence is not used to vary, contradict or control the written contract of the parties, but to apply it to the subject-matter, and thereby to render certain what would otherwise be doubtful and indefinite. For this reason, any evidence which tends to indicate the nature of the subject-matter included in a written contract, which would otherwise be uncertain or ambiguous, and to determine its application relatively to other objects, is admissible, as affording just means of interpretation of the intention of the parties. In the application of this general rule, it has therefore been held competent for parties to a written contract to show in aid of its interpretation the position of land and its condition, the mode of its use and occupation, that it had acquired a local designation or name by which it was known and distinguished, and also to show whether it was parcel of a particular estate. 1 Greenl. Ev. §§ 286, 288. Smith *v.* Jersey, 2 Brod. & Bing. 553; Paddock *v.* Fradley, 1 Cr. & J. 90; Murly *v.* M'Dermott, 8 Ad. & El. 138; Waterman *v.* Johnson, 13 Pick. 261; Brown *v.* Thorndike, 15 Pick. 400; Sargent *v.* Adams, ante, 79. By the terms of the contract in question, it is clear that the land included in the written contract can be ascertained only by resort to extrinsic facts. 'The wharf and flats occupied by Towne & Hardin, and owned by Francis Head,' is a general description referring to extrinsic objects and circumstances, which renders it necessary to resort to parol evidence to prove the existence of the facts by which alone this description can be applied to its subject-matter." Gerrish *v.* Towne, 3 Gray (Mass.) 82.

"**It Is an Elementary Proposition** that parol evidence is not admissible to impeach or vary the terms of a written contract, or to control its legal effect; but such evidences is competent to explain the circumstances under which the writing was executed, to show the real consideration upon which it rests, to identify the subject-matter where proper reference is made, and to give effect to the contract." Ditchey *v.* Lee, 167 Ind. 267, 78 N. E. 972.

Parol Evidence Admissible To Apply the Description. — Ogilvie *v.* Foljambe, 3 Mer. 53, 36 Eng. Reprint 21 (Mr. Ogilvie's house); Atwater *v.* Schenck, 9 Wis. 160.

"Where the description contained in a written contract or other instrument, of the person, thing, or place intended, is applicable with equal certainty to each of several subjects, this would constitute a *latent ambiguity*, and extrinsic evidence is admissible to show which of those several subjects was meant by the party or parties to the instrument of writing. Miller *v.* Travers, 8 Bing. 244; Gord *v.* Needs, 2 Mees. & Wels. 129. Latent ambiguities are first created by extrinsic evidence, which afterwards

the parties themselves upon the contract is entitled to great weight.[66]

c. *Words and Phrases.* — Words and phrases are to be given their common meaning unless it appears that the parties mutually understood and used them in a different sense.[67]

d. *Intention.* — As the intention of the parties is the controlling question in construing a contract, any evidence bearing upon their intention is admissible.[68]

renders extrinsic evidence necessary to explain or reconcile them. For example, if A make a devise of a particular house to his cousin B, there would be no difficulty, upon its face, in construing such a will. But if it be shown *aliunde*, that A has two cousins named B, extrinsic evidence must be given to show which of the two was intended." Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92.

Situation of the Parties and the surrounding circumstances may be shown. Aldrich *v.* Aldrich, 135 Mass. 153.

Defective Description in title bond cannot be aided by the obligor's receipt for the purchase-money where parol evidence is necessary to connect the two instruments; nor can it be remedied by a subsequent survey. Falls of Neuse Mfg. Co. *v.* Hendricks, 106 N. C. 485, 11 S. E. 568.

Patent Ambiguities Cannot Be Explained. — Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92.

66. Lawson *v.* Floyd, 124 U. S. 108; Milliken *v.* Minnis, 12 La. 539; Murray *v.* Nickerson, 90 Minn. 197, 95 N. W. 898.

"**Practical Construction of Contracts** is that given to agreements by the parties themselves by acts subsequently done with reference to the contracts. To such exposition of contracts the courts pay high regard and will effectuate it if they can do so consistently with the rules of law." Clark *v.* Sayers, 55 W. Va. 512, 47 S. E. 312.

67. "**With Regard to the Meaning** of the words used in contracts, the common or popular standard controls prima. 4 Wigmore on Evidence, p. 3474. For the purpose of this discussion, the only other standard necessary to be noted is the mutual standard. By the term 'mutual standard' is meant the meaning in which the ambiguous word or phrase was used and accepted by both parties to the contract in undertaking to express in writing the terms of the agreement actually made. Wigmore, supra. The rule with reference to mutual standards is in many jurisdictions, and especially in this state, subject to the modification that a clear and unambiguous meaning will not be overthrown by resort to parol to determine what the parties actually intended. Wigmore, p. 3475. It would seem that in such case the remedy of the parties is by suit to correct the deed, on the ground that, by mistake, it failed to express the contract made." West *v.* Hermann (Tex. Civ. App.), 104 S. W. 428.

But as Against a Bona Fide Purchaser without notice, the language must be given its commonly accepted meaning. West *v.* Hermann (Tex. Civ. App.), 104 S. W. 428.

68. Bergeron *v.* Daspit, 119 La. 9, 43 So. 894; Latta *v.* Schuler (Tex. Civ. App.), 100 S. W. 166.

"**Proof Is Admissible of Every Material Fact** that will help to identify the person or thing intended, and which will enable the court to put themselves as near as may be in the situation of the parties to the deed; and then when the court, by the aid of all these facts, can ascertain the intention of the parties, and especially of the grantor, they will construe the deed so as to give effect to that intention when they can find enough in the description, after rejecting all the particulars in which it is false or mistaken, to identify the land." Swain *v.* Saltmarsh, 54 N. H. 9.

Letters Containing Negotiations of the parties prior to the contract may be admitted in evidence to ascertain the intention of the parties when there is a doubt concerning it.

C. Collateral Agreements. — a. *In General.* — While all prior negotiations are assumed to have been merged in the final contract, which is presumed to be complete,[69] yet agreements entirely collateral to the contract may be established by extrinsic evidence.[70]

b. *Exception.* — An apparent exception to the general rule prohibiting the proof of cotemporaneous agreements exists in a few states in the case of a deed, upon the theory that the purpose of a deed is merely to convey title and not to express the entire agreement of the parties.[71]

Latta *v.* Schuler (Tex. Civ. App.), 100 S. W. 166.

Plans Referred to in a Contract of Sale, as filed in the building department, are to be examined and considered in construing the contract. Schoen *v.* Wagner, 1 App. Div. 298, 37 N. Y. Supp. 367.

Circumstances Surrounding the Transaction Admissible, including the previous history of the land. Aldrich *v.* Aldrich, 135 Mass. 153.

Presumption of Location From Place of Dating. — Where the contract is dated at a certain place, there is an inference of fact that the land is situated at such place, and this may sufficiently identify the land. Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699; Mead *v.* Parker, 115 Mass. 413; Riley *v.* Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099.

Presumption From Residence of Parties. — Where the county and state in which land lies is not specified, it will be presumed from the fact that all the parties are residents of the state, that the land is situated in the state. Atwater *v.* Schenck, 9 Wis. 160.

69. John O'Brien Lumb. Co. *v.* Wilkinson, 117 Wis. 468, 94 N. W. 337; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232; Newell *v.* Lamping, 45 Wash. 304, 88 Pac. 195.

"The land contracts involved are bilateral, and, upon their face, purport to set out the mutual undertakings of the two parties. There is, therefore, a presumption that they do so, and that, if the minds of the parties had in fact met upon any other elements, conditions, or propositions, all such had been abandoned, except as to those things which were expressly defined in the writing which, by their signatures, they had declared to be a correct and complete expression of their final contract." Foster *v.* Lowe, 131 Wis. 54, 110 N. W. 829.

Reservation of a Term cannot be shown by parol, since all parol negotiations are merged. Jones *v.* Timmons, 21 Ohio St. 596.

70. Stewart *v.* Trimble, 15 Pa. Super. 513; Lehman *v.* Paxton, 7 Pa. Super. 259; Blatz *v.* Denniston, 7 Pa. Super. 310.

"An Oral Agreement made before or at the time of the sale of real estate, or afterwards, in respect to indemnity for failure of title is not merged in a deed subsequently accepted." Close *v.* Zell, 141 Pa. St. 390, 21 Atl. 770.

71. "It Does Not Belong to the purpose of a conveyance to warrant the quantity of land, and, therefore, it is held that it does not exclude parol evidence of such a warranty and of a deficiency." Miller *v.* Fichthorn, 31 Pa. St. 252, 611.

Warranty of Quality May Be Shown by Parol. — "As a general rule, when the contract of the parties is reduced to writing and is apparently complete, the written instrument is supposed to contain the whole contract, and it cannot be varied by parol. This perhaps is the universal rule in respect to contracts relating to personal property. But contracts in respect to the sale and conveyance of land form an exception to this general and salutary rule. It might be more proper to say that such contracts do not come within the general rule. Preceding the conveyance, there is, of course, always an agreement of sale. The deed may contain a very small part of such contract. The deed is made only in execution of the contract. It does not attempt to state the entire agreement in respect to the subject-

D. Sale by the Acre or in Gross. — a. *In General.* — (1.) **Presumptions.** — In Virginia at least, a contract for the sale of land in gross is regarded as a contract of hazard, and there is a presumption that the sale is by the acre, requiring clear and strong proof to overthrow it.[72] Generally, however, this prejudice against sales

matter, but is merely adapted to transfer the title in part execution of the contract, and is manifestly incomplete. Deeds are supposed to contain only the ordinary covenants of title, and seldom, if ever, contain a covenant of warranty in respect to the *quality* of the land. This deed is in the ordinary form, and contains only the ordinary covenants. Therefore an agreement or covenant of warranty as to the *quality* of the land, and as to many other things which were a part of the prior or contemporaneous agreement of sale, may be shown by parol. Such evidence does not affect the deed or change it in any respect." Green *v.* Batson, 71 Wis. 54, 36 N. W. 849, 5 Am. St. Rep. 194.

In Buzzell *v.* Willard, 44 Vt. 44, plaintiff was allowed to prove by parol that at the time the property was purchased the vendor agreed to replace a millwheel if it proved unsatisfactory.

In Hahn *v.* Doolittle, 18 Wis. 196, parol evidence was admitted to prove that the vendor warranted the security, although the note and mortgage were conveyed by a written assignment silent on this point.

"**Whilst the Grantee** in a deed will not be permitted by parol to contradict, vary or enlarge the operative words of a conveyance so as to defeat, change or modify the estate granted, he may, nevertheless, disprove collateral facts recited in the instrument, which are not essential to validity as a conveyance of the estate granted. He may do so for the reason that the existence or non-existence of these facts does not impair the legal effect of the instrument. The title passes, whether the collateral fact exists or not." Ingersoll *v.* Truebody, 40 Cal. 603. And see Ludeke *v.* Sutherland, 87 Ill. 481; Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497; Carr *v.* Dooley, 119 Mass. 294.

Parol Contemporaneous Agreement that the vendor should pay all taxes assessed prior to a certain date was held inadmissible where there is an express provision that the vendee shall pay all subsequent taxes, since there is a presumption that the stipulation as to taxes covered all the agreement upon that subject. Gilbert *v.* Stockman, 76 Wis. 62, 44 N. W. 845, 20 Am. St. Rep. 23.

72. Hull *v.* Watts, 95 Va. 10, 27 S. E. 829; Boschen's Exx. *v.* Jurgen's Exr., 92 Va. 756, 24 S. E. 390. See Cunningham *v.* Millner, 82 Va. 526; Trinkle *v.* Jackson, 86 Va. 238, 9 S. E. 986, 4 L. R. A. 525; Watson *v.* Hoy, 28 Gratt. (Va.) 698; Jollife *v.* Hite, 1 Call (Va.) 301; Hundley *v.* Lyons, 5 Munf. (Va.) 342; Nelson *v.* Carrington, 4 Munf (Va.) 332; Russell *v.* Keeran, 8 Leigh (Va.) 9; Triplett *v.* Allen, 26 Gratt. (Va.) 721; Farrier *v.* Reynolds, 88 Va. 141, 13 S. E. 393; Emerson *v.* Stratton, 107 Va. 303, 58 S. E. 577.

Rules Stated. — "*First.* Every sale of real estate where the quantity is referred to in the contract, and where the language of the contract does not *plainly* indicate that the sale was intended to be a sale *in gross*, must be presumed to be a sale *per acre*. *Second.* The language 'more or less,' used in contracts for sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used it rather repels the idea of a contract of hazard, and implies that there is no considerable difference in quantity. *Third.* While contracts of hazard are not *invalid*, courts of equity do not regard them with favor. The presumption is against them, and while such presumption may be repelled, it can only be effectually done by clear and cogent proof. *Fourth.* The burden of proof is always upon the party asserting a contract of hazard; for

in gross does not exist and there is no presumption against them.[73]

(2.) Price in Equimultiple of the Number of Acres. — The fact that the price specified was an equimultiple of the number of acres sold has been held to render a sale which is *prima facie* a sale in gross ambiguous and subject to explanation, and it is itself an important item of evidence.[74]

the presumption always being in favor of a sale per acre, a sale in gross, or contract of hazard, must be *clearly established by the facts. Fifth.* Where the parties contract for the payment *of a gross sum* for a tract or parcel of land upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard. *Sixth.* Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it. But in interpreting such contracts the court, not favoring contracts of hazard, will always construe the same to be contracts of sale *per acre,* wherever *it does not clearly appear* that the land was sold by *the tract,* and not *by the acre."* Benson *v.* Humphreys, 75 Va. 196.

Not Conclusive. — "This presumption, however, may be met and overcome by proof that the parties agreed to be governed at all events by the estimated quantity. Such proof does not contradict or vary the deed in any particular. It merely establishes an understanding collateral to the written contract, and makes it clear that no such mistake was made as furnishes ground for relief in equity." Emerson *v.* Stratton, 107 Va. 303, 58 S. E. 577.

Clear and Cogent Proof Necessary to show that a sale of land was a sale in gross. Berry's Exx. *v.* Fishburne, 104 Va. 459, 51 S. E. 827.

"Contracts of hazard, such as those we are now considering, never have been discountenanced by our law. Where they are clearly established, they are valid, and will be respected and enforced, if fair and reasonable. But, though such a contract of hazard is valid, it is not readily to be presumed that the parties designed to enter into such a contract, unless it is clearly sustained by the facts. The courts will not favor such a construction; but they will rather take it, that a contract is by the acre, whenever it does not clearly appear that the land was sold *by the tract,* and not by the acre; Hundley *v.* Lyons, 5 Munf. 342. Nor will they presume, that an executor, who ought not to sell in gross, has done so, unless the fact be clearly established; Jolliffe *v.* Hite, 1 Call. 301. Nor do I think it should be readily presumed, that a vendee, who is ignorant of the lines and of the quantity of land, would enter into such a contract of hazard with the vendor, who may fairly be supposed to know everything about it; since, in such a contract, the hazard is only on one side." Keyton's Adm. *v.* Brawford's Exrs., 5 Leigh (Va.) 39.

73. See Faure *v.* Martin, 13 Barb. (N. Y.) 394, *affirmed,* 7 N. Y. 210, 57 Am. Dec. 515; Brumbaugh *v.* Chapman, 45 Ohio St. 368, 13 N. E. 584; Miller *v.* Bentley, 5 Sneed (Tenn.) 671.

Presumption From Acquiescence. Where the sale was of "about 1000 acres," acquiescence for twenty years is sufficient to raise a presumption that the purchaser understood that the sale was in gross. Lawson *v.* Floyd, 124 U. S. 108.

74. Newman *v.* Kay, 57 W. Va. 98, 49 S. E. 926. But see Rathke *v.* Tyler (Iowa), 111 N. W. 435.

Rule Stated. — "1. Where a vendor by his deed, for an entire sum, conveys a tract of land by metes and bounds, stating therein the quantity at a definite number of acres, this on its face is a sale not by the acre, but in gross and *prima facie* without any implied warranty of the quantity. Anderson *v.* Snyder, 21 W. Va. 632. 2. But, as the specifica-

(3.) "More or Less." — Generally the words "more or less" are given but slight weight when the land is described by definite bounds, although a certain number of acres is specified.[75]

(4.) Admissibility. — Parol evidence of the surrounding circumstances is admissible to aid in the construction of the contract.[76]

tion of an exact quantity without any qualifying words, renders the deed ambiguous as to whether it was or was not intended by the parties that the vendor, by such positive affirmation, undertook to warrant that there was that quantity, the court, to aid in interpreting the deed, may consider parol evidence of the circumstances surrounding the parties and their situation at the time of the sale, and also their subsequent conduct in carrying it into execution. And if, in addition to the specification of the exact quantity, it appears on the face of the deed, or by the contract of sale, that the consideration for the land is a multiple of the number of acres specified, this, while it is *prima facie* a sale in gross, renders the deed or contract ambiguous as to whether it was in fact intended by the parties as a sale in gross or by the acre, and in such case, also, parol evidence of the character just described may be received to aid the court in determining whether in fact it was intended as a sale in gross or by the acre; but in neither case can the court consider any other kind of parol evidence, such as the verbal declarations of the parties before, at the time or after the execution of the deed. Depue *v.* Sargent, 21 W. Va. 326." Hansford *v.* Coal Co., 22 W. Va. 70.

Evidence Admissible. — "Whether the sale was by the acre or in gross is a question of construction of the deed. In construing it parol evidence is admissible only when the deed is ambiguous, and then only certain kinds of parol evidence can be considered. Cristy *v.* Cain, 19 W. Va. 438, followed by a large number of later cases which need not be cited, established the rule that a deed, specifying positively a certain number of acres as the quantity of the land conveyed, is ambiguous on its face as to whether the sale is by the acre or in gross, if the amount of purchase money recited in it is an exact multiple of the number of acres specified, but is nevertheless *prima facie* a sale in gross. Wherefore the burden of proof rests upon the party alleging it to be a sale by the acre. The only evidence admissible upon such an issue is that of the circumstances which surrounded the parties and their situation when the deed was made, and their conduct in carrying the contract into execution." Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506.

Converse of the Rule Is Also True. "The price by the acre is not stated in the deed, but the round sum of $5,400 is given as the consideration for the land conveyed. When the purchase money for land is not an equimultiple of the number of acres, it is at least persuasive evidence that the contract was not by the acre." Emerson *v.* Stratton, 107 Va. 303, 58 S. E. 577. Jones *v.* Tatum, 19 Gratt. (Va.) 720.

75. "In a Conveyance of Land by Deed, in which the land is certainly bounded, it is immaterial whether any or what quantity is expressed, for the description by boundaries seems to be considered conclusive, and when the quantity is mentioned in addition to the description of the boundaries without any covenant that the land contains that quantity the whole must be considered as mere description." Brassell *v.* Fisk (Ala.), 45 So. 70. See Pearson *v.* Heard, 135 Ala. 348, 33 So. 673.

76. Hodges *v.* Denny, 86 Ala. 226, 5 So. 492; Caldwell *v.* Craig, 21 Gratt. (Va.) 132; Russell *v.* Keeran, 8 Leigh (Va.) 9; Jollife *v.* Hite, 1 Call (Va.) 301; Fleet *v.* Hawkins, 6 Munf. (Va.) 188.

Sale by Metes and Bounds concluding with recital that the land contains a certain number of acres. "more or less," is *prima facie* a sale in gross; but where fraud is alleged, parol evidence of contempo-

b. *Warranty of Quantity.* — **(1.) In General.** — A statement of quantity, following a general description by bounds, is regarded as a part of the description and not of the essence of the contract.[77]

(2.) Sale in Gross. — A warranty of quantity is never presumed in the case of a sale in gross and consequently to recover for any deficiency it must appear that the deficiency was of such an extent as to work a fraud upon the purchaser, and any material evidence is admissible upon this issue.[78]

raneous agreement is admissible to prove that the sale was by the acre. Franco-Texan Land Co. *v.* Simpson, 1 Tex. Civ. App. 600, 20 S. W. 953.

Deeds of Prior Sales containing a description of the land are admissible. Gay *v.* Larimore, 26 La. Ann. 253.

Offer by Vendor to a Stranger. On the issue whether land was sold by the tract or by the acre, offer of vendor made to a third person, on the same day, to sell the land by the acre, is admissible to corroborate the vendee. Seegar *v.* Smith, 78 Ga. 616, 3 S. E. 613.

Deed Will Not Control. — "In determining whether the sale is by the acre the deed will not control, but the parties may go behind it and prove the contract of which the deed was intended by the parties as an expression." Rich *v.* Scales, 116 Tenn. 57, 91 S. W. 50.

77. Brumbaugh *v.* Chapman, 45 Ohio St. 368, 13 N. E. 584; Faure *v.* Martin, 13 Barb. (N. Y.) 394, *affirmed* 7 N. Y. 210, 57 Am. Dec. 515; Hurt *v.* Stull, 3 Md. Ch. 24.

Rule Stated. — "It has been repeatedly affirmed, that when land is described in a bond or deed by well-defined boundaries, such as by its designation according to the government survey, or by natural or artificial metes and bounds, or courses and distances, open to observation and not subject to mistake, a statement of quantity, following the description, is regarded a part of the description, and not of the essence of the contract. By such sale, both parties take upon themselves the risk as to quantity. The purchaser is entitled to all the land included in the tract specifically described, though greater than the quantity stated, and the vendor is not liable if there be a deficiency. In such case, in the absence of fraud, or gross and palpable mistake, or an omission to truly express the contract, parol proof, varying or contradicting the terms of the conveyance, is inadmissible, even in equity. Wright *v.* Wright, 34 Ala. 194; Carter *v.* Beck, 40 Ala. 599; Rogers *v.* Peebles, 72 Ala. 529; Hess *v.* Cheney, 83 Ala. 251. . . . A different rule governs, when it is apparant from the conveyance that the land is not described by definite and certain boundaries, which furnish the standard of quantity; and the representation of the number of acres is an essential ingredient of the contract, regulating the aggregate sum to be paid. In such case, if there be a material and substantial variance, equity will place the parties in the same relative condition in which they would have stood, had the real quantity been known at the time of the bargain. Winston *v.* Browning, 61 Ala. 80; Harrison *v.* Talbot, 2 Dana 258. Whether the statement of the quantity in a bond or deed shall be regarded as descriptive, or of the essence of the contract, largely depends upon the manner of its use and its connection with other descriptive parts." Hodges *v.* Denny, 86 Ala. 226, 5 So. 492.

78. Voorhees *v.* DeMeyer, 2 Barb. (N. Y.) 37. See Britt *v.* Marks, 20 Or. 223, 25 Pac. 636.

"**There Is a Marked Distinction** between sales in gross and sales by the acre, as affecting the rights of the parties to recover for any excess or deficit in the quantity of land sold that may afterwards be ascertained. When there is a sale in gross, and a surplus or deficit, no fixed rule can be laid down, in the absence of fraud, misrepresentation, or mutual mistake, by which to determine the relief that the vendor or vendee may be entitled

(3.) Sale by the Acre. — Proof of a smaller deficiency will establish

to. The equity of each case must depend upon its own peculiar circumstances. The relative extent of the surplus or deficit cannot always furnish an infallible criterion. The conduct of the parties, the date of the contract, the value, quantity, and locality of the land, the price, and other circumstances must always be considered." Freeman *v.* Bow, 33 Ky. L. Rep. 254, 109 S. W. 877.

Sale in Gross. — Ambiguity From Naming the Exact Number of Acres. "By the contract in this case it was agreed to convey, and the deed did convey, to the vendee, Rezin Cain, a tract of land, setting forth its boundaries in detail, containing one hundred and forty acres, being the same land conveyed by James Biddle and wife to the late Allen Crislip. The consideration named in the contract and deed was $2,000.00. This was clearly a contract for a sale of the tract in gross and not by the acre. Had the purchase money been a multiple of the number of acres named, it would have rendered the contract ambiguous, though it would still have been *prima facie* a sale in gross and not by the acre. By this contract and deed on its face the vendor did not warrant that there were one hundred and forty acres in the tract; but the exact number of acres in the tract being named, it was thereby rendered ambiguous as to whether the vendor had or had not warranted the quantity of the land to be one hundred and forty acres, though the *prima facie* construction of the contract and deed would be, that there was no such warranty. But the ambiguity produced by the exact number of acres in the tract being named justifies the court in resorting to the circumstances, which surrounded the parties, their situation and their conduct in carrying out the written contract to aid in its interpretation; but in ascertaining the meaning of this contract we are carefully to exclude from our consideration all the verbal declarations of the parties; but as it is ambiguous on its face, we can look to the testimony showing the circumstances surrounding the making of the contract, the relative situation of the vendor and vendee, and their conduct in carrying out the contract; and though *prima facie* there was no warranty by the vendor, that there were one hundred and forty acres in the tract, yet aided by these surrounding circumstances, etc., if they justified it, the court might by their aid interpret this as a contract by the vendor that there were one hundred and forty acres in the tract." Crislip *v.* Cain, 19 W. Va. 438; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506.

Sale in Gross. — Burden of Proof. Where a sale is in gross the burden of proving a misrepresentation is upon the vendee who seeks abatement; but this having been proved, presumably it was relied upon. Cork *v.* Cook, 56 W. Va. 51, 48 S. E. 757.

Character of Evidence Admissible. "In such a suit the court can consider all sorts of parol evidence either to establish or rebut the alleged fraud of the vendor or to prove or disprove, that the statement of the vendor of the number of acres in the tract sold in gross was relied on by the vendee, or that it was not relied upon, or that by it he was or was not induced to purchase at the gross price, which he agreed to pay. The vendee in such a case would be permitted to prove by parol evidence that the price named in the written contract or deed was arrived at by multiplying the number of acres specified by a certain price per acre, which, by such parol proof it may be shown he was willing to pay, and the vendor to receive, this being direct and positive proof going strongly to establish (taken in connection with the price named in the contract or deed) that the vendee did in point of fact rely on the statement of the vendor as to the number of acres in the tract and was thereby induced to pay the price, which he agreed to pay, for the tract. This evidence, though it assumes the form of proving, that the land was sold by the acre, is admissible not to contradict the written contract or deed but to prove that the vendor's

a mistake and entitle a purchaser to relief where the land is sold by the acre than where it is sold in gross.[79]

II. ABANDONMENT AND RESCISSION.

1. Abandonment. — A. Intention. — a. *In General.* — Rights under an executory contract for the purchase or sale of land may be abandoned by either party, and whether or not such abandonment has been made is largely a question of the intention of the party.[80]

statement of the quantity of the land did in point of fact deceive the vendee to his injury, and in this way to establish the fact at issue in a suit of this character, that is, the fraud of the vendor." (syllabus). Crislip *v.* Cain, 19 W. Va. 438.

"**Specification in the Deed** of the exact quantity of the land sold, without any qualifying words whatever annexed, renders the contract ambiguous as to whether or not, although it is one of sale in gross, the vendor, by such positive affirmation of quantity, did not warrant the quantity. The effect of this is twofold. First. To overcome the presumption that the grantor did not intend to warrant the quantity, the circumstances which surrounded the parties, their situation, and their conduct in carrying the written contract into execution are admissible. Second. Such specification of quantity in the deed is a representation which may or may not be a fraud on the part of the vendor, according to the conduct and intent of the parties; and, to ascertain whether a fraud was in fact perpetrated by the vendor on the vendee, all kinds of relevant parol evidence are admissible." Newman *v.* Kay, 57 W. Va. 98, 49 S. E. 26.

79. Rich *v.* Ferguson, 45 Tex. 396.

Differences Contemplated. — "But where the sale is by the acre the differences presumed to have been contemplated by the parties are only such as are due to the errors incident to measurements by different surveyors and the variation in the instruments used, and the words 'more or less' in the deed are treated as words of safety or precaution merely, and intended to cover but slight and unimportant inaccuracies." Rathke *v.* Tyler (Iowa), 111 N. W. 435. But see Rich *v.* Ferguson, 45 Tex. 396 (*citing* McCoun *v.* Delany, 3 Bibb (Ky.) 46; Young *v.* Craig, 2 Bibb (Ky.) 270).

Parol Evidence Admissible. "The rule, in our courts, long established, is, that in an action upon a security executed for the purchase money of land, bought at a fixed rate per acre, the purchaser may abate the price by proof of deficiency in quantity; and that proof of the sale of so many acres, at a certain rate per acre, may be adduced by parol, and a verdict thereupon shall be reduced, *pro tanto*, according to the deficiency. The doctrine is not obnoxious to anything contained in the statute of frauds; nor to that rule of evidence which excludes anything by parol to vary, contradict, add to, or subtract from, written evidence of contract. It proceeds upon the footing of failure of consideration, and has been also adjudged to belong to the rights of a defendant under our discount law." Ellis *v.* Hill, 6 Rich. L. (S. C.) 37.

Exchange of Lands. — Where the transaction involves the exchange of several tracts of land between the parties, and is not the case of a sale of land for a definite cash purchase price, it is not to be construed with the same strictness as to the quantity of land conveyed as it would be in the latter case. Lawson *v.* Floyd, 124 U. S. 108.

80. Mason *v.* Bender (Tex. Civ. App.), 97 S. W. 715. See article "Abandonment."

Motive May Be Shown. — "The evidence offered of the financial depression and the condition of the

b. *Direct Testimony.* — A party may testify directly as to whether he had an intention of abandoning his contract rights.[81]

B. Parol Evidence. — Parol evidence is admissible to establish the abandonment of the contract.[82]

C. Acts Evidencing. — a. *Lapse of Time* and delay in asserting rights is strong evidence of abandonment.[83]

market for such lands between 1874 and 1880 would, of itself, be no evidence of abandonment. The most that could be claimed for it would be that, as showing a condition that might have induced the parties to abandon, it was admissible for the purpose of giving character to evidence introduced, directly tending to show abandonment in fact. Even for that purpose, it would be somewhat remote. But as in such a case the question of abandonment is one of the intent with which acts are done or omitted, or declarations made, we think it was proper to show, in connection with acts, omissions or declarations indicating an abandonment in fact, a motive or reason for abandoning, such as that the rights claimed to have been abandoned were of no value. We think, therefore, that the evidence offered ought to have been admitted." Smith *v.* Glover, 50 Minn. 58, 52 N. W. 210, 912, *affirmed,* 54 Minn. 419, 56 N. W. 168.

Declarations of Intention to abandon a contract are accorded slight weight. Melton *v.* Smith, 65 Mo. 315.

Mistake as to Legal Rights. Disclaimer of rights under a contract, made under a mistaken view as to the extent of such rights, is not conclusive upon a party and does not establish an abandonment. Williams *v.* Champion, 6 Ohio 169.

81. "**Then the Question of Abandonment** is one of fact to be determined by all the facts and circumstances in the case. The question, after all, is one of intention, which must be determined by all the evidence upon the issue. As to what the appellee's intention was may be directly testified to, as was done in this case, by himself. His testimony is to the effect that he never intended to nor did abandon his right in the land. While this is not conclusive of the issue, it is, unless all the other facts and circumstances regarding it are so conclusively established and of such overwhelming weight as to leave no reasonable doubt that his intention was diametrically contrary to what he swore that it was, sufficient to support the finding of the trial court that he never abandoned his right in the land." Mason *v.* Bender (Tex. Civ. App.), 97 S. W. 715.

82. Wisner *v.* Field, 15 N. D. 43, 106 N. W. 38; Mahon *v.* Leech, 11 N. D. 181, 90 N. W. 807; Wadge *v.* Kittleson, 12 N. D. 452, 97 N. W. 856.

When Abandonment Cannot Be Made by Parol. — "The second assignment of error asserts that the court erred in rendering judgment for plaintiff, because it appears conclusively from the uncontroverted evidence that he abandoned his right as subvendee to acquire the land in controversy by paying the unpaid purchase money, under such circumstances as now preclude him from the exercise of such right. It seems that equitable and executory rights to or in the title to land may be lost by abandonment. . . . Whether the title of appellee is such as falls within the principle, we are not able, from the limited authorities at our command, to positively determine. It seems, however, to the writer that, inasmuch as appellee's title was such as could only vest by virtue of a written instrument, he could not divest himself of it by parol." Mason *v.* Bender (Tex. Civ. App.), 97 S. W. 715.

83. Smith *v.* Glover, 54 Minn. 419, 56 N. W. 168; Green *v.* Covilland, 10 Cal. 317; Giltner *v.* Rayl, 93 Iowa 16, 61 N. W. 225; Hoyt *v.* Tuxbury, 70 Ill. 331; Holingren *v.* Piete, 50 Minn. 27, 52 N. W. 266.

"**Time Is Taken Into View** as evidence of a waiver by the party

b. *Voluntary Destruction of Writing* evidencing the contract may establish an abandonment.[84]

c. *Failure To Perform* the acts required by the contract is strong evidence of an abandonment of all rights under the contract.[85]

d. *Failure To Assert Rights* when it would be to a party's interest to do so will ordinarily prove an abandonment.[86]

e. *Purchase by Vendee of Prior Encumbrance* is not an abandonment.[87]

D. Sufficiency and Weight. — Clear proof is necessary to establish an abandonment.[88]

E. Question of Fact. — Abandonment is a question of fact to be determined by the jury from a consideration of all the evidence.[89]

2. Alteration. — A contract for the purchase or sale of land may be altered by an executed parol agreement as well as by a written agreement, and the same general rules of evidence apply as in the case of an abandonment.[90]

applying (for specific execution). It is but a presumption of waiver, however, and may be rebutted by accounting for it, by assigning sufficient reasons to justify or excuse the delay." Childress *v.* Holland, 3 Hayw. (Tenn.) 274.

84. Boone *v.* Drake, 109 N. C. 79, 13 S. E. 724.

Destruction of the writing evidencing the contract rights of the parties is immaterial unless shown to have been done with the intention of extinguishing the obligation. Brock *v.* Pearson, 87 Cal. 581, 25 Pac. 963.

85. Emery *v.* DeGolier, 117 Pa. St. 153, 12 Atl. 152.

86. Failure of a Defendant in Ejectment To Rely Upon a Parol Sale will be treated as an abandonment of any claim under such sale. Zimmerman *v.* Wengert, 31 Pa. St. 401.

Abandonment may be indicated by the conduct of the person in remaining silent and acquiescing in a treatment of the land in question inconsistent with his contract rights. Truesdail *v.* Ward, 24 Mich. 117, 134.

Sale Under Previous Lien. Vendor by suffering land to be sold under a previous lien and receiving a sum of money for failing to defend the suit, manifests an undoubted intention to abandon the sale made to his vendee. Sims *v.* Boaz, 11 Smed. & M. (Miss.) 318.

87. Where the Estate of the Vendor was incumbered, it was no abandonment of the contract on the part of the vendee to purchase the incumbrance, have the property sold at sheriff's sale and become the purchaser himself. Crouse's Appeal, 28 Pa. St. 139.

88. "Acts relied upon as constituting an abandonment must be 'positive, unequivocal, and inconsistent with the contract.' . . . The fact, if established, that the defendant remained silent when the witness Everett, under the direction of the plaintiff, mutilated the contract, is not necessarily inconsistent with the claim of an equity under it, much less a positive and affirmative surrender of his interest acquired under it." Boone *v.* Drake, 109 N. C. 79, 13 S. E. 724.

89. Colt *v.* Selden, 5 Watts (Pa.) 525; Mason *v.* Bender (Tex. Civ. App.), 97 S. W. 715.

90. Anderson *v.* Moore, 145 Ill. 61, 33 N. E. 848.

May Be Altered by Parol. — "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any

3. Rescission. — A. In General. — The general principles of rescission are treated elsewhere in this work.[91]

B. By Mutual Consent. — a. *Presumption From Lapse of Time.* — Rescission will be inferred where a considerable length of time has elapsed and no action has been taken under the contract.[92]

b. *Parol Evidence.* — Rescission by mutual agreement may be established by parol evidence.[93]

time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." Goss *v.* Lord Nugent, 5 Barn. & Ad. 58, 27 E. C. L. 33.

Statute of Frauds Does Not Apply. In an action for breach of the written contract, alteration by a parol agreement may be proved although the oral agreement appears to be within the statute of frauds, since the statute is interpreted as not requiring the alteration or dissolution of land contracts to be in writing. Cummings *v.* Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155.

Direct Testimony Admissible. Obligor in a bond given as part payment of purchase money may testify directly to an agreement by which title was retransferred to the vendor by sheriff's sale under a verbal agreement. McCauley *v.* Cremerieux, 132 Pa. St. 22, 18 Atl. 1070.

Weight of Evidence. — "A treaty and negotiation for a variation of an agreement will not amount to a waiver of it, unless the circumstances show an intention of the party that there should be an absolute abandonment and dissolution of the contract." Murray *v.* Harway, 56 N. Y. 337, 347; Robinson *v.* Page, 3 Russ. 114, 38 Eng. Reprint 519.

"A Written Contract may be altered by an executed parol agreement. Rev. Codes 1899, § 3936. For the reasons stated, we hold that the evidence conclusively establishes a proposal by defendant to alter the terms of the written contract, and an acceptance of that proposal by the plaintiff. The final payments, delivery, and acceptance of the deed were a complete execution of that modification of the written contract. The executed parol agreement was, in effect, a reformation of the written contract by the act of the parties so as to make it conform to their real intentions." Benesh *v.* Travelers' Ins. Co., 14 N. D. 39, 103 N. W. 405.

91. See article "Rescission."

Burden of Proving a defense that the plaintiff vendor exonerated them from further compliance with the terms of the contract is upon the vendee. Papin *v.* Goodrich, 103 Ill. 86.

92. Contract Presumed Reseinded where an agreement was made to convey lands on certain terms and nothing was done for four years; and the fact that defendant incapacitated himself to perform does not control the presumption. Ballard *v.* Walker, 3 Johns. Cas. (N. Y.) 60.

"It Seems That in France though the mere lapse of time within which a contract or condition is to be performed is sufficient, on principles of natural justice, to dissolve an engagement, yet the party must be summoned before a magistrate, who, in default of his appearance, or performance, will declare the agreement void; and such a summons and order of a judge seems necessary, according to the same usage, even where no time is limited, before there can be an extinguishment or rescission of the contract. But though no such sentence or order is obtained, yet if a considerable time has elapsed, a presumption will arise that the contract has been extinguished or rescinded by the tacit consent of the parties. Pothier, Trait. des Oblig. No. 636; Trait. du Contrat de Vente, No. 480." Dearborn *v.* Cross, 7 Cow. (N. Y.) 48.

93. *England.* — Goss *v.* Lord Nu-

c. *Acts Evidencing.* — **(1.) Conduct in General.**— Rescission may be inferred from the general conduct of the parties where such conduct is inconsistent with the further existence of the contract.[94]

gent, 5 Barn. & Ad. 58, 27 E. C. L. 33.

Kentucky. — Trumbo *v.* Curtright, 1 A. K. Marsh. 582.

Massachusetts. — Munroe *v.* Perkins, 9 Pick. 298; Richardson *v.* Hooper, 13 Pick. 446.

New Hampshire. — Robinson *v.* Batchelder, 4 N. H. 40.

New Jersey. — Perrine *v.* Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388.

New York. — Lattimore *v.* Harsen, 14 Johns. 330; Bailey *v.* Johnson, 9 Cow. 115; Keating *v.* Price, 1 Johns. Cas. 22.

North Dakota. — Mahon *v.* Leech, 11 N. D. 181, 90 N. W. 807; Haugen *v.* Skjervheim, 13 N. D. 616, 102 N. W. 311.

Ohio. — Reed *v.* McGrew, 5 Ohio 375.

Oregon. — Guthrie *v.* Thompson, 1 Or. 353.

Pennsylvania. — Vicary *v.* Moore, 2 Watts 451; McClure *v.* Jones, 121 Pa. St. 550, 15 Atl. 659.

Texas. — Ponce *v.* McWhorter, 50 Tex. 562.

West Virginia. — Ballard *v.* Ballard, 25 W. Va. 470.

"That a contract in writing for the purchase and sale of land may be rescinded by parol was determined in Boyce *v.* McCulloch, 3 W. & S. 429; and that case has been referred to approvingly many times." Brownfield's Exrs. *v.* Brownfield, 151 Pa. St. 565, 25 Atl. 92; Garver *v.* McNulty, 39 Pa. St. 473; Lauer *v.* Lee, 42 Pa. St. 165; Dayton *v.* Newman, 19 Pa. St. 194; Auer *v.* Penn, 92 Pa. St. 444; Raffensberger *v.* Cullison, 28 Pa. St. 426; McClure *v.* Jones, 121 Pa. St. 550, 15 Atl. 659.

Must Be Accompanied by Some Overt Act. — Lowther Oil Co. *v.* Miller's Oil Co., 53 W. Va. 501, 44 S. E. 433.

"**Nor Was It Necessary** that the title bond should have been rescinded or canceled by a writing. If Salyer and Helton mutually agreed to a cancellation or rescission of it, before the rights of third persons intervened, this would be fully as effective between them as a written cancellation." Asher *v.* Helton, 31 Ky. L. Rep. 9, 101 S. W. 350.

"**A Formal Release** must of course be in writing and under seal, but a verbal agreement to dispense with the performance of a written agreement may be set up as a bar to an action for its breach." Morrill *v.* Colehour, 82 Ill. 618; Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 425; Boyce *v.* M'Culloch, 3 Watts & S. (Pa.) 429; Raffensberger *v.* Cullison, 28 Pa. St. 426.

Statute of Frauds. — "It is to be observed, that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing." Goss *v.* Lord Nugent, 5 Barn. & Ad. 58, 27 E. C. L. 33.

Proof Should Be Clear and Convincing. — Davis *v.* Benedict, 9 Ky. L. Rep. 200, 4 S. W. 339. See Pipkin *v.* Allen, 24 Mo. 520; Ponce *v.* McWhorter, 50 Tex. 562; McCauley *v.* Cremerieux, 132 Pa. St. 22, 18 Atl. 1070.

94. "The Parties May Mutually Agree to rescind or disannul a contract previously made, or their acts may be construed into such a tacit agreement where nothing has been done in affirmance of the contract, but in disaffirmance of it for a long time, as in Lady Lanesborough's case, (cited Pow. on Contr. 413,) where a contract had been made between landlord and tenants which had not been acted under for 25 years; but the former relationship had existed between them as if no

(2.) Surrender of Possession by Vendee.— Surrender of possession by the vendee and acceptance of it by the vendor, establishes a rescission.[95]

(3.) Acceptance of Lease by Vendee. — Proof that the vendee has

such contract had been made, and in direct contradiction to it. Such acts were held to amount to a waiver of the contract. But unless there is an agreement express or implied to rescind, the party claiming that the contract is rescinded must support that claim upon the fact of a violation of the contract by the other party." Green *v.* Green, 9 Cow. (N. Y.) 46.

"**And Where a Contract** may be rescinded by parol the conduct of the parties may be quite as significant of their intention as any words they might use: Grove *v.* Donaldson, 15 Pa. 128. Indeed to make a parol rescission effectual as against the purchaser there must be a yielding up of the possession or some other equally unequivocal act: Lauer *v.* Lee, supra." Brownfield's Exrs. *v.* Brownfield, 151 Pa. St. 565, 25 Atl. 92.

"**Any Circumstance or Course of Conduct** from whence can be clearly deduced an agreement to put an end to the original agreement will amount to a rescission of it." Marsh *v.* Despard, 56 W. Va. 132, 49 S. E. 24.

"**Consent to a Rescission** need not in all cases be express but may be implied from the conduct of the parties." Gwin *v.* Calegaris, 139 Cal. 384, 73 Pac. 851, *holding* that where the vendor failed to make his record title satisfactory to the purchaser and sold to a third person, he will be deemed to have consented to rescission by the purchaser.

Receipt by Vendor of a quitclaim deed from the vendee was a rescission of the contract of purchase. Ives *v.* Bank of Lansingburg, 12 Mich. 361.

A Receipt executed by the vendee acknowledging the receipt of a sum of money in full of sums by him laid out for payment of surveying fees, etc., which in the deed to the land formed the consideration of the sale, is not evidence, of itself, of a resale or rescission of the contract of sale, but it is admissible with other testimony to sustain a parol resale or rescission. Pone *v.* McWhorter, 50 Tex. 562.

Accord and Satisfaction of a written contract to sell land is not proved by merely showing an oral agreement to render satisfaction at a date in the future, but it must appear that the agreement was actually and fully executed. Arnett *v.* Smith, 11 N. D. 55, 88 N. W. 1037.

95. Evans *v.* Ashe (Tex. Civ. App.), 108 S. W. 398.

"In Dearborn *v.* Cross, 7 Cow. 48, it was held that a court of law should, and a court of equity undoubtedly would, presume a rescission of a written contract for the sale of land from the fact of a surrender of possession by the vendee, and an acceptance of it by the vendor, and a subsequent sale by the vendor, as against either party who should attempt to enforce the contract. See, also, Ballard *v.* Walker, 3 Johns. Cas. 60; Fleming *v.* Gilbert, 3 Johns. 528; Green *v.* Green, 9 Cow. 46; Ketchum *v.* Evertson, 13 Johns. 359, 7 Am. Dec. 384; Morrill *v.* Colehour, 82 Ill. 618; Murray *v.* Harway, 56 N. Y. 347; Baldwin *v.* Salter, 8 Paige 473 (4 L. Ed. 508); Raffensberger *v.* Cullison, 28 Pa. 426; Boyce *v.* McCulloch, 3 Watts & S. 429, 39 Am. Dec. 35; Stevens *v.* Cooper, 1 Johns. Ch. 425, 1 L. Ed. (1 Johns. Ch.) 196, and cases cited in note; Stearns *v.* Hall, 9 Cush. (Mass.) 31; Cummings *v.* Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155, and cases cited; Goss *v.* Nugent, 5 Barn. & A. 65; Robinson *v.* Page, 3 Russ. 114. The foregoing authorities wholly sustain the doctrine that a written contract may be discharged by parol." Mahon *v.* Leech, 11 N. D. 181, 90 N. W. 807.

Renting of the Farm by vendor, after notice of rescission given by vendee, and a subsequent sale, was regarded as a practical abandonment of the contract by the vendor and an acceptance by him of the offer

accepted a lease of the premises establishes a rescission of the contract of purchase.[96]

C. By Vendor. — a. *Parol Evidence.* — A rescission by the vendor may be established by parol evidence.[97]

b. *Acts Evidencing.* — **(1.) Institution of Action.** — Institution of and recovery in an action to recover the possession of land is not ordinarily a rescission.[98]

(2.) Taking Possession. — Mere taking of possession of land after default does not amount to a rescission.[99]

(3.) Sale or Lease. — The conveyance of the property to a third person evidences an intention to rescind,[1] though leasing it after notice that the vendee would not carry out the contract is not a rescission.[2]

(4.) Failure To Perform. — Mere failure of the vendor to perform his contract does not amount to a rescission.[3]

(5.) Circumstantial Evidence. — A rescission may be established by evidence of the surrounding circumstances.[4]

of rescission. Henry *v.* Martin, 39 Vt. 42.

96. Irish *v.* Martin (Iowa), 113 N. W. 470; Marsh *v.* Despard, 56 W. Va. 132, 49 S. E. 24.

97. Possession Must Be Given Up. "There is no doubt but that an executory contract for the sale of land, whether written or oral, can be rescinded or waived, in equity, by word of mouth if possession be given up or the writing be destroyed, but not without something done by way of rescission or waiver." Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

Intention To Rescind must be evidenced by some overt act or outward manifestation. Melton *v.* Smith, 65 Mo. 315.

98. Southern Pac. R. Co. *v.* Allen, 112 Cal. 455, 44 Pac. 796.

Recovery of Possession of land by the vendor does not amount to a rescission of the contract unless it appears that it is inconsistent with the terms of the contract. Donaldson's Admr. *v.* Waters' Admr., 35 Ala. 107.

Ejectment. — Recovery of the land from purchaser under parol contract by vendor in an action of ejectment, amounts to a rescission of the contract. Marshall Hairston *v.* Jaudon, 42 Miss. 380.

99. Morris *v.* Derr, 55 Kan. 569, 40 Pac. 908; Hart *v.* Stickney, 41 Wis. 630, 22 Am. Rep. 728.

Where the Vendor resumes possession and refuses to receive any more money from the purchaser, a rescission by him is established. Feay *v.* Decamp, 15 Serg. & R. (Pa.) 227.

Surrender of Possession upon demand of the vendor, by the vendee, who then accepted a lease, evidences a rescission by the vendor. Steiner *v.* Baker, 111 Ala. 374, 19 So. 976.

1. Warren *v.* Richmond, 53 Ill. 52; Atkinson *v.* Scott, 36 Mich. 18; Utter *v.* Stuart, 30 Barb. (N. Y.) 20; Smith *v.* Rogers, 42 Hun (N. Y.) 110; Little *v.* Thurston, 58 Me. 86. *Compare* Shively *v.* Semi-Tropic Land & W. Co., 99 Cal. 259, 33 Pac. 848, where it was held that merely selling to a third person was not a rescission because the vendor had not necessarily put it out of his power to convey. And see Davidson *v.* Keep, 61 Iowa 218, 16 N. W. 101.

Mortgage. — Vendor who mortgages the property to a third person commits a breach of his contract with the vendee — who is entitled to treat the contract as rescinded. Hawkins *v.* Merritt, 109 Ala. 261, 19 So. 589.

2. Hunt *v.* Siemers, 22 Tex. Civ. App. 94, 53 S. W. 387.

3. Aikman *v.* Sanborn (Cal.), 52 Pac. 720.

4. Where the Right of Vendor to rescind appears, the listing of the property as his own, and the possession of the duplicate contracts orig-

c. *Forfeiture by Vendee.* — Forfeiture by the vendee through failure to meet payments is not shown by mere proof of the default, but it must further appear that the vendor elected to treat the default as a forfeiture and so notified the vendee.[5]

d. *Lesion Beyond Moiety.* —In Louisiana where the vendor may rescind where there has been a lesion beyond moiety, the burden is upon him to establish the lesion by clear and convincing proof.[6]

D. By Purchaser. — a. *Parol Evidence.* — Rescission by the vendee may be established by parol evidence.[7]

b. *Acts Evidencing.* — **(1.) Institution of Actions.** — Commencing an action to recover purchase money paid, or for damages, is not a rescission.[8]

inally executed, raise a presumption that in some manner the contract had been rescinded. Swain *v.* Baldwin, 54 Mich. 119, 19 N. W. 773.

Rescission by Vendor Completed by tendering back the consideration, after giving notice of an intention to rescind. Green *v.* Duvergey, 146 Cal. 379, 80 Pac. 234.

Rescission by vendor is shown where he demands a return of the deed sent to his agent for delivery to the vendee upon payment being made, and informs him that the deal is off. Mason *v.* Strickland, 73 Neb. 783, 103 N. W. 458.

5. Murphy *v.* McIntyre, 152 Mich. 591, 116 N. W. 197.

Burden of Proof is upon the vendor to prove a declaration of forfeiture, in an action by vendee for specific performance. Thompson *v.* Colby, 127 Iowa 234, 103 N. W. 117.

Where Time Is of the Essence. But where a contract expressly and positively made time of the essence, proof of the default will establish the forfeiture. Gilbert *v.* Union Pac. R. Co. (Neb.), 112 N. W. 359.

6. Girault *v.* Feucht, 120 La. 1070, 46 So. 26; Amiss *v.* Whitting's Exrs., 121 La. 501, 46 So. 606; Mayard *v.* Laporte, 109 La. 101, 33 So. 98.

Question of Fact. — Smart *v.* Bibbins, 109 La. 986, 34 So. 49.

Evidence of Value of Land. — To determine whether there has been "lesion beyond moiety" the highest estimates cannot be accepted as representing the true value of the property, since the evidence required "must be peculiarly strong and convincing." Amiss *v.* Witting's Exrs., 121 La. 501, 46 So. 606.

Fluctuations in Value. — In an action to rescind the sale of a tract of land on the ground of lesion, the defendant will be permitted to prove the fluctuations in price to which landed property in the same section of country was subject at the time of the sale; and the plaintiff may give evidence of the price for which the tract in dispute was sold by the plaintiff. Bertol *v.* Tanner, 3 La. 252.

Sale Merely of the Vendor's Interest. — "The facts here bring the case within the doctrine announced in Copley vs. Flint, 16 La. 380, and Copley vs. Flint, 1 Rob. 125, in both of which it was said the intrinsic value of the land at the time of the sale, and the plaintiffs' pretensions and the nature of his title, should be examined in and inquired into as matters put expressly at issue in an action for rescission of a sale on account of lesion. But in a sale of a precarious claim to land without warranty it is a proper subject of inquiry what were the vendor's pretensions worth, rather than what was the intrinsic value of the land in an action of lesion." Martin *v.* Delaney, 47 La. Ann. 719, 17 So. 264.

7. Crane *v.* Decamp, 21 N. J. Eq. 414; Walker *v.* Wheatly, 2 Humph. (Tenn.) 119; McCorkle *v.* Brown, 9 Smed. & M. (Miss.) 167; Dominick *v.* Michael, 4 Sandf. (N. Y.) 374, 426; Hill *v.* Gomme, 1 Beav. 540, 48 Eng. Reprint 1050.

8. Elterman *v.* Hyman (N. Y.), 84 N. E. 937; Tamsen *v.* Schaefer, 108 N. Y. 604, 15 N. E. 731; Pettus *v.* Smith, 4 Rich. Eq. (S. C.) 197; Hurst *v.* Means, 2 Swan (Tenn.)

(2.) Conduct. — Conduct inconsistent with the continued existence of rights under the contract is evidence of a rescission.[9]

(3.) Retention of Possession. — Retention of possession by the vendee is strong evidence that he has not rescinded the contract.[10]

c. *Question of Fact.* — Whether the vendee has or has not rescinded is a question of fact for the jury,[11] as is also the question whether he has rescinded within a reasonable time.[12]

III. PERFORMANCE.

1. Time. — A. Time as of the Essence. — a. *At Law.* — The general rule is that at law time will be presumed to be of the essence of a contract.[13]

b. *In Equity.* — In equity time is not regarded as of the essence of a contract unless it is so expressed in clear and unmistakable terms, or is proved to have been made so, by the acts of the parties, clearly established.[14]

c. *Admissibility of Evidence.* — While the determination as to

594. But see Herrington *v.* Hubbard, 2 Ill. 569, 33 Am. Dec. 426.

9. Surrender of Written Contract by the purchaser and participation in negotiations for sale of the property to a third person, constitute a rescission. Crane *v.* Decamp, 21 N. J. Eq. 414.

"**The Frequent and Emphatic** written declarations of the plaintiff that he considered the contract rescinded or annulled, demanding return of the earnest money, and threatening immediate suit if it was not returned, seems to us as amounting to very clear, unequivocal and absolute refusals to perform." Woodman *v.* Blue Grass Land Co., 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

Refusal by Vendee To Accept Title when tendered according to the provisions of the contract, is a rescission. Eshleman *v.* Henrietta Vineyard Co., 97 Cal. 670, 32 Pac. 595.

At Law. — Although in equity the purchaser under an executory contract is considered in many respects as the owner, at law he is not, and therefore to work a rescission at law he has nothing to return as a condition precedent, and his express declaration by rescission is sufficient. Miller *v.* Shelburn, 15 N. D. 182, 107 N. W. 51.

10. "**It Is Absurd** for the defendant to contend that the contract is at an end while he is in possession of the lands, holding under it." Schroeppel *v.* Hopper, 40 Barb. (N. Y.) 425; Lewis *v.* McMillen, 41 Barb. (N. Y.) 420.

Any Delay by Vendee, and especially remaining in possession of the land and treating it as owner, will be evidence of his intention to abide by the contract. Scott *v.* Walton, 32 Or. 460, 52 Pac. 180.

11. Magaw *v.* Lathrop, 4 Watts & S. (Pa.) 316.

12. Manahan *v.* Noyes, 52 N. H. 232; Holbrook *v.* Burt, 22 Pick. (Mass.) 546.

Where Facts Are Undisputed. Reasonable time for rescission is a question of law for the court when the facts are undisputed; but where they are disputed it is a question for the jury. Davis *v.* Stuard, 99 Pa. St. 295.

13. Conway *v.* Case, 22 Ill. 127; Oppenheimer *v.* Humphreys, 56 Hun 649, 9 N. Y. Supp. 840, *affirmed,* 125 N. Y. 733, 26 N. E. 757.

14. Ewing *v.* Crouse, 6 Ind. 312; Haverstick *v.* Erie Gas Co., 29 Pa. St. 254.

"As a rule, the courts will not infer that the parties intended to make time of the essence of the contract for the sale of land, from the mere appointment of a day for the delivery of a deed, or the payment of the price. The intention must be

whether or not time is of the essence of a contract is largely a question of construction of the contract itself, it is also dependent upon the intention of the parties, and their acts and conduct are admissible in evidence.[15]

B. Time Not Specified. — a. *In General.* — Where no time is specified in the contract within which either party must perform, it will be presumed that a reasonable time was contemplated by the parties.[16]

b. *Question of Fact.* — The question of reasonable time is one for the determination of the jury,[17] except where the facts are clearly

unequivocally expressed, or it must appear from the fluctuating, uncertain or perishable nature of the commodity. It is a general rule that language which admits of a milder interpretation, shall not be so construed as to work a forfeiture. Smith's Exx. *v.* Profitt's Admr., 82 Va. 832, 1 S. E. 67.

15. "**Relation of Parties** and surrounding circumstances," admissible to determine that time was of the essence. Judd *v.* Skidmore, 33 Minn. 140, 22 N. W. 183.

That Land Is Constantly Rising in Value may be shown. Edwards *v.* Atkinson, 14 Tex. 373.

Partial Payment made and accepted after the time specified for the completion of the sale tends to show that time was not regarded as of the essence. Bigham *v.* Carr, 21 Tex. 142.

Payment of Valuable Consideration for an extension of time is strong evidence that time was of the essence. Durant *v.* Comegys, 3 Idaho 204, 28 Pac. 425.

Purpose for which land was bought is relevant. Gilman *v.* Smith, 71 Md. 171, 17 Atl. 1035.

16. Coleridge Creamery Co. *v.* Jenkins, 66 Neb. 129, 92 N. W. 123; Ullsperger *v.* Meyer, 217 Ill. 262, 75 N. E. 482; Johnson *v.* Staley, 32 Ind. App. 628, 70 N. E. 541; Clark *v.* Wilson, 41 Tex. Civ. App. 450, 91 S. W. 627.

"**No Time Being Fixed** within which the testator was to give a deed of the property, he was entitled to a reasonable time in which to do so. White *v.* Poole, 73 N. H. 403, 62 Atl. 494; Brown *v.* Prescott, 63 N. H. 61; Kidder *v.* Flanders, 73 N. H. 345, 61 Atl. 675 (reasonable time presumed).

"**The General Rule** is that the debt would fall due as a matter of law, within a reasonable time after the contract was entered into." Tingue *v.* Patch, 93 Minn. 437, 101 N. W. 792.

17. Hays *v.* Hays, 10 Rich. L. (S. C.) 419; Quill *v.* Jacoby (Cal.), 37 Pac. 524; Campbell *v.* Prague, 6 App. Div. 554, 39 N. Y. Supp. 558.

"In the case before us, the plaintiff had conveyed to the defendant a tract of land, to one-half of which only he had title; the title to the other half being in the town of Piermont. In payment, the defendant had conveyed to the plaintiff one lot of land in Compton, and agreed to convey another lot when the plaintiff should extinguish the Piermont title. By this conveyance of the plaintiff, the defendant obtained a title to one-half the land only, and plaintiff was bound, in a reasonable time, to obtain the Piermont title to the other. What shall be regarded as a reasonable time, is in this case a question of fact for the jury, under the instructions of the court, and it is to be determined by a consideration of all the circumstances of the case, the nature of the contract, and what was conveyed, the character of the title to be extinguished, and the time required to do it, the occupation of the lands on both sides, the inconvenience caused by the delay, and whether or not it caused any change of circumstances on the part of the defendant. All these circumstances, with others of a like nature, are to be weighed in determining whether, according to the ordinary course of dealing, a reasonable time has elapsed without a performance of the condition precedent." Tyler *v.* Webster, 43 N. H. 147.

established or are undisputed, when it becomes a question of law.[18]

C. Collateral Agreement. — Time of performance may be shown by proof of a collateral parol agreement.[19]

D. Extension. — An extension of the time of performance may be made and proved by parol.[20]

2. Place. — A. In General. — Where no place is specified at which payment is to be made, the law implies the agreement of the purchaser to seek out the vendor personally, or to offer performance at his residence.[21]

B. Collateral Agreement. — The place where payment was to be made may be fixed by parol agreement and proved by parol evidence.[22]

3. Conveyance. — A. In General. — The subject of conveyance under land contracts is fully treated elsewhere in this work.[23]

B. Title. — a. *Presumption.* — There is a presumption in every

18. "It is true that what is a reasonable time for the performance of an act is ordinarily a question of fact to be determined by the jury, but the evidence may be such as to make it a question of law for this court. The plaintiff's evidence shows that he had time, after receiving the defendant's letter of acceptance, to execute and forward a deed. The inference is a fair one that he could have procured and sent an abstract with it. If longer time was required, he should have shown it." Randolph *v.* Frick, 57 Mo. App. 400.

"Where the facts are clearly established, or are undisputed, or admitted, reasonable time is a question of law. But where what is a reasonable time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to a jury, before any judgment can be formed, whether the time was or was not reasonable." Hill *v.* Hobart, 16 Me. 164.

19. **A Collateral Verbal Agreement** as to when the vendee shall be entitled to possession "may be shown by such evidence as is ordinarily sufficient to prove any other fact. It is not necessary that the evidence of such agreement should be clear, precise, and indubitable." Lichtenwallner *v.* Laubach, 105 Pa. St. 366.

20. *Illinois.* — Bacon *v.* Cobb, 45 Ill. 47, 56.

Massachusetts. — Rockwood *v.* Walcott, 3 Allen 458, 462; Lerned *v.* Wannemacher, 9 Allen 412; Whittier *v.* Dana, 10 Allen 326; Stearns *v.* Hall, 9 Cush. 31.

New York. — Fleming *v.* Gilbert, 3 Johns. 528; Dearborn *v.* Cross, 7 Cow. 48; Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121. *Contra* Stowell *v.* Robinson, 3 Bing. N. C. (Eng.) 928, 5 Scott 196.

21. Greenawalt *v.* Este, 40 Kan. 418, 19 Pac. 803; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; Smith *v.* Smith, 25 Wend. (N. Y.) 405. See Veith *v.* McMurtry, 26 Neb. 341, 42 N. W. 6.

22. Jamison *v.* Keith, 19 Ky. L. Rep. 511, 41 S. W. 33; Grillenberger *v.* Spencer, 7 Misc. 601, 27 N. Y. Supp. 864.

23. See article "Deeds."

Presumption From Lapse of Time. Where a condition in a bond was to be performed within a year and thirty years later the bond is presented in court as evidence of liability, there is a presumption from the lapse of time that the conveyance has been made. Shontz *v.* Brown, 27 Pa. St. 123.

Conveyance by Attorney in Fact. Performance of a contract to convey by a married man and his wife is not shown where the deed contains his signature, and her signature by her attorney in fact, where no power of attorney is shown in the record. Gunderson *v.* Gunderson, 25 Wash. 459, 65 Pac. 791.

case where no reference is made to the title, that the parties impliedly contracted for the conveyance of a good title.[24]

24. *United States.* — Washington *v.* Ogden, 1 Black 450.

Alabama. — Flinn *v.* Barber, 64 Ala. 193; Goodlett *v.* Hansell, 66 Ala. 151.

Iowa. — Shreck *v.* Pierce, 3 Iowa 350.

Kansas. — Durham *v.* Hadley, 47 Kan. 73, 27 Pac. 105.

Michigan. — Allen *v.* Atkinson, 21 Mich. 351.

New Jersey. — Keim *v.* Lindley, 30 Atl. 1063.

New York. — Tyler *v.* Strang, 21 Barb. 198.

Pennsylvania. — Freetly *v.* Barnhart, 51 Pa. St. 279.

South Carolina. — Prothro *v.* Smith, 6 Rich. Eq. 324.

Virginia. — Goddin *v.* Vaughn's Exx., 14 Gratt. 102; McAllister *v.* Harman, 101 Va. 17, 42 S. E. 920. *Contra* McDonald *v.* Beall, 55 Ga. 288.

An Implied Right. — "The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. The defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it; and the answer is, he has waived it, having chosen to go on with and conclude the agreement after he had full notice that he was not to expect it. I take this to be matter of notice, and not of contract." Ogilvie *v.* Foljambe, 3 Mer. 53, 36 Eng. Reprint 21; Meyer *v.* Madreperla, 68 N. J. L. 258, 53 Atl. 477; Smith *v.* McMahan (Mass.), 83 N. E. 9.

"In the absence of stipulations that a vendor sells only a partial interest, or such title or estate as he may have in particular lands, the presumption is, that the inducement to a vendee to buy is that he may acquire a good and indefeasible title. The right to such title does not spring from the express agreement of the parties; it is given by law, unless the agreement repels its existence. — Cullom *v.* Br. Bank of Mobile, 4 Ala. 28. In 1 Sugden on Vendors, 398 (marg. 339), the doctrine is thus stated: 'A general agreement to sell a property means a sale in fee simple; and the court will not infer that a term of years only is sold, on account of the smallness of the price. Where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, if it was a less number of years that he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for the sale.' If this be the right of the purchaser, where the vendor has a title, but not the title he has contracted to sell, the right is not less, nor is it varied, when the vendor has no title or estate which is vendible and alienable." Flinn *v.* Barber, 64 Ala. 193.

Presumption as to Character of Deed. — Where nothing is said, the vendor must convey by a deed with general warranty. Whitworth *v.* Pool, 29 Ky. L. Rep. 1104, 96 S. W. 880; Gaither *v.* O'Doherty, 11 Ky. L. Rep. 595, 12 S. W. 306.

Rebuttal of Presumption That Good Title was to be conveyed may be made by showing that the purchaser had notice of an existing incumbrance. "The making of the contract is admitted. It is urged on behalf of the defendants that from the terms of the agreement there arises a legal implication that the title to be conveyed is to be a good one, and therefore clear of incumbrance, and that the testimony offered on the part of the bank to show that it was understood between the parties when the agreement was made that the property was to be taken by Jones subject to the taxes and assessments, is incompetent. But the agreement is silent as to the character of the title to be given, and while in such case, in the absence of proof to the contrary, the implication arises that the title to

b. *Burden of Proof.* — The burden of proving that a good title was not stipulated for or that the vendee took his chance of getting a good title, is upon the vendor.[25] The vendee must point out specifically the defects upon which he relies.[26]

c. *Parol Evidence.* — The general rule is that a vendee is entitled to a good title of record, and that a title which is bad on the record is insufficient though it could be shown by parol evidence that such title was good.[27] In a few jurisdictions, however, parol evidence

be conveyed is to be a good one and therefore free from incumbrance, that implication may be rebutted. Notice is sufficient to rebut the mere implication, and parol proof is, on this ground, admissible." Newark Sav. Inst. *v.* Jones, 37 N. J. Eq. 449.

Covenant against incumbrances not violated where it appears that at the time of the purchase the land was openly subject to an easement of way, and this latter was a question for the jury. Eby *v.* Elder, 122 Pa. St. 342, 15 Atl. 423.

Presumption From Accepting Quit-claim Deed. — Acceptance by vendee of quitclaim deed or deed with special warranty warrants the presumption that he acts upon his own judgment and knowledge of the title, but this may be rebutted by evidence of fraud. Rhode *v.* Alley, 27 Tex. 443.

"It cannot be questioned that it is competent for a purchaser of land, who has received a deed with special warranty, to show that a fraud has been practiced upon him in respect to the title. If a vendor of land has a perfect title in himself, his vendee may well be content to accept from him a deed with special warranty, because such a deed would, in that case, vest an unimpeachable title in the vendee. Ordinarily, when a vendee accepts a quit-claim deed, or a deed with special warranty, the presumption of law is, that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title. But when, in the negotiations preliminary to the execution of the contract, the purchaser stipulates for a perfect title, and is afterwards induced by the false or fraudulent representations of the vendor to accept a quit-claim deed, or a deed with special warranty, in the belief that he is acquiring a perfect title and one free from litigation at the time, he will be permitted to show that he was deceived in respect to the title, and may be relieved against such a contract. (Mitchell *v.* Zimmermann, 4 Tex. 75; York's Admr. *v.* Gregg's Admr., 9 Tex. 85; Hays *v.* Bonner, 14 Tex. 629.)" Rhode *v.* Alley, 27 Tex. 443.

Parol Evidence Inadmissible To Vary Warranty. — Covenant of warranty cannot be varied by parol evidence that the defendant took his chances of getting a title. Warren *v.* Clark (Tex. Civ. App.), 24 S. W. 1105.

25. "The fact that a party undertakes to sell implies an affirmation on his part that he has such title on his part as he binds himself to convey, and if he fails to convey such a title and yet seeks to hold his vendee to his contract he has the burden of showing that the vendee purchased with a knowledge of the defectiveness of the title or with a risk of getting a better title." Green *v.* Chandler, 25 Tex. 148.

26. Baecht *v.* Hevesy, 115 App. Div. 509, 101 N. Y. Supp. 413; Woodward *v.* McCollum, 16 N. D. 42, 111 N. W. 623.

27. *England.* — Barnwall *v.* Harris, 1 Taunt. 430, 10 R. R. 560.

California. — Gwin *v.* Calegaris, 139 Cal. 384, 73 Pac. 851.

Iowa. — Fagan *v.* Hook, 105 N. W. 155.

Massachusetts. — Noyes *v.* Johnson, 139 Mass. 436, 31 N. E. 767.

Minnesota. — Howe *v.* Coates, 97 Minn. 385, 107 N. W. 397.

Missouri. — Bruce *v.* Wolfe, 102 Mo. App. 384, 76 S. W. 723.

is sometimes admitted to cure a defect in the record of a title.[28]

d. *Inspection.* — The right to inspect the deed does not exist by

New Jersey. — Rutherford Land Co. *v.* Sanntrock, 44 Atl. 938.

New York. — Carolan *v.* Yoran, 104 App. Div. 488, 93 N. Y. Supp. 935.

Vendee Is Entitled to "a title fairly deducible of record, free from reasonable doubt or litigation. He was not required to accept a title depending upon matters which rest in parol." Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. 315.

Where a "clear abstract of title" is required, a vendee will not be compelled to take a title resting in part on adverse possession, since although it may be a good legal title, it could not be shown by the abstract. Bruce *v.* Wolfe, 102 Mo. App. 384, 76 S. W. 723.

Under Iowa code § 2957 which provided that "affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting real property," it was not intended to enable any one to make out of record a title resting solely in parol, and affidavits that a vendor's possession had been adverse will not help the record. Fagan *v.* Hook (Iowa), 105 N. W. 155.

28. Seymour *v.* DeLancey, Hopk. Ch. (N. Y.) 436; Miller *v.* Macomb, 26 Wend. (N. Y.) 229; Fagen *v.* Davison, 2 Duer (N. Y.) 153; Brooklyn Park Comr. *v.* Armstrong, 45 N. Y. 234; Shriver *v.* Shriver, 86 N. Y. 575.

Parol evidence is admissible to show that "O. L. Hildebrandt" was the same person as "Levi Hildebrandt," for although the vendor bound himself to convey a good record title, apparent defects in the record may be explained. "Under the assignment presenting this question, he asserts the proposition that he had the right to demand a title evidenced entirely by the record, and that parol proof could in no event be resorted to for the purpose of explaining or supplying apparent lapses or defects. The proposition is not without support in the authorities, but the better rule seems to be that such proof is, under certain circumstances, admissible. It is said that this must necessarily be true, else many titles of the most conclusive and satisfactory nature would be held unmarketable or not 'good.' In this view of the question, title by descent or inheritance may be shown by parol, and, if the proof is clear and conclusive, the purchaser will be compelled to accept. Maupin on Marketable Title, pp. 175, 181. . . . While our laws require that every conveyance of real estate shall be in writing, and provide a means of recording such evidences of title, yet, as a matter of fact, a part of every such transaction rests in parol. Thus, however perfect the deed of conveyance may be, delivery is necessary to its validity, and, if questioned, must be determined by parol evidence. So, also, as to the identity of the person executing it. Where the names are the same, or very similar, identity is presumed until the contrary is shown. It is also true that many titles are good and free from doubt which rest in part on inheritance or limitation, for the evidence of which in neither case has the law provided a means of registration. Another instance is the case of the wife's interest in the community real estate where the deed was taken in the name of the husband. All these instances come within the reason of the rule laid down in Maupin on Marketable Title, *supra*, to the effect that such matters may be shown by parol; that, if so shown, the failure of the record to disclose them furnishes no sufficient excuse for rescission by the purchaser, if the facts are made to appear with such certainty as to satisfy a reasonably prudent person that the title is good. The doctrine seems to find ample support in the authorities cited by the author." Hollifield *v.* Landrum, 31 Tex. Civ. App. 187, 71 S. W. 970.

Title by Adverse Possession or

implication, and where it is claimed it must be proved to have been agreed upon by the parties.[29]

e. *Weight and Sufficiency.* — The validity of a title need not be established to the point of certainty, but if there is a reasonable doubt as to it, a vendee will not be compelled to accept it.[30]

limitations may be so clearly proved and so free from doubt, that it will be held to be a "good and sufficient title." Greer *v.* International Stock Yards Co., 43 Tex. Civ. App. 370, 96 S. W. 79.

29. Custom as Giving the Right to an Inspection. — "An offer was made to prove that there was a custom in Chicago to afford purchasers an opportunity to inspect the deed before requiring them to make payment. This was properly excluded by the court. There was no offer to prove that it was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it. Turner *v.* Dawson et al., 50 Ill. 85; Packard et al. *v.* Van Schoick, 58 id. 81. Besides, it is impossible there could be a custom to allow a party to inspect a deed at a time when there is no legal duty to have such deed made and ready to be delivered." Papin *v.* Goodrich, 103 Ill. 86.

30. Absolute Certainty Not Necessary. — "The rule at one time was to decide in every case whether the title was good or bad, and to compel the purchaser to take it as good or dismiss the bill on the ground that it was bad. But as the judgment in such case bound only the parties to the suit, and those claiming under them, and as the question might be again raised by other parties, and upon matters and evidence not before the court in the prior suit, it was deemed to be the safer rule not to decide whether the title was absolutely good or absolutely bad, but whether it was so clear and free of doubt, that the court would compel the purchaser to take it, or whether it was one which the court would not go so far as to decide it to be bad, but at the same time was the subject of so much doubt that a purchaser ought not to be obliged to accept it. In other words, whatever may be the private opinion of the court as to the validity of the title, yet if there be a reasonable doubt, either as to matter of law or matter of fact involved in it, the purchaser will not be enforced to take it. And if the objection is based upon matter of fact, some reasonable ground of evidence must be shown in support of the objection. The purchaser has the right, we have said, to demand a title which shall enable him not only to hold his land, but to hold it in peace; and one so clear of doubt as will enable him to sell the property for its fair market value. At the same time it is not every doubt, or suggestion, or even threat of contest that will be sufficient; otherwise an assailing purchaser might in every case raise or make such an objection. And to avoid this the rule is now well settled, that the doubt must be a reasonable doubt, and one sufficient to cause the Chancellor to hesitate, whether the purchaser should be obliged to complete the contract of sale." Levy *v.* Iroquois Bldg. Co., 80 Md. 300, 30 Atl. 707.

Reasonable Doubt Sufficient. "The whole evidence left the case free from any reasonable doubt that the plaintiff's deed would convey a good title, and hence, notwithstanding the apparent defect in the chain of title as shown by the records, the defendant could not justly refuse to perform his agreement. A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him; nor is it sufficient for him when the jurisdiction of an equity court is invoked to compel him to perform his contract, merely to raise a doubt as to the vendor's title. Before he can successfully resist performance of his contract on the ground of defect of title, there must be at least a reasonable doubt as to the vendor's title — such as affects its value, and

4. Payment. — A. PRESUMPTIONS. — a. *In General.* — Payment will be presumed after a lapse of twenty years.[31] The giving of a judgment note by the vendor to the purchaser raises a presumption of prior payment.[32]

b. *As Basis for Affirmative Relief.* — It has been held that the presumption of payment from lapse of time will not be indulged where the party relying upon it is seeking affirmative relief.[33]

B. ADMISSIBILITY OF EVIDENCE. — a. *Receipts.* — Receipts establish a *prima facie* case of payment, but may be explained by parol evidence.[34]

would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. A defect in the record title may, under certain circumstances, furnish a defense to the purchaser. But there is no inflexible rule that a vendor must furnish a perfect record or paper title. It has frequently been held that defects in the record or paper title may be cured or removed by parol evidence." Hellreigel *v.* Manning, 97 N. Y. 56.

In an Action at Law — as distinguished from an action in equity — the plaintiff relying upon the fact of a defective title in the vendor, must prove that the title of the vendor is absolutely bad, by proof that the defendant did not own the property or that there were liens or incumbrances upon it. Ingalls *v.* Hahn, 47 Hun (N. Y.) 104.

31. See article "PAYMENT."

Specific Performance decreed, without proof by the obligee of payment of the consideration where there was a recital of such payment, and he had been in possession twenty years. Anonymous, Moseley (Eng.) 37.

Ten Years. — Payment presumed ten years after the purchase money has become due. Rivers *v.* Washington, 34 Tex. 267.

Rebuttal — Instruments Under Seal. — Under the early New York statute, the presumption of payment after twenty years applies to sealed articles of agreement for the purchase of land, and such presumption could be rebutted only by evidence of payment of some part of the consideration or a written acknowledgment of a right of action, within the twenty years. Morey *v.* Farmers' L. & T. Co., 18 Barb. (N. Y.) 401; *s. c.*, 14 N. Y. 302.

32. **Presumption From Giving a Judgment Note.** — "It has been shown by the evidence that on the 12th of September, 1854, the plaintiff gave to the defendant a judgment note for $212, and that on the 24th of March, 1855, he gave the defendant a receipt for $1.07, in full of all accounts. And it is insisted by the defendant that the giving of the judgment note creates a legal *presumption* that the consideration for the land has been paid at or prior to its date. This is certainly true as a *general proposition*, and if this fact stood *alone*, without other circumstances, it would be entitled to great weight; as it would imply a settlement between the parties at that time, and that all claims and demands between them of inferior grade and dignity were included in it, and were extinguished by the security of a higher nature. It raises, however, at best, but a presumption, and as all presumptions of this character may be rebutted, it is not *necessarily* conclusive in this case." Callaway *v.* Hearn, 1 Houst. (Del.) 607.

33. **Presumption of Payment** after twenty years is merely a shield to a defendant and cannot be used in a court of equity for an affirmative, aggressive action; it is in the nature of a statute of limitations. Morey *v.* Farmers' L. & T. Co., 14 N. Y. 302; Lawrence *v.* Ball, 14 N. Y. 477 (relied upon to establish an equitable defense); Griswold *v.* Little, 13 Misc. 281, 34 N. Y. Supp. 703; and, see Brady *v.* Begun, 36 Barb. (N. Y.) 533.

34. Hawkins *v.* Gardner, 2 Sm.

b. *Conduct.* — The conduct and actions of the parties may be shown upon the issue of payment.[35]

C. RECITALS. — Recitals of payment in deeds and other instruments are not conclusive thereof and may be contradicted by parol.[36]

IV. REMEDIES OF THE PARTIES.

1. Specific Performance. — The specific performance of contracts is fully discussed elsewhere in this work.[37]

& G. 441, 65 Eng. Reprint 472. "A receipt or acknowledgment, contained in the body of the deed, is undoubtedly *prima facie* evidence of payment of the consideration money, but it is not conclusive. The fact of *actual* payment may be inquired into, and may be controverted, and it is competent for the plaintiff to show, by parol evidence, the non-payment of the consideration money mentioned in the deed. The acknowledgment, however, is considered sufficient evidence of the payment, until rebutted by showing the contrary." Callaway *v.* Hearn, 1 Houst. (Del.) 607.

35. See Austin *v.* Wilson, 50 Iowa 207.

Failure To Assert Claim. — "Appellant, holding the evidence of Sherman's indebtedness for the purchase money, while Sherman held only his bond or obligation to make title when the purchase money should be paid, executed a deed of conveyance, surrendered the evidence of debt, and, so far as we are informed, asserted no claim to the money or the land for seven or eight years. We think these combined facts presented a very strong *prima facie* case, which the appellant was required to overcome, before he could claim relief in the court below." Bryan *v.* Hendrix, 57 Ala. 387.

Certain Receipts in the handwriting of a third person were delivered to the vendee by the vendor at the time the contract for sale was delivered. *Held,* the receipts were admissible as evidence tending to show that he intended them to stand as his receipt for money paid on the contract, the act of delivery being *prima facie* an adoption of the receipt as his own. Mousseau *v.* Mousseau, 42 Minn. 212, 44 N. W. 193.

Repeated Requests for Payment. On the issue whether the purchase money had been paid prior to the execution of the deed, the fact that the grantor subsequently sent three different messages to the grantee requesting payment, to which no answer appears to have been made, will support a finding that payment was not made. Moore *v.* Moore's Admr., 30 Ky. L. Rep. 1370, 101 S. W. 358.

Substituted Payment. — Where the vendee, owing a balance on the purchase price, becomes insolvent and the vendor discharges the mortgage given by the vendee, and cancels the notes in consideration of a reconveyance by the vendee and an order on a third person for a specified amount, this amounts to a substituted payment and not to a rescission of the contract. Bush *v.* Abraham, 25 Or. 336, 35 Pac. 1066.

36. See article "DEEDS."

37. See article "SPECIFIC PERFORMANCE."

Burden of Proof. — Where defendant vendor seeks to justify a refusal to convey upon the ground that he cannot convey a good title and there is a clause in the contract excusing conveyance if the title is not good and cannot be made good, the burden is upon him to show that the title cannot be made good — in this case that the period of redemption from a tax sale has passed. Deakin *v.* Underwood, 37 Minn. 98, 33 N. W. 318.

Part Performance. — "Most of the evidence seems to have been acts tending to show a part performance of the contract, by the plaintiff;

2. Cancellation and Rescission. — The subject of the cancellation and rescission is also treated in another portion of this work.[38]

3. Remedies of Vendor. — A. LIEN. — a. *Creation.* — (1.) **Presumptions.** — In every case where the purchase price of land remains unpaid, upon principles of equity and good conscience the law presumes that it was the intention of the vendor to reserve a lien for the purchase price, in the absence of an express agreement to the contrary, or of circumstances from which such an agreement could be reasonably inferred.[39]

such as money paid, possession taken, improvements made, and money expended. To exclude evidence of this character, would be to say, that part performance will not take a case out of the statute of frauds; and whatever we might have been disposed to say, were this a new question, it is now much too late to countenance a discussion of it. The authorities are too numerous, and too overpowering for us to treat this as an open question." Annan *v.* Merritt, 13 Conn. 478; Veum *v.* Sheeran, 95 Minn. 315, 104 N. W. 135.

38. See articles "CANCELLATION OF INSTRUMENTS;" "RESCISSION."

39. *United States.* — Lewis *v.* Hawkins, 23 Wall. 119.

Alabama. — Hubbard *v.* Buck, 98 Ala. 440, 13 So. 364.

Arkansas. — Shall *v.* Biscoe, 18 Ark. 142.

California. — Baum *v.* Grigsby, 21 Cal. 173.

Florida. — McKeown *v.* Collins, 38 Fla. 276, 21 So. 103.

Illinois. — Moshier *v.* Meek, 80 Ill. 79; Wilson *v.* Lyon, 51 Ill. 166.

Iowa. — McDole *v.* Purdy, 23 Iowa 277.

Maryland. — Thompson *v.* Corrie, 57 Md. 197.

Mississippi. — Pitts *v.* Parker, 44 Miss. 247.

New Jersey. — Ogden *v.* Thornton, 30 N. J. Eq. 569.

Tennessee. — Green *v.* Demoss, 10 Humph. 371.

Texas. — Ransom *v.* Brown, 63 Tex. 188.

But see Ahrend *v.* Odiorne, 118 Mass. 261; Frame *v.* Sliter, 29 Or. 121, 45 Pac. 290; Philbrook *v.* Delano, 29 Me. 410.

Rule Stated. — "The lien of a vendor upon real estate sold, in cases where the purchase money has not been paid and no security taken therefor, stands upon the equitable presumption that it was not intended by the parties that one should part with and the other acquire the premises without payment of the purchase price. Franklin *v.* Hillsdale Land Co., 70 Ill. App. 297. 'Although an absolute conveyance be made, and no mortgage or other security taken, still in the hands of the vendee, or subsequent purchaser with notice, the vendor has a lien on the land for his money.' Dyer *v.* Martin, 4 Scam. 146; Croft *v.* Perkins, 174 Ill. 627. A vendor's lien is created in equity without an express agreement of the parties. It is an implied agreement existing between the vendor and vendee that the former shall hold a lien on the land for the payment of the purchase money. If the vendor does not rely on the lien such implied agreement is done away with and a court of equity will hold that the lien has been waived. A vendor's lien is waived if the vendor takes other security for the purchase money. It has been held that any act manifestly declaring an intention not to rely on the lien may defeat it or prevent it from attaching. Bloomstrom *v.* Dux, 175 Ill. 435. 'The burden of proof of the waiver rests upon the party alleging it.' Wilson *v.* Lyon, 51 Ill. 166-169. It must follow, we think, that if the vendor takes no security for the unpaid purchase money and does nothing that can be held to be a waiver or release of the lien in some form, and the right of no third party intervenes, then the lien continues. None of the authorities, so far as we are ad-

(2.) Burden of Proof. — The burden of establishing the contract out of which the alleged lien arose is upon the vendor.[40]

(3.) Facts To Be Shown. — (A.) CONVEYANCE. — The technical vendor's lien cannot arise in the absence of proof of a conveyance divesting the vendor of legal title and vesting it in the vendee.[41]

(B.) SALE OF REAL AND PERSONAL PROPERTY. — The vendor's lien is only allowed for the security of the purchase price where it is a

vised, go to the length of holding, as appellants contend, that the vendor must by some affirmative act *retain* a vendor's lien upon the land he sells." Wendell *v.* Pinneo, 127 Ill. App. 319.

In Mackreth *v.* Symmons, 15 Ves. 329, 33 Eng. Reprint 778, Lord Chancellor Eldon reviews the earlier English authorities exhaustively and states the principle to be that wherever a part of the purchase price remains unpaid there is an inference that the vendor's lien was retained, but that all of the attendant circumstances are to be considered for the purpose of arriving at the real intention of the parties.

"The vendor's lien exists in every case of a sale of land when the purchase price is not paid unless it be otherwise agreed between the parties. And the burden is upon the vendee to show that the vendor has waived it. Briscoe *v.* Bronaugh, 1 Tex. 330, 46 Am. Dec. 108; Burford *v.* Rosenfield, 37 Tex. 46. And this is so, although the vendor gives an absolute conveyance, reciting the receipt of the purchase money, yet if the purchase money be not in fact paid the vendor's lien subsists as between the vendor and vendee and all purchasers with notice that any of the purchase money is unpaid. McAlpin *v.* Burnett, 19 Tex. 498. This case further holds that the bringing of suit upon the debt, and taking judgment therefor, without adjudicating the lien, does not amount to a waiver of the same, but that a second action may be maintained to enforce the lien." Cecil *v.* Henry (Tex. Civ. App.), 93 S. W. 216.

"**As Early as 1814** this doctrine was recognized and established by the court of chancery in Garson *v.* Green, 1 Johns. Ch. 308. It was there held that a vendor has a lien on the estate sold for the purchase money while the estate is in the hands of the vendee, where there is no contract, express or implied, that the lien was not intended to be reserved. *Prima facie* the purchase money is a lien, and it rests upon the vendee to show the contrary. The death of the vendee does not alter or defeat the lien, nor does the taking of a promissory note affect it. If a part be paid, the lien is good for the residue, and the vendee is a trustee for that which remains unpaid. This decision has been followed in a long line of cases in this state, and the principle laid down must be regarded as conclusively settled." Hubbell *v.* Henrickson, 175 N. Y. 175, 67 N. E. 302.

40. Adams *v.* Adams, 127 Ala. 518, 29 So. 6.

41. McKinnon *v.* Johnson (Fla.), 45 So. 451; Dayton, etc. R. Co. *v.* Lewton, 20 Ohio St. 401. But see Mulky *v.* Karsell, 31 Ind. App. 595, 68 N. E. 689, *holding* that "the right of the vendor's lien does not depend upon the transfer of a perfect legal title, . . . nor is its conveyance to the person making the purchase essential thereto."

"Strictly speaking, a vendor's lien can attach only after conveyance of the premises by vendor to vendee, although a lien may attach to the estate as a trust, equally whether it be actually conveyed, or only be contracted to be conveyed." Morgan *v.* Dalrymple, 59 N. J. Eq. 22, 46 Atl. 664.

Where Bond for a Deed is given, and notes executed for the price, no lien arises, as the vendor retains the legal title. Lewis *v.* Shearer, 189 Ill. 184, 59 N. E. 580.

Completed Sale. — "It was said in Palmer *v.* Sterling, 41 Mich. 218,

known and certain sum, and where the sale is of real and personal property; for a gross consideration, no lien arises.[42]

(4.) Admissibility and Sufficiency. — (A.) INTENTION. — Although the question of a reservation of a lien by the vendor is a question of intention, such intention need not be expressly and specifically shown,[43] and if there is any doubt the lien will be held to have attached.[44]

220, 2 N. W. 24: 'The decisions in this state have followed the old rules in equity, whereby a vendor who had a claim for unpaid purchase money is allowed a lien on the land sold by him for its payment, where nothing is done to waive or lose it. . . . But all the authorities rest upon the basis that the land was actually sold for an agreed consideration, payable at all events, and payable as the purchase price. Unless there was a sale for a price, there could be no such relation as that of unpaid vendor and responsible purchaser. The lien can only exist as collateral to a debt which was a part of the transaction and created simultaneously with the sale.'" Shaw *v.* Tabor, 146 Mich. 544, 109 N. W. 1046.

42. Jones *v.* Ball, 94 Ala. 529, 10 So. 349; Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417; Stringfellow *v.* Ivie, 73 Ala. 209; Warner *v.* Bliven, 127 Mich. 665, 87 N. W. 49; Peters *v.* Tunell, 43 Minn. 473, 45 N. W. 867.

Rule Stated. — "The vendor's or grantor's lien is only permitted as security for unpaid purchase money, which must be a certain ascertained amount. The lien does not exist in behalf of any contingent, uncertain or unliquidated demand. . . . Under these authorities the claims for damages on account of unpaid rent and for decorating and heating, which were manifestly uncertain and unliquidated cannot be enforced under a vendor's lien. While it is true that specific articles of personal property may be substituted for cash as a part of the purchase price, if they are not delivered, in order to have a vendor's lien for the amount, they must in the contract have an agreed pecuniary value." Ross *v.* Clark, 225 Ill. 326, 80 N. E. 275.

Lien for Improvements. — Where the vendor claims a lien for improvements made by him, which the vendee had agreed to pay for as part of the purchase money, it is not enough for the vendor to prove the payment for the improvements; he must also show the value of the improvements made and that his payment was no more than their reasonable value. Grove *v.* Miles, 71 Ill. 376.

43. Carver *v.* Eads, 65 Ala. 190; Sims *v.* Nat. Com. Bank, 73 Ala. 248.

44. Hood *v.* Hammond, 128 Ala. 569, 30 So. 540; Moore *v.* Worthy, 56 Ala. 163; Cross *v.* Kennedy (Tex. Civ. App.), 66 S. W. 318; Brandenburg *v.* Norwood (Tex. Civ. App.), 66 S. W. 587.

Description of Lands Sold in Note. "One very important consideration in this case, throwing light upon the intention of the parties, is found in the fact that *the lands sold are described in the notes given for the purchase money.* In Bryant *v.* Stephens, 58 Ala. 636, it was held, that such a recital created conclusively, by contract, a charge on the land for the purchase money, in the nature of an equitable mortgage. We are not willing to follow the doctrine of this case, to this extent, but feel inclined to subject it to modification. The sounder and true principle, in such cases, perhaps, is, that where the lands are described in the note, it must be taken as a very strong implication of an intention to retain the vendor's lien, though falling short of such an express contract to charge the lands, as would constitute an equitable mortgage. In other words, it is a cogent fact, indicating an intention not to waive or abandon the vendor's lien, but to retain it. And we hold that the pre-

(B.) Recital of Payment. — Where there is a recital of payment in the deed, a *prima facie* case of payment of the purchase money is made out, and the evidence must be clear and satisfactory to establish a vendor's lien in the face of it.[45]

sumption is so strong, as to overcome and rebut the weaker presumption of waiver arising from the taking of personal security on the note for the purchase money. The taking of collateral or personal security is deemed, at most, as no more than a presumption of an intentional waiver of the lien, and not as conclusive. The theory is, that it indicates an intention to rest on such security, and to discharge the land. But, when the land is described in the note, this recital of the consideration must be regarded as evincing, at least impliedly, a strong intention of the parties that the vendor's lien shall be retained, and that the vendor does not rest upon the personal or collateral security taken, but upon the land itself." Tedder *v.* Steele, 70 Ala. 347.

Note Expressly Given for Balance of Purchase Money. — Question of waiver of lien is one of intention, and a recital in the note that it was given for the balance of the purchase money impliedly evinces a strong intention that the vendor's lien shall be retained. Hood *v.* Hammond, 128 Ala. 569, 30 So. 540.

On a sale and conveyance of land, part of the purchase-money being paid in cash, and the purchaser's individual note taken for the balance, a vendor's lien is presumptively retained, in the absence of an agreement to the contrary, or of attendant circumstances repelling such presumption; if the note recites that it is given for the unpaid balance of purchase money, and the purchaser is insolvent, these facts strengthen the presumption, and it is not overcome by the execution of the conveyance to his wife and children; nor is the uncorroborated testimony of the purchaser's wife, after his death, sufficient to establish an express agreement to waive the vendor's lien, in the face of these and other facts inconsistent with it. Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273.

Recital of Another Security. Where the deed conveying the land to vendee recited a cash consideration and reserved no lien; and the note given did not even disclose on its face that it had been given for unpaid purchase money of the land, but recited that rent on a certain farm was its security, the implied lien on the land will not be presumed, but the burden rests upon the vendor to show that it too was reserved. Weeks *v.* Barton (Tex. Civ. App.), 31 S. W. 1071.

45. *Arkansas.* — Scott *v.* Orbison, 21 Ark. 202; Holman *v.* Patterson's Heirs, 29 Ark. 357.

Maryland. — Thompson *v.* Corrie, 57 Md. 197.

Mississippi. — Gordon *v.* Manning, 44 Miss. 756.

Texas. — Cuney's Exr. *v.* Bell, 34 Tex. 177.

Wisconsin. — Tobey *v.* McAllister, 9 Wis. 463; Blair *v.* Dockery, 24 Wis. 502.

"When the conveyance recites payment of the consideration, a vendor's lien should not be enforced on vague or doubtful testimony. The proof should be of such character, that the court may satisfactorily determine the amount, as well as the fact of the unpaid purchase money." Jenkins *v.* Mathews, 80 Ala. 486, 2 So. 518.

Rule Stated. — "The vendor's lien does not depend on any special agreement nor specific intention of the parties. It arises on equitable principles from the contract of sale and a conveyance, and a refusal or failure to pay the agreed price. While the settled rule is, that a recital of payment in the deed does not waive, nor destroy the lien, which equity creates for the protection of the vendor, such recital is *prima facie* evidence of payment, requiring complainant to explain or

(C.) Best Evidence. — When the note given for the purchase money does not upon its face disclose all of the facts upon which the alleged lien is based, the deed must be introduced as the best evidence of the facts.[46]

(D.) Question of Fact. — Whether the facts shown are sufficient to establish the lien is a question for the jury.[47]

b. *Waiver.* — **(1.) Burden of Proof.** — Where the purchase money or any part of it remains unpaid the burden is upon the vendee to prove either that there was no intention on the part of the vendor to reserve a lien in the first place,[48] or that any lien which may have

disprove. Also, the recital of a particular consideration, is *prima facie* evidence that such is the real consideration, and casts on defendants the *onus* to show, that something other than money was agreed to be taken in payment. Though it is not permissible to show a consideration different in kind from that expressed, parol evidence is admissible to show when the deed recites a valuable consideration, that something of value, other than that recited, was agreed to be, and was received. The limitation is, that the character of the consideration recited and of that proved shall not vary in kind, but may vary in degree." Kelly *v.* Karsner, 81 Ala. 500, 2 So. 164, and see Dowling *v.* McCall, 124 Ala. 633, 26 So. 959; Campbell *v.* Baldwin, 2 Humph. (Tenn.) 248; Benedict *v.* Benedict, 85 N. Y. 625; Dodge *v.* Evans, 43 Miss. 570; Crampton *v.* Prince, 83 Ala. 246, 3 So. 519; Wilson *v.* Lyon, 51 Ill. 166.

46. "The note showed upon its face that it was given for the purchase money of the lotes described in it, purchased by appellant from appellee; thus showing a vendor's lien independent of the acknowledgment of it contained therein. It was original evidence, and as good evidence of the vendor's lien as the deed. It is only when the note does not in and of itself show all the facts constituting the lien, and that are necessary to a decree of foreclosure, that it is necessary to introduce the deed as the best evidence of the facts constituting the lien." Behrens *v.* Dignowitty, 4 Tex. Civ. App. 201, 23 S. W. 288.

47. Houston *v.* Dickson, 66 Tex. 79, 1 S. W. 375.

48. *England.* — Hughes *v.* Kearney, 1 Sch. & L. 132, 9 R. R. 30.

Alabama. — Tedder *v.* Steele, 70 Ala. 347.

California. — Selna *v.* Selna, 125 Cal. 357, 58 Pac. 270.

Illinois. — Wilson *v.* Lyon, 51 Ill. 166.

Michigan. — Dunton *v.* Outhouse, 64 Mich. 419, 31 N. W. 411. See Curtis *v.* Clarke, 113 Mich. 458, 71 N. W. 845; Sears *v.* Smith, 2 Mich. 243.

New York. — Seymour *v.* McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; Dubois *v.* Hull, 43 Barb. 26.

Tennessee. — Sehorn *v.* McWhirter, 8 Baxt. 201; Campbell *v.* Baldwin, 2 Humph. 248; Anthony *v.* Smith, 9 Humph. 508.

Generally speaking, the lien exists and the burden of proof is upon the purchaser to establish that in the particular case it has been intentionally displaced or waived by the consent of the parties. If under the circumstances it remains in doubt, then the lien attaches. Fenter *v.* McKinstry, 91 Ill. App. 255; Dubois *v.* Hull, 43 Barb. (N. Y.) 26.

"It has been often adjudged in this court that, as between vendor and vendee a lien results or is implied, without an express reservation. It springs out of the transaction, and this equity of the vendor can only be displaced by some affirmative act on his part. The onus of proving its waiver or abandonment is on the vendee." Pitts *v.* Parker, 44 Miss. 247.

"**The Rule** which prevails in this

arisen under the circumstances has subsequently been waived.[49]

(2.) Admission and Sufficiency. — (A.) In General. — Since the question of waiver of a lien is a matter depending upon the intention of the vendor, the conduct of the parties and the circumstances surrounding the transaction may be shown.[50]

state is, that in the sale of land where the purchase money or any part remains unpaid, the law presumes the existence of a vendor's lien, unless the terms of the contract or the attending circumstances furnish satisfactory evidence, that the parties did not intend to reserve the lien, and the burden is on him, who asserts the waiver or non-existence of the lien. Crampton *v.* Prince, 83 Ala. 246, 3 So. 519; Pylant *v.* Reeves, 53 Ala. 132; Carver *v.* Eads, 65 Ala. 190." McLean *v.* Smith, 108 Ala. 533, 18 So. 662.

Vendee a Trustee. — "In respect to the unpaid consideration money, the vendee is held to be a trustee for the vendors. *Prima facie* the lien exists without any special agreement for that purpose, and it remains with the purchaser to show that from the circumstances of the case, it results that the lien was not intended to be reserved." Vandoren *v.* Todd, 3 N. J. Eq. 397.

49. Hays, Admr. *v.* Horine, 12 Iowa 61, 79 Am. Dec. 518; Owen *v.* Bankhead, 76 Ala. 143; Crampton *v.* Prince, 83 Ala. 246, 3 So. 519; Noel *v.* Hays, 19 Ky. L. Rep. 1311, 43 S. W. 432.

Waiver Defensive Matter. — "The waiver of the lien which arises in equity in favor of a vendor of real estate for unpaid purchase money is defensive matter, and the burden of proving it rests upon the defendant unless it otherwise appears." Lucas *v.* Wade, 43 Fla. 419, 31 So. 231, *citing* Seymour *v.* McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94.

"It was not necessary to appellant's cause of action that he negative the existence of facts amounting to a waiver of the lien." Mulky *v.* Karsell, 31 Ind. App. 595, 68 N. E. 689; Lord *v.* Wilcox, 99 Ind. 491.

50. *Alabama.* — Hightower *v.* Rigsby, 56 Ala. 126.

Arkansas. — Neal *v.* Speigle, 33 Ark. 63.

Illinois. — Moshier *v.* Meek, 80 Ill. 79.

Indiana. — Anderson *v.* Donnell, 66 Ind. 150.

Iowa. — Stuart *v.* Harrison, 52 Iowa 511, 3 N. W. 546.

Maryland. — McGonigal *v.* Plummer, 30 Md. 422.

Minnesota. — Selby *v.* Stanley, 4 Minn. 65.

New Hampshire. — Buntin *v.* French, 16 N. H. 592.

New York. — Hare *v.* Van Deusen, 32 Barb. 92.

Texas. — Parker County *v.* Sewell, 24 Tex. 238.

Virginia. — Redford *v.* Gibson, 12 Leigh 332.

"The equitable lien which the law implies, in the absence of an express lien, or other remedy, is for the benefit of the grantor of land, and it may be waived. Such waiver may be expressly made, or it may be inferred from facts and circumstances. Any conduct on the part of the grantor tending to show that he does not rely solely upon the legal implication in his favor may operate as a waiver of the grantor's lien." McKinnon *v.* Johnson (Fla.), 45 So. 451.

"Any act or declaration of the vendor which shows that he does not rely upon or has abandoned the lien, operates to destroy it or prevent its attaching to the land." Fenter *v.* McKinstry, 91 Ill. App. 255. See Moshier *v.* Meek, 80 Ill. 79.

Whole Transaction Considered. "The whole transaction between the parties must be considered, and if from the transaction as a whole, it clearly appears the vendor trusted exclusively to the personal responsibility of the vendee, and did not look to the lands, the existence of the lien is repelled." Stringfellow *v.* Ivie, 73 Ala. 209. See Coster *v.* Bank of Georgia, 24 Ala. 37.

Rule Stated. — "The lien which equity, on principles of natural jus-

(B.) Taking of Other Security. — Proof that the vendor accepted the unsecured note of the vendee will not establish a waiver of his lien.[51] But where it is shown that distinct and independent security was taken, a waiver will be inferred whether such security is collateral security of the vendee[52] or the obligation of a third per-

tice, creates as security for the purchase price of land sold and conveyed, is the subject of waiver, express, or implied from the acts of the parties. Generally the lien will be regarded as waived if the grantor accepts any distinct and independent security. The authorities vary in the application of the rule to particular facts, and it would be difficult to formulate a general definition, specific, and yet comprehensive enough to include all acts which will operate to displace the lien. Ordinarily this result is produced by the acceptance of the note or bond of a stranger or of the grantee, with personal security, or with a mortgage on other land, or a pledge of stock or other personal property. There are cases in which no one of several acts is, of itself, sufficient. In such cases all the facts and circumstances should be considered, and, if it appears that the vendor did not intend to look to the land, but to rely on a substituted, independent security, or on the personal responsibility of the vendee, the presumption is rebutted, and the retention of the lien repelled." Acree *v.* Stone, 142 Ala. 156, 37 So. 934.

Intention Controlling Factor in question of whether a vendor's lien was waived. Maas *v.* Tacquard's Exrs., 33 Tex. Civ. App. 40, 75 S. W. 350.

Failure To Rely Through Ignorance of the Law — No Waiver. "It may be waived by such facts as show that the seller relies on other security or relinquishes his right to the security which the law gives him; but the absence of knowledge that the law gives such a security or a mere secret intention not to claim it, does not affect the right." Houston *v.* Dickson, 66 Tex. 79, 1 S. W. 375.

Novation. — Where a novation occurs, the original lien is destroyed. Williams *v.* McCarty, 74 Ala. 295.

Notes as the Consideration. *Held*, waived where it appeared that the consideration was certain notes — and not money evidenced by the notes. Walton *v.* Young, 132 Ala. 150, 31 So. 448.

51. *Arkansas.* — Dowdy *v.* Blake, 50 Ark. 205, 6 S. W. 897.

California. — Baum *v.* Grigsby, 21 Cal. 172.

Indiana. — Conlee *v.* Conlee, 87 Ind. 249.

Iowa. — Zook *v.* Thompson, 111 Iowa 463, 82 N. W. 930; Bank *v.* Gifford, 79 Iowa 300, 44 N. W. 558.

Michigan. — Sears *v.* Smith, 2 Mich. 243; Lyon *v.* Clark, 132 Mich. 521, 94 N. W. 4.

Missouri. — Winn *v.* Lippincott Inv. Co., 125 Mo. 528, 28 S. W. 998; Majors *v.* Maxwell, 120 Mo. App. 281, 96 S. W. 731; Eubank *v.* Finnell, 118 Mo. App. 535, 94 S. W. 591.

New Jersey. — Vandoren *v.* Todd, 3 N. J. Eq. 397.

Where a lien exists on land, the taking of a new lien to secure the debt does not waive the first unless that appears to be the intention. Seeligson *v.* Mitcham, 74 Tex. 571, 12 S. W. 237.

52. Parker County *v.* Sewell, 24 Tex. 238; Faver *v.* Robinson, 46 Tex. 204. See the following cases:

United States. — Gilman *v.* Brown, 1 Mason 191, 212, 10 Fed. Cas. No. 5,441.

Alabama. — Carroll *v.* Shapard, 78 Ala. 358; Foster *v.* Athenaeum, 3 Ala. 302; Walker *v.* Carroll, 65 Ala. 61.

California. — Avery *v.* Clark, 87 Cal. 619, 25 Pac. 919; Lewis *v.* Covillaud, 21 Cal. 178.

Illinois. — Ilett *v.* Collins, 103 Ill. 74.

Indiana. — Gilbert *v.* Bakes, 106 Ind. 558, 7 N. E. 257; Scott *v.* Edgar (Ind. App.), 60 N. E. 468.

son.[53] These facts are not conclusive proof of waiver, but may be rebutted.[54]

(C.) Taking Note of a Third Person. — Taking note of a third person in payment evidences a waiver of the lien by the vendor.[55]

Maryland. — McGonigal *v.* Plummer, 30 Md. 422.

Ohio. — Follett *v.* Reese, 20 Ohio 546.

Texas. — Cresap *v.* Minor, 63 Tex. 485; *citing* Ellis *v.* Singletary, 45 Tex. 27.

Trust Deed. — Taking a trust deed was held to be a waiver of the vendor's lien. Hunton *v.* Wood, 101 Va. 54, 43 S. E. 186.

Mortgage. — Where a personal collateral security as a pledge or mortgage is taken, the lien does not exist. Spears *v.* Taylor, 149 Ala. 180, 42 So. 1016.

53. Personal Surety. — Taking the purchaser's note with surety for the purchase money is presumptively a waiver. Tedder *v.* Steele, 70 Ala. 347; Walker *v.* Carroll, 65 Ala. 61; Donegan *v.* Hentz, 70 Ala. 437; Griffin *v.* Blanchar, 17 Cal. 71; Richards *v.* Leaming, 27 Ill. 431; Fonda *v.* Jones, 42 Miss. 792; Follet *v.* Reese, 20 Ohio 546.

Although a purchaser's note, with surety, recites that it was given for the purchase money of land, the vendor's lien is waived if this recital is made as a mere inducement to an agreement, also contained in said note, that the purchaser should have the right to pay off any lien which might exist on the land, and hold the amount so paid as a setoff against said note. Hammet *v.* Stricklin, 99 Ala. 616, 13 So. 573.

Illegal Surety. — Lien not waived by the fact that vendee's wife signs the note as security, she being prohibited by statute from being security for her husband — nor by the fact that the note contains a waiver of exemptions. Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756.

54. Coit *v.* Fougera, 36 Barb. (N. Y.) 195; Tobey *v.* McAllister, 9 Wis. 463; Gilbert *v.* Bakes, 106 Ind. 558, 7 N. E. 257.

Presumption From Taking Independent Security, Rebuttable. — But the question of waiver, it has been held, is one of intention and the burden of proof is on the vendee to establish in the particular case that the lien has been intentionally displaced, or waived, by consent of the parties, express or implied. 'If it remain in doubt, then the lien must be held to attach.'— Tedder *v.* Steele, 70 Ala. 347, 351, citing 2 Story's Eq. Jur. § 1224; 1 Perry on Trusts, § 236. In respect to the burden of proof it has also been held that 'the burden of proof is, in the first instance, on the party asserting a waiver of the lien; but, when it is shown that a distinct or independent security, sufficient to operate as a waiver, has been taken and accepted, the onus is shifted on the vendor to prove an understanding or agreement for its reservation.'— Jackson *v.* Stanley, 87 Ala. 270, 6 South. 193. While it is true that the note upon which the vendor's lien is sought to be enforced in the case at bar has upon it a personal surety, which fact evidences the waiver of the lien, it is also true that the note contains these recitals: 'It is understood that this note is given in part payment on the S. A. Spears land, better known as the "W. M. Sheppard Place."' Immediately following the recitals quoted is a description of the land by the government subdivisions. In this state of the case the rule is that such recitals are cogent facts indicating an intention not to waive or abandon the vendor's lien, but to retain it — so cogent, and the presumption so strong, as to overcome and rebut the weaker presumption of waiver arising from the taking of personal security on the note for the purchase money. . . . So it would seem that in the instant case the burden of proof remains with the vendee to establish that the lien has been intentionally waived. Tedder *v.* Steele, supra." Spears *v.* Taylor, 149 Ala. 180, 42 So. 1016.

55. Spence *v.* Palmer, 115 Mo.

(D.) Action on the Note. — Bringing an action on the purchase money note and obtaining judgment is not a waiver of the lien.[56]

(E.) Weight of Evidence. — The evidence to establish a waiver must be clear and convincing.[57]

(3.) Question of Fact. — The waiver of a vendor's lien is a question of fact for the jury unless the evidence is clear and undisputed.[58]

c. *Actions To Foreclose.* — **(1.) Burden of Proof.** — (A.) Fraud. Fraud or misrepresentation may be a defense to an action to foreclose a vendor's lien,[59] but it must be alleged in the answer[60] and the burden of proving it is upon the party relying upon it.[61]

(B.) Defective Title. — The burden of proof is upon the vendee in possession who alleges a defective title as a defense to an action for foreclosure of a vendor's lien.[62]

(C.) Payment. — The burden of proving payment of the purchase price is upon the vendee.[63]

(D.) Abatement. — The vendee has the burden of showing a de-

App. 76, 90 S. W. 749; Winn *v.* Lippincott Inv.. Co., 125 Mo. 528, 28 S. W. 998; Cresap *v.* Manor, 63 Tex. 485; Kendrick *v.* Eggleston, 56 Iowa 128, 8 N. W. 786; Sears *v.* Smith, 2 Mich. 243.

56. Chapman *v.* Lee, 64 Ala. 483; Dowdy *v.* Blake, 50 Ark. 205, 6 S. W. 897; Palmer *v.* Harris, 100 Ill. 276; Nutter *v.* Fouch, 86 Ind. 451; Zeigler *v.* Valley Coal Co., 150 Mich. 82, 113 N. W. 775; Waldrom *v.* Zacharie, 54 Tex. 503; Howard *v.* Herman, 9 Tex. Civ App. 79, 29 S. W. 542.

57. Zeigler *v.* Valley Coal Co., 150 Mich. 82, 113 N. W. 775; Dunton *v.* Outhouse, 64 Mich. 419, 31 N. W. 411; Curtis *v.* Clarke, 113 Mich. 458, 71 N. W. 845; Zook *v.* Thompson, 111 Iowa 463, 82 N. W. 930.

58. "**In the Second Place**, it is argued, that the abandonment of the vendor's lien is a question of intention, which should be left to the jury. Admit it. The law is, that the waiver may be actual or implied. But whether the uniting of other considerations in the same note is an implied waiver, is a question of law, just as much as whether taking other and additional security amounts to a waiver. The facts being admitted, the law arising out of any given state of facts, is to be decided by the courts." Mims *v.* Lockett, 23 Ga. 237, 68 Am. Dec. 521.

59. Newton *v.* Terry (Ky.), 22 S. W. 159; Orr *v.* Goodloe, 93 Va. 263, 24 S. E. 1014.

60. Claflin *v.* Harrington, 23 Tex. Civ. App. 345, 56 S. W. 370.

61. Joseph *v.* Seward, 91 Ala. 597, 8 So. 682; Fleming *v.* Kerns, 37 W. Va. 494, 16 S. E. 600.

62. Bennett *v.* Pierce, 50 W. Va. 604, 40 S. E. 395; Simmons *v.* Bailey, 105 Tenn. 152, 58 S. W. 277. But see Willis *v.* Lockett (Tex. Civ. App.), 26 S. W. 419.

Eviction. — Burden is upon the defendant vendee alleging a failure of title, in an action on a note and to foreclose a vendor's lien, to show legal eviction. Wilson *v.* Moore (Tex. Civ. App.), 85 S. W. 25.

In an action to enforce a lien there is a presumption that the instrument creating the lien did not authorize a recovery of damages for land lost unless eviction by paramount title be shown. Fields *v.* Fields, 16 Ky. L. Rep. 534, 29 S. W. 322.

63. Tillar *v.* Clayton, 76 Ark. 405, 88 S. W. 972.

Presumption. — Where the vendee abandoned possession soon after acquiring it, and the vendor returned, and no claim was made by the vendee or his heirs for nearly forty years, there is a presumption that the purchase money notes given by the vendee were not paid. Evans *v.*

ficiency in quantity entitling him to an abatement of the purchase price.[64]

(2.) Identification of Land Sold. — In an action on notes and to foreclose a vendor's lien, proof must be made that the notes in issue were given in payment for the particular land upon which the lien is claimed.[65]

d. *Express Lien.* — An express lien may be created by the parties either in place of or in addition to the implied vendor's lien.[66] Such a lien must be evidenced by a writing.[67]

B. Action for Purchase Money. — a. *Matters Forming the Basis of the Cause of Action.* — **(1.) Tender of Deed. — How Proved.** Where the covenants are mutual and dependent, performance or an offer of performance by the vendor by tendering a deed must be shown to put the vendee in default and to entitle the vendor to recover the purchase money.[68] But where the covenants are inde-

Ashe (Tex. Civ. App.), 108 S. W. 398.

64. Ward *v.* Moore, 60 W. Va. 615, 55 S. E. 743.

65. Clements *v.* Motley, 120 Ala. 575, 24 So. 947.

"Before a decree foreclosing the lien claimed can be rendered it must be proved that the note was given for the purchase money of the land described in the decree. If the note had contained a full description of the land it would have been sufficient to have followed it;" otherwise other evidence is necessary. Daugherty *v.* Eastburn, 74 Tex. 68, 11 S. W. 1053.

Prima Facie Evidence. — In an action to enforce a vendor's lien expressly reserved in notes, which themselves show that they were given for the purchase price of land fully described in them, the deed need not be introduced to show the description, in order to enable the court to order a foreclosure. Fant *v.* Wickes, 10 Tex. Civ. App. 394, 32 S. W. 126.

Where a note offered in evidence corresponded with that described in the petition and recited in the deed, this was *prima facie* evidence that it was the same which was given for the land. Steinbeck *v.* Stone, 53 Tex. 382.

Sufficiency of Proof. — Where one witness testified to the acknowledgment of the deceased vendee that the notes in issue were given for land in Mississippi, and, as the witness thought, in the county of Panola, and there was no evidence of any other transactions between the parties, it was held to be sufficiently proved that the notes were given for the purchase of this particular land. Glasscock *v.* Robinson, 13 Smed. & M. (Miss.) 85.

66. Although the purchase price has been paid, the parties may create a lien on the land to protect a general account, and their intention to do so may appear from the words of the note and deed. Wright *v.* Campbell, 82 Tex. 388, 18 S. W. 706.

67. Stringfellow *v.* Ivie, 73 Ala. 209.

68. *Arkansas.* — Thomas *v.* Lanier, 23 Ark. 639; Price *v.* Sanders, 39 Ark. 306.

California. — Naftzger *v.* Gregg, 99 Cal. 83, 33 Pac. 757; Rhorer *v.* Bila, 83 Cal. 51, 23 Pac. 274.

Illinois. — Baston *v.* Clifford, 68 Ill. 67.

Indiana. — Best *v.* Ellsworth, 4 Ind. 261.

Kentucky. — Handley *v.* Chambers, 4 Bibb 7.

Massachusetts. — Kane *v.* Hood, 13 Pick. 281.

Missouri. — Pershing *v.* Canfield, 70 Mo. 140; Dietrich *v.* Franz, 47 Mo. 85; Lumaghi *v.* Abt, 126 Mo. App. 221, 103 S. W. 104.

New Jersey. — Shinn *v.* Roberts, 20 N. J. L. 435.

New York. — Parker *v.* Parmele, 20 Johns. 130; Smith *v.* Smith, 83 Hun 381, 31 N. Y. Supp. 924.

pendent, the vendor need not aver a tender where the first act was to be performed by the vendee.[69] A tender may be proved by circumstantial evidence.[70]

(2.) Performance of Conditions. — Where, by the contract, specific acts are to be performed by the vendor, or the vendee stipulated for certain conditions to be met, the vendor must show a compliance with such conditions.[71]

Oregon. — Frink *v.* Thomas, 20 Or. 265, 25 Pac. 717; Guthrie *v.* Thompson, 1 Or. 353.

Pennsylvania. — Brown *v.* Metz, 5 Watts 164; Mervin *v.* M'Fadden, 2 Watts 132.

Texas. — Walling *v.* Kinnard, 10 Tex. 508.

Wisconsin. — Davidson *v.* Van Pelt, 15 Wis. 341.

Proof Under Plea of Covenant Performed "Absque Hoc." — The plea of covenants performed *absque hoc* undoubtedly put the plaintiffs upon showing performance on their part, and they did so by showing that they had put the defendant into possession of the premises they had agreed to sell him. This was all they were bound to do until payment of purchase money. The plea called on the plaintiffs for nothing more, and this was shown. It did not put in issue the plaintiff's title. Hite *v.* Kier, 38 Pa. St. 72.

Reasonable Time. — The tender of the vendor must be shown to have been made within a reasonable time. Saunders *v.* Curtis, 75 Me. 493.

Waiver of a tender must be proved — it will not be presumed. Mervin *v.* McFadden, 2 Watts (Pa.) 132.

Reconveyance by Vendor — Tender Necessary. — Where the vendor agreed to take a reconveyance from the vendee at a certain time, in an action on a note given for the purchase money, the burden was on the defendant vendee to show a tender of a deed within the time specified, and the fact that plaintiff would not have been able to comply with the contract will not excuse the want of tender. Pursley *v.* Good, 94 Mo. App. 382, 68 S. W. 218.

69. Manning *v.* Brown, 10 Me. 49; Paine *v.* Brown, 37 N. Y. 228.

Where the Purchase Price is to be paid upon a certain day and a conveyance executed at a subsequent date, an action may be maintained for the purchase money subsequent to the date of payment without making or offering to make a deed. Broughton *v.* Mitchell, 64 Ala. 210; Sparta Bank *v.* Agnew, 45 Wis. 131; Battey *v.* Beebe, 22 Kan. 81; Loud *v.* Pomona L. & W. Co., 153 U. S. 564; Mayers *v.* Rogers, 5 Ark. 417; Adams *v.* Wadhams, 40 Barb. (N. Y.) 225.

"It Has Been Uniformly ruled in this state that a contract of this sort, wherein the purchaser agrees to pay the whole purchase price absolutely in consideration of merely a promise by the grantor that after such complete payment and upon demand a conveyance of the land shall be made, the former's liability is absolute at law, and that no tender of conveyance, nor showing of ability to convey, need either precede or accompany the recovery of the purchase price." Foster *v.* Lowe, 131 Wis. 54, 110 N. W. 829.

Installments. — The vendor may sue for each installment as it becomes due. Sparta Bank *v.* Agnew, 45 Wis. 131.

70. See article "Tender."

A Tender is not proved by evidence that the agent of the vendor told the vendee that he had the deed in his pocket, but does not produce it. Lefferts *v.* Dolton, 217 Pa. St. 299, 66 Atl. 527.

Tender of the deed is proved by the testimony of a witness that he received the deed from the plaintiff's brother and tendered it to the defendant; the fact that the deed is found in the hands of the plaintiff after being in the hands of his brother tends to show that the latter had it merely for the purpose of making the tender. Kerney *v.* Gardner, 27 Ill. 162.

71. Epps *v.* Waring, 93 Ga. 765,

b. *Defenses.* — (1.) **Fraud.** — (A.) In General. — The defendant vendee showing fraud in an executory contract for the sale of land has a complete defense to an action for the purchase price.[72] But where the contract is executed, or partly executed, he can only recoup himself for the actual damages, unless the land was absolutely worthless or unless he has returned or offered to return the property.[73]

20 S. E. 645; Hudson *v.* Gibbony, 28 Kan. 612; Sewell *v.* Willcox, 5 Rob. (La.) 83; Fortier *v.* Burthe, 19 La. Ann. 510.

Clearing Title. — Where the vendor conveyed a clouded title, agreeing to clear it before the purchase money notes should be due, in an action on such notes he has the burden of proving that the title is clear. Zimmerman *v.* Owen, 34 Tex. Civ. App. 31, 77 S. W. 971.

Determination of Amount of Existing Liens. — Where vendor sues to recover the purchase price, alleging that a certain price was agreed upon from which all existing liens were to be deducted, the burden was on him to show the amount of the existing liens. And where the contract admitted that there were certain liens, the plaintiff was bound to prove that there were no others, although this involved proof of a negative, since this was an essential allegation of his case. Algie *v.* Wood, 11 Jones & S. (N. Y. Super.) 46.

Acceptance of Conveyance. — In an action to recover the purchase price of land alleged to have been purchased and conveyed, the acceptance of the conveyance must be shown by the plaintiff. Beckrich *v.* North Tonawanda, 57 App. Div. 563, 67 N. Y. Supp. 992.

Actual Conveyance. — Where note was given in consideration of conveyance of two lots of land, plaintiff suing on the notes has the burden of proving that the lots were conveyed. Way *v.* Simmons, 8 Blackf. (Ind.) 559.

Presumption of Satisfaction With Conveyances Accepted. — In an action to recover part of the purchase money of a sale of land for which notes had been given, the court would presume that the grantees were satisfied with the conveyances accepted by them, and the vendor was not bound to prove the execution and delivery of proper conveyances. Lyman *v.* Bank of U. S., 12 How. (U. S.) 225.

72. Myers *v.* Estell, 47 Miss. 4; Kelly *v.* Pember, 35 Vt. 183; Grimes *v.* Williams, 16 Ill. 47; Parks *v.* Burbank, 58 Iowa 707, 12 N. W. 729.

Fact or Opinion. — Representations as to the choice location of lots and as to their market value held matters of opinion; but representations that a cable car line was being extended and would pass within a block of the lots, and that railroad shops were being built nearby, were statements of fact. Gate City Land Co. *v.* Heilman, 80 Iowa 477, 45 N. W. 760.

Statement that the land contained the same quality of plaster rock as adjacent land, and that it could be found at a certain depth, held a statement of a fact and not an opinion. Norman *v.* Harrington, 118 Mich. 623, 77 N. W. 242.

Misdescription of Boundaries. Defendant in an action on a bond for purchase money may show that the vendor fraudulently misdescribed to him the boundaries of the tract subsequently conveyed. Stubbs *v.* King, 14 Serg. & R. (Pa.) 206.

Misrepresentation as to Quality. Where in an agreement to convey land there was a stipulation that a house was to be completed before settlement, subsequent acceptance of the deed is evidence of conceded completion but is not conclusive of the fact of completion in the manner agreed upon by the parties, and in an action for the purchase price the vendee may show that false representations were made to him as to the quality of the materials and workmanship. Stewart *v.* Trimble, 15 Pa. Super. 513.

73. Van Epps *v.* Harrison, 5 Hill (N. Y.) 63; Spurr *v.* Benedict, 99

(B.) Burden of Proof. — The vendee asserting and relying upon fraud as a defense has the burden of proving it.[74]

(C.) Admissibility and Weight. — Any relevant evidence is admissible to prove the existence of the fraud alleged.[75] Parol and circumstantial evidence may establish it,[76] but the proof must be clear and satisfactory in every case.[77]

Mass. 463; Jackson *v.* Jackson, 47 Ga. 99.

Conveyance Taken After Discovery of the Fraud. — Where the vendee accepts a conveyance after having become cognizant of the fraud he is bound to carry out the contract on his part. Vernol *v.* Vernol, 63 N. Y. 45.

74. Plaintiff Vendors gave a title bond; in an action to recover on a note given by the vendees, the burden was held to be upon the plaintiffs to prove that the title bond did not correctly represent the agreement — through fraud or mistake; and the burden was upon the defendants to show fraud or mistake in order to prove a parol agreement that the note should not be paid unless they obtained all of the property. Begley *v.* Combs, 27 Ky. L. Rep. 1115, 87 S. W. 1081.

Reliance. — Defendant alleging misrepresentations as to the location of the land must prove that he relied upon them and was misled. Sulkin *v.* Gilbert, 218 Pa. St. 255, 67 Atl. 415.

Injury. — Fraud will not be presumed to have injured the purchaser but he must prove the injury resulting. Missouri Val. L. Co. *v.* Bushnell, 11 Neb. 192, 8 N. W. 389.

75. As to the proof of fraud in general, see article "Fraud," and also see *supra*, I, 5.

Evidence of Value — When Inadmissible. — In an action on a bond to purchase land, testimony that the land was of trifling value compared with the price contracted for, is inadmissible unless the obligor also proves that the obligee made fraudulent representations in relation to the same. Robinson *v.* Heard, 15 Me. 296; Hessner *v.* Helm, 8 Serg. & R. (Pa.) 178.

In an action for the purchase-money, where a counterclaim is put in demanding rescission for fraud, evidence as to the value of the land is immaterial; it would have been material, however, had the counterclaim been to recover damages for the deceit. Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533.

Representations by the Agent of the plaintiff to the defendant are admissible on the issue of fraud. Hammatt *v.* Emerson, 27 Me. 308 (fraud discussed).

Advertisement. — Where fraud is alleged, an advertisement containing the alleged misrepresentations which appeared two years before the sale and was not shown to have been seen by the defendants was inadmissible. Clawson *v.* Lowry, 7 Blackf. (Ind.) 140.

Price paid by the vendor for the land may be shown. Mormon *v.* Harrington, 118 Mich. 623, 77 N. W. 242.

Representation to Third Person. Where defendant alleged a fraudulent misrepresentation as to the amount of an incumbrance on the land, evidence that plaintiff told a third person that the incumbrance was of a less amount was admissible — the plaintiff having told defendant that such third person was willing to pay a stated price for the land. Adcock *v.* Creighton, 27 Tex. Civ. App. 243, 65 S. W. 42.

76. Condict *v.* Brown, 21 Tex. 422; Means *v.* Brickell, 2 Hill (S. C.) 657.

77. Walton *v.* Caldwell, 5 Pa. Super. 143; Gordon *v.* Parmelee, 15 Gray (Mass.) 413.

Mistake. — Mistake at the time of closing the transaction alleged by the vendee, in that $1000 paid for an option was not credited upon the purchase price, must be established by the vendee by satisfactory evidence, since the presumption would be strong that the transaction was correctly closed and that the note which was given after deliberate calcula-

(2.) Defective Title. — (A.) EXECUTED CONTRACT. — In the absence of fraud, a purchaser who has received a conveyance and entered into possession cannot defend upon the ground of a defective title, without proving that he has suffered an actual eviction.[78] But where

tions would express the proper amount due and unpaid at the time. Bond *v.* Montague (Tenn.), 54 S. W. 65.

"It is well settled that mistakes of the kind alleged by plaintiffs in error may be corrected on sufficient proof; hence the only question that can arise upon this point is as to the *sufficiency of the proof*, and upon this point the authorities are well agreed, if not as to the precise language, yet as to the effect and substance of the rule. In the case of Gillespie *v.* Moon, Chancellor Kent, after a full and careful review of the previous decisions, concludes by saying: 'The cases all concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, does it satisfy the mind of the court?' (Gillespie *v.* Moon, 2 John. Chancery Cases 585.) And in the subsequent cases of Lyman *v.* The U. S. Insurance Co., the learned Chancellor says: 'The cases which treat of this head of equity jurisdiction, require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court.'" Stille *v.* McDowell, 2 Kan. 369.

78. *United States.* — Campbell *v.* Medbury, 5 Biss. (C. C.) 33, 4 Fed. Cas. No. 2,365.

Alabama. — Tobin *v.* Bell, 61 Ala. 125; Strong *v.* Waddell, 56 Ala. 471; Tankersley *v.* Graham, 8 Ala. 247.

Arkansas. — Alexander *v.* McCauley, 22 Ark. 553; Seaborn *v.* Sutherland, 17 Ark. 603.

California. — McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924.

Florida. — Hunter *v.* Bradford, 3 Fla. 269, 286.

Georgia. — McDonough *v.* Martin, 88 Ga. 675, 16 S. E. 59; McGehee *v.* Jones, 10 Ga. 127.

Illinois. — Niles *v.* Harmon, 80 Ill. 396; McNeal *v.* Calkins, 50 Ill. App. 17; Vining *v.* Leeman, 45 Ill. 246.

Indiana. — Gibson *v.* Richart, 83 Ind. 313.

Kansas. — Durham *v.* Hadley, 47 Kan. 73, 27 Pac. 105.

Kentucky. — Rogers *v.* Thornton, 101 Ky. 650, 42 S. W. 97.

Maryland. — Smith *v.* Chaney, 4 Md. Ch. 246; Timms *v.* Shannon, 19 Md. 296, 315.

Michigan. — Thorkildsen *v.* Carpenter, 120 Mich. 419, 79 N. W. 636.

Minnesota. — Tretheway *v.* Hulett, 52 Minn. 448, 54 N. W. 486.

Mississippi. — Heath *v.* Newman, 11 Smed. & M. 201; Hoy *v.* Talaiferro, 8 Smed. & M. 727.

Missouri. — Staley *v.* Ivory, 65 Mo. 74; Herryford *v.* Turner, 67 Mo. 296; Birge *v.* Bock, 24 Mo. App. 330.

New Hampshire. — Randlet *v.* Herren, 20 N. H. 102.

Nevada. — Fishback *v.* Miller, 15 Nev. 428.

New York. — Edwards *v.* Bodine, 26 Wend. 109; Smith *v.* Rogers, 42 Hun 110.

North Carolina. — Walsh *v.* Hall, 66 N. C. 233; Foy *v.* Haughton, 85 N. C. 168; Leach *v.* Johnson, 114 N. C. 87, 19 S. E. 239.

Tennessee. — Leird *v.* Abernathy, 10 Heisk. 626.

Texas. — Cooper *v.* Singleton, 19 Tex. 260; Hawkins *v.* Wells, 17 Tex. Civ. App. 360, 43 S. W. 816; Tarlton *v.* Daily, 55 Tex. 92.

West Virginia. — Johnston's Admr. *v.* Mendenhall, 9 W. Va. 112.

Wisconsin. — Booth *v.* Ryan, 31 Wis. 45.

Contra, Cross *v.* Noble, 67 Pa. St. 74; Fisk *v.* Duncan, 83 Pa. St. 196; Ludwick *v.* Huntzinger, 5 Watts & S. (Pa.) 51.

Burden of Proof. — In an action on a note given as the consideration for a warranty deed the presumption is that the grantee took possession of the land and has never been disturbed therein, and the burden of proof is upon him to show the contrary. Bardeen *v.* Markstrum, 64 Wis. 513, 25 N. W. 565; Hall *v.* Gale, 14 Wis. 54; Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653; Talmadge *v.* Wallis, 25 Wend. (N. Y.) 107; Hill *v.* Butler, 6 Ohio St. 207; Small *v.* Reeves, 14 Ind. 163; Morrison *v.*

fraud has been practiced, this with the proof of a defective title furnishes a complete defense.[79]

B. EXECUTORY CONTRACT. — (a.) *In General.* — Where the contract is executory, failure of title is a failure of consideration and the vendee will not be required to complete the contract,[80] unless

Underwood, 20 N. H. 369; Bond *v.* Montague (Tenn.), 54 S. W. 65.

But a Purchaser in Possession must show an abandonment of possession before he can have the defense of defective title. Hunter *v.* O'Neil, 12 Ala. 37; Chapman *v.* Lee, 55 Ala. 616; McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924; Yazel *v.* Palmer, 81 Ill. 82; Runner *v.* Young, 14 Ky. L. Rep. 828, 21 S. W. 871; Harvey *v.* Morris, 63 Mo. 475; Pershing *v.* Canfield, 70 Mo. 140; Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733.

Purchaser With Knowledge of the Defect. — A purchaser with a covenant of general warranty cannot, before eviction, detain purchase money on account of a known defect or incumbrance, as the legal presumption is that he compensated himself for the defect by a diminished price agreed to be paid for the land. Wilson *v.* Cochran, 48 Pa. St. 107, 86 Am. Dec. 574.

Constructive Eviction shown by the state, where by legislative act a forest preserve was created including the land which was held through a tax sale. Brown *v.* Allen, 57 Hun 219, 10 N. Y. Supp. 714.

Recoupment for Incumbrances. Defendant vendee may recoup himself for payments necessarily made to buy in incumbrances, in violation of covenants of clear title and undisturbed possession; there being a failure of consideration to that extent. Doremus *v.* Bond, 8 Blackf. (Ind.) 368; Poke *v.* Kelly, 13 Serg. & R. (Pa.) 165.

79. *United States.* — Noonan *v.* Lee, 2 Black 499.

Alabama. — Heflin *v.* Phillips, 96 Ala. 561, 11 So. 729.

Arkansas. — Bramble *v.* Beidler, 38 Ark. 200; Peay *v.* Wright, 22 Ark. 198.

Florida. — Hunter *v.* Bradford, 3 Fla. 269, 286.

Illinois. — Laforge *v.* Mathews, 68 Ill. 328; Willets *v.* Burgess, 34 Ill. 494; Buckles *v.* Northern Bank, 63 Ill. 268.

Indiana. — Small *v.* Reeves, 14 Ind. 163; Stelzer *v.* LaRose, 79 Ind. 435; Starkey *v.* Neese, 30 Ind. 222.

Louisiana. — Merritt *v.* Merle, 22 La. Ann. 257.

Missouri. — Mitchell *v.* McMullen, 59 Mo. 252.

North Carolina. — Webster *v.* Laws, 89 N. C. 224; Hughes *v.* McNider, 90 N. C. 248.

Ohio. — Purcell *v.* Heeny, 28 Ohio St. 39; Hill *v.* Butler, 6 Ohio St. 207.

Oregon. — Failing *v.* Osborne, 3 Or. 498.

Tennessee. — Kansas City L. Co. *v.* Hill, 87 Tenn. 589, 11 S. W. 797, 5 L. R. A. 45.

Texas. — Price *v.* Blount, 41 Tex. 472.

Wisconsin. — Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653; Walker *v.* Wilson, 13 Wis. 522.

Insolvency of Vendor will warrant a refusal to allow a recovery of the purchase price, where title is defective. Price *v.* Hubbard, 8 S. D. 92, 65 N. W. 436; Booth *v.* Saffold, 46 Ga. 278; Wofford *v.* Ashcraft, 47 Miss. 641; Wyatt *v.* Garlington, 56 Ala. 576.

Effect of Presumption of Solvency. "Were we to assume that a defect in the title exists, this action to recover the purchase price could not be defeated while the presumption that respondent is able to respond in damages remains unchallenged." Zerfing *v.* Seelig, 12 S. D. 25, 80 N. W. 140; Sanborn *v.* Knight, 100 Wis. 216, 75 N. W. 1009.

80. *Alabama.* — Whitehurst *v.* Boyd, 8 Ala. 375.

Arkansas. — Bolton *v.* Branch, 22 Ark. 435; Sorrells *v.* McHenry, 38 Ark. 127.

California. — Thurgood *v.* Spring, 139 Cal. 596, 73 Pac. 456.

Georgia. — Clark *v.* Croft, 51 Ga. 368; Bryan *v.* Osborne, 61 Ga. 51; Allen *v.* Thornton, 51 Ga. 594.

Illinois. — Runkle *v.* Johnson, 30

the vendor is himself in no position to perform,[81] or unless by the terms of the contract payment does not depend upon the character of the title.[82]

(b.) *Burden of Proof.* — The burden of proof is upon the vendee to show the defect complained of in the title.[83]

Ill. 328; Davis *v.* McVickers, 11 Ill. 327; Haynes *v.* Lucas, 50 Ill. 436.

Indiana. — Peterson *v.* McCullough, 50 Ind. 35.

Iowa. — Blasser *v.* Moats, 81 Iowa 460, 46 N. W. 1076.

Kansas. — Durham *v.* Hadley, 47 Kan. 73, 27 Pac. 105.

Kentucky. — Burchett *v.* Dailey, 15 Ky. L. Rep. 462, 23 S. W. 874.

Maine. — Coburn *v.* Haley, 57 Me. 346.

Massachusetts. — Stone *v.* Fowle, 22 Pick. 166; Galvin *v.* Collins, 128 Mass. 525.

Mississippi. — Lemon *v.* Rogge, 11 So. 470.

Missouri. — Pershing *v.* Canfield, 70 Mo. 140; Harvey *v.* Morris, 63 Mo. 475.

New York. — Smith *v.* McCluskey, 45 Barb. 610; Eddy *v.* Davis, 116 N. Y. 247, 22 N. E. 362.

North Carolina. — Howard *v.* Kimball, 65 N. C. 175; Castlebury *v.* Maynard, 95 N. C. 281.

Pennsylvania. — Evans *v.* Taylor, 177 Pa. St. 286, 35 Atl. 635; Murray *v.* Ellis, 112 Pa. St. 485, 3 Atl. 845.

Tennessee. — Mullins *v.* Jones, 1 Head 517; Topp *v.* White, 12 Heisk. 165.

Texas. — Ogburn *v.* Whitlow, 80 Tex. 239, 15 S. W. 807; Gober *v.* Hart, 36 Tex. 139.

Virginia. — Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733.

West Virginia. — Jackson *v.* Welsh Land Assn., 51 W. Va. 482, 41 S. E. 920.

Insolvency of Vendor Need Not Be Shown. — Gober *v.* Hart, 36 Tex. 139.

81. Installments. — Where the payments are to be made in installments, the vendor is not required to convey until the last installment is paid, but has an action for each installment as it falls due, and a defense of defective title could not be interposed to this action. Runkle *v.* Johnson, 30 Ill. 328; Monsen *v.* Stevens, 56 Ill. 335; Harrington *v.* Higgins, 17 Wend. (N. Y.) 376.

82. Kester *v.* Rockel, 2 Watts & S. (Pa.) 365.

"It Is Proper, however, to observe, that a different principle governs where the contract for the purchase of the land remains *in fieri*, and the action is brought on the contract itself with a view to enforce the payment of the purchase money according to its terms. There, if it should appear that the title of the vendor to the land is anywise doubtful, the vendee will not be held bound to pay the purchase money for it; 5 Binn. 365; unless it should also appear that he had expressly agreed to do so. Dorsey *v.* Jackman (1 S. & R. 42); Pennsylvania *v.* Sims (Add. 9)." Ludwick *v.* Huntzinger, 5 Watts & S. (Pa.) 51.

"As long as the contract for sale is *'in fieri,'* the vendor, to enforce payment, should show, when the vendee relies upon defect of title, that the latter had purchased at his own risk." Littlefield *v.* Tinsley, 26 Tex. 353.

83. *Arkansas.* — Benjamin *v.* Hobbs, 31 Ark. 151; Bolton *v.* Branch, 22 Ark. 435; Hoppes *v.* Cheek, 21 Ark. 585.

Georgia. — Sawyer *v.* Sledge, 55 Ga. 152.

Indiana. — Hunt *v.* Utter, 15 Ind. 318.

Maine. — Sawyer *v.* Vaughan, 25 Me. 337.

Michigan. — Baxter *v.* Aubrey, 41 Mich. 13, 1 N. W. 897.

Missouri. — Birge *v.* Bock, 24 Mo. App. 330.

Pennsylvania. — Stokely *v.* Trout, 3 Watts 163.

South Carolina. — Breithaupt *v.* Thurmond, 3 Rich. L. 216; Pyles *v.* Reeve, 4 Rich. L. 555.

Texas. — Tarpley *v.* Poage, 2 Tex. 139; Perry *v.* Rice, 10 Tex. 367.

Compare Day *v.* Burnham, 89 Ky. 75, 11 S. W. 807.

Rule Stated. — "In an action at law on a contract for the sale of

C. Action for Damages. — a. *The Plaintiff's Case.* — The plaintiff, vendor, must allege and prove that he has performed or tendered performance,[84] unless the first act of performance is cast upon the vendee, or performance by him is waived.[85]

b. *Defenses.* — The burden of showing that the vendor has failed to comply with some of the terms of the contract is upon the defendant,[86] but it has been held that the plaintiff vendor in an action

lands, the plaintiff is not bound to show that he has any title. It is sufficient that the defendant, by his contract to buy, admits that he has a title. The burthen of showing the want of title is thrown on the defendant. His right to object to the plaintiff's recovery at law, is on the ground of failure of consideration, and to sustain that as a ground to rescind the contract, if in possession of the land, he must show that the plaintiff has no title to any part—if he is out of possession, the failure of the plaintiff's title to a material part of the land, and which constituted the principal inducement to the contract, will be enough to rescind the contract." Breithaupt *v.* Thurmond, 3 Rich. L. (S. C.) 216.

"The Contracts Obligated the Vendor when the purchase price was paid to 'execute and deliver' to the vendee 'a good and sufficient warranty deed.' Baxter claimed that this means a warranty deed conveying the title to the land, and that it was not enough for the vendor to tender a deed sufficient in form, but she must go further and show that she had at the time a title which the deed would convey. We think, however, if the vendee accepts a contract in which the ownership of the vendor is assumed, and agrees to pay for the land without requiring the vendor to produce evidence of his title, the burden will be upon him to show defects. The presumption will be, in the absence of any showing, that he satisfied himself respecting the title when he made his bargain. Dwight *v.* Cutler, 3 Mich. 566; Allen *v.* Atkinson, 21 Mich. 361." Baxter *v.* Aubrey, 41 Mich. 13, 1 N. W. 897.

"The Difference Between the Liabilities of the vendee, under an executor and executed contract, is this: that in the former, he should be relieved by showing defect of title, unless on proof by the vendor that this was known at the sale, and it was understood that such title should be taken as the vendor could give. In the latter, the vendee should establish beyond doubt that the title was a failure in whole or in part; that there was danger of eviction, and also such circumstances as would *prima facie* repel the presumption that at the time of the purchase he knew and intended to run the risk of the defect." Cooper *v.* Singleton, 19 Tex. 260, *cited* and *approved* in Moore *v.* Vogel, 22 Tex. Civ. App. 235, 54 S. W. 1061; Johnson *v.* Long, 27 Tex. 21; Haralson *v.* Langford, 66 Tex. 111, 18 S. W. 339; Knight *v.* Coleman (Tex. Civ. App.), 51 S. W. 258.

Opinion of Attorneys. — The fact that three attorneys had declared that no title existed in its vendor and that the commissioner of the Land Office treated it as public school land, was held insufficient to support a defense of failure of title, the vendees being in possession. Kiser *v.* Lunsford, 38 Tex. Civ. App. 463, 86 S. W. 927.

84. Burnham *v.* Roberts, 70 Ill. 19; Harker *v.* Cochrane, 36 Iowa 390; Sanford *v.* Cloud, 17 Fla. 532; Johnson *v.* Wygant, 11 Wend. (N. Y.) 48.

"Where the stipulations of a contract to sell are concurrent and dependent, a tender of performance by vendor before suit must be proved." Blunt *v.* Egeland, 104 Minn. 351, 116 N. W. 653.

85. Nathan *v.* Rehkopf, 57 Ill. App. 212; Robinson *v.* Heard, 15 Me. 296; Wasson *v.* Palmer, 17 Neb. 330, 22 N. W. 773; North's Admrs. *v.* Pepper, 21 Wend. (N. Y.) 636; Blunt *v.* Egeland, 104 Minn. 351, 116 N. W. 653.

86. Failure To Furnish Abstract. Burden of proof is on the defendant to establish his defense that the vendor agreed to furnish an abstract

for damages must show that the title tendered by him was good.[87]

c. *Damages.* — **(1.) In General.** — In the absence of proof of the actual damage suffered, the vendor is entitled to recover only nominal damages;[88] he cannot recover the contract price.[89]

(2.) Price Obtained by Resale. — Where the property has been resold, evidence of the price it brought at such sale is admissible, and the amount that it brought less the contract price, is the measure of damages.[90]

(3.) Property Retained by Vendor. — Where the property has remained in the possession of the vendor, the measure of damages is the difference between the contract price and the value of the land at the date of the breach, and evidence is admissible to establish this value.[91]

of title and failed to do so. Jackson *v.* Martin (Tex. Civ. App.), 41 S. W. 837.

87. "I am not prepared to admit, in an action to recover damages, where the defendant's answer denies the plaintiff's title to the premises, that the *onus* of proof is on the defendant to show that the plaintiff's title is not good. The affirmative is with the plaintiff, who avers that he tendered a deed of the premises, and that the title was free and clear. This the defendant denied, and took issue thereon. It was for the plaintiff to show that he had a title to the premises which were agreed to be conveyed." Wilson *v.* Holden, 16 Abb. Pr. (N. Y.) 133.

88. Vendor Has the Burden of Showing substantial damages received by him, and in the absence of proof he cannot recover them. Bensinger *v.* Erhardt, 74 App. Div. 169, 77 N. Y. Supp. 577.

Land Enhanced in Value. — Vendor is entitled to only nominal damages. Evrit *v.* Bancroft, 22 Ohio St. 172; Hurd *v.* Densmore, 63 N. H. 171.

89. Hogan *v.* Kyle, 7 Wash. 595, 35 Pac. 399. And see cases cited in note under (3.) *infra,* note 91. But *compare* Goodpaster *v.* Porter, 11 Iowa 161; Tripp *v.* Bishop, 56 Pa. St. 424.

90. Noble *v.* Edwardes, 5 Ch. Div. (Eng.) 378, 37 L. T. 7; Adams *v.* McMillan, 7 Port. (Ala.) 73; Bowser *v.* Cessna, 62 Pa. St. 148; Webster *v.* Hoban, 7 Cranch (U. S.) 399; Springer *v.* Berry, 47 Me. 330; Gardner *v.* Armstrong, 31 Mo. 535; Griswold *v.* Sabin, 51 N. H. 167.

Not Conclusive Upon the Question of Value. — White *v.* Hermann, 51 Ill. 243; Adams *v.* McMillan, 7 Port. (Ala.) 73.

Where, upon the refusal of defendant to accept title, a sale at auction was had, evidence as to what the property then sold for is competent, it appearing that there had been no material change in the market value of the property in the meantime. Croak *v.* Owens, 121 Mass. 28.

91. *Alabama.* — Whiteside *v.* Jennings, 19 Ala. 784, 791.

Arkansas. — Fears *v.* Merrill, 9 Ark. 559.

California. — Drew *v.* Pedlar, 87 Cal. 443, 25 Pac. 749.

Connecticut. — Wells *v.* Abernethy, 5 Conn. 222.

Florida. — Smith *v.* Newell, 37 Fla. 147, 20 So. 249.

Georgia. — Gilbert *v.* Cherry, 57 Ga. 128.

Illinois. — Burnham *v.* Roberts, 70 Ill. 19.

Indiana. — Goodwin *v.* Kelley, 33 Ind. App. 57, 70 N. E. 832; Porter *v.* Travis, 40 Ind. 556.

Kentucky. — Allison *v.* Cocke's Exrs., 112 Ky. 212, 65 S. W. 342, 66 S. W. 392.

Massachusetts. — Old Colony R. Co. *v.* Evans, 6 Gray 25.

Michigan. — Allen *v.* Mohn, 86 Mich. 328, 49 N. W. 52.

Missouri. — Davis *v.* Watson, 89 Mo. App. 15; Gray *v.* Case, 51 Mo. 463.

Nebraska. — Wasson *v.* Palmer, 17 Neb. 330, 22 N. W. 773.

(4.) Liquidated Damages. — Whether the sum specified as damages is to be regarded as liquidated damages or as a penalty depends upon the intention of the parties.[92] The tendency of the courts is to allow the recovery of actual damages only.[93] If the damages would be difficult to prove or it appears that they have really been adjusted by the parties, such a sum will be treated as liquidated damages.[94] But where an actual intent is disclosed to treat the sum

New Hampshire. — Griswold *v.* Sabin, 51 N. H. 167; Hurd *v.* Dunsmore, 63 N. H. 171.

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

Texas. — Tinsley *v.* Dowell, 87 Tex. 23, 26 S. W. 946; Monroe *v.* South (Tex. Civ. App.), 64 S. W. 1014.

Wisconsin. — Muenchow *v.* Roberts, 77 Wis. 520, 46 N. W. 802.

Unusual Demand May Be Shown. To prove the value of the property at the time the contract was broken, evidence that there was an unsual demand for property of that description, however unreal the cause of the demand, is admissible. Allison *v.* Cocke's Exrs., 112 Ky. 212, 23 Ky. L. Rep. 1589, 65 S. W. 342, 66 S. W. 392.

Loss of Other Bargains. — Evidence that plaintiff vendor made other bargains in anticipation of receiving the purchase money is too remote. Lewis *v.* Lee, 15 Ind. 499.

Subsequent Offers by Other Persons, Inadmissible. — Evidence that other persons had soon after the failure of the vendee to perform offered the vendor the same purchase price, held inadmissible, the measure of damages being the difference in value at the time for performance and the contract price; but men who had made offers could be called as witnesses. Lewis *v.* Lee, 15 Ind. 499.

Proximate Damages. — Evidence may be given of all damages which could reasonably be foreseen. Hurd *v.* Dunsmore, 63 N. H. 171.

92. Peine *v.* Weber, 47 Ill. 41; Houghton *v.* Pattee, 58 N. H. 326; Dakin *v.* Williams, 17 Wend. (N. Y.) 447; Perkins *v.* Lyman, 11 Mass. 76; Streeper *v.* Williams, 48 Pa. St. 450.

Burden of Proof. — Where damages are specified in the contract, the burden is upon the party alleging them to be a penalty and not liquidated. Selby *v.* Matson (Iowa), 114 N. W. 609; Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791.

Stipulated Damages which are excessive and out of all proportion with those actually suffered, especially where the damages resulting from the breach are not difficult of ascertainment, will give color to the argument that they were intended as a penalty and not as liquidated damages. Selby *v.* Matson (Iowa), 114 N. W. 609.

Each Case Depends largely on its own circumstances. Jones *v.* Binford, 74 Me. 439; Mathews *v.* Sharp, 99 Pa. St. 560.

93. *Alabama.* — Watt's Exrs. *v.* Sheppard, 2 Ala. 425.

California. — Ricketson *v.* Richardson, 19 Cal. 330.

Kentucky. — Hahn *v.* Horstman, 12 Bush 249.

Massachusetts. — Wallis *v.* Carpenter, 13 Allen 19.

New Hampshire. — Brewster *v.* Edgerly, 13 N. H. 275.

New Jersey. — Cheddick *v.* Marsh, 21 N. J. L. 463.

New York. — Leggett *v.* Mut. Life Ins. Co., 53 N. Y. 394.

Pennsylvania. — Gillis *v.* Hall, 7 Phila. 422.

Tennessee. — Baird *v.* Tolliver, 6 Humph. 186.

94. *California.* — Fisk *v.* Fowler, 10 Cal. 512; Streeter *v.* Rush, 25 Cal. 67.

Connecticut. — Tingley *v.* Cutter, 7 Conn. 291.

Georgia. — Hardee *v.* Howard, 33 Ga. 533.

Illinois. — Gobble *v.* Linder, 76 Ill. 157.

Maine. — Gammon *v.* Howe, 14 Me. 250.

Massachusetts. — Leland *v.* Stone, 10 Mass. 459; Cushing *v.* Drew, 97 Mass. 445.

Missouri. — Morse *v.* Rathburn, 42 Mo. 594.

as a penalty, or where it has been inserted merely to secure prompt performance, it will be treated as a penalty, and evidence of the actual damages suffered is admissible.[95]

D. Recovery of Possession. — This subject is treated elsewhere in this work.[96]

4. Remedies of Vendee. — A. Lien. — A vendee has a lien closely analogous to the vendor's lien in those cases where the purchase money has been paid and the vendor is in default. The rules of evidence governing the two liens are the same.[97]

B. Action To Recover Purchase Money. — a. *The Plaintiff's Case.* — **(1.) In General.** — Before the plaintiff is entitled to recover purchase money advanced, the vendor must be shown to be in default by proof that the vendee was able and willing to pay the amount due, and offered to do so, and that a conveyance was refused,[98] unless the vendor does not possess title to the premises or

New York. — Williams *v.* Dakin, 22 Wend. 201.

95. Henderson *v.* Cansler, 65 N. C. 542; Lyman *v.* Babcock, 40 Wis. 503; Nevada County *v.* Hicks, 38 Ark. 557; Davis *v.* Freeman, 10 Mich. 188; Hallock *v.* Slater, 9 Iowa 599; Hammer *v.* Breidenbach, 31 Mo. 49.

96. See article "Ejectment."

Prima Facie Case made out by vendor when he shows that he sold the land to the vendee, who took possession, but retained legal title, and that the purchase price had never been paid. Clements *v.* Taylor, 65 Ala. 363.

97. *England.* — Aberaman Ironworks *v.* Wickens, L. R. 4 Ch. 101.

Alabama. — Hickson *v.* Lingold, 47 Ala. 449.

California. — Benson *v.* Shotwell, 87 Cal. 49, 25 Pac. 249.

Indiana. — Lowrey *v.* Byers, 80 Ind. 443; Stults *v.* Brown, 112 Ind. 370, 14 N. E. 230.

North Carolina. — Costen *v.* McDowell, 107 N. C. 546, 12 S. E. 432.

Tennessee. — Jones *v.* Galbraith, 59 S. W. 350.

Wisconsin. — Taft *v.* Kessel, 16 Wis. 273.

Vendee has a lien in all respects similar to the vendor's lien, where he has paid the purchase price and by reason of the vendor's fault the contract is not performed. Elterman *v.* Hyman (N. Y.), 84 N. E. 937.

98. *California.* — Chatfield *v.* Williams, 85 Cal. 518, 24 Pac. 839; Anderson *v.* Straussburger, 92 Cal. 38, 27 Pac. 1095; Leach *v.* Rowley, 138 Cal. 709, 72 Pac. 403; Dennis *v.* Strassburger, 89 Cal. 583, 26 Pac. 1070; Easton *v.* Montgomery, 90 Cal. 307, 27 Pac. 280.

Illinois. — Cassell *v.* Ross, 33 Ill. 244; Doggett *v.* Brown, 28 Ill. 493.

Iowa. — Wilhelm *v.* Fimple, 31 Iowa 131.

Massachusetts. — O'Brien *v.* Cheney, 5 Cush. 148.

Minnesota. — McNamara *v.* Pengilly, 58 Minn. 353, 59 N. W. 1055.

New York. — Hudson *v.* Swift, 20 Johns. 24.

Pennsylvania. — Irvin *v.* Bleakley, 67 Pa. St. 28.

South Dakota. — Way *v.* Johnson, 5 S. D. 237, 58 N. W. 552.

Wisconsin. — McDonald *v.* Hyde, 23 Wis. 487.

Rule Stated. — "Before the plaintiff can recover back the money paid on the contract, without first making a tender of the balance due, and demanding a deed, thus placing the vendors in default, he must clearly establish the fact that the agreement was rescinded or abandoned by mutual consent of the parties. . . . So long as the contract remained in force and unrescinded or abandoned, there could be no recovery of the money paid upon the contract, unless the vendee show a full performance or tender on his part." Way *v.* Johnson, 5 S. D. 237, 58 N. W. 552.

Burden of Proof. — "As the action was predicated upon the defendant's alleged breach of the contract, the burden is upon the plaintiff to show

unless it otherwise appears that he will be unable to perform.[99]

(2.) Defective Title. — (a.) *Burden of Proof.* — The vendee has the burden of proving that the title tendered by the vendor was so defective as to warrant him in refusing to accept the conveyance.[1]

(b.) *Marketability.* — A title absolutely free from all suspicion cannot be demanded by the vendee, but on the other hand it must appear that the title tendered was one which an ordinary person,

that she demanded performance at a time when they were bound to comply and under circumstances which indicate that they were unable to perform. Kaufmann *v.* Brennan, 53 Misc. 621, 103 N. Y. Supp. 912.

Where the vendee paid $100 down and took a bond from defendant to convey title, and the vendee alleged failure of consideration in that the house had been destroyed by fire, in an action to recover the purchase money the burden was upon him of proving the payment of the money, the failure of the consideration, and to produce the vendor's bond in order to show that he had complied therewith on his part, by making the payments, and that the vendor had refused or neglected to make the deed according to the terms of the bond. O'Brien *v.* Cheney, 5 Cush. (Mass.) 148.

Proof of Ability To Perform. Testimony by the vendee that he had made arrangements with another person to furnish the money for the purchase price, and corroboration of that by the testimony of such person, makes out a *prima facie* case of ability to perform. Munson *v.* McGregor (Wash.), 94 Pac. 1085.

Whether the plaintiff vendee had repaid money borrowed to pay the purchase price with was immaterial, as was also questions as to whether she would be able to meet subsequent installments. Flinn *v.* Barber, 64 Ala. 193.

99. *California.* — Merrill *v.* Merrill, 102 Cal. 317, 36 Pac. 675.

Illinois. — Smith *v.* Moore, 26 Ill. 392.

Indiana. — Turner *v.* Parry, 27 Ind. 163.

Maine. — Richards *v.* Allen, 17 Me. 296.

Massachusetts. — Newcomb *v.* Brackett, 16 Mass. 161.

Minnesota. — Jensen *v.* Weide, 42 Minn. 59, 43 N. W. 688.

New York. — Burwell *v.* Jackson, 9 N. Y. 535, 547; Hartley *v.* James, 50 N. Y. 38; Ziehen *v.* Smith, 148 N. Y. 558, 42 N. E. 1080.

Pennsylvania. — Thurston *v.* Franklin College, 16 Pa. St. 154.

Virginia. — White *v.* Dobson, 17 Gratt. 262.

1. Beyer *v.* Braender, 57 N. Y. Super. 429, 8 N. Y. Supp. 306; Meyer *v.* Madreperla, 68 N. J. L. 258, 53 Atl. 477.

"But a vendee who refuses to take title upon the ground of defect therein, must point out the objection and give proof tending to establish it, or to create such a doubt in respect thereto as to render the title unmarketable. If the defect or doubt is disclosed on the face of the record title, he need go no further, but if it depends upon some extrinsic fact not disclosed by the record, he must show the fact which justifies his refusal to accept the title tendered." Greenblatt *v.* Hermann, 143 N. Y. 13, 38 N. E. 966.

Paramount Title in Third Person. In order to entitle the vendee to recover back a deposit, or part of the purchase money, there must be a failure of title. In such an action it is necessary to allege and prove, not only that the vendor had no title, but also that the paramount title is in another. Thayer *v.* White, 3 Cal. 228; Riddell *v.* Blake, 4 Cal. 264; Bolton *v.* Branch, 22 Ark. 435; Winter *v.* Stock, 29 Cal. 408; Ingalls *v.* Hahn, 47 Hun (N. Y.) 104; Walker *v.* Towns, 23 Ark. 147; Freetly *v.* Barnhart, 51 Pa. St. 279.

Unsatisfied Mortgage. — Plaintiff alleging the failure of the vendor to comply with the conditions of his bond in relation to title must show that the deed tendered by the vendor as a compliance with his bond did not convey a good and indefeasible title; a *prima facie* case is made out when he shows that there is of rec-

acting with reasonable prudence, would have refused to accept.[2]

ord an unsatisfied mortgage on the land,—he is not required to go behind the record and show that the mortgage had not in fact been paid. Kimball *v.* Bell, 47 Kan. 757, 28 Pac. 1015; Durham *v.* Hadley, 47 Kan. 73, 27 Pac. 105.

Surrender of Lease Presumed Regular. — Burden of proof is upon the vendee to show that his reason for the rejection of the title was a good and sufficient one; and where it does not appear by extrinsic evidence that the surrender of a lease by a tenant to the vendor was not executed in accordance with the terms of the lease, it will be presumed that the lease was terminated in strict accordance with its terms. Weintraub *v.* Weil, 53 Misc. 325, 103 N. Y. Supp. 229.

Facts Dehors the Record. — Burden of proof is upon plaintiff vendee to establish facts dehors the record relied upon to affect the marketability. Witte *v.* Koerner, 123 App. Div. 824, 108 N. Y. Supp. 560.

2. Methodist E. Church Home *v.* Thompson, 108 N. Y. 618, 15 N. E. 193. See *supra* III, 3, B.

Marketable Title Defined. — "A purchaser is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim a marketable title, and that means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept." Todd *v.* Union Dime Sav. Inst., 128 N. Y. 636, 28 N. E. 504.

Possible Existence of Heirs Not Parties, does not render the title unmarketable. "The point that at least the title was doubtful, and, therefore, unmarketable, rests upon the possible existence of heirs on the mother's side, not brought into the proceedings. If their existence had been shown, or evidence given rendering it probable that such heirs were in being, the plaintiff would have been entitled to relief. It has been often said that the purchaser is entitled to a marketable title. The title tendered need not in fact be bad in order to relieve him from his purchase, but it must either be defective in fact, or so clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it. (Fleming *v.* Burnham, 100 N. Y. 1; Moore *v.* Williams, 115 id. 586.) In the present case there is no presumption in the absence of proof that the mother of the decedent had brothers or sisters or descendents of either. The title is not doubtful by reason of any fact shown or by reason of any inference from any such fact. It is a possibility merely that such heirs may exist. But the plaintiff has not seen fit to give any proof on the subject, and has left it to conjecture merely, and a suspicion or conjecture, without any facts to support it, does not raise a reasonable doubt as to the validity of a title good upon the record." Greenblatt *v.* Hermann, 144 N. Y. 13, 38 N. E. 966.

What Defects May Be Proved. The contract provided that the vendees should point out any defects in the abstract within a specified time. They did so, but the vendors failed to attempt to cure them. *Held,* on the trial, vendees could give evidence to prove other defects than those pointed out. Davis *v.* Fant (Tex. Civ. App.), 93 S. W. 193.

Title Requiring Parol Testimony Not Marketable. — Plaintiff had the right to a title fairly deducible from the record, free from reasonable doubt or litigation; he was not required to accept a title depending upon matters which rest in parol, and so the fact that the error in the name of the grantee could be proved by parol in any litigation, does not make the title marketable. Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. 315; Hoffman *v.* Titlow, 48 Wash. 80, 92 Pac. 888.

Invalidity of Adverse Claims no Defense. — Where the vendor is bound to furnish a clear abstract and the abstract shows that there are adverse claims, evidence to prove

(c.) *Admissibility.* — Any relevant evidence is admissible to prove the alleged defect in the title.[3]

(d.) *Satisfactory Title.* — Where the vendor agrees to convey a "satisfactory" title, the burden of showing dissatisfaction is upon the vendee; and evidence showing the good faith of his objections is admissible.[4]

b. *Defenses.* — **(1.) In General.** — The burden of establishing all affirmative defenses is of course upon the vendor who relies upon them.[5]

(2.) Set-Off. — The vendor is entitled to prove the rental value of the premises and to set it off against the vendee's claim for interest.[6]

(3.) Tender Subsequent to Suit. — Proof of a tender made subsequent to the institution of the action by the vendee is no defense.[7]

that the claims were groundless was held inadmissible. Taylor *v.* Williams, 2 Colo. App. 559, 31 Pac. 504; Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217.

Finding of Insanity of the Grantor. — Marketable title not shown where it appears that the vendor's grantor had been found to be insane by a jury, at the time when he conveyed, although the finding of the jury had been set aside for an erroneous charge. Brokaw *v.* Duffy, 36 App. Div. 147, 55 N. Y. Supp. 469; *affirmed*, 165 N. Y. 391, 59 N. E. 196.

3. Insufficient Deeds. — Where the allegation of the vendee is that the title conveyed was not the title called for by the contract, the deeds themselves are admissible, with other evidence tending to show the defect. Guttschlick *v.* Bank of the Metropolis, 5 Cranch C. C. 435, 11 Fed. Cas. No. 5,880, *affirmed*, 14 Pet. 19. See D'Utricht *v.* Melchor, 1 Dall. (U. S.) 428.

Vendor's Abstract of Title showing a defect in the title, established a *prima facie* case for the vendee. Hartley *v.* James, 50 N. Y. 38.

Unsuccessful Efforts of the vendor to clear the title are immaterial where he is under the absolute duty of conveying a clear title. Kimball *v.* Bell, 49 Kan. 173, 30 Pac. 240.

Aiding Abstract of Title. — Where the contract calls for a clear abstract of title, evidence to show the invalidity of what appear to be defects in the title, is inadmissible. Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Taylor *v.* Williams, 2 Colo. App. 559, 31 Pac. 504.

4. Where the Vendee in a contract is entitled to a return of the purchase if on the day set for conveyance of the title he is not satisfied with the property, the burden is upon him of proving that he was so dissatisfied that he notified the vendor and demanded a return of the purchase money. Liberman *v.* Beckwith, 79 Conn. 317, 65 Atl. 153.

Evidence of Good Faith, Admissible. — Where the vendor agreed to give a perfect title or a title to be made perfect to the satisfaction of the vendee's attorneys, testimony of the vendee and his attorney that they acted in good faith in rejecting the title tendered was admissible. Smith *v.* Lauder (Tex. Civ. App.), 106 S. W. 703.

5. Forfeiture. — In an action to recover earnest money, vendors claiming that it was forfeited have the burden of proving that they tendered a deed which would convey the property and possession thereof. Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315.

Abandonment by the Vendee is defensive matter and must be alleged and proved by the vendor, and where the contract did not require the vendee to remain in possession, abandonment of possession is not proof of abandonment of the contract. Pfeiffer *v.* Wilke (Tex. Civ. App.), 107 S. W. 361.

6. Fitzhugh *v.* Franco-T. Land Co., 81 Tex. 306, 16 S. W. 1078; Ankeny *v.* Clark, 1 Wash. St. 549, 20 Pac. 583; Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764.

7. Harris *v.* Strodl, 57 Hun 592,

c. *Parol Evidence.* — The vendee seeking to recover purchase money paid upon a parol contract to convey must prove a performance or readiness to perform upon his part, and must show that the contract failed because of the vendor's default.[8]

C. ACTIONS FOR DAMAGES. — a. *On Contract.* — **(1.) For Fraud.** Where damages are asked for on account of fraud, the fraud must be clearly established. What evidence is admissible and will establish the fraud is fully considered elsewhere.[9]

(2.) For Failure To Convey. — The Plaintiff's Case. — The plaintiff must allege and prove full performance upon his part, or a tender of performance,[10] unless it is shown that performance by him was waived or would have been futile.[11] He must also prove the breach

10 N. Y. Supp. 859, *affirmed,* 132 N. Y. 392, 30 N. E. 962; Cobb *v.* Hall, 33 Vt. 233; Lutz *v.* Compton, 77 Wis. 584, 46 N. W. 889.

8. Lewis *v.* Whitnell, 5 T. B. Mon. (Ky.) 190; Jellison *v.* Jordan, 68 Me. 373; Wyvell *v.* Jones, 37 Minn. 68, 33 N. W. 43; Davis *v.* Strobridge, 44 Mich. 157, 6 N. W. 205; Dowdle *v.* Camp, 12 Johns. (N. Y.) 451; Bedell *v.* Tracy, 65 Vt. 494, 26 Atl. 1031.

Oral Agreement Is Not Void but before the plaintiff vendee can recover payments made under it he must show that the transaction failed because of the defendant's fault and not by reason of his own neglect. Cave *v.* Osborne, 193 Mass. 482, 79 N. E. 794.

In an action to recover earnest money upon an oral contract to sell, the vendee must prove a tender of compliance upon his part and the refusal or inability of the vendor to comply. Cammack *v.* Prather (Tex. Civ. App.), 74 S. W. 354.

Purchaser of land under a parol contract cannot recover the purchase money paid, while he retains possession, and the contract has not been rescinded. Donaldson's Admr. *v.* Waters' Admr., 30 Ala. 175; Cope *v.* Williams, 4 Ala. 362.

9. See article "FRAUD." And see *supra,* I, 5.

10. Lewis *v.* Prendergast, 39 Minn. 301, 39 N. W. 802; Stafford *v.* Trimble, 1 Bibb (Ky.) 323; Axtel *v.* Chase, 77 Ind. 74; Brown *v.* Gammon, 14 Me. 276.

"Vendee, having elected to affirm the contract and sue for its breach, must aver and prove a performance or tender of performance of all covenants binding upon him." Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733.

Where Plea Is of Performance. In debt on a bond conditioned that the obligor make title to a certain tract of land when required, if the defendant pleads performance the plaintiff need not prove on his part any demand of a deed. Pate *v.* Spotts, 6 Munf. (Va.) 394.

11. **Tender of Agreed Price** must be proved unless it appears that it would have been futile. The futility of a tender is not proved where it appears that the defendant's refusal to convey was not absolute but only contingent. Beiseker *v.* Amberson (N. D.), 116 N. W. 94.

Want of Title in the vendor dispenses with proof of a demand for conveyance. Bowen *v.* Jackson, 8 Blackf. (Ind.) 203; Williams *v.* Casey, 4 Bibb (Ky.) 300.

Refusal To Convey Waives a Tender. — Where there has been an unqualified refusal by one of the parties before or after the time of performance is due, no tender is necessary to the right of action by the other. Matteson *v.* U. S. Land Co., 103 Minn. 407, 115 N. W. 195; Bedell's Admr. *v.* Smith, 37 Ala. 619.

Conveyance to Third Person. Where the defendant vendor has conveyed the premises to a third person, evidence is admissible to show a verbal promise by such person to reconvey, since if the vendor was in a condition to reconvey at the time agreed upon, the plaintiff was not excused from tendering the balance of the purchase price. Nesbit *v.* Miller, 125 Ind. 106, 25 N. E.

by the vendor upon which his claim for damages is based.[12]

(3.) Defective Title. — The plaintiff vendee has the burden of proving that the title tendered by the vendor was defective.[13]

(4.) Damages. — The general measure of damages being the difference between the contract price and the value of the land at the

148; Newcomb *v.* Brackett, 16 Mass. 161.

"The plaintiff rests his right to recover upon the claim that the agreement between him and the defendant was absolute, and that the defendant put it out of his power to perform by conveying the land to Keeline. If such was the case, it was not necessary for the plaintiff to allege or prove that he was able to and offered to perform the agreement on his part. He only alleged that he would have been ready and willing to perform had it not been for the conveyance to Keeline. There is no allegation that he was able and willing, or that he tendered performance, nor was such allegation necessary upon his theory of the case. The court very properly directed the jury to first determine whether the agreement was absolute or optional, and then proceeded to instruct them as to the rights of the parties in either event; saying that, if the agreement was an option, or if the conveyance to Keeline was conditional, so that it was not out of the power of the defendant to convey to the plaintiff, and the plaintiff was informed of that fact, then, to give the plaintiff the right of action, he must have tendered performance on his part; and, as no tender of performance had been made, the plaintiff could only recover upon finding that the agreement was absolute, and that the conveyance to Keeline was without condition, or, if conditional, that the plaintiff was not informed thereof. There was no error in excluding the testimony offered as to plaintiff's ability and willingness to perform the agreement, nor of the evidence offered by the defendant tending to show inability or unwillingness on the part of the plaintiff to perform the agreement." Damon *v.* Weston, 77 Iowa 259, 42 N. W. 187.

12. Prima Facie Case. — In a declaration on a bond, the production of the bond and proof of a failure on the part of the defendant to make the deed, make out a *prima facie* case. Turner *v.* Lord, 92 Mo. 113, 4 S. W. 420.

"In an action on a bond conditioned for the payment of a debt by instalments, a breach must be alleged that is the non-payment, and so of a bond conditioned for the payment of rent. But the simple production of the bond is sufficient to put the defendant upon proof of his performance of the condition, else the plaintiff must be driven to the legal absurdity of proving a negative, or fail in his suit. In principle this case does not differ; for though the condition here is not for the delivery of money, it is for the delivery of certain deeds and papers at a given time, the non-delivery of which cannot be proven except by proving a negative, and from the very nature of this case the burden of proof is thrown on the defendants to prove the affirmative." Stewart *v.* Grimes, Dud. (Ga.) 209. And see Garnett *v.* Yoe, 17 Ala. 74.

Declarations by defendant administratrix and her intestate which tend to show a refusal on the part of the declarants to make title and an inability to do so, are admissible. Bedell's Admr. *v.* Smith, 37 Ala. 619.

Proof of Conveyances of the land by the vendor to other persons, subsequent to the making of the contract, is competent to establish his intention to repudiate the contract. Maxon *v.* Gates (Wis.), 116 N. W. 758.

"**The Burden** is upon the vendee to show that he demanded performance at a time when the vendor was bound to comply and under circumstances which indicate that the vendor was unable to perform." Campbell *v.* Prague, 6 App. Div. 554, 39 N. Y. Supp. 558.

13. Burden of Proof is upon the plaintiff vendee who alleges that the

time of the breach, any evidence is admissible which tends to establish either of these facts.[14]

vendor has neither legal nor equitable title, to prove it. Gammon *v.* Blaisdell, 45 Kan. 221, 25 Pac. 580.

"I think it well settled in this country, where title deeds are recorded and open to the inspection of all parties, that when one contracts to sell and convey lands and the contract is silent concerning the title, it is to be assumed that the title is good, and that it devolves upon the vendee, if he questions it, to show the defect. Such was the opinion expressed by this court in Dwight *v.* Cutler, 3 Mich. 566, 576, and the cases of Breithaupt *v.* Thurmond, 3 Rich. 216, and Brown *v.* Bellows, 4 Pick. 179, there relied upon, fully sustain this decision." Allen *v.* Atkinson, 21 Mich. 351.

14. Value Placed Upon the Property by the Parties. — In an action to recover damages for a failure to convey, the value of the land is established *prima facie* by proof of the value the parties themselves have expressly put upon it in their contract. Humphreys *v.* Shellenberger, 89 Minn. 327, 94 N. W. 1083.

Value to a Particular Person. Evidence that a particular person refused to pay a specified price for land, after examining it, does not justify the inference that the land was not worth more than the price named. Reynolds *v.* Franklin, 47 Minn. 145, 49 N. W. 648.

Value for Particular Purpose. Proof of the fair cash value of the premises for subdivision is admissible — where the land is capable of such use at the time of the breach of the contract; and if in fact the expectations of changed conditions in the vicinity had resulted in an actual increase in value, this may be shown although the expected changes never occurred. Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088.

Price Brought at Subsequent Sale. Value of an equity in plaintiff's premises, which was part of the consideration for a conveyance by the defendant, may be shown by evidence of the price it brought at a sale a few months after the breach by the defendant. Lyon *v.* Katten (Conn.), 69 Atl. 534.

Resale Price Not Conclusive. "The respondent claims that the price at which Scott agreed to take the lots is controlling as to their value; but in view of the other testimony upon the subject, we do not think this can be so. It is true that the price at which a thing is sold may be shown as tending to prove its value; but property is sometimes sold for more and sometimes for less than its market value, and it is the market value — that is, the price at which an equivalent thing might be bought — that is controlling in a case like this. (Civ. Code, § 3354.) The plaintiff wanted the lots to build a residence on for himself, and the evidence shows that he could have purchased as good if not better lots for that purpose, in the immediate vicinity, for much less than Scott agreed to pay." Marriner *v.* Dennison, 91 Cal. 555, 27 Pac. 927, 1091.

Cost. — In an action for damages for failure to convey in consideration of the erection of a hotel by purchaser on the land, where the building erected by plaintiff vendee on the property had no market value, evidence of its cost was admissible. Jennings *v.* Oregon Land Co., 48 Or. 287, 86 Pac. 367.

Value at Time of Execution of Contract Inadmissible. — The measure of damages being the value of the land at the time of the breach, evidence of the value at the time of the execution of the contract is irrelevant. Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92; Clagett *v.* Easterday, 42 Md. 617; Crisfield *v.* Storr, 36 Md. 129, 150.

Defendant cannot diminish damages by proof that the plaintiff had occupied the land. Herndon *v.* Venable, 7 Dana (Ky.) 371; Combs *v.* Tarlton's Admr., 2 Dana (Ky.) 464.

Sale Price of Adjacent Land. — In an action for refusing to convey lands purchased at an auction sale, the measure of damages is the difference between the amount of the purchaser's bid and the market value

b. *On Covenants.* — (1.) Seisin. — (A.) Burden of Proof. — (a.) *Common-Law Rule.* — At the common law, the burden of proving that there has been no breach of the covenant of seisin as alleged in the complaint, was upon the defendant vendor, since he retained the evidence of title for this very purpose and the facts were peculiarly within his own knowledge.[15]

(b.) *Statutory Rule.* — Under the modern recording acts title becomes a matter of record, the necessity for the old rule disappears and the burden is generally held to be upon the vendee.[16]

of the lands at the date of the breach of contract; but as a mode of ascertaining this value, it is discretionary with the court to admit testimony as to sales of neighboring lands subsequent to that date, always keeping as near as reasonably may be to the particular point of time at which the value is to be ascertained. Where the contract was broken on the 7th of June, and testimony as to sales of neighboring lands at any time prior to the 26th of March following was admitted: *Held,* that the range of inquiry was not unreasonably extended. Barbour *v.* Nichols, 3 R. I. 187.

Parol Contract. — An action may be maintained for the breach of a parol contract for the sale of land, but damages in such an action are limited to the recovery of the purchase money paid, or the value of the consideration given and the expenses incurred, and does not include the loss of the bargain. Gray *v.* Howell, 205 Pa. St. 211, 54 Atl. 774.

15. *Illinois.* — Baker *v.* Hunt, 40 Ill. 264.

Iowa. — Swafford *v.* Whipple, 3 Greene 261; Schofield *v.* Iowa Homestead Co., 32 Iowa 317; Barker *v.* Kuhn, 38 Iowa 392; Blackshire *v.* Iowa Homestead Co., 39 Iowa 624.

Massachusetts. — Marston *v.* Hobbs, 2 Mass. 433.

New York. — Woolley *v.* Newcombe, 87 N. Y. 605 (rule stated); Abbott *v.* Allen, 14 Johns. 248.

Wisconsin. — Noonan *v.* Ilsley, 21 Wis. 138; Mecklem *v.* Blake, 16 Wis. 102; Beckmann *v.* Henn, 17 Wis. 412.

Where Possession Had Not Been Taken by Vendee. — "The mistake made by the learned circuit judge upon the trial was in holding that in this action for a rescission of the contract of sale for a breach of the covenants of this deed the burden of proof was upon the plaintiff to show that the defendant had no title in fact, and that, in the absence of any proof on the subject, the presumption was that the defendant had title. Under the complaint, the plaintiff had the right to recover upon a breach of the covenant of seisin, and on the covenant of a right to convey, upon proof of the execution and delivery of the deed and payment of the purchase money, and that the actual possession of the property had never been taken by the plaintiff under his deed. . . . It is unnecessary to quote other authorities in support of the rule. The defendant having admitted the making of the deed, and the deed being in evidence showing the covenants, and the evidence in this case showing affirmatively that no possession of the granted premises was ever given by the grantor to the grantee, and that no possession had ever been in fact taken by such grantee under his deed, the burden of showing that the grantor was seised of an estate in fee at the time of the making and delivery of the deed was upon the grantor." McLennan *v.* Prentice, 77 Wis. 124, 45 N. W. 943.

16. Woolley *v.* Newcombe, 87 N. Y. 605 (*overruling* Potter *v.* Kitchen, 5 Bosw. 566); Ingalls *v.* Eaton, 25 Mich. 32; Peck *v.* Houghtaling, 35 Mich. 127; Landt *v.* Major, 2 Colo. App. 551, 31 Pac. 524; Hamilton *v.* Shoaff, 99 Ind. 63; Lathrop *v.* Grosvenor, 10 Gray (Mass.) 52; Bayliss *v.* Stimson, 21 Jones & S. (N. Y. Super.) 225.

The Burden Upon the Plaintiff is sustained and he makes out a *prima*

(2.) **Incumbrances.** — (A.) Burden of Proof. — The burden is upon the vendee to establish the existence of the incumbrance.[17]

(B.) Damages. — Evidence is admissible to show the expense incurred in removing the incumbrance.[18]

V. BONA FIDE PURCHASERS.

1. Presumptions and Burden of Proof. — A. In General. — There is great conflict among the decisions as to which party has the burden of proving the bona fides of the transaction. This diversity of opinion has been caused by the variety of the pleadings under which the question arose, and by a failure to separate the question into its elements and distinguish between the proof of notice and proof of payment of a valuable consideration.[19] The general statement that the burden of proof is upon the party claiming to be a purchaser for value without notice is undoubtedly correct.[20] A con-

facie case if he proves that he yielded possession to a paramount title, this amounting in law to an eviction. Lowery *v.* Yawn, 111 Ga. 61, 36 S. E. 294.

17. "Where, instead of the affirmative fact of title in himself, set up in effect by the denial of the allegation that he was not the true owner, the defendant denies the existence of the particular incumbrance alleged by the plaintiff, the burden of proof is upon the plaintiff." Jerald *v.* Elly, 51 Iowa 321, 1 N. W. 639 (*distinguishing* Schofield *v.* Iowa Homestead Co., 32 Iowa 317).

In an action by vendee to recover on a covenant by vendor to repay any assessments that were confirmed up to a certain date, it was held that the burden of proof was on the plaintiff vendee to prove that the assessment was legal and valid. Tappan *v.* Young, 9 Daly (N. Y.) 357.

18. Lewis *v.* Harris, 31 Ala. 689; St. Louis *v.* Bissell, 46 Mo. 157; Eaton *v.* Lyman, 30 Wis. 41; Morehouse *v.* Heath, 99 Ind. 509; Comings *v.* Little, 24 Pick. (Mass.) 266.

Res Gestae. — A vendee is entitled to recover such a sum as he has been compelled to pay to extinguish an incumbrance, and a written agreement of the vendee with the purchaser at the foreclosure sale in relation to the redemption, is admissible as part of the transaction whereby such incumbrance was extinguished. Morehouse *v.* Heath, 99 Ind. 509.

19. Walter *v.* Brown, 115 Iowa 360, 88 N. W. 832; Shotwell *v.* Harrison, 22 Mich. 410; Brown *v.* Welch, 18 Ill. 343 (*approving* Boon *v.* Chiles, 10 Pet. (U. S.) 177, 211).

20. *United States.* — Reorganized Church *v.* Church of Christ, 60 Fed. 937; Nickerson *v.* Meacham, 14 Fed. 881; Lakin *v.* Sierra Min. Co., 25 Fed. 337.

Arkansas. — Bates *v.* Bigelow, 80 Ark. 86, 96 S. W. 125; Steele *v.* Robertson, 75 Ark. 228, 87 S. W. 117.

California. — Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803; Bell *v.* Pleasant, 145 Cal. 410, 78 Pac. 957; Eversdon *v.* Mayhew, 65 Cal. 163, 3 Pac. 641; Isenhoot *v.* Chamberlain, 59 Cal. 630; Wilhoit *v.* Lyons, 98 Cal. 409, 33 Pac. 325; Beattie *v.* Crewsdon, 124 Cal. 577, 57 Pac. 463. *Contra,* Smith *v.* Yule, 31 Cal. 180. *Compare* Garber *v.* Gianella, 98 Cal. 527, 33 Pac. 458.

Iowa. — Gardner *v.* Early, 72 Iowa 518, 34 N. W. 311; Nolan *v.* Grant, 53 Iowa 392, 5 N. W. 513; Hume *v.* Franzen, 73 Iowa 25, 34 N. W. 490; Kibby *v.* Harsh, 61 Iowa 196, 16 N. W. 85; Hannan *v.* Seidentopf, 113 Iowa 658, 86 N. W. 44.

Minnesota. — Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903.

Missouri. — Edwards *v.* Missouri, K. & T. R. Co., 82 Mo. App. 96.

Nebraska. — Bowman *v.* Griffith,

35 Neb. 361, 53 N. W. 140; Pfund *v.* Valley L. & T. Co., 52 Neb. 473, 72 N. W. 480; Baldwin *v.* Burt, 43 Neb. 245, 61 N. W. 601; Phoenix Mut. L. Ins. Co. *v.* Brown, 37 Neb. 705, 56 N. W. 488; First Nat. Bank *v.* Gibson, 60 Neb. 767, 84 N. W. 259.

New York. — Harris *v.* Norton, 16 Barb. 264.

Texas. — Holland *v.* Ferris (Tex. Civ. App.), 107 S. W. 102; McAllen *v.* Alonzo (Tex. Civ. App.), 102 S. W. 475; Hamman *v.* Keigwin, 39 Tex. 34; Green *v.* Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345; Turner *v.* Cochran, 94 Tex. 480, 61 S. W. 923; Watkins *v.* Edwards, 23 Tex. 443; Hawley *v.* Bullock, 29 Tex. 216.

West Virginia. — Clark *v.* Sayers, 55 W. Va. 512, 47 S. E. 312.

"**To Entitle a Party** to protection as a subsequent purchaser in good faith and for value against the title of a grantee under a prior unrecorded deed, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, at any moment of time before the payment of the money, or he is not a bona fide purchaser." Lindley *v.* Blumberg (Cal. App.), 93 Pac. 894.

"**It Has Been Repeatedly** decided by this court that where one holding under an unrecorded deed brings an action involving the respective titles to the lands against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without knowledge of the rights of the previous grantee." Bell *v.* Pleasant, 145 Cal. 410, 78 Pac. 957.

Person Claiming Under Mortgage as against a person in possession under an unrecorded deed, must allege and prove that his mortgage was given for a valuable consideration and that he had neither actual nor constructive notice. Smith *v.* White, 62 Neb. 56, 86 N. W. 930.

One Who Having Notice Himself bases his claim upon the fact of his grantor being a bona fide purchaser must allege and prove it. Prickett *v.* Muck, 74 Wis. 199, 42 N. W. 256.

Burden of Interpleaders claiming to have purchased without notice, to prove it. Steele *v.* Robertson, 75 Ark. 228, 87 S. W. 117.

An Unrecorded Deed is *prima facie* evidence of title, and its introduction in evidence casts upon one claiming title through a subsequent conveyance from the same grantor the burden of proving that he was a purchaser for a valuable consideration and without notice. Nolan *v.* Grant, 53 Iowa 392, 5 N. W. 513; Fogg *v.* Holcomb, 64 Iowa 621, 2 N. W. 111.

An Affirmative Defense. — In suits in equity, the claim of a bona fide purchaser for value is an affirmative defense, which must be pleaded, thereby placing the burden of proof in such cases upon the party relying thereon. Jennings *v.* Lentz (Or.), 93 Pac. 327; Simmons *v.* Redmond (Tenn. Ch.), 62 S. W. 366; Hows *v.* Butterworth (Tenn. Ch.), 62 S. W. 1114; Upton *v.* Betts, 59 Neb. 724, 82 N. W. 19; Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773; Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497; Holdsworth *v.* Shannon, 113 Mo. 508, 21 S. W. 85; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Arlington State Bank *v.* Paulsen, 57 Neb. 717, 78 N. W. 303; Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Nickerson *v.* Meacham, 14 Fed. 881.

"Where the defense of innocent purchaser is set up affirmatively as in this case and not in response to allegations in the bill, he must show an actual purchase for value fully completed, though he may not be bound to prove negatively that he had no notice at the time of the purchase. 2 Lead. Cas. Eq. Hare *v.* Wall, 124." Pearce *v.* Foreman, 29 Ark. 563; Gerson *v.* Pool, 31 Ark. 85.

"**But the Character of 'Purchaser'** under the statute is an independent one, something different from that of assignee, and to avail the defendant it was necessary to plead and prove not only that he was a 'purchaser' of record, but that he was a purchaser in good faith and for a valuable consideration. He was bound, therefore, to deny by his answer notice, although notice had not

been charged, and to prove it. These matters were new and in defense. The duty of setting them up and the burden of proving them were, therefore, upon him, and because he did not so plead and had not proved those things, the judgment of the court below was sustained. No new rule was applied, but a very old one which requires a defendant who would avail himself of new matter as a defense, to aver and prove it, and which has been illustrated to the present day and through various systems of equitable procedure." Seymour *v.* McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94.

In Kimball *v.* Houston Oil Co., 100 Tex. 336, 99 S. W. 852, *reversing* 94 S. W. 423, the court distinguishes between the Texas recording acts of 1840 and 1836, holding that under the latter the burden was upon the senior grantee to prove that the junior grantee was not a bona fide purchaser.

Fraud in Inception. — There is a line of authorities holding that where there was fraud in the inception of an agreement the burden of proof is upon a subsequent purchaser to show his good faith, in analogy to the similar rule which governs in the case of negotiable instruments. Letson *v.* Reed, 45 Mich. 27, 7 N. W. 231; Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Sillyman *v.* King, 36 Iowa 207; Rush *v.* Mitchell, 71 Iowa 333, 32 N. W. 367; Throckmorton *v.* Rider, 42 Iowa 84; Falconbury *v.* McIlravy, 36 Iowa 488.

"Where under the facts in a given case the original party would not be permitted to come into a court of equity and insist upon specific performance of an agreement, on the ground that to permit him so to do would operate as a fraud upon the defendant, any person claiming through him, in order to occupy any better position, must establish the that that he is in fact a *bona fide* purchaser, and this cannot be inferred from showing a purchase alone." Berry *v.* Whitney, 40 Mich. 65.

Confidential Relations. — The burden is upon one claiming under a grantee who held a confidential relation with his grantor, if the subsequent purchaser had notice of this fact, to prove that the original sale was fair. Jackson *v.* Grissom, 196 Mo. 624, 94 S. W. 263.

Fraud in Inception — Qualification to Rule. — "Plaintiffs' counsel concede the burden was on their clients to prove fraud in matters preceding and attending the foreclosure sale; but they say that, having proved fraud in the origin of the title, the burden shifts, and that one who takes title from a fraudulent grantee must purge himself — he must show his innocency. . . . There is a line of cases elsewhere sustaining that doctrine. . . . In some cases a presumption has been indulged against a party to a suit who, charged with fraud, stands mute under the accusation and refuses to testify. Obviously, that presumption could not be indulged here, for the mouth of David Calloway was not closed by mortal will or hand. The rule invoked by the line of cases just cited is that applied in cases of negotiable paper where the payor charges and proves fraud in its execution or utterance. In such cases the burden is cast upon the indorsee to show good faith. Clifford Banking Co. *v.* Donovan Com. Co., 195 Mo., loc. cit. 285, 94 S. W. 527, and cases cited. The rule should be applied with nice discrimination, and not mechanically, when it is sought by its use to uproot clear record titles to real estate. In many cases it might result in a gross perversion of justice if heirs, of such age and so situated as not to be expected to know anything of the transaction, were required to prove a negative, i. e., lack of notice in their ancestor. It is believed the uniform practice, nisi, has been that the complainant should both charge and prove notice to a subsequent grantee of the fact of fraud, or notice of such facts as put the grantee upon inquiry." Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60.

Exception Where Second Purchaser Acquires Legal Title. — "The general rule is that, to entitle a subsequent vendor to have a prior unregistered conveyance postponed to his subsequent conveyance, it must appear — first, that he was a pur-

trary rule exists in a few jurisdictions based upon the principle that fraud will never be presumed.[21]

B. NOTICE. — a. *In General.* — In the first instance the burden of proving want of notice is upon the person claiming to be a bona fide purchaser.[22] But most courts hold that a *prima facie* case is

chaser bona fide; second, that he purchased without notice, actual or constructive, of the title of the prior vendee; and, third, it must appear that the payment of the purchase money or consideration was bona fide and truly made. . . . But to the rule that a party claiming to be an innocent bona fide purchaser, without notice, must prove such fact, there is an exception, which is: Where the subsequent purchaser gets the legal title, and another party, holding an equitable title, seeks to oust him, the burden of proof rests on the holder of such equity to show that the subsequent purchaser had notice, actual or constructive, of his equitable title, or such facts as would put a prudent man on inquiry. Peterson *v.* McAulley (Tex. Civ. App.), 25 S. W. 829; Hill *v.* Moore, 62 Tex. 610; Lewis *v.* Cole, 60 Tex. 341. The facts bring this case within the well established exception to the general rule, and the trial court erred in refusing a special charge." Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. 1011. And this is the settled law of Texas. Middleton *v.* Johnston (Tex. Civ. App.), 110 S. W. 789; Oaks *v.* West (Tex. Civ. App.), 64 S. W. 1033; Lane *v.* De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437; Saunders *v.* Isbell, 5 Tex. Civ. App. 513, 24 S. W. 307; Barnes *v.* Jamison, 24 Tex. 362; Johnson *v.* Newman, 43 Tex. 628, 642; Hill *v.* Moore, 62 Tex. 610; Cameron *v.* Romele, 53 Tex. 241; Brown Hdw. Co. *v.* Catrett (Tex. Civ. App.), 101 S. W. 559; McAlpine *v.* Burnett, 23 Tex. 650; Lewis *v.* Cole, 60 Tex. 341; Turner *v.* Cochran, 94 Tex. 480, 61 S. W. 923; Biggerstaff *v.* Murphy, 3 Tex. Civ. App. 363, 22 S. W. 768; Newton *v.* McLean, 41 Barb. (N. Y.) 285.

"The principle that a party who claims land under an equitable title against one who purchased the legal title has the burden of proving that it was purchased without notice of his equity, or that such purchaser did not pay value, . . . has no application to a case where one party claims through administrative proceedings upon the estate of a decedent and the other under deeds from the heirs of the intestate." Holland *v.* Ferris (Tex. Civ. App.), 107 S. W. 102.

21. Lowden *v.* Wilson, 233 Ill. 340, 84 N. E. 245; Godfroy *v.* Disbrow, Walk. Ch. (Mich.) 260.

"**A Junior Purchaser,** whose deed is first recorded, is presumptively a bona fide purchaser for value, without notice, and the burden of proof to the contrary rests on the senior purchaser, whose deed has not been recorded." Gratz *v.* Land & R. Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393.

In Ejectment, defendant, subsequent purchaser whose deed is first recorded, is not bound to plead nor in the first instance to prove that his purchase was in good faith and for value; but may rely upon a mere assertion of paramount title with proof of the prior record of his deed. The burden is upon the plaintiff to show bad faith or want of consideration. Hoyt *v.* Jones, 31 Wis. 389.

22. Beattie *v.* Crewdson, 124 Cal. 577, 57 Pac. 463.

Subsequent Patentee must show that he was ignorant of a prior appropriation of the land, and entitled to protection as a junior good-faith locator. Keachele *v.* Henderson (Tex. Civ. App.), 78 S. W. 1082.

Notice must be denied positively by the party relying upon the defense of a bona fide purchase, although it is not charged in the bill, and if facts are charged from which notice may be inferred, such facts must be denied also. Johnson *v.* Toulmin, 18 Ala. 50, 50 Am. Dec. 212; Ledbetter *v.* Walker, 31 Ala. 175; Mantz *v.* McPherson, 7 B. Mon. (Ky.) 597, 18 Am. Dec. 216.

established by virtue of the presumption of good faith, which has the effect of shifting the burden of proof to the claimant under the prior unrecorded conveyance or lien.[23]

Burden of Proving That Grantor Was a Purchaser for Value Without Notice. — Where the plaintiffs had an unrecorded deed to the premises at the time of the sale to the grantor through whom the defendants claim, the burden of proving that such grantor was a bona fide purchaser was upon the defendants. Gardner *v.* Early, 72 Iowa 518, 34 N. W. 311.

23. *Alabama.* — Center *v.* P. & M. Bank, 22 Ala. 743.

Idaho. — Froman *v.* Madden, 13 Idaho 138, 88 Pac. 894.

Illinois. — Anthony *v.* Wheeler, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281; Gould *v.* Wenstrand, 90 Ill. App. 127.

Iowa. — Walter *v.* Brown, 115 Iowa 360, 88 N. W. 832; McCormick Co. *v.* Leonard, 38 Iowa 272; Hoskins *v.* Carter, 66 Iowa 638, 24 N. W. 249; Blackman *v.* Henderson, 90 N. W. 825, *modifying s. c.*, 116 Iowa 578, 87 N. W. 655, 56 L. R. A. 902.

Kentucky. — Boltz *v.* Boain, 28 Ky. L. Rep. 842, 90 S. W. 593.

Maine. — Sidelinger *v.* Bliss, 95 Me. 316, 49 Atl. 1094; Spofford *v.* Weston, 29 Me. 140; Marshall *v.* Dunham, 66 Me. 539; Smith *v.* Hodsdon, 78 Me. 189, 3 Atl. 276.

Michigan. — Hooper *v.* DeVries, 115 Mich. 231, 73 N. W. 132.

Montana. — Sheldon *v.* Powell, 31 Mont. 249, 78 Pac. 491.

New Jersey. — Paul *v.* Kerswell, 60 N. J. L. 273, 37 Atl. 1102; Protection Bldg. & L. Assn. *v.* Knowles, 54 N. J. Eq. 519, 34 Atl. 1083; Coleman *v.* Barklew, 27 N. J. L. 357; Hendrickson *v.* Woolley, 39 N. J. Eq. 307; Smith *v.* Umstead (N. J. Eq.), 65 Atl. 442; Roll *v.* Rea, 50 N. J. L. 264, 12 Atl. 905; Holmes *v.* Stout, 10 N. J. L. 419.

New York. — Fort *v.* Burch, 6 Barb. 60; Beman *v.* Douglas, 1 App. Div. 169, 37 N. Y. Supp. 859.

North Carolina. — Austin *v.* Staten, 126 N. C. 783, 36 S. E. 338.

Ohio. — Varwig *v.* Cleveland etc. Co., 54 Ohio St. 455, 44 N. E. 92.

Oregon. — Advance Thresher Co. *v.* Esteb, 41 Or. 469, 69 Pac. 447.

Tennessee. — Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834.

Texas. — Turner *v.* Cochran (Tex. Civ. App.), 63 S. W. 151; Guffey Pet. Co. *v.* Hooks (Tex. Civ. App.), 106 S. W. 690; Whitaker *v.* Farris (Tex. Civ. App.), 101 S. W. 456.

Wisconsin. — Cutler *v.* James, 64 Wis. 173, 24 N. W. 874.

Presumption of Innocence. "Men are not usually dishonest. Human nature is not as prone to do wrong in business transactions as sparks are to fly upward. In the law there is a presumption in favor of innocence. It is familiar doctrine of everyday use in the administration of justice that, if a transaction comports as well with honesty as dishonesty, then the law takes the nobler and better view of that transaction." Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60.

Rule Stated. — "It is true, as contended, that the recording laws can only operate for the protection of *bona fide* purchasers, but it is not true, as counsel seems to suppose, that such a purchaser is presumed not to be *bona fide* until proof be made to the contrary, or, that to avail himself of the benefit of such laws in an action of ejectment, a defendant must prove, *aliunde* the recitals in his deed, that a valuable consideration was paid therefor. The burden of proof in such cases is upon the party alleging bad faith or want of consideration." Ryder *v.* Rush, 102 Ill. 338.

"It Is Finally Insisted, that if these mortgagees were purchasers without notice, they were bound to show it; that the burden of proof is upon them. Such, in our opinion, is not the construction to be given to our recording system. The rule is, that a subsequent deed, first recorded, will prevail over a prior one subsequently recorded, unless the prior grantee can show knowledge in the other. The taking of the subsequent deed, with knowledge of the prior conveyance, is a fraud upon the first purchaser. This fraud will

b. *Effect of Payment.* — Proof by the purchaser that he paid value and took a title which was clear on the record, satisfies the burden which is upon the purchaser, and the burden then shifts to the claimant to show the existence of actual notice.[24]

C. Payment of Consideration. — a. *In General.* — The burden of proving payment of the consideration is upon the party claiming to be a bona fide purchaser, as this is a fact peculiarly within his own knowledge.[25]

not be presumed, but must be shown, by the party seeking to avail himself of it. The burden of proof is upon him." Bush *v.* Golden, 17 Conn. 594.

Where the Vendor alleges that the sub-vendee purchased with notice that the purchase money was not paid, such allegation being denied in the answer, the burden of proving it is upon the vendor. Stroud *v.* Pace, 35 Ark. 100.

Notice of Lien. — Where plaintiff alleges that the defendant purchased land with notice of a vendor's lien, the burden of proof is upon him. Gayle *v.* Perryman, 6 Tex. Civ. App. 20, 24 S. W. 850.

24. Barton *v.* Barton, 75 Ala. 400; Craft *v.* Russell, 67 Ala. 9; Kendrick *v.* Colyar, 143 Ala. 597, 42 So. 110. See Morimura *v.* Samaha, 25 App. Cas. (D. C.) 189; Basset *v.* Nosworthy, 2 Lead. Cas. in Eq. (White & T.) 1; Morris *v.* Daniels, 35 Ohio St. 406.

"The Two Essential Facts, which give to the later but first recorded deed precedence, are: 1st, the purchase in good faith, and, 2d, the payment of a valuable consideration. As to the good faith, this is not required to be shown by the purchaser otherwise than by proof of the record, upon which he had a right to rely if he had no notice of the prior deed aside from the record; but if he had such notice, this is a fact affirmative in its nature, and it is, therefore, more reasonable to require it to be shown by the party claiming under the prior unrecorded deed than to call upon the purchaser to prove the negative." Shotwell *v.* Harrison, 22 Mich. 410.

"The facts, therefore, lead to the inquiry, was Williams such a purchaser? The evidence is undisputed that he paid value. There is no evidence that the amount was not full value. Proof of such payment, in the absence of proof of notice, or of any fact sufficient in law to charge notice, or sufficient to put the purchaser upon inquiry, will raise the presumption that his purchase was without notice, and the onus will be upon the one asserting an equity in the property to prove notice thereof to such purchaser." Williams *v.* Smith, 128 Ga. 306, 57 S. E. 801; Johnston *v.* Neal, 67 Ga. 528.

Prima Facie Proof. — "Though the defense of *bona fide* purchaser is in affirmative one, and must be pleaded and proved by the defendant, proof of payment of the consideration is *prima facie* evidence of the want of notice, and devolves upon the complainant the burden of establishing the notice." Atkinson *v.* Greaves, 70 Miss. 42, 11 So. 688.

Presumption of Lack of Notice has been held to be warranted from a long lapse of time, together with payment of a full consideration. Rogers *v.* Pettus, 80 Tex. 425, 15 S. W. 1093.

25. *Alabama.* — Zelnicker *v.* Brigham, 74 Ala. 598.

Illinois. — Moshier *v.* Knox College, 32 Ill. 155.

Iowa. — Kringle *v.* Rhomberg, 120 Iowa 472, 94 N. W. 1115.

Maryland. — Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858.

Missouri. — Bishop *v.* Schneider, 46 Mo. 472, 482; Halsa *v.* Halsa, 8 Mo. 303; Paul *v.* Fulton, 25 Mo. 156; Aubuchon *v.* Bender, 44 Mo. 560.

Oregon. — Weber *v.* Rothchild, 15 Or. 385, 15 Pac. 650.

Texas. — Brown *v.* Texas Cactus Co., 64 Tex. 396; Robertson *v.* McClay, 19 Tex. Civ. App. 513, 48 S. W. 35; Mitchell *v.* Puckett, 23 Tex. 573.

Fact Peculiarly Within Pur-

b. *Recital of Payment in Deed.* — The recital of payment in a deed does not raise a presumption of payment as against strangers to the deed, nor is it evidence of payment,[26] although a few courts hold the contrary view.[27]

chaser's **Own Knowledge.** — "But the consideration which a party has himself paid for his own deed, is a fact peculiarly within his own knowledge, a fact affirmative in its nature, and which must, therefore, be presumed to be much more easy of proof than the negative fact of its non-payment could be to the opposite party. It would seem, therefore, to be more reasonable and just, in principle, to require the purchaser to give the affirmative proof of the consideration for his own immediate purchase, to bring himself within the protection of the statute, than to require the other party to prove the negative — the want or absence of consideration. And this seems to be the general rule in courts of equity in similar cases. This is not presuming fraud or bad faith in the party holding the subsequent, but first recorded deed, as the questions of good or bad faith and that of a valuable consideration are distinct in their nature. He may have taken the deed in entire good faith, within the meaning of the statutes, though he paid no consideration; or he may have purchased in bad faith, and yet paid a valuable consideration. Good faith *and* a valuable consideration are both required to give the record precedence over the prior unrecorded deed." Shotwell *v.* Harrison, 22 Mich. 410.

Averment of Notice does not shift the burden of proving payment.

"The introduction of the plaintiff's deed made a *prima facie* case for him. It became incumbent then upon the defendant to show facts sufficient to defeat the title thus acquired. Boone *v.* Childs, 10 Pet. 211. The defendant insists that this is not so, because the plaintiff assumed the burden of proof in respect to notice by averring that the defendant had notice. If we should concede that such averment by plaintiff would have the effect to shift the burden of proof in respect to notice, it would not, we think, shift the burden of proof in respect to the payment of a valuable consideration. Of such payment there was no evidence whatever. The deed to the defendant did, it is true, purport to be executed for a valuable consideration, but it was not evidence of the payment of a consideration as against the plaintiff. Sillyman *v.* King, 36 Iowa 207. Upon the evidence, then, we think that the plaintiff was entitled to recover." Nolan *v.* Grant, 53 Iowa 392, 5 N. W. 513.

26. *United States.* — Lakin *v.* Sierra Min. Co., 25 Fed. 337.

Florida. — Lake *v.* Hancock, 38 Fla. 53, 20 So. 811.

Illinois. — Roseman *v.* Miller, 84 Ill. 297.

Oregon. — Richards *v.* Snyder, 11 Or. 501, 6 Pac. 186.

Pennsylvania. — But see Baum *v.* Dubois, 43 Pa. St. 260.

Texas. — Moody *v.* Ogden, 31 Tex. Civ. App. 395, 72 S. W. 253; Turner *v.* Cochran, 94 Tex. 480, 61 S. W. 923; Hamman *v.* Keigwin, 39 Tex. 34.

"**It Is Well Settled** that one who seeks to postpone a prior legal title upon the ground that he has acquired a subsequent claim for value, without notice, has the burden of establishing both these facts by evidence outside of the recitals in the deed." Illies *v.* Frerichs, 11 Tex. Civ. App. 575, 32 S. W. 915; Bremer *v.* Case, 60 Tex. 151.

A Recital, Evidence Only Between the Parties. — "It is clear upon principle and authority that this recital in the deed, of the payment of the purchase money, is not evidence thereof as against the plaintiff, or any stranger to the deed, who is claiming adversely thereto. Such recital is evidence only as between the parties to the deed and persons claiming through or under them." Sillyman *v.* King, 36 Iowa 207.

27. Mullins *v.* Butte Hdw. Co., 25 Mont. 525, 65 Pac. 1004; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Lacustrine F. Co. *v.* Lake Guano

c. *Presumption of Payment From Lapse of Time.* — There is authority for the view that no presumption of payment arises from the mere lapse of time, in favor of strangers to the deed.[28]

2. Notice. — A. CONSTRUCTIVE NOTICE — a. *In General.* — Constructive notice arises out of a legal inference or presumption, and is distinguished from actual notice in that actual notice always affects the conscience of the person.[29] The notice conferred by means of the recording acts, is constructive notice,[30] as is also the notice implied from a *lis pendens.*[31]

& F. Co., 82 N. Y. 476; Jackson *v.* M'Chesney, 7 Cow. (N. Y.) 360; Doody *v.* Hollwedel, 22 App. Div. 456, 48 N. Y. Supp. 93; Bayliss *v.* Williams, 6 Coldw. (Tenn.) 440.

"**It Must Be Admitted That the Multitude** of opinions answer in the negative, and some respectable courts and authors so declare; but in this, as in many other matters, truth is found with the few, and we do not hesitate to stand with them against the many. The fundamental error of the view denying effect as *prima facie* evidence to the statement of the consideration in a deed consists in detaching this statement from the instrument and treating it as a mere receipt, and subject to the rule *res inter alios acta*, when, in truth, it is part of the conveyance, not an essential part, it may be, but an almost invariable accompaniment of conveyances of land generally true, and to be taken as true, in the first instance because it is part of the memorial of the transfer of title to land required by law to be evidenced by writing and spread upon record, for the information of all who have to trace the title. It is part of the *res gestae*, and where the thing done is admissible, the accompaniments are admissible." Hiller *v.* Jones, 66 Miss. 636, 6 So. 465.

Burden of proof is upon the vendor who has conveyed by an absolute deed, reciting payment of the purchase price, to show that a subpurchaser had notice of the fact that the purchase price was unpaid. Lambert *v.* Newman, 56 Ala. 623.

28. Rogers *v.* Pettus, 80 Tex. 425, 15 S. W. 1093; Bremer *v.* Case, 60 Tex. 151. See Illies *v.* Frerichs, 11 Tex. Civ. App. 575, 32 S. W. 915.

29. "**Actual Notice**, in the case we have been considering, is shown, when the proof, positive or presumptive, authorizes the clear and satisfactory conclusion, that the purchaser had knowledge of the incumbrance, or would have had it, if he had not wilfully declined to search for it, and thus his conscience is affected by it; and that constructive notice, is that which arises out of a legal inference, or presumption strictly speaking, such as notice from a register, record, or some such matter; and which does not affect the conscience of the purchaser, because, notwithstanding the legal presumption, he may never have had absolute knowledge of the record, or been put upon inquiry in relation to it." Jordan *v.* Pollock, 14 Ga. 145.

"Notice may be either actual or constructive. It is actual when the purchaser either knows of the existence of the adverse claim or title or is conscious of having the means of knowing, although he may not use them. Constructive notice is a legal presumption, and will be conclusive unless rebutted." Speck *v.* Riggin, 40 Mo. 405.

30. Dewitt *v.* Shea, 203 Ill. 393, 67 N. E. 761; Beach *v.* Osborne, 74 Conn. 405, 50 Atl. 1019, 1118; Warner *v.* Hamill, 134 Iowa 279, 111 N. W. 939; Copelin *v.* Schuler (Tex.), 6 S. W. 668.

31. "**Lis Pendens** is, in law, notice of every fact averred in the pleadings pertinent to the matter in issue or the relief sought, and of the contents of exhibits filed and proved. Center *v.* The Bank, 22 Ala. 743, 757. But, in order that the notice may attach, the property involved in the suit must be so pointed out in the proceedings so as to warn the public that they intermeddle at their peril." Allen *v.* Poole, 54 Miss. 323.

Where at the time the defendant

b. *Records. — Presumptions.* — There is no presumption that an instrument was recorded from the mere fact that it was entitled to record.[32]

B. ACTUAL NOTICE. — a. *Express Notice.* — **(1.) Lack of Notice.** Want of notice is established in the first instance by proof that the purchaser paid consideration and relied upon a clear record title,[33]

took the conveyance, the plaintiff was in possession and there was a *lis pendens* filed in an action by the plaintiff against the defendant's grantor, these facts were sufficient to charge the defendant with notice and the burden of showing the bona fide character of the transaction was upon him. Bryant *v.* Allen, 54 App. Div. 500, 67 N. Y. Supp. 89.

"**The Plaintiff** can be regarded in no other light than as a purchaser *pendente lite*. As such he would be held chargeable with notice of the character of the suit and of the extent of the claim asserted in the pleadings in reference to the land, even without express or implied notice in point of fact. This rule is founded in necessity and is salutary in its operation, for it would be almost impossible to terminate any suit successfully if alienations were allowed to prevail during its pendency." Smith *v.* Hodsdon, 78 Me. 180, 3 Atl. 276.

32. "**The Record** before us does not disclose that the deed from Raines to Ruth D. Walker and Ritie Anna Walker and Lena A. Walker was recorded. In the absence of evidence to that effect, there is no presumption of law that it was recorded. This eliminates the idea of constructive notice by a duly recorded deed." Williams *v.* Smith, 128 Ga. 306, 57 S. E. 801.

Presumption that the clerk has done his duty and recorded the deed when it has been filed and the fees paid. Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612.

When the time within which the sheriff's deed could be taken out has elapsed and none has been recorded, there is a presumption that none was ever executed. Stokes *v.* Riley (Ill.), 9 N. E. 69.

33. Coskrey *v.* Smith, 126 Ala. 120, 28 So. 11; Corcoran *v.* Merle, 67 Cal. 94, 7 Pac. 181; Lake *v.* Hancock, 38 Fla. 53, 20 So. 811.

"The good faith of the purchaser will sufficiently appear by proof of the record of conveyances showing title in his grantor at the time of the purchase, upon which record he had the right to rely and is presumed to have relied." Huil *v.* Diehl, 21 Mont. 71, 52 Pac. 782; Mullins *v.* Butte Hdw. Co., 25 Mont. 525, 65 Pac. 1004.

Admission of Payment Need Not Be Procured. — "The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and in the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record." Lennartz *v.* Quilty, 191 Ill. 174, 60 N. E. 913, *affirming* 92 Ill. App. 182. See Vogel *v.* Troy, 232 Ill. 481, 83 N. E. 960.

Question Is One of Apparent Ownership. — "There is no doubt that the word 'title' is often used to signify the right or interest a person has in or to the thing referred to, and when thus used is the equivalent of the word 'estate;' but this is not the sense in which it is used when it has reference to a purchase of real or personal property by a bona fide purchaser, for the inquiry in such cases is, upon what evidence did the purchaser act; and if this proved ownership in the vendor, acquired in the mode prescribed by law, then, in the absence of notice of some fact showing that the vendor had not such ownership or beneficial interest as the evidence showed to be in him, or of some fact sufficient to require inquiry as to this, the purchaser is authorized to believe and to act upon the belief that the vendor has the beneficial ownership or right shown by the evidence. The ques-

and evidence of notice is inadmissible until the execution of the prior unrecorded deed is shown.[34]

(2.) Direct Testimony. — The purchaser may testify directly to his want of notice.[35]

(3.) Failure To Testify. — Failure of the purchaser to testify as to his want of notice warrants an inference unfavorable to him.[36]

(4.) Admissions. — The admissions of the purchaser may be shown upon the issue of notice.[37]

(5.) Lapse of Time. — The lapse of time since the purchase is to be considered.[38]

(6.) Neighborhood Report. — To determine the question whether a particular person had notice of an encumbrance which existed on

tion is not one of real beneficial ownership or of superior right, but of apparent ownership evidenced as the law requires ownership to be." Patty *v.* Middleton, 82 Tex. 586, 17 S. W. 909.

34. "The deed from Sutter to Brannan was not properly recorded. It is scarcely pretended that it was — the officer having no authority for that purpose. Nor was the deed proven. It seems, from the copy produced, that there were subscribing witnesses to the deed. They were not called. The original itself was not produced. Brannan testifies to its loss; but if his testimony was sufficient to let in secondary evidence for the contents — which is by no means clear — the record fails to show any legal evidence of the contents of the deed. The subscribing witnesses were not shown to be without the jurisdiction of the court, and their testimony should have been had at least to the fact of the execution of the paper. The paper being the only evidence of the title of the defendant, was, therefore, properly excluded. This left the defendant without any proof of the case made by his answer. Under this state of facts, it is unnecessary to consider any question of notice. There could be no notice when there was no title. The defendant was bound to show a prior deed and notice, in order to defeat the subsequent deed. The notice itself amounted to nothing without proof of title." Smith *v.* Brannan, 13 Cal. 107.

35. Taylor *v.* Central Pac. R. Co., 67 Cal. 615, 8 Pac. 436.

36. Farley *v.* Bateman, 40 W. Va. 540, 22 S. E. 72.

Where a defendant is charged with fraud, "his failure to appear and testify in denial of the charge of something peculiarly within his own knowledge, carries with it the usual unfavorable and damaging presumptions." Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

37. Lake *v.* Hancock, 38 Fla. 53, 20 So. 811; Webb *v.* Robbins, 77 Ala. 176; Hamilton *v.* Fowlkes, 16 Ark. 340.

Declarations which tend to show some knowledge of a prior transaction but also show a belief that no deed was actually made out or sale completed will not justify an inference of notice. Spofford *v.* Weston, 29 Me. 140; Jackson *v.* Given, 8 Johns. (N. Y.) 137, 5 Am. Dec. 328.

Declarations by the grantee of lands that he knew of the prior mortgage on the land, made while seized of the land, are admissible against his subsequent purchaser. Walter *v.* Brown, 115 Iowa 360, 88 N. W. 832.

38. Guffey Pet. Co. *v.* Hooks (Tex. Civ. App.), 106 S. W. 690; Eastham *v.* Hunter, 98 Tex. 560, 86 S. W. 323.

Want of Notice may be presumed from proof of the death of the parties, of the lapse of time (40 years) and of the payment of the purchase money. Dean *v.* Gibson (Tex. Civ. App.), 58 S. W. 51.

land, the knowledge of the community in general as to this fact may be shown.[39]

(7.) Inadequacy of Consideration. — The inadequacy of the consideration paid is some evidence that the purchaser had notice.[40]

(8.) Relations of Parties. — Relationship or intimate association are facts to be considered.[41]

(9.) Notice of Specific Claim. — Notice of a specific claim is not notice of other independent claims.[42]

(10.) Transactions With Deceased Persons. — The general rules gov-

39. Berry *v.* House, 1 Tex. Civ. App. 562, 21 S. W. 711. See Chadwick *v.* Clapp, 69 Ill. 119.

"**General Neighborhood Talk**" is evidence of notice. Valentine *v.* Seiss, 79 Md. 187, 28 Atl. 892.

"**Where Particular Knowledge** of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors is admissible to go to the jury as tending to show that he also had knowledge as well as they." Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773.

40. *United States.* — Dunn *v.* Barnum, 51 Fed. 355.

Iowa. — Emonds *v.* Termehr, 60 Iowa 92, 14 N. W. 197.

Minnesota. — Hersey *v.* Lambert, 50 Minn. 373, 52 N. W. 963; Cummings *v.* Finnegan, 42 Minn. 524, 44 N. W. 796.

Missouri. — Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

Texas. — Tate *v.* Kramer, 1 Tex. Civ. App. 427, 23 S. W. 255.

Wisconsin. — Hoppin *v.* Doty, 25 Wis. 573; DeWitt *v.* Perkins, 22 Wis. 473.

"**Unquestionably the Defendant** knew that he was purchasing a suspicious and speculative title for a sum hardly more than sufficient to defray the cost of executing the deed. The statute was not enacted to protect one whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Its purpose is to protect the man who honestly believes he is acquiring good title and who invests some substantial sum in reliance on that belief. The fact that the supposed title could be and was purchased for a mere nominal consideration is certainly constructive notice of the invalidity of the title, and sufficient of itself to put the purchaser upon inquiry." Wisconsin River Lumb. Co. *v.* Selover (Wis.), 116 N. W. 265.

"**A Subsequent Purchaser,** in order to be entitled to protection, must not only pay a valuable consideration without notice, but he must be a purchaser in good faith. The consideration need not be what is an adequate consideration or the full value of the property. Inadequacy of price may be shown upon the issue of good faith. Wilson *v.* Denton, 82 Texas 531. That is, if the price paid was so grossly inadequate that it would call attention to the fact that there must be some defect in the title, or that the conveyance was made for improper purposes, as to defraud creditors, this might be submitted as a question of fact to the jury upon the question of notice; that is, knowledge of such fact as would put a prudent man upon inquiry." Hume *v.* Ware, 87 Tex. 380, 28 S. W. 935.

41. Galbraith *v.* Howard, 11 Tex. Civ. App. 230, 32 S. W. 803; Moore *v.* Tarrant Co. Assn. (Tex. Civ. App.), 31 S. W. 709; Perkins *v.* Wilkinson, 86 Wis. 538, 57 N. W. 371.

42. Allen *v.* Anderson (Tex. Civ. App.), 96 S. W. 54; Thompson *v.* Lapsley, 90 Minn. 318, 96 N. W. 788.

Testimony that the purchaser was told of "rumors" and that "the title was bad," is insufficient to prove notice, since it must be shown that he had notice of the particular defect in the title due to the claimant's prior rights. Williams *v.* Smith, 128 Ga. 306, 57 S. E. 801; Black *v.*

erning this subject will be found discussed elsewhere in this work.[43]

(11.) Circumstantial Evidence. — Evidence of the surrounding circumstances is admissible to establish notice.[44]

Thornton, 31 Ga. 641, 659; Raymond *v.* Flavel, 27 Or. 219, 40 Pac. 158.

43. See article "Transactions With Deceased Persons."

In an Action of Ejectment by a prior grantee under an unrecorded deed against the subsequent purchaser, the common grantor having died, the plaintiff is incompetent to testify to the fact that the defendant knew of the prior agreement of his grantor with the plaintiff and had read it, this being within the prohibition of the statute regulating the proof of transactions with deceased persons. Rudolph *v.* Rudolph, 207 Pa. St. 339, 56 Atl. 933.

A Grantor having sold property belonging to a trust estate, without authority, in an action to recover said property by the cestuis, the grantor is a competent witness to testify to the knowledge of the grantee, although the grantee has since deceased. Virgin *v.* Wingfield, 54 Ga. 451.

44. Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; Farley *v.* Bateman, 40 W. Va. 540, 22 S. E. 72; Maupin *v.* Emmons, 47 Mo. 304.

Rule Stated. — "The question presented in this case is whether the defendant Mann was a purchaser for valuable consideration without notice of plaintiffs' undocketed judgment. The fact of notice may be inferred from circumstances, as well as proved by direct evidence; and where the facts and circumstances are such as to raise a presumption of notice, the burden of proof is shifted, and it devolves upon the defendant purchaser to prove want of notice. . . . It is said a court of equity 'has a quick eye to detect fraud.' A boy may satisfy his mother that his wet hair is the result of sweat, and not of his going in swimming contrary to her commands, but he will hardly convince her that his back and arms were sunburned, and his shirt turned wrong side out, in crawling through a rail fence backwards. And so, in cases of this character, one suspicious circumstance, taken alone, may be easily explained; but, when a number result from the same transaction, the explanation will hardly be sufficient." Farley *v.* Bateman, 40 W. Va. 540, 22 S. E. 72.

Taking Security from the grantor in addition to his warranty does not establish notice. Lamont *v.* Stimson, 5 Wis. 443.

Conveyance by an Unusual Method. — The question being whether the defendant was a *bona fide* purchaser, the fact that he employed counsel, and that the records were examined, and that he did not take a notarial act of sale, which, in the usual course of business, is accompanied by a mortgage certificate, (C. C. 3328) but that he took a private act of sale, is a circumstance calculated to excite suspicion. Long *v.* Martin, 7 La. Ann. 579.

Mailing of Letter as Notice. — On the question of whether a person acquired notice of an equity from the fact that a letter was mailed to him containing a statement of the facts, the court in Bova *v.* Norigian, 28 R. I. 319, 67 Atl. 326, said: "'Notice' is equivalent to 'information,' 'intelligence' or 'knowledge.' Wile *v.* Southbury, 43 Conn. 53. Where the law prescribes written notice as a method of giving information, no doubt the receipt of a letter containing the information would be conclusive proof of knowledge for the purposes of the case. Whether, as a matter of fact, the recipient had read or could read the letter would make no difference, because the sender had fully complied with the direction of the law; but there is no indisputable presumption that a letter, which the law does not require to be sent, is read by the receiver to whom it is delivered. The question is one of fact, to be determined on all the evidence relating to it. Brayton, J., says, in Harris *v.* Arnold, 1 R. I. 125, 136: 'No man would be presumed to have that knowledge which we might be able to prove that he had not, unless as a consequence of

(12.) Failure To Investigate. — Evidence that a person fails to investigate through negligence or from a fear of what he might learn is strong proof of notice.[45]

(13.) Notice to Agent. — Notice acquired by an agent is equivalent to notice to the principal,[46] provided it was acquired during the continuance of the agency.[47]

the neglect of some known duty.' The law prescribes the recording of a conveyance of title to real estate as the method of giving legal notice of the conveyance to all the world. If the claimant under such a conveyance chooses to neglect this method, and attempts to give actual knowledge of his title to another person, he assumed the task of actually bringing this information to the apprehension of the person to be affected by it. The delivery of the notice in writing to a blind man, or to one unable to read, is not enough. The delivery of a letter may be ground of inference that the information was communicated, but this inference may be rebutted by contrary evidence. The question was thus properly left to the jury whether, if the letter were received by the plaintiff, he acquired actual knowledge of its contents." Bova *v.* Norigian, 28 R. I. 319, 67 Atl. 326.

"**While it Is True** that notice can be shown by circumstances, the circumstances must be of such a character as to point with some probative force to its existence." Wallis Landis & Co. *v.* Dehart (Tex. Civ. App.), 108 S. W. 180.

45. Peters *v.* Cartier, 80 Mich. 124, 45 N. W. 73; Wilson *v.* Miller, 16 Iowa 111; Chandler *v.* Clark, 151 Mich. 159, 115 N. W. 65; Bryan *v.* Tormey (Cal.), 21 Pac. 725.

Gross Negligence in Failure To Make Inquiry. — "Gross negligence in failing to make inquiry when the surrounding facts suggest the existence of others, and that inquiry to be made is tantamount in courts of equity to notice. Major *v.* Bukley, 51 Mo. 227; Leavitt *v.* LaForce, 71 Mo. 353; Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736. This is the universally prevalent doctrine of courts of equity in all jurisdictions. 2 Pom. Eq. Jur. (2 Ed.) §§ 596-600, *et seq.* And actual notice may be inferred from circumstances and by reasonable deductions therefrom. *Ib.*; Brown *v.* Volkening, 64 N. Y. 76. Courts of equity, since their earliest foundation, have always recognized that the still small voice of suggestion, emanating as it will from contiguous facts and surrounding circumstances, pregnant with inference and provocative of inquiry, is as potent to impart notice as a presidential proclamation, or an army with banners." Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

Evidence of Undue Haste and lack of investigation may show that the vendee was not a bona fide purchaser. Aldrich *v.* Adams, 166 Mass. 141, 43 N. E. 1029.

46. Blair *v.* Whittaker, 31 Ind. App. 664, 69 N. E. 182; Broughton *v.* Foster, 69 Ga. 712.

47. Lenehan *v.* M'Cabe, 2 Ir. Eq. Rep. 342.

Rule Applied. — Knowledge by an agent is knowledge by the principal, if obtained during the transaction, and the rule is not limited to knowledge obtained at the precise time when the deed was executed. Retherford *v.* Wright (Ind. App.), 83 N. E. 520.

No Notice Where Agent's Conduct Is Fraudulent. — Notice by an agent is notice to the principal ordinarily, but only where such knowledge is obtained while acting for the principal. And there is also an exception to the general rule where the conduct of the agent is such as to raise a presumption that he would not communicate the fact to his principal — as where his action is fraudulent. Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440.

Notice of Person's Attorney. Notice of a party's attorney cannot be imputed to the party where such notice was not acquired in doing

b. *Implied Notice.* — **(1.) In General.** — Positive information brought directly home to a purchaser need not be proved, but it is sufficient if he be shown to have notice of such facts as would put a reasonable man upon inquiry, in which case he is charged with knowledge of all the facts which a reasonable inquiry would have disclosed.[48]

business for her. Warner *v.* Hall, 53 Mich. 371, 19 N. W. 40.

Accommodation Grantee is bound by notice of the real party in interest. Bigelow *v.* Brewer, 29 Wash. 670, 70 Pac. 129.

48. *United States.* — Vattier *v.* Hinde, 7 Pet. 252; Tardy *v.* Morgan, 3 McLean 358, 23 Fed. Cas. No. 13,752.

Alabama. — Rosette *v.* Wynn, 73 Ala. 146; Center *v.* P. & M. Bank, 22 Ala. 743; Taylor *v.* Agricultural & M. Assn., 68 Ala. 229.

Connecticut. — Booth *v.* Barnum, 9 Conn. 286, 23 Am. Dec. 339.

Illinois. — Hatch *v.* Bigelow, 39 Ill. 546; Clark *v.* Plumstead, 11 Ill. App. 57; Morris *v.* Hogle, 37 Ill. 150, 87 Am. Dec. 243; Doyle *v.* Teas, 5 Ill. 202.

Kentucky. — Interstate Inv. Co. *v.* Bailey, 29 Ky. L. Rep. 468, 93 S. W. 578.

Maryland. — Price *v.* McDonald, 1 Md. 403, 54 Am. Dec. 657; Green *v.* Early, 39 Md. 223.

Massachusetts. — Pingree *v.* Coffin, 12 Gray 288.

Minnesota. — Martin *v.* Brown, 4 Minn. 282; McAlpine *v.* Resch, 82 Minn. 523, 85 N. W. 545.

Missouri. — Sicher *v.* Rambousek, 193 Mo. 113, 91 S. W. 68; Maupin *v.* Emmons, 47 Mo. 304; Bank *v.* Frame, 112 Mo. 502, 20 S. W. 620.

New Hampshire. — Nute *v.* Nute, 41 N. H. 60.

New York. — Baker *v.* Bliss, 39 N. Y. 70.

Oregon. — Carter *v.* City of Portland, 4 Or. 339.

Texas. — Bacon *v.* O'Connor, 25 Tex. 213; O'Mahoney *v.* Flanagan, 34 Tex. Civ. App. 244, 78 S. W. 245.

West Virginia. — Cain *v.* Cox, 23 W. Va. 594; Pocahontas Tanning Co. *v.* St. Lawrence B. & M. Co., 60 S. E. 890.

Wisconsin. — Mueller *v.* Brigham, 53 Wis. 173, 10 N. W. 366.

"**Notice by Implication** differs from constructive notice, with which it is frequently confounded, and which it greatly resembles, with respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, or resting upon strictly legal inference, while implied notice arises from inference of fact." Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122.

Rule Stated. — "The rule is that, where a person has knowledge of facts sufficient to put him upon inquiry as to the existence of a prior unrecorded mortgage or other lien upon the premises that he is about to purchase, he is presumed either to have made the inquiry and ascertained the facts of such prior right, or to have been guilty of a degree of negligence fatal to his claim as a bona fide purchaser. The circumstances, however, must be such as not only to lead to, but to direct, the course of inquiry which would, if pursued, end in a discovery of the defect. The presumption is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of due diligence on his part." Wheat *v.* Lord, 72 Hun 447, 25 N. Y. Supp. 208.

"Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title, or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of ac-

(2.) Possession. — (A.) In General. — It is a universal rule that possession of land is evidence of notice of the possessor's title or interest, and that a purchaser under such circumstances is bound to make diligent inquiry to ascertain the real rights of the occupant.[49]

tual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice." Brown *v.* Volkening, 64 N. Y. 76.

Sufficiency of Facts To Show. "It is well settled that actual notice is not essential to give effect to a prior unrecorded conveyance. The difficulty in such cases usually arises from the necessity of determining what shall be held sufficient constructive notice, and that is what we are called upon to do here. It is stated by the authorities generally, that any fact or circumstance coming to the knowledge of the subsequent purchaser, which would put a prudent man on inquiry, and which, pursued, would lead to actual notice of an unrecorded deed lying in the apparent chain of his title, is sufficient to invalidate the subsequent purchase. In such case, notice is imputed to the subsequent purchaser, on account of his negligence in not prosecuting his inquiries in the direction indicated. (Wade on Notice, sec. 246.) Enough must be shown to impute to the subsequent purchaser bad faith, so as to taint his purchase with fraud, in law. (Doyle et al. *v.* Teas et al., 4 Scam. 202.) Mere want of caution, as dintinguished from fraudulent and wilful blindness, is not sufficient to charge a subsequent purchaser with constructive notice of an unrecorded deed. Grundies *v.* Reid et al., 107 Ill. 304." Anthony *v.* Wheeler, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281.

Payment of Taxes by the purchaser in an unrecorded deed is not constructive notice. Sheldon *v.* Powell, 31 Mont. 249, 78 Pac. 491.

Community Property. — The fact that a deed to one-half of a joint estate signed by one of the joint owners and his wife, recites the fact that it is community property is sufficient to put a purchaser of the other half of the estate upon inquiry where his deed is signed by the joint owner and his wife, by another name, where by such inquiry he would have learned that this was a second wife and that the first wife's children had an interest in the property. Scripture *v.* Copp (Tex. Civ. App.), 57 S. W. 603.

Conveyance by Grantor as Heir. The fact that the grantor conveyed as heir was sufficient to put the grantee upon inquiry as to whether the grantor was a son of the deceased and whether the property was community property. Veatch *v.* Gilmer (Tex. Civ. App.), 111 S. W. 746.

Debt Past Due. — Where a recorded trust deed existed, the debt secured being past due, the purchaser of such land by quitclaim deed has sufficient knowledge to put him upon inquiry as to an unrecorded trustee's deed to the land. Bradford *v.* Carpenter, 13 Colo. 30, 21 Pac. 908.

49. *United States.* — Horbach *v.* Porter, 154 U. S. 549; Landes *v.* Brant, 10 How. 348.

Alabama. — Phillips *v.* Costley, 40 Ala. 486; Garrett *v.* Lyle, 27 Ala. 586.

Arkansas. — Atkinson *v.* Ward, 47 Ark. 533, 2 S. W. 77; Hamilton *v.* Fowlkes, 16 Ark. 340.

California. — Morrison *v.* Wilson, 13 Cal. 495; Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Beattie *v.* Crewdson, 124 Cal. 577, 57 Pac. 463; Woodson *v.* McCune, 17 Cal. 298; Landers *v.* Bolton, 26 Cal. 393.

Georgia. — Franklin *v.* Newsom, 53 Ga. 580; Helms *v.* O'Bannon, 26 Ga. 132; Garbutt *v.* Mayo, 128 Ga. 269, 57 S. E. 495; Bridger *v.* Exchange Bank, 126 Ga. 821, 56 S. E. 97; Parker *v.* Gortatowsky, 127 Ga. 560, 56 S. E. 846; Austin *v.* Southern Home B. & L. Assn., 122 Ga. 439, 50 S. E. 382 (adverse possession); Baldwin *v.* Sherwood, 117 Ga. 827, 45 S. E. 216.

Illinois. — Porter *v.* Clark, 23 Ill. App. 567; Bartling *v.* Brasuhn, 102 Ill. 441; Williams *v.* Brown, 14 Ill. 200; Tunison *v.* Chamblin, 88 Ill.

378; Partridge *v.* Chapman, 81 Ill. 137; Coari *v.* Olsen, 91 Ill. 273; Brainard *v.* Hudson, 103 Ill. 218; Helm *v.* Kaddatz, 107 Ill. App. 413; Thomas *v.* Burnett, 128 Ill. 37, 21 N. E. 352; Merchants' & F. Bank *v.* Dawdy, 230 Ill. 199, 82 N. E. 606; Joiner *v.* Duncan, 174 Ill. 252, 51 N. E. 323; Ashelford *v.* Willis, 194 Ill. 492, 62 N. E. 817.

Indiana. — Meni *v.* Rathbone, 21 Ind. 454; Rothschild *v.* Leonhard, 33 Ind. App. 452, 71 N. E. 673; Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042; Blair *v.* Whittaker, 31 Ind. App. 664, 69 N. E. 182.

Iowa. — Sears *v.* Munson, 23 Iowa 380.

Kentucky. — Bryant *v.* Main, 25 Ky. L. Rep. 1242, 77 S. W. 680; Jones *v.* Jones, 31 Ky. L. Rep. 183, 101 S. W. 980; Denton *v.* Cumberland Tel. & T. Co., 29 Ky. L. Rep. 1218, 96 S. W. 1112.

Maine. — McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646.

Maryland. — Baynard *v.* Norris, 5 Gill 468.

Massachusetts. — Sibley *v.* Leffingwell, 8 Allen 584.

Michigan. — Matteson *v.* Vaughn, 38 Mich. 373; Banks *v.* Allen, 127 Mich. 80, 86 N. W. 383.

Minnesota. — Thompson *v.* Borg, 90 Minn. 209, 95 N. W. 896; Groff *v.* Ramsey, 19 Minn. 44; Siebert *v.* Rosser, 24 Minn. 155.

Mississippi. — Jones *v.* Loggins, 37 Miss. 546.

Missouri. — Shumate *v.* Reavis, 49 Mo. 333; Squires *v.* Kimball, 208 Mo. 110, 106 S. W. 502; Wiggenhorn *v.* Daniels, 149 Mo. 160, 50 S. W. 807; Davis *v.* Wood, 161 Mo. 17, 61 S. W. 695; Myers *v.* Schuchmann, 182 Mo. 159, 81 S. W. 618; Shaffer *v.* Detie, 191 Mo. 377, 90 S. W. 131; Maupin *v.* Emmons, 47 Mo. 304.

Nebraska. — Fall *v.* Fall, 74 Neb. 104, 106 N. W. 412, 113 N. W. 175; Lipp *v.* South Omaha L. Synd., 24 Neb. 692, 40 N. W. 129.

New Hampshire. — Hadduck *v.* Wilmarth, 5 N. H. 181, 20 Am. Dec. 570.

New Jersey. — Havens *v.* Bliss, 26 N. J. Eq. 363; English *v.* Rainear, 55 Atl. 41.

Ohio. — McKenzie *v.* Perrill, 15 Ohio St. 162.

Oregon. — Cooper *v.* Thomason, 30 Or. 161, 45 Pac. 296.

Pennsylvania. — Anderson *v.* Brinser, 129 Pa. St. 376, 11 Atl. 809, 6 L. R. A. 205.

South Carolina. — Sheorn *v.* Robinson, 22 S. C. 32. But see Manigault *v.* Lofton, 78 S. C. 499, 59 S. E. 534, applying § 2457 Civ. Code 1902.

Texas. — Kuteman *v.* Carroll (Tex. Civ. App.), 80 S. W. 842; Frugia *v.* Truehart (Tex. Civ. App.), 106 S. W. 736.

Virginia. — Peery's Admr. *v.* Elliott, 101 Va. 709, 44 S. E. 919.

West Virginia. — Smith *v.* Owens, 59 S. E. 762; Lowther Oil Co. *v.* Miller S. Oil Co., 53 W. Va. 501, 44 S. E. 433.

Wisconsin. — Roberts *v.* Decker, 120 Wis. 102, 97 N. W. 519.

"**Visible Occupancy** has always been held sufficient to convey notice, and it is reasonable that it should. We need not here determine that it is conclusive evidence of notice; for at least it must be strong *prima facie* evidence, and if its effect can ever be avoided it must be by the purchaser denying it positively, and assuming the onus probandi, and showing that the purchase was made under circumstances which precluded notice therefrom." Brown *v.* Anderson, 1 Mon. (Ky.) 198.

Presumptive Evidence. — "Possession of land is notice to the world of every right that the possessor has therein, legal or equitable. Possession of land being an incident, and a very important incident, of ownership, the law raises a presumption that he who is in possession is the owner, and actual and notorious possession of land is sufficient to put a prudent person on inquiry as to the rights of such possessor before such land is purchased from one not in possession, or otherwise made the subject of negotiation or contract with him. Possession is not only notice of the rights of the possessor, but also of all facts that would be developed if inquiry were made of the one in possession and a truthful response were made. Therefore possession is notice of the rights of those under whom the possessor claims." Austin *v.* Southern Home

(B.) Nature of Possession. — It must be shown, however, that such possession was open, notorious and exclusive, in order to make it operative as implied notice.[59] The proof to be made will neces-

B. & L. Assn., 122 Ga. 439, 50 S. E. 382.

When Open Possession Is Not Notice. — Under a statute requiring actual notice to validate an unrecorded deed as to strangers to it, open and notorious possession and improvement of real estate is insufficient to prove such notice; it is not enough to prove facts which would put an ordinarily reasonable man on inquiry. Pomroy *v.* Stevens, 11 Metc. (Mass.) 244.

Vendor Out of Possession. Where the vendor, having record title, was out of possession, this was sufficient to put purchaser upon inquiry. Ward *v.* Russell, 121 Wis. 77, 98 N. W. 939.

Possession Under Parol Contract. Adverse possession of land by a purchaser under a valid parol contract of sale, is notice to subsequent purchasers. City Loan & Bkg. Co. *v.* Poole (Ala.), 43 So. 13.

"What will be sufficient to put a party upon inquiry appears to be difficult and uncertain in its application in some instances. Loose and vague rumors from strangers are not sufficient to put a party upon inquiry. It has, however, been settled by repeated adjudications, that possession of the premises by the owner in person, or by agent or tenant, will be considered a sufficient circumstance to put any prudent man upon inquiry as to the title under which he holds the possession of the premises, and will, in contemplation of law, amount to notice of the title under which the occupant holds and claims the land." Hawley *v.* Bullock, 29 Tex. 216.

50. *United States.* — Kirby *v.* Tallmadge, 160 U. S. 379; United States *v.* Sliney, 21 Fed. 894.

Alabama. — O'Neal *v.* Prestwood, 45 So. 251; McCarthy *v.* Nicrosi, 72 Ala. 332; Rankin Mfg. Co. *v.* Bishop, 137 Ala. 271, 34 So. 991; Kendrick *v.* Colyar, 143 Ala. 597, 42 So. 110.

California. — Havens *v.* Dale, 18 Cal. 359; Taylor *v.* Central Pac. R. Co., 67 Cal. 615, 8 Pac. 436; Pell *v.* McElroy, 36 Cal. 268; O'Rourke *v.* O'Connor, 39 Cal. 442; Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543.

Illinois. — Rupert *v.* Mark, 15 Ill. 540; Gray *v.* Lamb, 207 Ill. 258, 69 N. E. 794; Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870.

Massachusetts. — Norcross *v.* Widgery, 2 Mass. 505.

Michigan. — Chandler *v.* Clark, 151 Mich. 159, 115 N. W. 65.

Montana. — Mullins *v.* Butte Hdw. Co., 25 Mont. 525, 65 Pac. 1004.

New Hampshire. — Colby *v.* Kenniston, 4 N. H. 262.

New Jersey. — Holmes *v.* Stout, 10 N. J. Eq. 419.

New York. — DeRuyter *v.* Trustees of St. Peter's Church, 2 Barb. Ch. 555; Grouverneur *v.* Lynch, 2 Paige Ch. 300; Page *v.* Waring, 76 N. Y. 463.

Pennsylvania. — Meehan *v.* Williams, 48 Pa. St. 238.

The Character of the Possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record." Brown *v.* Volkening, 64 N. Y. 76.

"**While the General Rule** is that possession of land is notice to a purchaser of the possessor's title, nevertheless such possession, to be effectual, must be not only exclusive and uninterrupted, but it must be also open, notorious, and visible: i.e., it must indicate the occupant. The fact that lands are under cultivation does not of itself suggest that any one other than the reputed owner of the premises is in possession of them. In order to charge a pur-

sarily depend largely upon the character of the land[51] and upon the nature of the use to which it is placed.[52]

(C.) Possession of Particular Persons. — (a.) *By Tenant.* — Possession by a tenant is constructive notice of the claim or title of his landlord,[53] and it is also notice of any claim in the premises by him-

chaser with notice, the occupation must be of a character which would put a prudent person upon inquiry. It must indicate that some one other than he who appears by the record to be the owner has rights in the premises." Cox *v.* Devinney, 65 N. J. L. 389, 47 Atl. 569.

51. Land Used for Lumbering. Possession of a lumber company for the purpose of cutting logs is such possession as to act as constructive notice of their rights under a contract. Bolland *v.* O'Neal, 81 Minn. 15, 83 N. W. 471.

Cutting Wood on an unenclosed wood lot is weak evidence of notice of the person's claim of title. Kendall *v.* Lawrence, 22 Pick. (Mass.) 540; Mason *v.* Mullahy, 145 Ill. 383, 34 N. E. 36; Nolan *v.* Grant, 51 Iowa 519, 1 N. W. 709.

Pasture Land. — Use of lands for pasturage or cutting timber is not such an occupancy as will charge a purchaser with notice. McMechan *v.* Griffing, 3 Pick. (Mass.) 149; Holmes *v.* Stout, 10 N. J. Eq. 419; Coleman *v.* Barklew, 27 N. J. L. 357. But see Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, holding such use sufficient where it was the only use to which the land could be put.

Unimproved Land. — The principles of constructive notice arising from possession do not apply to unimproved lands, nor to cases where the possession is ambiguous. Patten *v.* Moore, 32 N. H. 382. Nor to an unfinished and uninhabited dwelling house. Brown *v.* Volkening, 64 N. Y. 76.

52. See Tate *v.* Pensacola G. L. & D. Co., 37 Fla. 439, 20 So. 542, 53 Am. St. Rep. 251; Lyman *v.* Russell, 45 Ill. 281.

Railroad Right of Way. — Where a railroad is being operated through land, a purchaser of the land has notice of the rights of the railroad company. Southern R. Co. *v.* Howell, 79 S. C. 281, 60 S. E. 677; Harman *v.* Southern R. Co., 72 S. C. 228, 51 S. E. 689. And see Chicago & E. I. R. Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29; Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370; Paul *v.* Connersville & N. J. R. Co., 51 Ind. 527; Day *v.* Atlantic & G. W. R. Co., 41 Ohio St. 392.

Drainage Ditch running through land for the benefit of adjacent owners is itself evidence of the easement, and a stranger purchasing the land takes subject to it, although he had no actual notice of it. Brown *v.* Honeyfield (Iowa), 116 N. W. 731. See Cook *v.* Chicago, B. & Q. R. Co., 40 Iowa 451.

Board Walk at Newport. — Open and notorious possession of the way and construction of visible improvement, was held to be notice to a subsequent purchaser. Atlantic City *v.* New Auditorium Pier Co., 67 N. J. Eq. 284, 58 Atl. 729.

Alley subject to constant use, notice of the easement. Myers *v.* Kenyon (Cal. App.), 93 Pac. 888.

53. *England.* — Hanbury *v.* Litchfield, 2 Myl. & K. 629, 39 Eng. Reprint 1084, 3 L. J. Ch. (N. S.) 49; Daniels *v.* Davison, 16 Ves. Jr. 249, 33 Eng. Reprint 978.

Alabama. — Price *v.* Bell, 91 Ala. 180, 8 So. 565.

California. — Peasley *v.* McFadden, 68 Cal. 611, 10 Pac. 179.

Georgia. — Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387.

Illinois. — Whitaker *v.* Miller, 83 Ill. 381.

Iowa. — Nelson *v.* Wade, 21 Iowa 49; Dickey *v.* Lyon, 19 Iowa 544; Hannan *v.* Seidentopf, 113 Iowa 658, 86 N. W. 44; Townsend *v.* Blanchard, 117 Iowa 36, 90 N. W. 519; O'Neill *v.* Wilcox, 115 Iowa 15, 87 N. W. 742.

Kansas. — Deetjen *v.* Richter, 33 Kan. 410, 6 Pac. 595.

Minnesota. — New *v.* Wheaton, 24 Minn. 406.

self, which is not inconsistent with the title shown by the record.[54]

(b.) *By Vendor.* — Continued possession by a vendor is a circumstance to be considered and tends to show notice of his claim or title, as against a purchaser from the vendee.[55]

(c.) *By Husband and Wife.* — While possession by the husband and wife from the mere fact of living on the premises is presumptively possession by the husband,[56] still, since inquiry if made would

Mississippi. — Levy *v.* Holberg, 67 Miss. 526, 7 So. 431.

Texas. — McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Watkins *v.* Edwards, 23 Tex. 443.

Agent. — Presumption exists that inquiry of an agent in possession would have disclosed the right under which he claimed and held possession. Parker *v.* Gortatowsky, 127 Ga. 560, 56 S. E. 846.

54. McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743.

Possession by Tenant is notice to a purchaser of any interest he may have either as tenant or under an agreement to purchase the property. Coari *v.* Olsen, 91 Ill. 273; Russell's Exr. *v.* Moore's Heirs, 3 Met. (Ky.) 436; Havens *v.* Bliss, 26 N. J. Eq. 363; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847; Fery *v.* Pfeiffer, 18 Wis. 510. But see Denison Lumb. Co. *v.* Milburn (Tex. Civ. App.), 107 S. W. 1161; Brown *v.* Roland, 11 Tex. Civ. App. 648, 33 S. W. 273.

Possession of Tenant in Common. Possession of an occupant to be notice of his own rights must be inconsistent with his record title; thus the possession of a tenant in common is not notice of his claims to the shares of other tenants in common acquired and held under an unrecorded conveyance. Martin *v.* Thomas, 56 W. Va. 220, 49 S. E. 118; May *v.* Sturdivant, 75 Iowa 116, 39 N. W. 221; Dutton *v.* McReynolds, 31 Minn. 66, 16 N. W. 468; Wilcox *v.* Leominster Nat. Bank, 43 Minn. 541, 45 N. W. 1136. *Contra,* Collum *v.* Sanger Bros., 98 Tex. 162, 82 S. W. 459, 83 S. W. 184; Wimberly *v.* Bailey, 58 Tex. 222; Howell *v.* Denton (Tex. Civ. App.), 68 S. W. 1002. See Allday *v.* Whitaker, 66 Tex. 669, 1 S. W. 794.

55. *Alabama.* — Shiff & Son *v.* Andress, 147 Ala. 690, 40 So. 824.

Arkansas. — Turman *v.* Bell, 54 Ark. 273, 15 S. W. 886.

Illinois. — White *v.* White, 89 Ill. 460.

Iowa. — Day *v.* Lown, 51 Iowa 364, 1 N. W. 786.

Kentucky. — Coppage *v.* Murphy, 24 Ky. L. Rep. 257, 68 S. W. 416.

Maine. — McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646.

Michigan. — Abbott *v.* Gregory, 39 Mich. 68.

Minnesota. — Groff *v.* State Bank, 50 Minn. 234, 52 N. W. 651.

Wisconsin. — Hoppin *v.* Doty, 25 Wis. 573.

"It Is True That a Person in Possession may, by delivering a deed of the premises, estop himself from relying upon his possession as evidence to subsequent purchasers that he claims title; but if the possession of complainants would not operate as absolute notice, it is a circumstance to be considered, in connection with other facts, on the question of notice and good faith." Stevenson *v.* Campbell, 185 Ill. 527, 57 N. E. 414.

Possession by Grantor after the record of a conveyance by him is not notice of title in him, but the fact that the claimant, after making a journey expressly to see the land, after having a conversation with a third person calculated to arouse his suspicions, refrained from visiting the land, is sufficient to establish notice. Richerson *v.* Moody, 17 Tex. Civ. App. 67, 42 S. W. 317.

56. Primrose *v.* Browning, 59 Ga. 69; Neal *v.* Perkerson, 61 Ga. 345; Garrard *v.* Hull, 92 Ga. 787, 20 S. E. 357.

Recorded Title in either husband or wife will prevent their joint occupancy from giving notice of the claim of the other. Kirby *v.* Tallmadge, 160 U. S. 379.

disclose the claim and interest of the wife, such possession is constructive notice of any claim in the wife.[57]

(d.) *By Parent and Child.* — Where parent and child live together on premises, the possession is referred to the parent and not to the child.[58]

(e.) *By Lodger or Boarder.* — A lodger or boarder does not have such possession as will serve as constructive notice of his claim to the premises.[59]

(D.) Sufficiency of Inquiry. — Only reasonable diligence need be exercised in the inquiry.[60]

57. Brown *v.* Carey, 149 Pa. St. 134, 23 Atl. 1103.

"Surely, the mere presumption that a husband, living upon land with his wife, is in possession of the same in his own right, can be no stronger than the presumption that a tenant, not known to be such, is in possession of the land which he occupies for himself. Inquiry in the one case will develop that the possession of the tenant is really the possession of the landlord. Inquiry in the other case will disclose that the presumed possession of the husband is really the possession of the wife. Possession by anybody adverse to the person offering to sell is sufficient to put the prospective purchaser upon notice of whatever inquiry of the occupant of the premises will develop, and, in the absence of such an inquiry, the presumption is that, had it been made, the right, title, or interest under which the possessor held would have been discovered." Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387.

58. Watson *v.* Murray, 54 Ark. 499, 16 S. W. 293; Stone *v.* Cook, 79 Ill. 424; Baldwin *v.* Golde, 88 Hun 115, 34 N. Y. Supp. 587.

Possession by Father or Son. "Title and occupancy by the father implied that possession was that of the father rather than that of the son. The presumption would be that the son was living with the father under the father's possession, and not that the father was living with the son under the son's possession distinct from that of the father." Nagelspach *v.* Shaw, 146 Mich. 493, 109 N. W. 843, 111 N. W. 343.

59. Possession of Lodger or Boarder. — "Were this not so, then it would be incumbent upon every one desiring to purchase land from one in actual possession, control, and holding dominion over property, in whom the records of deeds showed full and complete title, before he could purchase with any degree of safety, to seek out and inquire of every boarder and lodger on the premises, or who had been such boarder and lodger within a period of time not barred by the statute of limitations, what interest such boarder or lodger had or claimed in the property. The most that can be said of such evidence is that it may be taken and considered with all the other facts and circumstances in determining the issue as to whether or not the purchaser, or his agent effecting the purchase, had notice, or was charged with notice, of the equitable interest of the party lodging or boarding on the premises." Derrett *v.* Britton, 35 Tex. Civ. App. 485, 80 S. W. 562.

60. Sufficiency of Inquiry. "The rule, as we comprehend it from the decisions (Eylar *v.* Eylar, 60 Tex. 315; Ramirez *v.* Smith, 94 Tex. 191, 59 S. W. 258), is that a purchaser of land is primarily charged with notice of any title or equity a person has who is in possession, but that his inquiry or diligence is sufficient when he finds upon the records a deed from the possessor to his vendor. The principle is one of estoppel. The purchaser relying upon such record is protected. But it seems if he makes no examination, or if his inquiry does not extend to the records, and he does not know of such record, the fact that such a deed is on record will not make him an innocent

(3.) Conveyance by Quitclaim Deed. — (A.) OLD RULE. — The rule deducible from the early decisions was that a purchaser who acquired title under a quitclaim deed could not be regarded as a bona fide purchaser and has constructive notice of all outstanding equities. This rule continues to be the law in a few states.[61]

purchaser. In such a case he is not influenced by such record in consummating his purchase." Jinks *v.* Moppin (Tex. Civ. App.), 80 S. W. 390.

61. *United States.* — Oliver *v.* Piatt, 3 How. 333, 410; Villa *v.* Rodriguez, 12 Wall. 323; United States *v.* Sliney, 21 Fed. 894; Dodge *v.* Briggs, 27 Fed. 160; Gest *v.* Packwood, 34 Fed. 368; Dickerson *v.* Colegrove, 100 U. S. 578; Baker *v.* Humphrey, 101 U. S. 494; Runyon *v.* Smith, 18 Fed. 579.

Alabama. — Derrick *v.* Brown, 66 Ala. 162; McMillan *v.* Rushing, 80 Ala. 402; O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745; Wood *v.* Holly Mfg. Co., 100 Ala. 326, 13 So. 948; Smith's Heirs *v.* Branch Bank, 21 Ala. 125; O'Neal *v.* Prestwood, 45 So. 251; Clemmons *v.* Cox, 114 Ala. 350, 21 So. 426.

Colorado. — Bradbury *v.* Davis, 5 Colo. 265.

Florida. — Fries *v.* Griffin, 35 Fla. 212, 17 So. 66.

Idaho. — Leland *v.* Isenbeck, 1 Idaho 469.

Illinois. — Snyder *v.* Laframboise, 1 Ill. 343.

Indiana. — Aetna Life Ins. Co. *v.* Stryker, 38 Ind. App. 312, 73 N. E. 953, 76 N. E. 822, 78 N. E. 245.

Iowa. — Besore *v.* Dosh, 43 Iowa 211; Pettingill *v.* Devin, 35 Iowa 344; Postel *v.* Palmer, 71 Iowa 157, 32 N. W. 257; Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111; Rogers *v.* Chase, 89 Iowa 468, 56 N. W. 537; Springer *v.* Bartle, 46 Iowa 688; Winkler *v.* Miller, 54 Iowa 476, 6 N. W. 698; Raymond *v.* Morrison, 59 Iowa 371, 13 N. W. 332; Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889; Watson *v.* Phelps, 40 Iowa 482; Hannan *v.* Seidentopf, 113 Iowa 658, 86 N. W. 44; Bradley *v.* Cole, 67 Iowa 650, 25 N. W. 849; Steele *v.* Bank, 79 Iowa 339, 44 N. W. 764, 7 L. R. A. 524; Minneapolis & St. L. R. Co. *v.* Chicago, etc. R. Co., 116 Iowa 681, 88 N. W. 1082; Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205.

Kansas. — Smith *v.* Rudd, 48 Kan. 296, 29 Pac. 310; Bayer *v.* Cockrill, 3 Kan. 283; Ferguson *v.* Tarbox, 3 Kan. App. 656, 44 Pac. 905; Goddard *v.* Donaha, 42 Kan. 754, 22 Pac. 708; Johnson *v.* Williams, 37 Kan. 179, 14 Pac. 537.

Maine. — Bragg *v.* Paulk, 42 Me. 502, 517; Peaks *v.* Blethen, 77 Me. 510. 1 Atl. 451.

Michigan. — Chandler *v.* Clark, 151 Mich. 159, 115 N. W. 65; Zeigler *v.* Valley Coal Co., 150 Mich. 82, 113 N. W. 775; Messenger *v.* Peter, 129 Mich. 93, 88 N. W. 209; Peters *v.* Cortier, 80 Mich. 124, 45 N. W. 73.

Minnesota. — Marshall *v.* Roberts, 18 Minn. 405; Hersey *v.* Lambert, 50 Minn. 373, 52 N. W. 963; Everest *v.* Ferris, 16 Minn. 26.

Mississippi. — Smith *v.* Winston, 2 How. 601; Learned *v.* Corley, 43 Miss. 687.

Missouri. — Ridgeway *v.* Holliday, 59 Mo. 444; Stoffel *v.* Schroeder, 62 Mo. 147; Schradski *v.* Albright, 93 Mo. 42, 5 S. W. 807; Campbell *v.* Lacclede Gas Co., 84 Mo. 352; Emmel *v.* Headlee, 7 S. W. 22; Condit *v.* Maxwell, 142 Mo. 266, 44 S. W. 467.

Montana. — McAdow *v.* Black, 6 Mont. 601, 13 Pac. 377.

Nebraska. — Snowden *v.* Tyler, 21 Neb. 199, 31 N. W. 661; Bowman *v.* Griffith, 35 Neb. 361, 53 N. W. 140; Pleasants *v.* Blodgett, 39 Neb. 741, 58 S. W. 423; Byron Reed Co. *v.* Klabunde, 76 Neb. 801, 108 N. W. 133.

Ohio. — Harvey *v.* Jones, 1 Disn. 65.

Oregon. — Baker *v.* Woodward, 12 Or. 3, 6 Pac. 173; Richards *v.* Snyder, 11 Or. 501, 6 Pac. 186.

Tennessee. — Williamson *v.* Williams, 11 Lea 355; Woodfolk *v.* Blount, 3 Hayw. 146; Lowry *v.* Brown, 1 Coldw. 456.

(B.) Modern Rule. — In a great many jurisdictions the rule has been changed, under the leadership of a decision in the United States supreme court,[62] and the fact that the vendee took a conveyance[63] by quitclaim deed is now generally regarded as only a sus-

Texas. — Rodgers *v.* Burchard, 34 Tex. 441; Harrison *v.* Boring, 44 Tex. 255; Carter *v.* Wise, 39 Tex. 273; Milam County *v.* Bateman, 54 Tex. 153; Laurens *v.* Anderson, 1 S. W. 379; Huff *v.* Crawford (Tex. Civ. App.), 32 S. W. 592; *s. c.*, 89 Tex. 214, 34 S. W. 606.

Wisconsin. — Martin *v.* Morris, 62 Wis. 418, 22 N. W. 525.

Reason of the Rule. — "In nearly all cases between individuals where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received; hence when a party takes a quitclaim deed, he knows he is taking a doubtful title and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title. Also, as a quitclaim deed can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly, and by persons who have no real claim and scarcely a shadow of claim to the lands for which the deeds are given; and the deeds may be executed for a merely nominal consideration, and merely to enable speculators in doubtful titles to harass and annoy the real owners of the land; and speculators in doubtful titles are always ready to pay some trifling or nominal consideration to obtain a quitclaim deed. This kind of thing should not be encouraged. Speculators in doubtful titles are not so pre-eminently unselfish, altruistic, or philanthropic in their dealings with others as to be entitled to any very high degree of encouragement from any source. There are cases which are claimed to be adverse to the opinions herein expressed. They will be found cited in Martindale on Conveyancing, §§ 59 and 285, and notes, and 12 Cent. L. J. 127." Johnson *v.* Williams, 37 Kan. 179, 14 Pac. 537.

"Under the Cloak of Quitclaim Deeds, schemers and speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual methods of conveying a good title—one in which the grantor has confidence—is by warranty deed. The usual method of conveying a doubtful title is by quitclaim deed. The rule is wise and wholesome which holds that those who take by quitclaim deed are not *bona fide* purchasers, and take only the interest which their grantors had. This rule is adopted in the United States Supreme Court, and in the courts of many of the states." Peters *v.* Cartier, 80 Mich. 124, 45 N. W. 73.

If a Quitclaim Deed does not in terms convey the land itself, but only the right, title, interest and claim of his grantor, the purchaser is not bona fide. This case recognizes this as the rule but deprecates the fact and points out that the United States courts have discarded it. Woody *v.* Strong (Tex. Civ. App.), 100 S. W. 801; Tram Lumb. Co. *v.* Hancock, 70 Tex. 312, 7 S. W. 724; Hows *v.* Butterworth (Tenn. Ch.), 62 S. W. 1114.

62. Moelle *v.* Sherwood, 148 U. S. 21.

63. Purchaser by Warranty Deed From Grantee Under a Quitclaim. One who purchases by warranty deed for value, from the grantee in a quitclaim, is not affected by outstanding equities of which he had no notice. Hannan *v.* Seidentopf, 113 Iowa 658, 86 N. W. 44; Huber *v.* Bossart, 70 Iowa 718, 29 N. W. 608; Raymond *v.* Morrison, 59 Iowa 371, 13 N. W. 332; Stanley *v.* Schwalby, 162 U. S. 255; Sherwood *v.* Moelle, 36 Fed. 478, 1 L. R. A. 797; Meikel *v.* Borders, 129 Ind. 529, 29 N. E. 29; Winkler *v.* Miller, 54 Iowa 476, 6 N. W. 698; Chapman *v.* Sims, 53 Miss. 154; Brophy Min. Co. *v.* Brophy & Dale Co., 15 Nev. 101;

picious circumstance, tending to indicate notice to the grantee.[64]

Finch *v.* Trent, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679. *Compare* Carter *v.* Wise, 39 Tex. 273; Milani County *v.* Bateman, 54 Tex. 153.

Special Warranty Deed. — A special warranty deed while sometimes said to raise a presumption of knowledge by the grantee of a defective title, does not preclude a person claiming under it from being a bona fide purchaser. Raymond *v.* Flavel, 27 Or. 219, 40 Pac. 158; Woodfolk *v.* Blount, 3 Hayw. (Tenn.) 146, 9 Am. Dec. 736; Williamson *v.* Williams, 11 Lea (Tenn.) 355; Holmes *v.* Johns, 56 Tex. 41.

64. *United States.* — McDonald *v.* Belding, 145 U. S. 492; United States *v.* California Land Co., 148 U. S. 31.

Arkansas. — Miller *v.* Fraley, 23 Ark. 735.

California. — Graff *v.* Middleton, 43 Cal. 341.

Illinois. — Brown *v.* Banner Coal Co., 97 Ill. 214.

Mississippi. — Chapman *v.* Sims, 53 Miss. 154.

Missouri. — Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595; Fox *v.* Hall, 74 Mo. 315; Weissenfels *v.* Cable, 208 Mo. 515, 106 S. W. 1028; Strong *v.* Whybark, 204 Mo. 341, 102 S. W. 968; Hickman *v.* Green, 123 Mo. 165, 23 S. W. 455, 27 S. W. 440.

Nebraska. — Bannard *v.* Duncan, 112 N. W. 353; Schott *v.* Dosh, 49 Neb. 187, 68 N. W. 346.

New York. — Baecht *v.* Hevesy, 115 App. Div. 509, 101 N. Y. Supp. 413; Wilhelm *v.* Wilken, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743.

Texas. — Richerson *v.* Moody, 17 Tex. Civ. App. 67.

West Virginia. — Dunfee *v.* Childs, 59 W. Va. 225, 53 S. E. 209.

Wisconsin. — Cutler *v.* James, 64 Wis. 173, 24 N. W. 874.

"To Entitle an Innocent Purchaser without notice to protection in equity, the text-books do not assert, nor has any case been found to adjudge, that he must hold under a general warranty deed; but it is no doubt the law that, where a person bargains for and takes a mere quitclaim or deed without warranty, it is a circumstance, if unexplained, to show that he had notice of imperfections in the vendor's title, and only purchased such interest as the vendor might have in the property." Clark *v.* Sayers, 55 W. Va. 512, 47 S. E. 312.

"No Implication of a Defect in title can be drawn from the use of a quitclaim deed, so as to make the grantees in the chain of title thereunder purchasers with notice." Coombs *v.* Aborn (R. I.), 68 Atl. 817; Babcock *v.* Wells, 25 R. I. 23, 54 Atl. 596.

"Acquisition of Property under a quitclaim title loses its significance as a circumstance tending to show bad faith in the purchaser where a sufficient explanation is given, and more particularly when it is admitted as a fact that such purchaser acquired in good faith and without notice." William *v.* White Castle Lumb. Co., 114 La. 448, 38 So. 414.

Equity Not Subject of Record. "Can a grantee who holds under a quitclaim deed be such an innocent purchaser as will defeat existing outstanding trusts and equities not the subject of record under our registry act? That is not a new question in this state and must be answered in the negative." Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60.

Inquiry of Grantor. — Purchaser under quitclaim need not cross-examine his grantor in order to obtain a disclosure of defects in the title when the grantor on the face of the record appears to have an interest to convey. "As the opinion in Johnson *v.* Williams (37 Kan. 179, 14 Pac. 537) anticipated, a purchaser holding by quitclaim deed only may be a purchaser in good faith against latent, hidden or secret equities undiscoverable by the exercise of ordinary and reasonable diligence, and under the registry laws such a purchaser may hold title in good faith as against prior unrecorded deeds concerning which he had no notice, and no reasonable means of obtain-

(4.) Rebuttal. — In rebuttal of facts which would otherwise amount to implied notice, evidence may be given showing other facts which nullify or counteract their effect.[65]

c. *Effect.* — The existence of actual notice is equivalent to and takes the place of necessity for a registration under the recording acts, in most jurisdictions.[66]

ing notice." Eger *v.* Brown (Kan.), 94 Pac. 803.

65. Nutting *v.* Herbert, 37 N. H. 346.

Inference of Notice May Be Rebutted. — "If these authorities are to be relied upon, and I see no reason to doubt their correctness, the true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part." Williamson *v.* Brown, 15 N. Y. 354.

Presumption From Possession. "In the editor's note to the case of LeNeve *v.* LeNeve, on pages 156, 157, vol. 2, pt. 1, Leading Cases in Equity, where this subject of notice is fully treated, it is said: 'Where circumstances are brought directly home to the knowledge of the purchaser, which would have been sufficient in themselves to put him on inquiry, and thus amount to notice, he will be entitled to rebut the presumption of notice, which would otherwise arise, by showing the existence of other and attendant circumstances of a nature to allay his suspicions, and lead him to suppose the inquiry was not necessary.'" Chadwick *v.* Clapp, 69 Ill. 119.

66. *United States.* — Norton *v.* Meader, 4 Sawy. 603, 18 Fed. Cas. No. 10,351.

Alabama. — Ohio Life Ins. Co. *v.* Ledyard, 8 Ala. 866.

Arkansas. — Bird *v.* Jones, 37 Ark. 195; Brown *v.* Hanauer, 48 Ark. 277, 3 S. W. 27.

California. — Galland *v.* Jackman, 26 Cal. 79.

Colorado. — Hutchinson *v.* Hutchinson, 16 Colo. 349, 26 Pac. 814.

Connecticut. — Hamilton *v.* Nutt, 34 Conn. 501.

Florida. — Gamble *v.* Hamilton, 31 Fla. 401, 12 So. 229.

Georgia. — Finch *v.* Beal, 68 Ga. 594.

Illinois. — Turpin *v.* B. & O. R. Co., 105 Ill. 11; Hacker *v.* Munroe, 61 Ill. App. 420; Bayles *v.* Young, 51 Ill. 127.

Iowa. — Baldwin *v.* Lowe, 22 Iowa 367; Brady *v.* Otis, 40 Iowa 97; Wilson *v.* Holcomb, 13 Iowa 110.

Kentucky. — Hunt *v.* Nance, 122 Ky. 274, 92 S. W. 6; Edwards *v.* Brinker, 9 Dana 69.

Massachusetts. — Adams *v.* Cuddy, 13 Pick. 460.

Michigan. — Oliver *v.* Sanborn, 60 Mich. 346, 27 N. W. 527; Warner *v.* Hall, 53 Mich. 371, 19 N. W. 40; Hains *v.* Hains, 69 Mich. 581, 37 N. W. 563.

Nebraska. — Adams *v.* Thompson, 28 Neb. 53, 44 N. W. 74.

New Hampshire. — Patten *v.* Moore, 32 N. H. 382.

New York. — Haywood *v.* Shaw, 16 How. Pr. 119; Jackson *v.* Given, 8 Johns. 137, 5 Am. Dec. 328.

South Carolina. — Carrigan *v.* Byrd, 23 S. C. 89.

South Dakota. — Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193.

Texas. — Pearce *v.* Jackson, 61 Tex. 642.

Vermont. — Smith *v.* Hall, 28 Vt. 364.

Wisconsin. — Prickett *v.* Muck, 74 Wis. 199, 42 N. W. 256.

"**Actual Notice of a Transfer** of land is as effective as against subsequent purchasers as is registration of the instrument which effects the

d. *Weight of Evidence.* — It is the general rule that proof of notice to a third party purchaser must be made out by clear and unequivocal evidence, which leaves no reasonable doubt of its existence.[67]

transfer and notice of facts which ought to put such purchasers on inquiry, which, if pursued with proper diligence, would lead to knowledge of the transfer, is equivalent to actual notice." Rankin Mfg. Co. *v.* Bishop, 137 Ala. 271, 34 So. 991.

Effect of Possession. — "Notice of title given by possession is equivalent to the constructive notice afforded by registration of the deed." Watkins *v.* Edwards, 23 Tex. 443; Woods *v.* Farmers, 7 Watts (Pa.) 382; Pritchard *v.* Brown, 4 N. H. 397; Hawley *v.* Bullock, 29 Tex. 216; McCaskle *v.* Amarine, 12 Ala. 17; Hiller *v.* Jones, 66 Miss. 636, 6 So. 465.

In Fidelity Co. *v.* Railroad Co., 32 W. Va. 244, 9 S. E. 180, it is held that, where a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property, of which he had notice. Clark *v.* Sayers, 55 W. Va. 512, 47 S. E. 312.

Defective Record, immaterial where actual notice exists. Gross *v.* Watts, 206 Mo. 373, 104 S. W. 30.

Possession Under Unrecorded Deed is not sufficient in some jurisdictions where "actual" notice is called for in such a case. Hopping *v.* Burnam, 2 G. Gr. (Iowa) 39. See Vaughn *v.* Tracy, 22 Mo. 415.

Under the North Carolina Registry Act, actual notice cannot supply the want of registration of an instrument, and the subsequent purchaser is protected if he gets his conveyance recorded first. Collins *v.* Davis, 132 N. C. 106, 43 S. E. 579; Robinson *v.* Willoughby, 70 N. C. 358; Hooker *v.* Nichols, 116 N. C. 157, 21 S. E. 207; Harris *v.* Dudley Lumb. Co. (N. C.), 61 S. E. 604; Blalock *v.* Strain, 122 N. C. 283, 29 S. E. 408.

67. *England.* — Hine *v.* Dodd, 2 Atk. 275, 26 Eng. Reprint 569.

Arkansas. — Miller *v.* Fraley, 23 Ark. 735.

Illinois. — Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870; Rogers *v.* Wiley, 14 Ill. 65; Grundies *v.* Reid, 107 Ill. 304; McVey *v.* McQuality, 97 Ill. 93; Harshbarger *v.* Foreman, 81 Ill. 364.

Indiana. — Foust *v.* Moorman, 2 Ind. 17.

Missouri. — Cornet *v.* Bartelsmann, 61 Mo. 118.

New York. — Brumfield *v.* Boutall, 24 Hun 451; Van Epps *v.* Clock, 53 Hun 638, 7 N. Y. Supp. 21.

South Carolina. — Cabiness *v.* Mahon, 2 McCord 273.

Virginia. — Hord's Admr. *v.* Colbert, 28 Gratt. 49.

Rule Stated. — "The allegation of notice in the bill is a material one, and the onus probandi rests upon complainants. There is no ground for diversity of opinion as to the measure of proof which the law requires upon this question. It is well established by an unbroken current of authority that where it is sought to defeat a clear, legal title of record by one having a mere equitable title, on the ground that the equities of the latter were known to the former at the time of acquiring the legal estate, the allegation of notice must be established by clear and satisfactory proof. The evidence should leave no reasonable doubt of the fact of notice. It is the settled policy of the law to give security to, and confidence in, titles to the landed estates of the country which appear of record to be good." Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60.

Mere Probability Insufficient. "The title of a subsequent purchaser whose deed is first recorded will not be defeated on the ground of notice of a prior unrecorded deed, 'unless

the proof of such notice is so clear and positive as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith towards the first purchaser. The fact of notice must be proved by direct evidence or by other facts from which it may be clearly inferred, and the inference must not be probable, but necessary and unquestionable.'" Lowden *v.* Wilson, 233 Ill. 340, 84 N. E. 245.

Preponderance of Testimony Sufficient. — Giles *v.* Hunter, 103 N. C. 194, 9 S. E. 549.

Must Be Sufficient To Arouse an Imputation of Bad Faith. — "Whilst it is held that the fact of notice may be inferred from circumstances as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides*. 3 Gratt. 494, 545; Munday *v.* Vawter & als., 2 Gratt. 280, 313; McClanachan & als. *v.* Siter, Price & Co., and 2 Johns. C. R.; Day *v.* Dunham, 182. Professor Minor, in his admirable work, says the effect of the notice, which will charge a subsequent purchaser for value and exclude him from the protection of the registry law, is to attach to the subsequent purchaser the guilt of fraud. It is, therefore, never to be *presumed*, but *must be proved*, and proved *clearly*. A mere suspicion of notice, even though it be a strong suspicion, will not suffice. 2 Min. Inst. 887, 2 edi., and cases cited." Vest *v.* Michie, 31 Gratt. (Va.) 149, 31 Am. Rep. 722.

Must Show the Taint of Fraud. "As every presumption is in favor of the subsequent purchaser, when the former owner is guilty of neglect, his title cannot be postponed except by evidence which taints his conduct with fraud. And this, it is obvious, ought not to be done by testimony in its nature vague and indefinite, and leading to no certain results, such as that he ought to have known of the prior title because he lived near the owner, in the same town perhaps or on the next lot, that he was well acquainted with him, or because the title was well known to others. This may all be true, and yet at the time he pays his money he may be ignorant of any other title than his own. It is not just that inferences should be strained in favor of the person by whose default the mischief has been done." Boggs *v.* Varner, 6 Watts & S. (Pa.) 469. See Gill *v.* McAttee, 2 Md. Ch. 255; Vest *v.* Michie, 31 Gratt. (Va.) 149, 31 Am. Rep. 722.

Mere Rumors that a title is bad are insufficient to charge a purchaser with notice. Williams *v.* Smith, 128 Ga. 306, 57 S. E. 801; Black *v.* Thornton, 31 Ga. 641, 659; Satterfield *v.* Malone, 35 Fed. 445; Connell *v.* Connell, 32 W. Va. 319, 9 S. E. 252; Parkhurst *v.* Hosford, 21 Fed. 827; Ratteree *v.* Conley, 74 Ga. 153; Smith *v.* Ferguson, 91 Ill. 304; Jackson *v.* Given, 8 Johns. (N. Y.) 137, 5 Am. Dec. 328; Lamont *v.* Stimson, 5 Wis. 443.

No Reasonable Doubt Should Be Left. — "To take a case out of the registry acts, so as to defeat the title of a subsequent purchaser who first places his deed upon record, on the ground that he had actual notice of a prior unrecorded deed of the same premises, the proof of such notice should be clear and positive, so as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith towards the first purchaser." Rogers *v.* Wiley, 14 Ill. 65.

Casual Conversations are insufficient to put a purchaser upon notice. Rutherford *v.* Jenkins (Tenn. Ch.), 54 S. W. 1007.

Number of Witnesses. — Actual notice may be established by a finding from the testimony of two disinterested witnesses as against the denial of the purchaser. Howells *v.* Hettrick, 13 App. Div. 366, 43 N. Y. Supp. 183.

Where the Circumstances which are claimed to prove notice, by putting upon the purchaser the burden of inquiry, may be equally as well referred to a different claim, they will not suffice to establish notice. Chadwick *v.* Clapp, 69 Ill. 119.

Notice Is Not Proved where it is shown that the defendant is in the business of making abstracts, but it

3. Bona Fides. — In those jurisdictions which require proof of good faith in a purchaser, proof that he purchased with knowledge of a defect in the title is not conclusive evidence of bad faith.[68]

4. Payment of Consideration. — a. *In General.* — Actual payment in full of a valuable consideration must be established, and proof that security was given for the payment is insufficient.[69] But a

is not shown that he is in the habit of personally examining the records in question, or that in looking up the question of taxes the "paid" stubs are examined and not the "delinquent" stubs. Morton *v.* Leland, 27 Minn. 35, 6 N. W. 378.

68. Hutchins *v.* Bacon, 46 Tex. 408; Dorn *v.* Dunham, 24 Tex. 366, 380; Sartain *v.* Hamilton, 12 Tex. 219.

"The presumption of law is, that Walbridge purchased in good faith. Does the evidence, when fully considered, overcome that presumption? It may be true that Walbridge knew, when he purchased, that Funk's title was defective, or at least not a perfect title, but that did not impeach the good faith of the purchase, as said in McCagg *v.* Heacock, 42 Ill. 153. The doctrine is, that bad faith, as contradistinguished from good faith, in the Limitation act, is not established by showing actual notice of existing claims or liens of other persons to the property, or by showing a knowledge, on the part of the holder of the color of title from being an absolute one. Where there is no actual fraud, and no proof showing that the color of title was acquired in bad faith, which means in or by fraud, this court will hold it was acquired in good faith." Smith *v.* Ferguson, 91 Ill. 304.

69. *England.* — Harrison *v.* Southcote, 1 Atk. 528, 538, 26 Eng. Reprint 333; Story *v.* Lord Windsor, 2 Atk. 630, 26 Eng. Reprint 776; Hardingham *v.* Nicholls, 3 Atk. 304, 26 Eng. Reprint 977.

United States. — White *v.* McGarry, 47 Fed. 420; Wormley *v.* Wormley, 8 Wheat. 421.

Alabama. — Wells *v.* Morrow, 38 Ala. 125.

California. — Landers *v.* Bolton, 26 Cal. 393.

Georgia. — Carter *v.* Pinckard, 68 Ga. 817.

Illinois. — Brown *v.* Welch, 18 Ill. 343.

Indiana. — Dugan *v.* Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

Iowa. — Sillyman *v.* King, 36 Iowa 207; Norton *v.* Williams, 9 Iowa 528.

Kentucky. — Nantz *v.* McPherson, 7 T. B. Mon. 597, 18 Am. Dec. 216; Blight's Heirs *v.* Banks' Exr., 6 T. B. Mon. 192, 17 Am. Dec. 136.

Maryland. — Price *v.* McDonald, 1 Md. 403, 54 Am. Dec. 657.

Michigan. — Warner *v.* Whittaker, 6 Mich. 139; Palmer *v.* Williams, 24 Mich. 328.

Minnesota. — Minor *v.* Willoughby, 3 Minn. 225.

Mississippi. — Kilcrease *v.* Lum, 36 Miss. 569.

Nebraska. — Garmire *v.* Willy, 36 Neb. 340, 54 N. W. 562.

New Hampshire. — Patten *v.* Moore, 32 N. H. 382.

New York. — Spicer *v.* Waters, 65 Barb. 227; Jackson *v.* M'Chesney, 7 Cow. 360; Jewett *v.* Palmer, 7 Johns. Ch. 65.

Oregon. — Schetter *v.* Southern Or. Co., 19 Or. 192, 24 Pac. 25; Wood *v.* Rayburn, 18 Or. 3, 22 Pac. 521.

Pennsylvania. — Chadwick *v.* Phelps, 45 Pa. St. 105; Ludwig *v.* Highley, 5 Pa. St. 141; Bellas *v.* McCarty, 10 Watts 29.

South Carolina. — Lynch *v.* Hancock, 14 S. C. 66.

Tennessee. — Otis *v.* Payne, 86 Tenn. 663, 8 S. W. 848.

Texas. — Beaty *v.* Whitaker, 23 Tex. 526; Fraim *v.* Frederick, 32 Tex. 294.

Virginia. — Lamar's Exrs. *v.* Hale, 79 Va. 147; Briscoe *v.* Ashby, 24 Gratt. 454.

West Virginia. — Webb *v.* Bailey, 41 W. Va. 463, 23 S. E. 644.

Full Payment Not Always Necessary. — "There might perhaps be peculiar circumstances — such as in-

purchaser who has made partial payment before notice is protected to the extent of such payment.[70]

b. *Proof of Valuable Consideration.* — The adequacy of the consideration need not be shown, as the term valuable consideration applies rather to the nature of the consideration than to its amount.[71]

vestment for improvement of the property, etc., so that a purchaser could not be put in statu quo — which would take a purchase made wholly or partly upon credit, out of the rule." Davis *v.* Ward, 109 Cal. 186, 41 Pac. 1010.

70. *Alabama.* — Florence Sew. Mach. Co. *v.* Zeigler, 58 Ala. 221.

Illinois. — Baldwin *v.* Sager, 70 Ill. 503.

Indiana. — Burton *v.* Reagan, 75 Ind. 77.

Iowa. — Kitteridge *v.* Chapman, 36 Iowa 348.

Kansas. — Green *v.* Green, 41 Kan. 472, 21 Pac. 586.

Kentucky. — Hardin's Exrs. *v.* Harrington, 11 Bush 367; Lain *v.* Morton, 23 Ky. L. Rep. 438, 63 S. W. 286.

Mississippi. — Parker *v.* Foy, 43 Miss. 260, 55 Am. Rep. 484.

Pennsylvania. — Youst *v.* Martin, 3 Serg. & R. 423.

Texas. — Sparks *v.* Taylor, 99 Tex. 411, 90 S. W. 485.

71. Webster *v.* VanSteenbergh, 46 Barb. (N. Y.) 211; Johnson *v.* Newman, 43 Tex. 628.

"A Valuable Consideration is defined to be money or something that is worth money" — it is not necessary that the consideration should be adequate in point of value. Although small or even nominal, in the absence of fraud it is enough to support a contract entered into upon the faith of it. Five dollars enough to make the buyer a purchaser for value. Strong *v.* Whybark, 204 Mo. 341, 102 S. W. 968.

"In Equity the consideration must be valuable as distinguished from that which is merely moral or equitable, or imported from the nature of a sealed instrument, though it need not be pecuniary or equal to the value of the property conveyed." Sumter *v.* Sumter, 190 Mass. 449, 77 N. E. 497. See Hendy *v.* Smith, 49 Hun 510, 2 N. Y. Supp. 535.

Pre-Existing Debt Not Value. Holland *v.* Ferris (Tex. Civ. App.), 107 S. W. 102; Gest *v.* Packwood, 34 Fed. 368; Baze *v.* Arper, 6 Minn. 220; Bingham *v.* Hyland, 53 Hun 631, 6 N. Y. Supp. 75. *Contra,* Gassen *v.* Hendrick, 74 Cal. 444, 16 Pac. 242; Busey *v.* Reese, 38 Md. 264; Cammack *v.* Soran, 30 Gratt. (Va.) 292; Saffold *v.* Wade's Exr., 51 Ala. 214.

Satisfaction of Judgment. — *Prima facie* case that plaintiff did not pay value is made by showing that the consideration was merely the satisfaction of a judgment held by the plaintiff against his vendor; and this is not rebutted by the mere showing that an abstract of the judgment which had been recorded was to be released, but it must be shown that the judgment debtor owned land to which the judgment lien had attached. Brown Hdw. Co. *v.* Catrett (Tex. Civ. App.), 101 S. W. 559.

Giving of Note Not Payment of Value. — Rush *v.* Mitchell, 71 Iowa 333, 32 N. W. 367; Haughtwout *v.* Murphy, 21 N. J. Eq. 118; Genet *v.* Davenport, 66 Barb. (N. Y.) 412, *affirmed,* 56 N. Y. 676. *Compare* Watkins *v.* Spoull, 8 Tex. Civ. App. 427, 28 S. W. 356.

Mortgage given back does not evidence payment. Young *v.* Guy, 12 Hun (N. Y.) 325; Wood *v.* Rayburn, 18 Or. 3, 22 Pac. 521; Alden *v.* Trubee, 44 Conn. 455.

Proof of a "Good" Consideration, Insufficient. — Fassett *v.* Mulock, 5 Colo. 466; Jackson *v.* Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Bird *v.* Jones, 37 Ark. 195.

Gross Inadequacy of price, in equity, will prevent a person's being treated as a bona fide purchaser. Green *v.* Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345.

"Purchaser for Valuable Consideration" has been held to mean "a fair and reasonable price according

c. *Recitals.* — A recital of payment in a conveyance is generally regarded as no evidence upon that point as against a third person claiming under a prior unrecorded conveyance.[72]

d. *Admissibility and Sufficiency.* — The rules governing the proof of payment are treated elsewhere in this work.[73]

to the common mode of dealing between buyers and sellers." Fullenwider *v.* Roberts, 20 N. C. 278. See Collins *v.* Davis, 132 N. C. 106, 43 S. E. 579; Worthy *v.* Caddell, 76 N. C. 82.

72. *United States.* — Reorganized Church *v.* Church of Christ, 60 Fed. 937; Nickerson *v.* Meacham, 14 Fed. 881.

Alabama. — Nolen *v.* Gwyn's Heirs, 16 Ala. 725.

California. — Galland *v.* Jackman, 26 Cal. 79; Colton *v.* Seavey, 22 Cal. 496.

Illinois. — Roseman *v.* Miller, 84 Ill. 297; Brown *v.* Welch, 18 Ill. 343.

Iowa. — Rush *v.* Mitchell, 71 Iowa 333, 32 N. W. 367; Falconbury *v.* McElravy, 36 Iowa 488; Hogdon *v.* Green, 56 Iowa 733, 10 N. W. 267; Minneapolis & St. L. R. Co. *v.* Chicago, etc. R. Co., 116 Iowa 681, 88 N. W. 1082.

New Hampshire. — Kimball *v.* Fenner, 12 N. H. 248.

Oregon. — Richards *v.* Snyder, 11 Or. 501, 6 Pac. 186; Wood *v.* Rayburn, 18 Or. 3, 22 Pac. 521.

Pennsylvania. — Union Canal Co. *v.* Young, 1 Whart. 410, 30 Am. Dec. 212; Lloyd *v.* Lynch, 28 Pa. St. 425; Coxe *v.* Sartwell, 21 Pa. St. 480, 488.

Texas. — Watkins *v.* Edwards, 23 Tex. 443; Hawley *v.* Bullock, 29 Tex. 216; Robertson *v.* McClay, 19 Tex. Civ. App. 513, 48 S. W. 35; Eborn *v.* Cannon's Admrs., 32 Tex. 231; King *v.* Quincy Nat. Bank, 30 Tex. Civ. App. 92, 69 S. W. 978.

Contra, Doody *v.* Hollwedel, 22 App. Div. 456, 48 N. Y. Supp. 93; Hendy *v.* Smith, 49 Hun 510, 2 N. Y. Supp. 535. See *supra,* V, 1, C, b.

Considered as Mere Declarations. "Had the defendant, however, shown a deed from Vaca, recorded before that of the plaintiffs, he would have failed in making out this defense; for, aside from the recitals contained in his deed, he offered no evidence showing himself a subsequent purchaser in good faith and for a valuable consideration. The burden of proving this rested upon him, and the recitals of the deed are not, as he contends, *prima facie* proof of a valuable consideration. Such recitals are but the declarations of the grantor, and it has never been held that the declarations of a vendor or assignor, made after the sale or assignment, can be received to defeat the title of the vendee or assignee. A party seeking to bring himself within the statute cannot rely upon the recitals of his deed, but must prove the payment of the purchase money *aliunde.*" Long *v.* Dollarhide, 24 Cal. 218.

Recital in Judicial Deed. — Recital of consideration is not evidence in a private deed, but it is where the deed is one executed by the sheriff at a judicial sale. Morris *v.* Daniels, 35 Ohio St. 406.

73. See article "PAYMENT."

Evasion of Interrogatories, as to the particulars of the alleged payment, will justify a finding against the payment, although the grantee testified generally to the payment. Richerson *v.* Moody, 17 Tex. Civ. App. 67, 42 S. W. 317.

Receipt from the grantor is insufficient to prove payment of a consideration. Hoffman *v.* Strohecker, 9 Watts (Pa.) 183; Rogers *v.* Hall, 4 Watts (Pa.) 359.

Promissory Notes of Third Persons — Presumption of Value. Presumption that the promissory notes of a third person turned over to the vendor by the vendee were of value, exists although the notes were past due at the time, but it may be rebutted. Nickerson *v.* Meacham, 14 Fed. 881.

Payment by the Grantor. — Declarations of defendant's grantor, made while he was in possession, are admissible to prove that he himself

5. Questions of Fact. — The questions of notice,[74] bona fides and payment of a valuable consideration, are all questions of fact for the determination of the jury.[75]

paid no consideration for his deed. Norton *v.* Pettibone, 7 Conn. 319.

Employment and Payment of an Agent to purchase the land will not prove that payment was actually made. Mitchell *v.* Puckett, 23 Tex. 573.

74. Schutt *v.* Large, 6 Barb. (N. Y.) 373; Tart *v.* Crawford, 1 McCord (S. C.) 479; Mounce *v.* Byars, 11 Ga. 180.

Sufficient Inquiry. — Whether due inquiry has been made by a party under the circumstances of the case is a question for the jury. Nute *v.* Nute, 41 N. H. 60.

Character of Possession. Whether the possession of a person with an unrecorded deed is of such a character as to amount to constructive notice is a question of fact. Helm *v.* Kaddatz, 107 Ill. App. 413; Ponton *v.* Ballard, 24 Tex. 619.

Uncontroverted Facts. — The question of notice is then for the court. Birdsall *v.* Russell, 29 N. Y. 220.

Sufficiency of Facts to put a reasonable person upon inquiry. Hume *v.* Ware, 87 Tex. 380, 28 S. W. 935.

75. Duff *v.* Patterson, 159 Pa. St. 312, 28 Atl. 250; Stipe *v.* Shirley, 33 Tex. Civ. App. 223, 76 S. W. 307; Anthony *v.* Wheeler, 130 Ill. 128, 22 N. E. 494; Chiles *v.* Conley's Heirs, 2 Dana (Ky.) 21; Tram Lumb. Co. *v.* Hancock, 70 Tex. 312, 7 S. W. 724.

"Upon the balance of the charge given, and that refused, a majority of the court hold, that notice to a purchaser of a subsisting judgment against property purchased, is only *prima facie* evidence of *mala fides* against him, and that he may rebut and overcome this legal presumption by showing that he acted in good faith towards the judgment creditor. In other words, that the question of *bona fides* in such cases is one to be reached by evidence and settled by a jury, and not by the ruling of the judge that one who purchases with notice that the property is subject to the lien of a judgment, is absolutely concluded against showing the good faith of his purchase." Broughton *v.* Foster, 69 Ga. 712.

VENUE.

I. PRESUMPTIONS.

1. In Criminal Actions. — To the general rule that every fact material to conviction in criminal prosecutions must be established by proof, venue is no exception, but is indeed an important element in the very foundation of the action, and will not be presumed to lie as charged.[1] Even in jurisdictions where by legislative enactment the necessity of alleging venue in the indictment has been dispensed with, and courts required to consider the offense, either felony or misdemeanor, to have been committed within the county in which the grand jury was empaneled, proof of venue must be

1. Dobson *v.* State (Ark.), 17 S. W. 3; Randolph *v.* State, 100 Ala. 139, 14 So. 792. See Bain *v.* State, 61 Ala. 75; Cawthorn *v.* State, 63 Ala. 157; Thornell *v.* People, 11 Colo. 305, 17 Pac. 904.

"It is averred in the indictment that the offense was committed in Madison county. This was a material averment, and unless it was proven by the evidence introduced on the trial that the offense was committed in the county alleged in the indictment, the judgment will have to be reversed." Moore *v.* People, 150 Ill. 405, 37 N. E. 909. See Rice *v.* People, 38 Ill. 435; Sattler *v.* People, 59 Ill. 68; Dougherty *v.* People, 118 Ill. 160, 8 N. E. 673.

"The offense if larceny, which is a component part of the offense of entering and stealing from a railroad-car, is committed in every county into which the thief carries the goods, and he may be there indicted and tried for this offense, but if the state elects to try him for the compound offense, the venue must be laid and proved in the county where the actual entering and stealing took place." Williams *v.* State, 105 Ga. 743, 31 S. E. 749.

Forgery or Alteration of Instruments Is Presumed to have occurred in the place where they were uttered, owing to the difficulty or impossibility of showing the real fact. Heard *v.* State, 121 Ga. 138, 48 S. E. 905.

Contra by Statute. — In North Carolina the statute provides "that in

adduced at the trial to the same extent as though it had been pleaded.[2]

2. In Civil Actions. — In civil actions, however, the rule is different, to the extent that where the parties appear, there being no evidence or suggestion in the record to the contrary, a court of general jurisdiction will be presumed to have jurisdiction of the defendant,[3] unless the defendant being outside the state, service shall have been obtained by publication, in which event evidence is required to show strict compliance with the statute under which such service has been made, and presumptions will not be indulged in lieu of affirmative proof.[4]

Justice Courts. — The law presumes nothing in favor of the jurisdiction of a justice of the peace.[5]

the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which, by the indictment, it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement." State *v.* Outerbridge, 82 N. C. 617; State *v.* Allen, 107 N. C. 805, 11 S. E. 1016; State *v.* Lytle, 117 N. C. 799, 23 S. E. 476.

2. Noles *v.* State, 24 Ala. 672; Brassfield *v.* State, 55 Ark. 556, 18 S. W. 1040; Thetstone *v.* State, 32 Ark. 179; Wickham *v.* State, 7 Coldw. (Tenn.) 525; State *v.* Shull, 3 Head (Tenn.) 42; Williams *v.* State, 3 Heisk. (Tenn.) 37; State *v.* Donaldson, 3 Heisk. (Tenn.) 48.

"The code, with reference to the statement of venue in indictments, provides: 'It is not necessary to allege where the offense was committed; but it must be proved on the trial to have been committed within the jurisdiction of the county in which the indictment is preferred.' Code, § 4374." Toole *v.* State, 89 Ala. 131, 8 So. 95.

3. *United States.* — Voorhees *v.* United States Bank, 10 Pet. 449; Galpin *v.* Page, 18 Wall. 350.

California. — Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220.

Connecticut. — Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

Illinois. — Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107.

Indiana. — Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355.

Kentucky. — Bustard *v.* Gates, 4 Dana 429.

Minnesota. — Hempstead *v.* Cargill, 46 Minn. 141, 48 N. W. 686.

Missouri. — City of St. Louis *v.* Lanigan, 97 Mo. 175, 10 S. W. 475.

New York. — Foot *v.* Stevens, 17 Wend. 483.

Ohio. — Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459.

"The rule for jurisdiction is this, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so." Peacock *v.* Bell, 1 Saund. (Eng.) 73. See also Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; Royse *v.* Turnbaugh, 117 Ind. 539, 20 N. E. 485; Howard *v.* Gosset, 10 Ad. & El. (N. S.) 359, 59 E. C. L. 358.

The objection to the venue must be supported by positive evidence, unless shown by the record; otherwise the presumption controls. Martin *v.* Fraternal Life Assn. (Neb.), 114 N. W. 159.

The United States district court, being a court of record, the two presumptions, viz: that the court properly had jurisdiction and that the proceedings were legal, hold.

New York Inst. for Instruction of Deaf and Dumb *v.* Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412.

4. Galpin *v.* Page, 18 Wall. (U. S.) 350; Boyland *v.* Boyland, 18 Ill. 551; Neff *v.* Pennoyer, 3 Sawy. (U. S.) 274; Brownfield *v.* Dyer, 7 Bush (Ky.) 505; Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389; Rollins *v.* Maxwell Bros., 127 Wis. 142, 106 N. W. 677. *Contra*, Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295; Gemmell *v.* Rice, 13 Minn. 400.

5. Ferguson *v.* Basin Consol. Mines, 152 Cal. 712, 93 Pac. 867;

II. BURDEN OF PROOF.

1. In Criminal Actions. — Unless the statute provides otherwise[6] the burden rests upon the prosecution to prove the venue as laid in the indictment or information,[7] and that the situs of the offense charged is within the district over which the court has jurisdiction.[8]

2. In Civil Actions. — A. Local. — In local actions the burden devolves upon the plaintiff to introduce evidence of the existence of the subject-matter of his action within the jurisdiction of the court.[9]

Incorporeal Hereditaments. — Where an action affects incorporeal hereditaments, the evidence should show that the right is, or is to be, exercised within the jurisdiction.[10]

Harlan *v.* Gladding, McB. & Co. (Cal. App.) 93 Pac. 400. See also State *v.* Smith, 69 Ohio St. 196, 68 N. E. 1044.

But where a justice held an inquest he is presumed to have jurisdiction, his acts being, in this instance, those of an officer whose duties are presumed to have been regularly performed. Morgan *v.* San Diego County, 3 Cal. App. 454, 86 Pac. 720.

6. State *v.* Barrington, 141 N. C. 820, 53 S. E. 663.

7. People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773.

The venue in a criminal case must be proved by the state as a part of the general case. Mill *v.* State, 1 Ga. App. 134, 57 S. E. 969. See also Odom *v.* State, 147 Ala. 690, 40 So. 824; Walker *v.* State (Ala.), 41 So. 176.

8. Rex *v.* Halloway, 1 Car. & P. 127, 11 E. C. L. 341; Rex *v.* McAleece, 1 Cr. & Dix. 154; Rex *v.* Smith, Ry. & M. 295, 21 E. C. L. 443; Deck *v.* State, 47 Ind. 245; State *v.* Dorr, 82 Me. 212, 19 Atl. 171; Arcia *v.* State, 28 Tex. App. 198, 12 S. W. 599. See the following cases:

Florida. — Leslie *v.* State, 35 Fla. 184, 17 So. 559.

Georgia. — Berry *v.* State, 92 Ga. 47, 17 S. E. 1006; Moore *v.* State, 130 Ga. 322, 60 S. E. 544.

Indiana. — Harlan *v.* State, 134 Ind. 339, 33 N. E. 1102; Luck *v.* State, 96 Ind. 16.

Iowa. — State *v.* Laffer, 38 Iowa 422.

Texas. — Ryan *v.* State, 22 Tex. App. 699, 3 S. W. 547.

West Virginia. — State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380.

In Federal Courts. — Vernon *v.* United States, 146 Fed. 121, 76 C. C. A. 547; United States *v.* Richards, 149 Fed. 443.

Embezzlement. — Knight *v.* State (Ala.), 44 So. 585; Raiden *v.* State, 1 Ga. App. 532, 57 S. E. 989.

Anti-Trust Law Prosecution. Hughes *v.* State, 9 Ohio C. C. (N. S.) 369.

In Homicide Case. — Anderson *v.* Com., 100 Va. 860, 42 S. E. 865. See also McKinnie *v.* State, 44 Fla. 143, 32 So. 786.

A constitutional provision requiring an offender to be tried "in the county where the offense was committed," means where the offense was deemed to be committed under existing laws. State *v.* McCoomer, 79 S. C. 63, 60 S. E. 237.

9. Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; Briggs *v.* St. Louis, etc. R. Co., 111 Mo. 168, 20 S. W. 32; Backenstoe *v.* Wabash, etc. R. Co., 86 Mo. 492; Kinney *v.* Hannibal, etc. R. Co., 27 Mo. App. 610; Gorham *v.* Jones, 11 Humph. (Tenn.) 353; Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227; Hilliard *v.* Wilson, 76 Tex. 180, 13 S. W. 25.

Defendant Alleging Want of Jurisdiction assumes the burden of proof. Tipton *v.* Triplett, 1 Met. (Ky.) 570; List *v.* Kortepeter, 26 Ind. 27.

10. Rickey Land & Cattle Co. *v.* Miller, 152 Fed. 11, 81 C. C. A. 207

B. TRANSITORY. — In transitory actions evidence showing where the cause of action arose is not necessary, unless venue be a fact material to some issue presented.[11] Where the venue is based on a party's residence or place of business, and residence in the jurisdiction is denied, it must be shown that such residence is the permanent, and not a mere temporary residence.[12]

III. JUDICIAL NOTICE.

For the purpose of determining venue the courts will take judicial notice[13] of well-known geographical features,[14] judicial and congressional districts,[15] the division of states into counties, cities and towns,[16] the subdivision of cities into blocks,[17] and the boundary lines of counties and towns within the state when fixed by public law.[18] Courts have frequently taken notice of the location of a

(action affecting prior appropriation of water and diversion of same).

11. Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227.

"The venue in an action for an assault and battery is transitory, and may be laid in the county where the action is brought, without rendering it necessary for the plaintiff to prove that the cause of action arose where laid." Hurley *v.* Marsh, 2 Ill. 329.

Brought in Wrong County. — Burden of Proof. — Defendant urging that suit was brought in the wrong county must prove by facts so notorious that the plaintiff could discover them, that his residence was not in the county where he was sued when the suit was brought. Wilson *v.* Bridgeman, 24 Tex. 615. See also Morrison *v.* Jaliorick, 1 White & W. (Tex.) § 735.

12. Evidence that a non-resident who owned property in county of suit, visited a town in said county, collected rents from his property there, called at the office of his old place of business, a dwelling house, was held insufficient to prove that he did business in that county. State *v.* Shipley, 98 Md. 664, 57 Atl. 1131. A mere temporary residence for the purpose of nursing one's sister is not sufficient proof of residence. Gulf, etc. R. Co. *v.* Overton (Tex. Civ. App.), 107 S. W. 71; International & G. N. R. Co. *v.* Elder, 44 Tex. Civ. App. 605, 99 S. W. 856.

Domicil. — Kelsey *v.* Collins, (Tex. Civ. App.), 108 S. W. 793. See also Garrett *v.* Galveston & S. A. R. Co. (Tex. Civ. App.), 108 S. W. 760, 110 S. W. 487.

13. See article "JUDICIAL NOTICE," Vol. VII.

14. "The evidence was sufficient to show that it was in Storm Lake, and the jury were authorized to take notice of the fact that Storm Lake was in Buena Vista county." State *v.* Farley, 87 Iowa 22, 53 N. W. 1089.

15. Judicial Notice of United States Judicial and Congressional Districts. — United States *v.* Johnson, 2 Sawy. (U. S.) 482.

16. *United States.* — Lyell *v.* Supervisors, 6 McLean 446.

Connecticut. — State *v.* Powers, 25 Conn. 48.

Illinois. — Dickenson *v.* Breeden, 30 Ill. 279.

Indiana. — Mossman *v.* Forrest, 27 Ind. 233.

Maine. — Goodwin *v.* Appleton, 22 Me. 453.

Michigan. — LaGrange *v.* Chapman, 11 Mich. 499.

New Hampshire. — Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.

New York. — Vanderwerker *v.* People, 5 Wend. 530; People *v.* Breese, 7 Cow. 429.

17. Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841.

18. Rodgers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; Board of Comrs. *v.* State, 147 Ind. 476, 46 N. E. 908; Kansas City R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589; Ham *v.* Ham, 39 Me. 263; State *v.* Jackson, 39 Me. 291.

town within a given county,[19] though generally distances between cities and towns will not be noticed.[20] Courts sitting in a city have taken notice of well-known streets within such city.[21]

IV. DEGREE OF PROOF.

The general rule seems to be that venue need not be proved beyond a reasonable doubt,[22] though in some jurisdictions it is held to

19. Cities Within County. — Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; Jones *v.* Town of Lake View, 151 Ill. 663, 38 N. E. 688; State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106; Com. *v.* Salawich, 28 Pa. Super. 330; Dupree *v.* State, 148 Ala. 620, 42 So. 1004; People *v.* Curley, 99 Mich. 238, 58 N. W. 68.

"It is insisted that the proof fails to show that the offense was committed in Pope county. This fact was not proved in those words, but there was testimony that it occurred at a point three miles southwest of Dover. Courts cannot, generally, take judicial notice of matters of fact; but there are many facts, particularly with reference to geographical positions, of such common knowledge that the courts may judicially notice them." Forehand *v.* State, 53 Ark. 46, 13 S. W. 728.

"The proof of venue was not left to inference, but was directly submitted to the jury on evidence tending to show the crime to have been committed within a mile and a half of the town of Blairsburg, and we can take judicial notice of the location of the town so as to know that the land on which the crime is shown to have been committed was necessarily within the limits of Hamilton county." State *v.* Mitchell (Iowa), 116 N. W. 808. See also State *v.* Reader, 60 Iowa 527, 15 N. W. 423; State *v.* Farley, 87 Iowa 22, 53 N. W. 1089; State *v.* Arthur, 129 Iowa 235, 105 N. W. 422.

"The evidence shows that the homicide was committed in the city of New Albany. We are bound to know that that city is in Floyd county. The evidence as to venue was sufficient." Luck v. State, 96 Ind. 16. See also Wiles *v.* State, 33 Ind. 206; Whitney *v.* State, 35 Ind. 503; Cluck *v.* State, 40 Ind. 263.

Unincorporated Town. — Where the defendant, charged with murder in C county, was shown to have shot deceased at "Anderson's Store" about a quarter of a mile from "Lynch's Station," and there was no evidence that either was in C county, it was held that the court would not take judicial notice that a point at a given distance from Lynch's station, an unincorporated town, was in the county of C. Anderson *v.* Com., 100 Va. 860, 42 S. E. 865.

Location of County Seat with respect to range and township lines within the county. State *v.* Arthur, 129 Iowa 235, 105 N. W. 422. Judicial notice will be taken of the fact that the city fixed by statute as the county seat is in the county where trial is being held. State *v.* Buralli, 27 Nev. 41, 71 Pac. 532.

20. People *v.* Etting, 99 Cal. 577, 34 Pac. 237; Goodwin *v.* Appleton, 22 Me. 453; People *v.* Curley, 99 Mich. 238, 58 N. W. 68; Lewis *v.* State (Tex. Crim.), 24 S. W. 903.

21. State *v.* Ruth, 14 Mo. App. 226.

22. *Arkansas.* — Wilson *v.* State, 62 Ark. 497, 36 S. W. 842, 54 Am. St. Rep. 303.

California. — People v. Monroe, 138 Cal. 97, 70 Pac. 1072; People *v.* Manning, 48 Cal. 335.

Florida. — Smith *v.* State, 29 Fla. 408, 10 So. 894; McKinnie *v.* State, 44 Fla. 143, 32 So. 786.

Iowa. — State *v.* Meyer, 135 Iowa 507, 113 N. W. 322.

Missouri. — State *v.* Horner, 48 Mo. 520; State *v.* Knolle, 90 Mo. App. 238; State *v.* Shour, 196 Mo. 202, 95 S. W. 405.

Montana. — State *v.* Hardee, 28 Mont. 18, 72 Pac. 39.

Nevada. — People *v.* Gleason, 1 Nev. 173.

Ohio. — State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 13 L. R. A. (N. S.) 341.

the contrary.[23] But the venue of a crime should never be left in doubt nor supplied by inference, when it may be readily proved.[24]

V. MODE AND SUFFICIENCY OF PROOF.

1. Generally. — Venue may be established like any other fact,[25] and it may be found upon circumstantial evidence.[26] Where the

South Carolina. — City of Florence v. Berry, 61 S. C. 237, 39 S. E. 389.

Texas. — McReynolds v. State, 4 Tex. App. 327; Deggs v. State, 7 Tex. App. 359; Achterberg v. State, 8 Tex. App. 463; Cox v. State, 28 Tex. App. 92, 12 S. W. 493; Boggs *v.* State (Tex. Crim.), 25 S. W. 770; Lyon v. State (Tex. Crim.), 34 S. W. 947; Wright v. State (Tex. Crim.), 109 S. W. 186. *Contra,* Wright v. State (Tex. Crim.), 77 S. W. 809.

Virginia. — Richardson v. Com., 80 Va. 124.

23. Gosha v. State, 56 Ga. 36; Wimbish v. State, 70 Ga. 718; Cooper *v.* State, 2 Ga. App. 730, 59 S. E. 20; Smith v. State, 2 Ga. App. 413, 58 S. E. 549; Davis *v.* State, 134 Wis. 632, 115 N. W. 150. But see Malone *v.* State, 116 Ga. 272, 42 S. E. 468; Womble *v.* State, 107 Ga. 666, 33 S. E. 630; Kraimer *v.* State, 117 Wis. 350, 93 N. W. 1097.

24. Walker v. State (Ala.), 45 So. 640. See also Franklin *v.* State, 5 Baxt. (Tenn.) 613; Sedberry *v.* State, 14 Tex. App. 233.

25. State *v.* Meyer, 135 Iowa, 507, 113 N. W. 322; Weinecke *v.* State, 34 Neb. 14, 51 N. W. 307.

26. *Alabama.* — Chambers *v.* State, 26 Ala. 59; Johnson *v.* State, 35 Ala. 370; Tinney *v.* State, 111 Ala. 74, 20 So. 597.

Arkansas. — Bloom *v.* State, 68 Ark. 336, 58 S. W. 41.

California. — People *v.* Kamaunu, 110 Cal. 609, 42 Pac. 1090.

Colorado. — Brooke *v.* People, 23 Colo. 375, 48 Pac. 502.

Florida. — McCune *v.* State, 42 Fla. 192, 27 So. 867, 89 Am. St. Rep. 227.

Georgia. — Dumas *v.* State, 62 Ga. 58; Robson *v.* State, 83 Ga. 166, 9 S. E. 610.

Illinois. — Bland *v.* People, 4 Ill. 364.

Indiana. — Beavers *v.* State, 58 Ind. 530.

Kansas. — State *v.* Small, 26 Kan. 209.

Louisiana. — State *v.* Morgan, 35 La. Ann. 293.

Massachusetts. — Com. *v.* Costley, 118 Mass. 1.

Missouri. — State *v.* Snyder, 44 Mo. App. 429; State *v.* McGinniss, 74 Mo. 245; State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145.

Nebraska. — Weinecke *v.* State, 34 Neb. 14, 51 N. W. 307.

Pennsylvania. — Com. *v.* Salyards, 158 Pa. St. 501, 27 Atl. 993.

Texas. — Hoffman *v.* State, 12 Tex. App. 406.

"It is claimed that it was not proved that the offense was committed in the county of Hennepin where the indictment was found; and it is true that no witness testified directly that such was the fact. Yet there is abundant evidence satisfactorily, although somewhat indirectly, proving the venue. Many witnesses through the use of such words as 'here', 'here in Minneapolis', and 'in this city', and otherwise, locate the commission of the offense concerning which they testified in the place where the trial was had, which also appears to have been the city of Minneapolis. The court was sitting in Hennepin county. Enough is shown upon this point by the testimony of the witnesses Hein, Pray, and Little, as well as by other evidence. The proof was sufficient, although it was indirect." State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458; State *v.* Grear, 29 Minn. 221, 223, 13 N. W. 140; People *v.* Waller, 70 Mich. 237, 38 N. W. 261.

"Evidence that the defendant on trial for forgery lived in the county

only rational conclusion from the evidence is that the offense was committed in the county alleged in the indictment, the venue is sufficiently proved, though it may not appear from the express statement of any witness that it was committed within the jurisdiction alleged.[27] It is not essential that the venue of the crime be proved in express terms.[28] It is sufficient that the court or jury is satisfied from the evidence that the act in question occurred within the limits of the jurisdiction.[29] All reasonable inferences or deductions which

of the trial, and, within it, admitted the forgery, is sufficient proof of venue, there being no evidence that defendant was ever out of the county." Johnson *v.* State, 62 Ga. 299.

"The venue of the crime of murder is sufficiently established where the evidence shows that the wound was inflicted while deceased was passing on a wagon road between two points eight miles apart, both in the same county, and that he left one point late in the afternoon, and arrived at the other during the early part of the night; there being no testimony that the road crossed the county line, or that it left the county during that time." Dumas *v.* State, 62 Ga. 58.

"Where it appears that defendant lived in the county and collected the money there, and it was last seen in his custody therein, the jury may infer that the conversion occurred there." Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

The fact that a criminal committed the offense in a ship on a voyage to a port in a particular judicial district, and that the prisoner is in custody in such port, will warrant a finding that he was first brought into that district, in absence of proof to the contrary. United States *v.* Mingo, 2 Curt. 1, 26 Fed. Cas. No. 15,781.

In a Civil Case. — Brown *v.* Boulden, 18 Tex. 431.

27. Weinberg *v.* People, 208 Ill. 15, 69 N. E. 936. See also McCune *v.* State, 42 Fla. 192, 27 So. 867, 89 Am. St. Rep. 227; City of Florence *v.* Berry, 61 S. C. 237, 39 S. E. 389; Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837; Tipton *v.* State, 119 Ga. 304, 46 S. E. 436. But proof of venue must not be left to inference. Franklin *v.* State, 5 Baxt. (Tenn.) 613; Sedberry *v.* State, 14 Tex. App. 233.

28. State *v.* Dickerson, 77 Ohio St. 34, 82 N. E. 969, 13 L. R. A. (N. S.) 341.

29. *Arkansas.* — Wilson *v.* State, 62 Ark. 497, 36 S. W. 842, 54 Am. St. Rep. 303.

Florida. — Warrace *v.* State, 27 Fla. 362, 8 So. 748.

Iowa. — State *v.* Meyer, 135 Iowa 507, 113 N. W. 322; State *v.* Goodsell, 116 N. W. 605.

Kansas. — State *v.* Benson, 22 Kan. 471.

Missouri. — State *v.* Burns, 48 Mo. 438.

Texas. — Boggs *v.* State (Tex. Crim.), 25 S. W. 770; Hoffman *v.* State, 12 Tex. App. 406; Achterberg *v.* State, 8 Tex. App. 463.

In an action against a railroad company for wrongful ejection from train, proof merely that defendant operated a railroad in the county was held sufficient. Southern Pac. Co. *v.* Craner (Tex. Civ. App.), 101 S. W. 534.

Homicide. — Evidence that the murder was committed at "Mitchells' Mill at West End" was held sufficient proof of venue in Saline County. Waller *v.* People, 209 Ill. 284, 70 N. E. 681. Proof that the murder was committed in B county establishes a *prima facie* venue, although it was not expressly shown that it was in the state. Lewis *v.* State, 129 Ga. 731, 59 S. E. 782. See also State *v.* Hardee, 28 Mont. 18, 72 Pac. 39.

Where the evidence showed that the offense was committed "near the railroad yards on Mississippi Avenue" it was held sufficient to warrant the jury in finding the venue as laid in the indictment. State *v.* Knolle, 90 Mo. App. 238.

Municipal Court. — Where the only

the testimony will admit of may be made,[30] but it must nevertheless appear with reasonable certainty where the act in question occurred.[31] Mere subterfuge to cover crimes will not be allowed to

evidence of venue was that at a certain time the witness had a store place in the city, it was held sufficient establishment of venue, where the jurisdiction of the municipal court was confined to the limits of the city. Fountain *v.* Fitzgerald, 2 Ga. App. 713, 58 S. E. 1129.

"No witness testified in so many words that the killing occurred in the city and county of San Francisco. But the whole testimony, taken together, left no room for a reasonable doubt on this point. We think the venue was sufficiently proved." People *v.* Manning, 48 Cal. 335.

30. "In This County." — Testimony that the offense was committed "in this county" is sufficient proof of venue, where the record shows that the trial was had in the county in which the offense was alleged to have been committed. Malone *v.* State, 116 Ga. 272, 42 S. E. 468.

Where the prosecuting witness testified that "it was in Putnam county," and followed with a story of the assault, the venue was sufficiently showed. Little *v.* State, 3 Ga. App. 441, 60 S. E. 113.

Larceny. — If the evidence shows that the stolen property was in the county where defendant was tried, or that he carried the property into the county before the indictment was found, it is sufficient to establish venue. McCoy *v.* State, 123 Ga. 143, 51 S. E. 279.

In a case of criminal assault, the only evidence of venue was that of the father of the child, who testified that he was a farmer, that the child resided at his home; that he was living in the city of Sheldon, Carroll township, and had lived there for twenty-two years. It was held that "it is fairly to be inferred that in mentioning Carroll township in connection with Sheldon, he had reference to the township of that name in the county in which the case was tried." State *v.* Meyer, 135 Iowa 507, 113 N. W. 322.

False Pretenses. — Where in a prosecution for obtaining money under false pretenses, the defrauded person testified that he resided in W. city and that he was parted from his money in the back yard of a hotel in that city, and the accused stated that he was soliciting for the Episcopal Church from there, indicating its location, the church being located by other witnesses in said W. city, the venue was held sufficiently established. Davis *v.* State, 134 Wis. 632, 115 N. W. 150.

Where on a trial for larceny the prosecuting witness was asked:

Q. "The money stolen was worth $200.00 and that was in this county?"

A. "Yes sir, it was worth $200.00 as I gave him a check for it and it was paid."

Held, to have sufficiently established venue of the offense. Carroll *v.* State, 121 Ga. 197, 48 S. E. 909.

31. Guiles *v.* State (Tex. Crim.), 72 S. W. 187; Murphy *v.* State, 121 Ga. 142, 48 S. E. 909; Smith *v.* State, 2 Ga. App. 413, 58 S. E. 549.

Where no evidence was adduced as to venue, except that the crime was committed at the corner of "Farm and Bryan" streets without naming the city where such streets were located, the evidence was held insufficient to establish venue. Kolman *v.* State, 124 Ga. 63, 52 S. E. 82.

In a prosecution under a fraudulent contract for purchase of lumber, where part of the transaction was in another state, the evidence was held insufficient to prove the venue. Hylton *v.* Com., 29 Ky. L. Rep. 64, 91 S. W. 696.

In a Prosecution for Rape, the prosecuting witness spoke of going from town to the home of the accused, but no evidence was submitted showing how far the town was from the home of the accused. It was held that the venue was not sufficiently proved although the court took judicial notice that the town in question was in the county of in-

affect the venue in a criminal action and thus defeat jurisdiction.[32]

2. Maps. — Indicating the *locus in quo* on a map identified as a map of the county or any section within the court's jurisdiction is sufficient proof of the venue.[33]

3. Two Counties Situs of Offense. — Where, by statute, action may be prosecuted in either of two counties or jurisdictions it is generally sufficient to prove that the offense was partly committed in the county where the accused is indicted.[34]

4. In Particular Cases. — The sufficiency of proof relied upon to establish the venue depends somewhat upon the nature of the action or character of offense, as in conspiracy cases evidence that the conspirators consummated one overt act within the jurisdiction is held sufficient;[35] so proof that a forged or altered instrument was uttered

dictment and trial. Boykin *v.* State, 148 Ala. 608, 42 So. 909.

Stolen Goods. — From Freight Train. — Where goods were stolen from a freight train running between Chattanooga and Carterville, Tenn., through different counties, and the evidence showed that the goods were found on defendant in D in another county outside the jurisdiction but between the two points, a conviction for larceny from the car of the train could not be sustained for want of proof of venue. Howard *v.* State, 3 Ga. App. 659, 60 S. E. 328.

Embezzlement. — Evidence held insufficient to show place of. Jeffreys *v.* State, 51 Tex. Crim. 566, 103 S. W. 886; People *v.* Goodrich, 142 Cal. 216, 75 Pac. 796; State *v.* Shour, 196 Mo. 202, 95 S. W. 405.

32. In a prosecution for the illegal operation of a pool room, it appeared that wagers were made under the guise of telegrams to a city in another state, but that a room was maintained in Louisiana and money paid and bets received in said room. This was held sufficient proof of venue in Louisiana. State *v.* Mahoney, 115 La. 498, 39 So. 539; People *v.* Murray, 95 N. Y. Supp. 107.

33. Krainer *v.* State, 117 Wis. 350, 93 N. W. 1097.

34. Under a statute allowing trial in either of two counties where the offense was committed partly in one and partly in the other, evidence that an embezzler took the property from A county to C county and then back to A county, was held sufficient to show venue in A county. State *v.* Allen (S. D.), 110 N. W. 92.

A statute allowing an offense to be prosecuted in either county if committed within four hundred yards of the boundary line is sufficiently broad to allow the venue to be proved within four hundred yards of the line on a river bounding a county. Hackney *v.* State (Tex. Crim.), 74 S. W. 554. See also Pearce *v.* State, 50 Tex. Crim. 507, 98 S. W. 861.

Homicide. — Evidence that deceased was fatally wounded in B county, was conveyed to and died in F county the following day, sufficiently shows venue in F county. Britton *v.* Com., 29 Ky. L. Rep. 857, 96 S. W. 556. So where a murder was committed on an island between two counties, it was held that either county had jurisdiction under the statute, and the fact that the evidence showed that the crime was committed closer to one county line than the other was immaterial. Patterson *v.* State, 146 Ala. 39, 41 So. 157. See also Nickols *v.* Com., 27 Ky. L. Rep. 690, 86 S. W. 513.

Intoxicating Liquors. — Under act of Congress giving certain counties in Missouri concurrent jurisdiction with other states over offenses committed on the Mississippi River, proof of sales of liquor opposite said counties is sufficient proof of venue, although said sales were not shown to have occurred on the Missouri side of the center of the river channel. State *v.* Seagraves, 111 Mo. App. 353, 85 S. W. 925.

35. People *v.* Murray, 95 N. Y. Supp. 107; People *v.* Summerfield, 48 Misc. 242, 96 N. Y. Supp. 502.

within the court's jurisdiction, sufficiently establishes that it was also forged or altered therein.[36]

In certain cases the venue of an action apparently occurring outside the jurisdiction of the court where an action is brought may be established within the jurisdiction by showing that part of the offense or cause of action did occur or accrue within the jurisdiction, as in the case of streams polluted from refuse from another jurisdiction,[37] or in a prosecution for a failure to support defendant,[38] or for breach of labor contract,[39] or for publishing illegally an advertisement.[40]

The proof of venue of receiving stolen goods must show that the goods were actually received in the jurisdiction.[41]

In a prosecution for dealing in merchandise prohibited by statute, proof that the orders were given and the money paid within the jurisdiction is sufficient.[42] And in prosecutions for transporting liquor from a license to a prohibition territory, the place of sale is held to control the venue.[43] Proof of situs of the criminal intent of

36. A prosecution for alteration of a teacher's certificate establishes a *prima facie* case where the evidence shows that the accused *uttered* the altered instrument in the county in which he was indicted and tried in the absence of evidence as to where the alteration actually took place. Heard *v.* State, 121 Ga. 138, 48 S. E. 905.

37. Pollution of Waters. — If the evidence shows that water in a certain county was polluted from refuse dumped into the stream from another county, it is sufficient to sustain a conviction against the defendant guilty of so polluting said stream in the county into which said polluted waters flowed. American Strawboard Co. *v.* State, 70 Ohio St. 140, 71 N. E. 284; State *v.* Sugar Refining Co., 117 Iowa 524, 91 N. W. 794; Robbins *v.* State, 8 Ohio St. 131; Simpson *v.* State, 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248; Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89; State *v.* Wyckoff, 31 N. J. L. 65; State *v.* Chapin, 17 Ark. 561, 65 Am. Dec. 452.

38. Failure To Support. — Where a parent residing in one county, is prosecuted for failure to support his child, residing in another county, the offense is committed where the child resides. State *v.* Peabody, 25 R. I. 544, 56 Atl. 1028. *Contra,* State *v.* Dangler, 74 Ohio St. 49, 77 N. E. 271.

39. Under a statute making a breach of labor contract a misdemeanor, the breach or offense is held to be committed at the place of hiring. King *v.* State, 83 Miss. 375, 35 So. 691.

40. In a prosecution for advertising without using the word "incorporated" after the corporate name, the place of business of the corporation is the proper venue, and not the county where the advertisement was published. Paracamph Co. *v.* Com., 33 Ky. L. Rep. 981, 112 S. W. 587.

41. The venue of a crime of receiving stolen goods is in the county where they are received and not in the county where they are stolen, nor the one to which they are subsequently taken. State *v.* Pray (Nev.), 94 Pac. 218.

42. Weare Com. Co. *v.* People, 111 Ill. App. 116.

43. Owens *v.* State, 47 Tex. Crim. 634, 85 S. W. 794.

In a prosecution for violating the local option law in L. county, the venue is not sustained by evidence that defendant, as agent for a dealer in another county, took an order from the purchaser subject to acceptance by the dealer, and to be shipped C. O. D., as the sale was at the point of shipment. Luster *v.*

enticing a female away for prostitution may be shown by circumstances.[44]

Wife Abandonment. — In a prosecution for abandonment of a wife, the offense is committed where the abandonment took place.[45]

False Pretenses. — So in obtaining money or goods under false pretenses, the venue is where the proof shows that the crime was consummated.[46]

VI. CHANGE OF VENUE.

1. Burden of Proof. — On an application for a change of venue, the burden is on the applicant to prove the facts entitling him to a change.[47]

2. Discretion of Court. — In those states where compliance with the statute does not of itself require a change to be granted as of course, the court is vested with a large discretion in determining the right to a change: First, where the evidence or facts presented as the cause for change is conflicting or controverted by counter proof;[48] second, where the statute authorizes the court to change

State (Tex. Crim.), 86 S. W. 326.

44. Where the evidence shows that defendant took a girl under eighteen years of age from her father's home with the father's consent from a foreign county into A county, it may be inferred that his purpose to use her for prostitution was not manifest until after she was carried into A county. People *v.* Lewis, 141 Cal. 543, 75 Pac. 189.

Under a charge of decoying a girl to a house of ill-fame, the offense is committed where the procuring and decoying was done and the proper venue of the offense is there and not in the county where the house of ill-fame is situated. Studer *v.* State, 74 Ohio St. 519, 78 N. E. 1139, 9 Ohio C. C. (N. S.) 185.

45. On a prosecution for wife abandonment in Missouri, where the evidence showed that the final separation took place in Idaho, it was held that the offense was one against the laws of Idaho. State *v.* Shuey, 101 Mo. App. 438, 74 S. W. 369.

46. Where a draft is obtained by false pretenses in Wisconsin but is paid in Iowa, the prosecution can be had only in Iowa. Bates *v.* State, 124 Wis. 612, 103 N. W. 251.

Where goods are sent from one county to another and the consignee obtained the goods under false pretenses, the venue is properly laid where the evidence shows the goods were so delivered. *In re* Stephenson, 67 Kan. 556, 73 Pac. 62.

In a prosecution for obtaining money by false pretenses, the evidence should show that the money or property was obtained in the jurisdiction, and not merely that the pretenses were there made. People *v.* Hoffman, 142 Mich. 531, 105 N. W. 838.

47. Trimble *v.* Borroughs, 41 Tex. Civ. App. 554, 95 S. W. 614; Wilson *v.* Bridgeman, 24 Tex. 615; Kuteman *v.* Page, 3 Wills. Civ. Cas. (Tex.) § 164; Chase *v.* South Pac. C. R. Co., 83 Cal. 468, 23 Pac. 532; Bischoff *v.* Bischoff, 88 App. Div. 126, 85 N. Y. Supp. 81 (nonresidence).

48. *Alabama.* — Taylor *v.* State, 48 Ala. 180.

California. — Clanton *v.* Ruffner, 78 Cal. 268, 20 Pac. 676.

District of Columbia. — Lewis *v.* Fire Ins. Co., 2 Cranch (C. C.) 500.

Idaho. — State *v.* Reed, 3 Idaho 754, 35 Pac. 706.

Illinois. — Jamison *v.* People, 145 Ill. 357, 34 N. E. 486.

Indiana. — Ringgenberg *v.* Hartman, 102 Ind. 537, 26 N. E. 91.

Iowa. — Cobb *v.* Thompson, 10 Iowa 367; State *v.* Hutchinson, 27 Iowa 212; Davis *v.* Rivers, 49 Iowa 435.

the venue when he is satisfied that "good cause" for change exists.[49]

3. Affidavits and Other Proof. — A. Necessity. — a. *Generally.* It is the general rule provided by statute in most states to require the motion for change of venue to be supported by affidavit.[50] Such affidavits must contain all information required by the statute, or by the existing practice, and which may be necessary to fully acquaint the court with the situation.[51] But facts, or a manner of stating them, that tends to express contempt for, or scandalize the court or a judge thereof, should be avoided.[52] Superfluous facts or redundant details are improper.[53] If the court is satisfied by

Kansas. — Vaughn *v.* Hixon, 50 Kan. 773, 32 Pac. 358.

Kentucky. — Howard *v.* Com., 15 Ky. L. Rep. 873, 26 S. W. 1.

Louisiana. — Fletcher *v.* Henley, 13 La. Ann. 191; State *v.* Dent, 41 La. Ann. 1082, 7 So. 694.

Maryland. — Atlantic etc. Coal Co. *v.* Maryland Coal Co., 64 Md. 302, 1 Atl. 878.

Minnesota. — Walker *v.* Nettleton, 50 Minn. 305, 52 N. W. 864.

Missouri. — State *v.* Brownfield, 83 Mo. 448.

Nevada. — State *v.* Millain, 3 Nev. 409.

New Hampshire. — Cochecho R. *v.* Farrington, 26 N. H. 428.

New York. — Payne *v.* Eureka Elec. Co., 88 Hun 250, 34 N. Y. Supp. 657.

North Carolina. — Smith *v.* Greenlee, 14 N. C. (3 Dev. L.) 387; State *v.* Johnson, 104 N. C. 780, 10 S. E. 257.

Ohio. — Cleveland Bank *v.* Ward, 11 Ohio 128.

Pennsylvania. — Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695.

South Carolina. — Utsey *v.* Charleston etc. R. Co., 38 S. C. 399, 17 S. E. 141.

Tennessee. — Moses *v.* State, 11 Humph. 232.

Texas. — Crow *v.* State, 41 Tex. 468.

Washington. — Ward *v.* Moorey, 1 Wash. Ter. 104.

Wisconsin. — Ross *v.* Hanchett, 52 Wis. 491, 9 N. W. 624.

The applicant is not permitted to swear or offer proof as to prejudice that may exist in outside counties and thus interfere with the discretion of the court. State *v.* Wofford, 119 Mo. 375, 24 S. W. 764.

49. *Florida.* — McNealy *v.* State, 17 Fla. 198.

Illinois. — Myers *v.* Walker, 31 Ill. 353.

Missouri. — State *v.* Sayers, 58 Mo. 585; State *v.* O'Rourke, 55 Mo. 440.

Nevada. — State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

Pennsylvania. — Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110.

Tennessee. — Hudson *v.* State, 3 Coldw. 355.

Wisconsin. — Rowan *v.* State, 30 Wis. 129.

Good Cause. — "The court has a large discretionary power in determining what is "good cause" under the statute. Pittsburg, etc. R. Co. *v.* Applegate, 21 W. Va. 172.

50. Toledo, etc. R. Co. *v.* Eddy, 72 Ill. 138.

The application for change must be supported by affidavits. It cannot be assumed from the allegations in the pleadings that the cause cannot be fairly tried in the county. State *ex rel.* Field *v.* Saxton, 14 Wis. 123.

51. Gourley *v.* Shoemaker, 1 Johns. Cas. (N. Y.) 392; Satterlee *v.* Groot, 6 Cow. (N. Y.) 33. The cause of action should be stated. Baker *v.* Sleight, 2 Caines (N. Y.) 46.

52. Hughes *v.* People, 5 Colo. 436.

53. Surplusage. — After a statement of facts that show a fair and impartial trial cannot be obtained in the county, a statement that "This also applies to P. county," is surplusage. Wells *v.* State, 53 Ark. 211, 13 S. W. 737. Nor is a suggestion in the affidavit, of the proper

other proof, he has the power ordinarily to relieve a party from filing affidavits.[54]

b. *Affidavit of Merits.* — In some states, usually where the code system prevails, a defendant who seeks a change must file an affidavit of merits to show that his defense is meritorious.[55] But in case of several defendants, all having the same defense and joining in the application for change, such affidavit by one defendant is sufficient.[56] An affidavit of merits may be amended so as to relate back to the time of the original filing.[57]

Affidavit by Attorney. — A party's attorney who has personal knowledge of the defense[58] may make the affidavit on sufficient showing why the party does not make it.[59]

B. Persons Competent or Required To Make Affidavit. — a. *Generally.* — The movant is the proper person to make the affidavit for change of venue.[60] This is, ordinarily, compulsory when the

county to which change should be allowed, proper. That is for the court to determine. Such statements in affidavits will be considered merely surplusage. Philbrick *v.* Boyd, 16 Abb. Pr. (N. Y.) 393. *Contra.* — In justice courts, it is held proper to indicate in the affidavit that another justice is also disqualified. Paul *v.* Ziebell, 43 Neb. 424, 61 N. W. 630.

54. In a case where the purported facts in an affidavit were signed but not sworn to, the court having already tried the case twice, it was held that such facts were sufficient to satisfy the court, and the sworn affidavit was not necessary. Cartright *v.* Belmont, 58 Wis. 370, 17 N. W. 237.

55. *California.* — Nickerson *v.* California Raisin Co., 61 Cal. 268; Watkins *v.* Degener, 63 Cal. 500; Palmer *v.* Barclay, 92 Cal. 199, 28 Pac. 226; Johnson *v.* Walden, 12 Pac. 257.

Indiana. — Bowen *v.* Bowen, 74 Ind. 470.

Minnesota. — Olivier *v.* Cunningham, 51 Minn. 232, 53 N. W. 462.

New York. — Cromwell *v.* Van Rensselaer, 3 Cow. 346; Hemingway *v.* Spaulding, 1 How. Pr. 70; Lynch *v.* Mosher, 4 How. Pr. 86; Bingham *v.* Bingham, 1 Civ. Proc. 166.

"The affidavit first served stated as follows: 'I reside in the county of Santa Barbara, state of California, and have so resided for more than five years last past. I further say that I have fully and fairly stated the case in this cause to (naming his attorneys), and after such statement I am by them and each of them advised and verily believe that I have a good and substantial defense on the merits of the said action.' This affidavit was sufficient." Nolan *v.* McDuffie, 125 Cal. 334, 58 Pac. 4.

56. People *v.* Larue, 66 Cal. 235, 5 Pac. 157; Rowland *v.* Coyne, 55 Cal. 1.

57. Palmer *v.* Barclay, 92 Cal. 199, 28 Pac. 226.

58. Olivier *v.* Cunningham, 51 Minn. 232, 53 N. W. 462.

59. Nicholl *v.* Nicholl, 66 Cal. 36, 4 Pac. 882.

60. McCauley *v.* People, 88 Ill. 578; Clements *v.* Greenwell, 40 Mo. App. 589; Western Bank *v.* Tallman, 15 Wis. 92; Shattuck *v.* Myers, 13 Ind. 46; Lewin *v.* Dille, 17 Mo. 64.

A statute reading "where either party files an affidavit," etc., it was held that the attorney for the party could make the affidavit, or even some other person. Ellsworth *v.* Henshall, 4 Greene (Iowa) 417. Under a later statute, however, requiring the party's affidavit to be "verified by himself" it is held that such verification cannot be made by his attorney. Hedge *v.* Gibson, 58 Iowa 656, 12 N. W. 713.

An affidavit by one of several defendants, where all join in the application, is sufficient, where the ground is disqualification of the judge. Wolcott *v.* Wolcott, 32 Wis. 63.

ground is disqualification of the judge.[61] Except where the statute provides otherwise, or its language by implication prohibits, an attorney for a party may make the affidavit,[62] but he should state why the party, himself, does not make it.[63]

b. *Affidavits in Support of the Movant's Affidavit* must be made by credible[64] persons of good repute,[65] and, if possible, disinterested in the controversy.[66]

c. *Where Corporation Is Movant.* — If the application for change is made in behalf of a corporation, the affidavit may be verified by an officer,[67] an agent[68] or even an employe intimately acquainted with the facts.[69]

C. Requisites in General. — The affidavit should be properly

Where an application for change was made on the ground that the action was brought in the wrong county, an affidavit of merits made by one of several defendants stating that he made it for himself and for all the defendants, at their request and that he and the other defendants fully stated the facts to their attorneys who advised them that they had a good defense on the merits, which all of them believed to be true, and which affidavit was used on the hearing in behalf of all the defendants, was held sufficient. McSherry *v.* Pennsylvania, etc. Co., 97 Cal. 637, 32 Pac. 711.

61. Heshion *v.* Pressley, 80 Ind. 490.

62. Scott *v.* Gibbs, 2 Johns. Cas. (N. Y.) 116; Dean *v.* White, 5 Iowa 266; Ellsworth *v.* Henshall, 4 Greene (Iowa) 417; Sells *v.* King, 11 Heisk. (Tenn.) 397.

Although the motion for the change stated that it was founded on the files and on the affidavit of the "Party" whereas in fact, the attorney swore to the affidavit, it was held sufficient. Moreland *v.* Lenawee Cir. Judge, 144 Mich. 329, 107 N. W. 873.

63. Dean *v.* White, 5 Iowa 266.

64. Jackson *v.* State, 54 Ark. 243, 15 S. W. 607. The mere fact that the affiant is a local agent for the railway company does not make him a party to the action or keep him from being a "credible person." Texas, etc. R. Co. *v.* Pierce, 10 Tex. Civ. App. 429, 30 S. W. 1122; Texas, etc. R. Co. *v.* Allen, 7 Tex. Civ. App. 214, 26 S. W. 434.

The statute requiring the application to be supported by affidavits of two disinterested persons is not dispensed with by a showing that disinterested persons fear to make such affidavits through fear of personal violence. State *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

65. Statute requiring affidavit of movant to be supported by affidavits of three reputable citizens of the county must be complied with as to the number. Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Reputation. — Where the statute requires the affidavits filed in support of the petition for change to be made by "reputable persons residents of the county," the petition need not state their names or residences, but the affidavits of each should state such facts and their qualifications should be shown by their own affidavits. Hanna *v.* People, 86 Ill. 243.

"Respectable witnesses," required by statute to make such affidavits, means "credible, disinterested, or competent witnesses. Freleigh *v.* State, 8 Mo. 606.

66. Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226.

67. McGovern *v.* Keokuk Lumb. Co., 61 Iowa 265, 16 N. W. 106, *holding* also that an affidavit by an officer should show his official character. Mere unverified recitations are insufficient for that purpose.

68. Vankirk *v.* Pennsylvania R. Co., 76 Pa. St. 66.

69. See *supra,* note 68.

verified[70] and served.[71] The allegation of the residence of the affiant should be specific.[72] The affidavit upon which the motion is based should state facts, not conclusions unsupported by facts;[73] and while merely technical defects will be disregarded,[74] the facts must be so stated as to clearly show the grounds for the change.[75] The

70. Wadleigh *v.* Phelps, 147 Cal. 541, 82 Pac. 200.

A petition for a change of venue in condemnation proceedings, signed by all parties defendant, but not sworn to by one of them, is properly denied. Eddleman *v.* Union Co. Tract. & P. Co., 217 Ill. 409, 75 N. E. 510.

A verification to an affidavit stating that affiant "being first duly sworn, deposes and says that he is personally familiar with the matter stated in the foregoing affidavit and that such affidavit is true," is a sufficient verification. Wadleigh *v.* Phelps, 147 Cal. 541, 82 Pac. 200.

Where a statute requires the filing of an affidavit by the applicant, verified by himself and three disinterested persons, a single affidavit verified by the party and the three persons specified is sufficient, although each might have made a separate affidavit. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557.

A petition for a change of venue which is not verified will not be granted. Rand, McNally & Co. *v.* Turner, 29 Ky. L. Rep. 696, 94 S. W. 643.

71. But service of an affidavit in court and then and there allowing it to be read without objection waives service of prior notice as required by statute. George *v.* Kotan, 18 S. D. 437, 101 N. W. 31.

72. An affidavit declaring that the defendant "is now, and for more than two months last past, has been, a resident of Hennepin county, in which county she does now and during all of said time has been a resident," is defective in that it does not state that the defendant was a resident at the commencement of the action. State *v.* District Court of Pine County, 88 Minn. 95, 92 N. W. 518.

73. "The affidavit in this case for the change of venue should have disclosed how the attorneys obtained knowledge of the fact that the district judge was a material witness, and all the facts the defendants believed the judge would prove. This was not done; but, although the affidavit is deficient in this respect, we cannot wholly ignore the personal knowledge of the judge who transferred the case. A judge ought not to transfer a case upon a mere suggestion, or even upon an affidavit stating conclusions only, and no change of venue should be granted except for cause, true in fact, and sufficient in law, and all of this should be made to clearly appear; but when an affidavit is presented in general terms for such change, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is disqualified, cannot be declared erroneous." Gray *v.* Crockett, 35 Kan. 66, 10 Pac. 452.

74. Affiant stated that he fully and fairly stated "the case," when the statute required him to have stated the "facts of the case" to his counsel. *Held*, sufficient. Eddy *v.* Houghton, 6 Cal. App. 85, 91 Pac. 397; Bittick *v.* State, 67 Ark. 131, 53 S. W. 571; Hanna *v.* People, 86 Ill. 243.

75. In Criminal Cases. — *Alabama.* — Byers *v.* State, 105 Ala. 31, 16 So. 716.

California. — People *v.* Shuler, 28 Cal. 490.

Dakota. — Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Delaware. — State *v.* Windsor, 5 Har. 512.

Kansas. — State *v.* Knadler, 40 Kan. 359, 19 Pac. 923.

Kentucky. — Com. *ex rel.* Atty. Gen. *v.* Carnes, 30 Ky. L. Rep. 506, 102 S. W. 284.

Minnesota. — *Ex Parte* Curtis, 3 Minn. 274.

Oklahoma. — Peters *v.* United States, 2 Okla. 116, 33 Pac. 1031.

grounds relied upon should not be stated in the alternative.[76]

Statements on Information and Belief are of little weight and will be disregarded unless the source of the information is set out.[77]

D. Statement of Grounds and Sufficiency. — a. *Action Brought in Wrong County.* — To be entitled to a change of venue on ground that the action is brought in the wrong jurisdiction or county, only such facts as are necessary to apprize the court of the wrong venue need be stated, and the pleadings and other files may be referred to.[78]

On Account of Residence of a Party. — The plaintiff's residence will be presumed to be where he alleges it to be unless the contrary appears.[79] Proof of defendant's residence in a different jurisdiction from that in which action is brought must be clear,[80] and the simple statement that defendant was a resident of a certain county at the commencement of the action is a mere conclusion.[81] In some states it is held that allegations as to residence of a party, on information and belief are sufficient if the source of the information is given.[82]

b. *Disqualification of Judge.* — Obviously, an affidavit assigning prejudice of the judge need not be as fully stated as where prejudice of the inhabitants is averred, usually suggestion (information with-

Virginia. — Wormeley *v.* Com., 10 Gratt. 658.

West Virginia. — State *v.* Douglas, 41 W. Va. 537, 23 S. E. 724.

76. Hinkle *v.* Lovelace, 204 Mo. 208, 102 S. W. 1015.

77. *California.* — People *v.* Shuler, 28 Cal. 490.

Colorado. — De Walt *v.* Hartzell, 7 Colo. 601, 4 Pac. 1201.

District of Columbia. — Lewis *v.* Fire Ins. Co., 2 Cranch. (C. C.) 500.

Idaho. — Shirley *v.* Nodine, 1 Idaho 696.

Illinois. — Jamison *v.* People, 145 Ill. 357, 34 N. E. 486.

Nebraska. — Simmerman *v.* State, 16 Neb. 615, 21 N. W. 387.

Nevada. — Table Mount, G. & S. Min. Co. *v.* Waller's Defeat Silver Min. Co., 4 Nev. 218.

New York. — People *v.* Bodine, 7 Hill 147.

North Carolina. — State *v.* Seaborn, 15 N. C. (4 Dev. L.) 305.

South Carolina. — McNair *v.* Tucker, 24 S. C. 105.

"It should be added that affidavits based upon information and belief, especially where the sources of the information are readily obtainable, as was the case here, but were not brought forward, have but weak probative force as ground for change of place of trial. The court has in many cases so held, and in some of them it has been held that a statement upon information and belief, standing alone, is not sufficient to authorize the change to be ordered." Higgins *v.* San Diego, 126 Cal. 303, 314, 58 Pac. 700.

78. An affidavit for change on the ground that action was brought in the wrong county need not also state that an impartial trial cannot be had in such county. Fishburne *v.* Minott, 72 S. C. 572, 52 S. E. 646.

79. Dabaghian *v.* Kaffafian, 71 N. J. 115, 58 Atl. 106.

80. An affidavit stating that at the time it was verified affiant was a resident of a certain city does not show residence at the time of the commencement of the action. Burke *v.* Frenkel, 97 App. Div. 19, 89 N. Y. Supp. 621.

Affidavits as to defendant being a non-resident held not to have shown sufficient facts to warrant a change. Barfield *v.* Coker & Co., 73 S. C. 181, 53 S. E. 170; Harrodsburg Water Co. *v.* Harrodsburg, 28 Ky. L. Rep. 625, 89 S. W. 729; Drake *v.* Holbrook, 28 Ky. L. Rep. 1319, 92 S. W. 297.

81. Boyle *v.* Standard Oil Co., 102 App. Div. 622, 92 N. Y. Supp. 677.

82. Boyle *v.* Standard Oil Co., 102 App. Div. 622, 92 N. Y. Supp. 677.

out oath) being sufficient to cause the court to grant the change.[83] But a naked declaration and conclusion that the judge is prejudiced is insufficient.[84] Where the statute does not require specific facts constituting the prejudice of the judge to be set forth, a rule of court requiring same to be set forth is held void.[85] In the absence of an express statute providing for a change of venue on account of the prejudice of the judge, a clear showing must be made, or the judge whose partiality is assailed, may properly deny the change.[86] But where the statute expressly allows a change on this ground the same must be granted on compliance with the statute.[87]

Allegation of Facts Insufficient. — Setting forth remarks of the court in passing sentence,[88] or in ruling on the testimony[89] or remarks at a previous trial,[90] or in upbraiding others indicted with the accused,[91] is not a sufficient showing to overthrow the presumption of fairness of the trial judge. Even language indicating a be-

83. Hughes *v.* People, 5 Colo. 436; Backman *v.* Milwaukee, 47 Wis. 435, 2 N. W. 543. See Seehawer *v.* Milwaukee, 39 Wis. 409; Gale *v.* Michie, 47 Mo. 326; Turner *v.* Hitchcock, 20 Iowa 310; Swan *v.* Bournes, 47 Iowa 501.

84. Griggs *v.* Corson, 71 Kan. 884, 81 Pac. 471.

Only those grounds set forth in the affidavits in an application for change of venue for disqualification of judge can be considered, and other grounds set forth in the notice of the motion are not open to consideration. Dakan *v.* Superior Ct. of Santa Cruz Co., 2 Cal. App. 52, 82 Pac. 1129.

Where the affidavit states only certain conclusions showing that judge was prejudiced, sworn to by the attorney for the party, it is insufficient. State *v.* Smith, 77 Neb. 824, 110 N. W. 557.

85. Hunt *v.* State, 5 Ohio C. C. (N. S.) 621.

86. The evidence offered in support of the fact must be clear, convincing and strong enough to overthrow the presumption of the impartiality of the court." State *v.* Smith, 77 Neb. 824, 110 N. W. 557.

The constitution allowed a change where the presiding judge had previously been counsel in the case. An affidavit stating "That the presiding judge has heretofore, as counsel, given an opinion in regard to the validity of the title to the land in controversy," is not sufficient to justify a change. Houston, etc. R. Co. *v.* Ryan, 44 Tex. 426.

87. See Llyner *v.* State, 8 Ind. 490; State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; McCarthy *v.* State, 10 Neb. 438, 6 N. W. 769; Packwood *v.* State, 24 Or. 261, 33 Pac. 674.

Under a Wisconsin statute, an affidavit in the language of the statute, that "the party has reason to believe and does believe that he cannot have a fair trial of the action on account of the prejudice of the judge," was held a sufficient statement. Bachmann *v.* Milwaukee, 47 Wis. 435, 2 N. W. 543, drawing the distinction that it was not the *fact* of the judge's prejudice but the *imputation* of it that warranted the change.

88. State *v.* Hale, 65 Iowa 575, 22 N. W. 682.

89. State *v.* Bohan, 19 Kan. 28.

90. State *v.* Alexander, 66 Mo. 148.

91. State *v.* Stark, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910.

It has been held that even the expression of the judge at a former trial that the accused was guilty, is not a sufficient showing to secure a change from him. State *v.* La Grange, 94 Iowa 60, 62 N. W. 664.

In the same state, however, it was held that a statement by the judge, during the selection of the jury, that, "I intend to give the defendant a better jury than he is entitled to," does warrant a change. State *v.* Read, 49 Iowa 85.

lief in the defendant's guilt, expressed by the court, has been held insufficient.[92]

In Justice Courts, the mere sworn statement that the party cannot obtain justice, or words of like tenor, is sufficient to warrant a change.[93]

c. *Prejudice of Inhabitants.* — Affidavits to show prejudice of the inhabitants of the county or jurisdiction must clearly state facts or circumstances[94] showing or tending to show the present existence[95] of prejudice against the party, the nature of the prejudice,[96] its prevalence throughout the jurisdiction,[97] and on account thereof the improbability of obtaining a fair trial in the county or jurisdiction.[98]

Prejudice Against a Third Party, generally supposed to be connected with the movant, if set forth particularly, may warrant a change of venue.[99] If the affidavits state conclusions only, *e. g.*, that the affiants have heard the case discussed, and believe that an impartial trial cannot be had, they are usually held insufficient to warrant a change.[1]

92. State *v.* Crilly, 69 Kan. 802, 77 Pac. 701.

93. Swan *v.* Bournes, 47 Iowa 501; Peyton *v.* Johnson, 37 Neb. 886, 56 N. W. 728.

94. Healy *v.* Dettra (Pa.), 8 Atl. 622; State *v.* Greer, 22 W. Va. 800; Taylor *v.* Gardiner, 11 R. I. 182.

Mere Conclusions are valueless. The facts or circumstances should be detailed showing that an impartial trial cannot be had. Seams *v.* State, 84 Ala. 410, 4 So. 521.

95. Poe *v.* State, 10 Lea (Tenn.) 673; Blain *v.* State (Tex. Crim.), 31 S. W. 368.

96. The affidavit should show that a prejudice against the party, *personally*, exists. Randle *v.* State, 34 Tex. Crim. 43, 28 S. W. 953. Facts showing a strong prejudice against the crime are insufficient. McNealy *v.* State, 17 Fla. 198.

97. Power *v.* People, 17 Colo. 178, 28 Pac. 1121, where affidavits showed prejudice to prevail in a part of the county only. See also State *v.* Perigo, 70 Iowa 657, 28 N. W. 452.

98. *Alabama.* — Seams *v.* State, 84 Ala. 410, 4 So. 521.

Arkansas. — Ward *v.* State, 68 Ark. 466, 60 S. W. 31.

California. — People *v.* Suesser, 132 Cal. 631, 64 Pac. 1005.

Florida. — Garcia *v.* State, 34 Fla. 311, 16 So. 223.

Iowa. — State *v.* Crafton, 89 Iowa 109, 56 N. W. 257.

Kentucky. — Shipp *v.* Com., 30 Ky. L. Rep. 904, 99 S. W. 945.

Mississippi. — Brown *v.* State, 83 Miss. 645, 36 So. 73.

Nebraska. — Lucas *v.* State, 75 Neb. 11, 105 N. W. 976.

New York. — People *v.* Georger, 109 App. Div. 111, 95 N. Y. Supp. 790.

Oklahoma. — Garrison *v.* Territory, 13 Okla. 690, 76 Pac. 182.

Pennsylvania. — Com. *v.* Ronemus, 205 Pa. St. 420, 54 Atl. 1095.

Texas. — Alarcon *v.* State, 47 Tex. Crim. 415, 83 S. W. 1115.

Washington. — State *v.* Hillman, 42 Wash. 615, 85 Pac. 63.

West Virginia. — State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

99. Trimble *v.* Borroughs, 41 Tex. Civ. App. 554, 95 S. W. 614.

1. The mere statement by the accused of the conclusion that he does not believe he will obtain a fair and impartial trial, etc., is held insufficient in the following cases: Jackson *v.* State, 104 Ala. 1, 16 So. 523; People *v.* Shuler, 28 Cal. 490; People *v.* McCauley, 1 Cal. 379; State *v.* Burris, 4 Har. (Del.) 582; Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387; Territory *v.* Kelly, 2 N. M. 292; People *v.* Bodine, 7 Hill (N. Y.) 147.

Affidavits that deponents have

d. *Convenience of Witnesses.* — Affidavits in support of a motion for change of venue for convenience of witnesses must clearly and particularly set out the inconvenience of witnesses if compelled to attend trial where suit is brought.[2] The affidavits should be made in accordance with the prevailing practice,[3] and should always show, the number of witnesses whose convenience is considered,[4] their names,[5] their residences,[6] that they are material witnesses and why

heard the case frequently discussed, and do not believe that defendant can have an impartial trial in the county because the inhabitants are prejudiced against him, are insufficient for change of venue. Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387.

Contra. — In Pennsylvania, where the plaintiff files an affidavit "that local prejudice exists and that a fair trial cannot be had in said county," the court is bound to make an order changing the venue. Brittain *v.* Monroe County, 214 Pa. St. 648, 63 Atl. 1076.

2. Cordas *v.* Morrison, 23 N. Y. Supp. 1076, 53 N. Y. St. 512. Unless a showing is made that the convenience of witnesses will be promoted by changing the place of trial where the defendant and most of the witnesses reside, it will not be allowed. Daly *v.* Hellman, 62 Hun 620, 16 N. Y. Supp. 689. See also Tuthill *v.* Long Island R. Co., 75 Hun 556, 26 N. Y. Supp. 1029, 58 N. Y. St. 195.

The convenience of material witnesses whose testimony is necessary is the main consideration, and the court will look beyond the affidavits and ascertain from the whole case whether the change will be the most convenient for the greatest number of witnesses. King *v.* Vanderbilt, 7 How. Pr. (N. Y.) 385.

Of course the convenience of parties is also considered along with the witnesses and may be stated in the affidavit. Challoner *v.* Boyington, 86 Wis. 217, 56 N. W. 640.

Where the moving party swears to facts "which he will prove by said witnesses on the trial of the cause," it is sufficient to require the court to consider the merits of the motion, although there is nothing in the affidavit to show what grounds affiant had for his expectation that the witnesses would swear to the facts. Kalbfleisch *v.* Rider, 120 App. Div. 623, 105 N. Y. Supp. 539.

Where the applicant for a change states in his affidavit that he bases his application on the files of the case, states the names of the witnesses, their residences and that they were necessary witnesses, a sufficient showing is made to authorize a change of venue. Robertson Lumb. Co. *v.* Jones, 13 N. D. 112, 99 N. W. 1082.

3. Bull *v.* Babbitt, 1 How. Pr. (N. Y.) 184; Hurn *v.* Olmstead, 55 Misc. 504, 105 N. Y. Supp. 1091.

Defendant's affidavit that the written contract sued on was indefinite as to the terms and the amount of the consideration stated was a mere conclusion and was insufficient to show that the contract would admit of oral proof by witnesses for whose convenience a change of place of trial was asked. The writing should have been set forth so that the court could determine whether the terms were indefinite or whether oral proof would be proper. Ennis-Brown Co. *v.* Long (Cal. App.), 94 Pac. 250.

4. Minor *v.* Garrison, 4 Johns. (N. Y.) 481.

Overstating the Number of Witnesses. — Where both sides evidently overstate the number of witnesses who will be accommodated or inconvenienced by the change, the court has reference to the pleadings to ascertain the merits of the motion. Smith *v.* Servis, 50 Hun 604, 2 N. Y. Supp. 865.

Where seventy-eight material witnesses were averred by the affidavit, the court may investigate and ascertain whether such averments are true. Garbutt *v.* Bradner, 1 How. Pr. (N. Y.) 122; Wallace *v.* Bond, 4 Hill (N. Y.) 536. And see Freeman *v.* King, 3 How. Pr. (N. Y.) 10.

5. Reavis *v.* Cowell, 56 Cal. 588; Anonymous, 6 Cow. (N. Y.) 389.

6. Cook *v.* Finch, 2 How. Pr. (N.

they are material,[7] that they are necessary witnesses,[8] the facts that can be proved by them,[9] and that defendant (or plaintiff) "cannot safely proceed to trial without the testimony of each and every one of the witnesses as he is advised by his counsel and verily believes.[10] They must state that the facts can be proved by the witnesses or disclose grounds for believing that the facts can probably be established by them.[11] And such an application may be met by counter affidavits showing that the change will inconvenience plaintiff's witnesses,[12] but cannot be so met when the change is asked on other grounds.[13] A change on this ground may be denied where its allowance, by reason of the adverse party's poverty, would practically defeat his cause of action.[14]

Y.) 89; Van Auken *v.* Stewart, 2 How. Pr. (N. Y.) 181; Westbrook *v.* Merritt, 1 How. Pr. (N. Y.) 195; Bleecker *v.* Smith, 37 How. Pr. (N. Y.) 28.

The convenience of three witnesses, some of whose residences are not named, is nevertheless a sufficient statement to entitle party to a change. Brady *v.* Hogan, 117 App. Div. 898, 102 N. Y. Supp. 962.

7. The reasons or facts upon which the applicant bases his claim that such witnesses are material should be set out to enable the court to judge whether the witnesses are in fact material witnesses. American Exch. Bank *v.* Hill, 22 How. Pr. (N. Y.) 29; People *v.* Hayes, 7 How. Pr. (N. Y.) 248; Price *v.* Fort Edward Water Wks. Co., 16 How. Pr. (N. Y.) 51; Sawyer *v.* Clark, 60 Hun 577, 14 N. Y. Supp. 252; Gourley *v.* Shoemaker, 1 Johns. Cas. (N. Y.) 392.

8. Where the affidavit states that certain witnesses are "material witnesses for this deponent on the trial of this cause, as he is advised by said counsel and verily believes, that, without the testimony of each and every of said witnesses, deponent cannot safely proceed to the trial of this cause, as he is also advised by said counsel, and verily believes," it sufficiently shows that such witnesses were necessary. Smith *v.* Mack, 24 N. Y. Supp. 131, 53 N. Y. St. 616.

9. Imgard *v.* Duffy, 25 N. Y. Supp. 865, 56 N. Y. St. 104; People *v.* Hayes, 7 How. Pr. (N. Y.) 248; American Exch. Bank *v.* Hill, 22 How. Pr. (N. Y.) 29; Ennis Brown Co. *v.* Long (Cal. App.), 94 Pac. 250. See Abrahams *v.* Bensen, 60 How. Pr. 208, 22 Hun (N. Y.) 605.

10. Perry *v.* Boomhauer, 17 N. Y. Supp. 890, 43 N. Y. St. 375.

11. Mole *v.* New York, etc. R. Co., 53 Misc. 22, 102 N. Y. Supp. 308, *holding* that the fact that movant *expected* to prove certain facts named by the witnesses is not enough.

12. Affidavits which give the names, occupations, or addresses of witnesses, who would be inconvenienced but name partnership associations rather than members thereof, and which while stating certain expected testimony, do not state that plaintiffs are advised by counsel that the testimony of such witnesses is material and necessary, and fail to state the individuals named will swear to any material fact, are fatally defective. Rieger *v.* Pulaski Glove Co., 114 App. Div. 174, 99 N. Y. Supp. 558.

A change was refused where it appeared by affidavit that the plaintiff was a poor man, that he was unable to move to the county where change was asked, that it was dangerous to remove said case there on that account. Tuthill *v.* Long Island R. Co., 75 Hun 556, 26 N. Y. Supp. 1029. See Osborn *v.* Stephens, 74 Hun 91, 26 N. Y. Supp. 160.

13. Mills *v.* Starin, 119 App. Div. 336, 104 N. Y. Supp. 230.

14. "The fact that the plaintiff was a poor man, and that the change of the place of trial desired by defendant would practically defeat plaintiff's cause of action was a controlling consideration to justify a denial of the change." Mole *v.* New

Materiality. — A statement of affiant's belief in a witness' materiality is sufficient,[15] especially if the reasons for such belief are given,[16] or affiant states that he is advised by his counsel, and believes that such witnesses are material.[17] A failure to show materiality, however, will not defeat the motion for change if the opposite party makes no showing as to the convenience of his witnesses.[18]

e. *Undue Influence of Adverse Party.* — The facts showing undue influence of the opposite party,[19] or his attorney[20] over the inhabitants, or over the judge, to such an extent as to warrant a change of venue, must be clearly and specifically set out in the affidavit.[21] But affidavits stating the grounds in the exact language of the statute have been held sufficient.[22]

E. Counter Affidavits. — a. *Generally.* — Except where, by statute, a change of venue must be allowed as of right, the opposite party may resist the application,[23] by counter affidavits or other

York, etc. R. Co., 53 Misc. 22, 102 N. Y. Supp. 308. See also Tuthill *v.* Long Island R. Co., 75 Hun 556, 26 N. Y. Supp. 1029.

15. Sherwood *v.* Steele, 12 Wend. (N. Y.) 294.

16. Imgard *v.* Duffy, 25 N. Y. Supp. 865, 56 N. Y. St. 104.

17. Constantine *v.* Dunham, 9 Wend. (N. Y.) 431; People *v.* Hayes, 7 How. Pr. (N. Y.) 248; Chapin *v.* Overin, 72 Hun 514, 25 N. Y. Supp. 627.

18. Brown *v.* Peck, 10 Wend. (N. Y.) 569.

19. Smith *v.* Hortler, 4 N. C. (1 Law Repos.) 518.

Where the affidavit stated that a combination was continually stealing ore, that it was an organized combination, but failed to state of whom the combination was composed and the manner in which they would be likely to influence the jury, the change was denied. Lady Franklin Min. Co. *v.* Delaney, 4 N. M. 39, 12 Pac. 628.

20. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557 (showing great political popularity and reputation as an able lawyer, held sufficient showing to warrant change).

21. Mere statements that the adverse counsel is a close friend of the judge and an enemy of the applicant, with a conclusion that the judge will be partial, is an insufficient statement of facts necessary to warrant a change Dakan *v.* Superior Ct. Of Santa Cruz Co., 2 Cal. 52, 82 Pac. 1129.

22. Preston Nat. Bank *v.* Brooke, 142 Mich. 272, 105 N. W. 757, the statute reading, "that the opposite party has an undue influence over the citizens of the county, or that an odium attaches to the applicant or to his cause of action or defense on account of local prejudice."

23. State *v.* Burris, 4 Har. (Del.) 582; *Ex parte* Chase, 43 Ala. 303.

When Affidavit of Merits Necessary. — Where the application for change is made by plaintiff, and defendant opposes same on ground of convenience of witnesses, an affidavit of merits should always accompany the counter affidavits. Olivier *v.* Cunningham, 51 Minn. 232, 53 N. W. 462.

While plaintiff need not show the jurisdictional facts, nevertheless, if defendant controverts his right to bring it there, he may show the facts on which he relies for jurisdiction, in opposition to defendant's motion. Jordan *v.* Kavanaugh, 63 Iowa 152, 18 N. W. 851.

Where defendant claims a change, in a local action, as of right, the plaintiff is held not to have the right to a retention of the case in county where suit is brought by offering to abandon his remedy affecting the real estate. Sweetser *v.* Smith, 22 Abb. N. C. (N. Y.) 319.

The Adverse Party's Failure To Deny the allegations of undue in-

credible proof.[24] Such counter affidavits may show the incompetency of the applicant, or the unreliability or bad reputation of persons making the original affidavits for the applicant,[25] or that the statements in the original affidavits are untrue.[26] Where the change is demanded on the ground of disqualification of the judge, counter affidavits are inadmissible.[27]

b. *Degree of Proof.* — The proof established by such counter affidavits must be sufficient to overcome the *prima facie* case or right to change made out by the applicant's affidavits.[28]

fluence and prejudice claimed as a ground for change, does not, however, imply an admission of their existence. Cassem *v.* Olson, 45 Ill. App. 38. Thus where the applicant's affidavit states, on information and belief, that the trial judge has stated that he deemed himself disqualified to sit in the case in which plaintiff was a party, the failure of defendant to controvert same by counter affidavit is not an admission of the disqualification of the judge. Southern Cal. Motor Road Co. *v.* Merrill (Cal.), 34 Pac. 712.

24. *Alabama.* — Hussey *v.* State, 87 Ala. 121, 6 So. 420.

Arizona. — Territory *v.* Barth, 2 Ariz. 319, 15 Pac. 673.

Arkansas. — Jackson *v.* State, 54 Ark. 243, 15 S. W. 607.

California. — People *v.* Majors, 65 Cal. 138, 3 Pac. 597.

Idaho. — State *v.* Reed, 3 Idaho 754, 35 Pac. 706.

Illinois. — Price *v.* People, 131 Ill. 223, 23 N. E. 639. But see Cantwell *v.* People, 138 Ill. 602, 28 N. E. 964.

Indiana. — Clem *v.* State, 33 Ind. 418.

Iowa. — State *v.* Wells, 46 Iowa 662.

Louisiana. — State *v.* Peterson, 2 La. Ann. 921.

Minnesota. — State *v.* Stokely, 16 Minn. 282.

Mississippi. — Mask *v.* State, 32 Miss. 405.

Nebraska. — Smith *v.* State, 4 Neb. 277.

New Mexico. — Territory *v.* Kelly, 2 N. M. 292.

Oregon. — Lander *v.* Miles, 3 Or. 35.

Tennessee. — Weakley *v.* Pearce, 5 Heisk. 401.

Texas. — Crow *v.* State, 41 Tex. 468.

Virginia. — Wormeley *v.* Com., 10 Gratt. 658.

West Virginia. — Caperton *v.* Bowyer, 4 W. Va. 176.

For sufficiency of counter affidavit to raise issue, see Moore *v.* State, 46 Tex. Crim. 54, 79 S. W. 565.

Counter affidavit need not negative relationship between affiants and complaining witness. State *v.* Icenbice, 126 Iowa 16, 101 N. W. 273.

25. Jackson *v.* State, 54 Ark. 243, 15 S. W. 607; Dunn *v.* State, 7 Tex. App. 600; Davis *v.* State, 19 Tex. App. 201.

26. Dunn *v.* Lewis, 65 Hun 620, 19 N. Y. Supp. 755; Buford *v.* State, 43 Tex. 415.

27. The disqualification being the relationship of the judge to a party in interest, counter affidavits traversing the interest of such party are inadmissible. Smith *v.* Amiss, 30 Ind. App. 530, 66 N. E. 501.

28. Dunn *v.* Lewis, 65 Hun 620, 19 N. Y. Supp. 755.

Counter affidavits attacking the competency of the movant's affiants, merely showing that the affiants for the applicant are "new men and rarely seen" will not overcome the *prima facie* case made out by the movant. Buford *v.* State, 43 Tex. 415. Nor will merely controverting applicant's pleading be a sufficient counter showing to defeat the applicant. Kelley *v.* Cosgrove, 83 Iowa 229, 48 N. W. 979.

Defendant company, in a damage suit, produced seven affidavits that it could not have a fair trial in the county. Plaintiff produced fourteen affidavits that said defendant could have such fair trial in the county. *Held,* court's refusal to grant change not error. Croft *v.* Chicago, R. I. & P. R. Co., 134 Iowa 411, 109 N. W. 723.

c. *Requisites of.* — Where the requisites of counter affidavits are not specified by statute, a general denial under oath of the sufficiency of the means of knowledge of movant's affiants is enough of a contradiction to authorize the issue to be determined by the court.[29] Where the counter affidavit, opposing change for convenience of witnesses, states positively the facts that certain witnesses would testify to, it is not defective for failure to disclose also how affiant knows that the witnesses would so testify.[30]

4. Hearing and Determination. — A. ORAL EVIDENCE. — To assist the court in determining the necessity for a change of venue,[31] or to test the credibility of the affiants,[32] oral evidence may be required in addition to the affidavits submitted. It is within the

Plaintiff sued a San Francisco corporation at plaintiff's residence, and justified his suing under Code of Civil Procedure § 395, on the ground that defendant's residence was unknown to plaintiff. The plaintiff set up in his affidavit that he had sent letters to the address of the defendant company at San Francisco and none of his letters were answered. *Held*, the affidavit was not sufficient. Mahler *v.* Drummer Boy Gold Min. Co. (Cal. App.), 93 Pac. 1064.

29. Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468.

30. Avery *v.* Allen, 78 App. Div. 540, 79 N. Y. Supp. 886.

31. *Arkansas.* — St. Louis S. W. R. Co. *v.* Furlow, 81 Ark. 496, 99 S. W. 689.

Indiana. — Anderson *v.* State, 28 Ind. 22.

Louisiana. — State *v.* Ford, 37 La. Ann. 443.

Mississippi. — Cavanah *v.* State, 56 Miss. 299; Weeks *v.* State, 31 Miss. 490; Mask *v.* State, 32 Miss. 405.

Missouri. — Leslie *v.* Chase & Son Merc. Co., 200 Mo. 363, 98 S. W. 523.

New Mexico. — Territory *v.* Kelly, 2 N. M. 292.

New York. — Dresser *v.* Mercantile Tr. Co., 118 App. Div. 901, 103 N. Y. Supp. 1123.

Pennsylvania. — Brittain *v.* Monroe Co., 214 Pa. St. 648, 63 Atl. 1076; Everson *v.* Sun Co., 215 Pa. St. 231, 64 Atl. 365; Presbyterian Church *v.* Philadelphia, etc. R. Co., 217 Pa. St. 399, 66 Atl. 652.

Tennessee. — Porter *v.* State, 3 Lea 496; Weakley *v.* Pearce, 5 Heisk. 401.

Texas. — Alarcon *v.* State, 47 Tex. Crim. 415, 83 S. W. 1115; Henning *v.* State, 24 Tex. App. 315, 6 S. W. 137.

Wisconsin. — Cartright *v.* Belmont, 58 Wis. 370, 17 N. W. 237. But see Hawes *v.* State, 88 Ala. 37, 7 So. 302.

The statutory privilege to hear evidence pro and con at the hearing, does not affect the court's duty to order a change in a proper case. Johnson *v.* Com., 82 Ky. 116.

Bystanders May Be Called To Testify at the hearing either by the court (Dillard *v.* State, 58 Miss. 368; Holcomb *v.* State, 8 Lea (Tenn.) 417), or by the applicant for change. State *v.* Bohanan, 76 Mo. 562; Holcomb *v.* State, 8 Lea (Tenn.) 417.

If it is averred that a large number of the inhabitants of the county have an interest in the question involved adverse to the plaintiffs, it is the duty of the court to hear testimony in order to ascertain the truth of that averment in the petition. Brittain *v.* Monroe County, 214 Pa. St. 648, 63 Atl. 1076.

Prospective Jurors May Be Examined to test the existence of the alleged cause for change. Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387; Ward *v.* Moorey, 1 Wash. Ter. 104; State *v.* Gray, 19 Nev. 212, 8 Pac. 456; Messenger *v.* Holmes, 12 Wend. (N. Y.) 203. See *infra*, VI, 4, E, c.

32. Territory *v.* Leary, 8 N. M. 180, 43 Pac. 688; Crow *v.* State, 41 Tex. 468; Cravey *v.* State, 23 Tex.

court's discretion, however, to hear such testimony;[33] and its order requiring all proof to be in the form of affidavits is not an abuse of discretion.[34] So also the number of witnesses to be examined may be limited.[35] The court may examine the affiants themselves as to their interests, feelings, motives and sources of information.[36]

B. Opinion Evidence. — It has been held proper to admit the opinion of competent witnesses as to whether a fair trial can be had under all the circumstances.[37]

C. Cross-Examination. — Where court or counsel examine witnesses, opposite counsel may cross-examine them.[38]

D. Other Matters Considered. — In addition to affidavits submitted and oral testimony heard, the court may draw from all sources that may aid him in determining whether a change should be granted,[39] and may consider its personal knowledge of the matters in question.[40] The inquiry may extend to the general comment occasioned by the character of the offense charged, and the settled conviction in the community regarding all persons accused of such offenses.[41] The court may consider facts brought out in a previous trial of the cause.[42] A stipulation containing an agreed statement

App. 677, 5 S. W. 162; White *v.* State, 83 Ark. 36, 102 S. W. 715.

33. In the absence of a sworn statement that counter affidavits are false, or any circumstances showing intent to mislead the court by such counter affidavits, the court properly refused to allow oral testimony to be introduced to corroborate said counter affidavits. State *v.* Kennedy, 77 Iowa 208, 41 N. W. 609.

34. Taylor *v.* State, 48 Ala. 180; State *v.* Rodrigues, 45 La. Ann. 1040, 13 So. 802; State *v.* Champoux, 33 Wash. 339, 74 Pac. 557.

Whether after submitting affidavits, the applicant may thereafter call other witnesses is discretionary with the trial court. Holcomb *v.* State, 8 Lea (Tenn.) 417.

It is not an abuse of discretion to refuse to compel the attendance of a witness whose testimony would be merely cumulative. State *v.* Rodrigues, 45 La. Ann. 1040, 13 So. 802.

35. State *v.* Whitton, 68 Mo. 91.

36. Davis *v.* Rivers, 49 Iowa 435; State *v.* Adams, 20 Kan. 311; Davis *v.* State, 19 Tex. App. 201; Winkfield *v.* State, 41 Tex. 148; Smith *v.* State, 31 Tex. Crim. 14, 19 S. W. 252; Dunn *v.* State, 7 Tex. App. 600; White *v.* State, 83 Ark. 36, 102 S. W. 715.

In Iowa by statute (Code § 2590) the court may order affiants to appear and testify orally on matters contained in their affidavits; this, however, does not confer the right to compel such affiant to testify as to the truth of his affidavit. McGovern *v.* Keokuk Lumb. Co., 61 Iowa 265, 16 N. W. 106.

Whether persons making affidavits are credible persons, is a question of fact to be determined by the court on taking proof and examining witnesses. Bruner *v.* Kansas Moline Plow Co. (Ind. Ter.), 104 S. W. 816.

37. State *v.* Ford, 37 La. Ann. 443. But see State *v.* Burgess, 78 Mo. 234.

38. Mask *v.* State, 32 Miss. 405; Willoughby *v.* Buffalo, etc. R. Co., 203 Pa. St. 243, 52 Atl. 188.

39. See Anderson *v.* State, 28 Ind. 22; State *v.* Ford, 37 La. Ann. 443; Cavanah *v.* State, 56 Miss. 299; Territory *v.* Kelly, 2 N. M. 292; Porter *v.* State, 3 Lea (Tenn.) 496; Alarcon *v.* State, 47 Tex. Crim. 415, 83 S. W. 1115.

40. Giese *v.* Schultz, 60 Wis. 449, 19 N. W. 447; Gray *v.* Crockett, 35 Kan. 66, 10 Pac. 452.

41. Winkfield *v.* State, 41 Tex. 148.

42. Cartright *v.* Belmont, 58 Wis. 370, 17 N. W. 237.

of facts concerning the alleged prejudice, or other cause for change, may be considered in the place of affidavits.[43] The complaint may be examined by the court to ascertain if there is ground for retaining the cause,[44] although the complaint is no part of the application papers.[45] This does not, however, give the court right to enter into the merits of the cause of action, either to determine whether there is a cause of action against a resident defendant,[46] or whether a proper joinder has been made.[47] Where the alleged ground for change is convenience of witnesses, the court will not allow testimony on matters not yet at issue.[48]

E. PREJUDICE. — a. *Generally.* — The facts showing, or tending to show, that a general prejudice exists must be stated. Conclusions are worthless. The court deduces the conclusions from the facts presented, and mere expressions of opinion that the accused can or cannot have an impartial trial are not considered, unless supported by sufficient reasons testified to as facts.[49] The proof of prejudice must be clear and of reputable character, aimed to satisfy the court of the real existence of the prejudice;[50] though it is not required that prejudice be established conclusively.[51] It should appear that such prejudice would prevent an impartial jury from being obtained.[52] The mere sworn statements of the defendants to the effect that he cannot have a fair and impartial trial in the county, must be supported by affidavits of persons not interested.[53] If the facts sworn to by the accused are not corroborated by other affidavits, or proof of a credible character, the court may properly deny the application.[54] The court is at liberty to consider his personal

43. Emery *v.* Hardee, 94 N. C. 787.

44. Lakeshore Cattle Co. *v.* Modoc Land, etc. Co., 108 Cal. 261, 41 Pac. 472.

45. Lakeshore Cattle Co. *v.* Modoc Land, etc. Co., 108 Cal. 261, 41 Pac. 472.

An Ambiguity in a complaint, as between two causes of action, may be considered by the court in determining the party's right to a change. Ah Fong *v.* Sternes, 79 Cal. 30, 21 Pac. 381.

46. Armstrong *v.* Borland, 35 Iowa 537.

47. Lyons *v.* Frazier, 8 Iowa 349.

48. Miller *v.* Kern County L. Co. (Cal.), 70 Pac. 183, *affirmed* on rehearing, 140 Cal. 132, 73 Pac. 836.

49. Byers *v.* State, 105 Ala. 31, 16 So. 716; Salm *v.* State, 89 Ala. 56, 8 So. 66.

50. Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695; Frank *v.* Avery, 21 Wis. 166.

51. Where over the question of the ownership of a lot, practically the whole town was arrayed against the plaintiff, it is not necessary to show conclusively that an impartial trial cannot be had. Jacob *v.* Town of Oyster Bay, 119 App. Div. 503, 104 N. Y. Supp. 275.

52. The fact that there are numerous persons in the county biased against the party will not justify a change unless it appears that an impartial jury cannot be obtained, or a fair trial had. Northeastern Neb. R. Co. *v.* Frazier, 25 Neb. 42, 40 N. W. 604.

53. The fears of the prisoner, expressed in his affidavit, that he cannot have a fair trial must be corroborated by independent proof from others, not interested, to make it probable that the prisoner's fears are well grounded. Wormeley *v.* Com., 10 Gratt. (Va.) 658.

54. State *v.* Tatlow, 136 Mo. 678,

information, acquired on former trials, or elsewhere, as to the real existence of prejudice.[55]

Failure To Deny Prejudice. — The fact that the party not applying for the change fails to deny the proof offered by the applicant to show prejudice, does not constitute an admission of the existence of such prejudice.[56]

b. *Oral Evidence and Other Proof.* — In addition to the affidavits presented, the court may, of its own motion, hear evidence from sources outside the affidavits.[57] He may orally examine veniremen and others to aid him in determining the general nature and extent of the prejudice; but his decision should not be made to turn merely on whether a panel of jurymen were prejudiced.[58]

c. *Examination of Prospective Jurors.* — The court is not confined to the affidavits submitted by the parties in determining whether general prejudice does, in fact, exist throughout the county or jurisdiction against the accused. He may examine prospective jurors to determine the extent or existence of such prejudice.[59] The court may even make an effort to obtain a jury to further satisfy himself whether or not an impartial trial can be had.[60]

38 S. W. 552; State *v.* Hildreth, 31 N. C. (9 Ired. L.) 429, 51 Am. Dec. 364. White *v.* State, 83 Ark. 36, 102 S. W. 715, which inquires into the witness' credibility.

55. Giese *v.* Schultz, 60 Wis. 449, 19 N. W. 447. See Gray *v.* Crockett, 35 Kan. 66, 10 Pac. 452.

56. Cassem *v.* Olson, 45 Ill. App. 38.

57. Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695. See also Messenger *v.* Holmes, 12 Wend. (N. Y.) 203; New Jersey Zinc Co. *v.* Blood, 8 Abb. Pr. (N. Y.) 147; Bowman *v.* Ely, 2 Wend. (N. Y.) 250.

He "may make inquiry as to any of the facts and circumstances which would be likely to give him information on the subject." Winkfield *v.* State, 41 Tex. 148.

58. Western Coal & Min. Co. *v.* Jones, 75 Ark. 76, 87 S. W. 440.

59. State *v.* Millain, 3 Nev. 409; State *v.* Gray, 19 Nev. 212, 8 Pac. 456; People *v.* Webb, 1 Hill (N. Y.) 179; People *v.* Long Island R. Co., 16 How. Pr. (N. Y.) 106; People *v.* Wright, 5 How. Pr. (N. Y.) 23. See *supra*, VI, 4, A, note.

60. Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387; Hunter *v.* State, 43 Ga. 483. See also Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Not until the jury list is reasonably exhausted, upon such an examination, should the court determine that such impartial trial cannot be had. Brinkley *v.* State, 54 Ga. 371.

VERACITY—See Impeachment.

VERIFICATION.—See Accounts; Affidavits.

VIEW BY JURY.

By John Abbott Powell.

CROSS-REFERENCES:

Demonstrative Evidence,
Eminent Domain
Experiments,
Highways.

I. IN GENERAL.

In considering the various questions arising in regard to the view of premises or property by the trier of the facts, the fundamental conception of the view as being that process by which real evidence, otherwise inaccessible, is brought into the case, should be constantly borne in mind.[1]

II. AT COMMON LAW.

1. In England. — The right to order a view of premises by the jury inhered in the court at common law,[2] and seems to have been based upon the right of the jurors to use their personal knowledge in reaching a verdict.[3]

In Actual Practice, the use of the view in the earliest times was apparently limited to real and mixed actions,[4] but with the passage of the early statutes it came to be used in personal actions,[5] although it could not be used in criminal actions without the consent of both parties.[6] Such use, however, has been authorized by a recent

1. Jones on Ev. 2d ed. § 404; Wigmore on Ev., Vol. 2, § 1162; Lake Erie & W. R. Co. *v.* Purcell, 75 Ill. App. 573. And see Groundwater *v.* Town of Washington, 92 Wis. 56, 65 N. W. 871.

"The premises in view may be regarded, as it is termed in the books, 'real evidence,' and oral testimony in reference to the premises could not be as satisfactory in its character as the real evidence." Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

Not the Universal Conception. That the opinion expressed in the text would not be universally accepted as accurate, will be seen from an examination of this article *infra,* V.

2. Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; Bibb County *v.* Reese, 115 Ga. 346, 41 S. E. 636, 26 Cent. Law Journal 436.

3. "The view has been a part of the jury trial since its origin, and at one time constituted, with the personal knowledge of the jurors, the entire evidence considered by the jury in arriving at its verdict." People *v.* White, 5 Cal. App. 329, 90 Pac. 471.

4. Bacon's Abr. "Juries" (H), p. 372; Doud *v.* Guthrie, 13 Ill. App. 653; Washburn *v.* Milwaukee, etc. R. Co., 59 Wis. 364, 18 N. W. 328.

"At common law a view by the jury was only taken in certain real actions and was so taken upon the theory that the jury were acting, not only as triers of the facts but as viewers, and it was intended in that way they should procure evidence to assist them in arriving at a conclusion." City of Columbus *v.* Bidlingmeier, 7 Ohio C. C. 136.

View Could Be Taken only when the title was in issue. Kempstet *v.* Deacon, 2 Salk. (Eng.) 665.

5. See Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

Title Need Not Be in Issue to authorize a view. Flint *v.* Hill, 11 East (Eng.) 184.

Action of Assumpsit. — The statute 4 Ann. c. 16, § 8, provides for a view of "messages, lands, or places in question." In an action of assumpsit it was held that a view would not be ordered, as the statute did not contemplate such a case. Stones *v.* Menhem, 2 Exch. 382, 17 L. J. Ex. 215. And see Snell *v.* Evans, 55 Ill. App. 670; Richmond *v.* Atkinson, 58 Mich. 413, 25 N. W. 328. *Compare* Fitzgerald *v.* La-Porte, 67 Ark. 263, 54 S. W. 342.

6. Note to 1 Burrows 252; Rex *v.* Redman, 1 Kenyon (Eng.) 384; Reg. *v.* Petrie, 20 Ont. (Can.) 317.

statute.[7] At first no view could be had until the case was brought to trial,[8] but under the early statutes the view was had before trial.[9] The awarding of a view came to be regarded as a matter of right, but the courts themselves later corrected this practice and required a showing of necessity to be made before they would order it.[10]

2. In United States. — In the absence of any statute on the subject of view,[11] the common law governing the practice, including the early statutes, has been generally adopted in the various states,[12] with a few exceptions based more upon the ground of policy than of want of power.[13]

Compare Wigmore on Ev., Vol. 2, § 1163; State *v.* Perry, 121 N. C. 533, 27 S. E. 997.

7. 1825, Stat. 6 G. IV, c. 50, §§ 23, 24; Litton *v.* Com., 101 Va. 833, 44 S. E. 923.

8. Flint *v.* Hill, 11 East (Eng.) 184.

9. 1705, Stat. 4 Ann. c. 16, § 8; 1730, Stat. 3 G. II, c. 25, § 14; 1825, Stat. 6 G. IV, c. 50, §§ 23, 24.

Where a view was granted, six or more of the jurors on the panel were selected to take the view and on the trial they were the first jurors sworn in to try the case. 1 Burrows 252.

Compare the practice under the statutes of Pennsylvania, Act 1834, §§ 124, 156, P. L. 363-8 (Finn *v.* Providence G. & W. Co., 99 Pa. St. 631) and New Jersey. New Jersey Gen. Stat. Vol. 2, p. 1851, §§ 31-35.

10. Rules for Views in Civil Cases. — 1 Burrows 252; Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901.

11. See *infra*, III.

12. Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

"The legislature of this state having in 1784 adopted the common law of England as it existed prior to 1776, including this right of trial by view in the discretion of the trial judge, and no repealing statute ever having been passed, that law is still in force in Georgia." Bibb County *v.* Reese, 115 Ga. 346, 41 S. E. 636.

Power To Grant View Is Inherent. — "There are some states in which express statutes have been passed recognizing the right to grant a jury of view, but the authority inheres in the courts in the investigation of truth to call in this and other aids, and rests in the discretion of the presiding judge in the absence of constitutional or statutory prohibition." State *v.* Perry, 121 N. C. 533, 27 S. E. 997.

In Criminal Cases. — In Com. *v.* Parker, 2 Pick. (Mass.) 550, the court refused to order a view in a murder case on the ground that there was no precedent for it, but later in the case of Com. *v.* Knapp, 9 Pick. (Mass.) 496, 515, 20 Am. Dec. 491, a view was granted upon the request of both counsel, the prisoner and the jury, though the court had great doubt of the correctness of the practice. But see the cases in the next note.

13. Johnson *v.* Winship Mach. Co., 108 Ga. 554, 33 S. E. 1013 (but see the later case of County of Bibb *v.* Reese, *supra*); Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002 (view refused in civil action where there was a statutory provision allowing it in a criminal action).

"In the absence of legislative provision, describing the mode in which jury views are to be conducted, the court is of the opinion that it is more in consonance with the theory and methods of judicial trials that the jury should base their findings solely upon sworn testimony in open court, or by depositions taken as provided by law." Dowd *v.* Guthrie, 13 Ill. App. 653, *quoted* and *approved* in Garcia *v.* State, 34 Fla. 311, 335, 16 So. 223.

In Criminal Cases. — It has been erroneously held that a view could not be allowed in a criminal case even with the consent of the defendant, in the absence of a statute. Garcia *v.* State, 34 Fla. 311, 334, 16 So. 223; Bostock *v.* State, 61 Ga. 635 (an "extraordinary proceed-

III. MODERN STATUTES.

In General. — While the practice of granting a view is today regulated by statute in most jurisdictions,[14] it should be remembered that these statutes are, in general, merely declaratory of the common law.[15]

2. In What Actions Allowed. — A. In General. — The statutes relating to view are commonly broad enough to allow a view in all cases, both civil[16] and criminal,[17] though under the statutes in some

ing"). And see State *v.* Bertin, 24 La. Ann. 46.

"In the absence of statutory enactment providing for such a course, there is no authority in the trial of a criminal case, for a view of the premises where the crime is alleged to have been committed." State *v.* Hancock, 148 Mo. 488, 50 S. W. 112.

In Texas, an early law, Pasch. Dig. art. 1468 (Sayle's Civ. St. art. 1447) expressly abolished all vouchers, views, essoins and wagers of battle, and this has been erroneously construed as abolishing all views by the jury, whereas it doubtless had reference merely to the ancient practice of awarding a view to a tenant in certain real actions. Smith *v.* State, 42 Tex. 444; Gulf, etc. R. Co. *v.* Waples, P. & Co., 3 Wills. Civ. Cas. (Tex.) § 409. *Compare* Hart *v.* State, 15 Tex. App. 202, 228.

14. Various state statutes will be referred to in the course of this article. The modern English practice is governed by, 1852, Stat. 15 and 16 Vict., c. 76, § 114; 1854, Stat. 17 and 18 Vict., c. 125, § 58; 1883, Rules of Court, Ord. 50, R. 3, 4 and 5.

15. Wigmore on Ev., Vol. 2, § 1163.

16. Assumpsit. — Fitzgerald *v.* La-Porte, 67 Ark. 263, 54 S. W. 342; Richmond *v.* Atkinson, 58 Mich. 413, 25 N. W. 328; Norcross Bros. Co. *v.* Vose (Mass.), 85 N. E. 468. *Contra,* Snell *v.* Evans, 55 Ill. App. 670.

Action To Recover for Personal Injuries. — Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63; Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936; Gunn *v.* Ohio R. Co., 36 W. Va. 165, 14 S. E. 465; Memphis & C. P. Co. *v.* Buckner, 108 Ky. 701, 57 S. W. 482; City of Springfield *v.* McCarthy, 79 Ill. App. 388.

Action on Fire Insurance Policy. Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417; Rickeman *v.* Williamsburg City F. Ins. Co., 120 Wis. 655, 98 N. W. 960; Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Co., 85 Minn. 65, 88 N. W. 272.

Appeal From Special Assessment. Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901; Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567.

Eminent Domain Proceedings. Dearborn *v.* Boston, etc. R. Co., 24 N. H. 179; Washburn *v.* Milwaukee, etc. R. Co., 59 Wis. 364, 18 N. W. 328; Toledo, etc. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271; Springfield *v.* Dalby, 139 Ill. 34, 29 N. E. 860.

A statute (Ballinger's Ann. Codes & Stat., § 4998, Wash.) which authorizes the jury to view "real property which is the subject of litigation," is broad enough to cover condemnation proceedings. *In re* Jackson St., 47 Wash. 243, 91 Pac. 970.

Injuries to Land. — Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40; Lake Erie & W. R. Co. *v.* Purcell, 75 Ill. App. 573.

Trover. — Trafton *v.* Pitts, 73 Me. 408; Erwin *v.* Bulla, 29 Ind. 95, 92 Am. Dec. 341.

In Georgia where the common law on this subject is in force, the right to a view is probably limited to real and mixed actions. Bibb County *v.* Reese, 115 Ga. 346, 41 S. E. 636.

17. *California.* — People *v.* Bush, 71 Cal. 602, 12 Pac. 781.

Florida. — Garcia *v.* State, 34 Fla. 311, 16 So. 223.

Hawaii. — Territory *v.* Watnabe Masagi, 16 Hawaii 196, 220.

states a view can apparently be ordered only by a court of record.[18]

B. Exclusiveness of Statute. — Statutes relating to views are liberally construed and are not considered as limiting the inherent common law authority of the courts[19] to order a view when they deem it necessary.[20] There are cases holding the contrary of this rule.[21]

Kansas. — State *v.* Adams, 20 Kan. 311.

Minnesota. — Chute *v.* State, 19 Minn. 271.

Nevada. — State *v.* Lopez, 15 Nev. 407.

New York. — People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368.

Ohio. — Blythe *v.* State, 4 Ohio C. C. 435.

See the following cases: Reg. *v.* Martin, 12 Cox Cr. (Eng.) 204 (misdemeanor); Queen *v.* Whalley, 2 Cox Cr. (Eng.) 231, 2 Car. & K. 376 (rape); Fleming *v.* State, 11 Ind. 234 (arson); Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711 (capital case); People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766 (criminal negligence); Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138 (maintaining public nuisance).

Virginia Code, § 3167, was held to apply to both civil and criminal cases. Litton *v.* Com., 101 Va. 833, 44 S. E. 923.

On an indictment for maintaining a public nuisance, the court on appeal spoke of the magnitude of the interests involved as showing a case where a view by jury would be of especial value. Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138.

18. See Mich. Comp. Laws Vol. 3, § 10.256.

Justice of the Peace may order a view, under the Ohio Practice. Sell *v.* Ernsberger, 8 Ohio C. C. 499.

19. Although a particular statute makes it obligatory upon the court to grant a view in eminent domain proceedings upon the request of either party, this will not be construed as taking away from the court the right to order a view in such other cases as it deems necessary. Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

20. The top of a phaeton was caught by a turnpike gate and the plaintiff's intestate was thrown out and killed. On the trial the judge took the jury to the courthouse yard and the horse and phaeton were shown to them and there identified. On appeal this was held to be proper. "The plaintiff was simply offering the horse and phaeton in evidence before the jury, just upon the sound principle that a map or a block from a tree may be offered in evidence. The court could have commenced and concluded the case in the courthouse yard or in any room of the courthouse he chose to select." Board of Internal Imp. *v.* Moore's Admr., 23 Ky. L. Rep. 1885, 66 S. W. 417. (In this case the court clearly distinguishes this from a proceeding under § 318 Kentucky Civ. Code Pr. which allows a view of *real property* or of the *place* where a material fact occurred.)

View of "Subject of Testimony," Proper. — Although the statute (Iowa Code § 2790) provides only for a "view of real property which is the subject of the controversy, or of the place in which any material fact occurred," the court in Morrison *v.* Burlington, etc. R. Co., 84 Iowa 663, 51 N. W. 75, allowed the jury, at the request of the plaintiff and over the objection of the defendant to view a gate; the plaintiff alleging that by reason of its negligent construction certain animals escaped from their pasture and were killed by a train of the defendant.

"There is no objection, in principle, to a jury seeing an object which is the subject of testimony. By this means they may obtain clearer views and be able to form a better opinion. . . . The practice lies in the discretion of the court." Nutter *v.* Ricketts, 6 Iowa 92.

21. Under Montana Penal Code,

3. What May Be Viewed. — A. In General. — a. *Statutes Classified.* — The statutes fall into two general classes; those in which a view is allowed of property which is the subject of litigation, or of the place in which any material fact occurred, or the alleged offense was committed;[22] and those in which a view may be had of the premises or place in question, or any property, matter or thing relating to the controversy.[23] Material variations from these classes are mentioned in the notes.[24]

§ 2097, which authorizes the jury "to view the place in which the offense is charged to have been committed or in which any other material fact occurred," the inspection is limited to inanimate objects, and it was held improper to allow an inspection of a mare in a larceny case. State *v.* Landry, 29 Mont. 218, 74 Pac. 418.

The defendant being charged with the larceny of cattle and the issue turning largely on the brands, the court, jury and counsel went to a corral nearby, over the objection of the defendant, to examine the brands on certain cattle which were not cattle covered by the information. Held, this was improper and was not authorized by §1119, California Pen. Code, by which the jury may be conducted to the place in which the offense was committed or other material fact occurred. People *v.* Fagan (Cal.), 33 Pac. 846.

"The only authority for directing a jury to view and inspect premises during a trial in a civil action is found in § 1659 of the Code of Civil Procedure." That section relates only to "actions for waste." Buffalo Structural Steel Co. *v.* Dickinson, 98 App. Div. 355, 90 N. Y. Supp. 268.

22. *Arizona.*— Pen. Code 1901, § 947.

Arkansas. — Stat. 1894, § 2225 (criminal cases).

California. — California Civ. Proc. § 610, Pen. Code § 1119.

Colorado. — Anno. Stat. 1891, Colorado Civ. Proc. § 118.

Delaware. — Rev. Stat. 1893, c. 109, § 20.

Idaho. — Code Vol. 2, §§ 4386, 7878.

Iowa. — Code 1901, § 5380 (criminal cases).

Kansas. — Gen. Stat. 1905, c. 80, § 5172, c. 82, § 6209.

Kentucky. — Code Cr. Proc. § 236.

Minnesota. — Rev. L. §§ 4172, 5362.

Montana. — Code Civ. Proc. § 6747, Pen. Code § 9298.

Nebraska. — Civil Code § 1268, Cr. Code § 2614.

Nevada. — Comp. Laws, §§ 4342, 4343.

North Dakota. — Rev. Code, §§ 7203, 10018.

Ohio. — Bates Anno. Stat. Vol. 2, § 5191.

Oklahoma. — Stat. 1893, §§ 5222, 4167.

South Dakota. — Stat. 1899, §§ 8666, 6257.

Utah. — Comp. Laws §§ 3152, 4870.

Wyoming. — Rev. Stat. 1887, § 3303.

23. *Florida.* — Rev. Stat. 1892, § 1087.

Massachusetts. — Pub. Stat. c. 170, § 43.

Michigan. — Comp. Laws 1897, Vol. 3, §§ 10256, 10257.

Mississippi. — Anno. Code 1892, § 2391, amend, Stat. 1894, c. 62.

South Carolina. — Rev. Stat. 1893, § 2410.

Virginia. — Code 1904, § 3167.

West Virginia. — Code 1906, c. 116, § 3730.

Wisconsin. — Stat. 1898, § 2852.

24. **"Real Property"** is substituted for "property" in the following statutes: Alaska Code Civ. Proc. 1900, § 188; Arkansas Stat. 1894, § 5821; Iowa Code 1901, § 3710; Kentucky Code Civ. Proc. 1895, § 318; Ballinger's Code (Oregon), Vol. 1, § 133; Ballinger's Code (Oregon) Vol. 2, § 4998.

"In Any Criminal Case" view may be had. Wisconsin Stat. 1898, § 4694; Ballinger's Code (Wash.), Vol. 2, §6948; Florida Rev. Stat. 1892, § 2918; Michigan Comp. Laws 1897, § 11952; Massachusetts Pub. Stat. 1882, c. 214, § 11.

b. *Property That May Be Viewed.* — Except under those statutes which expressly limit a view to real property,[25] there is no limitation upon the class or kind of property which the jury may inspect.[26]

B. EXTENT OF VIEW. — a. *In General.* — The court has a large discretion in determining what the jury shall view and is to be guided by the circumstances of each case.[27]

In Colorado, Stat. 1893, p. 78, § 1, provides for a view of mining premises on the application of either party.

In Illinois the sole statutory provision authorizes a view in eminent domain proceedings, Rev. Stat. 1874, c. 47, § 9.

In Indiana, 1 Burns Anno. Stat. § 547 (381) provides for the view of "real or personal property."

In Maine, Rev. Stat. 1903, c. 84, § 96, provides for a view "in any jury trial;" c. 135, § 23, expressly authorizes a view in any criminal case.

In Montana, Penal Code § 9298, contains a special provision authorizing a view in cases where the brand, mark, or identity of live-stock or other personal property is involved.

In New Hampshire, Pub. Stat. 1891, c. 27, §§ 19, 20, relate to actions involving real estate, or in which the examination of places or objects may aid the jury.

In New Jersey, Gen. Stat. 1900, c. 150, § 30, provides for the inspection of any premises or chattels or other property; Gen. Stat. 1896, Vol. 2, p. 1851, §§ 31, 35, provides for a jury of view prior to the trial; Stat. 1898, c. 237, § 77, provides for views in criminal cases.

In New York, Code Cr. Proc. 1881, § 411, provides for a view in criminal cases; Bliss Anno. Code, Vol. 2, § 1659, provides for a view in an action of waste.

In Pennsylvania, Stat. 1834, Pub. Laws 333, §§ 158, 159, a jury of view prior to the trial is provided for.

In Rhode Island, under Gen. Laws, c. 244, § 1, a view may be had in all cases in which it is deemed advisable.

In Vermont, Stat. 1894, § 1504, a view may be had where necessary in an action for betterments.

25. See *supra,* note 24, and also III, 2, B.

26. *Arkansas.* — Dobbins *v.* Little Rock R. & Elec. Co., 79 Ark. 85, 95 S. W. 794 (machinery).

California. — People *v.* White, 116 Cal. 17, 47 Pac. 771 (buildings).

Florida. — O'Berry *v.* State, 47 Fla. 75, 36 So. 440 (cattle).

Georgia. — Johnson *v.* Winship Mach. Co., 108 Ga. 554, 33 S. E. 1013 (machinery).

Indiana. — Erwin *v.* Bulla, 29 Ind. 95, 92 Am. Dec. 341 (heifers).

Kentucky. — Memphis & C. P. Co. *v.* Buckner, 108 Ky. 701, 57 S. W. 482 (hatchway of boat).

Maine. — Trafton *v.* Pitts, 73 Me. 408 (sheep).

Massachusetts. — McMahon *v.* Lynn & B. R. Co., 191 Mass. 295, 77 N. E. 826 (snow-plow).

Michigan. — Mulliken *v.* Corunna, 110 Mich. 212, 68 N. W. 141 (sidewalk).

Wisconsin. — Koepke *v.* Milwaukee, 112 Wis. 475, 88 N. W. 238 (sidewalk).

Physical Facts Concerning the Place Involved. — In an action for flowage of lands, the court said: "There was no error in the calling of the attention of the jury at the view to the newly dug hole in the ground and the height of the water therein, as compared with the height of the water in the river. . . . The height of the water in the plaintiff's land . . . was a physical fact relevant to the issue on trial and it might be shown by direct observation." Flint *v.* Union Water Power Co., 73 N. H. 483, 62 Atl. 788.

27. City of Chicago *v.* Baker, 98 Fed. 830, 39 C. C. A. 318.

The plaintiff sought to condemn a right of way for its telegraph line along a railroad right of way. A view was had for a distance of three miles along the railroad. The defendant complains because the view did not cover the entire right of way lying in six counties. The court held that in the absence of any showing

b. *In Eminent Domain Proceedings.* — In viewing land which has been taken under eminent domain proceedings, the jury is entitled to visit and examine that part of the original parcel which has not been taken, as well as the land condemned,[28] but it is not entitled to view other adjacent land.[29]

4. How Obtained. — A. On the Initiative of the Court. No case has been found in which the court has ordered a view upon its own initiative, although there would seem to be nothing to prevent its doing so, under most of the statutes.[30]

B. On Motion of a Party. — The common practice is for the question of a view to be settled upon motion by one of the parties, and this is expressly required under some statutes.[31]

C. On Application by Juror. — It has been held that it is within

that the conditions were different along other parts of the right of way, the view was sufficient. St. Louis, etc. R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

Jury, in ejectment, cannot be authorized to view other land, similarly situated, under § 610 California Code Civ. Proc., which merely provides for a view of property the subject of the litigation. Wright *v.* Carpenter, 50 Cal. 556.

View Made After Dark. — The jury viewed the property after dark. It was held that it did not appear that they failed to adequately see the property with the lanterns furnished them, and so the proceedings were proper. Maysville & B. S. R. Co. *v.* Trustees, 18 Ky. L. Rep. 1111, 39 S. W. 35.

Discretion of the Jury. — In taking a view of mining premises it was complained that all of the jurors did not descend the shafts and examine the entire premises. The court on appeal recognized the right of a party to have the jury specially directed regarding the examination, but held that in the absence of such a request, a party could not complain because the jury, in its discretion, only examined such features of the property as it thought necessary. Beals *v.* Cone, 27 Colo. 473, 493, 62 Pac. 948.

28. Wakefield *v.* Boston & N. R. Co., 63 Me. 385.

29. In an eminent domain proceeding the jury, besides viewing the land in question, visited and examined other adjacent premises, without the order of the court. This was held to be prejudicial error, although the appellant proceeded with the trial without making any objection— it amounted "to the introduction of improper evidence before the jury at a time and place where no opportunity was given to object." Tedens *v.* Sanitary Dist., 149 Ill. 87, 36 N. E. 1033. But the jury, while on the premises, may examine the land with reference to its location and situation in connection with other lands— "the jury could not be expected to view the land in controversy without seeing the surrounding lands, and they were not bound to close their eyes as to the location and quality of other lands in the immediate neighborhood." Dady *v.* Condit, 87 Ill. App. 250, *reversed* in 188 Ill. 234, 58 N. E. 900, on the authority of Tedans *v.* Sanitary Dist., *supra,* the court failing apparently to distinguish the facts of the cases.

Knowledge of Other Property, incidentally acquired by being necessarily conducted over it, is not prejudicial. United States *v.* Freeman, 113 Fed. 370.

30. Court May Act on its own volition (dictum). City of Louisville *v.* Caron, 28 Ky. L. Rep. 844, 90 S. W. 604.

31. Under Massachusetts Rev. Laws, c. 176, § 35, "a view can be granted only upon motion of one of the parties. After the view had been requested by the jury the defendant's counsel 'expressed a desire to have it.' This might be treated and must be taken to have been treated by the presiding judge as a motion for a

the power of the court to order a view upon the request of a juror.[32]

D. Consent of Both Parties. — While in a few jurisdictions the consent of both parties is necessary before a court can order a view,[33] in most cases it may be ordered upon the motion of one party and over the objection of the other.[34] But the court is not required to order a view of premises even if both parties consent to it.[35]

view by the defendant." Yore *v.* City of Newton, 194 Mass. 250, 80 N. E. 472.

Presumption on Appeal. — Under West Virginia Code, § 30, c. 116, a view can only be had on the request of one of the parties; but on appeal, if there has been a view, it will be conclusively presumed that either the state or the prisoner requested it. State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

Renewal of Motion for Jury of View at Subsequent Term Not Necessary. — "Juries of view are ordered by this court in pursuance of statute. El. Dig. 268, p. 11, and when a rule for such a jury is once entered, it continues in force until the cause is tried or the rule discharged," holding that where a case had not been tried at the circuit to which it had been awarded, a new jury need not be appointed. Houston *v.* Woodward, 17 N. J. L. 344.

32. See Louisville, etc. R. Co. *v.* Schick, 28 Ky. L. Rep. 844, 90 S. W. 604 (view allowed on request of jury after the case had been submitted); Rev. *v.* Martin, 12 Cox Cr. (Eng.) 204 (same).

§ 318 Kentucky Code Civ. Proc. provides that "whenever in the opinion of the court, it is proper for the jury to have a view, etc." It was held in City of Louisville *v.* Caron, 28 Ky. L. Rep. 844, 90 S. W. 604, that the court could direct a view upon the request of a juror, alone.

"It seems to us wholly immaterial whether the court in sending the jury to view the premises in controversy acted by request of a member of the jury, at the instance of counsel, or of his own volition. If in his judgment such an inspection was necessary or proper, he had the right to allow it."

33. Shular *v.* State, 105 Ind. 289, 4 N. E. 870; Conrad *v.* State, 144 Ind. 290, 43 N. E. 221.

Since the adoption of the Maryland Code of 1888 juries have not been allowed to visit and inspect premises except on the application and consent of both parties. When that Code was adopted, ch. 415 of the Act of 1886, which allowed a view in the discretion of the judge, was omitted. Arnold *v.* Green, 95 Md. 217, 52 Atl. 673.

In the Absence of a Statute the Georgia court doubted whether the trial court could at the request of a party order a view against the objection of the adverse party. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389. See Johnson *v.* Winship Mach. Co., 108 Ga. 554, 33 S. E. 1013.

In the absence of a statute "it is not competent for the court to order a view against the objections of a party to the suit." Doud *v.* Cuthrie, 13 Ill. App. 653, *overruled,* Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

34. Chute *v.* State, 19 Minn. 271; Litton *v.* Com., 101 Va. 833, 44 S. E. 923.

Comment on Objections by a Party. While counsel may ordinarily comment upon the objection of the adverse party to a view, the court may in its discretion limit and control such comments. Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138.

35. In Sanitary Dist. *v.* McGuirl, 86 Ill. App. 392, the court overruled a motion for a view of the premises made by the plaintiff, although the defendant did not object.

Since it is within the discretion of the trial judge to direct a view, where he had ordered a view upon the defendant's request but was told by the jury that they did not care to see the premises, it was not error not to require them to make the view.

5. Discretion of the Court. — A. In General. — While the value of the view in practice is generally recognized,[36] it is fully established that in most proceedings[37] the awarding or refusing of a view is a matter within the discretion of the trial court,[38] and this discretion which is equally applicable to both civil[39] and criminal

Bodie *v.* Charleston, etc. R. Co., 66 S. C. 302, 44 S. E. 943.

36. "A view is often advantageous in enabling a jury better to understand the testimony of witnesses, and they may derive some additional information not directly testified to which may be considered by them. McCarthy *v.* Fitchburg R. Co., 154 Mass. 17, 27 N. E. 773.

Referring to a view of the jury, in an action to assess damages resulting from the change of grade of a street, the court in Zug *v.* Pittsburg, 194 Pa. St. 367, 45 Atl. 61, said: "They could understand the testimony far better, and could determine the merits of the varying opinion of witnesses as to the value of the premises, before and after the injury, with much more intelligence and satisfaction by seeing the property for themselves."

"We think this (allowing a view) was a good practice, as it must undoubtedly have materially aided them in arriving at a correct conclusion as to whether the city authorities were negligent or not." Mayor *v.* Brown, 87 Ga. 596, 13 S. E. 638.

"On some occasions it (a view) may be very useful and indeed almost necessary. . . . On the other hand, it is most usually unnecessary for any good purpose and would be productive of delay and expense and an occasion of possible irregularities." Jenkins *v.* Wilmington & W. R. Co., 110 N. C. 438, 15 S. E. 193.

"A view is not often essential. It is inconvenient, and productive of delay, and costly. It is requisite only where other evidence is inadequate to fairly present the case to the jury." Davis *v.* American Tel. & T. Co., 53 W. Va. 616, 45 S. E. 926.

37. See *infra* I, 6.

38. "The word 'may' implies a discretion. Without such governance views might become rather an obstruction than an aid to justice, and we believe that when extended from their ancient use in real actions they always have been held to be subject to the discretion of the court, both in this state and in England." Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551.

39. *Arkansas.* — Curtis *v.* State, 36 Ark. 284.

Colorado. — Saint *v.* Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320.

Indiana. — Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428; Board of Comrs. *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986. 34 N. E. 687.

Iowa. — Clayton *v.* Chicago, etc. R. Co., 67 Iowa 238, 25 N. W. 150; King *v.* Iowa M. R. Co., 34 Iowa 458; Morrison *v.* Burlington, etc. R. Co., 84 Iowa 663, 51 N. W. 75.

Kansas. — Coughlen *v.* Chicago, etc. R. Co., 36 Kan. 422, 13 Pac. 813; Kansas Cent. R. Co. *v.* Allen, 22 Kan. 285, 31 Am. Rep. 190.

Kentucky. — Memphis & C. P. Co. *v.* Buckner, 108 Ky. 701, 57 S. W. 482; Green's Admr. *v.* Maysville, etc. R. Co., 25 Ky. L. Rep. 1623, 78 S. W. 439; Cohankus Mfg. Co. *v.* Rogers' Guardian, 29 Ky. L. Rep. 747, 96 S. W. 437; Valley Tpk. & G. R. Co. *v.* Lyons, 23 Ky. L. Rep. 646, 58 S. W. 502; Henderson & G. R. Co. *v.* Cosby, 103 Ky. 182, 44 S. W. 639; Central Kentucky Asylum *v.* Hauns, 21 Ky. L. Rep. 22, 50 S. W. 978.

Maine. — Snow *v.* Boston & M. R. Co., 65 Me. 230.

Massachusetts. — Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94.

Michigan. — Mulliken *v.* Corunna, 110 Mich. 212, 68 N. W. 141; Stewart *v.* Cincinnati R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539; Seidlein *v.* Meyer, 95 Mich. 586, 55 N. W. 367; Dupuis *v.* Saginaw Val. Tract. Co., 146 Mich. 151, 109 N. W. 413; Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811; Richmond

cases[40] will not be reviewed on appeal unless objection is duly made[41] and an abuse of such discretion is clearly shown.[42]

B. FACTS CONTROLLING. — a. *In General.* — The necessity of a view to enable the jury to understand the case is the first matter

v. Atkinson, 58 Mich. 413, 25 N. W. 328; Leonard *v.* Armstrong, 73 Mich. 577, 41 N. W. 695.

Minnesota. — Shalgren *v.* Red Cliff Lumb. Co., 95 Minn. 450, 104 N. W. 531; Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248.

Missouri. — Ellis *v.* St. Louis, etc. R. Co., 131 Mo. App. 395, 111 S. W. 839.

Montana. — Maloney *v.* King, 30 Mont. 158, 76 Pac. 4; Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45.

Nebraska. — Beck *v.* Staats, 114 N. W. 633; Alberts *v.* Husenetter, 77 Neb. 699, 110 N. W. 657.

New Hampshire. — Lydston *v.* Rockingham Co. L. & P. Co., 70 Atl. 385; Fairfield *v.* Amherst, 57 N. H. 479.

Pennsylvania. — Rudolph *v.* Pennsylvania R. Co., 186 Pa. St. 541, 40 Atl. 1083; Mintzer *v.* Greenough, 192 Pa. St. 137, 43 Atl. 465.

South Carolina. — McCarley *v.* Glenn-Lowry Mfg. Co., 75 S. C. 390, 56 S. E. 1.

Virginia. — Baltimore & O. R. Co. *v.* Polly, Woods & Co., 14 Gratt. 447, 470.

Washington. — Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936; Bellingham Bay, etc. R. Co. *v.* Strand, 4 Wash. 311, 30 Pac. 144.

West Virginia. — Davis *v.* American Tel. & T. Co., 53 W. Va. 616, 45 S. E. 926; Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465.

Wisconsin. — Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417; Pick *v.* Hydraulic Co., 27 Wis. 433; Andrews *v.* Youmans, 82 Wis. 81, 52 N. W. 23.

40. *England.* — Queen *v.* Martin, L. R. 1 Cr. Cas. Res. 378.

Arkansas. — Benton *v.* State, 30 Ark. 328.

California. — People *v.* Bush, 71 Cal. 602, 12 Pac. 781; People *v.* Bonney, 19 Cal. 426; People *v.* White, 116 Cal. 17, 47 Pac. 771.

Kentucky. — Mise *v.* Com., 25 Ky. L. Rep. 2207, 80 S. W. 457.

Michigan. — People *v.* Hull, 86 Mich. 449, 465, 49 N. W. 288.

Minnesota. — Chute *v.* State, 19 Minn. 271.

New York. — People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

Ohio. — Reighard *v.* State, 22 Ohio C. C. 340.

Pennsylvania. — Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138; Com. *v.* VanHorn, 188 Pa. St. 143, 41 Atl. 469.

Utah. — State *v.* Mortensen, 26 Utah 312, 341, 73 Pac. 562, 633.

Washington. — State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

West Virginia. — State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

41. Booth *v.* Columbia & P. S. R. Co., 6 Wash. 531, 33 Pac. 1075; Chicago, P. & St. L. R. Co. *v.* Leah, 152 Ill. 249, 38 N. E. 556.

42. Banning *v.* Chicago, etc. R. Co., 89 Iowa 74, 56 N. W. 277; Leidlein *v.* Meyer, 95 Mich. 586, 55 N. W. 367; Chicago, etc. R. Co. *v.* Leah, 41 Ill. App. 584; St. Louis, etc. R. Co. *v.* Claunch, 41 Ill. App. 592; Board of Comrs. *v.* Nichols, 139 Ind. 611, 38 N. E. 526; Coughlen *v.* Chicago, etc. R. Co., 36 Kan. 422, 13 Pac. 813.

"This provision of the law is merely directory, or rather it gives the court the option or discretion to send the jury to the place in controversy to view the premises. We can not interfere with this discretion. It would be an exceedingly difficult matter to show that the court abused its discretion in refusing to make an order of this kind." Clayton *v.* Chicago, I. & D. R. Co., 67 Iowa 238, 25 N. W. 150.

View Properly Granted But Upon an Erroneous Theory. — Error cannot be predicated upon any arguments used by counsel in inducing the court to grant the view. "All that this court can consider is the

to be considered,[43] and where there is little or no controversy in regard to the facts,[44] or the case as made is not complicated,[45] a view will ordinarily be refused. The courts are slow in awarding it in new and unusual situations.[46]

b. *Change in Conditions.* — While ordinarily, where it appears that changes have occurred in the premises, a view may properly be refused,[47] and in such a case the discretion of the trial court will not be reviewed on appeal,[48] the mere fact that such changes have occurred will not necessarily make the allowance of a view error,[49]

fact that the order was made and whether the court had the authority to make it." Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417.

43. Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465.

"In the case before us the facts involved in the litigation were of such a character that they could be accurately described to the jury, so nothing of importance could have been accomplished by an inspection of the premises," and a refusal to order a view was held proper. Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428.

44. State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

45. Where an accident occurred on a well known street of Los Angeles and there was nothing intricate or complicated in the facts nor obscure in the place of happening, it was not an abuse of discretion to refuse a view. Niosi *v.* Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185.

Fact that machinery causing the accident was not complicated may be considered and justifies a refusal of a view. Shalgren *v.* Red Cliff Lumb. Co., 95 Minn. 450, 104 N. W. 531.

46. In an action for personal injuries the plaintiff's counsel stated to the court that the plaintiff was unable to come into court to testify unless upon a stretcher and moved that the jury take a view of the plaintiff at his home. After observing that the awarding of a view was discretionary with the court, the judge said: "A motion that the jury take a view of the plaintiff in his home in order to judge of the extent of his injuries, is very unusual, if not entirely unprecedented in this Commonwealth. There was no error of law in the denial of this motion and the discretion of the court seems to have been wisely exercised." Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94.

47. Coker *v.* Merritt, 16 Fla. 416; Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389; People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368; Dewey *v.* Williams, 43 N. H. 384; Seward *v.* Mayor (Del.), 42 Atl. 451; Lydston *v.* Rockingham Co. L. & P. Co. (N. H.), 70 Atl. 385.

"In this case the court properly exercised its discretion (in refusing a view) because several months had elapsed since the accident, and the pile of gravel in the road which in part, according to the claim of the plaintiff, caused the injury, had been spread, and its condition was then unlike it was when the accident occurred; besides the rut in the road was probably filled up. At any rate there was no testimony tending to show that the conditions remained as they existed when the accident occurred." Henderson & C. G. R. Co. *v.* Cosby, 103 Ky. 182, 44 S. W. 639.

Presumption on Appeal is that there had been no change in the premises. Banning *v.* Chicago, etc. R. Co., 89 Iowa 74, 56 N. W. 277.

48. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389.

49. City of Louisville *v.* Caron, 28 Ky. L. Rep. 844, 90 S. W. 604; Bedell *v.* Berkey, 76 Mich. 435, 43 N. W. 308; Cleveland, etc. R. Co. *v.* Penketh, 27 Ind. App. 210, 60 N. E. 1095.

Compare Sell *v.* Ernsberger, 8 Ohio C. C. 499 (error for a justice to order a view, "unless the premises were shown to be, or at least the premises were in fact, in substantial-

or in any way affect the power of the court to order the view.[50] The burden of proving that a change in the premises has not prejudiced the defendant in a criminal action, is upon the state.[51]

c. *Lapse of Time.* — The lapse of time since the event in question occurred is to be considered in connection with the changed conditions.[52]

d. *Distance.* — The distance which the jury would be required to travel is a matter of considerable importance.[53]

e. *Expense and Delay.* — The expense involved in taking the view and the delay in the trial and inconvenience caused by it, are often given controlling weight and a view refused on those grounds.[54]

ally the same condition," as they were before the wrongful act was committed).

Repair of Highway as an Admission of Negligence; View Not Unwarranted. — The fact that the alleged defect in a highway, which was the cause of an accident, has been repaired, will not prevent a view being taken on the ground that repairs subsequent to an accident cannot be shown. In every trial matters may come to the knowledge of the jury which they cannot lawfully consider in making up their verdict, and in such a case it is the duty of the court to instruct them to disregard such matters. Lydston *v.* Rockingham Co. L. & P. Co. (N. H.), 70 Atl. 385.

50. Where a new house had been erected on the premises since the act in question, and the action was brought for damages for injury to the property by erecting a bridge, the court said: "Where changes in the condition of the property alleged to have been damaged might render the view of the jury less satisfactory in applying the testimony, such change could not affect the power of the court to allow such view." Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40.

51. Immediately preceding a view by the jury of the place where a rape was alleged to have been committed, a change was made in the premises by a person alleged to be an agent of the state, by replacing a board on a fence. There was a conflict in the evidence as to whether the board was on or off at the time of the alleged crime, and the question became important as bearing upon the testimony of certain witnesses and whether they had an unobstructed view of the premises. The court held that notice of the change in the premises should have been given to the defendant, and since notice was not given the burden was upon the state to satisfy the court that the defendant could not have been injured by the change. State *v.* Knapp, 45 N. H. 148, 158.

52. Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811 (six months — view allowed); Tully *v.* Fitchburg R. Co., 134 Mass. 499 (two years — view allowed); Stewart *v.* Cincinnati, etc R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539 (two years — view refused); McCarley *v.* Glenn-Lowry Mfg. Co., 75 S. C. 390, 56 S. E. 1 (one year — view refused).

53. McCarley *v.* Glenn-Lowry Mfg. Co., 75 S. C. 390, 56 S. E. 1 (eighteen miles — view refused); Mise *v.* Com., 25 Ky. L. Rep. 2207, 80 S. W. 457 (fifteen miles — view refused); Vane *v.* Evanston, 150 Ill. 616, 37 N. E. 901 (twelve miles — view allowed).

View allowed although it necessitated the jury's being away over night. People *v.* Bush, 68 Cal. 623, 10 Pac. 169.

54. Kansas Cent. R. Co. *v.* Allen, 22 Kan. 285, 31 Am. Rep. 190; State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

"There may be cases where a trial court should not grant a view of the premises, where it would be expensive or cause delay, or where a view would serve no useful purpose." Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

f. *Maps or Diagrams.* — Ordinarily a map or diagram of the locality will be held to be a satisfactory substitute for a view,[55] but the court will not always refuse a view upon that ground.[56]

6. View an Absolute Right. — In a few exceptional cases, statutes have given to a party the absolute right to a view upon demand. This is most commonly true in eminent domain proceedings.[57] In Colorado, it is also the rule in proceedings involving mining rights.[58]

55. Mise *v.* Com., 25 Ky. L. Rep. 2207, 80 S. W. 457; Jenkins *v.* Wilmington & W. R. Co., 110 N. C. 438, 15 S. E. 193.

"It is only where the testimony cannot otherwise be so well understood and applied that a view should be permitted. If the testimony can be readily understood and applied from the language in which it is expressed, aided by maps, plats, or like evidence, there is no necessity for a view and to permit it often leads to the question whether the jury have not allowed their own observations to have the effect of testimony." Morrison *v.* Burlington, etc. R. Co., 84 Iowa 663, 51 N. W. 75.

Where diagrams of machinery were presented, it was held proper for the court to refuse a view. McCarley *v.* Glenn-Lowry Mfg. Co., 75 S. C. 390, 56 S. E. 1; Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45.

56. Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248.

57. A view may be demanded as a matter of right in condemnation proceedings, by either party, in Illinois, under Rev. Stat. c. 47, § 9. Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; Kankakee & S. R. R. Co. *v.* Straut, 102 Ill. 666; Galena & S. W. R. Co. *v.* Haslam, 73 Ill. 494. And see St. Louis, etc. R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

In an action for damages to property by a public improvement, it was held by the Illinois court that the granting of a view was discretionary with the trial court, and this in the face of the fact that under the Eminent Domain Act a view may be had as of right upon the request of either party—the court also recognizing the fact that the object of the action was precisely the same as that of a cross-petition in a proceeding under the Eminent Domain Act. Sanitary Dist. *v.* McGuirl, 86 Ill. App. 392.

Massachusetts. — Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94 (dicta).

Michigan. — Grand Rapids *v.* Perkins, 78 Mich. 93, 43 N. W. 1037 (dictum).

Missouri. — In a proceeding under the charter of the City of Kansas to condemn land the jury must inspect the property. City of Kansas *v.* Hill, 80 Mo. 523, 537. And see City of Kansas *v.* Street, 36 Mo. App. 666.

Pennsylvania. — By virtue of Act May 21, 1895 (P. L. 89) either party has a right to demand a view by the jury in eminent domain proceedings. Bond *v.* Philadelphia, 218 Pa. St. 475, 67 Atl. 805. But this act has been construed as still leaving the granting of a view to the discretion of the trial judge where the case is brought before the court on appeal from the award of viewers appointed by the court. Frazee *v.* Light & Heat Co., 20 Pa. Super. 420, *approved* in Bond *v.* Philadelphia, *supra.*

West Virginia. — Charleston & S. Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69 (applying § 14, c. 42 Code).

58. "In suits involving the title to the right of possession of a mining claim, it is made the duty of the court, upon the application of either party, to send the jury in a body to view and inspect the premises in dispute." Mills Code, §188*a*; Beals *v.* Cone, 27 Colo. 473, 492, 62 Pac. 948.

Although the Colorado statute is mandatory it does not apply to a case where the party applying for the view has not introduced any evidence. (Connolly *v.* Hughes, 18 Colo. App. 372, 71 Pac. 681); nor to a case where the evidence produced is insufficient to be submitted

In Massachusetts a view must be allowed on request in flowage cases, in actions on special assessments, and in highway proceedings.[59]

IV. TAKING THE VIEW.

1. Time. — A. In General. — There is no particular time during the trial when an application for a view should be made and the view taken.[60] The best practice is for the party desiring the view to apply for it before he closes his case in chief;[61] but a view has been allowed in exceptional cases, even after the case had been submitted to the jury.[62]

B. Jury of View. — Where, as under the Pennsylvania and New Jersey practice, the technical jury of view exists, and a view by six jurors before trial is contemplated, it has been held necessary to apply for such jury before the week set for the trial.[63]

to the jury. McMillen *v.* Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461.

59. See Massachusetts Pub. Stat. c. 51, § 6 (special assessments); c. 190, § 13 (flowage cases); c. 49, § 49 (highway awards); Tully *v.* Fitchburg R. Co., 134 Mass. 499 (dicta).

60. Time of Granting a View Discretionary. — View allowed any time before the jury is instructed. Kankakee & S. R. Co. *v.* Straut, 102 Ill. 666; Galena & S. W. R. Co. *v.* Haslam, 73 Ill. 494. But see Sanitary Dist. *v.* McGuirl, 86 Ill. App. 392.

It was urged that it was error to allow a view at the close of the plaintiff's evidence — that all of the evidence should have been introduced first — held discretionary with the court. Alberts *v.* Husenetter, 77 Neb. 699, 110 N. W. 657.

View allowed on motion of prosecution, after the state had closed its testimony and during the introduction of testimony by defendent. Curtis *v.* State, 36 Ark. 284.

In Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428, application was made and the view allowed after the evidence was in and before argument to the jury.

"Ordinarily the time for granting a view is before the evidence is put in. But if the subsequent course of the trial shows that a view should be taken it may then be granted," and the case reopened. Yore *v.* City of Newton, 194 Mass. 250, 80 N. E. 472.

"After the jury was impanelled, and before the trial commenced, the court on motion of the defendant permitted the jury in charge of an officer to go upon and view the premises." Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

Any error in refusing a view in the earlier stage of the trial was held cured, where the court allowed the view on a motion made after all the testimony was taken. Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63.

61. The request for a view "was not made until the evidence was closed on both sides. The view pertains to the evidence, and properly the motion therefor should be made by the party desiring it, before he closes his case in chief. If made after all the evidence is in, it is discretionary with the court to allow or refuse it." Denniston *v.* Philadelphia Co., 1 Pa. Super. 599.

62. Queen *v.* Martin, L. R. 1 Cr. Cas. Res. (Eng.) 378; Anderson *v.* Mowatt, 20 N. B. (Can.) 255; Louisville, etc. R. Co. *v.* Schick, 94 Ky. 191, 21 S. W. 1036.

Granting view after submission of case is an irregularity, but court may grant it in its discretion. People *v.* Hawley, 111 Cal. 78, 43 Pac. 404 ("it was little, if anything more than would have been the exhibition of a map which had been referred to in the evidence, but which had not been exhibited to the jury").

63. Bare *v.* Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42.

2. Place. — The jury may be sent upon a view to any place within the state, although such place be without the territorial jurisdiction of the court.[64]

3. Showers. — A. In General. — It was the practice at common law[65] and continues to be under the statutes,[66] even where not expressly regulated, for some person to be appointed by the court,[67]

64. Beck *v.* Staats (Neb), 114 N. W. 633; People *v.* Bush, 71 Cal. 602, 12 Pac. 781 (view of a place in another county may be ordered).

Where there had been a change of venue in a murder trial, it was held that the court of common pleas had authority under the Ohio Rev. St. § 7283, to send the jury into an adjoining county to view the scene of the crime; it could be sent anywhere within the state. Jones *v.* State, 51 Ohio St. 331, 38 N. E. 79.

Contra, Rockford, etc. R. Co. *v.* Coppinger, 66 Ill. 510 (jury cannot be sent on view outside territorial jurisdiction of the court, even though a change of venue was had); Malins *v.* Lord Dunraven, 9 Jur. (Eng.) 690.

65. "The extent to which the court should go, beyond directing a mere view of the premises, is to send some person to be agreed upon by the parties, or appointed by the court to go with the jury and point out the premises to them. This was the practice under ancient English statutes in real actions." Garcia *v.* State, 34 Fla. 311, 335, 16 So. 223.

66. See the various statutes upon this point. The point is seldom raised in the cases.

"The order of the court should specify the place to be inspected, and should designate some person who knows the place, to point it out to the jury." State *v.* Lopez, 15 Nev. 407. *Compare* Colorado Fuel & I. Co. *v.* Four Mile R. Co., 29 Colo. 90, 101, 66 Pac. 902.

Reasons for Having a Shower. "The evident purpose of this clause in the section is to have some person appointed, well acquainted with the locality; it is the mode of identification of the place. There may have been no necessity for it in this particular case, as many of the jurors, or the sheriff in charge of the jury, may have been familiar with the land appropriated and damaged;" holding that there would be no reversal because it did not affirmatively appear that a shower had been appointed. Coughlen *v.* Chicago, etc. R. Co., 36 Kan. 422, 13 Pac. 813.

"A view in many cases would be futile unless the judge or some person by him appointed were authorized to point out the particular place or premises to the jury, and we are satisfied that such a power exists in the courts of this state." *In re* Jackson St., 47 Wash. 243, 91 Pac. 970.

Effect of Failure To Appoint a Shower. — "The only purpose of having some other person accompany the jury is that he may show them the place to be viewed; and as they found and inspected the right place, the omission was necessarily unimportant." City of Emporia *v.* Juengling (Kan.), 96 Pac. 850. See also Coughlen *v.* Chicago, etc. R. Co., 36 Kan. 422, 13 Pac. 813; Benton *v.* State, 30 Ark. 328.

Objections to the Shower. — "Objections to the person appointed or that he was not sworn, should be taken at the time of the appointment and cannot be urged for the first time on motion for new trial." *In re* Jackson St., 47 Wash. 243, 91 Pac. 970.

67. See *infra,* IV, 3, B.

The following cases illustrate exceptions to the general practice as stated in the text.

Colorado. — Under the Colorado statute (Mill's Anno. Code, § 188*a*) which provides for a view of mining claims, it is provided that the parties designate guides. It was held that this contemplated partisan guides and that it was not improper for one of the parties to appoint himself. Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395. And see Beals *v.* Cone, 27 Colo. 473, 493, 62 Pac. 948.

In Montana, Code Civ. Proc.

to point out to the jury the places or property they were to view.[68]

B. Who May Be a Shower. — Ordinarily the statutes provide that the judge or some person, familiar with the place, appointed by him shall act as shower, and under such provisions it has been held unnecessary to appoint persons unconnected with the trial, though that is usually done; but the appointment of a witness,[69] a juror,[70] or the officer in charge of the jury[71] has been held proper.

4. Manner of Conducting. — A. Oath of Officer in Charge. The officer in whose charge the jury is taken on a view is usually required to take a special oath not to allow others to converse with the jurors, nor to do so himself.[72]

Failure To Take Such Oath has, however, been regarded as a mere irregularity.[73]

B. Entire Jury Should Be Present. — While under the modern practice a party is entitled to have all of the jurors present at the view,[74] it has been held that if a party knew that one of the jurors did not make the view but nevertheless continues the trial without objection, he cannot later complain.[75]

C. Presence of Accused. — a. *In General.* — The decisions are in hopeless conflict on the question of the right of the defendant in a criminal case to be present upon the taking of the view; probably the great weight of authority recognizes that he has the right[76]

§ 6747 provides for the appointment of one person representing each party.

In New Jersey the statute authorizing a jury of view requires the appointment of two showers.

68. People *v.* Bush, 71 Cal. 602, 12 Pac. 781; State *v.* Lopez, 15 Nev. 407; State *v.* Perry, 121 N. C. 533, 27 S. E. 997.

69. People *v.* Milner, 122 Cal. 171, 54 Pac. 833.

70. State *v.* Adams, 20 Kan. 311, 322.

71. It is a serious irregularity to appoint the officer in charge of the jury as the shower where it does not appear that he is personally acquainted with the locality and the precise spot in question. State *v.* Lopez, 15 Nev. 407.

72. State *v.* Lopez, 15 Nev. 407; People *v.* Green, 53 Cal. 60; People *v.* Palmer, 43 Hun (N. Y.) 397. *Compare* City of Emporia *v.* Juengling (Kan.), 96 Pac. 850 (where a view is ordered, the officer in charge of the jury need not take any additional oath).

73. "The omission of the trial court to cause the officers in charge of the jury, while taking a view, to take the oath prescribed by § 412, was an irregularity merely, which could be waived by the defendant, and was we think waived by the consent of his counsel that such view should be taken and by his omission to object or call the attention of the court of the want of such oath." People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684.

74. See Wigmore on Ev., Vol 2, § 1165. For the old practice, see *supra,* II, 1, note 9.

75. Gurney *v.* Minneapolis & St. C. R. Co., 41 Minn. 223, 43 N. W. 2.

So, also, where a party agrees to continue the trial with the eleven jurors who took the view. Oregon Cascades R. Co. *v.* Oregon Steam Nav. Co., 3 Or. 178.

76. *Canada.* — Reg. *v.* Petrie, 20 Ont. 317.

Arkansas. — Benton *v.* State, 30 Ark. 328.

California. — People *v.* Bush, 68 Cal. 623, 10 Pac. 169; People *v.* Jones, 11 Pac. 501; People *v.* Lowrey, 70 Cal. 193, 11 Pac. 605; People *v.* Mathews, 139 Cal. 527, 73 Pac. 416.

Florida. — Garcia *v.* State, 34 Fla.

but the sounder rule would seem to be that he has no such right.[77]

b. *Waiver of Right.* — (1.) **In General.** — In most of the cases which recognize the right of a defendant to be present upon a view, his right to waive this privilege is also recognized.[78]

311, 334, 16 So. 223 ("The safest course is to have them (defendants) present," where no statute requires it).

Kentucky. — Rutherford *v.* Com., 78 Ky. 639.

Louisiana. — State *v.* Bertin, 24 La. Ann. 46.

Mississippi. — Foster *v.* State, 70 Miss. 755, 12 So. 822.

Montana. — State *v.* Landry, 29 Mont. 218, 74 Pac. 418.

Nebraska. — Carroll *v.* State, 5 Neb. 31; Neal *v.* State, 32 Neb. 120, 49 N. W. 174.

New York. — People *v.* Palmer, 43 Hun 397 (but *compare* People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368).

Ohio. — Blythe *v.* State, 4 Ohio C. C. 435, *affirmed,* 47 Ohio St. 234, 24 N. E. 268; Hotelling *v.* State, 3 Ohio C. C. 630.

Wisconsin. — Sasse *v.* State, 68 Wis. 530, 32 N. W. 849 (very questionable whether a view on the trial of defendant for a capital offense should be taken in his absence, unless he expressly waived his right to be present).

The statute authorizing a view in criminal cases "contemplates the presence of the defendant and his counsel at such view, in order that he may not be deprived of any of his constitutional rights, to be confronted by witnesses against him, and to appear and defend in person and with counsel." People *v.* Bush, 71 Cal. 602, 12 Pac. 781.

In Kentucky, by Code Cr. Proc. § 236 it is expressly provided that the "judge, prisoner and counsel" shall accompany the jury while the view is being taken.

In Mississippi the direct result of the holding in the case of Foster *v.* State, 70 Miss. 755, 12 So. 822, that § 2391, Code of 1892, was unconstitutional as depriving the defendant of the right to be confronted with the witnesses, was the passage of an amendment, Stat. 1894, c. 62, by which it is provided that the whole organized court shall go with the jury on the view, and that witnesses may be examined; and the court is to be regarded as still in session.

77. People *v.* Bonney, 19 Cal. 426 (*overruled* by California cases cited in preceding note); State *v.* Reed, 3 Idaho 754, 35 Pac. 706 (but *compare* State *v.* McGinnis, 12 Idaho 336, 85 Pac. 1089; State *v.* Chee Gong, 17 Or. 635, 21 Pac. 882; People *v.* Hull, 86 Mich. 449, 465, 49 N. W. 288; Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469; Com. *v.* Salyards, 158 Pa. St. 501, 27 Atl. 993; State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103.

78. *Arizona.* — Elias *v.* Territory, 9 Ariz. 1, 76 Pac. 605.

Idaho. — State *v.* Reed, 3 Idaho 754, 35 Pac. 706; State *v.* McGinnis, 12 Idaho 336, 85 Pac. 1089 (dicta).

Indiana. — Shular *v.* State, 105 Ind. 289, 4 N. E. 870.

Kansas. — State *v.* Adams, 20 Kan. 311.

Nebraska. — Carroll *v.* State, 5 Neb. 31.

Nevada. — State *v.* Hartley, 22 Nev. 342, 40 Pac. 372.

New York. — People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368.

Ohio. — Blythe *v.* State, 4 Ohio C. C. 435.

Oregon. — State *v.* Moran, 15 Or. 262, 14 Pac. 419; State *v.* Ah Lee, 8 Or. 214.

Utah. — State *v.* Mortensen, 26 Utah 312, 347, 73 Pac. 562, 633.

Contra. — People *v.* Bush, 68 Cal. 623, 10 Pac. 169; Bostock *v.* State, 61 Ga. 635.

"If the absence of the defendant from a view taken by the jury in a capital trial may be cause for granting him a new trial under some circumstances, it is no such cause when he had an opportunity and declined an invitation to be present." State *v.* Buzzell, 59 N. H. 65.

(2.) How Waived. — A waiver of the right to be present is shown where the view was granted at the request of the defendant and he did not ask to accompany the jury,[79] nor object to its being taken in his absence.[80]

c. *Compelling Accused To Be Present.* — The right to compel a defendant to be present at a view has been recognized,[81] but the court in the same case held that this would never be necessary because this right could be waived.[82] On the other hand, it has been said that the presence of a defendant could not be compelled as this would be requiring him to be a witness against himself.[83]

d. *Examination of the Principle.* — **(1.) Right of Confrontation.** The statutory and constitutional privilege of a defendant to be confronted with the witnesses is merely to insure to him the benefits of cross-examination;[84] and where, as in a view, no testimonial evidence is taken, the hearsay rule is not involved and this objection loses its force.[85]

In Nebraska. — In Neal *v.* State, 32 Neb. 120, 49 N. W. 174, it was held that the defendant could waive being present at a view of the premises. But it is doubtful if this is now the rule in that state, for the court in a later case said: "This decision is not in conflict with the point actually decided in Neal *v.* State, 32 Neb. 120, but it implies doubtless that the judgment in that case was wrong." Chicago, etc. R. Co. *v.* Farwell, 60 Neb. 322, 83 N. W. 71.

79. State *v.* Congdon, 14 R. I. 458; Reighard *v.* State, 22 Ohio C. C. 340; People *v.* Mathews, 139 Cal. 527, 73 Pac. 416.

A defendant in a criminal case who objects to the granting of a view and excepts to it "should not be regarded as waiving his objection, because with his counsel he accompanied the jury when he found that the view was to be made notwithstanding his resistance." Jones *v.* State, 51 Ohio St. 331, 38 N. E. 79.

80. Price *v.* United States, 14 App. Cas. (D. C.) 391. And see State *v.* Chee Gong, 17 Or. 635, 21 Pac. 882.

81. Blythe *v.* State, 4 Ohio C. C. 435.

82. See *supra*, note 78.

83. As a defendant could not have it within his power to prevent a view by merely refusing to attend, and since compelling his attendance would make him a witness against himself, this would seem to be a sufficient reason for holding that his presence at the view is not necessary. State *v.* Mortensen, 26 Utah 312, 347, 73 Pac. 562, 633. And see Hays *v.* Territory, 7 Okla. 15, 54 Pac. 300.

84. See article "Witnesses."

"Nor is such a view as is authorized by the statute . . . inhibited by the Constitution. The provisions in that instrument which guarantee the accused in a criminal action, the right to 'appear and defend in person and by the counsel' and 'to be confronted by the witnesses against him,' were designed to protect every person accused of crime against judgment of condemnation without a hearing in open court or by secret trial. The latter provision had reference to the persons or individuals who may testify against the accused, and not to inanimate objects, although they be objects which viewed in the light of the testimony of living witnesses may give rise to inferences and make human understanding more clear and perfect." State *v.* Mortensen, 26 Utah 312, 342, 73 Pac. 562, 633. And see People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368.

85. Greenleaf on Ev., Vol. 1, p. 162 (o); Wigmore on Ev., Vol. 3, § 1803. See cases cited under note 77, *supra*.

(2.) **View as Part of the Trial.** — Neither is the view a part of the trial[86] within the meaning of the provisions above mentioned. The situation is similar to that which occurs when the jury retires to deliberate upon a verdict.[87] Moreover, the fact that no express provision is made for the presence of the defendant, the judge and other officers of the court is conclusive proof that no change in the place of trial was contemplated.[88]

(3.) **Right To Correct Erroneous Impressions.** — It is sometimes contended that the defendant should be allowed to attend the view in order to enable him to correct any false impressions which the jury might receive.[89] But it must be remembered that in no event could he interfere or participate in any way in the proceedings,[90] and his

Leading Cases to the Contrary are Benton *v.* State, 30 Ark. 328, and Foster *v.* State, 70 Miss. 755, 12 So. 822.

Further Discussion of whether a view is evidence will be found, *infra*, V.

Mere Sight of Premises Not a Taking of Evidence Within the Constitutional Inhibition. — "If seeing is the taking of evidence, it would follow in every case that a juror who had seen and was familiar with the locality would be incompetent to sit as a juror, for he would have taken evidence in the absence of the accused, with which he had never been confronted or had an opportunity to explain." This striking suppositious case was then put: "In front of this Capitol in the city of Albany, there is a park. On the opposite side of this park stands the courthouse. Should a felony be committed in the park, the accused could not well be brought to trial, for the reason that every juror summoned in the case necessarily would see and view the locality every time he entered or departed from the courthouse." People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368.

86. People *v.* Bonney, 19 Cal. 426 (view is no part of the trial — rather a suspension of the trial); State *v.* Adams, 20 Kan. 311.

87. "Just as when the case is finally submitted to the jury and they 'retire for deliberation,' there is simply a temporary removal of the jury. The place of trial is unchanged. . . . Though the defendant may not go with them into their place of retirement, he is nevertheless personally present during that portion as well as the rest of the trial." State *v.* Adams, 20 Kan. 311.

88. People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368; Hays *v.* Territory, 7 Okla. 15, 54 Pac. 300; State *v.* Adams, 20 Kan. 311.

"The statute expressly provides who shall accompany the jury, and this express provision implies that all others shall be excluded from that right or privilege." Shular *v.* State, 105 Ind. 289, 4 N. E. 870.

89. "According to the general rule of right applicable to the admission of evidence, the defendant should be allowed to attend the jury when making view, not for the purpose of then and there raising objections or making any suggestions, but to the end that he might correct by proof in court any misleading fact, if any should exist, growing out of the view by the jury." People v. Palmer, 43 Hun (N. Y.) 397.

90. State *v.* Moran, 15 Or. 262, 14 Pac. 419; People *v.* Bonney, 19 Cal. 426.

"Failure of the accused to be present when the jury were making their view is no ground of error. We are unable to see what good his presence would do, as he could neither ask nor answer any questions, nor in any way interfere with the acts, observations or conclusions of the jury. He would have been

rights may be sufficiently guarded in this respect by the presence of his counsel at the view.[91]

D. Presence of Judge. — a. *In General.* — Under most[92] of the statutes the presence of the judge at the view is not contemplated;[93] but in those jurisdictions in which the presence of the defendant is deemed necessary,[94] the same considerations lead the courts to declare that it is advisable for the judge to accompany the jury.[95]

b. *In Equity Cases.* — Since in equity cases the verdict of a jury is merely advisory, the judge should always accompany the jury on a view so as to be in possession of all the information upon which the jury acts.[96]

only a mute spectator while there." State *v.* Ah Lee, 8 Or. 214.

91. See *infra,* IV, 4, E.

92. In Kentucky, Code Cr. Proc. § 236 (in criminal cases), and in Mississippi, Stat. 1894, c. 62 (in all cases) the presence of the judge is expressly required.

93. State *v.* Hartley, 22 Nev. 342, 40 Pac. 372; Hays *v.* Territory, 7 Okla. 15, 54 Pac. 300.

"The statute does not intend that the judge should accompany the jury on a tour of inspection." Shular *v.* State, 105 Ind. 289, 4 N. E. 870.

Eminent Domain Proceedings. — A special tribunal exists and the judge need not be present. Toledo, etc. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

94. See *supra,* IV, 4, C, a, note 76.

95. "When the jury went to view the premises the judge should have gone along with them. It was the right of the defendant to have the judge accompany the jurors when they went to take this view." People *v.* Yut Ling, 74 Cal. 569, 16 Pac. 489. And see Rutherford *v.* Com., 78 Ky. 639.

"If in the exercise of his discretion he (the judge) deems it necessary to order the view to be made, it would be better and proper for him to accompany the jury, if convenient, to see that nothing improper occurs at the view. If not convenient he may appoint a person to show the jury the place to be viewed, sworn as directed by statute." Benton *v.* State, 30 Ark. 328, 350.

A view was had, in a crminal case, without the presence of the judge. Later, on this point being brought to the attention of the judge, he directed them to disregard their first view, and proceeded to accompany them on a second view. This was held to cure the error. "The first view was no more prejudicial to the defendant than the introduction of incompetent evidence during the trial, which on the discovery of the error by the court, was directed to be stricken out, and the jury instructed to disregard it. The jury were aided in doing this by the second view." People *v.* White, 5 Cal. App. 329, 90 Pac. 471.

Right To Have Judge Present May Be Waived by failure to request his presence and to object to his absence. People *v.* White, 5 Cal. App. 329, 90 Pac. 471; State *v.* Moore, 119 La. 564, 44 So. 299; County of San Luis Obispo *v.* Simas, 1 Cal. App. 175, 81 Pac. 972 (ancient domain case); City of Newport *v.* Com., 108 Ky. 151, 55 S. W. 914 (indictment for maintaining nuisance).

96. Fraedrich *v.* Flieth, 64 Wis. 184, 25 N. W. 28. But see Moritz *v.* Larsen, 70 Wis. 569, 36 N. W. 331 (even if the verdict of the jury were merely advisory (as in an equity case) the failure of the judge to accompany the jury on its view would not be error if he was not so requested).

General Rule Applies Where the Court Is Bound by the Verdict. In an action to enforce a mechanic's lien, although it is an action in equity, the verdict of the jury is not merely advisory, but is equally as conclusive as is a verdict in a common law action (Rev. Stat. § 3323),

E. Presence of Counsel. — Whether counsel shall be allowed to accompany the jury is ordinarily[97] within the discretion of the trial court, but it is usually allowed as a matter of course.[98]

F. Experiments. — While the general rule is not to allow any experiments to be made by the jury[99] or in their presence while taking a view,[1] there is a tendency in some courts on account of the recognized value of experimental evidence where the conditions can

and therefore the judge need not accompany the jury on its view. Moritz *v.* Larsen, 70 Wis. 569, 36 N. W. 331.

97. Under the Kentucky and Mississippi statutes (see *supra,* note 92) counsel appear to have an absolute right to be present.

98. City of Chicago *v.* Baker, 98 Fed. 830, 39 C. C. A. 318 (the better practice would seem to be to allow counsel to be present if they desire).

In State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, the fact that even the attorneys of defendant were not present at the view was held immaterial where they had the opportunity.

Counsel in accompanying the jury on a view should not comment in any manner on the situation. "The great temptation to improper communication with the jury in such an outdoor and informal view, and unrestrained discussion with them of the relative bearings of objects and places upon the facts in issue, has caused us to question the propriety of leading the respective counsel into it. There appears to be no grave necessity that they should attend the jury upon such an excursion, and it would seem that the jury ought to depend upon their own knowledge of the case, derived from the evidence, and upon their own undirected and uninfluenced observation. There is on such a view, at least a tendency for them to disband and wander about in detachments in search of new discoveries, affording excellent opportunities for the polite and unsuspected attentions of the counsel. It might be as well for the jury to be unaccompanied except by the proper officer." Sasse *v.* State, 68 Wis. 530, 32 N. W. 849.

99. See *infra,* IV, G, e, (3).

1. See "Experiments," III, 10, B; Hughes *v.* General Elec. L. & P. Co., 21 Ky. L. Rep. 1202, 54 S. W. 723.

Where a railroad track and switch were viewed by the jury, the unauthorized running of a train over the track was prejudicial and ground for a new trial. Cox *v.* Chicago, etc. R. Co., 95 Iowa 54, 63 N. W. 450.

In an action for damages for an injury received by a child while operating machinery, a view was allowed and the jury were permitted to see the machinery in operation. The Kentucky statute allows the jury "to have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred" (§ 318, Code Civ. Proc.) The court on appeal said: "It is the place and the place only, that the court is authorized to send the jury to see. The operation of machinery may, by one who is interested, be made so different before the jury from what it was at the time in controversy as to entirely mislead them in regard to the merits of the case." Meier *v.* Weikel, 22 Ky. L. Rep. 953, 59 S. W. 496.

On a prosecution for larceny an order was issued for the inspection of a mare belonging to the defendant, and claimed to be the mother of the colt in question. On the view this mare and another mare claimed by the prosecuting witness to be the mother of the colt, and the colt, were all turned out together and the jury were allowed to gather from their actions which of the two mares was the mother of the colt. *Held,* improper as an experiment used by them as independent evidence. State *v.* Landry, 29 Mont. 218, 74 Pac. 418.

In an action for removing coal from beneath plaintiff's land thereby causing it to crack, the court in

be substantially reproduced[2] to allow experiments to be made in the presence of the jury, at least where both parties consent.[3]

G. Misconduct on the View. — a. *Purpose of the View.* — A view is allowed only for the purpose of giving to the jury a sight and inspection of the place or property in question,[4] and the courts

approving the refusal of a view, said: "The mine could not be entered and it was unnecessary to examine the land in order to be able to apply the evidence. Viewing the land might have aided the jury in determining whether there were cracks in it and their extent, concerning which the evidence was in conflict, but this would have been owing to examinations made by the jury and evidence afforded by the condition of the premises, and this is not permissible. It must be regarded as settled that premises may be viewed by the jury only for the purpose of the better applying the evidence introduced in the course of the trial." Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621.

2. See "Experiments."

3. Wheeling & L. E. R. Co. *v.* Parker, 9 Ohio C. C. (N. S.) 28, 43. "The jury were, by the consent of the parties and the order of the court, in a position where they could satisfy themselves upon a question of fact which they were required to determine. . . . The truth could be unerringly reached by the experiment. . . . We are not prepared to hold that the experiment itself was not proper and unauthorized by law." Stockwell *v.* C. C. & D. R. Co., 43 Iowa 470. But *compare* Moore *v.* Chicago, etc. R. Co., 93 Iowa 484, 61 N. W. 992.

Where the offer of the defendant involved "placing the jury and the judge upon the car or placing them in the vicinity, where they might view the car with others standing upon it in the position in which the plaintiff stood," the court while holding that it was discretionary with the judge to order the view, intimated that it did not regard the experimental part of the view as being improper. Dupuis *v.* Saginaw Val. Tract. Co., 146 Mich. 151, 109 N. W. 413.

In an action for damages for injuries received at a sawmill through the negligence of an employe of the defendant, it was held not to be improper to allow the jury to view the mill in operation; this was not an experiment; a view of its usual working; and moreover the point at issue was not negligence in operating the machinery but negligence in an employe by failing to give warning of a certain act. Olsen *v.* North Pacific Lumb. Co., 106 Fed. 298.

It was held in a prosecution for murder that the jury could experiment with a horse which the deceased was riding in order to determine the position of the parties when the wounds were inflicted. Dillard *v.* State, 58 Miss. 368.

4. O'Berry *v.* State, 47 Fla. 75, 36 So. 440; State *v.* Perry, 121 N. C. 533, 27 S. E. 997.

"In the absence of any statutory provision, or rule of court, if a view of the premises is ordered, it should be a view pure and simple. No examination of witnesses should be had outside of the court room." Garcia *v.* State, 34 Fla. 311, 334, 16 So. 223.

Jury on view "should go for the single purpose of viewing the place, and not for the purpose of hearing any oral explanations or comments even from the person appointed by the court to show it to them." State *v.* Lopez, 15 Nev. 407.

Jury Should Be Instructed as to the purpose of the view. Morrison *v.* Burlington, etc. R. Co. 84 Iowa 663, 51 N. W. 75; Cox *v.* Chicago, etc. R. Co., 95 Iowa 54, 63 N. W. 450.

Instruction Held Proper. — "It appears that you are to hold no conversation with any person outside nor with yourselves while going to or returning from the place, nor while there, on any subject connected with the trial." People *v.* Palmer, 43 Hun (N. Y.) 397.

are very rigid in excluding everything which is in the nature of testimonial evidence.[5]

b. *Presumption of Proper Conduct.* — There is a presumption that the jury conducted itself properly and that there were no irregularities committed upon a view.[6]

c. *Misconduct of Shower.* — The duty of the shower is limited to pointing out the places or property specified in his instructions from the trial judge;[7] but any acts in excess of these instructions will be treated as irregularities, merely, unless a party objects to such conduct at the time or on the return to court,[8] and unless the party objecting has been prejudiced thereby.[9]

d. *Misconduct of Bystanders.* — A view should not be taken in the presence of spectators, and where the sentiment and opinion of

5. Hays *v.* Territory, 7 Okla. 15, 54 Pac. 300 (a session of court cannot be held in a country place or on a public street).

In Garcia *v.* State, 34 Fla. 311, 16 So. 223, the trial court practically adjourned, and went with the jury on their view; witnesses were examined and the trial proceeded regularly; *held* that this practice was erroneous.

May Be Allowed by Consent. While a view was being taken of the place of a murder, the scene of the killing was re-enacted as far as possible by various persons including attorneys for the state and for the defendant. The defendant himself was present but did not object. It was held that he had waived his rights by failure to object to the proceeding and could not complain. Jones *v.* State, 51 Ohio St. 331, 38 N. E. 79.

In Mississippi, under Stat. 1894, c. 62, provision is expressly made for a change of the place of trial to the place where the view is to be taken. The whole organized court is to attend the jury, witnesses are to be examined, and the court is to be regarded as still in session. The same result is apparently reached in Kentucky under the decisions, to the effect that the court is justified in trying the case at the place where the view is had. See Underwood *v.* Com., 119 Ky. 384, 84 S. W. 310.

6. Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417; Rutherford *v.* Com., 78 Ky. 639.

7. People *v.* Bush, 68 Cal. 623, 10 Pac. 169; *s. c.*, 71 Cal. 602, 12 Pac. 781; People *v.* Milner, 122 Cal. 171, 54 Pac. 833. *Compare* Hotelling *v.* State, 3 Ohio C. C. 630.

In Hayward *v.* Knapp, 22 Minn. 5, a new trial was granted because one of the showers answered questions of the jurors and volunteered information as to a material matter in controversy.

8. McMahon *v.* Lynn & B. R. Co., 191 Mass. 295, 77 N. E. 826; Territory *v.* Watanabe Masagi, 16 Hawaii 196, 220.

A party who consents to a view and does not object to the mode in which the premises are pointed out to the jury, cannot claim on appeal that it was done improperly by calling attention to particular facts. People *v.* Fitzgerald, 137 Cal. 546, 70 Pac. 554. And see People *v.* Tarm Poi, 86 Cal. 225, 24 Pac. 998.

9. Doe *v.* Murray, 5 N. B. (Can.) 335.

The fact that members of the jury received unwarranted information from the officers accompanying them is an irregularity merely; and the court in its discretion may refuse a motion to set aside a verdict upon the ground of such irregularity if it believes the defendant was not prejudiced thereby. People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684.

The misconduct of the shower in exceeding the instructions of the court was called to the attention of the court and the jury was directed to disregard what the shower had said and done. This was held to

such persons are brought to the attention of the jury it will be treated as error.[10]

e. *Misconduct of Jury.* — (1.) Conversation With Other Persons. (A.) With Witnesses. — It is generally held improper for the jury to have any conversation with witnesses in relation to the case, while taking the view.[11]

(B.) With Persons in Charge of the Premises. — The jury is not entitled to obtain any information from persons who are in charge of the premises viewed,[12] or who are incidentally encountered there,[13] but prejudice must be shown to have resulted before a new trial will be ordered.

cure the error. Beals *v.* Cone, 27 Colo. 473, 491, 62 Pac. 948.

10. Where one of the witnesses in a case made a remark pertaining to it which was overheard by jurors while on a view, and which seems to have been acted upon, a new trial was granted. Erwin *v.* Bulla, 29 Ind. 95, 92 Am. Dec. 341.

On a view persons present indicated by their remarks and laughter, in the presence of the jury, a belief as to the superiority of the conflicting claims of the parties, as to ownership of a certain horse. *Held,* prejudicial error. State *v.* Landry, 29 Mont. 218, 74 Pac. 418.

11. The action of the trial court in allowing a witness to go on a view with the jury and show them the position of the parties and of himself at the time of the transaction in question, was held erroneous, as no one is to be allowed to speak to the jury on any subject connected with the trail. People *v.* Green, 53 Cal. 60.

It was error for the court to allow a witness in a criminal case to point out to the jury on a view places marked on a diagram which was in evidence; he was instructed not to make any explanations. This was held to be a giving of testimony in the absence of the defendant. State *v.* Bertin, 24 La. Ann. 46.

In Queen *v.* Martin, L. R. 1 Cr. Cas. Res. (Eng.) 378, the jurors on a view asked the witnesses to point out the exact place where they were standing and also where the defendants were standing, and they then placed themselves in the same position to ascertain how well the witnesses could see. *Held,* not to be error.

Judge allowed the defendant, at the request of a juror, to point out on the view the place where he had testified he had hidden his pistol. *Held,* not error; the judge could try the whole case there if he wished. Underwood *v.* Com., 119 Ky. 384, 84 S. W. 310.

12. People *v.* Gallo, 149 N. Y. 106, 43 N. E. 529.

Where jurors on the view asked some questions and received answers but were immediately told by the officers that they had no right to converse, and it did not appear that incorrect information was given them, there was no prejudicial error. People *v.* Johnson, 46 Hun (N. Y.) 667.

The jury on taking a view, asked questions of a person whom they found at the place, and who in response to their questions pointed out the special features of the premises. *Held,* this was a violation of the law, a denial of the right of the defendant to be confronted with the witnesses against him, and a taking of evidence out of court, and the error was not cured unless the state showed clearly that the defendant was not prejudiced thereby. State *v.* Lopez, 15 Nev. 407.

13. State *v.* Perry, 121 N. C. 533, 27 S. E. 997.

In an eminent domain case, the value of land depended upon its adaptability to be subdivided into lots for suburban homes. It was held an immaterial error that while the jury were taking a view of the premises one of the jurors asked a

C. With a Party. — It is regarded as error justifying a new trial for a party to converse with a jury on the view.[14]

(2.) Conversation With Each Other. — The jury should not converse among themselves in relation to what they see, but if they do it is regarded as a mere irregularity.[15]

(3.) Experiments and Individual Examination. — Actions taken by the jurors to satisfy themselves will not be regarded as more than mere irregularities unless it is shown that a party has been prejudiced by the acts.[16]

(4.) Refreshments Served to Jury. — While the mere fact that necessary refreshments were furnished to a jury while on a view is not of itself prejudicial error,[17] yet if there is any ground for suspicion that the jury were influenced by the act, relief may be obtained.[18]

stranger as to the amount of hay raised on the land. Louisville, etc. R. Co. *v.* Whipps, 27 Ky. L. Rep. 977, 87 S. W. 298.

Objection Must Be Duly Made and Entered. — Reighard *v.* State, 22 Ohio C. C. 340, 360.

14. Pond v. Barton, 8 Kan. App. 601, 56 Pac. 139.

Where on a view the defendant conversed with the juror, new trial allowed, although no protest was made until after verdict and although the plaintiff's conduct was also improper. Anderson *v.* Mowatt, 20 N. B. (Can.) 255.

In Hahn v. Miller, 60 Iowa 96, 14 N. W. 119, it appeared that the defendant rode in the same sleigh with the jury on their return from a view of the premises. But it not appearing that he conversed with the jurors, a new trial was refused.

15. People *v.* Bush, 68 Cal. 623, 10 Pac. 169; State *v.* Moore, 119 La. 564, 44 So. 299.

16. The fact that jurors on the view of a murder paced off distances and closely examined the ground, is not error. State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 633.

"The specifications of misconduct are that some of the jurors talked with an outsider about which way the sewer ran, that one made measurements at the manhole, and that another dug into the earth near it with a knife and said that he had struck gravel or rock or something. It is apparent that no substantial prejudice could have resulted from any of these matters." City of Emporia *v.* Juengling (Kan.), 96 Pac. 850.

Where the issue was negligence on the part of the defendant in maintaining a sidewalk, "the facts that one of the jurors uncovered the end of one of the sleepers and in so doing broke off a small piece of it and crumpled it with his fingers, and that another juror cut the end of it with his knife, if such were the facts, do not amount to such misconduct on the part of the jurors as should be held to vitiate the verdict, in the absence of anything showing that they had any influence in the formation of the verdict." City of Indianapolis *v.* Scott, 72 Ind. 196.

17. In Coleman *v.* Moody, 4 Hen. & M. (Va.) 1, the court held it unnecessary to set aside a verdict because it appeared that the jury on taking an inquisition, were served with liquor at the defendant's home, no prejudice appearing.

Where lunch was provided by one of the parties to the suit to the jurors while away on a view, it was held that this was not sufficient cause to set aside the verdict. Vane v. City of Evanston, 150 Ill. 616, 37 N. E. 901. And see Gurney *v.* Minneapolis, etc. R. Co., 41 Minn. 223, 43 N. W. 2; Johnson *v.* Greim, 17 Neb. 447, 23 N. W. 338.

18. Tripp *v.* County Comrs., 2 Allen (Mass.) 556; People *v.* Hull, 86 Mich. 449, 466, 49 N. W. 288; Patton *v.* Hughesdale Mfg. Co., 11 R. I. 188.

(5.) Separation of the Jury. — The requirement that the jury shall not be separated while taking a view is sufficiently complied with where it appears that they were at all times kept in as much of a body as the nature of the case would permit.[19]

f. *Temporary Absence of Defendant.* — In a jurisdiction where the defendant in a criminal case is entitled to be present, his mere unexplained absence from the presence of the jury, for a short time, does not require a reversal.[20]

V. NATURE AND EFFECT OF VIEW.

1. Position That the View Is Not Evidence. — A. In General. In several jurisdictions the rule is held to be that what the jury sees on a view is not to be considered by them as evidence in the case,[21]

All the expenses of the jury on a view were paid by the defendant, who also furnished refreshments to them, and this was known to the jury; this was held to be prejudicial error. Doud *v.* Guthrie, 13 Ill. App. 653.

19. Trustees *v.* Patchen, 8 Wend. (N. Y.) 47, 84; People *v.* Yut Ling, 74 Cal. 569, 16 Pac. 489 (jurors need not always be in sight of each other, though they should never be far apart.).

Jury on a view must be kept together, but where a stage journey was necessary to reach the place it was proper for them to travel in two conveyances, where they were in sight of each other all the time. People *v.* Bush, 68 Cal. 623, 10 Pac. 169.

Even where there was no statutory provision "it was the duty of the court . . . to have kept the jury while on their way to, and on their return from, and in their view of the premises, under the supervision of an officer, so that no person might communicate with them, or express any opinion, or give any directions in their hearing." People *v.* Hull, 86 Mich. 449, 466, 49 N. W. 288.

On a view some of the jurors were in a different room of the house at the time others of them were in other rooms, but this was held not to be a separation of the jury. State *v.* Moore, 119 La. 564, 44 So. 299.

20. While the jury were viewing the inside of a house the defendant was on the outside; it did not appear why it was done, and it was held not to be error, especially since no objection was made at the time. State *v.* Moore, 119 La. 564, 44 So. 299.

21. *England.* — Queen *v.* Martin, L. R. 1 Cr. Cas. Res. 378.

California. — Wright *v.* Carpenter, 49 Cal. 607 (*overruled* by People *v.* Milner, 122 Cal. 171, 184, 54 Pac. 833.

Indiana. — Heady *v.* Vevay, etc. Tpk. Co., 52 Ind. 117; Pittsburgh, etc. R. Co. *v.* Swinney, 59 Ind. 100; Jeffersonville, etc. R. Co. *v.* Bowen, 40 Ind. 545 (*overruling* Evansville, etc. R. Co. *v.* Cochran, 10 Ind. 560); Shular *v.* State, 105 Ind. 289, 4 N. E. 870.

Iowa. — Guinn *v.* Iowa & St. L. R. Co., 131 Iowa 680, 109 N. W. 209.

Minnesota. — Chute *v.* State, 19 Minn. 271; Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Co., 85 Minn. 65, 88 N. W. 272; Schultz *v.* Bower, 57 Minn. 493, 59 N. W. 631.

Nevada. — State *v.* Hartley, 22 Nev. 342, 40 Pac. 372.

Oklahoma. — Hays *v.* Territory, 7 Okla. 15, 54 Pac. 300.

Wisconsin. — See Hughes *v.* Chicago, etc. R. Co., 126 Wis. 525, 106 N. W. 526.

Leading Opinion. — The purpose of the statute "was to enable the jury by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same and thereby the more intelligently to apply the testimony to the issues on trial

but that they can use information thus obtained only to aid them in weighing conflicting testimony, and to better understand and apply the evidence produced.[22]

B. Inability To Incorporate Results of View in Bill of Exceptions. — a. *Theory Stated.* — The inability to incorporate in the bill of exceptions, on appeal, the sources from which the jury received its information seems to have been the basis for adopting the rule,[23] and to have led the courts to the adoption of the principle

before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the weight of evidence or even refuse to set it aside without knowing the facts ascertained by such personal examination by the jury." Close *v.* Samm, 27 Iowa 503.

"It is not to be supposed that the legislature intended that the observations of juries upon the view should have probative effect in determining the issues of fact joined between the parties and yet leave to the judge discretion to prevent the taking of the view." Machader *v.* Williams, 54 Ohio St. 344, 43 N. E. 324.

Party Entitled to Instruction Limiting the Effect of a View. — Vane *v.* City of Evanston, 150 Ill. 616, 37 N. E. 901; Lake Erie & W. R. Co. *v.* Purcell, 75 Ill. App. 573; Chute *v.* State, 19 Minn. 271.

22. *United States.* — Laflin *v.* Chicago, etc. R. Co., 33 Fed. 415.

Idaho. — State *v.* Reed, 3 Idaho 754, 35 Pac. 706.

Illinois. — Vane *v.* City of Evanston, 150 Ill. 616, 37 N. E. 901.

Indiana. — Cleveland, etc. R. Co. *v.* Penketh, 27 Ind. App. 210, 60 N. E. 1095; Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428.

Iowa. — Harrison *v.* Iowa M. R. Co., 36 Iowa 323; Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82.

Minnesota. — Brakken *v.* Minneapolis, etc. R. Co., 29 Minn. 41, 11 N. W. 124.

New York. — People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368 (O'Brien, J., dissenting).

North Carolina. — State *v.* Perry, 121 N. C. 533, 27 S. E. 997.

Ohio. — Machader *v.* Williams, 54 Ohio St. 344, 43 N. E. 324.

Utah. — State *v.* Mortensen, 26 Utah 312, 344, 73 Pac. 562, 633.

West Virginia. — Fox *v.* Baltimore, etc. R. Co., 34 W. Va. 466, 12 S. E. 757.

Wisconsin. — Munkwitz *v.* Chicago, etc. R. Co., 64 Wis. 403, 25 N. W. 438; Washburn *v.* Milwaukee, etc. R. Co., 59 Wis. 364, 18 N. W. 328; Seefeld *v.* Chicago, etc. R. Co., 67 Wis. 96, 29 N. W. 904.

"It is not to obtain original testimony in addition to or contradiction of the evidence given in court, or independent of it, but to obtain a more perfect knowledge of the evidence and to enable the jury better to understand it, and to consider it in the light and by the aid of the sensible objects and localities disclosed by the view." Sasse *v.* State, 68 Wis. 530, 32 N. W. 849.

"A view as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." London Gen. O. Co. *v.* Lavell (1901), 1 Ch. 135, 70 L. J. Ch. 17.

23. Machader *v.* Williams, 54 Ohio St. 344, 43 N. E. 324; Lake Shore, etc. R. Co. *v.* Gaffney, 9 Ohio C. C. 32.

In Zanesville, M. & P. R. Co. *v.* Bolen, 76 Ohio St. 376, 81 N. E. 681, 11 L. R. A. (N. S.) 1107, after a full discussion of the authorities, the earlier case of Machader *v.* Williams, 54 Ohio St. 344, 43 N. E. 324, is followed; the precise holding of the court being that the observations of the jury were not evidence and there-

that the bill of exceptions may be said to contain all the evidence although the jury has taken a view.[24]

b. *Theory Unsound.* — The rule requiring the evidence to be incorporated in the bill of exceptions does not contemplate that the entire evidence should be placed there, but only so much of it as it is practicable to reproduce.[25] Many courts find in the fact that the jury has had a view an added reason why a verdict should not be set aside unless clearly against the weight of evidence;[26] and finally this view would exclude and render illegal all forms of real or demonstrative evidence.[27]

C. Effect of Decisions in Criminal Cases. — On this point it should be noted that while some criminal cases contain strong dicta to the effect that what is seen on a view is not evidence, most of these cases are authorities only to the extent of holding that it is not evidence within the constitutional provision preserving to a defendant the right to be confronted with the witnesses.[28]

fore the bill of exceptions contained all of the evidence and the court did not err in passing upon the weight of the evidence.

"It is the theory of our system of practice that cases must be tried by juries who have no knowledge of their own as to the issues to be tried, and that the decision must be based upon evidence given before the court and jury, and such evidence as can be incorporated into the record and be reviewed by the trial and appellate courts. Juries therefore have no right to inspect or receive in evidence that which cannot be presented to the appellate court for review." Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002.

24. Jeffersonville, etc. R. Co. *v.* Bowen, 40 Ind. 545; Close *v.* Samm, 27 Iowa 503.

25. Chicago, etc. R. Co. *v.* Farwell, 60 Neb. 322, 83 N. W. 71. See Wigmore on Ev., Vol. 2, § 1168; Jones on Ev. § 412.

26. Court hesitates to set aside verdict where jury viewed the premises. Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91; Omaha & R. V. R. Co. *v.* Walker, 17 Neb. 432, 23 N. W. 348; Peoria & F. R. Co. *v.* Barnum, 107 Ill. 160; Peoria G. L. & C. Co. *v.* Peoria R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

"In holding that the evidence was sufficient to justify the submission of the case to the jury on this point, it is to be observed that the jury may have been materially aided by a view taken by them of the locality." Hanks *v.* Boston & A. R., 147 Mass. 495, 18 N. E. 218.

27. The objection that to give the effect of evidence to a view by the jury would hinder the court on appeal is met by pointing out the fact that for hundreds of years the jury has been allowed to consider objects presented to them in court; to inspect persons, and to examine personal injuries and wounds. Chicago, etc. R. Co. *v.* Farwell, 60 Neb. 322, 83 N. W. 71.

"Is it true or is it a standard test, or even a test at all, that the legality and admissibility of evidence depends upon the fact that it must be such as can and must be incorporated into and brought up by the record? We know of no such rule announced by any standard work on the law of evidence. If it be true, then the identification, the pointing out of a defendant in court, is not legitimate or admissible because he cannot be sent up here with the record. A witness' countenance, tone of voice, mode and manner of expression and general demeanor on the stand oftentimes influence the jury as much in estimating the weight they give and attach to his testimony as the words he utters, and yet they cannot be sent up with the record." Hart *v.* State, 15 Tex. App. 202, 228.

28. See *supra,* IV, 4, C, d, (1.).

D. Unauthorized View. — It is the universal rule that an unauthorized view may be prejudicial error as being a taking of evidence out of court, and a holding that an authorized view is not a taking of evidence would seem to be entirely inconsistent with this well established principle.[29]

2. Correct Theory That View Is Evidence. — A. In General. The impossibility of preventing a jury from being influenced by what they see on a view,[30] and the actual fact that what is really seen is evidence in the highest sense[31] is recognized by all the leading

29. See infra, VI; Conrad *v.* State, 144 Ind. 290, 43 N. E. 221.

30. The jury may take into account their view of the premises and make it in connection with other evidence the basis of their verdict. "This is the rational rule. By its adoption a fact is recognized and a fiction abolished. In whatever capacity men act, they will not reject the evidence of their own senses, and it is futile, and almost foolish, to direct them to do so. The human mind has its limitations; and neither human faith in human testimony nor customary instructions from the presiding judge will make jurors accept as true what their own senses assure them is false. This is so plain that courts have little excuse for feigning ignorance of it." Chicago, etc. R. Co. *v.* Farwell, 60 Neb. 322, 83 N. W. 71.

"We are very frank to say that we do not appreciate the refined distinction which is drawn by some of the authorities, wherein it is held that the jury are not at liberty to regard what they have seen as evidence in the case, but must utterly reject it otherwise than as an aid to the understanding of the testimony offered. The folly of it is apparent from the constitution of the human mind and the well understood processes by which juries arrive at conclusions." Denver, etc. R. Co. *v.* Pulaski Irr. Ditch Co., 11 Colo. App. 41, 52 Pac. 224.

"We do not think the court erred in refusing to tell the jury that they must not base their verdict in any degree upon such an examination. . . . If that was the rule, a view would be almost certain to prejudice one side or the other; for the jury, after having seen the work itself, could hardly eradicate the impression thereby made upon their minds, so as to render their verdict without reference thereto." Fitzgerald *v.* La Porte, 67 Ark. 263, 54 S. W. 342.

31. "The view of the premises was evidence. As well say that the plans, photographs, and diagrams of a building which have been introduced and allowed to go before the jury are not evidence, as to hold that a view of the same building by the jurors, permitted by the court, is not evidence." Chicago, etc. R. Co. *v.* Farwell, 59 Neb. 544, 81 N. W. 440, *affirmed* on rehearing, 60 Neb. 322, 83 N. W. 71.

"We understand the object of a view is to acquaint the jury with the physical situation, condition and surroundings of the thing viewed. What they see they know absolutely. If a witness testify to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed, cannot believe, the witness, and they may disregard his testimony." Washburn *v.* Milwaukee, etc. R. Co., 59 Wis. 364, 18 N. W. 328.

"If, for example, it were material to determine whether a hole in the panel of a door was or was not caused by a bullet, it would be permissible to remove the panel, to bring it into the court room, offer and have it received in evidence, and submit to the inspection of the jury. It would not for a moment be doubted if this procedure were adopted, but that the physical object was evidence in the case. If, instead of so doing, the court should direct that the place where the material fact occurred should be viewed by the jury, and the jury should be conducted to the spot, and the panel of the door pointed out to them, would it be any the less the reception of evidence be-

text-book writers[32] and by the better reasoned authorities, and is probably now the prevailing rule.[33]

B. Weight of View as Evidence. — a. *In General.* — As a rule of policy it is generally[34] held that while what the jury saw on the view may be considered by it in reaching a verdict, it may not give such information preëminent or controlling force[35] and that other

cause obtained in that way? Certainly not." People *v.* Milner, 122 Cal. 171, 184, 54 Pac. 833.

"The place appearing on the view is evidence intended to explain, modify, corroborate or contradict the recollection of witnesses as to it." Louisville, etc. R. Co. *v.* Schick, 94 Ky. 191, 21 S. W. 1036.

"When parties to a cause affecting real estate request the trier to visit it for a special inspection, its situation and state as well as its surroundings, so far as they may be material to the issue, are as fully in evidence as if they had been presented to his consideration through descriptions given by witnesses under oath." McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000.

"When a jury have viewed and examined the premises, their own observation, as the learned judge well said, is just as good as that of any of the witnesses; and while they are not to disregard the testimony produced on the trial they are nevertheless not required to repudiate the evidence of their own senses." Hartman *v.* Reading & P. R. Co. (Pa.), 13 Atl. 774.

In California the criminal code recognizes that evidence is received by a jury on a view "when it declares that a new trial shall be granted when the jury has received evidence out of court other than that resulting from a view of the premises." People *v.* Milner, 122 Cal. 171, 54 Pac. 833.

32. Thompson on Trials, §§ 893, 894; Wigmore on Ev., Vol. 2, § 1168; Jones on Ev. § 408; Greenleaf on Ev. 16th ed. § 13, i, j; Wharton on Ev. §§ 345-347.

33. *California.* — People *v.* Milner, 122 Cal. 171, 54 Pac. 833.

Colorado. — Denver, etc. R. Co. *v.* Pulaski Irr. Ditch Co., 11 Colo. App. 41, 52 Pac. 224.

Illinois. — Lake Erie & W. R. Co. *v.* Purcell, 73 Ill. App. 573.

Maine. — Wakefield *v.* Boston & M. R. Co., 63 Me. 385.

Massachusetts. — Parks *v.* Boston, 15 Pick. 198; Tully *v.* Fitchburg R. Co., 134 Mass. 499; Smith *v.* Morse, 148 Mass. 407, 19 N. E. 393.

Mississippi. — Foster *v.* State, 70 Miss. 755, 12 So. 822.

Montana. — Ormond *v.* Granite Mt. Min. Co., 11 Mont. 303, 28 Pac. 289.

New York. — People *v.* Palmer, 43 Hun 397 (*compare* People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368).

West Virginia. — State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

In Nebraska this point has been thoroughly threshed out in the case of Chicago, etc. R. Co. *v.* Farwell, 59 Neb. 544, 81 N. W. 440; 60 Neb. 322, 83 N. W. 71. This view was followed in City of Lincoln *v.* Sager (Neb.), 89 N. W. 617.

34. The statement sometimes seen that in some jurisdictions a view may furnish evidence upon which the jury may act to the exclusion of other evidence will be found to be based principally upon the dicta contained in other cases. See City of Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419; Denver, etc. R. Co. *v.* Pulaski Irr. Ditch Co., 11 Colo. App. 41, 52 Pac. 224; Toledo, etc. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

35. *Colorado.* — Denver, etc. R. Co. *v.* Pulaski Irr. Ditch Co., 11 Colo. App. 41, 52 Pac. 224.

Kansas. — Wellington Waterworks *v.* Brown, 6 Kan. App. 725, 50 Pac. 966; Chicago, etc. R. Co. *v.* Willits, 45 Kan. 110, 25 Pac. 576; City of Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419; Chicago, etc. R. Co. *v.* Mouriquand, 45 Kan. 170, 25 Pac. 567.

Michigan. — City of Grand Rapids *v.* Perkins, 78 Mich. 93, 43 N. W. 1037.

evidence must be produced in order to sustain a casue of action.[36]

b. *On Appeal.* — While the appellate court recognizes the fact that the jury having had a view was in a position to judge of the evidence more satisfactorily, that does not prevent reversal and a

Missouri. — City of Kansas *v.* Butterfield, 89 Mo. 646, 1 S. W. 831, *distinguishing* City of Kansas *v.* Hill, 80 Mo. 523.

Pennsylvania. — Ham *v.* Delaware & H. Canal Co., 155 Pa. St. 548, 26 Atl. 757; Flower *v.* Baltimore & P. R. Co., 132 Pa. St. 524, 19 Atl. 274.

Washington. — Seattle & M. R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498.

"The evidence which the jury may acquire from making the view is not to be elevated to the character of exclusive 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 reviewing court may set aside the verdict." Chicago, etc. R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1083.

"The true rule in such cases is believed to be that the jury in estimating the damages shall consider the testimony as given by the witnesses in connection with the facts as they appeared upon the view; and upon the whole case, as thus presented," ascertain the damages. Gorgas *v.* Philadelphia R. Co., 144 Pa. St. 1, 22 Atl. 715.

"A view may render the testimony more intelligible and otherwise afford valuable assistance, but it does not authorize the jury to ignore physical facts or disregard settled rules of law." In this case, the court was led to grant a new trial largely by a consideration of photographs of the place at which the accident happened from which it drew its knowledge of the physical surroundings." Cunningham *v.* Inhab. of Frankfort (Me.), 70 Atl. 441.

Comparative Weight of Expert Evidence. — While a jury is not bound to shut its eyes to what it sees when an inspection is allowed by the court, and while it may, even on a matter of opinion as to value and damages, weigh the evidence of experts in the light of its own examination of the property, the verdict must find support in some of the evidence. It cannot fix the value of the damages above the highest or below the lowest figure which is fixed by expert evidence, unless there are other circumstances proved in the case which would justify it in so doing." Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

36. Seaverns *v.* Lischinski, 181 Ill. 358, 54 N. E. 1043. And see Fleming *v.* Daly, 12 Colo. App. 439, 55 Pac. 946.

"The view of the premises by the jury is a species of evidence, and must necessarily operate to some extent upon the minds of the jury. The verdict must be supported by other evidence than the view, and a verdict depending upon a view alone could not be upheld." Fitzgerald *v.* LaPorte, 67 Ark. 263, 54 S. W. 342. And see Thompson on Trials, §§ 901, 902.

It Should Be Noted that the remaining cases cited in this note are from jurisdictions which do not recognize a view as furnishing primary evidence; but they nevertheless support the principle laid down in the text.

"If a party has failed to prove a material fact, the jury must take the evidence as it is, even though their view convinces them that the fact exists. To find the fact upon their own observation is not to find it upon evidence, while if it had been the subject of testimony the other party might show the finding to be wrong." Morrison *v.* Burlington, etc. R. Co., 84 Iowa 663, 51 N. W. 75.

In an action for damages to property because of a street improvement the jury viewed the premises, but the plaintiff offered no evidence as to the damages. The instruction of the trial court to the jury to return a verdict for the defendant was held proper, since a view is not evidence. Besuden *v.* Comrs., 7 Ohio C. C. 237.

In an injunction case, based upon deceit, the judgment of the trial judge founded upon a view of the property in question was reversed

new trial when the case made by the bill of exceptions shows it to be proper.[37] It seems, however, that the court on appeal should not be influenced by the fact that a view was taken, unless the proceedings be spread in detail upon the record.[38]

C. Eminent Domain Proceedings. — In several jurisdictions, in some of which at least the rule that a view is evidence is not recog-

upon the ground that there must be independent evidence of a reasonable probability of deception. London Gen. O. Co. *v.* Lavell, (1901) 1 Ch. 135, 70 L. J. Ch. 17.

37. "Though the knowledge acquired by a jury from a view may be such, in some cases as to embarrass a court in passing upon the question of the sufficiency of the verdict to warrant a verdict for the plaintiff, or upon a motion for a new trial, for the reason that the verdict is against the weight of evidence, or that the damages are excessive, yet a judge must, in each case, determine from the circumstances of that case, whether he is so far in possession of all the material evidence as to enable him to act intelligently. The fact that the jury may have had a view presents no insuperable obstacle to the granting a new trial on the ground that the verdict is against the evidence or the damages excessive." Tully *v.* Fitchburg R. Co., 134 Mass. 499.

The plaintiff appealed from an order of non-suit given upon the ground that the evidence was insufficient to warrant a verdict for the plaintiff. A view of the place of the accident was had by the jury and the plaintiff alleged that for this reason the court could not say that the evidence was insufficient. But the court held that the fact that a view was taken did not prevent the court deciding that the evidence was insufficient to support a verdict where it nowhere appeared in the bill of exceptions that there was anything before the jury to be derived from the testimony on their view of the premises which would have warranted a verdict for him. McCarthy *v.* Fitchburg R. Co., 154 Mass. 17, 27 N. E. 773.

Where in assessing damages for taking of land by a railroad, the jury viewed the premises, their award may still be set aside if not supported by the evidence. Munkwitz *v.* Chicago, etc. R. Co., 64 Wis. 403, 25 N. W. 438; Washburn *v.* Milwaukee, etc. R. Co., 59 Wis. 364, 18 N. W. 328.

Verdict of sheriff's jury assessing damages to a party whose land has been taken for a highway may be set aside on the ground of excessive damages. Harding *v.* Medway, 10 Met. (Mass.) 465; Fitchburg R. Co. *v.* Eastern R. Co., 6 Allen (Mass.) 98; Tully *v.* Fitchburg R. Co., 134 Mass. 499.

Direction of Verdict by Trial Judge. — "The presiding justice might properly rule upon the effect of the evidence, and direct a verdict, notwithstanding the fact that the jury had taken a view." Rigg *v.* Boston, etc. R. Co., 158 Mass. 309, 33 N. E. 512. And see Williams *v.* Citizens' Elec. St. R. Co., 184 Mass. 437, 68 N. E. 840. And see *supra*, V, B, b, note 26.

38. Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467.

"We cannot assume in favor of the excepting party, that the inspection of the car by the jury added anything to the evidence stated in the bill of exceptions." Williams *v.* Citizens' Elec. St. R. Co., 184 Mass. 437, 68 N. E. 840.

In an action for negligence, on motion of the defendant a view of the snow plow used on defendant's street car track was taken. On the close of the plaintiff's case the defendant, instead of proceeding, rested his case. The plaintiff now objects that it was improper to incorporate in the bill of exceptions the statements of the defendant's counsel on making his motion for a view, and a narrative of what was pointed out by him to the jury on the view. *Held*, that this was a part of the evidence and properly in the bill of exceptions. McMahon *v.* Lynn & B. R. Co., 191 Mass. 295, 77 N. E. 826.

nized, proceedings under eminent domain and similar statutes, are regarded as being special in their nature and allied to the old English real actions in which the evidence was largely taken by view, and the jury is allowed to consider what it saw on the view,[39] and

39. See "EMINENT DOMAIN," Vol. V, p. 151.

California. — Commissioners appointed to assess damages for land condemned not bound by the testimony. Western Pac. R. Co. *v.* Reed, 35 Cal. 621.

Illinois. — Under the Eminent Domain Act in Illinois (Rev. Stat. c. 47, § 9) "we have repeatedly held that the information derived by the jury from their personal view and inspection of the premises, is to be considered by them, in connection with the other evidence in the case." Vane *v.* City of Evanston, 150 Ill. 616, 37 N. E. 901. And see Rock Island & P. R. Co. *v.* Leisy Brew. Co., 174 Ill. 547, 51 N. E. 572; DuPont *v.* Sanitary Dist., 203 Ill. 170, 67 N. E. 815; Kiernan *v.* Chicago, etc. R. Co., 123 Ill. 188, 14 N. E. 18; Chicago & I. R. Co. *v.* Hopkins, 90 Ill. 316; Green *v.* Chicago, 97 Ill. 370; McReynolds *v.* Burlington & O. R. Co., 106 Ill. 152; Peoria G. L. & C. Co. *v.* Peoria T. R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 375; Groves & S. R. Co. *v.* Herman, 206 Ill. 34, 69 N. E. 36; Illinois, I. & M. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880; Martin *v.* Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86; Mitchell *v.* Illinois & St. L. R. Co., 85 Ill. 566.

In an action on a case for damages to property by construction of viaduct jury may consider view as evidence. Culbertson Prov. Co. *v.* Chicago, 111 Ill. 651.

Rule Has Been Held Not To Apply in an Action Involving a Special Assessment. — Rich *v.* Chicago, 187 Ill. 396, 58 N. E. 306; Cram *v.* Chicago, 94 Ill. App. 199.

Louisiana. — In Louisiana, a jury impaneled under Art. 2608 Civ. Code to assess land taken for a public use are expected to base their verdict upon their own personal knowledge or their view of the land in question. Remy *v.* Municipality No. 2, 12 La. Ann. 500.

Maryland. — A jury summoned under the Maryland Act of 1825, c. 180, to assess damages for property taken by power of eminent domain "is not bound, as juries in ordinary civil and criminal cases are, by the weight of evidence — they may be governed greatly by the 'view' they take." Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479.

Michigan. — In Michigan the jury sits to appraise and condemn lands as a special tribunal, and the jurors "are expected to use their own judgment and knowledge from a view of the premises and their experience as freeholders, quite as much as the testimony of witnesses to matters of opinion." Toledo, etc. R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Inquest to assess damage for land condemned is not bound down by the rigid rules of practice used in courts, but the admission of testimony is left largely to the discretion of the jury. Michigan A. L. R. Co. *v.* Barnes, 44 Mich. 222, 6 N. W. 651.

Missouri. — Jurors are sent to examine property in eminent domain proceedings in order that they may make use of the information thus acquired in estimating damages. Kansas City *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562.

New York. — Commissioners to assess damages for land taken for a public use are entitled to consider the result of their view of premises. *In re* Comrs. of Central Park, 54 How. Pr. (N. Y.) 313; *In re* Kings Co. El. R. Co., 59 Hun 586, 15 N. Y. Supp. 516; *In re* Newland Ave., 60 Hun 581, 15 N. Y. Supp. 63. See *In re* Riverside Avenue, 83 Hun 50, 31 N. Y. Supp. 735 (view proper).

Ohio. — In Ohio two kinds of view by jury are expressly recognized by the decisions. In Williams *v.* Lockoman, 46 Ohio St. 416, 21 N. E. 358, which was a proceeding to establish a drain, § 4452 Rev. Stat. was applied, and it was held that the jury were technical viewers and were entitled to use information acquired upon the view in rendering their ver-

a verdict within the range of the testimony will not be disturbed.[40]

2. In Subsequent Trial. — Even in a jurisdiction where observations made on a view are not considered as evidence, it is permissible on a subsequent trial of the case to call a member of the former jury to testify as to the condition of the premises at the time of the view.[41]

3. Explanatory Evidence. — Evidence explanatory of what the jury has seen upon a view is admissible;[42] any change in the premises since the time of the accident may be shown;[43] but evidence of facts within the knowledge of the jury, who had a view and who knew the facts as well as the witnesses could have known them, has been held inadmissible.[44]

VI. UNAUTHORIZED VIEW.

1. In General. — A jury is required to base its verdict upon the evidence produced in court,[45] or derived from an authorized view;

dict. And see Machader *v.* Williams, 54 Ohio St. 344, 43 N. E. 324; City of Columbus *v.* Bidlingmeier, 7 Ohio C. C. 136.

But in applying the law which relates to ordinary civil actions (§ 5191 Rev. Stat.) it is held that the jury are not entitled to use their view as evidence. Machader *v.* Williams, 54 Ohio St. 344, 43 N. E. 324; Lake Shore, etc. R. Co. *v.* Gaffney, 9 Ohio C. C. 32, 42; City of Columbus *v.* Bidlingmeier, 7 Ohio C. C. 136.

Pennsylvania. — Road jurors may disregard the evidence. Antoinette St., 8 Phila. (Pa.) 461.

Tennessee. — In the charter of a private corporation was a provision that any person whose property was injured by the acts of the corporation could obtain from the circuit court a writ of *ad quod damnum*, directed to the sheriff, who should impanel a jury to go on the premises and assess the damages. *Held*, such jury were to decide from their view alone, and could not take testimony from witnesses. Stevens *v.* Duck River Nav. Co., 1 Sneed (Tenn.) 237. And the same rule was applied in assessing damages against a turnpike company, applying Act of 1850, c. 7235. Clarksville, etc. Co. *v.* Atkinson, 1 Sneed (Tenn.) 426.

40. "The rule in such cases is not to disturb a verdict if it is within the range of the testimony, unless we can clearly see that injustice has been done and that passion or prejudice influenced the action of the jury." Sexton *v.* Union Stock Yard & T. Co., 200 Ill. 244, 65 N. E. 638; West Chicago St. R. Co. *v.* Chicago, 172 Ill. 198, 50 N. E. 185; Rock Island & P. R. Co. *v.* Leisy Brew. Co., 174 Ill. 547, 51 N. E. 572; East & W. I. R. Co. *v.* Miller, 201 Ill. 413, 66 N. E. 275; Lanquist *v.* Chicago, 200 Ill. 69, 65 N. E. 681.

41. "It is urged that because the jurors obtained the information while acting as such upon a former trial, they should not be permitted to testify upon a subsequent trial to physical facts coming to their knowledge during a view made by them on a former trial. The cases cited by counsel do not go to the extent of holding this doctrine." Hughes *v.* Chicago, etc. R. Co., 126 Wis. 525, 106 N. W. 526.

42. Dewey *v.* Williams, 43 N. H. 384.

43. A jury had viewed a certain sidewalk alleged to have been the cause of an injury. It was held proper to introduce testimony to show that the condition of the sidewalk had been changed since the accident. Morton *v.* Smith, 48 Wis. 265, 4 N. W. 330.

44. Neilson *v.* Chicago, etc. R. Co., 58 Wis. 516, 17 N. W. 310.

45. Aldrich *v.* Wetmore, 52 Minn. 164, 53 N. W. 1072.

and where some or all of the jury have unauthorizedly seen or visited the place or property involved in the action, it is within the discretion of the court to award a new trial.[46]

2. Necessity of an Objection. — As such an unauthorized view is not necessarily harmful, it is held that unless a proper objection is made at the time or immediately upon learning of the fact, the party cannot complain of the action upon appeal,[47] and this rule applies to criminal[48] as well as civil cases.

3. Casual Inspection. — Where the inspection of the premises by the jurors was the result of a casual and an unintentional visit or sight of the place,[49] it will not ordinarily be considered as

46. Harrington *v.* Worcester, etc. R. Co., 157 Mass. 579, 32 N. E. 955; Aldrich *v.* Wetmore, 52 Minn. 164, 53 N. W. 1072; Woodbury *v.* City of Anoka, 52 Minn. 329, 54 N. W. 187; Chicago, etc. R. Co. *v.* Oyster, 58 Neb. 1, 78 N. W. 359; Garside *v.* Ladd Watch Case Co., 17 R. I. 691, 24 Atl. 470; Hardin *v.* State, 40 Tex. Crim. 208, 49 S. W. 607; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79.

While the jury were considering their verdict, they were for a time in the room where the homicide was committed, but the court held that this was not ground for a new trial since it did not appear probable that they were influenced in their verdict by this fact. McDonald *v.* State, 15 Tex. App. 493.

Where two jurors visited the place of an alleged rape and verified the testimony of some of the state's witnesses as to physical conditions, but testified that their visit had no effect on their verdict, their conduct would not be regarded as requiring a reversal of the verdict. State *v.* Crouch, 130 Iowa 478, 107 N. W. 173.

New Trial Granted in the following cases: Ortman *v.* Union Pac. R. Co., 32 Kan. 419, 4 Pac. 858; Winslow *v.* Morrill, 68 Me. 362; Bowler *v.* Washington, 62 Me. 302; Aldrich *v.* Wetmore, 52 Minn. 164, 53 N. W. 1072; Floody *v.* Great Northern R. Co., 102 Minn. 81, 112 N. W. 875, 1081.

Inspection After Verdict Agreed Upon But Before it Was Rendered. After the jury had agreed upon a verdict and separated, but before the verdict was returned into court, a juror visited the place of the assault. *Held,* not prejudicial error. Com. *v.* Desmond, 141 Mass. 200, 5 N. E. 856.

Unauthorized View Following an Authorized View. — After taking an authorized view some of the jurors returned a second time. *Held,* improper but not harmful error. Trafton *v.* Pitts, 73 Me. 408.

Unauthorized View of Place Similar to That in Litigation. — Jurors examined a railroad car and track other than those involved in the accident complained of, in order to test the credibility of a witness. *Held,* prejudicial error to the same extent as if they had examined the place where the injury had actually occurred. Pierce *v.* Breman, 83 Minn. 422, 86 N. W. 417.

47. Stampofski *v.* Steffens, 79 Ill. 303; Consolidated Ice Mach. Co. *v.* Trenton H. Ice Co., 57 Fed. 898; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79; Whitcher *v.* Peacham, 52 Vt. 242.

48. Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505. *Compare* People *v.* Tyrrell, 3 N. Y. Crim. 142.

49. Caldwell *v.* Nashua, 122 Iowa 179, 97 N. W. 1000; Lyons *v.* Dee, 88 Minn. 490, 93 N. W. 899; Com. *v.* Brown, 90 Va. 671, 19 S. E. 447; Dysart-Cook M. Co. *v.* Reed, 114 Mo. App. 296, 89 S. W. 591.

The jury in being conducted to its boarding place was incidentally taken past the scene of the homicide, but it not appearing that the jury were subjected to improper influences, it was held not to be reversible error though characterized as reprehensible practice. Luck *v.* State, 96 Ind. 16.

Jury while taking exercise went to the store where the homicide occurred to obtain tobacco. As noth-

requiring a reversal of the judgment or the granting of a new trial.[50]

4. Premeditated Inspection. — If the inspection resulted from a premeditated plan, it is generally considered to have been prejudicial.[51]

5. Prejudice From Conduct. — In some cases the reason for holding an unauthorized view to be prejudicial has been not the purpose and intent with which it was undertaken, but the conduct of the jurors and the nature of their examination of the premises.[52]

6. Proof by Affidavit of Jurors. — Contrary to the general rule this form of misconduct by the jury may be proved by the affidavits of the jurors themselves.[53]

VII. COSTS.

The expenses of a view are to be advanced by the party moving for the view and to be taxed as costs in the case.[54]

ing was pointed out there, or said, it was held not to require a new trial. Tudor *v.* Com., 19 Ky. L. Rep. 1039, 43 S. W. 187.

50. State *v.* Gage (Iowa), 116 N. W. 596; State *v.* Boggan, 133 N. C. 761, 46 S. E. 111; Haight *v.* City of Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193; Buffalo Struct. Steel Co. *v.* Dickinson, 98 App. Div. 355, 90 N. Y. Supp. 268.

Where the jury incidentally saw the place of a homicide but it did not appear that they looked the place over with a view of understanding how the deed was done, nor conversed about it, and where there was no conflict in the evidence on that point, the defendant was not prejudiced by such action and a new trial would not be granted. State *v.* Brown, 64 Mo. 367.

51. Rush *v.* St. Paul C. R. Co., 70 Minn. 5, 72 N. W. 733; People *v.* Tyrrell, 3 N. Y. Crim. 142.

"Where the gist of the action, as was the case here, is the character or condition of the *locus in quo*, or where a view of it will enable the jurors better to determine the credibility of the witnesses, or any other disputed fact in the case, if in such a case the jurors without the permission of the court or the knowledge of the parties visit the locality for the express purpose of acquiring such information, their verdict will be set aside unless it is clear that their misconduct could not and did not influence their verdict." Twaddle *v.* Mendenhall, 80 Minn. 177, 83 N. W. 135.

Where three jurors, in an action for overflowing land, at the solicitation of a friend of the plaintiff inspected a spring, the situation of which was a material point in the case, and were accompanied by the brother of the plaintiff and by a witness and friend of the plaintiff, who conversed with the jurors about the matter, the verdict was properly set aside. Deacon *v.* Shreve, 22 N. J. L. 176.

Misconduct affording ground for new trial for one of the jurors to view the premises of his own accord after the court had refused to order a view. Helme *v.* Kingston, 8 Kulp (Pa.) 221.

52. Eastwood *v.* People, 3 Park. Crim. (N. Y.) 25, 39; Nelson *v.* State (Tex. Crim.), 58 S. W. 107; State *v.* Perry, 121 N. C. 533, 27 S. E. 997; Tyrrell *v.* Bristow, Alcock & Nap. (Ir.) 398.

The jury visited the scene of the crime, unauthorizedly, and examined the place, experimented, talked among themselves and with witnesses. *Held*, prejudicial error, although they filed affidavits that they went out of idle curiosity and were not influenced by what they saw. Conrad *v.* State, 144 Ind. 290, 43 N. E. 221.

53. Twaddle *v.* Mendenhall, 80 Minn. 177, 83 N. W. 135; Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417.

54. Huntress *v.* Town of Epsom,

VIII. VIEW BY JUDGE.

Views have sometimes been taken by the judge before whom actions were being tried, and the practice has been quite generally[55] approved,[56] especially in equitable actions.[57]

15 Fed. 732 (applying the New Hampshire practice); Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417 (applying Wis. Rev. Stat. § 2852).

This is especially provided for in the statutes of England, Florida, Massachusetts, Michigan, New Hampshire, Rhode Island, Virginia, West Virginia and Wisconsin.

"Courts of law have power to allow the reasonable expenses of surveys and views in proper cases." Stockbridge Iron Co. *v.* Cone Iron Wks., 102 Mass. 80, 89.

Under a statute by which the plaintiff was bound to pay the costs if he recovered a verdict for less than 40*s.*, if his verdict was less than that, but there had been a view taken by the jury, costs of increase would not be allowed even though the view had been taken at the request of the defendant. Flint *v.* Hill, 11 East (Eng.) 184.

55. Action for an Injunction. The trial judge inspected the premises and after hearing evidence refused the injunction. The court on appeal ordered a rehearing, observing: "We do not mean to say that the mere fact that the judge may have seen the premises involved before him in litigation, or may have known them, will either disqualify him or be a reason for reversing his judgment. But where a personal inspection is made a part of the trial and expressly enters into the judgment rendered, we think this is error unless authorized by consent of parties. Atlantic & B. R. Co. *v.* Cordele, 125 Ga. 373, 54 S. E. 155.

A judge trying a prisoner under the provisions of a local statute can not, in the absence of a statute, take a view. Reg. *v.* Petrie, 20 Ont. (Can.) 317.

56. In an election contest case, the issue being the boundary line between two precincts, the trial judge, with the consent of the parties, visited the locality. On appeal the court refused to disturb his finding. Preston *v.* Culbertson, 58 Cal. 198, 210.

In England — Under the Rules of the Supreme Court, 1883, Order 50 r. 4, any judge is given authority to inspect any property or thing concerning which any question may arise. London Gen. O. Co. *v.* Lavell, (1901), 1 Ch. 135, 70 L. J. Ch. 17 (injunction case).

57. In an action to foreclose a mortgage, the judge while the action was pending, inspected the premises. "Even if as independent information upon the subject of value, it was improper to be considered, such inspection may greatly aid the judge in understanding and weighing the evidence before him in the form of affidavits attempting to describe methods of division of the premises, and the adaptability and value of the buildings upon such subdivision. This purpose is recognized as even justifying inspection by a jury. If necessary to sustain the order, we should not hesitate to indulge in a presumption that the information thus acquired was only so applied. Why should not the judge use his knowledge of the premises to test the force of an affidavit as to their situation and value, as well as he should use his personal knowledge of the character of the affiant to test its credibility?" Kremer *v.* Thwaits, 105 Wis. 534, 81 N. W. 654.

"Information obtained by the court in an action to quiet title, from a personal view of the premises, is independent evidence that can be taken into consideration in determining the issues of the case." Hatton *v.* Gregg, 4 Cal. App. 537, 88 Pac. 592.

In an injunction suit, the issue being the location of a boundary line, the act of the trial justice in viewing the premises at the request of the parties and accompanied by them was approved, and it was held that his decision on the facts would not be disturbed unless at variance with uncontradicted evidence. Weiant *v.*

IX. VIEWS BY OTHER OFFICERS.

Views have been permitted under various other circumstances. Thus at common law, the tenant in certain real actions was entitled to a view.[58] Commissioners in eminent domain proceedings customarily take views.[59] It has been held proper for an auditor[60] or referee[61] to take views.

Rockland Lake T. R. Co., 61 App. Div. 383, 70 N. Y. Supp. 713. And see *In re* New York El. R. Co., 58 Hun 611, 12 N. Y. Supp. 858; *In re* Staten Island M. R. Co., 22 App. Div. 366, 48 N. Y. Supp. 274.

In a partition action, the judge refused to view the premises though requested to do so, upon the ground that he did not think it would aid him in reaching a decision. It was held that there was no error in his refusing to make the view, though he might have visited the premises if he had so desired. Parrott *v.* Barrett (S. C.), 62 S. E. 241.

Presumption of Consent of the Parties. — In an injunction case complaint was made of the action of the court in visiting the premises after the facts of the case had been agreed upon by the parties, but it was held that in the absence of a finding that it was done without the consent of the parties it would not be assumed that it was. Bitello *v.* Lipson, 80 Conn. 497, 69 Atl. 21, 16 L. R. A. (N. S.) 193.

58. Bacon's Abr. "Juries," (H) p. 372.

The early practice was that either the tenant or demandant was entitled to a view of the premises where a writ of right was taken, as of course. Freeholders of Gravesend *v.* Voorhis, 1 Johns. Cas. (N. Y.) 237; Haines *v.* Budd, 1 Johns. Cas. (N. Y.) 335.

59. Commissioners appointed to estimate and apportion damages incurred by condemnation of land have a right to act upon information derived in part from a personal view of the premises. *In re* Certain Lands in Twelfth Ward, 33 Misc. 648, 68 N. Y. Supp. 965; *In re* Comrs. of Central Park, 54 How. Pr. (N. Y.) 313; *In re* Kings Co. El. R. Co., 60 Hun 586, 15 N. Y. Supp. 516, 517; Western Pac. R. Co. *v.* Reed, 35 Cal. 621.

60. An auditor reported to the court that in his opinion a view was necessary to a just decision of the case and that it should be taken before the evidence was introduced. On motion of the plaintiff the auditor was authorized to take the view, and it was held that the court had authority to so order if it considered it necessary. Clark *v.* Baker, 192 Mass. 226, 78 N. E. 455.

61. See Claflin *v.* Meyer, 75 N. Y. 260, 31 Am. Rep. 467.

VOIR DIRE.

CROSS-REFERENCES:

Atheist,
Bias,
Competency,
Expert and Opinion Evidence,
Infants.

Definition. — The phrase "voir dire" has reference to the oath administered to, or the preliminary examination of, witnesses or jurors to determine competency to act in their respective capacities.[1]

I. WITNESSES.

1. Right of Examination, Application Therefor and Burden of Proof. — The party against whom a witness is called is entitled to have him put on his voir dire, in order to show his incompetency.[2] And the court has the same right.[3] It is sometimes held that the

1. "Voir dire. To speak the truth. Refers to an oath administered to a proposed witness or juror, and also to the examination itself, to ascertain whether he possesses the required qualification, he being sworn to make true answers to the questions about to be asked him concerning the matter." Anderson's Dict. of Law, p. 1093. See also Bouvier's Law Dict., Vol. II, p. 645. As bearing out the definition in its relation to witnesses, see Doe *v.* Webster, 12 Ad. & El. 442, 40 E. C. L. 88. 4 P. & D. 270, 9 L. J. Q. B. 373; Dewdney *v.* Palmer, 4 Mees. & W. (Eng.) 664; Yardley *v.* Arnold, 10 Mees. & W. (Eng.) 141; Mifflin *v.* Bingham, 1 Dall. (U. S.) 272. And as to jurors, see Finch *v.* United States, 1 Okla. 396, 33 Pac. 638; Ellis *v.* State, 25 Fla. 702, 6 So. 768; Paducah, etc. R. Co. *v.* Muzzell, 95 Tenn. 200, 31 S. W. 999.

2. Brown *v.* State, 24 Ark. 620.

When a party is offered as a witness, the examination ought to be suffered to ascertain in favor of which party he is interested. Rochelle & S. *v.* Musson, 3 Mart. O. S. (La.) 73.

In State *v.* Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605, it appeared that a witness introduced in the lower court on behalf of the state was five years of age, of ordinary intelligence, with very little or no knowledge of moral accountability and clearly outside the pale of legal responsibility. She was held competent to testify without a sufficient preliminary examination to determine her competency. *Held,* error.

Preliminary Examination Not Permissible To Show Defense. — When a witness is called to testify to any fact, the opposite party may, before he has testified, interrogate him in order to show that the evidence offered is incompetent and to exclude it on that ground. The court says: "But the order by conduct of trials will not admit of a party interposing in that manner for the purpose of showing he has a defense to the facts which the witness is offered to prove." Lautenschlager *v.* Hunter, 22 Minn. 267.

Determination of Question in Another Proceeding Not Sufficient. "It was the right of the prisoner to test the competency of the witness, either as to religious belief — whether she recognized the obligation of an oath — or as to intellectual capacity. It is no answer that on another occasion and in a different legal proceeding the judge made such an examination. The prisoner was a stranger to that inquiry, without opportunity to offer testimony or suggest questions. The witness may have been compos mentis on one day and a lunatic on another. The question is as to the competency at the time she was offered as a witness. 10 Johns. 362; Gelband *v.* Spingly, 15 Serg. & Rawle, 235; Evans *v.* Hallock, 7 Wheat. 453." White *v.* State, 52 Miss. 216.

Not Discretionary. — A party has an absolute right to examine a witness on voir dire to determine his competency. Seeley *v.* Engell, 13 N. Y. 542.

Right in Civil and Criminal Cases. In civil as well as criminal cases witnesses may be put on their voir dire. Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142.

3. Finch *v.* United States, 1 Okla. 396, 33 Pac. 638.

party offering a witness is also entitled to examine on voir dire to show competency,[4] especially where there is a *prima facie* appearance of incompetency appearing on the face of the record.[5]

Burden of Proof. — The burden of proving facts which make the witness incompetent is upon the party challenging his competency.[6]

The Correct Practice is to state the objection and ground of the application (to have a witness put on voir dire) so that the court may determine as to the propriety of entering upon the investigation;[7] but since the objection is merely to the competency of the witness and not to the admissibility of his testimony, the testimony offered need not be set out when the objection is made.[8]

Duty of the Court. — It is sometimes held that when an objection as to incompetency is made it is then the duty of the court to examine for the purpose of determining the question.[9]

2. Conduct of Examination. — A. In General. — a. *Old Rule.* **(1.) Objection Before Witness Sworn in Chief.** — It was formerly the practice to require the party objecting to the competency of a witness to make the objection before the witness was sworn in chief,

4. Henderson *v.* State, 135 Ala. 43, 33 So. 433. *Contra,* Foley *v.* Mason, 6 Md. 37.

5. In Bunter *v.* Warre, 1 B. & C. 689, 8 E. C. L. 186, which was an action of replevin, a joint holding was alleged by the plaintiff and T. B., who was no party to the record. The testimony of T. B. having been rejected without any examination or voir dire to enable him to explain his situation, a new trial was granted. See Goodhay *v.* Hendry, 1 Moody & M. (Eng.) 319, and Wandless *v.* Cawthorne, 1 Moody & M. (Eng.) 322, involving competency of bankrupts.

6. Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266 (witness is presumed to be competent and will be permitted to testify in absence of objection); Standley *v.* Moss, 114 Ill. App. 612 (interest, if doubtful, goes to credit and not competency. Burden on party objecting to competency); West *v.* Steamboat Berlin, 3 Iowa 532.

"The witness, both upon the preliminary examination and throughout his entire deposition, disavowed all interest in the result of the suit; the facts disclosed by him do not contradict his disavowal; consequently, the decision of the court in favor of his competency we think was correct." Strawbridge *v.* Spann, 8 Ala. 820. See also State *v.* Brown (Del.), 36 Atl. 458 (*holding* that a witness as to whose competency the court is evenly divided will be admitted to testify).

7. Brown *v.* State, 24 Ark. 620. And see also Pegg *v.* Warford, 7 Md. 582, *holding* that since there is a legal presumption in favor of the competency of every witness produced on the stand, no objection to the competency of such witness can be entertained unless the party making it discloses at the time the ground upon which the objection is based.

8. Wright *v.* Stowe, 49 N. C. (4 Jones' L.) 516.

9. **Duty of the Court.** — Where timely objection is made to a witness testifying on the grounds of incompetency it is unquestionably the duty of the court to make such examination as will satisfy him as to the competency or incompetency of the witness. Dahlstrom *v.* Portland Min. Co., 12 Idaho 87, 85 Pac. 916. But see Cannady *v.* Lynch, 27 Minn. 435, 8 N. W. 164, *holding* that the court is under no obligation to examine into the competency of a witness, objected to as mentally unsound where the appearance of the witness does not indicate any such incapacity.

and in the event that it was not, the objection was considered waived.[10]

(2.) Modes of Determining Competency. — There were two ways to determine the witness' competency.[11] He might examine the proposed witness on his voir dire oath,[12] or he might call witnesses to prove incompetency.[13]

(3.) Waiver of Methods. — (A.) In General. — A resort to one method constituted a waiver of the other. This rule was based upon the theory that a party by examining a witness on voir dire appealed to his conscience and accepted him as a competent witness, and therefore he was not in a position to afterwards impeach his credibility.[14]

10. Dewdney *v.* Palmer, 4 Mees. & W. (Eng.) 664; Stone *v.* Blackburn, 1 Eq. Rep. (Eng.) 37, 1 T. R. 719. But see Rochelle & S. *v.* Musson, 3 Mart. O. S. (La.) 73, where it was held not error to administer voir dire on oath after witness had been sworn in chief.

Rule Not Inflexible. — "It has never been held in this state that objection to the competency of a witness is necessarily waived, unless made before the examination in chief." In the opinion, however, it is said: "The general rule, however, is that objection to the competency of a witness ought to be taken before the witness is examined in chief, but the rule is not inflexible." Hill *v.* Postley, 90 Va. 200, 17 S. E. 946, *citing* Warwick *v.* Warwick, 31 Gratt. (Va.) 70.

11. *United States.* — Mifflin *v.* Bingham, 1 Dall. 272; Evans *v.* Eaton, 1 Pet. C. C. 322, 8 Fed. Cas. No. 4,559.

Connecticut. — Chance *v.* Hine, 6 Conn. 231.

Illinois. — Walker *v.* Collier, 37 Ill. 362.

Maine. — Stuart *v.* Lake, 33 Me. 87.

Massachusetts. — Bridge *v.* Wellington, 1 Mass. 219.

New York. — Welden *v.* Buck, Anthon's N. P. 15.

North Carolina. — Ray *v.* Marriner, 3 N. C. (2 Hayw.) 585.

Pennsylvania. — Schnader *v.* Schnader, 26 Pa. St. 384.

Tennessee. — Berry *v.* Wallin, 1 Overt. 106.

Vermont. — Dorr *v.* Osgood, 2 Tyler 28.

The intent of a witness may be proved by his own examination or by evidence aliunde; but the adoption of either mode of proof by the party objecting to the competency of the witness, precludes a resort to the other for a like purpose, upon the same ground. LeBarron *v.* Redman, 30 Me. 536.

Where defendant proposed to show want of religious belief by introducing witness and the court refused to allow it unless they first interrogate the witness himself, it was held that the court erred. Odell *v.* Koppee, 5 Heisk. (Tenn.) 88.

12. Bridge *v.* Wellington, 1 Mass. 219.

Other Evidence as to Competency of Lunatic. — To exclude a witness from testifying as being non compos, or an idiot, the fact must be proved by other testimony and not by a preliminary examination of the witness, and even if the court has any discretion by which they permit such preliminary examination, still it is not error for them to refuse to allow it. The court says if a witness, objectionable on the ground of legal infancy, is wanting in a sense of moral obligation, is a lunatic or non compos, he cannot be permitted to testify, but the fact should not be proved by the witness himself for he is as unsuitable to prove or disprove this fact as any other. Robinson *v.* Dana, 16 Vt. 474.

13. Bridge *v.* Wellington, 1 Mass. 219.

14. Mifflin *v.* Bingham, 1 Dall. (U. S.) 272; Schnader *v.* Schnader,

(B.) Waiver of Extrinsic Evidence. — After a witness on his voir dire had denied interest it could not be proved by other evidence so as to affect his competency,[15] but such evidence might go to his credibility before the jury.[16]

(4.) Examination as to Documents. — (A.) In General. — There is no objection to requiring a witness, examined upon his voir dire, to identify a paper which shows his interest, and then reading the paper in connection with his evidence. This is not adopting both modes. The paper forms a part of the voir dire examination.[17]

(B.) Documents Not Produced. — A witness may be examined upon the voir dire as to the contents of a will, deed, or other written instrument, supposed to contain evidence of his interest, without the production of the instrument itself.[18] The general rule requiring the production of the best evidence does not apply in such cases, for an objection to a witness on the ground of interest is often unexpectedly made. Neither the witness, therefore, nor the party producing can be reasonably required to have with them written papers

26 Pa. St. 384; Walker *v.* Collier, 37 Ill. 362.

The general rule on this subject as laid down in Diversy *v.* Will, 28 Ill. 216, is that a witness who is objected to because of interest in the event of the suit, may be examined on his voir dire or his interest may be shown by witness, but resort cannot be had to both modes. Walker *v.* Collier, 37 Ill. 363, *distinguishing* Stebbins *v.* Sackett, 5 Conn. 258.

The rule is not, that in the same case, the interest of the witness on one set of facts, may not be proved by disinterested testimony, and afterwards, his interest on a different set of facts may not be proved under the voir dire; but it is, that "at the same time," or, more correctly, on the same ground, these distinct modes may not be resorted to. Where the inquiry of interest arises at different times and on distinct grounds, there is no possible objection to the establishment of it, by different modes of testimony. Stebbins *v.* Sackett, 5 Conn. 258.

Waiver of Voir Dire. — And it was generally held that where a party calls witnesses to prove interest, he will not be allowed an examination on voir dire. Bridge *v.* Wellington, 1 Mass. 219; Stuart *v.* Lake, 33 Me. 88.

15. M'Alister's Lessee *v.* Williams, 1 Overt. (Tenn.) 107; Evans *v.* Eaton, 1 Pet. C. C. 322, 8 Fed. Cas. No. 4,559, *reversed* on other points, 3 Wheat. 454; Butler *v.* Tufts, 13 Me. 302; LeBarron *v.* Redman, 30 Me. 536; Lessee of Bisbee *v.* Hall, 3 Ohio 449.

16. M'Alister's Lessee *v.* Williams, 1 Overt. (Tenn.) 107. See also Ellis *v.* State, 25 Fla. 702, 6 So. 768; Hooker *v.* Johnson, 6 Fla. 730.

17. Hamblett *v.* Hamblett, 6 N. H. 333.

18. Miller *v.* Mariner's Church, 7 Me. 51; Howell *v.* Lock, 2 Campb. (Eng.) 14; The King *v.* Gisburn, 15 East (Eng.) 57; Hamblett *v.* Hamblett, 6 N. H. 333; Herndon *v.* Givens, 16 Ala. 261.

In Stebbins *v.* Sackett, 5 Conn. 258, the court said: "As to the subject-matter of the inquiry, in order to found an objection to the interest of the witness, from the necessity of the case, there must be one exception from the usual rule. 'On the examination of a witness as to his situation, he may be asked any questions concerning instruments he has executed, without producing those instruments; for the party against whom he is called not knowing the witnesses to be produced against him, cannot always be prepared with the evidence to prove him incompetent." *Citing* Peake's Ev. 196, 1 Swift's Dig. 740.

or documents which happen to be referred to on such an inquiry.[19]

b. *Modern Rule. — Generally No Voir Dire Examination.* — By the modern practice, counsel generally waits until a witness has been sworn in chief, and then, if necessary, examines him as to competency.[20]

(1.) Discretion of Court. — Although this is now the common practice, yet it is within the discretion of the court to allow an examination on voir dire.[21]

(2.) Right of Objecting Party. — And in at least one instance it was held that it was the right of the objecting party to examine on voir dire.[22]

(3.) Waiver of Defendant's Right Because of Plaintiff's Examination. And where a plaintiff conducts an examination of a witness on voir dire and the witness is ruled competent, to show incompetency the defendant must do so at this time, and upon failure he thereby waives his right of objection and also his right to examine on voir dire.[23]

(4.) Examination by Court. — The court may and should conduct a preliminary examination of a witness, for the purpose of determining mental capacity,[24] especially in the case of infants.[25] But

19. Miller *v.* Mariner's Church, 7 Me. 51; Robertson's Exrs. *v.* Allen, 16 Ala. 106.

But where it appears that a witness on his voir dire examination has with him the document rendering him incompetent, it must be produced since the reason for dispensing with its actual production, viz., the difficulty of procuring it, has ceased. Butler *v.* Carver, 2 Stark. (Eng.) 433.

To Show Lack of Interest. — A witness examined on the voir dire and exhibiting an apparent interest in the cause, may be permitted to show by testifying further that such apparent interest has been removed by writings or records, although not produced or present at the time. Fifield *v.* Smith, 21 Me. 383.

20. Jacobs *v.* Layborn, 11 Mees. & W. (Eng.) 685.

21. *Alabama.* — Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515.

Connecticut. — Stebbins *v.* Sackett, 5 Conn. 258.

Florida. — Hooker *v.* Johnson, 6 Fla. 730.

Illinois. — Walker *v.* Collier, 37 Ill. 362.

Indiana. — Wright *v.* Mathews, 2 Blackf. 187.

Louisiana. — Weigel's Succession, 18 La. Ann. 49.

Maine. — Butler *v.* Tufts, 13 Me. 302; Fifield *v.* Smith, 21 Me. 383.

Maryland. — Foley *v.* Mason, 6 Md. 37.

Massachusetts. — Bridge *v.* Wellington, 1 Mass. 219.

Tennessee. — Harrel *v.* State, 1 Head 125.

22. Seeley *v.* Engell, 13 N. Y. 542.

23. In Henderson *v.* State, 135 Ala. 43, 33 So. 433, a boy of nine years was examined on voir dire and ruled competent. After examination on fact was begun, the defendant objected. *Held*, a waiver of objection and also of right to examine on voir dire.

24. Insane Person. — "It seems, however, to be the usual practice, and we think the proper and orderly way to proceed for the court to examine the witness for the purpose of ascertaining his condition of mind and ability to truthfully and correctly narrate the facts concerning which he is called to testify, and in determination of this fact it may often be found proper and necessary to call other witnesses to testify." State *v.* Simes, 12 Idaho 310, 85 Pac. 914.

25. Flanagin *v.* State, 25 Ark. 92;

if the question of competency is not raised by the parties to the suit, the court may in its discretion omit an examination to determine competency.[26]

(5.) Time for Objection to Incompetency. — (A.) INCOMPETENCY KNOWN. Where the witness' incompetency is known the objection must be raised, under the modern rule, as soon as the witness is sworn and before his examination is begun.[27]

(B.) INCOMPETENCY UNKNOWN. — (a.) *In General.* — Where the witness' incompetency is unknown, objection must be made as soon as it is discovered.[28]

Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869; Simpson *v.* State, 31 Ind. 90; State *v.* Doyle, 107 Mo. 36, 17 S. W. 751; State *v.* Jackson, 9 Or. 457; State *v.* Reddington, 7 S. D. 368, 64 N. W. 170; State *v.* Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605.

"The question of the competency of the witness on account of mental incapacity is one to be passed on by the court, and if request is properly made, the court should first test the mental capacity of the witness. After such examination the action of the court in permitting the witness to testify or not testify is largely confined to the sound discretion of the trial court." Mills *v.* Cook (Tex. Civ. App.), 57 S. W. 81.

Where a witness, a child of sixteen years, was reared in a Christain country and in a Christian family, a voir dire examination is not necessary. Den *v.* Vancleve, 5 N. J. L. 589, 655.

26. Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

27. *England.* — Turner *v.* Pearte, 1 T. R. 717.

Alabama. — Henderson *v.* State, 135 Ala. 43, 33 So. 433.

Illinois. — Standley *v.* Moss, 114 Ill. App. 612.

Iowa. — State *v.* O'Malley, 132 Iowa 696, 109 N. W. 491; Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428; Murphy *v.* McCarthy, 108 Iowa 38, 78 N. W. 819; Watson *v.* Riskamire, 45 Iowa 231.

Louisiana. — State *v.* Downs, 50 La. Ann. 694, 23 So. 456.

Maryland. — Andre *v.* Bodman, 13 Md. 241, 71 Am. Dec. 628.

Massachusetts. — Donelson *v.* Taylor, 8 Pick. 390.

Ohio. — Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430.

Pennsylvania. — Howser *v.* Com., 51 Pa. St. 332.

Tennessee. — Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

Virginia. — Pillow *v.* Southwest Va. Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

Objection to the competency of a witness if known must be taken before the witness is examined. Code § 3860; Brunswick & W. R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84.

"If not made at the time he is introduced." State *v.* Crab, 121 Mo. 554, 26 S. W. 548. See also Miller *v.* Miller's Admr., 92 Va. 510, 23 S. E. 891; State *v.* Williams, 28 La. Ann. 604.

Objection to competency must be taken at the outset before witness is sworn. People *v.* M'Garren, 17 Wend. (N. Y.) 460 (so held in case of infidel); Watson *v.* Riskamire, 45 Iowa 231 (witness wife of one of the parties to action). See also State *v.* Houston, 50 Iowa 512. But see State *v.* Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, *holding* that it was not error for the trial court to allow an objection to the competency of a witness to be made after his examination in chief had been taken, although his incapacity was known at the time he was offered.

28. *California.* — Brooks *v.* Crosby, 22 Cal. 42.

Maine. — Butler *v.* Tufts, 13 Me. 302.

Maryland. — Andre *v.* Bodman, 13 Md. 241, 71 Am. Dec. 628.

(b.) *When Other Evidence Necessary.* — Where the examination of a witness shows his incompetency, objection must be made at once according to the general rule, but when his incapacity can only be determined by a consideration of other evidence it is proper to defer the question until his examination is completed.[29]

(c.) *Incompetency Appearing Through Witness Himself.* — If it appears from the witness' own testimony after he has been sworn in chief that he is incompetent on account of interest, his testimony may be rejected,[30] and even after he has been examined as to his interest on his voir dire and has been received as a competent witness.[31]

(6.) Waiver. — If an objection is not made upon discovery it is waived.[32] And so where cross-examination is made with knowledge of incapacity, the objection is waived.[33] The rule is equally

Massachusetts. — Donelson *v.* Taylor, 8 Pick. 390.

Mississippi. — Carter *v.* Graves, 6 How. 9.

New Jersey. — Sheridan *v.* Medan, 10 N. J. Eq. 469, 64 Am. Dec. 464.

New York. — Seeley *v.* Engell, 13 N. Y. 542; Swift *v.* Dean, 6 Johns. 523.

Ohio. — Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430.

"Objections to the competency of a witness ought generally to be taken before he is examined in chief. A party aware of his interest will not be permitted to examine a witness and then object to his competency if he dislike the testimony. But it appears the defendant was not apprised of the existence of this interest until discovered on the examination of Martial C. Johnson. His objection then made was not too late. It is a general rule that at whatever stage of the cause (before the trial is concluded) the interest of the witness be discovered his testimony may be excluded." Johnson *v.* Alexander, 14 Tex. 382. See also article "OBJECTIONS," Vol. IX, p. 28.

29. Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361.

30. Stone *v.* Blackburn, 1 Eq. Rep. (Eng.) 37, 1 T. R. 719.

Where the objection to the competency of a witness does not appear upon the pleadings or upon the testimony of witnesses previously examined, the party against whom the witness is called may raise the objection whenever the facts on which it is founded are disclosed by the witness. Rogers *v.* Dibble, 3 Paige (N. Y.) 238.

31. Cole's Lessee *v.* Cole, 1 Har. & J. (Md.) 572; Evans *v.* Eaton, 1 Pet. C. C. 322, 8 Fed. Cas. No. 4,559. But see Henderson *v.* State, 135 Ala. 43, 33 So. 433.

32. Standley *v.* Moss, 114 Ill. App. 612; Kingsbury *v.* Buchanan, 11 Iowa 387; Lewis *v.* Morse, 20 Conn. 211; Drake *v.* Foster, 28 Ala. 649.

The rule is that objection to the competency of witnesses must be made as soon as opportunity to present it occurs, and failure to make it at that time must be considered as a waiver. Milsap *v.* Stone, 2 Colo. 137.

"The rule is well settled for obvious reasons, that objections to the competency of a witness must be made before his examination, if known to the party objecting, or they will not avail. And if the knowledge is first acquired after the examination of the witness has commenced the objection is waived if the witness is suffered to proceed after the discovery." State *v.* Damery, 48 Me. 327, *citing* Donelson *v.* Taylor, 8 Pick. (Mass.) 390. See also Com. *v.* Green, 17 Mass. 515; Stuart *v.* Lake, 33 Me. 87, *quoting* Greenl. on Ev. See article "OBJECTIONS," Vol. IX, p. 28.

33. Planters' & M. Ins. Co. *v.* Tunstall, 72 Ala. 142; Burgess Inv. Co. *v.* Vetti, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Wait *v.* Maxwell, 5 Pick. (Mass.) 217, 16

applicable where the objecting party has himself examined the witness in relation to those matters in regard to which he is alleged to be incompetent.[34]

(7.) Distinction Between Partial and Total Incapacity. — Where the witness' incapacity is but partial, it is not necessary that an objection should be made until he is examined as to those matters to which his incapacity relates.[35]

(8.) Expurgation of Incompetency by Witness' Own Oath. — If one party proves by evidence a witness to be incompetent, the witness cannot purge himself of such incompetency by his own oath.[36]

(9.) Particular Interrogation To Show Situation. — If a witness on voir dire denies generally that he has any interest in the event of the suit, he may be particularly interrogated as to his situation, for

Am. Dec. 391; Miller *v.* Miller, 92 Va. 196, 23 S. E. 232; *In re* Hess' Estate, 57 Minn. 282, 59 N. W. 193.

A mulatto having been examined in chief as a witness for the state — on cross-examination it appeared that he had been a slave, whereupon the prisoner's counsel called on the court to exclude the testimony, there being no evidence that he had been emancipated. *Held,* the objection came too late, there being no averment that the incompetency of the witness was not known before the examination in chief. The color of the witness would naturally have suggested an inquiry into his condition on voir dire, and as the prisoner had a person in court to prove the witness had once been a slave, this could have been no surprise when on cross-examination the witness testified to that fact. State *v.* Taylor, 11 La. Ann. 430.

34. *Kentucky.* — Weil & Bro. *v.* Silverstone, 6 Bush 698.

Louisiana. — Castleman *v.* Stone, 5 Mart. N. S. 282; Buard's Curator *v.* Buard's Heirs, 5 Mart. N. S. 132.

Michigan. — Dunlap *v.* Dunlap, 94 Mich. 11, 53 N. W. 788.

Missouri. — Ess *v.* Griffith, 139 Mo. 322, 40 S. W. 930.

Ohio. — Choteau *v.* Thompson, 3 Ohio St. 424.

Pennsylvania. — Bair *v.* Frishkorn, 150 Pa. St. 466, 25 Atl. 123, 30 Am. St. Rep. 823.

Tennessee. — Thomas *v.* Irvin, 90 Tenn. 512, 16 S. W. 1045.

Virginia. — Pillow *v.* Southwest Va. Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Hord's Admr. *v.* Colbert, 28 Gratt. 49.

35. Murphy *v.* McCarthy, 108 Iowa 38, 78 N. W. 819; Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428; Bolin *v.* State, 9 Lea (Tenn.) 516; Swift *v.* Dean, 6 Johns. (N. Y.) 523; LeBarron *v.* Redman, 30 Me. 536.

If a witness is altogether incompetent to testify, objection must be taken before the witness is examined at all. If he is competent as to some matters and incompetent as to others, the objection may be taken at the time he offers to testify as to the matters concerning which he is incompetent. Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266.

36. Vincent *v.* Lessee of Huff, 4 Serg. & R. (Pa.) 298; Gordon *v.* Bowers, 16 Pa. St. 226; Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266; Diversy *v.* Will, 28 Ill. 216.

Where a witness is shown to be interested as a partner by other witnesses, he is not competent to testify even as to his interest on voir dire. Robinson *v.* Turner, 3 Gr. (Iowa) 540.

A witness can never be examined on the voir dire as to his interest unless called on by the party objecting to him. Wright *v.* Mathews, 2 Blackf. (Ind.) 187, *citing* Vincent *v.* Lessee, 4 Serg. & R. (Pa.) 298.

But Where the Evidence Showing Incompetency Is Merely Prima Facie, the witness may, on his voir dire oath, give his testimony in rebuttal of such presumption. Peralta *v.* Castro, 6 Cal. 354.

the purpose of discovering his interest.[37] And if he states generally that he is interested he must be rejected, unless the examination is followed up so as to show that the interest is not such as to exclude him.[38]

(10.) Cross-Examination To Show Interest. — A party has a right to cross-examine a witness on voir dire as to qualifications or interest.[39]

(11.) Sufficiency of Voir Dire Examination. — Interest proven on voir dire is sufficient proof thereof.[40]

Question of Competency for the Court. — It is generally held that the question as to the competency of a witness, by reason of interest or otherwise, is for the court,[41] and not for the jury,[42] or for the witness himself.[43]

37. Baldwin *v.* West, Hardin (Ky.) 50; Reid's Lessee *v.* Dodson, 1 Overt. (Tenn.) 395; Emerton *v.* Andrews, 4 Mass. 653.

38. Williams *v.* Matthews, 3 Cow. (N. Y.) 252.

A witness may be asked to explain the nature of his interest so that the court may decide whether his interest is such as ought to disqualify. Moore *v.* Sheridine, 2 H. & McH. (Md.) 453.

39. Beach *v.* Covillaud, 2 Cal. 237.

But see Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406, where a mother on voir dire testified that she knew the value of her son's services and the court refused to allow cross-examination as to her sources of knowledge. The court said: "We think the court was right. The witness having stated that she knew the value of the services was then competent. Upon general cross-examination as to the sources of her knowledge, the jury would then weigh the value of her testimony in connection with her knowledge as shown."

Experts. — As to cross-examination of experts in general in relation to their qualifications, see article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 547, notes 91 and 92.

40. The interest of a witness as a stockholder may be proved by his statements on the voir dire without producing any other evidence thereof. Bank of Oldtown *v.* Houlton, 21 Me. 501.

Where a witness acknowledges on the voir dire that he was once interested, his own statement that the interest was at an end does not render him competent. Den ex dem. Ely *v.* Jones, 1 N. J. L. 46.

41. Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Jordan *v.* State, 22 Ga. 545; Cook *v.* Mix, 11 Conn. 432; State *v.* Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605.

42. Cook *v.* Mix, 11 Conn. 432; State *v.* Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605 (error for the court to refer the question of competency to the jury either by instructions or otherwise).

Compare Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266, *holding* that if a witness has been declared to be competent by the court and during the progress of the trial evidence should be introduced which would make his competency doubtful, the jury should be instructed to determine this question and if they should find that the witness is incompetent, not to consider his testimony on points concerning which he was not competent to testify.

43. A person is not incompetent as a witness because he believes himself interested in the event of the suit; the court and not the person called as a witness must decide upon his competency. Objections arising from a supposed moral or honorary obligation go merely to the credibility of the witness. Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94. And see article "EXPERT AND OPINION EVIDENCE," Vol. VIII, p. 548, notes 93-95, for a discussion

(12.) Effect of Discovery of Incompetency. — (A.) In General. — Where in the course of a trial it is incidentally discovered that a witness is interested, the evidence will be struck out though no objection was made on voir dire,[44] or the jury should be instructed to disregard the evidence already given.[45]

(B.) Prior Unsuccessful Objection Immaterial. — This rule is applied notwithstanding there has been a previous attempt unsuccessfully made to exclude him, by the party against whom he was produced.[46]

B. Religious Belief. — Where a witness is objected to as an atheist, the better practice appears to be to examine witnesses and not to swear the witness himself on voir dire.[47]

In Massachusetts and some other states there can be no inquiry as to religious belief on voir dire.[48]

In Maryland where the court examined an alleged atheist as to his religious belief and then offered to allow testimony to be produced contradicting the testimony of the witness himself, it was held that there was no substantial error.[49]

C. Conclusiveness of Court's Decision as to Competency. Testimony given on voir dire is addressed to the court and not to the jury unless the latter's aid is solicited by the former. The decision of the trial court will not be reviewed by an appellate court when the question is one of fact,[50] unless the error of the judge be

in relation to opinion of witness as to his own qualifications.

44. Howell *v.* Lock, 2 Campb. (Eng.) 14.

45. Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266; State *v.* Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605.

46. Schillinger *v.* McCann, 6 Me. 364; Butler *v.* Tufts, 13 Me. 302; The Queen *v.* Muscot, 10 Mod. 192, 88 Eng. Reprint 689; Le Barron *v.* Redman, 30 Me. 536; Evans *v.* Eaton, 1 Pet. C. C. 322, 8 Fed. Cas. No. 4,559, *reversed,* but on other grounds, 3 Wheat. 454.

47. Arnd *v.* Amling, 53 Md. 192.

48. Com. *v.* Burke, 16 Gray (Mass.) 32; Com. *v.* Smith, 2 Gray (Mass.) 516.

A witness cannot be required to testify to his want of belief in any religious tenet nor to divulge his opinion upon matters of religious faith. Dedric *v.* Hopson, 62 Iowa 562, 17 N. W. 772, *citing* Searcy *v.* Miller, 57 Iowa 613, 10 N. W. 912, where on cross-examination the questions as to his belief were held error, *quoting* 1 Greenl. Ev. § 370, the court says: "The state of his religious belief at the time he is offered as a witness is a fact to be ascertained. The ordinary mode of showing this is by evidence of his declarations previously made to others, the person himself not being interrogated. The want of religious belief must be established by other means than the examination of the witness upon the stand. He is not to be questioned as to his religious belief, nor required to divulge his opinion. If he is to be set aside for want of religious belief this fact is to be shown by other witnesses and by evidence of his previously expressed opinions voluntarily made known to others." *Citing* Com. *v.* Smith, 2 Gray (Mass.) 516.

49. Arnd *v.* Amling, 53 Md. 192.

For a full discussion of religious belief as affecting competency, see article "Atheist," Vol. II, p. 64.

50. *United States.* — Wright *v.* Southern Exp. Co., 80 Fed. 85.

California. — People *v.* Craig, 111 Cal. 460, 44 Pac. 186.

Connecticut. — Holcomb *v.* Holcomb, 28 Conn. 177.

palpable and plain and such as to amount to an abuse of justice.[51]

II. JURORS.

1. Practice and Evidence in General. — A. Right of Examination. — The object and purpose of the examination of a juror is to determine whether or not he is qualified to sit in the trial, and for this purpose either party has a right to request that the jurors

Georgia. — Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266.

Idaho. — State *v.* Simes, 12 Idaho 310, 85 Pac. 914.

Illinois. — Wickliffe *v.* Lynch, 36 Ill. 209.

Indiana. — Nave's Admr. *v.* Williams, 22 Ind. 368.

Maine. — Jackson *v.* Jones, 38 Me. 185.

Massachusetts. — O'Connor *v.* Hallinan, 103 Mass. 547.

North Carolina. — State *v.* Perry, 44 N. C. (Busb. L.) 330.

Pennsylvania. — Lyon *v.* Daniels, 14 Pa. St. 197.

The competency of a witness is a question of law for the court (so held in case of weak-minded person). Kelly *v.* People, 29 Ill. 287. Also in case of lunatic. Coleman *v.* Com., 25 Gratt. (Va.) 865; Duncan *v.* Welty, 20 Ind. 44.

Where a witness was examined on voir dire, Chief Justice Shaw said: "In every question of the competency of a witness on the ground of interest there is a question of law and a question of fact, on both of which the judge at law must decide. Upon the question of fact his decision is conclusive unless upon satisfactory considerations. We may think it proper to report the whole evidence and reserve the question for the whole court when perhaps the merits of the case may depend upon it. In the present case we consider the decision of the judge on the question of fact conclusive. Dole *v.* Thurlow, 12 Met. (Mass.) 157; Duncan *v.* Welty, 20 Ind. 44.

Question of Competency May Be Left to Jury. — "It" (competency) "is usually a question for the court and often depends on intricate questions of fact and the judge may in his discretion take the opinion of the jury upon them." Walker *v.* Skeene, 3 Head (Tenn.) 1.

The court may in a civil case refer the question of the competency of a witness to the jury when it is a question of fact. The rule is different in criminal cases. Spencer *v.* Trafford, 42 Md. 1, *citing* Funk's Lessee *v.* Kincaid, 5 Md. 404; Nicholson *v.* State, 38 Md. 140. See also Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502; Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266; Currier *v.* Bank of Louisville, 5 Coldw. (Tenn.) 460.

51. State *v.* Bailey, 31 Wash. 89, 71 Pac. 715; Uthermohlen *v.* Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911.

"The mode of electing and determining by examination the fact of competency is left to the sound discretion of the judge; and when the exercise of that discretion has been called in question it has been more than ever declared by this court that we believe that the court before the examination of a child offered as a witness is made better able to determine as to its competency to testify than this court can possibly be from the bare transcript, and we would not feel warranted in reversing a conviction had on account of the admission of such testimony unless it was made clearly to appear that the discretion of the court had been abused." Williams *v.* State, 12 Tex. App. 127.

Whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness is a question for the discretion of the trial judge, and his ruling in that regard will not be disturbed by an appellate court except in case of manifest abuse of discretion, or where the witness is admitted to have been rejected upon an

be put upon their voir dire in order that their competency may be determined.[52]

The Form of the Oath is not material unless prescribed by statute.[53]

B. CROSS-EXAMINATION. — A juror may be cross-examined as to his qualifications;[54] but the court may in its discretion limit the scope of the cross-examination of a juror on his voir dire. He should not be subjected to the rigid cross-examination of a witness on cross-examination,[55] and cross-examination must be made before the juror has been accepted or rejected by the opposing party,[56] or has been declared competent by the court after an examination on voir dire.[57]

C. CONTRADICTION. — A statement of a witness on voir dire may be contradicted by witnesses who may be called to testify to any fact tending to show the incompetency of the juror.[58]

D. VOIR DIRE EXAMINATION BEFORE OR AFTER CHALLENGE. — In some states the rule is that before challenge, neither party has a right to interrogate a juror to ascertain whether he is subject to challenge,[59] yet the court may, in the exercise of its discretion, per-

erroneous view of legal obligations. Clinton *v.* State, 53 Fla. 98, 43 So. 312.

52. Ellis *v.* State, 25 Fla. 702, 6 So. 768; Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142; State *v.* Mann, 83 Mo. 589; Finch *v.* United States, 1 Okla. 396, 33 Pac. 638; Paducah, etc. R. Co. *v.* Muzzell, 95 Tenn. 200, 31 S. W. 999; Hendrick *v.* Com., 5 Leigh (Va.) 707; Brown *v.* Carkeek, 14 Wash. 443, 44 Pac. 887.

In Fisher *v.* Brooklyn Hts. R. Co., 84 N. Y. Supp. 254, the court refused to wait for one of the lawyers. *Held*, that this did not deprive defendant of his right to examine the jurors on voir dire.

53. Denham *v.* State, 22 Fla. 664.

54. Hardin *v.* State, 4 Tex. App. 355.

55. State *v.* Cornelius, 118 La. 146, 42 So. 754.

It is not error for the trial judge to exercise control of counsel for the accused with regard to the extent of his cross-examination of a juror on his voir dire, if the same be reasonably exercised. State *v.* Cancienne, 50 La. Ann. 1324, 24 So. 321.

56. Hardin *v.* State, 4 Tex. App. 355; Grissom *v.* State, 4 Tex. App. 374.

57. Handy *v.* State, 101 Md. 39, 60 Atl. 452.

58. Simmons *v.* State, 73 Ga. 609, 54 Am. Rep. 885; People *v.* Evans, 72 Mich. 367, 40 N. W. 473; Nesbit *v.* State, 43 Ga. 238; Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884.

59. Hornsby *v.* State, 94 Ala. 55, 10 So. 522; Lundy *v.* State, 91 Ala. 100, 9 So. 189; Hawes *v.* State, 88 Ala. 37, 7 So. 302; State *v.* Flower, Walker (Miss.) 319. See also Crippen *v.* People, 8 Mich. 117.

"The uniform practice of the courts has been to try all challenges to individual jurors, whether grand or petit, in the manner here pointed out. To be technically correct, therefore, on the trial of any such challenge, the challenge should be interposed first and evidence introduced afterwards." Territory *v.* Lopez, 3 N. M. 104, 2 Pac. 364.

The rule prevailing in this state is that, before challenge, neither party has a right to interrogate a juror to ascertain whether he is subject to challenge. Hill *v.* Nash, 73 Miss. 849, 19 So. 707, *citing* Boles *v.* State, 63 Ala. 30.

In trials for misdemeanor there is no right to examine a juror on voir dire without first challenging him and assigning a cause of challenge. This must be done before the juror is sworn unless the cause of challenge is unknown till afterward. Where it does not appear to the reviewing court that any particular

mit this to be done, and a ruling allowing it is not revisable.[60]

In Other Jurisdictions it is held that an examination on voir dire may be conducted for the purpose of ascertaining whether or not there exist grounds for challenging.[61]

E. Examination of Jurors Separately or Collectively. — It is generally held that the accused in a criminal case is entitled to examine on voir dire each juror separately as to his qualifications.[62]

F. Burden of Proof and Weight of Evidence. — A person called as a juror is presumed to be qualified and impartial until the contrary is shown. The challenging party takes upon himself the burden of proving the disqualification and he does not relieve himself of that burden until he has made out a *prima facie* case, or in criminal cases, such a case as leaves the juror's impartiality in reasonable doubt.[63]

juror was challenged or that any cause of challenge was assigned, or at what stage of the proceedings the request was made to examine the jurors on voir dire, the refusal of the court to put each and every one of the jurors on his voir dire at the request of counsel for the accused, cannot be held to be erroneous, the onus of showing error being upon the party who alleges it. Schnell *v.* State, 92 Ga. 459, 17 S. E. 966.

69. Mann *v.* State, 134 Ala. 1, 32 So. 704; Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; State *v.* Lautenschlager, 22 Minn. 514.

The rule laid down in Smith *v.* Lautenschlager, 22 Minn. 514, that whether a trial court will allow questions preliminary to challenge to be put to a person called to sit in a criminal case, as to his qualification, is purely a matter of discretion, adhered to and applied in a case where nothing further appeared in the record than that defendant had exhausted all of her peremptory challenges when her counsel attempted to ask such questions. State *v.* Smith, 56 Minn. 78, 57 N. W. 325.

61. Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295; People *v.* Reynolds, 16 Cal. 128; People *v.* Backus, 5 Cal. 275.

62. Driskell *v.* Parish, 10 L. R. 395, 7 Fed. Cas. No. 4,087; Williams *v.* State, 60 Ga. 367; Jackson *v.* State, 103 Ga. 417, 30 S. E. 251; Horbach *v.* State, 43 Tex. 242; Taylor *v.* State, 3 Tex. App. 169; Hardin *v.* State, 4 Tex. App. 355; Ray *v.* State, 4 Tex. App. 450.

It is error for the court to cause twelve jurors to be sworn upon their voir dire and examined together touching their competency, ordering such as disqualified themselves to stand aside. Each juror should be disposed of and either accepted or rejected before another is presented to accused, and more than one cannot be examined on their voir dire. Wilkerson *v.* State, 74 Ga. 398, *citing* Roberts *v.* State, 65 Ga. 430, 432, Code §§ 4681-4684.

May Be Called and Sworn Together, But Must Be Examined Separately. — Wasson *v.* State, 3 Tex. App. 474.

In Missouri the defendant is not entitled to examine each juror separately in regard to the formation or expression of an opinion when the court has already put the inquiry to the panel as a whole. State *v.* Munch, 57 Mo. App. 207. In the opinion it is said: "It is clearly within the discretion of the court how many jurors should be placed in the box for examination at one time."

In Connecticut the accused is not entitled as a matter of strict right to examine each juror individually as to his qualifications. It is within the discretion of the trial court, and unless it appears that that discretion has been improperly exercised, or that defendant was injured by the refusal, it is not ground for a new trial. State *v.* McGee (Conn.), 69 Atl. 1059, *citing* State *v.* Lee, 69 Conn. 186, 194, 195, 37 Atl. 75.

63. Holt *v.* People, 13 Mich. 224; State *v.* Jones, 32 Mont. 442, 80 Pac.

2. Who May Examine. — A. Examination by Court. — The examination of jurors for the purpose of acceptance by one party or the other must necessarily be left to the judicial discretion of the court. It is the right[64] and duty[65] of the latter to subject, or cause to be subjected, jurors to such examination as in its discretion is necessary to determine whether they are competent and impartial.

Court's Exclusive Right. — In some cases it has been held that it is the exclusive right of the court to examine on voir dire.[66]

Necessity for Request for Examination. — But the court is not

1095; Shafstall *v.* Downey (Ark.), 112 S. W. 176; State *v.* Hamilton, 74 Kan. 461, 87 Pac. 363.

Weight and Sufficiency of Evidence. — Where the examination of a juror raises a doubt of his being an elector of the county where the action is brought, there is no error in sustaining a challenge for cause. Omaha, etc. R. Co. *v.* Cook, 37 Neb. 435, 55 N. W. 943.

Contradictory Answers. — Answers given finally by a juror on his voir dire to questions propounded to him by the court, differing from those first given and which have shown him utterly incompetent, are entitled to little weight when they have been changed after the judge has threatened the juror with proceedings for contempt of court because of his original answers. Such a juror should not be placed upon the panel. State *v.* Fourchy, 51 La. Ann. 228, 25 So. 109.

64. Wells *v.* State, 102 Ga. 658, 29 S. E. 442; Donovan *v.* People, 139 Ill. 412, 28 N. E. 964.

In King *v.* State (Tex. Crim.), 64 S. W. 245, it was held that the court in asking certain questions did not invade the provinces of the counsel. In the opinion the court says: "The court is not only not interdicted from asking questions, but the statute provides that he may interrogate jurors. In Davis *v.* State, 19 Tex. App. 201, the court said: 'We are of the opinion that with proper limitations, the safer practice would be to permit counsel to make examination, but this matter is within the discretion of the court, and if not abused we will not reverse its action in the premises.'"

65. Wells *v.* State, 102 Ga. 658, 29 S. E. 442; Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; State *v.* Coleman, 20 S. C. 441.

Duty of Court To Propound or Cause To Be Propounded such questions as will test the competency of the jurors to pass upon the issues in the case. Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142.

In Wisconsin a Justice of the Peace is not bound to examine jurors on voir dire. In Bracken *v.* Preston, 1 Pin. (Wis.) 365, *citing* M'Corkle *v.* Binns, 5 Binn. (Pa.) 340, the court says: "Without an act on the subject a juror may be sworn, but there is no obligation to do so."

66. The better practice, in the examination of veniremen upon their voir dire is to permit questions to be asked by the counsel in the case; still there is nothing in the Florida statute on the subject to prohibit the court from exclusively burdening itself with the entirety of such examination if it sees fit to do so. Jones *v.* State, 35 Fla. 289, 17 So. 284. See also Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

In Guice *v.* State, 60 Miss. 714, it is held to be optional with the court to allow counsel to propound questions on voir dire to proffered jurors or to do so itself.

"The whole matter, relative to the examination of jurors, beyond the provisions of the statute, is one that must be left to the sound judgment and judicial discretion of the presiding judge. This applies not only to the propounding of further questions to the juror, but also to the manner of putting them. The counsel has no right personally to interrogate the jurors with a view of showing their bias or prejudice by facts drawn out by cross-examination or something very like it. The orderly conducting

required to put jurors on their voir dire where no request for such examination is made.[67]

B. Examination By Counsel. — It is generally held that such reasonable examination by counsel should be allowed as will enable the court to see that jurors stand indifferently between the parties and are possessed of the requisite qualifications,[68] and also to enable counsel to challenge for cause if cause exists, or to exercise the right of peremptory challenge when in their judgment it is deemed necessary or admissible.[69]

When Failure To Allow Not Prejudicial Error. — While pertinent questions should be allowed to be asked by counsel, if the court should deny the right and interrogate the juror from the bench so as to show that the juror is honest and impartial as between the litigants, that fact appearing of record, there can be no reason for reversing the judgment when neither party has been prejudiced.[70]

of trials will be better promoted by adhering as a general rule to the usual practice of interrogating the jurors by questions propounded by the court or by their order. Com. *v.* Gee, 6 Cush. (Mass.) 174.

67. Especially so it would seem when there was no issue as to the facts, but merely a legal question whether the jurors were disqualified on an admitted state of facts. Tucker *v.* Buffalo Cotton Mills, 76 S. C. 539, 57 S. E. 626.

Where a judge did not examine the jurors as to their general qualifications but simply stated to them the qualifications demanded of them by the law and announced that they should answer as to their qualifications when interrogated by counsel, and counsel failed to make an examination, a new trial will not be granted even though one of the jurors was not a citizen where examination would have shown it. People *v.* Evans, 124 Cal. 206, 56 Pac. 1024.

68. Jones *v.* State, 35 Fla. 289, 17 So. 284. But see Guice *v.* State, 60 Miss. 714; Powers *v.* Presgroves, 38 Miss. 227; Comfort *v.* Mosser, 121 Pa. St. 455, 15 Atl. 612 (refusal to allow examination as to bias reversible error); State *v.* Steeves, 29 Or. 85, 43 Pac. 947 (*held,* error to refuse examination to show bias).

The court erred in refusing the defendant's counsel permission to ask pertinent and proper questions of the persons called as jurors testing their capacity and competency, and to advise him of the propriety of exercising the right of peremptory challenge. Donovan *v.* People, 139 Ill. 412, 28 N. E. 964.

Examination by Judge Does Not Curtail Right of Party. — "We shall not question the right of the judge to pursue the examination of the juror personally instead of leaving it as is customary to the prosecuting officer; but he is mistaken in supposing that the defense could have any less liberty in examination than if he had allowed the case to proceed in the usual way." Stephens *v.* People, 38 Mich. 739.

Counsel May Examine Subject to Court's Control. — The trial court has and may exercise a broad discretion in the matter of ascertaining the fitness of persons for jury services, and though counsel for each party may examine those who constitute the jury, they must do so within reasonable limits subject to the court's reasonable control. South Covington, etc. R. Co. *v.* Weber, 26 Ky. L. Rep. 922, 82 S. W. 986. See also Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

69. Donovan *v.* People, 139 Ill. 412, 28 N. E. 964. *Contra,* Kansas City, M. & B. R. Co. *v.* Whitehead, 109 Ala. 495, 19 So. 705.

70. London & L. Fire Ins. Co. *v.* Rufer's Admr., 89 Ky. 525, 12 S. W. 948.

3. Nature and Extent of Inquiry. — A. In General. — The effect and purpose of the examination of a juror on voir dire is to determine whether or not he is qualified to sit in the trial, and for this purpose a rigid examination is allowed before his acceptance by the parties to the cause. Every question needful to show the juror's disqualification may be propounded.[71] The examination should be such as is calculated to disclose the juror's relation to the parties to the cause or the actual disposition of his mind as to the subject-matter of the action, for either of these conditions may render the juror incompetent.[72]

B. Pertinency of Questions. — Questions asked must be pertinent and proper for testing a juror's capacity and competency.[73] The court should exclude questions, answers to which would not affect the juror's competency to sit in the case,[74] or questions

71. State *v.* Harris, 51 La. Ann. 1194, 25 So. 984; Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Williams *v.* Godfrey, 1 Heisk. (Tenn.) 299.

A venireman was asked upon his voir dire if he was under prosecution for any crime. He answered that he believed that he was and was thereupon excused. This was not error. Ellis *v.* State, 25 Fla. 702, 6 So. 763.

Disability Removed. — Where upon the voir dire of a proposed juror he states that he is of foreign birth and parentage, but, without objection, is also permitted to testify that he has declared his intention to become a citizen of the United States, the apparent disability is removed. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

72. People *v.* Plyler, 126 Cal. 379, 58 Pac. 904 (juror may be asked as to whether he believes it right in a particular case to take the law into his own hands, although he himself commits a crime); Justices, etc. *v.* Griffin, etc. R. Co., 15 Ga. 39; Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795; Burgess *v.* Singer Mfg. Co. (Tex. Civ. App.), 30 S. W. 1110 (question as to membership in fraternal orders may be asked); State *v.* Bokien, 14 Wash. 403, 44 Pac. 889; State *v.* Everitt, 14 Wash. 574, 45 Pac. 150 (question as to how juror would look on evidence of defendant if he went on stand, admissible).

73. Stoots *v.* State, 108 Ind. 415, 9 N. E. 380; South Covington, etc. R. Co. *v.* Weber, 26 Ky. L. Rep. 922, 82 S. W. 986; State *v.* Harris, 51 La. Ann. 1194, 25 So. 984; State *v.* Cross, 72 Conn. 722, 46 Atl. 148; Com. *v.* Surles, 165 Mass. 59, 42 N. E. 502 (no error in refusing to allow questions which add nothing further to the inquiry); State *v.* Mann, 83 Mo. 589 (jurors not bound to answer impertinent or irrelevant questions); Stagner *v.* State, 9 Tex. App. 440 (examination should be confined to particular cause of challenge under investigation).

Considerable latitude should be allowed in the examination of jurors to the end that all who have any bias or prejudice, or are otherwise disqualified may be excluded from the panel, but the inquiry should never extend so far as to unnecessarily introduce extraneous matter of a prejudicial character that may improperly influence the verdict. Swift & Co. *v.* Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

74. *Alabama.* — Hawes *v.* State, 88 Ala. 37, 7 So. 302; Parrish *v.* State, 139 Ala. 16, 36 So. 1012.

California. — People *v.* Brittan, 118 Cal. 409, 50 Pac. 664 (question as to how many murder cases a juror had sat on).

Florida. — Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Illinois. — Pennsylvania Co. *v.* Rudel, 100 Ill. 603 (where under a statute providing that persons selected by the county board to serve as jurors shall be of "sound judgment and well informed," the ques-

which merely have a tendency to confuse or mislead the juror.[75]

C. Leading Questions. — Leading questions are permissible in the discretion of the court.[76]

D. Character and Number of Questions. — What shall be the character and number of the questions is left largely to the discretion of the judge, who must keep in mind whether the minds of the jurors are in such a condition that they can pass fairly and intelligently upon the issues to be submitted to them.[77] While counsel may suggest questions to be asked, they have no right to insist that questions as framed by them shall be adopted by the court.[78]

E. Discretion of Court. — The examination should, in all cases, be confined to a legitimate inquiry into the particular matter under investigation, and taking range enough only to put the court and counsel in possession of such material matters affecting the juror as will enable them to act intelligently in the selection of the jury. The nature and extent of the inquiry in each case is necessarily left to the sound judgment and judicial discretion of the presiding judge. What would be reasonable examination in one case would be manifestly unreasonable in another, and the trial court is therefore clothed with large discretion in controlling and limiting the examination and may prevent its abuse.[79]

tion, state briefly "your idea of the duties of a juror" was held improper).

Iowa. — State *v.* Cleary, 97 Iowa 413, 66 N. W. 724.

Louisiana. — State *v.* Casey, 44 La. Ann. 969, 11 So. 583.

Maryland. — Handy *v.* State, 101 Md. 39, 60 Atl. 452.

Massachusetts. — Com. *v.* Abbott, 13 Met. 120.

Mississippi. — Natchez, etc. R. Co. *v.* Bolls, 62 Miss. 50.

Missouri. — State *v.* Garth, 164 Mo. 553, 65 S. W. 275.

North Carolina. — State *v.* Mills, 91 N. C. 581.

Texas. — Woodroe *v.* State, 50 Tex. Crim. 212, 96 S. W. 30; Shaw *v.* State, 32 Tex. Crim. 155, 22 S. W. 588.

Vermont. — State *v.* Smith, 72 Vt. 366, 48 Atl. 647.

Virginia. — Richardson *v.* Planters' Bank, 94 Va. 130, 26 S. E. 413.

Washington. — State *v.* Bokien, 14 Wash. 403, 44 Pac. 889; State *v.* Holedger, 15 Wash. 443, 46 Pac. 652 (question as to whether a clergyman's testimony would be given more credence than any other person's).

75. State *v.* Perioux, 107 La. 601, 31 So. 1016; State *v.* Harris, 51 La. Ann. 1194, 25 So. 984.

76. People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213; People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

77. Justices, etc. *v.* Griffin, etc. R. Co., 15 Ga. 39; Howell *v.* Howell, 59 Ga. 145; Holton *v.* Hendley, 75 Ga. 847; Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142; State *v.* Coleman, 20 S. C. 441.

78. Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142.

79. *Colorado.* — Union Pac. R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 891.

Connecticut. — State *v.* Cross, 72 Conn. 722, 46 Atl. 148.

Georgia. — Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721; Nobles *v.* State, 127 Ga. 212, 56 S. E. 125.

Illinois. — Donovan *v.* People, 139 Ill. 412, 28 N. E. 964.

Kansas. — Swift & Co. *v.* Platte, 68 Kan. 1, 74 Pac. 635, *reversing* on other points, 72 Pac. 271.

Louisiana. — State *v.* Cornelius, 118 La. 146, 42 So. 754; State *v.* Hinton, 49 La. Ann. 1354, 22 So. 617; State *v.* Perioux, 107 La. 601, 31 So. 1016.

Review. — The exercise of the court's discretion will not be disturbed on appeal unless clearly abused.[80]

F. Questions Relating to Bias. — A juror may be asked any pertinent questions tending to bring out the fact of bias or prejudice.[81]

G. Hypothetical Questions. — But the examination should, as a general rule, be directed to existing facts, and hence merely hypothetical questions should not be propounded.[82] Although where the

Missouri. — State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Nebraska. — Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295.

South Carolina. — State *v.* Coleman, 20 S. C. 441 ("The presiding judge must determine on the character of the questions proposed and when the examination shall cease").

The authority of the trial judge to control the examination of jurors on their voir dire as relates to the mode of examination, has always, when apparently reasonable, been recognized. State *v.* Harris, 51 La. Ann. 1194, 25 So. 984.

Rule Applied in Criminal as Well as Civil Cases. — "That inquiry (as to bias) is conducted under the supervision of the court, and a great deal must of necessity be left to its sound discretion. This is the rule in civil questions and the same rule must be applied in criminal cases." Connors *v.* United States, 158 U. S. 408.

80. *United States.* — Connors *v.* United States, 158 U. S. 408.

District of Columbia. — Howgate *v.* United States, 7 App. Cas. 217.

Kansas. — Swift & Co. *v.* Platte, 68 Kan. 1, 74 Pac. 635, *reversing* on other points, 72 Pac. 271.

Louisiana. — State *v.* Cancienne, 50 La. Ann. 1324, 24 So. 321.

Missouri. — State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Nebraska. — Basye *v.* State, 45 Neb. 261, 63 N. W. 811; Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. 295.

Texas. — Shaw *v.* State, 32 Tex. Crim. 155, 22 S. W. 588; Cavitt *v.* State, 15 Tex. App. 190.

81. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Comfort *v.* Mosser, 121 Pa. St. 455, 15 Atl. 612; People *v.* Reyes, 5 Cal. 347. See also article "Bias," Vol. II, p. 392.

82. *Illinois.* — Fish *v.* Glass, 54 Ill. App. 655; Chicago, etc. R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406, *affirming* 38 Ill. App. 33, and *overruling* Galena, etc. R. Co. *v.* Haslam, 73 Ill. 494; Chicago & A. R. Co. *v.* Buttolf, 66 Ill. 347; Chicago & A. R. Co. *v.* Adler, 56 Ill. 344.

Indiana. — Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236 ("a party has no right to assume the facts of a case on trial and ascertain the juror's opinion in advance").

Missouri. — Keegan *v.* Kavanaugh, 62 Mo. 230.

New York. — People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092.

Pennsylvania. — Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469.

Washington. — State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

"Would the fact that a man had been indicted by the grand jury raise in your mind any presumption of guilt" — *held,* immaterial (must ask in reference to finding in the special case). State *v.* Cleary, 97 Iowa 413, 66 N. W. 724.

In State *v.* Leicht, 17 Iowa 28, the defendant asked the jurors if they had not just "set upon a jury for the trial of a person indicted for the same kind of an offense," and upon receiving an affirmative answer, asked the further question: "If the evidence in this case should be the same as in the one just decided, if their minds were not made up as to the guilt or innocence of the defendant," to which the state objected. *Held,* that the court did not err in sustaining the objection.

When the juror on his voir dire has answered fully and explicitly that he will give the benefit of any reasonable doubt, it is not error for

defendant in a criminal case has put hypothetical questions to the jury based upon his theory of the case, and the same have been answered over the objection of the district attorney in a manner favorable to the defendant, there is no error in also allowing the district attorney on cross-examination to put hypothetical questions to the jury, based upon his theory of the case.[83]

H. Statute May Prescribe Questions. — A statute which prescribes questions to be asked a juror upon his voir dire and declares that when answered as therein prescribed he shall be adjudged a competent juror, does not impair the constitutional right of defendant to be tried by an impartial jury.[84]

I. Questions Directed by Statute. — Where certain questions are prescribed by statute for the purpose of ascertaining a juror's competency, the court is not obliged to ask any others,[85] nor have counsel the right to do so.[86] After the juror is pronounced *prima facie* competent, then evidence may be introduced showing his incompetency.[87] And if after the introduction of such testimony the juror's incompetency appears it is within the province of the judge to examine the juror further.[88] On the other hand, even if from such subsequent examination the juror's competency appears it is within the discretion of the trial court to examine further.[89] Other questions than those prescribed by the statute may be propounded,[90]

the court to exclude another question on the same line presenting a hypothetical phase it is assumed the testimony will disclose. State *v.* Hinton, 49 La. Ann. 1354, 22 So. 617.

83. People *v.* Copsey, 71 Cal. 548, 12 Pac. 721.

84. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Statute Not Retroactive. — In Reynolds *v.* State, 1 Ga. 222, it was held that the court erred in permitting questions, testing the competency of jurors, provided by the act of 1843 to be propounded to them, the offense having been committed before that time.

85. Com. *v.* Gee, 6 Cush. (Mass.) 174; Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884; Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906; Simmons *v.* State, 73 Ga. 609, 54 Am. Rep. 885.

86. *Alabama.* — Carr *v.* State, 104 Ala. 4, 16 So. 150.

Georgia. — Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142; Dumas *v.* State, 65 Ga. 471; Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Bishop *v.* Georgia, 9 Ga. 121; Pines *v.* State, 21 Ga. 227; Monday *v.* State, 32 Ga. 672; Nesbit *v.* State, 43 Ga. 238.

Massachusetts. — Com. *v.* Gee, 6 Cush. 174.

87. See note 58, *ante*.

88. Carter *v.* State, 56 Ga. 463.

Under the present law we hold that after the juror has answered the statutory questions satisfactorily and has been pronounced competent and the parties put him before the court as trior, primary evidence of the untruthfulness of the answers must be offered, and it is not competent or legal to propound questions to the juror himself to show his incompetency. But after the introduction of such testimony it is within the province of the court to hear the juror or examine him as to his explanations in the premises. Nesbit *v.* State, 43 Ga. 238.

89. Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Com. *v.* Gee, 6 Cush. (Mass.) 174; Com. *v.* Warner, 173 Mass. 541, 54 N. E. 353; Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884.

90. Com. *v.* Gee, 6 Cush. (Mass.) 174; Com. *v.* Burroughs, 145 Mass.

but not where there is not some sufficient reason shown therefor.[91]

Variation of Form of Question. — Either the court or counsel may vary or allow to be varied in form, so as to enable the jury properly to understand them, the questions directed by the statute.[92]

J. Questions Aiding Exercise of Peremptory Challenge. Upon the question as to whether or not questions are permissible which tend to aid counsel in the exercise of his right of peremptory challenge, the courts are in conflict.[93]

242, 13 N. E. 884; State *v.* Mann, 83 Mo. 589; Pierce *v.* State, 13 N. H. 536; Gunter *v.* Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573.

"Reason, authority and sound public policy unite in leaving it discretionary with the presiding judge, when acting as a trior, to allow other than the questions prescribed by statute, to be propounded to jurors in order to ascertain their competency to pass upon the rights of parties, and where it is clear, either that no case exists for the exercise of such discretion as in this case, or where there are circumstances to justify its exercise unless it has been grossly abused, we will and cannot interfere to control it." Simmons *v.* State, 73 Ga. 609, 54 Am. Rep. 885.

91. Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906; Com. *v.* Thrasher, 11 Gray (Mass.) 55; Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

92. King *v.* State, 21 Ga. 220; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

The questions propounded to the juror under the statute are the tests of the law for ascertaining this fact (partiality), and it is legitimate in the court if he suspects from the examination the answer of the witness or otherwise that the juror does not correctly understand the questions or the effect of his answer, to sift the juror by other questions and explanations until the question as well as the answer and its effect is fully comprehended, but the statutory questions or the consequences of a negative or affirmative answer thereto must not be neglected when the question is fully understood and fairly answered. Henry *v.* State, 33 Ga. 441.

93. Held Permissible. — State *v.* Mann, 83 Mo. 589; State *v.* Cross, 72 Conn. 722, 46 Atl. 148; Bissell *v.* Ryan, 23 Ill. 517; Chicago & A. R. Co. *v.* Buttolf, 66 Ill. 347; Lavin *v.* People, 69 Ill. 303; Brooks *v.* Bruyn, 35 Ill. 392.

"Upon the examination of the jurors upon the voir dire each was asked by the plaintiff against the objection of the defendant as to whether or not he was a man of family and the ruling of the court permitting this question is assigned for error. We think there was no error in this ruling while the answers to the questions propounded could furnish no basis for a challenge for cause. It is customary to allow such questions to be put to the jurors in order that counsel may advisedly exercise their peremptory challenges within reasonable limits. Counsel has this right to put questions to jurors, not only for the purpose of ascertaining whether or not cause exists for challenges for cause but also for the purpose of intelligently exercising their peremptory challenges. But beyond this the matter of examination must be allowed to rest entirely in the discretion of the trial judge. Union Pac. R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 891.

Held Not Permissible. — People *v.* Brittan, 118 Cal. 409, 50 Pac. 664; People *v.* Trask (Cal. App.), 93 Pac. 891.

It is not error to refuse to allow questions where the sole purpose of such questions is to aid in the exercise of the right of peremptory challenge. Dimmack *v.* Wheeling Tract. Co., 58 W. Va. 226, 52 S. E. 101.

"It has never been declared in any case where such declaration was necessary to the decision, that a person summoned as a juror may be

K. Questions Pertaining to Law. — Questions put to juror on preliminary examination concerning legal terms[94] or involving propositions of law[95] as to which a fair and competent juror might well be ignorant and which, without explanation, even an educated layman might not clearly comprehend, are improper.

L. Incriminating Questions. — Jurors are not bound to answer questions, answers to which may tend to their disgrace or injury or self-accusation of crime.[96]

questioned for the mere purpose of ascertaining whether the questioner shall determine to challenge him peremptorily." People *v.* Hamilton, 62 Cal. 377, *disapproving dicta* in Watson *v.* Whitney, 23 Cal. 376, and *explaining* People *v.* Car Soy, 57 Cal. 102.

94. San Antonio, etc. R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; Fugate *v.* State, 85 Miss. 86, 37 So. 557 (asking as to juror's conception of a reasonable doubt, improper).

Questions addressed to proposed jurors as to whether they "understand the meaning of a circumstantial evidence case" and as to whether a case hypothetically stated depends on circumstantial evidence, are properly excluded because they do not test the qualifications of the proposed jurors, nor are such questions authorized by § 1086 Rev. Stat., which provides that when the nature of any case, civil or criminal, requires a knowledge of reading, writing or arithmetic, or either, to enable a juror to understand the evidence on the trial, it shall be cause of challenge if he does not possess such qualifications to be determined by the trial judge. Roberson *v.* State, 40 Fla. 509, 24 So. 474.

95. O'Rourke *v.* Yonkers R. Co., 32 App. Div. 8, 52 N. Y. Supp. 706; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; Ryan *v.* State, 115 Wis. 488, 92 N. W. 271 (question calling on a juror to anticipate the instructions to be given by the court, properly excluded).

Inquiries on the voir dire examination of a juror touching his knowledge of the law of the case and as to whether he is willing to apply such law without instructions thereon from the court, are improper and can never be made a test of a juror's competency. Brown *v.* State, 40 Fla. 459, 25 So. 63.

96. The King *v.* Edmonds, 4 Barn. & A. 471, 6 E. C. L. 491, 23 R. R. 350; Hudson *v.* State, 1 Blackf. (Ind.) 317; State *v.* Mann, 83 Mo. 589; Fletcher *v.* State, 6 Humph. (Tenn.) 249; Sewell *v.* State, 15 Tex. App. 56.

A juror is no more than a witness obliged to disclose on oath his guilt, or of any act which would disgrace him, in order to test his qualification as a juror. Burt *v.* Panjaud, 99 U. S. 180.

When a juror who has qualified upon his voir dire is put upon the judge as a trier, the latter, in the absence of any extrinsic evidence impeaching or attacking the juror's competency, is not required to enter upon an investigation as to the same, and in no event is the court bound to ask or permit counsel to ask the juror any question, the answer to which would tend to incriminate or disgrace him. Ryder *v.* State, 100 Ga. 528, 28 S. E. 246.

"Upon principle a juror should not be compelled to answer questions tending to inculpate him; '*nemo tenetur seipsum prodere*' is announced in magna charta as a fundamental principle indispensable to the protection of life and liberty. We have always extended the benefit of this principle to witnesses in whose behalf it has been invoked, whether they were suitors or juror." Simmons *v.* State, 73 Ga. 609, 54 Am. Rep. 885.

VOTERS.—See Elections.

WAIVER.

By Lewis Cruickshank.

CROSS-REFERENCES:

Abatement;
Rescission;
Insurance.

I. DEFINITION.

Waiver is the voluntary and intentional relinquishment of a known right.[1]

II. PRESUMPTIONS.

1. In General. — Unless a waiver plainly and explicitly appears,

1. Shaw *v.* Spencer, 100 Mass. 382, 395, 1 Am. Rep. 115; Stewart *v.* Crosby, 50 Me. 130; Dawson *v.* Shillock, 29 Minn. 189, 12 N. W. 526. See Ripley *v.* Aetna Ins. Co., 30 N. Y. 136, 164, 86 Am. Dec. 362; Warren *v.* Crane, 50 Mich. 300, 15 N. W. 465. Hence voluntary choice is of the essence of waiver, and not mere negligence, though from such negligence, unexplained, such intention may be inferred. Fishback *v.* VanDusen Co., 33 Minn. 111, 22 N. W. 244. Nor is there a waiver where one acts on a misapprehension of the facts. State *v.* Churchill, 48 Ark. 426, 445, 3 S. W. 352, 880. There must be both *knowledge* of

every reasonable presumption will be made against the waiver, especially when it relates to a constitutional right.[2]

2. Objections. — Where the record on appeal shows that evidence was objected to, when offered at the trial, but no ruling appears to have been made on it, it will be presumed that the objection was waived and the testimony admitted.[3]

3. Present Payment by Delivery. — An apparently unrestricted and unconditional delivery of goods sold for cash is presumptive evidence of the waiver of the condition that payment should be made on delivery in order to vest the title in the purchaser.[4]

4. By Agent. — Whether a person acting as agent for a corporation is in fact its agent, and as such may reasonably be presumed to have authority to waive a particular provision of a contract, is a question of fact to be determined by a jury.[5]

the existence of the right and an *intention* to relinquish it. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 40, 85 Am. Dec. 240.

A person cannot be bound by a waiver of his rights unless such waiver is distinctly made with full knowledge of his rights which he intends to waive; and knowledge of his rights and distinct intention to waive them, when fully known must be plainly made to appear. Montague's Admrs. *v.* Massey, 76 Va. 307.

A waiver takes place where a person dispenses with the performance of something which he has a right to exact. He may dispense with it by saying that he excuses the performance, or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. State Ins. Co. *v.* Todd, 83 Pa. St. 272.

2. United States *v.* Rathbone, 2 Paine C. C. (U. S.) 578; Allworth *v.* Interstate C. R. Co., 27 R. I. 106, 60 Atl. 834.

Facts and Circumstances. — A waiver will sometimes be presumed from facts and circumstances. Mills *v.* Home Ben. L. Assn., 105 Cal. 232, 38 Pac. 723.

3. Rosenthal v. Bilger, 86 Iowa 246, 53 N. W. 255; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569.

4. Fishback *v.* Van Dusen Co., 33 Minn. 111, 22 N. W. 244; Scudder *v.* Bradbury, 106 Mass. 422; Smith *v.* Lynes, 5 N. Y. 41; Farlow *v.* Ellis, 15 Gray (Mass.) 229.

May Be Rebutted by Acts and Declarations of the parties connected with the circumstances, showing an intention that the delivery should not be complete until the condition should be performed. The intention where any doubt arises is a question of fact. Hammett *v.* Linneman, 48 N. Y. 399. An express declaration of an intention to insist upon the performance of the condition and a lien upon the goods is not necessary. The intent may be inferred from the acts of the parties and the circumstances of the case, and it is a question of fact for the jury. Osborn *v.* Gantz, 60 N. Y. 540; Marston *v.* Baldwin, 17 Mass. 606; Smith *v.* Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; Lupin *v.* Marie, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256; Furniss *v.* Hone, 8 Wend. (N. Y.) 247; Leven *v.* Smith, 1 Denio (N. Y.) 571.

But an Undisclosed Intention not to waive the condition is not sufficient to overcome an apparently unconditional delivery. Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446; Taft v. Dickinson, 6 Allen (Mass.) 553.

5. In Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297, 9 Am. Rep. 235, in which the question of the right of an agent to waive a condition relating to the non-assignability of a policy of fire insurance arose, the court said: "Whether there was such a waiver of the condition in this case, is, of course, a question for the jury; and it will be for them to say whether an insurance company, systematically transacting and

5. Service of Papers. — Waiver of service is shown where counsel for a party admits service in writing, although the service itself could not legally be made upon the attorney.[6]

6. Incompetent Testimony. — When the testimony of an incompetent witness is given at the trial without objection, the presumption is that the objection is waived and his testimony thereby becomes competent evidence.[7]

7. Policy Provisions. — It must be presumed, when certain provisions in a policy are omitted, that they were intended to be waived by the company.[8]

8. Rights by Imputed Knowledge of Circumstances. — Action taken in real ignorance of the rights of the actor will be deemed a waiver of such rights, where knowledge is presumed or imputed to him from the circumstances of the case, or by virtue of the law, or where duty requires him to inform himself.[9]

III. BURDEN OF PROOF.

1. Preponderance of Testimony. — Where a party relies upon a waiver of a condition in a contract, it is incumbent upon him to prove by a preponderance of the testimony that the condition was in fact waived.[10]

2. Degree of Proof. — In order to establish a waiver of an agreement the proof must be clear and convincing.[11]

soliciting business at points remote from its primary location, may reasonably be presumed to have conferred upon a person held out to the world as '*the agent of such company*' authority to act for them to the extent of dispensing with a formality the waiver of which could do the company no harm so long as they received a full consideration for their contract."

6. To the sheriff's return of service was attached a memorandum signed by the counsel of the corporation admitting service. It was held that while this was not proof of service on the corporation, since the attorney was not authorized by law to accept service, it would be construed as a waiver of service by the corporation, and a consent by the attorney to voluntarily appear, his authority to do so being presumed. Northern Cent. R. Co. *v.* Rider, 45 Md. 24.

7. Bartlett *v.* Bartlett, 15 Neb. 593, 19 N. W. 691.

8. Vanderhoef v. Agricultural Ins. Co., 46 Hun (N. Y.) 328.

9. Dawson v. Shillock, 29 Minn. 189, 12 N. W. 526.

10. North British & M. Ins. Co. v. Steiger, 124 Ill. 81, 16 N. E. 95; Bergeron *v.* Palmico Ins. & B. Co., 111 N. C. 45, 15 S. E. 883.

Where a defendant sets up the omission from the contract of material fact contrary to its conditions as a defense, a reply alleging a parol waiver only need be proven by a preponderance of the evidence. Bergeron *v.* Pamlico Ins. & B. Co., 111 N. C. 45, 15 S. E. 883.

The plaintiff must show that the receipt of an article inferior to the one contracted for was accepted in lieu of the article stipulated in the contract, in order to prove a waiver of such stipulation. Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015.

11. Fox v. Harding, 7 Cush. (Mass.) 516; Blakiston *v.* Am. Life Ins. Co., 15 Phila. (Pa.) 315.

An agreement in writing as to lands may, in equity, be waived by parol; but the waiver must be clearly made out. The return of part of the purchase price of land is not of

3. Conduct of Party. — Where one party seeks to establish a waiver of a written agreement, based upon the conduct of the other party, it is incumbent on the moving party to prove clearly not merely his own understanding of the conduct, but that the other party had a like understanding regarding the effect of such conduct.[12]

4. Knowledge of Facts. — In order to bind a person by his acts or words as a waiver, it must be shown that he acted or spoke with full knowledge of the facts and circumstances attending the creation of the right he is alleged to have waived.[13]

5. Waiver of Appeal by Attorney. — The general authority of an attorney does not give him power to waive an appeal; he must show

itself sufficient proof of a waiver of the right to have the agreement to sell specifically enforced. Clifford v. Kelly, 7 Ir. Ch. 333.

In Carolan *v.* Brabazon, 3 Jo. & La. T. 200, 2 Ir. Eq. 124, Lord St. Leonards decided that there must be as clear evidence of the waiver as of the existence of the contract and that the court would not act upon less.

12. In Bennecke *v.* Ins. Co., 105 U. S. 355, the court said: "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the parties. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding." *Citing* Darnley *v.* London, C. & D. R. Co., L. R. 2 H. L. (Eng.) 43, 36 L. J. Ch. 404, 16 L. T. 217, 15 W. R. 817.

A waiver must be an intentional act with knowledge, and when parties who have bound themselves by a written agreement depart from what has been so agreed on in writing and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavoring to enforce, a substituted verbal agreement, to show not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding — that both parties were proceeding on a new agreement, the terms of which they both understood. Holdsworth *v.* Tucker, 143 Mass. 369, 9 N. E. 764, *following* Darnley *v.* London R. Co., L. R. 2 H. L. (Eng.) 43, 36 L. J. Ch. 404, 16 L. T. 217, 15 W. R. 817.

13. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880. The rule most usually finds its application in the cases of endorsers of commercial paper, but it is none the less applicable to the case of a surety on a bond or other obligation. Spurlock *v.* Union Bank, 4 Humph. (Tenn.) 336 Creamer *v.* Perry, 17 Pick. (Mass.) 332, 28 Am. Dec. 297; Dodge *v.* Minn. Roofing Co., 14 Minn. 49; Lyon *v.* Tams, 11 Ark. 189, 205; Pike *v.* Douglass, 28 Ark. 59, 65. Nor is it sufficient that he should have notice of facts that, if followed up by inquiry, would have led to information that would have shown that he was discharged. Spurlock *v.* Union Bank, 4 Humph. (Tenn.) 336.

In order to establish waiver of a clause invalidating a policy for an increased risk, the plaintiff must prove that defendant had knowledge of the change prior to the loss. North British & M. Ins. Co. *v.* Steiger, 124 Ill. 81, 16 N. E. 95; Bergeron *v.* Pamlico Ins. & B. Co., 111 N. C. 45, 15 S. E. 883; Continental Ins. Co. *v.* Cummings, 98 Tex. 115, 81 S. W. 705.

such authority from his client in writing, or the burden of proving special authority is on the attorney.[14]

6. Condition in a Policy of Insurance. — Where the provisions of a policy have been violated, it is incumbent upon the assured to prove a waiver of said provisions in order to recover under the policy.[15]

7. Proofs of Loss Under Policy of Insurance. — Under a policy requiring proofs of loss to be made within a specified time, the plaintiff must show that proof of loss was made in substantial compliance with the terms of the policy, or a waiver of such proof of loss by the company must be shown.[16]

8. Authority of Agent. — The authority of an agent to waive a condition in a contract must be shown by the plaintiff before such agent's admissions can be used in evidence to establish the waiver of the condition alleged.[17]

IV. MODE OF PROOF.

1. Admissibility of Evidence. — A. In General. — A written contract may be waived either directly or inferentially, and such waiver may be proved by express direction, or by acts and directions manifesting an intent not to claim the supposed advantage, or by a course of acts and conduct,[18] or by so neglecting and failing to act

14. "An attorney has general authority from his client in all matters which may reasonably be expected to arise during the progress of a cause. He may make agreements as to continuances, evidence, and the conduct of the trial, because from the nature of the case, he must be permitted to use his skill and judgment in the management of the case. And, if in such matters he enters into an agreement within the scope of his authority, his client is bound thereby, even though contrary to his interest. McCann *v.* McLannan, 3 Neb. 25; Palmer *v.* The People, 4 Neb. 68, 76; Rich *v.* State National Bank, 7 Neb. 201, 29 Am. Rep. 382. But an attorney, by virtue of this general authority, cannot authorize an execution to issue against the property of his client, while a proper supersedeas bond is on file to provide for an appeal. This is admitted by the attorney for the appellee, but it is claimed the attorneys for Green had special authority from him for that purpose. Green denies positively any such authority, and the burden of proof is on the attorneys to show that such authority existed. No written authority has been shown, and the mere oath of one of the attorneys as to such authority is not sufficient to overcome the position denied under oath of Green." State Bank *v.* Green (Neb.), 1 N. W. 210.

15. Stapleton *v.* Greenwich Ins. Co., 16 Misc. 483, 38 N. Y. Supp. 973. The burden of proof to show knowledge in the defendant of the existence of a mortgage, which by the terms of the policy would invalidate it at the date of the issuance of the policy, is upon the plaintiff. Wierengo *v.* American Fire Ins. Co., 98 Mich. 621, 57 N. W. 833.

16. Insurance Co. *v.* Thorp, 48 Kan. 239, 28 Pac. 991; Insurance Co. *v.* Hathaway, 43 Kan. 399, 23 Pac. 428; Planters' Mut. Ins. Co. *v.* Deford, 38 Md. 382; Troy Fire Ins. Co. *v.* Carpenter, 4 Wis. 20; Cumberland Val. Mut. Ins. Co. *v.* Schell, 29 Pa. St. 31; Eastern R. Co. *v.* Relief Fire Ins. Co., 105 Mass. 570.

17. Elsner *v.* Prudential Ins. Co., 13 Misc. 395, 34 N. Y. Supp. 246.

18. In Missouri, K. & T. R. Co. *v.* Cook, 8 Tex. Civ. App. 376, 27 S. W. 769, the plaintiff was riding on a

as to induce a belief that it was the intention and purpose to waive.[19]

B. Declarations and Acts, or Omission to Act. — Waiver may be proved by express declaration,[20] or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage,[21] or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. Still, voluntary choice not to claim is of the essence of waiver, and not mere negligence; though from negligence, unexplained, the intention may be inferred.[22]

C. Conduct. — Acceptance of benefits under a contract with knowledge of the existence of facts contrary to its terms, without objection to the existence thereof, will be deemed a waiver of the right to insist upon the strict performance of the contract when liability has been incurred thereunder.[23]

stock-train in charge of a horse. His ticket stipulated that he should ride in the caboose, and, if elsewhere, at his own risk. On presenting the ticket to the contracting agent he asked if the ticket entitled him to ride with the horse and he received an affirmative reply. The train conductor also gave him permission to ride in the stock-car and took his ticket while there. The declarations of the agent and the acts and acquiescence of the conductor were held admissible to show a waiver of the terms of the contract; also that the custom of conductors on defendant's road to allow shippers of live stock to ride on the stock-car was admissible to show authority in the conductor to waive the stipulation requiring shippers to ride in the caboose.

19. Hilton *v.* Hanson, 101 Me. 21, 62 Atl. 797.

20. California S. H. Co. *v.* Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; Kilpatrick *v.* Kansas City & B. R. Co., 38 Neb. 620, 57 N. W. 664.

21. State Ins. Co. *v.* Todd, 83 Pa. St. 272; California S. H. Co. *v.* Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; Kilpatrick *v.* Kansas City & B. R. Co., 38 Neb. 620, 57 N. W. 664; Osborn *v.* Gantz, 60 N. Y. 540. See note 50, *Post.*

The conditions in a policy of insurance may be waived by the company, and the waiver may be made as well by acts as by positive declarations, and the company may be estopped under certain circumstances, when by a course of dealing on its open action it has induced the assured to pursue a policy to his detriment. Reithmuller *v.* Fire Assn., 38 Mo. App. 118, *citing* Hayward *v.* Ins. Co., 52 Mo. 181, 14 Am. Rep. 400; Pelkington *v.* Ins. Co., 35 Mo. 172; Franklin *v.* Ins. Co., 42 Mo. 456, 97 Am. Dec. 349; Combs *v.* Ins. Co., 43 Mo. 148, 97 Am. Dec. 383; Northrup *v.* Ins. Co., 47 Mo. 435, 4 Am. Rep. 337.

22. Farlow *v.* Ellis, 15 Gray (Mass.) 229. See Mills *v.* Home Ben. L. Assn., 105 Cal. 232, 38 Pac. 723.

Waiver may be proved by various species of evidence, as by declarations or by forbearance to act. Fishback *v.* Van Dusen Co., 33 Minn. 111, 22 N. W. 244.

23. In Monroe Water Wks. Co. *v.* Monroe, 110 Wis. 11, 85 N. W. 685, the city passed an ordinance giving the appellant the right to build and maintain a water system and agreed that if the plant was of a certain capacity and met with the approval of the city for fire purposes the city should pay $4500 per year hydrant rent. The water company agreed to furnish water for flushing gutters and sewers; also for school and public buildings, drinking and display fountains, and for sprinkling streets in the business portion of the city. In consideration of which the city agreed to pay annually a sum equal to the taxes levied upon the property of the water company located in the streets and public grounds of the city. After paying

D. Knowledge of Facts. — Evidence that a fact is of local public notoriety may be admissible as a circumstance, which as part of the *res gestae* would tend to establish a waiver.[24]

2. Parol Evidence. — A. Written Instrument. — a. *Express Contracts.* — Notwithstanding the rule that a written contract cannot be varied or contradicted by oral evidence, it has often been held competent for parties, who have entered into stipulations, to show that the performance of them has been waived by the opposite parties.[25]

the hydrant rent and the amount agreed for other city purposes for six years the city refused to pay the amount equal to the taxes on said property for 1898 and set up a counterclaim for money paid as hydrant rent when the service was grossly inadequate. The court held that having paid the stipulated price the city could not afterwards be permitted to reclaim the rights it has thereby waived.

In Southern Mut. Ins. Co. *v.* Yates, 28 Gratt. (Va.) 585, the insurance company tried to avoid a policy for a breach of warranty, regarding incumbrances upon the property when insured. The premium was paid partly in cash and balance by a note, on which the company received payments from time to time. The court said: "If the defendant, with knowledge of the existence of the incumbrance, knowingly received assessments upon the note involved in this controversy, such conduct would amount to a waiver of the breach of warranty, whether so intended or not."

24. Proof of Circumstances. — An insurance company sought to avoid liability under a policy, because the assured said he was the sole owner, when in fact the property belonged to a partnership of which he was a member, which representation was contrary to the terms of the policy and precluded recovery. The fact that it was well known in the place where the property was located that it was owned by the partnership was admissible in evidence as a circumstance which, taken in connection with other facts and circumstances, would tend to prove the knowledge of agent and establish a waiver of the condition. Continental Ins. Co. *v.* Cummings, 98 Tex. 115, 81 S. W. 705.

25. Medomak Bank *v.* Curtis, 24 Me. 36; Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814.

A Waiver of a Condition in a Policy may be established by a parol agreement, notwithstanding the policy calls for a written indorsement upon the policy itself. Baldwin *v.* Citizens' Ins. Co., 60 Hun 389, 15 N. Y. Supp. 587; Steen *v.* Niagara Fire Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297. See also St. Landry Co. *v.* Teutonia Ins. Co., 113 La. 1053, 37 So. 967; Carroll *v.* Charter Oak Ins. Co., 1 Abb. Ct. App. (N. Y.) 316, 10 Abb. Pr. (N. S.) 166; Pennsylvania Fire Ins. Co. *v.* Faires, 13 Tex. Civ. App. 111, 35 S. W. 55; Morrison *v.* Ins. Co., 69 Tex. 353, 6 S. W. 605; and article "Insurance," Vol. VII, pp. 541, 572. Waiver of a condition in a policy which makes liability dependent upon actual payment of the premium may be proved by parol. Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

The settled law in Massachusetts is: that a breach of condition happening after a policy is issued, may be waived, no doubt; but when the breach exists at the moment when, if ever, the contract comes into existence, it must be waived at that moment, if ever, and at the very instant the writing purports to establish and insist upon the condition, and parol evidence of such a waiver would contradict the written instrument. Batchelder *v.* Queen Ins. Co., 135 Mass. 449, *citing* Barrett *v.* Union Ins. Co., 7 Cush. (Mass.) 175; Oakes *v.* Manufacturers' Ins. Co., 135 Mass. 248.

In Taylor *v.* Seaboard R. Co., 99 N. C. 185, 5 S. E. 750, in which the question of parol waiver of a con-

b. *Instruments Under Seal.* — As a general rule, waiver of an instrument under seal can only be evidenced and proved by an instrument of the same dignity;[26] but there is a well recognized exception that they may be avoided or waived by a subsequent parol agreement, especially when the agreement has been executed.[27]

c. *Contracts Within the Statute.* — The old decisions deny the right to waive or annul the conditions of an instrument within the statute of frauds by parol, on the theory that a waiver or an annul-

dition in a railroad ticket arose, the court said: "A written contract may be changed, modified or waived in whole or in part, by a subsequent unwritten one, express or implied; and as defendant might waive such requirement in writing or by parol agreement, it was likewise competent for the plaintiff to prove such agreement of waiver by parol."

26. Swain *v.* Seamens, 9 Wall. (U. S.) 254, 271.

27. Leathe *v.* Bullard, 8 Gray (Mass.) 545; Dana *v.* Hancock, 30 Vt. 616. See also Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Lattimore *v.* Harsen, 14 Johns. (N. Y.) 330.

Parol evidence of a subsequent waiver of any of the stipulations in a written contract or of a right under such contract is admissible, even when such contract is under seal. Hilton *v.* Hanson, 101 Me. 21, 62 Atl. 797.

In Monroe *v.* Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475, in which the terms of a sealed contract were waived by parol, the court said: "It is objected, that as the evidence was parol, it is insufficient in law to defeat or avoid the special contract; and many authorities have been cited to show that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract under seal cannot be avoided or altered or explained by parol evidence. That this is the general doctrine of the law cannot be disputed. It seems to have emanated from the common maxim, *unumquodque dissolvitur eo ligamine quo ligatur.* But like other maxims, this has received qualifications, and indeed was never true to the letter, for at all times, a bond, covenant or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, etc. It is a general principle, that where there is an agreement in writing, it merges all previous conversations and parol agreements; but there are many cases in which a new parol contract has been admitted to be proved. And though when the suit is upon the written contract itself, it has been held that parol evidence should not be received, yet when the suit has been brought on the ground of a new subsequent agreement not in writing, parol evidence has been admitted."

In Ratcliff *v.* Pemberton, 1 Esp. 35, Lord Kenyon decided that in an action of covenant on a charter party, for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was master and owner of the ship, verbally permitted the delay and agreed not to exact any demurrage, but waived all claim to it.

In Morehouse *v.* Terrill, 111 Ill. App. 460, in which the question as to the admissibility of parol evidence to show a parol waiver of a condition in a contract under seal, the court said: "It is the long established law of this state that the terms of a contract under seal can not be varied except by an instrument of the same dignity. And this is so even if the contract would have been valid without a seal. But a mere waiver of a term or condition may be shown where it is in the nature of a release or discharge and leaves the contract otherwise unchanged and introduces no new element into it. Moses *v.* Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St Rep. 194; Starin *v.* Kraft, 174 Ill 120, 50 N. E. 1059; Palmer *v.* Meriden B. Co., 188 Ill. 508, 59 N. E 247; Dauchy Iron Works *v.* Toles, 76 Ill. App. 669; Robinson *v.* Nessel, 86 Ill. App. 212.

ment of a condition created a new agreement,[28] but the later decisions do not adhere to that theory and enforce parol agreements to waive or annul such contracts.[29]

d. *Can Be Used Only as a Defense.* — A plaintiff cannot by parol evidence excuse non-performance of a written contract, or establish a waiver by defendant;[30] but some courts of equity hold the contrary in suits for specific performance.[31]

B. WARRANTY. — Parol evidence is admissible to show knowledge and waiver of defects included within the terms of a contract of warranty.[32]

C. FORFEITURE IN A BUILDING CONTRACT. — Where a building contract provides for a forfeiture of a certain amount per day for each day required to complete the building after the time agreed upon for its completion, parol evidence is admissible to show a waiver of such provision.[33]

D. NON-ASSIGNABILITY. — Although a contract by its terms states that upon assignment the same shall be void unless consent to such

28. An agreement in writing under seal cannot be waived or varied as to time or manner of its performance by a subsequent oral agreement if the agreement is within the statute of frauds. Swain *v.* Seamans, 9 Wall. (U. S.) 254, 271.

29. Cummings *v.* Arnold, 3 Met. (Mass.) 486 (citing many authorities); Negley *v.* Jeffers, 28 Ohio St. 90 (agreement to waive the right to insist upon removal of incumbrance before payment); Long *v.* Hartwell, 34 N. J. L. 116; Raffensberger *v.* Cullison, 28 Pa. St. 426 (agreement for the sale or transfer of real estate).

It is competent to prove a waiver of a condition in a deed by parol evidence of the acts and declarations of the parties. Leathe *v.* Bullard, 8 Gray (Mass.) 545.

If a waiver of performance of a contract in writing is attempted to be shown by oral evidence as matter of defense, it is perfectly competent, even in cases where the contract is under seal, as was long since held in this state. Lawrence *v.* Dole, 11 Vt. 549. And the same rule is now well established in regard to the defense of actions upon contracts within the statute of frauds although it was for a long time questioned by the courts whether such a contract could be waived by an unwritten agreement. Dana *v.* Hancock, 30 Vt. 616.

The statute of frauds debars one of an action on a contract, in certain cases, unless the contract be in writing, but a parol agreement to waive or annul a particular stipulation in the written contract, which has been mutually assented to and fully performed, may be offered in evidence in defense of an action for a breach of the original written contract. Lee *v.* Hawks, 68 Miss. 669, 68 So. 828, 13 L. R. A. 633 (waiver of right to cut trees).

30. La Chicotte *v.* Richmond R. & E. Co., 15 App. Div. 380, 44 N. Y. Supp. 75; Taylor *v.* Seaboard & R. Co., 99 N. C. 185, 5 S. E. 750, 6 Am. St. Rep. 509; Dana *v.* Hancock, 30 Vt. 616; Lee *v.* Hawks, 68 Miss. 669, 9 So. 828, 13 L. R. A. 633; Price *v.* Dyer, 17 Ves. Jr. 356, 34 Eng. Reprint 137. See Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

31. Parol evidence is admissible to show a waiver of a written agreement which is sought to be specifically enforced in equity. See Walker *v.* Wheatly, 2 Humph. (Tenn.) 119.

32. Schuyler *v.* Russ, 2 Caines (N. Y.) 202; Bennett *v.* Buchan, 76 N. Y. 386; Jennings *v.* Chenango Ins. Co., 2 Denio (N. Y.) 75; Bidwell *v.* N. W. Ins. Co., 24 N. Y. 302; Tallman *v.* Atl. Fire Ins. Co., 3 Keyes (N. Y.) 87; Van Schoick *v.* Niagara F. Ins. Co., 68 N. Y. 434.

33. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

assignment is given by the maker, acquiescence in an assignment may be proved by parol in order to establish a waiver of the condition.[34]

E. Tender. — A waiver of tender may be proved by parol evidence.[35]

F. Waiver Made Prior to or Contemporaneous With Execution of Contract. — Parol evidence is inadmissible to prove a waiver of a condition in a contract made prior to or contemporaneous with the execution thereof,[36] unless some benefit has been received by the obligee under the contract, with knowledge of the breach thereof.[37]

34. In an action on a policy of insurance, which by its conditions would be void if assigned without the company's consent, it appeared that the assured sold the insured property and assigned the policy to the vendee with the knowledge and consent of a duly authorized agent of the company. It was held that plaintiff could show by parol that the company's agent had notice and acquiesced in the assignment. Imperial F. Ins. Co. *v.* Dunham, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. Rep. 686.

35. See Smith *v.* Old Dominion B. & L. Assn., 119 N. C. 257, 26 S. E. 40.

In Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528, it was held that a tender of money under a contract and refusal, or waiver, which must always rest in parol, is equivalent to an actual performance; and evidence of a parol agreement to enlarge the time of performance of a written contract is admissible. See also Herzog *v.* Sawyer, 61 Md. 344.

36. Batchelder *v.* Queen Ins. Co., 135 Mass. 449; Madison Ins. Co. *v.* Fellowes, 1 Disn. (Ohio) 217 (insurance policy); Ripley *v.* Aetna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362.

Where a premium note given in payment of a policy of insurance provides for the forfeiture of the policy on the non-payment of the installments of the note, parol evidence is inadmissible in an action on the policy to show a waiver of the provision by an agreement contemporaneous with the taking of the contract. Johnson *v.* Continental Ins. Co. (Tenn.), 107 S. W. 688.

In Germania Ins. Co. *v.* Bromwell, 62 Ark. 43, 34 S. W. 83, in which the question of the admissibility of parol evidence to prove a parol waiver made prior to the execution of the written contract arose, the court said: "It was not competent thus to contradict the material stipulations of the policy by evidence of the parol declarations of the parties made at the time or before the policy was issued. The rule that 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument' applies to contracts of insurance as well as to other written or printed contracts. Robinson *v.* Insurance Co., 51 Ark. 441; Southern Ins. Co. *v.* White, 58 Ark. 281; Weston *v.* Emes, 1 Taunton 115; Mobile Life Ins. Co. *v.* Pruett, 74 Ala. 497; Thompson *v.* Ins. Co., 104 U. S. 259; Insurance Co. *v.* Mowry, 96 U. S. 547; 1 Wood on Fire Ins. 10; 1 Greenleaf on Ev. sec. 275."

37. Where a policy holder in violation of the terms of his policy takes a particular route of travel with the knowledge of the company, the company having received the premiums from time to time, knowing the route he took, is estopped from claiming a violation of the condition, and parol evidence is admissible to prove such waiver and estoppel and to explain words of indeterminate meaning. Bevin *v.* Connecticut Life Ins. Co., 23 Conn. 244; Allen *v.* Vermont Ins. Co., 12 Vt. 366; Frost *v.* Saratoga Ins. Co., 5 Denio (N. Y.) 154, 49 Am. Dec. 234; Mobile Ins. Co. *v.* Miller, 58 Ga. 420.

G. LIEN. — It is competent to prove, by parol, whether or not a lien was waived.[38]

H. RECEIPTS. — Parol evidence is admissible to prove that the acceptance of premiums by the agent was an unconditional waiver of a forfeiture upon sufficient consideration instead of a conditional waiver as inserted in the receipts.[39]

I. RIGHT WAIVED BY ATTORNEY. — An attorney may waive a right in a matter of practice by parol.[40]

3. Sufficiency of Evidence. — A. DETERMINED FROM THE FACTS OF EACH CASE. — The sufficiency of evidence of waiver is determined from the facts of each case, therefore making it impossible to lay down any general rule on the subject. A number of the leading cases on the sufficiency[41] and insufficiency[42] of evidence are cited in the notes.

38. Jarman *v.* Farley, 7 Lea (Tenn.) 141.

39. McLean *v.* Piedmont & A. Ins. Co., 29 Gratt. (Va.) 361.

40. Northern Cent. R. Co. *v.* Rider, 45 Md. 24. See State Bank *v.* Green (Neb.), 1 N. W. 210.

In People *v.* Boyd, 2 Edw. Ch. (N. Y.) 516, the solicitor waived his right to a copy of answer by parol, and it was held that he was bound thereby and could not raise the objection of want of service of a copy.

41. Kidder *v.* Knights Templars & M. L. I. Co., 94 Wis. 538, 69 N. W. 364; Renier *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208.

In an action on a certificate of insurance it appeared that deceased died on January 5th, 1880. The certificate contained an agreement that deceased would pay all dues and monthly payments agreeable to the by-laws. By rule of defendant, the monthly payment was due on the first day of each month, with the balance of the month allowed as grace; and, if any such payment was not made at the expiration of such days of grace the certificate would become void. Deceased's payment for September, 1879, was made October 4th; his payment for October was made November 1st; his payment for November was made December 2d; but his payment for December was not made when he died. Defendant's by-laws provided that lapsed members might be reinstated within thirty days after lapse on payment of back dues and giving a certificate of good health. Plaintiff contended that such payments were accepted with a waiver of a certificate as to good health under such section. It was held that the jury were warranted in finding that the certificate was continued in force and the dues accepted after the days of grace had lapsed. Painter *v.* Industrial Assn., 131 Ind. 68, 30 N. E. 876.

Plaintiff's policy contained a condition invalidating it if the building insured was located on ground not owned in fee simple by the insured. Plaintiff's broker informed the assistant secretary that the land on which the house stood was the property of the city of Brooklyn and not that of the insured. The assistant secretary considered the application and issued the policy. *Held,* that the policy being issued with full knowledge of the facts, the condition was thereby waived. Baldwin *v.* Citizens' Ins. Co., 60 Hun 389, 15 N. Y. Supp. 587.

42. Facts Held Insufficient. McFetridge *v.* Phenix Ins. Co., 84 Wis. 200, 54 N. W. 326; Cannon *v.* Home Ins. Co., 53 Wis. 585, 11 N. W. 11; Fraser *v.* Aetna L. Ins. Co., 114 Wis. 510, 90 N. W. 476 (revival of a lapsed policy); Johnson *v.* Continental Ins. Co. (Tenn.), 107 S. W. 688. See the following cases:

California. — McCormick *v.* Orient Ins. Co., 86 Cal. 260, 24 Pac. 1003.

Iowa. — Fitchpatrick *v.* Hawkeye Ins. Co., 53 Iowa 335, 5 N. W. 151.

B. Second Objection Does Not Waive First. — The taking of a second and distinct objection is not of itself sufficient proof of a waiver of the first.[43]

C. Subsequent Agreement. — Proof of a subsequent agreement between two parties relating to the same subject-matter as a prior agreement, and inconsistent therewith, is sufficient proof of waiver of the first agreement.[44]

D. Collateral Security. — A waiver will not be inferred from the mere taking of collateral security when it is in no way inconsistent with the intention of retaining the prior lien.[45]

E. Cannot Be Inferred From Silence. — Waiver may be implied from certain acts or follow as a legal result, but it cannot always be inferred from silence.[46]

Kentucky. — Phoenix Ins. Co. *v.* Stevenson, 78 Ky. 150.

Massachusetts. — McCoy *v.* Metropolitan L. Ins. Co., 133 Mass. 82; Mulrey *v.* Shawmut Mut. F. Ins. Co., 4 Allen 116; Pettengill *v.* Hinks, 9 Gray 169.

New York. — Ronald *v.* Mutual R. F. L. Assn., 23 Abb. N. C. 271; Armstrong *v.* Agricultural Ins. Co., 130 N. Y. 560, 29 N. E. 991.

Tennessee. — Boyd *v.* Ins. Co., 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676.

Vermont. — Packer *v.* Steward, 34 Vt. 127.

43. In Blossom *v.* Lycoming F. Ins. Co., 64 N. Y. 162, where the question of waiver of proof of loss arose, the plaintiff's policy provided that failure to furnish proof of loss within thirty days would preclude recovery under it. Four months after the loss plaintiff furnished proofs of loss. The defendant denied liability, 1st, that the proof of loss came too late, and 2nd, that the claim was fraudulent. Plaintiff contended that by making the latter objection the first was waived. *Held*, that defendant might make all the objections open to him and that the objections would not in any way affect each other.

44. Ford *v.* Euker, 86 Va. 75, 9 S. E. 500.

45. In Kilpatrick *v.* Kansas City & B. R. Co., 38 Neb. 620, 57 N. W. 664, 41 Am. St. Rep. 741, the plaintiff was suing on a mechanic's lien for labor and material furnished a railroad company, and the company claimed that the lien was extinguished by the acceptance of certain collateral drafts. The court said: "We do not think that the mere receipt of the drafts under such circumstances amounted to a waiver, which, in the absence of an express agreement, will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party had been misled, to his prejudice, into the honest belief that such waiver was intended, or consented to."

46. In Titus *v.* Glens Falls Ins. Co., 8 Abb. N. C. (N. Y.) 315, the court said: "When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiation or transaction with the insured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts

F. Defective Preliminary Step Waived by Appearance. — A general appearance in court and proceeding to trial on the merits, or taking notice of steps taken in a case, precludes the introduction of evidence to attack the validity of preliminary steps which the party as a right could have insisted upon, the defectiveness being waived by the appearance.[47]

G. Tender. — Proof of an offer to tender a sum due with the ability to execute such offer, and refusal of the other party to accept, is sufficient proof of a waiver of tender.[48]

H. Trial by Jury. — Proof of acquiescence in the transfer of a case to a court of equity, and the taking of testimony before a master, is sufficient proof of a waiver of a jury trial.[49]

I. Question for Jury. — Whether acts or circumstances are sufficient to constitute a waiver of a particular right is a question to be determined by the jury from the evidence of all the surrounding circumstances, declarations and acts of the parties.[50]

based thereon, or required the insured by virtue thereof to do some act, or incur some trouble or expense, the forfeiture is, as matter of law, waived; and it is now settled in this court, after some differences of opinion, that such a waiver need not be based upon any new agreement or an estoppel. (Allen *v.* Vermont Mutual Fire Ins. Co., 12 Vt. 366; Webster *v.* Phoenix Ins. Co., 36 Wis. 67; Gans *v.* St. Paul Ins. Co., 43 Id. 109; Insurance Company *v.* Norton, 96 U. S. 234; Goodwin *v.* Massachusetts Mutual Life Ins. Co., 73 N. Y. 480, 493; Prentice *v.* Knickerbocker Life Ins. Co., 77 Id. 483; Brink *v.* Hanover Fire Ins. Co., in this court, not yet reported)."

47. When a defective affidavit is filed with an appeal bond and the appellee appears and notices the case for trial, all defects, are thereby waived. Hamilton *v.* Circuit Judge, 52 Mich. 409, 18 N. W. 193.

Defendant's voluntary appearance in court and his proceeding to trial on the merits without making any objection to the sufficiency of the affidavit or the defect of jurisdiction, must be construed as an admission by him that he was subject to the jurisdiction of the court in the case and as a waiver of all previous defects in the manner of taking the appeal. Pearson *v.* Gillett, 55 Mo. App. 312.

48. See Herzog *v.* Sawyer, 61 Md. 344; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528; Holmes *v.* Holmes, 12 Barb. (N. Y.) 137; U. S. Bank *v.* Bank of Georgia, 10 Wheat. (U. S.) 333; Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195; Koon *v.* Snodgrass, 18 W. Va. 320.

In Smith *v.* Old Dominion B. & L. Assn., 119 N. C. 257, 26 S. E. 40, which was an action for the recovery of money paid as usurious interest and the amount of the debt was set up as a counterclaim, it was found as a fact that the plaintiff stated to defendant's secretary that he then had the money in the bank in the same building and that this was true, and that plaintiff was ready to pay the sum tendered ($1600) but the secretary declined to receive it. The production of the money was thereby rendered unnecessary.

49. Eysaman *v.* Small, 61 Hun 618, 15 N. Y. Supp. 288.

Parties to an action at law believing that the case was one over which a court of equity had jurisdiction, acquiesced in the transfer, and the testimony was taken by a master, and his findings agreed upon by the parties and entered of record as the true value of certain improvements, rents and profits. It was held that this constituted an express waiver of the right to a trial by a jury. Sharrock *v.* Kreiger, 6 Ind. Ter. 466, 98 S. W. 161.

50. Painter *v.* Industrial L. Assn., 131 Ind. 68, 30 N. E. 876; State Ins.

4. Right of Action After Breach of Contract. — After breach of a sealed contract a right of action may be waived or released by a parol contract in relation to the same subject-matter, or by any valid parol executed contract.[51]

5. Laches. — Waiver may be established by proof of laches.[52]

6. Protest. — No general rule can be laid down as to what words or acts will amount to a waiver, except they must be such as fairly to lead a reasonable man to believe that the indorser did not wish the regular course in making demand and giving notice to be pursued. Unless such be the direct and natural inference from the words and acts, and they be so clear and pointed as to leave no reasonable doubt as to what was intended, they are not within the rule.[53]

7. Custom. — Waiver may be established by showing a general custom, by clear and uncontradicted evidence.[54]

Co. *v.* Todd, 83 Pa. St. 272; Home Ins. Co. *v.* Wood, 47 Kan. 521, 28 Pac. 167; Farlow *v.* Ellis, 15 Gray (Mass.) 229.

Whether the evidence in any case establishes a waiver of any legal right by a party is one of fact to be settled by the verdict of a jury. There may be cases in which the facts are few and simple and the acts or admissions of parties clear and unequivocal, when it would be the duty of the court to instruct the jury that certain legal rights upon which a party might otherwise have relied, have been surrendered and can no longer be insisted on; but these are cases where the law affixes certain consequences to acts of parties when clearly and indisputably proved. Fox *v.* Harding, 7 Cush. (Mass.) 516.

A question of waiver is one of intention and usually depends on acts and declarations which, in regard to their character are of an inconclusive or doubtful nature and furnish only evidence of intention and grounds of inference and deduction, which it is the appropriate province of a jury only to consider. The cases are scarce where the declarations or acts of the parties to a contract are so express or unequivocal as to be a matter for the court to determine. Fitch *v.* Woodruff & B. Iron Wks., 29 Conn. 82.

Exercise of Power by Agent. Whether an agent has exercised the power of waiving the requirements of a condition in a contract is a question to be determined by the jury from all the evidence presented relating to the circumstances surrounding the transactions in which the alleged waiver took place. Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297, 9 Am. Rep. 235.

Proofs of Loss. — Before the case may be taken from the jury a waiver of proofs of loss must be established by undisputed evidence. See McFetridge *v.* Phenix Ins. Co., 84 Wis. 200, 54 N. W. 326, *citing* Cannon *v.* Home Ins. Co., 53 Wis. 585, 11 N. W. 11; Renier *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208.

51. Delacroix *v.* Bulkley, 13 Wend. (N. Y.) 71.

52. In Ford *v.* Euker, 86 Va. 75, 9 S. E. 500, which was a suit for the specific performance of an agreement to transfer real estate, the facts were: Defendant's wife refused to assent to the sale, whereupon the defendant refused to proceed with the sale. The plaintiff after a lapse of two years, during which time the property became more valuable and improvements had been placed thereon, sought to have the agreement specifically enforced and take the land subject to the wife's dower, it was held that the right to specific performance had been waived.

53. Moyer Bros. Appeal, 87 Pa. St. 129.

54. Overdue Premiums. — It is well settled in Pennsylvania that a

general custom may be proved to exist, that insurance companies receive premiums after they become due, and that consequently the forfeiture contemplated by the terms of the policy was waived. Blakiston *v.* American L. Ins. Co., 15 Phila. (Pa.) 315, *citing* Helme *v.* Philadelphia Life Ins. Co., 61 Pa. St. 107, 100 Am. Dec. 621; Girard L. & T. Co. *v.* Mut. L. Ins. Co., 38 Leg. Int. (Pa.) 194. See Clifford *v.* Kelly, 7 Ir. Ch. 333; Carolan *v.* Brabazon, 9 Ir. Eq. 124, 3 Jo. & La. T. 200; Fox *v.* Harding, 7 Cush. (Mass.) 516. But see article "INSURANCE," Vol. VII, p. 542.


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